BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In re: Final RCRA Permit for Evoqua Water Technologies, LLC and Colorado River Indian Tribes 2523 Mutahar Street Parker, Arizona 85344 EPA RCRA ID No. AZD982441263	)	RCRA Appeal No. 18-01

United States Environmental Protection Agency, Region IX's

RESPONSE TO EVOQUA WATER TECHNOLOGIES, LLC'S MOTION TO REMAND EPA NOTICE OF STAYED PERMIT PROVISIONS OR IN THE ALTERNATIVE, MOTION TO STAY PERMIT PENDING APPEAL

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Statement of Compliance with Word Limitation

Undersigned counsel for EPA certifies that this response to the Motion to Stay complies with the word limit of 40 CFR § 124.19(f)(5) because this motion contains 3897 words.

I. Introduction

Evoqua Water Technologies, LLC (Evoqua), the operator of a carbon regeneration facility in Parker, Arizona (the Facility), objects to the stay of Condition I.A.6. of the hazardous waste treatment and storage permit (Permit) for the Facility issued by the US Environmental Protection Agency Region IX (the Region or EPA) on September 25, 2018.[1] Permit Condition I.A.6. provides that Evoqua and the Colorado River Indian Tribes (CRIT), the beneficial owner of the land and co-applicant for the Permit, are both Permittees, but that compliance with the Permit by one is sufficient for both.[2] The stay is of CRIT's status as a Permittee because Evoqua objected to that status.

Evoqua claims that the Environmental Appeals Board (Board) should expand the stay to over 300 additional allegedly non-severable provisions of the Permit. Evoqua did not identify these provisions as non-severable or otherwise specifically challenge these provisions, as it was obligated to do. "[A] petition for review must identify the contested permit condition *or other specific challenge to the permit decision* and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 CFR §

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[1] Evoqua Water Technologies LLC's Motion to Remand EPA Notice of Stayed Permit Provisions or, In the Alternative, Motion to Stay Permit Pending Appeal, dated November 14, 2018 ("Motion to Stay"), at 3-4.

[2] Attachment A, Excerpt of Permit, Introduction, Table of Contents and Module I, without Permit Attachment Sections, Permit Attachment Appendices or Permit Exhibit 1 at Module I, page 2 (pdf file page 9/31). Permit Condition I.A.6. provides that "[u]nless set forth specifically otherwise herein, requirements of this Permit apply to both the Tribal trust landowner and the operator of the Facility, who are referred to herein collectively as the "Permittees." However, compliance with such requirements of this Permit by either the Tribe, as beneficial landowner, or the operator is regarded as sufficient for both. [See 45 Federal Register (FR) 33295/col. 3, (May 19, 1980)]."

124.19(a)(4)(i) (emphasis added). Because Evoqua did not contest or challenge provisions other than Condition I.A.6 on the issue of Permittee status, its Motion to Stay should be dismissed.

Contested provisions of the Permit are stayed by operation of 40 CFR § 124.16.[3] In response to Evoqua's objection to Permit Condition I.A.6, EPA issued a Notification[4] of the stayed provisions of the Permit, as well as the remaining provisions that would go into effect thirty days after the Notification.[5] EPA identified contested Permit Condition I.A.6. as stayed as to the status of the tribal government landowner as a Permittee. EPA did not identify all other provisions of the Permit that refer to "Permittees" as stayed; nor had Evoqua objected to such provisions in its Petition.

As discussed below, the Environmental Appeals Board (Board) should dismiss the Motion to Stay because Evoqua did not object to or identify the allegedly severable provisions of the Permit that it now asks the Board to stay. If the Board reaches the issue of severability, EPA contends that by specifying that compliance by either Permittee is sufficient for compliance by both, the wording of Permit Condition I.A.6. renders Condition I.A.6. severable from other provisions of the Permit. Therefore, all conditions of the Permit that apply to Permittees are not stayed as non-severable or required to be noticed as stayed.

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[3] Evoqua objected to Permit Condition I.A.6. on the basis that Evoqua should be the "primary" Permittee and that "the Permit should reflect that . . . the party responsible for implementing and complying with the permit is, in all instances, Evoqua and not CRIT." Evoqua Water Technologies LLC's Petition for Review, dated October 25, 2018, (Petition) at 5.

[4] Notification Regarding Effect of Petition for Review on Effective date of Final RCRA Permit for Evoqua Water Technologies, LLC and Colorado River Indian Tribes, Parker AZ, EPA ID No. AZD082441263, October 31, 2018 (Notification).

[5] *See* 40 CFR § 124.16(b)(ii).

