

**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	)	RCRA Appeal No. 18-01
2523 Mutahar Street	)	
Parker, Arizona 85344	)	US ENVIRONMENTAL
	)	PROTECTION AGENCY REGION
EPA RCRA ID No. AZD982441263	)	IX'S SUPPLEMENTAL BRIEF
	)	RESPONDING TO THE BOARD'S
	)	QUESTIONS REGARDING
	)	CHALLENGE TO NOTIFICATION
	)	OF STAYED PERMIT
	)	CONDITIONS

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*Attachment 2:*

“2014 10 10 R9 Delegation RCRA TSD Permits R9-08-006.pdf,” Administrative Record document number 1271 ..... fn. 21, 22, p. 13.

## I. INTRODUCTION

This Supplemental Brief involves a challenge to a notification of stayed permit conditions<sup>1</sup> issued by the U.S. Environmental Protection Agency (EPA or the Agency), Region IX (the Region) in accordance with Title 40 of the Code of Federal Regulations (40 CFR) § 124.16.

### *A. The Petition and Motion to Remand*

On October 25, 2018, Evoqua Water Technologies, LLC (Petitioner or Evoqua) filed a Petition for Review with the Environmental Appeals Board (the Board) of the Region's September 2018 decision to issue a hazardous waste permit to Evoqua and the Colorado River Indian Tribes (CRIT) pursuant to the Resource Conservation and Recovery Act (RCRA)<sup>2</sup> for the facility located at 2523 Mutahar Street in Parker, Arizona.<sup>3</sup> The Petitioner raised, among other things, a challenge to the Region's issuance of the permit to the owner of the facility, CRIT, as a co-permittee (Petition, Section V.A.).

After the Region issued the Notification, the Petitioner filed a Motion to Remand the Region's Notification.<sup>4</sup> Petitioner's Motion to Remand focused on the Region's identification of Permit Condition I.A.6., which the Notification indicated was stayed "(only as to the status of the tribal government landowner as a co-permittee)." Despite the Petitioner's failure to specifically identify other provisions of the permit related to this issue in its Petition, the Petitioner alleged in

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<sup>1</sup> Notification Regarding Effect of Petition for Review on Effective Date of Final RCRA Permit for Evoqua Water Technologies, LLC and the Colorado River Indian Tribes, Parker, AZ, November 1, 2018 (#2), (the Notification).

<sup>2</sup> 42 U.S.C. §§ 6901-6992k.

<sup>3</sup> Evoqua Water Technologies, LLC's Petition for Review, October 25, 2018 (#1), (Petition).

<sup>4</sup> Motion to Remand EPA Notice of Stayed Permit Provisions or in the Alternative Motion to Stay Permit Pending Appeal, November 14, 2018 (#3), (Motion to Remand).

its Motion to Remand that the Region should have stayed the entire permit or every provision mentioning the co-permittee.<sup>5</sup>

*B. The Board's December 14, 2018 Order*

This Supplemental Brief is filed in response to the Board's December 14, 2018 Order for Further Briefing on Evoqua's Motion for Stay of Permit Provisions Pending Board Review.<sup>6</sup>

This Order sought the Parties' respective responses to the following questions:

1. May the Board review a Region's notification of a stay of permit conditions issued pursuant to 40 CFR § 124.16(a)?
2. If the Board may review a Region's notification, what is the appropriate standard of review? and,
3. If the Board may not review a Region's notification, what other recourse, if any, does a party have to challenge the notification?<sup>7</sup>

The Dec. 14, 2018 Order further directed the Region to "confer with the EPA's Office of General Counsel to ensure that the Region's responses to these questions reflect the Agency's views."<sup>8</sup> The Region has done so.

In addition, the Dec. 14, 2018 Order directed the parties to "meet and confer in advance of their filings to narrow their areas of disagreement or resolve, if possible, the issues raised by the Motion and report to the Board in their supplemental briefs on the outcome of their meet and

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<sup>5</sup> Motion to Remand, p. 1.

<sup>6</sup> Order for Further Briefing on Evoqua's Motion for Stay of Permit Provisions Pending Board Review, December 14, 2018 (#18), (Dec. 14, 2018 Order), p.4.

<sup>7</sup> See, also, the Board's Orders dated December 20, 2018 (#22), January 29, 2019 (#25), and February 8, 2019 (#27), respectively, extending the deadline for the Parties' Supplemental Briefs to February 25, 2019.

