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. _____

EVOQUA WATER TECHNOLOGIES LLC'S PETITION FOR REVIEW

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I.
INTRODUCTION

Per 40 C.F.R. § 124.19(a), Petitioner, Evoqua Water Technologies LLC ("***Evoqua***"), hereby petitions the U.S. Environmental Protection Agency's ("***EPA's***") Environmental Appeals Board ("***EAB***") to review and remand or, in the alternative, modify the Resource Conservation and Recovery Act ("***RCRA***") final permit decision that EPA Region IX issued on September 25, 2018, concerning the existing carbon regeneration facility located in Parker, Arizona (the "***Facility***"), and operated by Evoqua (EPA RCRA ID No. AZD982441263).

II.
THRESHOLD PROCEDURAL REQUIREMENTS

As set forth herein, the threshold procedural requirements for EAB review are satisfied. Evoqua filed comments on the draft permit on January 6, 2017.[1] Thus, Evoqua has standing to seek review of the final permit decision, per 40 C.F.R. § 124.19(a)(2). As demonstrated in Section IV below, per 40 C.F.R. § 124.19(a)(4)(ii), the issues raised in this petition were previously raised in Evoqua's comments on the draft permit, with two exceptions. These exceptions involve permit conditions that first appeared in the final permit after the close of the public comment period (i.e., the conditions were not in the draft permit available for public comment). Per 40 C.F.R. § 124.13, Evoqua's concerns with respect to these new permit conditions were not "reasonably ascertainable" during the public comment period.

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[1] *See* Admin. R., 2017 01 06 Comments of Evoqua Draft Permit Decision.pdf (Letter from Stephen M. Richmond, Beveridge & Diamond, P.C., to "Mike" Mahfouz Zabaneh, P.E., U.S. EPA Region 9, Land Div. (Jan. 6, 2017) (attaching Comments of Evoqua Water Technologies LLC on Draft RCRA Permit for Parker Facility, EPA RCRA I.D. Number: AZD982441263 [hereinafter "Evoqua Comments"])).

In Section V below, Evoqua provides specific citation to each relevant comment on the draft permit and each corresponding response in EPA's response to comments, and explains why EPA's response to the comment was clearly erroneous or otherwise warrants review, in compliance with 40 C.F.R. § 124.19(a)(4)(i)-(ii). With respect to the two issues that were not "reasonably ascertainable" during the public comment period, Evoqua identifies the contested permit condition, explains why the issue was not required to be raised during the public comment period, and sets forth Evoqua's contentions for why the permit condition should be reviewed, per 40 C.F.R. § 124.19(a)(4)(i)-(ii).

III.
FACTUAL AND STATUTORY BACKGROUND

Evoqua owns and operates the Facility – a carbon regeneration facility[2] located on the Colorado River Indian Tribes ("***CRIT***") reservation near Parker, Arizona.[3] The Facility receives and stores spent carbon and treats that spent carbon in a reactivation furnace to purify it and make it available for reuse as a commercial product. The spent carbon that is shipped to the Facility has generally been used to remove contaminants from air emissions and water streams at a variety of sites throughout the nation. Approximately 10-15% of the spent carbon received by the Facility is subject to regulation as hazardous waste under RCRA.

In 1991, EPA determined, in the preamble to EPA's boiler and industrial furnace rule, that new carbon regeneration facilities would be regulated as thermal treatment devices and would be

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2 *See* 40 C.F.R. § 260.10 (defining "[c]arbon regeneration unit" as "any enclosed thermal treatment device used to regenerate spent activated carbon").

3 CRIT is viewed by EPA as a co-permittee by virtue of its status as beneficial owner of the land on which the Facility is located. Evoqua holds a tenancy on the property under a lease from CRIT. *See* Evoqua Comments, *supra* note 1, at 3; EPA Response to Comment at 3 (response to comment I-1).

subject to hazardous waste permit requirements.[4] At that time, the Facility was eligible to operate under the interim status regulations at 40 C.F.R. Part 265 while its hazardous waste permit application was pending with EPA. The Facility's first RCRA Part A permit application was submitted to EPA by letter of August 12, 1991.[5] EPA first called for a Part B permit application by letter of August 30, 1993, extended by letter of January 14, 1994.[6] The Facility's first Part B permit application was submitted to EPA on January 16, 1995.[7] The Facility has operated pursuant to EPA's interim status rules since the submittal of the initial Part A application.

IV.
ISSUES PRESENTED FOR REVIEW

This petition presents the following issues with the final permit for review:

1. **EPA has impermissibly issued the final permit jointly to Evoqua and CRIT as co-permittees.** This issue was raised in Evoqua's comments on the draft permit.[8]

2. **EPA has impermissibly imposed standards for hazardous waste combustors under 40 C.F.R. Part 63, Subpart EEE.** This issue was raised in Evoqua's comments on the draft permit.[9]

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4 *See* 56 Fed. Reg. 7134, 7200 (Feb. 21, 1991); *see also* 1998 01 05 EPA OSW Status of Carbon Regeneration Units Under RCRA Subpart X.

5 *See* Admin. R., 1991 08 12 Letter re Part A Permit Application.

6 *See* Admin. R., 1993 08 30 Request to Submit Part B; 1994 01 14 Request for Extension of Part B.

7 *See* Admin R., 1995 01 16 Re: Revised Part Applications (sic) and Original Part B Application.

8 *See* Evoqua Comments, *supra* note 1, at 3 (comments on draft permit condition I.A.6).

9 *See* Evoqua Comments, *supra* note 1, at 6 (comments on draft permit condition I.E.10), 9 (comments on draft permit condition I.G.4), 16 (comments on draft permit condition I.K.13), 21 (comments on draft permit condition II.M.1.b), 22 (comments on draft permit conditions II.M.1.d and II.M.2), 34 (comments on draft permit condition V.A.3), 35-38 (comments on draft permit Table V-1), 39 (comments on draft permit conditions V.C.1.ix, V.C.1.x, V.C.5.v, V.C.5.v.c, and V.G.4), 40 (comments on draft permit condition V.C.5), 41 (comments on draft permit conditions V.F and V.G).

3. **EPA has impermissibly imposed automatic waste feed cutoff operational and recordkeeping requirements that have no support in the administrative record.** This issue was raised in Evoqua's comments on the draft permit.[10]

4. **EPA has impermissibly imposed MACT continuous emissions monitoring system maintenance and calibration requirements.** This issue was raised in Evoqua's comments on the draft permit.[11]

5. **EPA has impermissibly required frequent and expensive performance demonstration tests.** This issue was raised in Evoqua's comments on the draft permit.[12]

6. **EPA has impermissibly required an additional human health and ecological risk assessment.** This issue was raised in Evoqua's comments on the draft permit.[13]

7. **EPA has impermissibly added a condition requiring reporting of noncompliance to the National Response Center.** This issue was not raised in Evoqua's comments on the draft permit because it was not "reasonably ascertainable" during the public comment period, per 40 C.F.R. § 124.13. This condition first appeared in the final permit after the close of the public comment period.

