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

PETITION FOR REVIEW

Mimi Newton
Assistant Regional Counsel (ORC-3)
United States Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
Office: 415-972-3941/ Fax: 415-947-3570
Newton.Mimi@epa.gov

Counsel for Respondent, U.S. EPA Region IX

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Statement of Compliance with Word Limitation

Undersigned counsel, on behalf of Permit-Issuer U.S. Environmental Protection Agency Region IX (the Region) certifies that this RESPONSE TO EVOQUA WATER TECHNOLOGIES, LLC'S PETITION FOR REVIEW complies with the word limit of Title 40 of the Code of Federal Regulations (40 CFR) § 124.19(d)(3) because this Response contains less than 14,000 words, including its headings, footnotes, and quotations. The word count certified herein excludes the Table of Contents, Table of Authorities, Table of Attachments, Statement Requesting Oral Argument, this Statement of Compliance with Word Limitation, and the Attachments, none of which are counted toward the word limitation.

Request for Oral Argument

Undersigned counsel, on behalf of the Region, requests oral argument on Evoqua Water Technologies, LLC's Petition for Review.

US ENVIRONMENTAL PROTECTION AGENCY REGION IX's RESPONSE TO EVOQUA WATER TECHNOLOGIES, LLC'S PETITION FOR REVIEW

I. INTRODUCTION AND STATEMENT OF THE CASE

This case involves a challenge to portions of a final hazardous waste permit decision issued by the U.S. Environmental Protection Agency, Region IX (the Region) under the Resource Conservation and Recovery Act (RCRA).[1] On September 25, 2018, the Region issued its final permit decision for Evoqua Water Technologies, LLC (Petitioner or Evoqua) -- as operator -- and the Colorado River Indian Tribes (CRIT) -- as owner -- of a hazardous waste storage and treatment facility located at 2523 Mutahar Street, Parker, Arizona, 85344 on the CRIT Reservation (the Facility). The Facility, which regenerates spent hazardous and non-hazardous carbon by thermal treatment, achieved RCRA interim status in 1991. The Petition for Review (Petition) [2] challenges the first RCRA hazardous waste Permit (Permit)[3] issued to the Facility.

In its Petition, Evoqua has raised ten specific challenges to the Permit, which may be grouped into the following six categories for which Petitioner seeks the Environmental Appeals Board's (Board's) review:

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[1] The Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992k, (RCRA).

[2] The Petitioner filed its Petition on October 25, 2018.

[3] The Permit is included in the Administrative Record in 42 separate pdf files. The first file, AR Document Number 1609, entitled "z_2018 09 Evoqua Final RCRA Permit Modules I-VI," includes the cover sheet, table of contents and Modules I through VI and to which references herein will be made as the "Permit," (to include page number references by Module and page number). The remaining 41 pdf files comprising the final Permit consist of: (1) 17 "Permit Sections," identified as Sections A through Q (AR Document Numbers 1610 ["z_2018 09 Evoqua Final RCRA Permit_001Permit Attachment Section A.pdf"] through 1626 ["z_2018 09 Evoqua Final RCRA Permit_017 Permit Attachment Section Q.pdf"]); (2) 23 "Permit Appendices" identified as Permit Attachment Appendix I through Permit Attachment Appendix XXIII (AR Document Numbers 1627 ["z_2018 09 Evoqua Final RCRA Permit_018 Permit Attachment Appendix I.pdf"] through 1649 ["z_2018 09 Evoqua Final RCRA Permit_040 Permit Attachment Appendix XXIII.pdf"]); and (3) one "Permit Exhibit 1" (AR Document Number 1650 ["z_2018 09 Evoqua Final RCRA Permit_Permit Exhibit I.pdf"]).

(1) the issuance of the Permit to the owner of the Facility, CRIT, as a co-permittee (Petition, Section V.A.);

(2) Permit conditions for the Facility's carbon regeneration furnace (RF-2) (Petition, Sections V.B., C., D., E., and F.);

(3) whether inclusion of the National Response Center's contact phone number in the Permit for 24-hour reporting for certain instances of non-compliance was appropriate (Petition, Section V.G.);

(4) whether a sentence in the Permit's dispute resolution provision violates the Petitioner's due process rights (Petition, Section V.H.);

(5) whether the Permit's requirement to base nitrogen oxides emissions in part on stack flow rate is appropriate (Petition, Section V.I); and

(6) whether a particular tank, T-11, is subject to regulation under RCRA or should be excluded as part of a wastewater treatment unit (Petition, Section V.J.).

As explained below, while the Region opposes most of the arguments raised by the Petitioner and urges the Board to deny the Petition in nearly all respects, the Region is also requesting remand of the Region's Permit decision only insofar as requested in accordance with Section V.J. of the Petition, relating to the regulation of Tank T-11 (T-11). The Region has reviewed the issues raised in and the materials attached to the Petition and reexamined its own assessment of the regulation of T-11 under RCRA in light of the Responses to Comments and the Permit conditions that address T-11. As a result, the Region is prepared to reconsider the Permit conditions that would apply to T-11 and to reevaluate whether T-11 is potentially subject to RCRA's permitting requirements, including the air emissions requirements of 40 CFR Part 264,

Subpart CC, or if the tank is exempt from regulation as part of a wastewater treatment unit under 40 CFR § 264.1(g)(6).

II. GENERAL STANDARDS OF REVIEW

A) THRESHOLD REQUIREMENTS

The requirements governing petitions for review filed under 40 CFR § 124.19 dictate that certain threshold procedural requirements must be met. The threshold requirements for petitions for review by the Board of permit decisions under RCRA include both an "issue preservation" requirement and a "specificity" requirement.

To meet the issue preservation requirement, petitioners must demonstrate that the issues and arguments raised on appeal were raised previously or that the issue was not "reasonably ascertainable" or the argument was not "reasonably available" at the time. 40 CFR §§ 124.13, 124.19(a)(4)(ii).

The specificity requirement ensures that the Board will have "certain fundamental information" that it needs to consider the petition on its merits, In re Envotech, L.P., 6 E.A.D. 260, 267 (EAB 1996), and the Board "will not entertain vague or unsubstantiated claims." In re City of Attleboro, 14 E.A.D. 398, at 406, 443 (EAB 2009); see also In re General Electric Company, 17 E.A.D. 434, at 446, (EAB 2018). To meet the specificity requirement, petitioners must identify each permit condition or other issue being contested and clearly set forth, with legal and factual support, the arguments as to why the Board should grant review. 40 CFR § 124.19(a)(4).

B) Once petitioners have satisfied all threshold procedural obligations, the Board evaluates a petition on its merits to determine if it warrants review.[4] REVIEW OF RCRA PERMIT DECISIONS BY THE ENVIRONMENTAL APPEALS BOARD

In considering whether to grant or deny review of a permit decision, the Board has stated that it is guided by the preamble to the 40 CFR Part 124 permitting regulations. See, e.g., General Electric Company, 17 E.A.D. at 446. This preamble states that the Board's power to grant review should be exercised "only sparingly" and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 FR 33290, 33412 (May 19, 1980).

Ordinarily, the Board will deny review of a RCRA permit decision, and thus not remand it, 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. 40 CFR § 124.19(a)(4)(i)(A)-(B). See also, e.g., In re GMC Delco Remy, 7 E.A.D. 136, 141 (EAB 1997), (citing In re Chemical Waste Management of Indiana, Inc., 6 E.A.D. 144, 150 (EAB 1995) and In re Ross Incineration Services, Inc., 5 E.A.D. 813, 816 (EAB 1995)).

1. Clear Error

a. Do the Region's Responses to Comments Reflect Its "Considered Judgment"?

When 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.[5] To the extent petitioners challenge an issue the permit issuer addressed in its response to comments, petitioners must explain why the permit issuer's previous response to those

[4] *See*, *e.g.*, General Electric Company. 17 E.A.D. at 445, citing In re Indeck-Elwood, LLC, 13 E.A.D. 126, 143 (EAB 2006).
[5] Id., at 446.

comments was clearly erroneous or otherwise warrants review. See 40 CFR § 124.19(a)(4)(ii). See also GMC Delco Remy, 7 E.A.D. at 141.

2. Deference Where There Are Technical or Scientific Matters Involved and an Adequate Explanation, Supported by the Administrative Record

The Board does not find clear error simply because a petitioner presents a difference of opinion or alternative theory regarding a technical matter. In re Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 667 (EAB 2001). On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record. See, e.g., General Electric Company, 17 E.A.D. at 447, (citing In re FutureGen Indus. All., Inc., 16 E.A.D. 717, 733-35 (EAB 2015), review dismissed as moot sub nom. DJL Farm LLC v. EPA, 813 F.3d 1048 (7th Cir. 2016); In re Energy Answers Arecibo, LLC, 16 E.A.D. 294, 365 (EAB 2014), review dismissed sub nom. Sierra Club de P.R. v. EPA, 815 F.3d 22 (D.C. Cir. 2016); and In re NE Hub Partners, 7 E.A.D. 561 at 570 (EAB 1998) (*rev. den.*, Penn Fuel Gas, Inc. v. EPA, 185 F.3d 862 (3rd Cir. 1999).)

3. Abuse of Discretion

When reviewing a permit issuer's exercise of discretion, the Board applies an abuse of discretion standard. See In re Guam Waterworks Authority, 15 E.A.D. 437, 443 n.7 (EAB 2011). The Board will uphold a permit issuer's reasonable exercise of discretion if the decision is cogently explained and supported in the administrative record. General Electric Company, 17 E.A.D. at 447.