<sup>8</sup> Dec. 14, 2018 Order, p.4.

confer efforts.”<sup>9</sup> On February 5, 2019, the parties met and discussed the questions posed by the Board. At the Region’s request, on February 20, 2019, the parties again met and discussed the questions posed by the Board because positions the Region had previously discussed evolved after the Region’s initial conference with the parties, based on input received from the Office of General Counsel.

The parties were unable to agree whether the Board has authority under 40 CFR § 124.19 to hear Motions such as Petitioner’s Motion to Remand. However, both counsel for Evoqua and counsel for CRIT agreed with the Agency’s anticipated position that, if the Board decides to review the Motion, the appropriate standard of review of the Notification would be whether a finding of fact or conclusion of law constituted clear error. In addition, the parties were unable to agree on a way to narrow the scope of the Board’s final question regarding the recourse available to a petitioner where the Board determines that it is not able to review the Motion to Remand.

II. MAY THE BOARD REVIEW A REGION’S NOTIFICATION OF A STAY OF PERMIT CONDITIONS ISSUED PURSUANT TO 40 CFR § 124.16(a)?

***Region’s Response:*** No. There is no authority for the Board to review a Region’s notification of stayed permit conditions because the Part 124 rules do not expressly provide for such review; instead, those regulations limit, with a few express exceptions not relevant here, the Board’s authority to review contested permit conditions or other specific challenges to a final permit decision under 40 CFR § 124.15.

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<sup>9</sup> *Id.*

A. *The Board's Authority Under Part 124 is Limited to the Express Delegations Afforded in the Regulations*

In 1992, EPA created the Environmental Appeals Board.<sup>10</sup> Among other things, the rule creating the Board provided “*express delegations* of authority from the Administrator to the Board to hear and decide appeals”<sup>11</sup>:

The Environmental Appeals Board shall exercise any authority *expressly delegated* to it in [Title 40 of the Code of Federal Regulations]. With respect to any matter for which authority has not been *expressly delegated* to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.”<sup>12</sup>

As set forth in the regulations, where a delegation has not been expressed, the Board's authority to act is limited. Accordingly, the Board does not have authority to rule on matters for which there is no express delegation.<sup>13</sup>

1. The Part 124 regulations do not expressly authorize the Board to review a notification of stayed permit conditions.

The Region's Notification of stayed permit conditions at issue is governed by 40 CFR § 124.16. This provision was included in and later amended as part of the consolidated permit procedures for RCRA, UIC and NPDES permits.<sup>14</sup> A notification of stayed permit conditions issued in accordance with 40 CFR § **124.16** is neither “a final permit decision under 40 CFR §

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<sup>10</sup> Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 FR 5320, 5320 (Feb. 13, 1992).

<sup>11</sup> *Id.*, emphasis added. The delegation was itself accomplished by the rulemaking as opposed to by internal delegation: “Under the old scheme, the rules of practice governing Agency adjudications did not actually delegate authority to the Judicial Officers (with the exception of the Equal Access to Justice Act regulations in part 17) . . . By contrast, under the rule promulgated herein, the rules of practice actually effect the delegation of the Administrator's authority.” *Id.*

<sup>12</sup> 40 CFR § 1.25(e)(2), emphasis added.

<sup>13</sup> See, e.g., *In re: Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997).

<sup>14</sup> See, e.g., 45 FR 33290, 33411-33412 (May 19, 1980), 48 FR 14146, 14271-14272 (April 1, 1983), 65 FR 30886, 30911 (May 15, 2000), and 78 FR 5281, 5285 (Jan. 25, 2013).

*124.15* or a decision to deny a permit under § 270.29.” See 40 CFR § 124.19(a)(1), emphasis added. Nor is such a notification a “contested permit condition” or “other specific challenge to the permit decision.” 40 CFR § 124.19(a)(4)(i).

While one might argue that a notification is an action taken in the context of a Region’s permitting responsibilities, and thus a type of “final permit decision,” 40 C.F.R. § 124.15(a) forecloses this broad interpretation by precisely and narrowly defining the term “final permit decision” to mean “a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.” A notification of stay is plainly not one of the actions listed in this definition.

All of 40 CFR § 124.19 is expressly focused on and limited to appeals of contested permit conditions or other challenges *to the final permit decision*. The silence of the regulation at 40 CFR § 124.19 with respect to appealing a notification of stayed permit conditions, therefore, speaks volumes. Since the Board may only act where authority has been expressly delegated to it to do so, the Board has no authority to review the Region’s Notification of stayed permit conditions.