8. **The final permit's dispute resolution provisions purport to require Evoqua to implement future EPA decisions on substantive issues without recourse to judicial review, in violation of Evoqua's due process rights.** This issue was raised in Evoqua's comments on the draft permit.[14]

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[10] *See* Evoqua Comments, *supra* note 1, at 39, 40-42 (comments on draft permit conditions V.C.5 and V.G).

[11] *See* Evoqua Comments, *supra* note 1, at 39 (comments on draft permit conditions V.C.4.ii and iii).

[12] *See* Evoqua Comments, *supra* note 1, at 11, 12-13, 14.

[13] *See* Evoqua Comments, *supra* note 1, at 14 (comments on draft permit condition I.K.5).

[14] *See* Evoqua Comments, *supra* note 1, at 9-11, 16 (comments on draft permit condition I.L).

9. **EPA has incorrectly required Evoqua to maintain stack flow data for NOx combustion calculations.** This issue was not raised in Evoqua's comments on the draft permit because it was not "reasonably ascertainable" during the public comment period, per 40 C.F.R. § 124.13. This condition first appeared in the final permit after the close of the public comment period.

10. **EPA has impermissibly concluded that Tank T-11 is subject only to a partial exemption from RCRA regulation.** This issue was raised in Evoqua's comments on the draft permit.[15]

V.
ARGUMENT

A. EPA HAS IMPERMISSIBLY ISSUED THE FINAL PERMIT JOINTLY TO EVOQUA AND CRIT AS CO-PERMITTEES

Final permit condition I.A.6 provides: "Unless set forth specifically otherwise herein, requirements of this Permit apply to both the Tribal trust landowner [CRIT] and the operator of the Facility [Evoqua], who are referred to herein collectively as the 'Permittees.'" Consistent with that condition, the permit identifies the "Permittees" as responsible for essentially all of the permit requirements. Evoqua submitted comments on draft permit condition I.A.6, asking EPA to clarify "that the responsibility for RCRA compliance rests primarily with [Evoqua]."[16] Evoqua further commented that EPA should not "issue a permit that treats [Evoqua] and CRIT as co-equal permit holders and that identifies in every section that the 'Permittees' are responsible for individual compliance activities."[17] EPA responded to Evoqua's comments, maintaining that "40 CFR §270.1(c) requires that both owners and operators of hazardous waste management units have

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15 *See* Evoqua Comments, *supra* note 1, at 27 (comments on draft permit condition IV.A.2).

16 Evoqua Comments, *supra* note 1, at 3 (comments on draft permit condition I.A.6).

17 *Id.*

permits during the active life . . . of the unit," and refusing to "identify the permittees as anything other than co-equals."[18]

CRIT is a sovereign tribal entity and a government regulator of the Facility. (*See* Tribal Council Resolution 138-16 (April 8, 2016) in 2016 04 25 CRIT Ltr re Evoqua HW Permit Application.pdf) ("the Facility is subject to concurrent regulation under the federal RCRA and the Tribes' Environmental Protection Agency"). CRIT has clearly expressed its expectation that EPA will maintain government-to-government consultations with EPA regarding the status of the permit (*see* letter from Tribal Council Chairman Patch to J. Scott of EPA (April 25, 2016) in 2016 04 25 CRIT Ltr re Evoqua HW Permit Application.pdf)("CRIT expects the EPA to continue to maintain regular communications and government-to-government consultations with CRIT regarding the status of the RCRA permit…"). As a tribal nation, CRIT is also the beneficial owner of the land within its territory, including the land on which the Facility is located. Evoqua is the tenant under a commercial ground lease with CRIT, under which CRIT has leased the land and Evoqua owns and operates the Facility (*see, supra,* Tribal Council Resolution 138-16) ("Evoqua has leased a parcel of land"); and commercial lease in 1993 08 30 Request of Documents).

EPA's response to Evoqua's comments indicates that EPA interprets RCRA § 3004 and 40 C.F.R. § 270.1(c) as requiring CRIT to be a co-permittee under RCRA. Evoqua disagrees with this interpretation for several reasons. First, CRIT is a Tribal Nation and a sovereign governmental entity and is a regulator of the Facility. Second, CRIT is the beneficial owner of the land on which the Facility is located, but during the term of the lease Evoqua is the sole owner of the infrastructure that comprises the Facility itself. EPA's interpretation under these facts requires a Tribal Nation and governmental entity, and the landlord under a ground lease, to take full shared responsibility

[18] EPA Response to Comments at 3 (response to comment I-1).

for operations of a facility that it does not own, and to meet every operational condition of EPA's RCRA permit. But CRIT does not own or operate the Facility; CRIT owns only the land and it is a governmental regulator of the Facility. CRIT is not authorized to make operational decisions at the Facility, and it does not have any operational role. Further, the permit requires the permittees to submit numerous applications for permit modifications (see, i.e., the numerous submittals required by Condition I.K.), each one on a tight timeline. EPA's co-permittee interpretation forces CRIT to undertake the onerous task of reviewing and signing every application as an applicant, generally under short deadlines, or risk non-compliance with the permit. These results are not compelled by RCRA § 3004 or 40 C.F.R. § 270.1(c). EPA's insistence that CRIT be considered a co-permittee constitutes an erroneous conclusion of law.

In the alternative, if the EAB does not agree that final permit condition I.A.6 is based on an erroneous conclusion of law, the condition is an "exercise of discretion," or is otherwise "an important policy consideration," that the EAB should, in its discretion, review.[19] The relationship between EPA, Tribal Nations and owners and operators of RCRA facilities located on tribal lands is a matter of significant national interest, and EPA's conclusion that RCRA mandates treating a Tribal Nation as a co-permittee raises important policy considerations.

For the reasons discussed above, EPA should provide deference to CRIT's unique role as a tribal government and sovereign entity. The Permit should reflect that, while CRIT is the beneficial owner of the real property on which the Facility is sited, the party responsible for implementing and complying with the permit is, in all instances, Evoqua and not CRIT. The permit should also reflect that Evoqua is solely responsible for the submittal and signing of the numerous

[19] 40 C.F.R. § 124.19(a)(4)(i)(B).

permit modification applications required by the permit, particularly those applications required by the provisions of Condition I.K.

B. EPA HAS IMPERMISSIBLY IMPOSED STANDARDS FOR HAZARDOUS WASTE COMBUSTORS UNDER 40 C.F.R. PART 63, SUBPART EEE

The following final permit conditions impermissibly subject the reactivation furnace ("***RF-2***") at the Facility to "maximum achievable control technology" standards (*other than* air emission limits and standards for startup, shutdown, and malfunctions) for hazardous waste combustors under 40 C.F.R. Part 63, Subpart EEE ("***MACT EEE***"): II.M.1.b and c (derived from 40 C.F.R. §§ 63.1211, 63.1209(b)(2)); V.C.1.b and Table V-1 (derived from with 40 C.F.R. §§ 63.1206(b), 63.1209); V.C.4.a, Table V-3, and V.C.5 (derived from 40 C.F.R. §§ 63.1206(c)(2)(v)(A)*(1)-(2)*, 63.1206(c)(2)(v)(A)*(3)(i)*, *(ii)*, 63.1206(c)(2)(v)(B), 63.1206(c)(3), 63.1206(c)(3)(i)(B)-(D), 63.1206(c)(3)(ii)-(iii), 63.1206(c)(3)(v), 63.1206(c)(3)(vii)), V.E (derived from 40 C.F.R. § 63.1206(c)(5)), V.G.2 (derived from 40 C.F.R. § 63.1211), and V.I (derived from 40 C.F.R. §§ 63.1206(c)(5)(ii), 63.1207, 63.1207(d)(3), 63.1207(e)(2)(i)-(v), 63.1208).