C) ISSUES INVOLVED IN THE PETITION

In addition to procedural requirements for issuing RCRA hazardous waste permits found at 40 CFR Part 124, the regulations governing the Region's issuance of a hazardous waste permit

are generally found at 40 CFR Part 270. Additionally, permit requirements are also found in the hazardous waste permitting regulations at 40 CFR Part 264.

The Region includes its analysis regarding the appropriate standards for each of the remaining issues raised in the Petition in the arguments below.

III. ARGUMENT

A) THERE IS NO CLEAR ERROR, ABUSE OF DISCRETION, OR OTHER COMPELLING REASON TO REVIEW THE INCLUSION OF THE TRIBAL LANDOWNER AS A CO-EQUAL PERMITTEE

1) Petitioner's Challenge to CRIT's Inclusion on the Permit as a Co-Equal Permittee

The Petition wrongly asserts that the Region made a clear error in a conclusion of law insofar as the Region concluded that the Tribe – as opposed to the Petitioner -- is the "owner" of the Facility for the purposes of RCRA and insofar as the Tribe is identified in the Permit as a co-equal co-Permittee. Petition at 5-8. Petitioner contends that: (1) CRIT does not "own" the Facility, (as distinguished from the land on which the Facility is situated); (2) RCRA Section 3004 and 40 CFR § 270.1(c) do not compel the Region to make CRIT a co-equal permittee on the Permit; (3) this challenge raises an important policy consideration that warrants EAB review; and (4) it would be onerous to have CRIT have to approve Permit modifications. Petition at 6-7.

A portion of Petitioner's argument – that it would be onerous for CRIT to have to sign Permit Modifications -- is raised for the first time in the Petition. Beyond that, the evaluation of whether the Region clearly erred in naming CRIT a co-permittee as the owner of the Facility involves an evaluation of whether the administrative record reflects that the Region exercised "considered judgment" in rendering its decision. Although the Region maintains that the Board's review of this issue is not warranted because Petitioner failed to preserve the issue for

review, to the extent the Board disagrees and is inclined to review this issue, the Board should uphold the Region's reasonable exercise of discretion because the decision to include the Tribe as a co-permittee is cogently explained and supported in the administrative record. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983) ("[w]e have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner").

2) A Portion of Petitioner's Argument Is Raised for the First Time in the Petition and is not Preserved for Review

As discussed above, the purpose behind the requirement that "all reasonably ascertainable issues" as well as "all reasonably available arguments" be provided during the public comment period is to ensure the timely input by the public on the Region's decision-making process. Allowing arguments to be raised for the first time during the appeal of the permit decision to the Board also prejudices the permit-issuer's opportunity to consider and address all the public's comments, including where commenters wish to raise multiple arguments about a specific issue. See, e.g., In re Florida Pulp and Paper Assoc., 6 E.A.D. 49, 53 (EAB 1995); In re Broward County, Florida, 4 E.A.D. 705, 714 (EAB 1993); and In re Sequoyah Fuels Corp., 4 E.A.D. 215, 218 (EAB 1992). Where commenters might reasonably have at hand specific arguments about a particular issue that could have been raised during the comment period but was not, the mere fact that the commenter made other arguments about the same issue should not form the basis for the Board to review the Petitioner's additional arguments.[6]

[6] *See*, *e.g.*, In re Steel Dynamics, Inc., 9 E.A.D. 165, 229 (EAB 2000) (concluding that, although petitioner had commented that the permit should contain continuous monitoring, this comment did not preserve the specific argument that the [New Source Review] Manual required continuous monitoring).

In its comments on the draft permit, the Petitioner raised four arguments with respect to draft permit condition I.A.6.[7] Petitioner raises an additional argument for the first time in the Petition.[8] The new argument is that obtaining CRIT's approval of permit modification applications during the time periods specified in the Permit will be potentially onerous. Petition at 7. Because the argument about the onerous nature of obtaining CRIT's signature and approvals was not raised by the Petitioner during the Public Comment period but would have been reasonably available to the Petitioner to be argued during that period, the Board should disregard this argument as a threshold matter. See 40 CFR §§ 124.13 and 124.19(a)(4)(ii).

3) No Clear Error Has Been Demonstrated

The Petition asserts that the Region made a clear error in a conclusion of law[9] insofar as the Region concluded that the Tribe is the "owner" of the Facility for the purposes of RCRA. Petition at 6-7. Nowhere in the Petition are there any citations to any RCRA regulatory

[7] The arguments raised by Petitioner during the comment period differ from those raised in the Petition. Briefly, the four arguments raised during the public comment period by Petitioner regarding the status of CRIT as a co-permittee were: (1) that the Petitioner is the owner of the carbon reactivation Facility, and that CRIT as the landowner where the Facility is located (and lessor of that land) need not be named as a co-Permittee responsible for compliance to an equal degree as the Petitioner; (2) that responsibility for RCRA compliance at the Facility rests primarily with the Petitioner and CRIT is not authorized to make operational decisions and has no operational role at the Facility; (3) that CRIT is a sovereign entity and a government regulator of the Facility; and (4) that the Region has the discretion to identify the Permittees separately on the Permit and not require that the co-permittees both be bound by every Permit condition. See AR Doc. No. 1477, "2017 01 06 Comments of Evoqua Draft Permit Decision.pdf." The argument that it would be onerous to require the Tribe's signature on submittals was not raised during the comment period.

[8] The Petition cites the Petitioner's Comments on Permit Condition I.A.6. as the basis for its assertion that the issue was raised during the public comment period. Petition at fn. 8.

[9] Pursuant to 40 CFR § 124.19(a)(4)(i), a petition for review must demonstrate that each challenge to the permit decision is based on either a "finding of fact or conclusion of law that is clearly erroneous," or an "exercise of discretion or an important policy consideration that the [Board] should, in its discretion, review." *See also*, 45 FR 33412 (May 19, 1980).

preamble language or other authority to support the Petitioner's conclusion of law in this regard.[10]

The Board will not usually overturn the Region's decision-making, where the administrative record reflects that the Region exercised "considered judgment" in rendering its decision. See, e.g., General Electric Company, 17 E.A.D. at 447, (citing In re Steel Dynamics, Inc., 9 E.A.D. at 191, 224-25; and In re Ash Grove Cement Co., 7 E.A.D. 387, 417-18 (EAB 1997)). As demonstrated in the Responses to Comments, and supported in the administrative record, the Region has in fact exercised its "considered judgment" in making its decision. See, In re Upper Blackstone Water Pollution Abatement District, 14 E.A.D. 577, 587 (EAB 2010) (asking if the Region satisfactorily articulated a rule of decision or interpretation for its decision and whether it identified a sufficient statutory and regulatory basis for it).

The Petitioner's comment on this issue was summarized and the Region provided its response as follows:

> I-1. 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.
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> **RESPONSE:** The Region disagrees. 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

[10] The Region's Supplemental Addendum, AR Doc. No. 1515 at "2018 09 18 Supplemental Administrative Record Addendum.pdf," includes a reference to EPA's "December 2014 Hazardous Waste Treatment, Storage, and Disposal Facilities (TSDF) Regulations: A User-Friendly Reference Document for RCRA Subtitle C Permit Writers and Permittees, Version 4, EPA 30- R- 11- 006 at https://nepis.epa.gov/Exe/ZyPDF.cgi/P100MUYE.PDF?Dockey=P100MUYE.PDF. This document includes a list of over 200 Federal Register Notices covering 1978 – 2014 and almost 100 permit appeal decisions (at pp.23-47/48) and ***none*** are cited in the Petition to support Petitioner's legal theory regarding CRIT's "unique role," which Petitioner asserts is "of significant national interest." Petition at 7.

> 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.[11]

The Region, for example, considered and does not dispute that CRIT is a sovereign entity and a government regulator of the Facility. However, the status of the Tribe either as a sovereign entity or as a government regulator of the Facility is not relevant in terms of whether the Tribe is the owner of the "Facility" under RCRA.[12] Nor does the Tribe's status as a sovereign or government regulator of the Facility dictate the role CRIT has in terms of operational control at the Facility. Rather, CRIT's role and operational control is determined by one or more contractual agreements, such as the lease between CRIT and Petitioner.

The Region considered and does not dispute that CRIT is the beneficial landowner of the land where the Facility is located and is the lessor of the land where the Petitioner/lessee conducts its hazardous waste management activities.[13] However, the Petitioner's assertion – as a conclusion of law -- that the Petitioner, as the owner of the operational "infrastructure," is the

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[11] The Region's Responses to Public Comments are found in the administrative record for the Region's Permit decision as Doc. Nos. 1599 to 1606, at: "x_2018 09 Responses to Public Comments_001_CS-1 and I-1 to I-42.pdf" (RTC 001); "x_2018 09 Responses to Public Comments_002_ II-1 to II-20 .pdf" (RTC 002); "x_2018 09 Responses to Public Comments_003_III-1 to III-13.pdf" (RTC 003); "x_2018 09 Responses to Public Comments_004_IV-1 to IV-35.pdf" (RTC 004); "x_2018 09 Responses to Public Comments_005_V-1 to V-41.pdf" (RTC 005); "x_2018 09 Responses to Public Comments_006_VI-1 to VI-9.pdf" (RTC 006); "x_2018 09 Responses to Public Comments_007_C-1 to C-32.pdf" (RTC 007); and "x_2018 09 Responses to Public Comments_008_C-33 to C-40.pdf" (RTC 008). Response to Comment I-1, RTC 001, at 3 (pdf p. 3/30). See also Response to Comment I-22, RTC 001, at 9 (pdf p. 9/30). See also Responses to Comments C-1, C-2, and C-3, RTC 007, at 122-130 (pdf pp. 1-9/45).