Where the Board is asked to opine on something other than either a final permit decision under 40 CFR § 124.15 or a decision to deny a permit under § 270.29, the regulations expressly provide for that review. For example, 40 CFR § 124.5 sets forth a process whereby the Regional Administrator’s denials of requests for modification, revocation and reissuance, or termination of NPDES, UIC and RCRA permits can be “informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts.” 40 CFR § 124.5(b). The Board’s jurisdiction to review Regional actions that are outside the scope of its 40 CFR § 124.19(a) authority is limited to those authorities expressly delegated, such as informal review of such



denials, or responding to requests from the Administrator for advice or other assistance in accordance with 40 CFR § 1.25(e)(2).

III. IF THE BOARD MAY REVIEW A REGION'S NOTIFICATION, WHAT IS THE APPROPRIATE STANDARD OF REVIEW?

**Region's Response:** If the Board undertakes review of the Region's Notification, the appropriate standard in this particular case would be the clearly erroneous finding of fact or conclusion of law standard applicable to review of final permit decisions under 40 CFR § 124.19(a)(4).

A. *If the Board Determines that Review of the Motion to Remand is Appropriate, the Board Should Apply the Standards Set Forth at 40 CFR § 124.19.*

There is no standard to apply since review is not contemplated by the rules. See the Region's response to the Board's first question, above.

However, if the Board determines that review of Petitioner's Motion to Remand is appropriate, the Board should apply the standards of review set forth at 40 CFR § 124.19(a)(4)(i) for a petition for review of permit conditions. As explained in the Region's Response to the Petition,<sup>15</sup> the standard applied by the Board in reviewing RCRA permit decisions is that such requests would typically be denied "unless the decision either (1) is based on a clearly erroneous finding of fact or conclusion of law, or (2) involves a matter of policy or exercise of discretion that warrants review." Response to Petition, p. 4, (citing 40 CFR § 124.19(a)(4)(i)(A)-(B), *In re: GMC Delco Remy*, 7 E.A.D. 136, 141 (EAB 1997), and *In re: Ross Incineration Services, Inc.*, 5 E.A.D. 813, 816 (EAB 1995)).

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<sup>15</sup> Region's Response to Evoqua Water Technologies LLC Petition For Review, December 3, 2108 (#14), (Response to Petition).

Because the standards set forth in 40 CFR § 124.19(a)(4)(i) are the only explicit standards provided by Part 124, these standards would be appropriate here.

*B. If a Decision to Review a Notification of Stayed Permit Conditions is Made, the Appropriate Standard to Apply Depends on the Challenge Presented.*

To begin with, to the extent that the Board determines that it is appropriate to review a notification of stayed permit conditions, the question of which standard to apply in accordance with 40 CFR § 124.19(a)(4) necessarily involves an examination of the specific challenge presented. Here, given the specific facts and issues raised by the Motion, the question is whether the Region has correctly identified permit conditions that are not severable from the challenged Permit condition I.A.6. in its Notification.<sup>16</sup>

The notification provision at 40 CFR § 124.16, which underlies the Petitioner’s Motion to Remand, requires the following:

“Uncontested conditions which are not severable from those contested shall be stayed together with the contested conditions.” 40 CFR § 124.16(a)(2).

Thus, the stay that occurs is automatic as to both the contested provisions as well as the uncontested provisions that are not severable from those contested provisions. The obligation required by the regulations of the Regional Administrator, or their delegatee, is to identify the stayed provisions of the permit, *i.e.*, both the contested permit conditions and those that are not severable from the contested conditions. *Id.*

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<sup>16</sup> And, the Region does not think it appropriate to apply any “threshold” standards in undertaking review of the notification of stayed conditions, since the notification of stayed permit conditions only comes after the petition has been filed. See Response to Petition, p. 3.

1. Petitioner’s Challenge Should be Reviewed Under a Clearly Erroneous Standard.

The question presented is whether the Region correctly identified any uncontested permit conditions that were “not severable from those contested” in accordance with 40 CFR § 124.16(a)(2). This is a question of application of the law to the facts.

After the Petition was filed, the Region issued the required notification of stayed permit conditions and identified permit condition I.A.6. as stayed “only as to the status of the tribal government landowner as a co-permittee.”<sup>17</sup> The stay of permit condition I.A.6. as to the status of the tribal government was sufficient to stay the tribal government’s co-permittee status throughout the permit.

As explained in the Region’s Response to the Petition, when reviewing a permit issuer’s application of the law to a particular set of facts, the Board applies a clearly erroneous standard. And, in evaluating a permit decision for clear error, the Board examines the administrative record to determine whether the permit issuer exercised “considered judgment” in rendering its decision. Response to Petition, p. 4, (citing *In re: General Electric Company*, 17 E.A.D. 434, 445 (EAB 2018)).