Evoqua submitted numerous comments on these conditions (and others) in the draft permit demonstrating why these MACT EEE standards are not appropriate for the Facility.[20] EPA

[20] *See* Evoqua Comments, *supra* note 1, at 6 (comments on draft permit condition I.E.10), 9 (comments on draft permit condition I.G.4), 16 (comments on draft permit condition I.K.13), 21 (comments on draft permit condition II.M.1.b), 22 (comments on draft permit conditions II.M.1.d and II.M.2), 34 (comments on draft permit condition V.A.3), 35-38 (comments on draft permit Table V-1), 39 (comments on draft permit conditions V.C.1.ix, V.C.1.x, V.C.5.v, V.C.5.v.c, and V.G.4), 40 (comments on draft permit condition V.C.5), 41 (comments on draft permit conditions V.F and V.G).

responded to these comments,[21] generally taking the position that "Clean Air Act standards for Hazardous Waste Combustors are -- in certain, specific ways -- appropriate for this unit."[22]

EPA's responses to Evoqua's comments regarding the contested final permit conditions are clearly erroneous conclusions of law and, to the extent that application of the MACT EEE standards is within EPA's discretion, here EPA has abused its discretion.

Under EPA's own rules, the MACT EEE standards apply only to "hazardous waste combustors: hazardous waste incinerators, hazardous waste cement kilns, hazardous waste lightweight aggregate kilns, hazardous waste solid fuel boilers, hazardous waste liquid fuel boilers, and hazardous waste hydrochloric acid production furnaces."[23] Carbon regeneration facilities are without question not hazardous waste combustors as EPA has defined them. EPA expressly acknowledged this in its response to Evoqua's comments: "Imposing burdensome incinerator training requirements from the MACT EEE standards on the Permittees because RF-2 is a miscellaneous unit is not justified considering the expertise and knowledge of the operator when it comes to operating RF-2, which the Region acknowledges is ***not*** an incinerator."[24]

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[21] *See* EPA Response to Comment at 36-37, 64, 66-86, 91-92, 93, 95, 98, 101-102, and 104-114 (responses to comments II-16, V-9, V-11, V-12, V-13, V-18, V-20, V-26, V-32, V-36, V-39).

[22] EPA Response to Comment at 66-68 (response to comment V-11).

[23] 40 C.F.R. § 63.1200; *see also id.* § 63.1201 (defining "[h]azardous waste combustor" as "a hazardous waste incinerator, hazardous waste burning cement kiln, hazardous waste burning lightweight aggregate kiln, hazardous waste liquid fuel boiler, hazardous waste solid fuel boiler, or hazardous waste hydrochloric acid production furnace").

[24] EPA Response to Comment at 27 (response to comment I-39) (emphasis in original); *see also id.* at 69 (response to comment V-12) ("RF-2 does not qualify as an incinerator because it is a carbon regeneration unit."); *id.* at 134 (response to comment C-6) (recognizing that "RF-2 is not an incinerator").

Evoqua's carbon regeneration unit is instead regulated as a "miscellaneous unit," subject to the RCRA permit standards of 40 C.F.R. Part 264, Subpart X.[25] Under Subpart X, EPA may include MACT EEE standards in RCRA permits for Subpart X units only to the limited extent they are "appropriate for the miscellaneous unit being permitted."[26] Subpart X requires EPA to impose in its permits "such terms and provisions as necessary to protect human health and the environment." EPA therefore has the same burden to justify its selection of permit provisions as it has when it seeks to impose conditions that are not mandated by its rules: EPA must make a site specific, fact specific showing that the provisions EPA has crafted for the site are necessary to protect human health and the environment.[27]

Evoqua's predecessor-in-interest agreed during the lengthy permitting process that the Facility would meet the air emission limits in MACT EEE.[28] Consistent with that agreement, Evoqua does not contest here either (a) the specific air emission limits established in MACT EEE, or (b) the requirements of the final permit that address the maintenance and use of a startup, shutdown, and malfunction plan, to the extent those provisions are derived from MACT EEE. However, EPA incorrectly and improperly imposes in the final permit a large number of additional, enormously complex, costly, and time-consuming standards and operating provisions from MACT EEE. Evoqua has never agreed to comply with the general provisions of MACT EEE and contests each of those provisions here, except as provided in this paragraph.

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25 56 Fed. Reg. at 7200; *see also* 40 C.F.R. § 260.10 (defining "miscellaneous unit").

26 40 C.F.R. § 264.601.

27 *See In re Allied Signal, Inc.*, 4 E.A.D. 748 (EAB 1993); *In re Caribe General Elec. Products, Inc.*, 8 E.A.D. 696 (EAB 2000).

28 *See* Permit Attachment Section D.

In its response to comments, EPA states clearly: "[T]he Region believes that using many of the same standards that RCRA would have applied to an incinerator in the Facility's Permit requirements for the carbon regeneration unit is a conservative approach."[29] EPA further acknowledges that, unlike an incinerator, which can process "a much broader variety of waste streams both in terms of types and concentrations of toxic contaminants in the waste," "RF-2 is used only for processing a relatively homogenous and well-characterized waste stream, spent carbon."[30]

Nevertheless, EPA states that it "deems it necessary to regulate this unit using certain relevant MACT EEE standards." The basis for EPA's conclusion is that MACT EEE:

> ensures that volatile organic compounds are controlled before emissions reach the stack. The inclusion of these MACT EEE standards in the Permit ensures that the destruction of organic compounds is sufficiently completed before emissions reach the stack. It also ensures that the emissions levels from the stack (e.g., unburned organics that may be present at very low levels, by products of organic compound decomposition, low-volatile and semi-volatile metals) do not pose an unacceptable risk to human health or the environment, as demonstrated by the risk assessment.

Over 25 years ago, EPA determined that its hazardous waste incinerator standards do not "make technical sense for [carbon regeneration] devices" because such standards "may not be achievable or warranted for carbon regeneration units considering the relatively low levels of toxic

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29 EPA Response to Comment at 134 (response to comment C-6).