[12] *See*, *e.g.*, Backcountry Against Dumps v. EPA, 100 F.3d 147, 149 (D.C. Cir. 1996) (Indian tribes are listed in RCRA's definition of "municipality"). *See also* Washington, Dep't of Ecology v. United States EPA, 752 F.2d 1465, (9th Cir. 1985) (regarding EPA's responsibility for ensuring that federal standards to protect health and the environment are met on reservations). See also, 51 FR 7722 (March 5, 1986) (regarding government ownership of hazardous waste facilities).

[13] *See*, *e.g.*, AR Doc. No. 1461, "2016 11 10 Evoqua-CRIT Revised Statement of Basis.pdf" at 4, 6, and 11/1064.

Facility "owner" and that CRIT, as the landowner, is ***not*** the "owner" of the Facility within the meaning of RCRA, is erroneous. Petition at 6. See RCRA Sections 1004, 3004, and 3005, 42 USC §§ 6903, 6924, and 6925, and 40 CFR §§ 260.10,[14] 264.10, and 270.10.[15] See also Responses to Comments C-2, RTC 007, at 128-130, (pdf pp. 7-9/45) and C-39, RTC 008, at 169-170 (pdf pp. 3-4/5).[16]

The lease between Petitioner and CRIT does not dictate the bounds of the parties' respective legal liabilities under RCRA for either ownership or operation of a hazardous waste management facility.[17] RCRA does not allow owners and operators of a Facility to self-determine their respective liabilities by private contract. Rather, the statute and the regulations define the terms "owner" and "operator" for the purposes of the Permit. For example, requiring the signature of the landowner on a RCRA permit application is entirely consistent with the regulatory structure of RCRA's hazardous waste requirements. *See*, RCRA Sections 1004, 3004, and 3005, 42 USC §§ 6903, 6924, and 6925 and 40 CFR § 270.10(b).[18] (*Cf.* Upper Blackstone, 14 E.A.D. at 590.)[19]

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[14] The definition of "owner" at 40 CFR § 260.10 states: "*Owner* means the person who owns a facility or part of a facility."

[15] *See*, *e.g.*, 40 CFR § 270.10(b): "*Who applies?* When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit, except that the owner must also sign the permit application."

[16] *See also*, *e.g.*, AR Doc. No. 0074, "1992 09 23 letter re revise Part A w_o encl.pdf"; AR Doc. No. 0076, "1992 11 30 Revised RCRA Part A Permit Application.pdf"; AR Doc. No. 1020, "2007 09 26 Letter Landowner signature and certification of Hazardous Waste Permit Application.pdf"; and AR Doc. No. 1024, "2007 10 15 Siemens Response re Landowner Signature and Certification of Permit Application.pdf."

[17] *See*, *e.g.*, Systech Envtl. Corp. v. EPA, 55 F.3d 1466, 1469-1470 (9th Cir. 1995).

[18] *See,* fn.13, above re: 40 CFR 270.10(b).

[19] See, *e.g.*, RCRA Section 3005, 42 U.S.C. § 6925. See also the Revised Statement of Basis (Doc. No. 1461, at "2016 11 10 Evoqua-CRIT Revised Statement of Basis.pdf") (Rev. Stmt. of Basis), at 7/1064, citing RCRA Sections 3004 and 3005 (42 U.S.C. §§ 6924 and 6925) as the RCRA statutory authorities for the RCRA permit.

Moreover, the Region does not typically determine, as between any particular owner and operator of a RCRA facility, which of them bears "primary" responsibility for RCRA compliance.[20] Typically, the Region regards ***both*** as responsible. As written, the challenged Permit condition, I.A.6., makes clear that the Region's priority is compliance but that compliance by either entity is sufficient for both. Thus, to the extent that one of the parties takes on most of the responsibility for compliance with the Permit's conditions, the parties' self-determined assignment of "primary" responsibility to either the operator or the owner is anticipated and addressed by Permit Condition I.A.6.

Thus, as to the four specific arguments raised during the public comment period with respect to the inclusion of CRIT as a co-equal Permittee on the Permit, the Region responded to the portions of the arguments it disputed in its Response to Comments. To summarize, the Region disputed the legal arguments that Facility "owner" means something other than landowner or that the Region had the discretion to create a separate class of Permittee for the Tribe. Response to Comments I-1, RTC 001, at 3 (pdf p. 3/30).[21] The Region's Response to Comments, as noted above, reflects its "considered judgment" in terms of the legal status of the landowner within the meaning of RCRA and the administrative record supports this analysis. The Region stands behind the conclusions of law that led to its decision to identify both the Facility owner and the Facility operator as co-equal permittees on the draft Permit and to reject

[20] The Agency may use its "enforcement discretion" to pursue hazardous waste management violations of RCRA separately against either an owner or an operator, but the use of enforcement discretion involves different questions than are raised here concerning the identification of a facility owner on a RCRA permit.

[21] The argument raised in the Petition is that the Tribe's status as a sovereign and government regulator of activities occurring at the Facility somehow insulates the Tribe from responsibility for compliance with RCRA as the owner of the land where the Facility is located. The Petitioner provides no support for this argument because there is none.

the Petitioner's arguments that the Region had the discretion to draw legal distinctions between the owner and the operator in the final Permit decision.[22]

With respect to the fifth argument raised in the Petition -- *i.e.*, that requiring the Tribe's signature on permit modification applications will be "onerous" -- *if* the Board decides it is appropriate to consider this argument, the Region continues to maintain that inclusion of the Tribe as a co-equal Permittee along with the Petitioner is appropriate. Neither RCRA nor the hazardous waste regulations provide any relief in terms of identifying permittees based on whether their inclusion may prove "onerous." Indeed, RCRA and 40 CFR § 270.1(c) require that ***both*** owners and operators of hazardous waste management units have permits during the active life of the unit. See RCRA Section 3005. See also Response to Comments I-1, RTC 001, at p.3/30.

Accordingly, the Petitioner has failed to demonstrate any clear error, either in a finding of fact or conclusion of law, with respect to the Region's inclusion of the tribal government landowner, CRIT, as one of the two Permittees identified on the Facility's Permit.

4) No Abuse of the Region's Discretion Has Been Demonstrated

For decisions involving the Region's exercise of discretion, the Board will typically uphold the Region's reasonable exercise of discretion[23] if the decision is cogently explained and supported in the administrative record. General Electric Company, 17 E.A.D. at 447.

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[22] The Region's conclusions of law regarding the requirement that the landowner be identified on the hazardous waste permit are supported in the administrative record by the myriad of RCRA-related federal register preambles listed on AR Doc. No. 1436, "2016 09 26 Administrative Record Addendum.pdf," and AR Doc. No. 1515, "2018 09 18 Supplemental Administrative Record Addendum.pdf."

[23] The Petitioner argues that Permit condition I.A.6. "is an 'exercise of discretion,' or is otherwise 'an important policy consideration,' that the EAB should, in its discretion, review." Petition at 7. Although the Petition cites 40 CFR § 124.19(a)(4)(i)(B) as the authority for this statement, the argument fails to meet the standards set forth for Petitions under 40 CFR § 124.19(a)(4), which requires more specificity. Petition at fn. 19.

Here, the Region disagrees with the Petitioner's assertion that the Region has the discretion to create a separate class of Permittee for CRIT as the Facility landowner that would presumably limit CRIT's obligations under the Permit and under RCRA. As was cogently and concisely explained in the Region's Response to Comments, "[n]either 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." Response to Comments I-1, RTC 001, at p.3/30. Thus, because the Region lacks the discretion to omit the landowner from the Permit, the Region did not abuse any discretion by naming the tribal government landowner as a co-equal Permittee on the RCRA Permit.

Alternatively, if the Board determines that the Region exercised some level of discretion by identifying the tribal government landowner as a Permittee along with the Petitioner, the Board should evaluate whether the Region abused that discretion. Here, the Region provided a cogent explanation of the statutory and regulatory basis for identifying the Tribe as a co-equal Permittee along with the Petitioner that demonstrated considered judgment. Furthermore, the Administrative Record supports inclusion of the Tribe as a co-permittee on the Permit. [24] Thus, the Region's decision to identify both the Petitioner and CRIT as co-equal Permittees has not been shown to have been an abuse of the Region's discretion. Nor has the Petitioner demonstrated that this challenge to the Region's permit decision warrants the Board's review for any other reason.

[24] *See*, *e.g.*, the Responses to Comments: I-1, RTC 001, at 3 (pdf p. 3/30); I-22, RTC 001, at 9 (pdf p. 9/30); and C-1, C-2, and C-3, RTC 007, at 122-130 (pdf pp. 1-9/45). See also Sections 1, 5 and 6 of the Rev. Stmt. of Basis, at 4, and 7-12/1064.

B) THERE IS NO CLEAR ERROR, ABUSE OF DISCRETION, OR OTHER COMPELLING REASON TO REVIEW THE CHALLENGED REQUIREMENTS IMPOSED ON THE CARBON REGENERATION UNIT

Petitioner challenges the inclusion of certain requirements imposed on the operations of the carbon regeneration unit, RF-2, in the Facility's Permit. In some instances, the Petition challenges specific conditions where the Region based the Permit language, at least in part, on CAA requirements for hazardous waste combustion units found 40 CFR Part 63, Subpart EEE, as authorized by the RCRA permit regulations for Miscellaneous Units at 40 CFR Part 264, Subpart X. The Petition also challenges the imposition of specified Permit conditions applicable to RF-2, such as the required performance of an update to the risk assessment, based on other authorities referenced in RCRA's Subpart X regulations and/or based on RCRA's "omnibus authority."[25] Petition, Sections V.B., V.C., V.D., and V.E. and V.F., at 8 - 24. Both the Miscellaneous Unit requirements and the omnibus authority mandate that the Region impose permit conditions necessary to protect human health and the environment.[26]

Petitioner's carbon regeneration unit, RF-2, is regulated under RCRA's interim status regulations as a "Thermal Treatment Unit" (40 CFR Part 265, Subpart P) and under RCRA's permitting regulations as a "Miscellaneous Unit" (40 CFR Part 264, Subpart X). Since RF-2 is a Miscellaneous Unit, RCRA's regulations authorize the Region to base its permit requirements

[25] RCRA's "omnibus authority" states that "each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment." RCRA Section 3005(c)(3), 42 USC § 6925(c)(3). See also 40 CFR § 270.32(b)(2) ("Each permit issued under section 3005 of this act shall contain terms and conditions as the Administrator or State Director determines necessary to protect human health and the environment.")