Here, the Region stayed permit condition I.A.6. “only as to the status of the tribal government landowner as a co-permittee” as supported by the Administrative Record.<sup>18</sup> This was not a clearly erroneous application of the regulation. By doing so, the Region severed the tribal government’s status as a co-permittee throughout the permit. The Region demonstrated

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<sup>17</sup> See the Region’s Notification.

<sup>18</sup> The Region’s decision to stay Permit Condition I.A.6. was supported in the Administrative Record where the Region responded to the Petitioner’s comment regarding the status of the Tribe as a co-equal permittee. See, e.g., Response to the Motion to Remand at pp.7-8.

very clearly that the portion of the Permit Condition I.A.6. identifying the tribe as a co-permittee *is* capable of being severed from all other permit conditions throughout the permit.

In sum, to the extent that the Board determines that review of the Motion to Remand is appropriate, the Board should apply a “clearly erroneous finding of fact or conclusion of law” standard in its review of the Notification and, based on the pleadings and the administrative record in this matter, should find that the Region’s application of the law to the facts was not “clearly erroneous.”

IV. IF THE BOARD MAY NOT REVIEW A REGION’S NOTIFICATION, WHAT OTHER RECOURSE, IF ANY, DOES A PARTY HAVE TO CHALLENGE THE NOTIFICATION?

***Region’s Response:*** If the Board determines that it may not review the Region’s notification because such review is outside the Board’s authority, the Petitioner in this case may seek discretionary review by the Regional Administrator and, potentially, the Administrator.

*A. Authority Not Delegated Has Been Retained by the Administrator*

As explained above in response to the Board’s first question, the Region believes the Board lacks the authority to review a challenge to a notification of stayed permit conditions. However, this conclusion does not leave the Petitioner in this action without recourse to a higher authority within the Agency.

As reflected both in the regulatory authority provided the Board pursuant to 40 CFR § 1.25(e) and in the definition of the “Environmental Appeals Board” at 40 CFR § 124.2, unless the Board has been expressly delegated authority to take action, its options are limited. In accordance with 40 CFR § 1.25(e), the Board may respond to requests from the Administrator for advice or other assistance.

40 CFR § 1.25(e)(2) contemplates the Administrator hearing a motion where the Board has not been expressly delegated the authority to hear it.<sup>19</sup> This is because, to the extent that authority held by the Administrator was not delegated to the Board, the Administrator retained that authority, and may otherwise delegate that authority.

For example, in accordance with HQ Delegation 8-6, the Administrator delegated to the Regional Administrators the authority to “perform all actions necessary to issue, deny, modify, revoke and reissue, or terminate permits for owners and operators of hazardous waste treatment, storage, and disposal facilities” pursuant to RCRA.<sup>20</sup> In Region 9, the Regional Administrator re-delegated this authority to the Division Director for the Region’s Land Division (the Division Director).<sup>21</sup>

As a result, both the Regional Administrator and the Administrator have retained the authority that was also delegated to the Division Director who issued the Notification.<sup>22</sup> To the extent that a petitioner such as Evoqua is aggrieved by a delegatee’s application of facts or law to a particular notification of stayed permit conditions, a petitioner may seek redress through application to the Regional Administrator. The Regional Administrator may, at his or her discretion, undertake review of the notification. To the extent that a Regional Administrator refuses to hear or rejects the party’s arguments regarding a notification, permittees may seek

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<sup>19</sup> See, also, 40 CFR § 124.2.

<sup>20</sup> The June 11, 1991 delegation states that the “authority may be redelegated to the Associate Division Director or the Deputy Division Director level.” See “1991 10 10 HQ Delegation 8-6 RCRA TSD Permits.pdf,” Administrative Record document number 0067, Attachment 1, hereto.

<sup>21</sup> See, “2014 10 10 R9 Delegation RCRA TSD Permits R9-08-006.pdf,” Administrative Record document number 1271, Attachment 2, hereto.

<sup>22</sup> See, for example, the Region’s 2014 re-delegation, Administrative Record document number 1271, (*id.*), at 3.b.: “An official who redelegates authority does not divest herself or himself of the power to exercise that authority, and any redelegations can be exercised by management officials within the chain of command to the lowest level of delegated authority.”

relief directly from the Administrator. Here again, the Administrator may, at his or her discretion, review a notification or refuse a petitioner's request.