30 *Id.*

organic compounds absorbed onto the activated carbon."[31] EPA further concluded: "In addition, few if any of these units have actually been regulated as incinerators in practice."[32]

In the more than 25 years since making that statement, EPA has never publicly taken a different position and EPA has never imposed the extremely costly MACT EEE standards on a carbon regeneration unit. Until now. EPA claims in the response to comments that "similarities [between incinerators and carbon regeneration units] justify the imposition of similar standards on the units."[33] EPA then cites to the interim status rules for thermal treatment units, 40 C.F.R. Part 265, Subpart P, to support the use of MACT EEE standards and claims that because there are similar requirements for incinerators and thermal treatment units in interim status, this supports using MACT EEE when a facility leaves interim status.[34] This comparison falls very far from the mark. First, there are *different* standards for incinerators and thermal treatment units (which include carbon regeneration units) in interim status: incinerators are subject to Part 265, Subpart O, and thermal treatment units are subject to Subpart P. This differentiation clarifies that EPA understood during its notice and comment rulemaking that these are different types of hazardous waste management units. Second, MACT EEE standards are designed for incinerators, not for thermal treatment units. As EPA acknowledged in its response to comments, incinerators receive variable wastes streams with different contaminant loadings, and carbon regeneration units do

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31 56 Fed. Reg. at 7200. As noted above, a "hazardous waste incinerator" is one type of "hazardous waste combustor." By definition, an "incinerator" is a device that does not meet "the criteria for classification as a . . . carbon regeneration unit." *See* 40 C.F.R. § 260.10 (defining "[i]ncinerator"). EPA's RCRA standards for hazardous waste incinerators are set forth in 40 C.F.R. Part 264, Subpart O. Those standards expressly integrate the MACT EEE standards. *See* 40 C.F.R. § 264.340(b).

32 56 Fed. Reg. at 7200.

33 EPA Response to Comment at 69 (response to comment V-12).

34 *Id*. at 69-70.

not.[35] There is much more complexity (and attendant risk) involved in combusting variable wastes streams and variable pollutant loadings. Carbon regeneration units do not combust solid matter and therefore are much simpler devices.

MACT EEE is infinitely more complex than Part 265, Subpart P, and Evoqua would happily accept the Subpart P provisions, which the Facility has operated under for more than 25 years, in lieu of the MACT EEE standards.

As recently as 2016, EPA concluded that the Facility poses minimal risk: "EPA has determined that impacts from long-term exposure to the Evoqua facility emissions are insignificant."[36] This conclusion is directly at odds with EPA's new conclusion that the MACT EEE standards are "appropriate" to "ensure protection of human health and the environment" under 40 C.F.R. Part 264, Subpart X.[37]

EPA's 2016 "insignificant" impacts determination was based on comprehensive performance demonstration testing ("***PDTs***")[38] and a human health and ecological risk assessment ("***HHERA***"), which collectively provided a detailed and extremely conservative emissions profile for the Facility and then exhaustively evaluated the potential risks posed by the Facility.[39] The results of the PDTs and the extensive HHERA evaluation and conclusions in the record demonstrate that the Facility meets all applicable risk-based standards with a comfortable margin of safety. These conclusions, following EPA's determination that incinerator standards are not

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35 *See* EPA Response to Comment at 134 (response to comment C-6).

36 Admin. R., EPA Fact Sheet, Risk Assessment at Evoqua Water Technologies, June 2016.

37 40 C.F.R. § 264.601.

38 *See* Final Permit, Appendix V, Performance Demonstration Test Plan and Report.

39 *See* Admin. R., 2008 03 13 Executive Summary Carbon Regeneration Fac Risk Assessment; 2008 03 13 Letter re Risk Assessment; 2008 12 23 USEPA R9 Memo re Eco Risk Assessment Status; *see also* Final Permit, Appendix XI, Risk Assessment Report.

technically appropriate for carbon regeneration units, demonstrate that there is no basis for the imposition of the contested MACT EEE provisions. The record shows that the Facility emits extremely low levels of pollutants, and EPA's own stringent risk assessment methodologies have established, with ample margins for safety, that the Facility's emissions are at a level where health and ecological impacts from long-term operations will be "insignificant."

EPA's own conclusions demonstrate that it would be an absurd result to impose costly and inapplicable MACT EEE standards on the Facility. The Facility has demonstrated that it can operate with comfortable safety margins using process parameters in place during the PDTs, including a 99.99% destruction and removal efficiency. Instead of burdensome and expensive MACT EEE standards, the permit can readily adopt a limited suite of emissions limits and controls to ensure those operational conditions are maintained.

EPA's rationale in the permitting record for including the onerous MACT EEE provisions is that the carbon regeneration process involves combustion of volatile gases and that this is similar enough to an incinerator that MACT EEE standards should apply. This conclusion conflicts with 25 years of EPA policy, is contrary to EPA's separation of incinerators and thermal treatment units in Part 265, and is not supported by site specific technical information. Instead, the record demonstrates that (i) EPA previously determined it would not make "technical sense" to apply MACT EEE requirements to carbon regeneration facilities; (ii) EPA previously determined the MACT EEE standards may not be achievable or warranted for these facilities; (iii) the Facility has been subjected to comprehensive PDTs and a HHERA to assess site-specific human health and ecological risks; and (iv) based on these studies EPA concluded that this Facility poses insignificant risk. As a matter of law, the record does not support the MACT EEE permit conditions.

C. EPA HAS IMPERMISSIBLY IMPOSED AUTOMATIC WASTE FEED CUTOFF OPERATIONAL AND RECORDKEEPING REQUIREMENTS THAT HAVE NO SUPPORT IN THE ADMINISTRATIVE RECORD

Final permit conditions V.C.5 and V.G.2 specify automatic waste feed cutoff ("***AWFCO***") operational and recordkeeping requirements, respectively. Evoqua submitted numerous comments on these conditions in the draft permit, including the following comment regarding draft permit condition V.C.5.ii: "[I]t is not possible to have the waste feed cutoff system automatically shut off flow whenever there is a [continuous monitoring system] malfunction or a AWFCO system failure because the instrumentation cannot detect the wide range of malfunctions that could occur and the system cannot be set to respond in the manner that the draft Permit dictates."[40] While EPA adopted several reasonable revisions to the permit in response to Evoqua's AWFCO comments,[41] EPA did not respond to the foregoing quoted comment regarding draft permit condition V.C.5.ii.

The AWFCO provisions are adopted from MACT EEE. To the extent that these provision are not removed from the final permit pursuant to Evoqua's petition argument above relating to MACT EEE, Evoqua renews its objection to draft permit condition V.C.5.ii (now re-numbered to conditions V.C.5.b.ii, iii, and iv in the final permit). It is not possible to have the Facility's AWFCO system automatically shut off flow whenever there is a CMS malfunction or an AWFCO system failure because the instrumentation cannot detect the wide range of potential malfunctions that could occur. The system cannot be set to respond in the manner that the permit now dictates.

There was no response to Evoqua's comment on draft permit condition V.C.5.ii by EPA, and Evoqua believes there is no support in the administrative record for final permit conditions V.C.5.b.ii, ii, and iv. For these reasons, Evoqua submits that these conditions are based on clearly

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40 *See* Evoqua Comments, *supra* note 1, at 39, 40-42 (comments on draft permit conditions V.C.5 and V.G).