[26] Id. See also 40 CFR § 264.601, which reads, in part, "Permits for miscellaneous units are to contain such terms and provisions as necessary to protect human health and the environment . . ."

for RF-2 on other standards the Agency has set for similar units.[27] The permit regulations for Miscellaneous Units specifically include, in the scope of what may be applied, the Clean Air Act's (CAA) requirements for hazardous waste combustion units, among other regulations.[28]

Petitioner has also challenged permit conditions imposed on RF-2 that are based, at least in part, on RCRA's omnibus authority. Specifically, Petitioner is challenging the Permit's requirements relating to the performance of periodic performance demonstration tests (PDTs) and an update to the Human Health and Environmental Risk Assessment (HHERA). Petition at V.E. and V.F. See also Responses to Comments V-39 and V-41, RTC 005, at 104-115 (pdf pp. 46-57/57); Responses to Comments C-5, C-6, C-9, C-13, C-14, RTC 007, at 132-139, and 144-148 (pdf pp. 13-16/45; and Response to Comment C-38, RTC 008, at 168-169 (pdf pp. 2-3/5).

The requirements imposed on RF-2 were not an abuse of the Agency's discretion. To the extent that the Board determines it appropriate to review the exercise of such discretionary decisions because of Petitioner's challenges to conditions applicable to RF-2, deference should be given to the Region on fundamentally scientific or technical issues so long as the Region has adequately explained its rationale and supported its reasoning in the administrative record. In re ESSROC Cement, 16 E.A.D. 433, at 455 (EAB 2014).

1) There is No Clear Error, Abuse of Discretion or Other Compelling Reason to Review the Application of CAA MACT EEE-Based Standards for Hazardous Waste Combustion Units to RF-2

(i) Petitioner's Challenge to the Application of CAA MACT EEE Requirements to a Miscellaneous Unit

[27] *See*, *e.g.*, 52 FR 46946, (Dec. 10, 1987).

[28] 40 CFR § 264.601 states, in part, ". . .Permit terms and provisions must include those requirements of subparts I through O and subparts AA through CC of this part, part 270, part 63 subpart EEE, and part 146 of this chapter that are appropriate for the miscellaneous unit being permitted. . ."

In evaluating the Petitioner's challenge to the Region's authority to impose permit conditions based on the CAA's Maximum Achievable Control Technology (MACT) 40 CFR Part 63, Subpart EEE (EEE), the Board should examine whether the Region clearly erred in either a finding of fact or a conclusion of law. 40 CFR § 124.19(a)(4)(i). Here, the Petition purports to explain why the Responses to Comments were erroneous and, should the Board determine review is appropriate, it should evaluate whether the Region exercised "considered judgment" in deciding the specific matter challenged.[29] Petition at 8-14.

In addition, the evaluation of the application of specific CAA MACT EEE requirements to Miscellaneous Units -- such as carbon regeneration units that thermally treat hazardous waste -- involves fundamentally technical or scientific questions. Where such matters are raised in Petitions for Review of a RCRA Permit, deference to the Region's technical expertise and experience is appropriate. This standard should be applied if there is an adequate explanation of the rationale for the challenged condition, supported in the administrative record.[30]

Perhaps as an acknowledgement that both the Subpart X regulations and omnibus authority ***compel*** the permit-issuer to create permit conditions that ensure protection of human health and the environment, the Petitioner argues that the Region abused its discretion with respect to the challenged permit conditions only "to the extent that application of the MACT EEE standards is within EPA's discretion." Petition at 9. Should the Board determine, therefore, that it is appropriate to review the exercise of any such discretionary decisions due to Petitioner's challenge to these fundamentally technical Permit conditions,[31] deference should be

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[29] See, e.g., General Electric Company, 17 E.A.D. at 447.

[30] Id.

[31] Petitioner specifically challenged the following Permit conditions as derivative of the CAA MACT EEE requirements: II.M.1.b. and c., (derived from 40 CFR §§ 63.1209 (b)(2) and 63.1211); V.C.1.b. and Table V-1 (derived from with 40 CFR §§ 63.1206 (b), and 63.1209); V.C.4.a., Table V-3, and V.C.5.

given to the Region if there is an adequate rationale for the permit conditions and that rationale is supported in the Administrative Record.[32]

(ii) The Region Exercised Considered Judgement and Provided an Adequate Explanation, Supported by the Administrative Record

The Region addressed the Petitioner's general comments on the draft Permit pertaining to a variety of conditions applicable to RF-2 for which the CAA MACT EEE regulations served as guides. In a number of instances, the Region removed or altered references to 40 CFR Part 63, Subpart EEE.[33] In other instances, the Region explained its decision *not* to alter or remove the language or provision to which the Petitioner objected.[34] For some of the challenged Permit conditions, no specific comment or objection was raised during the public comment period by the Petitioner.[35]

The Petitioner's comments on the draft Permit included general objections to the inclusion of draft Permit conditions that were either based on or specifically referred to the CAA MACT EEE regulations at 40 CFR Part 63, Subpart EEE.[36] Responses to Comments V-11 and V-12 include the responses to some of these more general objections.[37]

(derived from 40 CFR. §§ 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), and 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). Petition at 8.

[32] See, e.g., General Electric Company, 17 E.A.D. at 447.

[33] See, e.g., Responses to Comments I-27, RTC 001, at 12 (pdf p. 12); I-39, RTC 001, at 26-27 (pdf pp. 26-27/30); and V-20, RTC 005, at 93 (pdf p. 35/57).

[34] See, e.g., Responses to Comments V-11, RTC 005, at 66-68 (pdf pp. 8-10); and V-12, RTC 005, at 69-85 (pdf pp.10-27/57).

[35] For these conditions, the Region relies on its responses to the Petitioner's more general objections to the draft Permit conditions that reference or were based on MACT EEE as evidence of the Region's considered judgment being exercised as to the specific provisions challenged in the Petition.

[36] AR Doc No. 1477 2017 01 06 Comments of Evoqua Draft Permit Decision.pdf

[37] See Responses to Comments V-11 and V-12, RTC 005 at 66-85. Some of the Responses to Comments addressed specific Permit conditions that are subject to challenge in this part of the Petition, but did not specifically address the Petitioner's CAA MACT EEE-related objections in the response

In evaluating whether the Region exercised considered judgment in determining which CAA MACT EEE regulations were appropriate to include in the Facility's Permit, the Board should review the Responses to Comments that pertain to each of the Permit conditions challenged in the Petition. Further, however, the Region urges the Board to consider the Responses to Comments that reflect the changes or deletions made to specific draft Permit conditions that were the subject of Petitioner's public comments. These Responses also demonstrate the Region's considered judgment.[38]

2) *There is No Clear Error, Abuse of Discretion or Other Compelling Reason to Review the Automatic Waste Feed Cut-off (AWFCO) Operating and Record-Keeping Requirements for RF-2*

(i) Petitioner's Challenge to Imposition of AWFCO Requirements on a Miscellaneous Unit

The Region did not make a clearly erroneous finding of fact or abuse its discretion with respect to the imposition of Automatic Waste Feed Cutoff (AWFCO) requirements on RF-2. The Petition challenges the Permit conditions pertaining to the requirement that the AWFCO system automatically shut off flow whenever there is a continuous monitoring system (CMS) malfunction or an AWFCO system failure. The Petitioner argues that RF-2's instrumentation cannot detect the wide range of potential malfunctions that could occur. Petition at 15. The Petitioner also asserts that the AWFCO system cannot programmed in the manner that the Permit now dictates. Id.

The Petition cites AWFCO-related Permit conditions (V.C.5. and V.G.2.), which involve fundamentally technical questions. Thus, if the Region has provided an adequate explanation of

because the specific comment relating to that Permit condition concerned another issue. See, for example, Response to Comment II-17, RTC 002, at 37.

[38] See, e.g., Responses to Comments I-18, I-27 and I-39, RTC 001, 8,12, and 26-27 (pdf pp. 8, 12, and 26-27/30).

the rationale for its decisions in its Responses to Comments, and that rationale is supported in the administrative record, deference to the Region's expertise and experience with respect to this matter will be appropriate. ESSROC Cement, 16 E.A.D. at 455.

3) The Region Exercised Considered Judgement and Provided an Adequate Explanation, Supported by the Administrative Record

The Region responded to a number of comments submitted by the Petitioner that mention or pertain to the AWFCO System for RF-2.[39] The Petitioner points specifically to comments it made on draft permit conditions V.C.5. and V.G. Petition at 4, fn. 10. RTCs V-20 and V-21 address the Petitioner's comments recommending deletion of the requirement to follow the MACT EEE requirements in the operation of the AWFCO system and requiring the Permittees to "automatically" cut off the feed to RF-2 upon the occurrence of certain specified events, respectively.