Evoqua has moved to remand EPA's Notification, or in the alternative, to stay over 300 provisions of the Permit, or the entire Permit, pending the outcome of its Petition for Review. Remand or further stay of the Permit is unnecessary and inappropriate because Evoqua never contested or challenged these provisions, as it was required to do; Condition I.A.6. is severable from the rest of the Permit, as intended by the Region; and there is no harm to Evoqua in being the sole Permittee, as it expressly argued in its Petition for Review that it should be. In the alternative, EPA requests that a remand be granted if further clarification is required.

II. Factual and Regulatory Background

In November 1992, the operator at the time, Westates Carbon, Inc., and CRIT submitted a Part A Permit Application for the Facility to EPA, signed by both parties.[6] In January 1995, operator Westates Carbon-Arizona, Inc. and CRIT submitted a revised Part A Permit Application for the Facility, signed by both parties.[7] At the same time, in January 1995, the operator submitted the Part B Permit Application for the Facility.[8] In October 2009, CRIT passed Resolution 303-09 to authorize the Tribe's signature on the Evoqua Part B permit application, which occurred in December 2009.[9] CRIT endorsed its previous signature on the April 2016 Permit Application by passing Resolution 138-16 and the final Part B Permit Application was submitted to EPA on April 25, 2016.[10]

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[6] Doc. No. 76, "1992 11 30 Revised RCRA Part A Permit Application.pdf." See also Doc. No. 74, "1992 09 23 letter re revise Part A w_o encl.pdf." EPA filed its Certified Administrative Record Index on November 27, 2018.

[7] Doc. No. 162, "1995 01 Revised RCRA Part A Permit Application."

[8] Doc. No. 161, "1995 01 16 Re Revised Part Applications and original Part B Application."

[9] See Doc. No. 1058, "2009 10 01 Section L Certification Revision 1.pdf," and Doc. No. 2063, "2009 10 26 CRIT Resolution.pdf."

[10] See Doc. No. 1316, "2016 04 25 CRIT Ltr re Evoqua HW Permit Application.pdf," and Doc. No. 1322, "2016 04 RCRA Application Cover Page Rev 3.pdf."

On September 25, 2018, EPA issued its final Permit for the Evoqua Facility. On October 25, 2018, Evoqua filed its Petition for Review.

The Petition for Review identifies ten grounds for objection. The first objection is to Permit Condition I.A.6., specifically, that EPA issued the Permit jointly to Evoqua and CRIT as Permittees.[11] In response, EPA acknowledged in its Notification that Permit Condition I.A.6. is stayed to the extent it identifies CRIT as a Permittee. EPA left in place the application of the Permit to Evoqua as the Facility operator. EPA's response to the Petition for Review is due on December 3, 2018.[12]

III. Argument

A. Because Evoqua did not Contest Provisions Other than I.A.6 as Non-Severable, the Board Should Dismiss the Motion to Stay.

The burden was on Evoqua to identify in its Petition for Review any contested or challenged permit condition, and clearly set forth, with legal and factual support, its contentions for why the permit decision should be reviewed. "[A] petition for review must identify the contested permit condition *or other specific challenge to the permit decision* and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed."[13] Evoqua did not specifically identify any other provisions of the Permit (with regard to the issue of CRIT's Permittee status) as contested or as allegedly non-severable. The burden was on Evoqua to identify not only contested provisions, but also any other specific challenge to the permit decision, and it failed in that burden. Therefore, the Board should not consider Evoqua's

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[11] Petition at 3.
[12] EAB Order Granting Motion for Extension of Time to File Response, dated November 19, 2018.
[13] 40 CFR § 124.19(a)(4)(i) (emphasis added).

late challenge to provisions other than Condition I.A.6 that refer to Permittees, and should dismiss the Motion to Stay on this ground alone.

B. If the Board Chooses to Reach the Issue of Severability, the Board Should Find that Condition I.A.6. of the Permit is Severable from Other Provisions of the Permit.

Here, the issue is whether the obligations set forth in Permit Condition I.A.6. are severable from the rest of the Permit. EPA contends that they are. EPA recognizes that "[u]ncontested provisions which are not severable from those contested shall be stayed together with the contested conditions," and that "the Regional Administrator shall identify the stayed provisions of permits."[14] Part 124 does not define "severable," thus leaves it to the Regional Administrator to determine which provisions of the Permit are stayed. According to the dictionary, "severable" means "capable of being severed, especially: capable of being divided into legally independent rights or obligations." Merriam Webster, https://www.merriam-webster.com/dictionary/severable. Permit Condition I.A.6. provides that "[r]equirements of this Permit apply to both the Tribal trust landowner and the operator of the Facility . . . . However, compliance with such requirements of this Permit *by either the Tribe, as beneficial landowner, or the operator is regarded as sufficient for both.*"[15] Thus, by its terms, Condition I.A.6. is severable from other provisions of the Permit.