41 EPA Response to Comments at 74, 93-95 (response to comments V-20 to V-26).

erroneous findings of fact and an abuse of discretion because the Region has provided no fact-specific, human health or environmental justification for these provisions.

D. EPA HAS IMPERMISSIBLY IMPOSED MACT CONTINUOUS EMISSIONS MONITORING SYSTEM MAINTENANCE AND CALIBRATION REQUIREMENTS

In final permit condition V.C.4.a, EPA has inserted a requirement to conduct quality assurance/quality control ("***QA/QC***") for all monitoring parameters in accordance with 40 C.F.R. Part 60, Appendix F. In its comments on the draft permit, Evoqua commented that EPA did not have the authority to impose MACT EEE standards, including MACT continuous emissions monitoring system ("***CEMS***") monitoring, repair, and maintenance procedures.[42] Evoqua offered to provide daily calibrations of the oxygen and carbon dioxide CEMs. EPA responded by stating that CEMs maintenance and calibration were important, and that "[t]his provision references Table V-3, which includes the maintenance and calibration requirements for a variety of instruments necessary to ensure proper operations of RF-2. . . . . For all of these instruments, the reasons for requiring periodic calibration and maintenance are self-evident."[43]

Evoqua disagrees that a permit condition imposing Appendix F requirements is appropriate for the Facility, and contests that its use is "self-evident." The Facility is not subject to 40 C.F.R. Part 60. EPA merely added the Appendix F requirement in the final permit, but did not provide a site-specific explanation to demonstrate that this requirement was necessary to protect human health and the environment. EPA could have selected from a number of other options to ensure that CEMs data were quality assured: it could have required daily calibrations and periodic relative accuracy tests, or it could have required use of the specification and test procedures for oxygen

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42 *See* Evoqua Comments, *supra* note 1, at 39 (comments on draft permit conditions V.C.4.ii and iii).

43 EPA Response to Comments at 91-92 (response to comment V-18).

and carbon dioxide monitors in 40 C.F.R. Part 60, Appendix B (Performance Specification 2—Specifications and Test Procedures for SO_2 and NO_X Continuous Emission Monitoring Systems in Stationary Sources) and Performance Specification 3 (Specifications and Test Procedures for O_2 and CO_2 Continuous Emission Monitoring Systems in Stationary Sources). Instead, it imposed Appendix F, which is the most burdensome option. The record does not establish why Appendix F is a necessary selection.

In addition, EPA's new language in final permit condition V.C.4.a is ambiguous and may be interpreted to apply Appendix F requirements to the monitoring equipment used for all 15 of the parameters in Table V-3. Condition V.C.4.a provides, with respect to Table V-3 monitoring: "Quality assurance and quality control shall be done in accordance with 40 CFR Part 60 Appendix F QA/QC requirements." However, 40 C.F.R. Part 60, Appendix F, states specifically that it is designed for QA/QC conducted on "pollutant (e.g., SO2 and NOx) and diluent (e.g., O2 or CO2) monitors." Consequently, at most Appendix F would apply to the equipment at the Facility used to monitor emissions of oxygen and carbon monoxide. Evoqua also contests Condition V.C.4.a to the extent EPA may seek to apply the Appendix F requirement to any equipment other than the O_2 and CO_2 monitors that are in place at the Facility.

For the foregoing reasons, the Appendix F requirement in condition V.C.4.a is erroneous and an abuse of discretion.

E. EPA HAS IMPERMISSIBLY REQUIRED FREQUENT AND EXPENSIVE PDTS

Final permit condition V.I.1.b impermissibly requires a PDT approximately every 55 months (i.e., on an approximate 5-year interval).[44] Subpart X requires EPA to impose in its permits

[44] *See* Final Permit Condition V.I.1.b ("[T]he Permittees shall submit PDT Work Plans to the Director for approval no later than 49 months after the start date of each previous PDT. The

"such terms and provisions as necessary to protect human health and the environment." EPA therefore has the same burden to justify its selection of permit provisions as it has when it seeks to impose conditions that are not mandated by its rules: EPA must make a site specific, fact specific showing that the provisions EPA has crafted for the site are necessary to protect human health and the environment.

Evoqua submitted comments on the proposed frequency of PDTs in the draft permit, agreeing to conduct one PDT within 61 months of the effective date of the final permit to confirm that the Facility's emissions remain at consistent, protective levels; Evoqua opposed any more frequent or numerous PDTs as unnecessary and without support in the record.[45] EPA responded to these comments, stating that it has the statutory and regulatory authority to require PDTs every 5 years, that the Facility is getting older, and that a 5-year PDT interval is "appropriate" for the Evoqua facility under 40 C.F.R. § 264.601; EPA did not provide a technical or policy basis for this conclusion.[46]

There is no support in the record for EPA's position that aging of a system necessarily will result in an increase in emissions. Nor is there any record support for EPA's position that, because "the carbon being regenerated at the Facility has been used to remove contaminants from processes where hazardous or toxic materials are being handled,"[47] a PDT should be conducted every 5 years. And there is also no support for EPA's apparent position that all carbon regeneration facilities now need to conduct frequent PDTs.

Permittees shall conduct testing within 6 months following receipt of the Director's approval of each PDT Work Plan.").

45 *See* Evoqua Comments, *supra* note 1, at 11, 12-13, 14.

46 *See* EPA Response to Comments at 104-114 (response to comment V-39).

47 *Id.* at 107.

PDTs for carbon regeneration facilities are not required by RCRA, EPA's RCRA regulations, or the federal Clean Air Act. PDTs can only be imposed on carbon regeneration facilities as an exercise of EPA's discretion under 40 C.F.R. § 264.601, and there is no support in the record for EPA's discretionary determination to require Evoqua to conduct a PDT every 5 years.

As EPA's response to Evoqua's comments on the PDT 5-year interval make clear, the PDT condition is derived from the MACT EEE standards. Above, Evoqua challenges as unjustified EPA's conclusion that the MACT EEE standards apply here. The Facility is not a hazardous waste incinerator and the completed comprehensive PDT and HHERA that are in the administrative record demonstrate that the Facility operates safely. The PDT results demonstrate low emissions and 99.99% destruction of organic compounds. The HHERA establishes with a high degree of scientific certainty that the emissions from the Facility are protective of public health and the environment. Therefore, there is no justification in the record that would support a conclusion that the Facility needs to be regulated with the stringent and costly controls that EPA has established for hazardous waste incinerators, with continuing, perpetually ongoing PDT requirements.