Petitioner claims that the Region failed to respond to its specific comment regarding draft Permit condition V.C.5.ii., (renumbered as Permit condition V.C.5.b.), and that technical reasons exist as to why the system cannot be operated in accordance with the Permit. Petition at 15. However, in its Response to Petitioner's comment regarding draft Permit condition V.C.5.viii (renumbered as Permit condition V.C.5.h.), the Region addressed the Petitioner's comment regarding the ability of the system to automatically shut off flow when a malfunction of a CMS or the AWFCO system occurs, as follows:

> V-25 One commenter suggested deleting draft Permit condition V.C.5.viii as duplicative of the [Startup Shutdown and Malfunction Plan (SSMP)].
>
> **RESPONSE**: The Region has deleted draft Permit condition V.C.5.viii (Failure of an AWFCO) since it is duplicative of Section 4.6 of the SSMP (Appendix XXII), which also includes the language about stopping the

[39] See, e.g., Response to Comments V-12, V-20, V-24, V-25, V-26, V-28, and V-35, RTC 005, at 68-65, 93-96, 100-101 (pdf pp. 10-27, 35-38, 42-43/57).

> waste feed as quickly as possible. It is important that the waste feed to RF-2 be stopped as quickly as possible if one of the Group A1 or A2 parameters listed in Table V-2 are not met, to ensure that the unit meets these operating parameters. ***If the AWFCO system fails to cut off the flow of spent carbon, the SSMP requires the feed be cut off as quickly as possible as a fallback, safety precaution.*** Response to Comment V-25, RTC 005, at 94 (pdf p. 36/57). (Emphasis added.)

The Region also provided its response to the Petitioner's comment on draft Permit condition V.C.5.ii. (aka Permit condition V.C.5.b. in the final Permit) as part of the Response to the Petitioner's concerns about draft Permit condition V.C.5.viii. (aka Permit condition V.C.5.h.in the final Permit). A review of the redline of the changes between draft Permit condition V.C.5., regarding the AWFCO system, coupled with Responses to Comments V-12, V-20, V-24, V-25, V-26, V-28, and V-35[40], are more than enough evidence for the Board to conclude that the Region exercised its considered judgment in crafting final Permit condition V.C.5, regarding RF-2's AWFCO system.

With respect to the Petitioner's objections to Permit condition V.G.2.[41], the Region provided a rationale, cogent response to Petitioner's comments regarding the need to maintain records relating to AWFCO events insofar as Response to Comment V-23 addressed the

[40] See, Responses to Comments V-12, V-20, V-24, V-25, V-26, V-28, and V-35, RTC 005, at 68-85, 93-96, 100-101 (pdf pp.10-27, 35-38, 42-43/57). There are also numerous parameters discussed throughout the Responses to Comments that are tied to the AWFCO system such that the feed is to be cut off if specified limits are not met. *See*, *e.g.*, RTC 005 at 74 (pdf p. 16/57) (carbon monoxide), 79 (21/57) (carbon feed rate limit), 80 (22/57) (minimum afterburner temperature and minimum temperature for hearth #5), 81 (23/57) (minimum Venturi scrubber pressure differential and minimum quench Venturi total liquid flow rate), 82 (24/57) (minimum packed bed scrubber liquid flow rate and minimum packed bed scrubber pH), and 83 (25/57) (minimum wet electrostatic precipitator voltage).

[41] Permit condition V.G.2. states: "The Permittees shall record in the Operating Record for this Permit the date and time of all automatic waste feed cutoff events, including the triggering parameters, reason for the event, and corrective actions taken. The Permittees shall also record all failures of the automatic waste feed cutoff system to function properly and corrective actions taken. [See 40 CFR §§ 63.10 and 63.1211.]" Permit at Module V, p.19.

rationale behind rejecting the recommendation that draft Permit condition V.C.5.v.c. be deleted.[42] The Region points out that:

> [T]he Region has retained the requirement to conduct an investigation and submit a summary report to the Director for approval after any 10 exceedances during any 60-day block of time. The Region is cautiously optimistic that exceedances will be few and far between and that the occurrence of 10 such events in any 60-day period would signal a serious problem with the operation of RF-2. The Region maintains that the serious nature of the occurrence of 10 exceedances within a 60-day window warrants investigation and evaluation of the causes of the exceedances and potential remedies. . . Response to Comment V-23, RTC 005, at 93-94 (pdf. pp. 35-36/57).

The requirement in Permit condition V.G.2. to which the Petitioner objects requires data collection regarding both AWFCO events and events where the AWFCO system failed to function properly. To comply with the requirement to report 10 exceedances that occur within any 60-day window under Permit condition V.C.5.e.iii., records of the exceedances that do occur must also be maintained in accordance with Permit condition V.G.2.

In addition, the Region addressed Petitioner's comments about recordkeeping relating to RF-2 by revising a blanket 5-year record-keeping requirement based on the MACT EEE record-keeping requirements to a 3-year record-keeping requirement – with some exceptions – as briefly explained in Response to Comment II-19.[43] See also additional justification in Response to Comments V-35.[44]

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[42] Draft Permit condition V.C.5.v.c., renumbered final Permit condition V.C.5.e.iii., requires an investigation and report if there are 10 exceedances of a specified limit or parameter. Permit at Module V, pp. 15-16. See also Permit conditions V.C.5.e.ii., V.C.5.e.iv., and V.C.1.b. Permit at Module V, pp. 3, 15, and 16.

[43] Response to Comment II-19, RTC 002, at 38 (pdf. p. 8/9) ("The Region had drawn from the requirements for hazardous waste combustors at 40 CFR Part 63, Subpart EEE, as guidance in developing requirements applicable to the miscellaneous unit RF-2. However, the Region has reconsidered its reference to Part 63, Subpart EEE, and has opted to model the RF-2-related reporting requirements on RCRA's reporting requirements instead. *See*, *e.g.*, Permit Condition V.G.").

[44] Response to Comment V-35, RTC 005, at 100-101 (pdf pp.42-43/57).

The Startup Shutdown and Malfunction Plan (SSMP) is also relevant to recording and reporting AWFCO events, as it is, in part, designed to minimize the need for exceedance reporting by proscribing standard procedures for addressing situations where the AWFCO system fails to function properly, or even where the SSMP is not followed, thereby allowing more flexibility in addressing and preventing such occurrences. The Region provided thorough responses to the Petitioner's comments regarding the SSMP and its relationship to AWFCO events and exceedances of specified parameters.[45]

In light of the Responses to Comments, and the support for the Region's decisions with regard to the challenged Permit conditions, as reflected in the administrative record, the Region urges the Board to defer to the Region's expertise and experience with respect to Permit conditions V.C.5.b.i-iii., and V.G.2., and recommends denial of this part of the Petition.

4) There is No Clear Error, Abuse of Discretion or Other Compelling Reason to Review the Permit's Maintenance and Calibration Requirements for RF-2's Continuous Emissions Monitoring System

(i) Petitioner's Challenge to Imposition of CEMS Maintenance and Calibration Requirements on a Miscellaneous Unit

The Petition challenges Permit condition V.C.4.a., and specifically, the sentence in this condition that requires quality assurance and quality control (QA/QC) to be performed on RF-2 in accordance with 40 CFR Part 60's Appendix F QA/QC requirements. Petition, Section V.D., at 16-17. The Petition notes that the reference to 40 CFR Part 60, Appendix F in the challenged requirement was not included as part of the draft permit and asserts that the imposition of this

[45] *See*, *e.g.*, RTC 005 at 91 (regarding the SSMP, at the end of Response to Comment V-17), and 101-102 (Response to Comment V-36, regarding exceedance reporting). *See also* Permit conditions V.C.1.b., V.C.5.e., and V.G.4. Permit, Module V, at pp. 3, 15, and 19.

requirement is ambiguous and is therefore a clear error and an abuse of the Region's discretion. Petition at 17.

The Region explained the new language in Permit condition V.C.4.a. in its Responses to Comments, *i.e.*, that it was clarifying the reference in the draft Permit to "Part 60 QA/QC procedures" by including the more specific reference to Appendix F's procedures.[46] Because this challenge relates to a fundamentally technical question, the Board should defer to the Region if the explanation for the challenged language was adequate and supported in the Permit's Administrative Record. To the extent that the explanation provided is cogent and supported in the Administrative Record, the Board should also conclude that no abuse of discretion has been demonstrated. Motor Vehicle Mfrs. Ass'n., 463 U.S. at 48.

(ii) The Region Exercised Considered Judgement and Provided an Adequate Explanation, Supported by the Administrative Record

The Responses to Comments addressed the changes reflected in Permit condition V.C.4.a., as compared to the version of the condition proposed in the draft Permit:[47]

> "… Permit condition V.C.4.a. requires quality assurance and quality control in accordance with 40 CFR Part 60's Appendix F QA/QC requirements. The term 'Appendix F' was added to this Permit Condition to provide more clarity." Response to Comment V-37, RTC 005, at 103, (pdf p. 45/57).

As acknowledged by Petitioner, Appendix F QA/QC requirements could only apply to the Facility's continuous emissions monitoring systems (CEMS), namely the oxygen and carbon dioxide CEMS, currently being operated on RF-2. Petition at 17. The argument that the provision is ambiguous is not supported by the Petitioner's own analysis. The Petitioner acknowledges that these systems are subject to numerous options regarding QA/QC specification

[46] Permit condition V.C.4.a. was proposed as draft Permit condition V.C.4.i. See AR Doc. No. 1608, "y_2018 09 Redline Final RCRA Permit v Draft RCRA Permit.pdf," (Redline) at 114/168. See also Responses to Comments V-18 and V-37, RTC 005, at 91-92, 102-103, (pdf pp. 44-45/57).
[47] Redline at 114/168.

and performance test procedures but that Appendix F allegedly represents the "most burdensome" option available. Id. The allegedly burdensome nature of the option the Region has chosen seems to form the true basis for this challenge.