## V. CONCLUSION

To summarize, the Region provides the following responses to the Board's questions:

1. May the Board review a Region's notification of a stay of permit conditions issued pursuant to 40 CFR § 124.16(a)?

**Region's Response:** No. There is no authority for the Board to review a Region's notification of stayed permit conditions because the Part 124 rules do not expressly provide for such review; instead, those regulations limit, with a few express exceptions not relevant here, the Board's authority to review contested permit conditions or other specific challenges to a final permit decision under 40 CFR § 124.15.

2. If the Board may review a Region's notification, what is the appropriate standard of review?

**Region's Response:** If the Board undertakes review of the Region's Notification, the appropriate standard in this particular case would be the clearly erroneous finding of fact or conclusion of law standard applicable to review of final permit decisions under 40 CFR § 124.19(a)(4).

3. If the Board may not review a Region's notification, what other recourse, if any, does a party have to challenge the notification?

**Region's Response:** If the Board determines that it may not review the Region's notification because such review is outside the Board's authority, the Petitioner in this case may seek discretionary review by the Regional Administrator and, potentially, the Administrator.

Statement of Compliance with the Word Limitation

Undersigned counsel for the Region hereby certifies that this Brief complies with the word limit of 40 CFR § 124.19(f)(5) because this Brief, without including the Table of Contents, Table of Authorities, or Table of Attachments contains less than 7,000 words.

Respectfully submitted,

\_\_\_\_\_/S/\_\_\_\_\_  
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Date: \_\_\_\_\_

## ATTACHMENTS

ATTACHMENT 1 - "1991 10 10 HQ Delegation 8-6 RCRA TSD Permits.pdf,"  
Administrative Record document number 0067.

ATTACHMENT 2 - "2014 10 10 R9 Delegation RCRA TSD Permits R9-08-006.pdf,"  
Administrative Record document number 1271.



ATTACHMENT 1 - "1991 10 10 HQ Delegation 8-6 RCRA TSDf Permits.pdf,"  
Administrative Record document number 0067.

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## 8-6. Permits for Treatment, Storage, and Disposal of Hazardous Waste

Office of Human Resources

1200 TN 257  
6/11/91

1. **AUTHORITY.** To perform all actions necessary to issue, deny, modify, revoke and reissue, or terminate permits for owners and operators of hazardous waste treatment, storage, and disposal facilities pursuant to SWDA.
2. **TO WHOM DELEGATED.** Regional Administrators.
3. **REDELEGATION AUTHORITY.** This authority may be redelegated to the Associate Division Director or the Deputy Division Director level.

ATTACHMENT 2 - "2014 10 10 R9 Delegation RCRA TSD Permits R9-08-006.pdf,"  
Administrative Record document number 1271.

**Solid Waste Disposal Act****R9-8-6. Permits for Treatment, Storage, and Disposal of Hazardous Waste**1. **AUTHORITY:**

To perform all actions necessary to issue, deny, modify, revoke and reissue, or terminate permits for owners and operators of hazardous waste treatment, storage, and disposal facilities pursuant to Solid Waste Disposal Act (SWDA).

2. **TO WHOM REDELEGATED:**

The Director, Deputy Director, and Assistant Directors or equivalent of the Land Division.

3. **FURTHER REDELEGATION OF AUTHORITY:**

a. This authority may be not further redelegated.

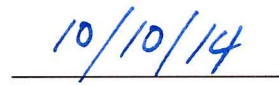
b. An official who redelegates authority does not divest herself or himself of the power to exercise that authority, and any redelegations can be exercised by management officials within the chain of command to the lowest level of delegated authority.

c. An official who redelegates authority may revoke such redelegation at any time.

4. **SUPERSESION:**

This delegation supersedes any and all prior regional orders delegating the authority contained herein, including Regional Order 1280.03, dated September 17, 1997.

  
\_\_\_\_\_  
JARED BLUMENFELD  
Regional Administrator

  
\_\_\_\_\_  
Date

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 "US EPA Region IX's Supplemental Brief Responding to the Board's Questions Regarding Challenge to Notification of Stayed Permit Conditions," (including Attachments 1 and 2 thereto) has been served on the following parties via the following methods on this 25<sup>th</sup> day of February 2019:



2/25/2019

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Date

*Clerk of the US EPA  
Environmental Appeals Board (EAB):*

Eurika Durr, Clerk  
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Environmental Appeals Board

Service on the Clerk of the EAB is made via the EAB's electronic filing system at [https://yosemite.epa.gov/OA/EAB/EAB-ALJ\\_Upload.nsf/HomePage?ReadForm](https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf/HomePage?ReadForm) in accordance with 40 CFR § 124.19.

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Service on counsel for Permittee the  
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124.19.

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