PDTs are not just stack tests; they are engineered testing procedures that involve feeding highly spiked samples into facility processes and then carefully monitoring emissions to evaluate pollution control system performance. These are extremely burdensome and expensive procedures owing to their high degree of complexity and detail. The original PDT plan for the Facility is 394 pages. Evoqua *voluntarily* agreed to conduct a PDT to demonstrate, with a high degree of scientific certainty, that the Facility is safe and its operations are protective of human health and the environment. The voluntary PDT and HHERA conducted for this facility were, to Evoqua's knowledge, the most stringent and comprehensive evaluation of emissions from a carbon

regeneration facility ever conducted in the United States. The test results, documented in the PDT report in the record, confirmed that the Facility meets or exceeds all risk criteria. Following the conduct of the PDT and review of the test results, EPA "has determined that impacts from long-term exposure to the Evoqua facility emissions are insignificant."[48]

During the permitting process, EPA has been the target of spirited criticism from an activist group in San Francisco, California, which has made repeated controversial (and, in Evoqua's view, entirely baseless) accusations about EPA's conduct.[49] In a November 11, 2016 press release, EPA announced that "[t]he proposed permit will impose stricter requirements that Evoqua must follow, including ***the most stringent environmental controls for this type of facility in the nation***." (emphasis added). We believe this announcement was in response to pressure from this activist group, and that EPA committed to overregulate the Facility to show that it was responding to the pressure. However, there is no technical or policy justification for the need for such overregulation in the administrative record. EPA cannot lawfully impose frequent, burdensome, and expensive requirements for additional PDTs at this Facility alone, nor for the industry as a whole, without establishing a rational basis for such a requirement. There is no such basis in the administrative record.

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48 *See* Admin. R., 2017 02 Risk Assessment Fact Sheet; 2016 06 Risk Assessment Fact Sheet.

49 *See, e.g.*, Admin. R., 2002 08 06 email B Angel Greenaction ("EPA continues to dump on the people and land of CRIT. . . ."); 2006 06 08 Email – Greenaction Objection ("EPA continues to make decisions like this without facts being presented, with the concerns of tribal elders and cultural/traditional people being ignored, and without transparent public processes. . . .)" 2006 07 17 Email-NHPA Scope of Impact ("US EPA has spent so much effort disputing the religious beliefs of traditional Mohave people . . . ."); 2009 10 07 Email Response to Status Update ("[T]he word of EPA is beyond meaningless. Does EPA care at all about your credibility? The integrity of your words or of the law? Obvioulsy (sic) not."); 2017 01 09 Greenaction Transmittal and Comments in Opposition ("The fact that USEPA has improperly allowed this hazardous waste facility to operate and pollute . . . is nothing less than environmental racism as it demonstrates a complete bias in favor of the company and violation of numerous laws and policies.").

There is insufficient information in the record to support a conclusion that frequent PDTs are necessary to protect public health and the environment. The PDT provision is therefore in excess of EPA's authority.

F. EPA HAS IMPERMISSIBLY REQUIRED AN ADDITIONAL HHERA

Final permit condition V.I.4 impermissibly requires an additional HHERA. A comprehensive HHERA was previously conducted by Evoqua in 2008, and the results of that rigorous assessment informed EPA's permitting decision. Subpart X requires EPA to impose in its permits "such terms and provisions as necessary to protect human health and the environment." EPA therefore has the same burden to justify its selection of permit provisions as it has when it seeks to impose conditions that are not mandated by its rules: EPA must make a site specific, fact specific showing that the provisions EPA has crafted for the site are necessary to protect human health and the environment.

Evoqua submitted comments on EPA's proposal for an additional HHERA in the draft permit, commenting that "[t]here is no justification, either technically or in the permitting record, that would support a requirement to re-conduct [a HHERA]."[50] EPA responded to these comments, taking the position that it has the authority to require a new HHERA, and that, "[t]o continue to ensure appropriate protection of human health and the environment, it is imperative that the HHERA be updated to verify that the Facility's emissions remain protective of human health and the environment."[51] More specifically, EPA's stated justification for the additional HHERA included:

- "As the carbon regeneration system ages, efficiency of the system *potentially* changes."

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50 Evoqua Comments, *supra* note 1, at 14 (comments on draft permit condition I.K.5).

51 EPA Response to Comments at 115 (response to comment V-41).

- "[T]he toxicity criteria and associated response actions for some of the contaminants are also *subject to update* by EPA."

- "The air dispersion models used to predict the fate and transport of constituents that are released from the stack are . . . dependent upon site-specific meteorological data, which itself is variable with time."

- "EPA's recommended models for site-specific analysis are also *periodically* updated based on the best available science."

- "[T]he 2008 [HHERA] was conducted using methods and procedures that are no longer supported or have been updated by EPA. These include but are not limited to: updated air dispersion and deposition modeling analysis, updated toxicity criteria, and updated exposure assessment analysis."[52]

As shown above, nearly all of EPA's proffered justification for the additional HHERA requirement is based on mere potentialities – i.e., the *potential* for change. But the requirement in the final permit to conduct an additional HHERA is not triggered by any identified changing circumstances – by changes to the efficiency of the system, updated contaminant toxicity criteria and associated response actions, variations in site-specific meteorological data, or updates to EPA's recommended models for site-specific analysis. Rather, final permit condition V.I.4 is an unconditional, one-time requirement for an additional HHERA, regardless of whether there have been any actual, material changes since the prior HHERA, and regardless of whether there are any such changes subsequent to the completion of the additional HHERA required by condition V.I.4.

Furthermore, updated methods and procedures for HHERAs provide no independent justification for a new HHERA. EPA's methods and procedures are continually updated on an ongoing basis, but EPA does not require all facilities to redo their HHERAs with each change to an applicable EPA method or procedure. The record is devoid of any determination by EPA that

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[52] *Id.* (emphasis added).

HHERAs at facilities across the country must be repeated because of a substantive change in EPA's methods or procedures. And that is because there has been no such determination.

HHERAs are extremely burdensome and expensive. EPA did not initially require a HHERA for the Facility; rather, the applicant agreed voluntarily to conduct a HHERA to show that the Facility does not pose health or environmental risks. The voluntary HHERA was, to Evoqua's knowledge, the most costly, stringent, and comprehensive evaluation of emissions impacts from a carbon regeneration facility ever conducted in the United States. The test results, documented in the HHERA report in the administrative record, confirmed that the Facility meets or exceeds all risk criteria. Importantly, as noted above, after reviewing the HHERA results, EPA concluded that "impacts from long-term exposure to the Evoqua facility emissions are insignificant."[53]

Given the prior HHERA results, and EPA's conclusion about the insignificance of Facility emissions impacts, there is no justification for EPA to impose a requirement for an additional HHERA for the Facility. EPA has never previously determined that comprehensive HHERAs are necessary for carbon regeneration facilities, nor does it point to specific changes that would justify a new HHERA here, nor has it identified any changes in methods or procedures that have resulted in a national-scope decision to require updated HHERAs at facilities where risk assessments have previously been conducted.

As noted above, during the permitting process, EPA has been the target of spirited criticism from an activist group in San Francisco, California, which has made repeated controversial accusations about EPA's conduct.[54] In a November 11, 2016 press release, EPA announced that

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53 *See* Admin. R., EPA Fact Sheet, Risk Assessment at Evoqua Water Technologies, June 2016.

54 *See supra* note 43.

"[t]he proposed permit will impose stricter requirements that Evoqua must follow, **including the most stringent environmental controls for this type of facility in the nation.**" (emphasis added). We believe this announcement was in response to pressure from this activist group, and that EPA committed to overregulate the Facility to show that it was responding to the pressure.