Here the Board is urged to defer to the Region's expertise and experience in determining the appropriate level of performance specifications for this unit. The Region has provided an adequate and cogent explanation for the inclusion of the reference to Appendix F in Permit condition V.C.4.a. It is appropriate, therefore, for the Board to reject Petitioner's challenge regarding this Permit condition.

5) There is No Clear Error, Abuse of Discretion or Other Compelling Reason to Review the Permit's Requirements Regarding Periodic Performance Demonstration Tests of RF-2

(i) Petitioner's Challenge to Imposing Performance Demonstration Testing Requirements on a Miscellaneous Unit

The Petition challenges the Permit's requirements that PDTs be performed approximately every 5 years. Petition at 17-21. See also Permit condition V.I. The Petition asserts that the requirements relating to the periodic PDTs are in excess of EPA's authority. Petition at 21.

Because this challenge relates to a fundamentally technical question, the Board should defer to the Region if the periodic, 5-year cycle for performance of PDTs was adequately explained and supported in the Permit's Administrative Record. And, just as with the Petitioner's other challenges to the requirements imposed on RF-2 pursuant to EPA's regulations for Miscellaneous Units at 40 CFR § 264.601 *et seq.*, to the extent that the explanation provided in the Responses to Comments is cogent and supported in the Administrative Record, the Board ought to also conclude that there has been no abuse of discretion on the Region's part. General Electric Company, 17 E.A.D. at 447.

In addition, any examination of the inclusion of the periodic PDT requirement in the Permit should consider the degree to which the Region is compelled under the statute or otherwise has discretion to impose the challenged requirement in accordance with either the regulations pertaining to Miscellaneous Units or RCRA's omnibus authority. And, to the extent the Board determines it appropriate to review any arguably discretionary aspect of the decision-making about the Permit conditions that require performance of periodic PDTs, the Board should also evaluate whether the PDT requirements included in the Permit reflect an abuse of that discretion by the Region.[48]

(ii) The Region Exercised Considered Judgment and Provided an Adequate and Cogent Explanation, Supported by the Administrative Record

The Region provided responses to the Petitioner's comments regarding periodic testing of RF-2 on a variety of specific comments made by the Petitioner.[49] However, the basis for the decision to require a five-year cycle of periodic PDTs for RF-2 was discussed primarily in Response to Comment V-39. There, the Region clearly states that it regards the five-year cycle as appropriate because: (1) "several performance and emissions standards are being verified during the periodic PDTs because they do not have continuous emission monitoring"; and (2) "as RF-2 continues to age, it is important to make sure it remains efficient in destroying and removing contaminants and that it continues to operate in a manner that does not pose an

[48] The Petition asserts that the inclusion of requirements in the Permit relating to the periodic PDTs is "in excess" of EPA's authority. Petition at 21. It is unclear whether Petitioner intends to argue that the Region has *abused its discretion.* But, in light of 40 CFR § 124.19's requirement that the Petition clearly set forth, with legal and factual support, its arguments as to why the Board should grant review, the Petition is too vague.

[49] See Responses to Comments, RTC 001, at I-28, and I-37 at 12, 26 (pdf pp. 12, 26/30), RTC 002, at II-18 at 37-38 (pdf pp.7-8/9), and RTC 005, at V-10, V-11, V-14, V-16, V-34, V-37, V38, and V-39 at 64-68, 86-88, 99-100, 102-114 (pdf pp. 6-10, 28-30, 41-42, 44-56/57).

unacceptable risk to human health or the environment and the PDT is an efficient way to make that determination."[50]

Each of these reasons alone would constitute a cogent explanation for the five-year PDT cycles. Together they constitute a more than adequate explanation. Taken with all the Responses to Comments addressing the PDT, it is evident that the analysis is supported in the administrative record. For all these reasons, the Board should deny Petitioner's challenge to the Permit's requirements that five-year PDT tests be performed.[51]

6) There is No Clear Error, Abuse of Discretion or Other Compelling Reason to Review the Permit's Requirements Regarding Performance of an Update to the Human Health and Ecological Risk Assessment

(i) Petitioner's Challenge to Imposing a Requirement to Update the Human Health and Ecological Risk Assessment for a Miscellaneous Unit

The Petitioner argues that EPA abused its discretion in imposing requirements to update the Human Health and Ecological Risk Assessment (HHERA) in the Permit. Petition at Section V.F., pp. 21 - 24. As explained above, when reviewing a Region's exercise of discretion, the Board applies an abuse of discretion standard and will typically uphold a permit issuer's reasonable exercise of discretion if the decision is cogently explained and supported in the Administrative Record. General Electric Company, 17 E.A.D. at 447.

Where questions are raised to the Board of a fundamentally scientific or technical nature, the Board will usually defer to the expertise and experience of the permit-issuer, so long as there is cogent rationale supported on the record. See Ash Grove Cement Company, 7 E.A.D. at 403,

[50] Response to Comments V-39, RTC 005, at 104-114 (pdf pp. 46-56/57).

[51] The Region does not interpret the challenge raised in the Petition as questioning whether *any* PDT should be performed, but rather the appropriate cycle for performing the PDTs. To the extent that the Petitioner's challenge may be interpreted more broadly, the Region points to all its PDT-related Responses to Comments (see immediately preceding fn) in opposition to any such broader challenge.

(citing Chemical Waste Management of Indiana,, 6 E.A.D. at 80, in finding that "risk assessment is a multi-disciplinary and technical exercise").

(ii) The Region Provided a Cogent Explanation, Supported by the Administrative Record, for the HHERA

The Region addressed comments raised by the Petitioner and others regarding the Permit's HHERA requirements.[52] The Responses to Comments present a cogent, rational argument for the requirement that a one-time update to the HHERA be performed during the life of the Permit and its rationale is supported in the Administrative Record, as demonstrated below. In responding to the Petitioner's over-arching challenge to the HHERA:

> The Region notes that the 2008 risk assessment 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

[52] *See*, *e.g.*, Responses to Comments V-39 and V-41, RTC 005, at 104-115 (pdf pp. 46-57/57); C-5, C-6, C-8, C-13, and C-14, RTC 007, at 132-139, and 144-148 (pdf pp. 11-18, 23-27); and C-38, RTC 008, at 168-169 (pdf pp. 2-3/5). See also, EPA Human Health Risk Assessment Guidelines, https://www.epa.gov/risk/risk-assessmentguidelines#tab-1; EPA Ecological Risk Assessment Guidelines, https://www.epa.gov/risk/risk-assessmentguidelines#tab-2; EPA Air Dispersion Modeling materials, https://www3.epa.gov/scram001/dispersionindex.htm; April 1998 Guidelines for Ecological Risk Assessments, EPA/630/R-95/002F, at https://www.epa.gov/sites/production/files/2014-11/documents/eco_risk_assessment1998.pdf; August 1999 Screening Level Ecological Risk Assessment Protocol for Hazardous Waste Combustion Facilities, at https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P10006ZU.TXT; July 2001 Risk Burn Guidance for Hazardous Waste Combustion Facilities, at http://www.epa.gov/epawaste/hazard/tsd/td/combust/pdfs/burn.pdf; October 2003 Generic Ecological Assessment Endpoints (GEAEs) for Ecological Risk Assessment, EPA/630/P-02/004F, at https://www.epa.gov/sites/production/files/2014-11/documents/generic_endpoinsts_2004.pdf; and September 2005 Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities, at http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P10067PR.TXT (identified on "2016 09 26 Administrative Record Addendum.pdf"); and December 1989 Risk Assessment Guidance for Superfund Volume I Human Health Evaluation Manual (Part A), EPA/540/1-89/002 at https://www.epa.gov/risk/risk-assessment-guidance-superfund-rags-part; February 1996 Applicability of the Omnibus Authority and Site Specific Risk Assessments to Waste Minimization and Combustion Strategy at https://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/7E7C90490AF95D2C8525670F006C29E8/$file/14040.pdf; April 2003 Memorandum: Use of the Site Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities at https://yosemite.epa.gov/osw/rcra.nsf/ea6e50dc6214725285256bf00063269d/6F5F665CB57A71F885256D1600748C53/$file/14663.pdf; May 2003 EPA Framework for Cumulative Risk Assessment, at https://www.epa.gov/sites/production/files/2014-11/documents/frmwrk_cum_risk_assmnt.pdf;

> analysis, updated toxicity criteria, and updated exposure assessment analysis. See, e.g., Human Health Risk Assessment Protocol for Hazardous Waste Combustion Facilities Final, 2005, https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=P10067PR.txt.[53]

In EPA's 2011 IRIS update of the toxicity and hazards associated with trichlorethylene (TCE) exposure, EPA found that low level exposure to TCE in women of child-bearing age has been associated with a structural birth defect in children. The Region followed with its own update of the testing protocol for TCE.[54]

Because of these changes in the Agency's view of TCE toxicity, the Region requested an update to the 2008 HHERA prepared for the Facility to ensure that potential exposure to TCE releases at the Facility do not result in an unacceptable health impact.[55] This request illustrates the rationale for supporting a periodic update to the existing risk assessment.[56]

In addition, the exposure duration for the 2008 risk assessment is a 10-year time frame. That is to say, while the risk of developing cancer or other adverse health impacts from Facility releases is considered a "lifetime risk-estimate," the "duration of chemical exposure" assumed in the risk analysis remains consistent with the duration of the proposed permit.[57] Therefore, exposures in excess of this duration have not been quantitatively assessed in the current analysis. The Region, therefore, in balancing all the various factors at play, determined that:

> To 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." Response to Comments V-41, RTC 005, at 115, (pdf p. 57/57).