Where compliance by either party is sufficient for compliance by both, the obligation to comply with the Permit is capable of being divided into legally independent rights or obligations. Condition I.A.6. is severable because its obligations can be divided into separate components.

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[14] 40 CFR § 124.16(a)(2)(i)-(ii).

[15] Attachment A, Permit Excerpts at Module I, Page 2, Permit Condition I.A.6., (pdf file page 9/139). (Emphasis added.)

One party may comply for both, or the parties may allocate responsibilities between themselves, thus dividing the responsibilities into independent components between them. Therefore, Permit Condition I.A.6. is severable from the other provisions of the Permit. *See* 40 CFR § 124.16(a)(2)(i)-(ii).

Furthermore, it was the Region's express intent that Condition I.A.6 would be severable from the rest of the Permit, such that if one Permittee does not perform, the other could operate independently. The Region's intent is relevant to the severability determination. *See* Averett v. United States Dep't of Health and Human Serv., 306 F. Supp. 3d 1005, 1021 (M.D. Tenn. 2018) ("Whether an administrative agency's order or regulation is severable . . . depends on the issuing agency's intent.") Similarly, a court will sever and affirm a portion of an administrative regulation when it can say without substantial doubt that the agency would have adopted the severed portion on its own. Id., citing Am. Petroleum Inst. v. Envtl. Prot. Agency, 862 F.3d 50, 71 (D.C. Cir. 2017) ("API 1"). [16]

Here, there is no doubt that EPA intended Condition I.A.6. to be severable -- or that the Region would have adopted the requirement that either or both CRIT and Evoqua could independently comply with the Permit and that compliance would be sufficient for both – because the Region did so in fact, both in the Permit itself, by providing that compliance by one is compliance by both, and in the Notification, by staying the Permit only as to CRIT's status as a Permittee.

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[16] *Compare* API 1, 862 F.3d at 71 (court declined to sever a portion of an EPA regulation where there was doubt that the Agency would have adopted the provision had it known another portion of the regulation) with Am. Petroleum Inst. v. Envtl. Prot. Agency, 883 F.3d 918, 922 (D.C. Cir. 2018), (court severed and affirmed portion of revised EPA regulation in reliance on analysis in API 1).

Evoqua acknowledges that other than Condition I.A.6., Evoqua did not contest Permit conditions that impose requirements on Permittees.[17] It was not apparent to the Region from the Petition for Review that Evoqua was seeking a stay of all provisions related to Permittees, as opposed to the tribe's Permittee status under Condition I.A.6.[18] If not contested, a provision must be both uncontested and non-severable to be stayed. Condition I.A.6. is severable from the rest of the Permit., therefore other provisions of the Permit that refer to Permittees are not stayed by regulation and are not required to be noticed as stayed.

C. The Blackstone Cases Provide No Useful Precedent for Whether a Stay Should be Granted in this Case.

In the Motion to Stay, Evoqua cites to cases and makes arguments on the merits of CRIT's Permittee status that are not presented in its Petition for Review.[19] These cases and arguments are not relevant to the Motion to Stay because CRIT's Permittee status is not at issue in the Motion to Stay.

That said, EPA notes that the additional argument on the merits put forth in the Motion to Stay is only that EPA must articulate a statutory or regulatory basis for a co-permittee provision.[20] EPA has done so in this case, as it will demonstrate further in its response to the Petition for Review.

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[17] Motion to Stay at 4.

[18] *See* Petition at 5-6: Evoqua expressly objects to Final Permit Condition I.A.6., submits that it commented on the draft permit condition, and then goes on to argue that EPA's conclusion that CRIT is an appropriate permittee is legally erroneous. Evoqua does not object to other Permit conditions that mention Permittees. It was not an abuse of discretion for EPA to identify Condition I.A.6. as stayed as to CRIT, and not to identify every other provision with the term "Permittees" stayed. Evoqua remained an appropriate permittee that could (and was petitioning to) independently implement the Permit.

[19] *See* Petition at iii. Evoqua cites to three cases, In re Allied Signal, In re Caribe General Electric Products, Inc., and Mathews v. Eldridge. In the Motion to Stay, Evoqua includes pages of arguments based on cases called Upper Blackstone I and II. *See* Motion to Stay at 4-5.

[20] Motion to Stay at 5.