Uniquely burdening this Facility with an additional HHERA when EPA has concluded that the emissions impacts from the Facility are insignificant, and where EPA has not required any other carbon regeneration facility to conduct this costly testing and evaluation, is arbitrary and capricious and an abuse of agency discretion. EPA cannot impose a HHERA requirement without scientific and engineering support in the record, and here there is none; there is no evidence in the record that would show or even suggest that the risk profile of the Evoqua Facility will change during the ten-year term of the final permit. There is insufficient information in the record to support a conclusion that EPA's attempt to impose a requirement for an additional HHERA is necessary to protect public health and the environment. The HHERA provision is therefore in excess of EPA's authority.

G. EPA HAS IMPERMISSIBLY ADDED A CONDITION REQUIRING REPORTING OF NONCOMPLIANCE TO THE NATIONAL RESPONSE CENTER

Final permit condition I.E.13.a contains a new requirement to provide reports of noncompliance which "may endanger human health or the environment" to the National Response Center ("***NRC***"). This provision in the draft permit was originally proposed to require such reporting to EPA, and Evoqua commented on the draft permit condition, objecting that the provision did not mirror the language in EPA's RCRA compliance reporting rule at 40 C.F.R. § 270.30.[55] EPA's response was in part to harmonize the language, but also in part to add the new

[55] *See* Evoqua Comments, *supra* note 1, at 7-8 (comments on draft permit condition I.E.13).

requirement to report to the NRC instead of to EPA, which was not proposed in the draft permit, nor is it consistent with 40 C.F.R. § 270.30.[56] As is the case with other provisions of the permit where EPA has not adhered to regulatory language, EPA must make a site specific, fact specific showing that the provision is necessary to protect human health and the environment.

In its response to comments on the draft permit, EPA explained the change as one to "clarify to whom the verbal notice should be provided."[57] EPA stated that it "re-examined" the 24-hour reporting obligation and "as a result of that re-examination" revised the provision to identify the NRC as the recipient of the report.[58] Evoqua contends that, while EPA has explained the change it made, the agency has not justified its rationale for the change, and that adding the NRC as the recipient of noncompliance reports is arbitrary and capricious and beyond its authority.

As EPA describes on its own web site, the NRC:

> is the designated federal point of contact for reporting all oil, chemical, radiological, biological and etiological discharges into the environment, anywhere in the United States and its territories. The NRC also takes maritime reports of suspicious activity and security breaches within the waters of the United States and its territories.
>
> Reports to the NRC activate the National Contingency Plan and the federal government's response capabilities. It is the responsibility of the NRC staff to notify the pre-designated On-Scene Coordinator assigned to the area of the incident and to collect available information on the size and nature of the release, the facility or vessel involved, and the party(ies) responsible for the release.[59]

Noncompliance reports related to the Facility are rarely (if ever) going to rise to the level of requiring the invocation of the federal government's emergency response or national security capabilities.

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56 *See* EPA Response to Comments at 9-10 (response to comment I-23).

57 *Id.* at 9.

58 *Id.*

59 https://www.epa.gov/emergency-response/national-response-center

There are numerous examples of situations that might invoke 24-hour reporting where a report to the NRC would be entirely inconsistent with the purpose that the NRC serves. Permit noncompliance that could conceivably trigger this 24-hour reporting provision may include the discovery of a late transmittal of a contingency plan to a hospital, the discovery that certain employee training had not been provided within the specified timeframe, or other fairly innocuous events that "may" endanger human health or the environment.[60] There is nothing in the record that suggests such reporting should be made to the NRC, the governmental entity that is responsible for coordinating national disaster response.

In addition, the comment that Evoqua originally made on the draft permit language in this section applies to the new language inserted in the final permit by EPA: the requirement to notify the NRC is inconsistent with the language that EPA adopted in its rule addressing noncompliance reporting (40 C.F.R. § 270.30(l)(6)), which makes clear that the report is to be made to the Director of EPA's RCRA Division (*see id.* § 270.30(l)(6)(iii)). Changing that provision, which previously went through public notice and comment in a rulemaking, with no justification in the record is in excess of EPA's authority.

For the foregoing reasons, EPA has not established that the new requirement in final permit condition I.E.13 to notify the NRC is necessary to protect public health or the environment and the requirement should be removed from the permit.

[60] The phrase "may endanger human health or the environment" is itself extremely vague and is susceptible to differing interpretations. Evoqua does not adopt any particular interpretation of the phrase in this petition; it merely states what seems obvious about possible interpretations.

H. THE FINAL PERMIT'S DISPUTE RESOLUTION PROVISIONS PURPORT TO REQUIRE EVOQUA TO IMPLEMENT FUTURE EPA DECISIONS ON SUBSTANTIVE ISSUES WITHOUT RECOURSE TO JUDICIAL REVIEW, IN VIOLATION OF EVOQUA'S DUE PROCESS RIGHTS

Evoqua submitted comments on the dispute resolution provisions in draft permit conditions I.G.5 – I.G.8 and I.L (the "***DR Provisions***"), arguing that the DR Provisions infringed upon Evoqua's constitutional and statutory rights.[61] While EPA adopted several reasonable revisions to the permit in response to Evoqua's comments, EPA continues to assert in the permit that EPA decisions made under the DR Provisions must be complied with.[62] Final permit condition I.L.c now states that following the dispute resolution process: "The Permittee(s) shall comply with the Director's decision regardless of whether the Permittee(s) agree with the decision." This language is unlawful and clearly erroneous.

EPA's final amended language requires Evoqua to agree in advance to accept future EPA decisions, including issues which may infringe upon both substantive and procedural rights and may obligate Evoqua to conduct actions that cost many hundreds of thousands of dollars. It is not possible for Evoqua to know what decisions EPA will make in the future when the DR Provisions are invoked, but on its face, final permit condition I.L.1.c denies Evoqua procedural safeguards and access to judicial review of substantive agency actions. This condition deprives Evoqua of property interests that are protected by the Fifth Amendment to the U.S. Constitution, and Evoqua's statutory rights to access the courts for judicial review under RCRA § 7006(b), 42 U.S.C. § 6976(b).

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61 *See* Evoqua Comments, *supra* note 1, at 9-11, 16 (comments on draft permit condition I.L).

62 EPA Response to Comments at 28-30 (response to comment I-42).

Evoqua is cognizant of the several decisions of the EAB on this issue. As Evoqua noted in its comments on the draft permit, it disagrees with the Board's conclusions in those decisions.[63] EPA concludes in its response to comments that these decisions would be upheld if subject to judicial review, and argues that it has provided sufficient procedural safeguards by offering opportunities to resubmit documents and confer with the same person making a permitting decision, or where permit modifications are needed, the opportunity to appeal from the agency's modification decision.[64]

While the opportunity to appeal from a modification decision does provide partial relief of the type that Evoqua seeks, EPA's solution has not adequately addressed the many decisions that EPA may make where no permit modification is needed. Such decisions could involve a number of potentially very high cost matters, including the extent of testing required for a PDT (Condition V.I), the extent of study needed for an HHERA (Condition V.I.4), leak or spill response work (Condition IV.I), implementation of the Closure Plan (Conditions II.N and IV.M) and implementation of corrective action (Module VI). For these decisions, where EPA's decision-making could impose significant costs on Evoqua, an appropriate balancing of due process factors under the Supreme Court's guidance in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) requires that there must be recourse for further meaningful review in order to protect Evoqua's property rights. "[T]he degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process." *Id.*, at 341.