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[53] Response to Comments V-41, RTC 004, at 114-115, (pdf pp. 56-57/57).
[54] See, e.g., AR Doc. No. 1272, "2014 10 21 Email Transmitting Memo re TCE Ambient air concentrations.pdf."
[55] *See*, AR Doc. No. 1272 "2014 10 21 Email Transmitting Memo re TCE Ambient air concentrations.pdf."
[56] *See*, *also*, AR Doc. No. 1023 "2007 10 09 Email-AERMOD vs ISCST3.pdf," and AR Doc. No. 1291 "2015 04 13 Memo re Evaluation of Sulfur Dioxide and Nitrogen Dioxide Emissions.pdf."
[57] Permit, Introduction/Table of Contents, at 1-2. See also Permit condition I.E.3, Permit, Module I, at 6.

For all the foregoing reasons, the Region believes that its rationale for requiring an update to the HHERA is both adequate and cogent and urges the Board to defer to the Region's experience and expertise with respect to its requirement that the HHERA be updated once during the life of the Facility's Permit.

C) THE PETITIONER HAS FAILED TO DEMONSTRATE AN ABUSE OF DISCRETION OR OTHER COMPELLING REASON TO REVIEW THE REQUIREMENT TO REPORT CERTAIN INSTANCES OF NON-COMPLIANCE AT THE FACILITY TO THE NATIONAL RESPONSE CENTER

1) Petitioner's Challenge to Including the National Response Center Phone Number for 24-Hour Reporting Purposes

The Petition contends that the inclusion of the National Response Center's (NRC's) phone number in Permit condition I.E.13.a. constitutes an abuse of the Region's discretion. In evaluating whether EPA abused its discretion by adding the NRC phone number, the Board should uphold the Region's decision if it is cogently explained and supported in the administrative record. See General Electric Company, 17 E.A.D. at 447.

2) The Region Provided a Cogent Explanation, Supported by the Administrative Record

The Region provided a cogent explanation for including the National Response Center's phone number in Permit condition I.E.13. at the time it issued the Permit.[58] The Region added the NRC's phone number to the Permit condition's requirement that the Permittees provide 24-hour notice of any non-compliance that "may endanger human health or the environment"[59] in order to "clarify to whom the verbal notice should be provided." Response to Comment I-23,

[58] Response to Comment I-23, RTC 001, at 9-10 (pdf pp. 9-10/30), and Response to Comment C-39, RTC 008 at 169-170 (pdf pp. 3-4/5). See also Response to Comment C-40, RTC 008 at 170-171 (pdf pp. 4-5/5).

[59] Permit Condition I.E.13.a. at Module I, p. 10.

RTC 001, at 9 (pdf p. 9/30). The Board should defer to the Region's experience and expertise in terms of what phone number within the Federal government family might best be equipped to respond to this type of urgent call that could come in at any time.

D) THE PETITIONER HAS FAILED TO DEMONSTRATE CLEAR ERROR, AN ABUSE OF DISCRETION, OR OTHER COMPELLING REASON TO REVIEW THE PERMIT'S DISPUTE RESOLUTION PROVISION

1) Petitioner's Challenge to Including Permit Language Pertaining to Judicial Review of Regional Decisions Regarding Disputes

Petitioner erroneously asserts that the Region made a clear error in a conclusion of law by including Permit condition I.L.c., stating that the Permittees must comply with the Region's future dispute resolution decisions even if they disagree with those decisions, and argues that Petitioner should be permitted to judicially dispute any such decision. Petition at 27. In evaluating the Petition's challenge to the dispute resolution provision, the Board should find that the Region exercised "considered judgment" in rendering its decision and that the Petitioner failed to demonstrate that the Region's previous responses to the comments relating to this issue were clearly erroneous or otherwise warrant review.

2) The Region Exercised Considered Judgment and Provided an Adequate and Cogent Explanation, Supported by the Administrative Record

The Responses to Comments provided a detailed explanation for the Region's decision. As more fully discussed below, the Region maintained that the dispute resolution provisions at Permit condition I.L. provide appropriate and adequate procedural safeguards to protect the Permittees' due process rights, where disagreements between the Permittees and the Region may arise. See In re Allied-Signal, Inc., 4 E.A.D. 291, 297-298 (EAB 1994).[60] However, the Region

[60] *See* Response to Comment I-42, RTC 001, at 28 (pdf pp. 28-30/30).

also accommodated Petitioner's specific concern about due process by deleting from the Permit any reference to whether judicial review would be available or not.[61] The Region unquestionably exercised considered judgment in reaching its decision. As the Region stated in its Response to Comments:

> In both developing the draft Permit and responding to this comment, the Region evaluated whether the processes and procedures prescribed in the Permit would provide the Permittees with the opportunity to be heard 'at a meaningful time and in a meaningful manner.' See Mathews v. Eldridge, 424 US 319, 333 (1976) (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 [1965] and Grannis v. Ordean, 234 U.S. 385, 394 [1914]). Such an analysis generally requires consideration of: (1) the private interests potentially affected; (2) the risk that the private interests may be deprived compared to the value of additional procedural safeguards; and (3) the burden on the government or the public imposed by such additional safeguards. Mathews*, 424 U.S.* at 334-347 . . .[62]

The Region directly addressed the commenter's concern that unilateral modifications to workplans or other deliverables by the Region might result in significant expenditures or costs to the operator to which it had not agreed. However, the Region also noted Supreme Court precedent that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."[63] The financial interests of the operator must be considered in light of the government's interests, and hence the public's interests, in conserving "scarce fiscal and administrative resources."[64]

In that light, the Region noted that to allow a Permittee to pursue administrative or judicial review of the Division Director's resolution of any dispute that may arise could severely limit the government's administration of the Permit. Administrative or judicial review will typically cause significant delays to the implementation of critical Permit requirements. The

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[61] Id., at 30.
[62] Id.
[63] Id., (citing Mathews at 424 U.S. 348).
[64] Id. at 29.

Region considered further how to weigh potential and, at this stage at least, hypothetical costs to the operator against both the public's and the federal government's interests in the efficient use of Agency resources.[65]

The Region considered that, where there are changes to the Permit or its attachments or appendices, such changes will be put into effect through the permit modification process, which does allow for review of the Region's permit decisions.[66] However, immediate recourse to review by an administrative or judicial body is inappropriate where no permit modification occurs – such as where a deliverable is disapproved or modified. In that case, the Permittees may invoke the dispute resolution provision and be heard by the Division Director. The Region regards these protections as sufficient to protect the due process rights of the Permittees while not simultaneously over-burdening the Agency or putting the public at risk.[67]

The Region did accommodate Petitioner's final agency action concern such that, although the Region declined to add a new Permit condition indicating the Director's resolution of a dispute would be a final agency action, the Region deleted the language from draft Permit condition I.L.1.c. that indicated the resolution of disputes would ***not*** be subject to administrative or judicial appeal.[68]

The Region noted its disagreement with the commenter's conjecture that the EAB decisions from General Electric, 4 E.A.D. 615 (EAB 1993), Allied-Signal, 4 E.A.D. 291 (EAB 1994) and In re Caribe General Electric Products, 8 E.A.D.696 (EAB 2000), "would not be upheld if subject to judicial review."[69] However, so as to not unnecessarily constrain any due

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65 Id.
66 Id.
67 Id.
68 Id., at 30.
69 See p. 16/202 at "2017 01 06 Comments of Evoqua Draft Permit Decision.pdf."

process options that might otherwise be available to the Permittees, the Region revised Permit condition I.L.1.c. to be silent on the question of whether the resolution of a dispute constitutes a "final agency action."[70]

In fact, in terms of the Region's reactions to Petitioner's comments on the Permit's dispute resolution provisions, the Region's explanations are more than fair and appropriate.

The carefully considered response to Petitioner's objection and its explanations for its decision are more than cogent and considered, were not clearly erroneous and do not warrant review. The Region's responses to Petitioner's concerns are supported in the Administrative Record by the draft Permit, final Permit and Responses to Comments,[71] as well as by Environmental Appeals Board and other federal precedent. In response to the comments it received, the Region revised the Permit to make it clear that anything in the Permit is potentially subject to dispute, and it left open the issue of whether Petitioner could successfully appeal a dispute decision.[72] Accordingly, the Region urges the Board to deny the Petition as to the Permit's Dispute Resolution provisions.

E) THE PETITIONER HAS FAILED TO DEMONSTRATE CLEAR ERROR, AN ABUSE OF DISCRETION, OR OTHER COMPELLING REASON TO REVIEW THE PERMIT REQUIREMENTS PERTAINING TO MAINTAINING STACK FLOW DATA FOR THE PURPOSES OF PERFORMING STACK EMISSIONS CALCULATIONS FOR NITROGEN OXIDES

1) Petitioner's Challenge to Inclusion of Permit Conditions Requiring the Maintenance of Stack Flow Data for Nitrogen Oxide Combustion Calculations

[70] Response to Comment I-42, RTC 001, at 30 (pdf pp. 27-28/30).
[71] Id., at 28-30. See also Responses to Comments I-28, I-40, and I-41, RTC 001, at 12-14, and 27-28 (pdf pp. 12-14, 27-28/30).
[72] Id.