In its Response to Comments,[21] EPA thoroughly explained the statutory and regulatory basis for its decision. EPA stated as follows:

> One commenter requested clarification of the roles of each of the Permittees in terms of their respective obligations under the Permit and suggested that the Colorado River Indian Tribes as the beneficial landowner not be identified throughout the Permit as a Permittee with operator-related obligations.
>
> RESPONSE: Neither RCRA Section 3004 nor the regulations promulgated pursuant to RCRA's hazardous waste provisions distinguish permittees based on whether they are the owner versus the operator. 40 CFR § 270.1(c) requires that both owners and operators of hazardous waste management units have permits during the active life (including the closure period) of the unit. While facility owners and operators may agree between themselves which will be primarily responsible for compliance, and while compliance by one in nearly all cases constitutes compliance by both, the Region will not identify the permittees as anything other than co-equals. The Region will not make changes to the term "Permittees," which appears throughout the final permit.[22]

Furthermore, Evoqua fails to demonstrate that EPA's decision to remove certain co-permittees from the permit in the Blackstone cases provides any precedent whatsoever for this case. Those cases involved a pollution abatement district permit, which EPA had extended to sewage collection systems that were separately owned and operated, and that discharged solely into the District's Treatment Plant. The Board remanded the provisions imposing permit conditions on the co-permittees for an explanation of the statutory or regulatory basis for doing so. The language of the permit in that case is not quoted or discussed; nor is EPA's reasoning for removing co-permittees from the permit.[23]

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[21] Id.

[22] Id.

[23] *See* In re Upper Blackstone Water Pollution Abatement Dist., 15 E.A.D. 297, 298 (EAB 2011).

Notably, the Board stated that EPA could maintain these parties as co-permittees if it added justification to the permit for doing so.[24] EPA chose to remove the permit conditions from the co-permittees, but its rationale is not discussed. Evoqua's assertion that EPA's choice in the Blackstone cases means that EPA recognized that co-permittee provisions were non-severable is unfounded. The Blackstone cases do not discuss the reasoning for EPA's choice in that case, and none should be inferred from it.

Here, EPA has extended co-permittee status to CRIT, the co-applicant for the Permit, the beneficial owner of the land on which the Facility is located, and the lessor of the land to Evoqua. EPA made the obligations of Evoqua and CRIT severable from one another and included the statutory and regulatory basis for its reasoning in the Response to Comments. The situation could not be more distinct from the Blackstone cases, and it is baseless to argue that the Blackstone cases demonstrate non-severability or have any other application to the Board's decision here.

IV. Conclusion

The Motion to Stay should be dismissed because Evoqua failed to contest or otherwise identify as challenged over 300 now contested provisions of the Permit. Accordingly, the Board should dismiss the Petition on that ground and not reach the issue of severability, but if it does, the Board should find that Condition I.A.6 is severable from the rest of the Permit. EPA provided

[24] Id. at 298, quoting Upper Blackstone Water Pollution Abatement Dist., 14 E.A.D 577, 591 (EAB 2010). The Board stated that "[o]n remand, the Region may re-issue the Permit with, or without, the co-permittee provisions as the Region determines is appropriate."

that the Permittees' performance was severable from each other, and from the rest of the Permit, so that either Permittee could provide full compliance.

Moreover, EPA's Notification leaves Evoqua as the sole Permittee pending the outcome of its Petition for Review. Evoqua's fundamental argument in its Petition for Review is that Evoqua should be the party responsible for implementing and complying with the Permit, not CRIT.[25] It is confounding at best to argue that the entire Permit should be stayed as to Evoqua because Evoqua has objected to CRIT as a Permittee, and the objection, in turn, is that Evoqua should be the sole Permittee.

It also would be a troubling precedent if a permit could be effectively stayed in its entirety based on an objection to one permit applicant being involved or not involved in its administration. While Evoqua could revert to interim status, a new facility that did not have interim status could not operate at all while the appeal was being pursued, even though a competent operator was available and able to operate the facility and comply with the permit. *See* 40 CFR § 124.16(a)(1).[26] Accordingly, EPA contends that the Board should not stay the Permit pending the decision on Evoqua's Petition for Review.

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[25] Petition for Review at 7.

[26] "If a request for review of a RCRA . . . permit . . . is filed, the effect of the contested permit conditions shall be stayed and shall not be subject to judicial review pending final agency action. If the permit involves a new facility, . . . the applicant shall be without a permit for the proposed new facility . . . pending final agency action."

In the alternative, if the Board finds that 40 CFR § 124.16 requires clarification to EPA's Notification, EPA requests that the Notification be remanded for that purpose. EPA believes, however, that this would be a waste of resources and is not within the intent of 40 CFR § 124.16. That provision only seeks clarity for the permit holder as to which provisions apply while the permit is on appeal. EPA's Notification provided that clarity – all provisions of the Permit that are not referenced in the Notification as stayed apply to Evoqua while CRIT's status as a Permittee is stayed.

Date: November 28, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on behalf of the United States Environmental Protection Agency, Region IX, a true and correct copy of the foregoing "Response to Evoqua Water Technologies, LLC's Motion to Remand EPA Notice of Stayed Permit Provisions or in the Alternative, Motion to Stay Permit Pending Appeal," has been served on the following parties via the following methods on this 29th day of November, 2018:

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