63 *See* Evoqua Comments, supra note 1, at 9-11.

64 EPA Response to Comments at 28-30 (response to comment I-42).

The permit language that Evoqua here contests states that Evoqua will comply with EPA's future decisions even if it disagrees with those decisions. Absent a change in this language, Evoqua may in the future be forced to either comply with an objectionable decision made by EPA, at potentially significant cost, or defend an enforcement action brought by EPA to cure not just a claimed violation of an obligation under the permit, but also a claimed violation under Condition I.L.1.c that Evoqua did not implement EPA's dispute resolution decision even where that decision violated Evoqua's rights. Evoqua cannot be forced to surrender its constitutional and statutory rights in order to receive permission to operate its facility under RCRA.

I. EPA HAS INCORRECTLY REQUIRED EVOQUA TO MAINTAIN STACK FLOW DATA FOR NO_X COMBUSTION CALCULATIONS

Final permit condition V.C.6.c requires Evoqua to maintain four categories of information for purposes of calculating emissions of nitrogen oxides ("***NO_x***"). In draft permit condition V.C.6.iii, EPA had required calculations based on several factors and recording of data in millions of standard cubic feet ("***MMSCF***"). Evoqua commented on that provision asking that EPA delete the MMSCF requirement because this format was not customary for gas metering.[65] EPA responded by deleting the MMSCF requirement but inserting additional requirements for the NO_x emissions calculation, including a requirement that the emissions be based upon the flow rate out of the stack.[66]

Flow rate is not necessary for the NO_x emissions calculations performed by Evoqua. The calculations are based on the use of an EPA emission factor and the actual metered natural gas usage at the Facility. Flow rate would only be of value if monitoring was based on concentration.

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65 *See* Evoqua Comments, *supra* note 1, at 41 (comment on draft permit condition V.C.6.ii and redlined markup of conditions V.C.6.ii and iii).

66 EPA Response to Comments at 95-96 (response to comment V-27).

Because Evoqua uses an AP-42 emission factor, there is no concentration recorded and no flow rate is needed to calculate NO_x emissions. A requirement to base NO_x emissions in part on stack flow rate is not supported by the administrative record and is clearly based upon an erroneous finding of fact.

J. EPA HAS IMPERMISSIBLY CONCLUDED THAT TANK T-11 IS SUBJECT ONLY TO A PARTIAL EXEMPTION FROM RCRA REGULATION

In its comments on the draft permit, Evoqua noted its understanding that 40 C.F.R. Part 264, Subpart CC air emissions standards do not apply to Tank T-11 on the basis that annual testing confirms the low volatile organic concentration in the incoming water exempts Tank T-11 from Subpart CC control requirements, and requested a number of changes to the permit language.[67] EPA agreed that Tank T-11 was eligible for this exemption but disagreed with the language changes requested by Evoqua, as discussed in its response to Evoqua's comment.[68] Importantly, EPA declined to remove Tank T-11 from the list of tanks that "are subject to [Subpart CC] air emission control requirements pursuant to this Permit."[69]

EPA's conclusion that Tank T-11 is subject to Subpart CC air emission control requirements is incorrect and Evoqua hereby petitions for a determination that Tank T-11 is entirely exempt from the control requirements of 4 0 C.F.R. Part 264, Subpart CC, on the following grounds. First, as discussed above and in Evoqua's comment on the draft permit language, annual testing on Tank T-11 has confirmed that it is exempt from Subpart CC control requirements. Second, Evoqua has several times provided EPA with an analysis explaining that Tank T-11 is

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67 *See* Evoqua Comments, *supra* note 1, at 27 (comments on draft permit condition IV.A.2).

68 *See* EPA Response to Comments at 47-48 (response to comment IV-4).

69 *See* Final Permit Condition IV.G.1; EPA Response to Comments at 47 (response to comment IV-4).

part of a wastewater treatment unit, and EPA rules clearly state that wastewater treatment units are exempt from Subpart CC requirements.

By e-mail of March 30, 2009, the Facility provided EPA with an analysis explaining why Tank T-11 was part of the Facility's RCA-exempt wastewater treatment unit.[70] The Facility subsequently provided the analysis to EPA on February 9, 2011,[71] and again on October 31, 2014.[72] For reasons that are not clear to Evoqua, none of these transmittals are included in the administrative record. They should be provided in the "supporting file for the permit" and, therefore, in the administrative record.[73] Accordingly, copies of these transmittals are attached to this petition and Evoqua requests that these submittals be added to the administrative record of this proceeding.

Per 40 C.F.R. § 264.1(g)(6), the requirements of 40 C.F.R. Part 264 "do not apply to . . a wastewater treatment unit as defined in [40 C.F.R.] § 260.10." EPA's guidance on the Subpart CC air emissions standards clarifies that EPA interprets this wastewater treatment unit exemption exactly as it is written: "Units exempt under §§264/265.1 are not subject to these air emission control requirements."[74] The bases for exempting Tank T-11 as a wastewater treatment unit under 40 C.F.R. § 264.1(g)(6) are set forth in the analysis that Evoqua thrice provided to EPA.

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70 *See* Attachment 1.

71 *See* Attachment 2.

72 *See* Attachment 3.

73 40 C.F.R. §§ 124.9(5), 124.18(6).

74 *See* RCRA, Superfund & EPCRA Call Center Training Module, Introduction to Air Emission Standards (40 CFR 264/265 Subparts AA, BB, and CC) (October 2001), Section 3.3 Subpart CC, at 11.

Consequently, Tank T-11 should be removed from Provision IV.G.1 as it is not subject to the air emission control requirements of Subpart CC. The inclusion of Tank T-11 in this provision is based on an erroneous finding of fact and/or conclusion of law.

VI.
CONCLUSION

For the foregoing reasons, Evoqua respectfully requests that the EAB review and remand or, in the alternative, modify the EPA's final permit decision.

VII.
STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Undersigned counsel for Evoqua hereby certifies that this petition complies with the word limit of 40 C.F.R. § 124.19(d)(3) because, excluding the parts of the petition exempted by 40 C.F.R. § 124.19(d)(3), this petition contains 10,914 words.

VIII.
LIST OF ATTACHMENTS

Attachment 1: Email of Mar. 30, 2009, from Monte McCue to John Moody.

Attachment 2: Email of Feb. 9, 2011, from Monte McCue to "Mike" Mahfouz Zabaneh.

Attachment 3: Email of Oct. 31, 2014, from Monte McCue to Elizabeth Janes.

Date: October 25, 2018

Respectfully submitted,

/s/ Bryan J. Moore

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following parties via the following method on this 25th day of October 2018:

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