The Petition challenges specific Permit conditions that require "stack flow rate" to be included in the Facility's NOx emissions calculations. Petition at 30. The Petition asserts that this requirement constitutes a clear error in a finding of fact. Id. It further asserts that the administrative record does not support the Region's decision-making on this issue. Id. When evaluating this part of the Petition, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment" in rendering its decision.

On matters such as this, because they are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience. Thus, where the Region has adequately explained its rationale and supported its reasoning in the administrative record, the Board's deferral to EPA's expertise and experience is appropriate.

2) The Region Exercised Considered Judgement and Provided an Adequate and Cogent Explanation, Supported by the Administrative Record

The Petitioner challenges Permit condition V.C.6.c., which requires the Petitioner to calculate and record emissions of oxides of nitrogen (NOx) based on (1) the amount of natural gas burned; (2) an emission factor obtained through performance demonstration testing; (3) flow rate; and (4) hours of operation.[73] The Petitioner's challenge is focused on the requirement that NOx emissions be based in part on flow rate out of the stack.[74] The Petitioner claims that flow rate would only be useful if NOx monitoring was based on NOx concentration.[75] The Petitioner asserts that NOx emissions will be measured using an AP-42 emission factor, which is not based on concentration and thus does not require monitoring flow rate out of the stack.[76] The

[73] Final Permit condition V.C.6.c.
[74] Petition at 29-30.
[75] Id.
[76] Id.

Petitioner explains that it did not raise these issues in its public comments because the language first appeared in the final permit after the close of the public comment period.[77] The Petitioner further asserts that the administrative record does not support the Region's decision-making on calculating NOx emissions to demonstrate compliance with the annual limit in the Permit.[78] As explained below, the Petitioner's argument in this regard is unfounded. The Region appropriately exercised its considered judgment in making this technical decision establishing the NOx compliance demonstration method in the final Permit.

The Petitioner is correct that, as compared with the draft Permit, the final Permit includes additional terms regarding the method for determining compliance with the 22 ton per year (tpy) NOx emissions cap, including the requirement to use the rate of air flow from the emission stack to calculate emissions. While this compliance demonstration method in final Permit condition V.C.6.c. was not included in the draft Permit, it is based on the Petitioner's agreement, in a letter to the Region, dated September 19, 2016, to demonstrate compliance with the NOx emissions cap "using the NOx stack gas concentration from the most recent stack test where NOx was measured (average of 3 runs), flow rate out of the stack and the hours of operation of the . . . reactivation unit."[79] Moreover, the terms included in the final Permit were also presented in the Statement of Basis that the Region prepared and made available during the public comment period, which evidenced the Region's intent to adopt this method that the Petitioner had already agreed to use:

> For NOx, this includes a Facility-wide cap of 22 tpy, demonstrated on a 12-month rolling basis, using the NOx stack gas concentration from the most recent stack test where NOx

[77] Id. at 5.
[78] Id. at 30.
[79] See "2016 09 19 Evoqua Ltr to USEPA R9 re SO2 and NOx Limitations on Emissions.pdf."

was measured (average of 3 runs), flow rate out of the sack, and the hours of operation of the reactivation unit.[80]

In response to the draft Permit, the Region received a comment concerning the Facility's potential to emit NOx (as well as sulfur dioxide) and its possible status as a major source subject to construction permitting requirements under the CAA New Source Review program.[81] Response to Comment C-10 clarified that, as explained in the Statement of Basis, the Region intended "to impose practically enforceable, synthetic minor limits on SO2 and NOx to keep emission of those pollutants below CAA major source thresholds," and referred to the Petitioner's letter dated September 19, 2016 agreeing to demonstrate compliance with the NOx synthetic minor limit using NOx concentration measured from the most recent stack test and flow rate from the stack.[82] The Region appropriately added these terms, which had already been agreed to by the Petitioner and included in the Statement of Basis, to Condition V.C.6.c of the final Permit in response to this public comment expressing concern over applicability of major source requirements to the Facility.

As stated above, the Final Permit imposes a Facility-wide cap on NOx emissions of 22 tpy, averaged over a 12-month rolling sum basis.[83] Condition V.C.6.c requires compliance with this annual NOx emissions cap to be determined by using the NOx stack gas concentration from the most recent stack test where NOx was measured (average of 3 runs), flow rate out of the stack, and the hours of operation of the reactivation unit. Like the draft Permit, the final Permit

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[80] Section 5.4.6 of the Rev. Stmt. of Basis, at 10/1064.

[81] Response to Comment C-10, RTC 007, at 140-141 (pdf pp. 19-20/45). *See also*, "2017 01 09 Greenaction Transmittal and Comments in Opposition of Proposed Permit" at 8/147.

[82] Response to Comment C-10, RTC 007, at 140-141 (pdf pp. 19-20/45).

[83] The basis for the inclusion of controls of both SOx and NOx emissions under the RCRA Permit was the HHERA. See, e.g., Response to Comments V-39, RTC 005, at 104-114, (pdf pp. 46-56/57). EPA has broad authority under RCRA's omnibus provision to include permit terms and conditions as the Administrator determines "necessary to protect human health and the environment." See RCRA Section 3005(c)(3), 42 USC § 6925(c)(3), and 40 CFR § 270.32(b)(2).

also provides additional assurance of compliance with the 22 tpy emission cap by requiring the Facility to track natural gas usage.

The Petitioner claims that it uses an AP-42 emission factor for compliance with the NOx emissions cap and that the Permit's requirement to use flow rate from the stack is erroneous because "there is no concentration recorded and no flow is needed to calculate NOx emissions."[84] Petitioner provides no support for this claim. There is no mention of an AP-42 emission factor in the draft Permit, or the Statement of Basis, and the Petitioner points to no document in the administrative record that supports the use of a generic emissions factor such as an AP-42 emission factor to determine compliance with the NOx emissions cap. On the contrary, in its draft Permit, in its Statement of Basis, and in its Response to Comments, EPA expressed its reliance on Petitioner's express assurance, as evidenced by its letter dated September 19, 2016, that it would use a source-specific emissions factor obtained during performance demonstration testing, combined with flow rate, to calculate compliance with the NOx emissions cap.[85]

[84] Petition at 30. According to EPA's website, "AP-42, *Compilation of Air Pollutant Emission Factors*, has been published since 1972 as the primary compilation of EPA's emission factor information. It contains emissions factors and process information for more than 200 air pollution source categories. A source category is a specific industry sector or group of similar emitting sources. The emissions factors have been developed and compiled from source test data, material balance studies, and engineering estimates. The Fifth Edition of AP-42 was published in January 1995. Since then EPA has published supplements and updates to the fifteen chapters available in *Volume I, Stationary Point and Area Sources.*" Source: https://www.epa.gov/air-emissions-factors-and-quantification/ap-42-compilation-air-emissions-factors, (downloaded Dec. 01, 2018).

[85] Draft Permit condition V.C.6.iii., Section 5.4.6 of the Rev. Stmt. of Basis, at 10/1064; and Responses to Comments V-12, RTC 005, at 77 and 78, and V-39, RTC 005, at 109, fn 43 (pdf pp. 19, 20, and 51/57). *See*, *also*, "2016 09 19 Evoqua Ltr to USEPA R9 re SO2 and NOx Limitations on Emissions.pdf."

Consistent with EPA's long-standing policy regarding the practical enforceability of limits on a source's potential to emit criteria and hazardous air pollutants,[86] the final Permit imposes reasonable requirements to demonstrate compliance with the 22 tpy NOx limit based on emissions data that is specific to the operation of this Facility rather than generic emission factors such as those in AP-42.

Because this matter involves fundamentally technical issues, and the Region has adequately explained its rationale and supported its reasoning in the administrative record, the Board should defer to the Region's experience and expertise regarding the appropriate manner for calculating NOx emissions under the Permit. *See, e.g.,* General Electric Company, 17 E.A.D. at 447. The Board should deny review of Permit condition V.C.6.c.

F) THE BOARD IS REQUESTED TO REMAND THE QUESTION OF THE REGULATION OF T-11 TO THE REGION FOR FURTHER CONSIDERATION

The Region agrees with Petitioner that the final Permit conditions purporting to potentially subject T-11 to regulation as a hazardous waste tank are at odds with both the Petitioner's position that T-11 is ancillary equipment to an exempt wastewater treatment unit and some of the conditions set forth in the final Permit. Petition at 30-32.[87] However, the Region opposes Petitioner's request that T-11 be removed from Permit condition IV.G.1. Instead, the

[86] *See*, *e.g.*, In the Matter of Hu Honua Bioenergy Facility, Order on Petition IX-2011-1 (February 7, 2014) (https://www.epa.gov/sites/production/files/2016-09/documents/hu_honua_response2014_0.pdf); "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," John S. Seitz, Director, Office of Air Quality Planning and Standards (January 25, 1995), cited in AR Doc. No. 1436 ,"2016 09 26 Administrative Record Addendum.pdf."

[87] *See*, *e.g.*, Permit Module VI, page 28, Table VI-2, Solid Waste Management Unit Identification, Item No. 6, "Wastewater storage tank, T–11 System."

Region respectfully requests that the Board remand the question of the appropriate regulation under RCRA to the Region to reconsider.[88]

IV. CONCLUSION AND REQUESTED RELIEF

Accordingly, the Region requests that the Board remand the Region's Permit decision only insofar as requested in accordance with Section V.J. of the Petition, relating to the regulation of T-11. The Region requests that the Board decline to review the remainder of the challenges raised in the Petition. Petitioner has failed to show that the Region's decisions constitute clear error as to an issue of fact or law. The Region has demonstrated that it used considered judgment and adequately explained its decisions on matters where Petitioner argues to the contrary, and as to technical matters, the Region urges the Board to defer to EPA's technical expertise and judgment.

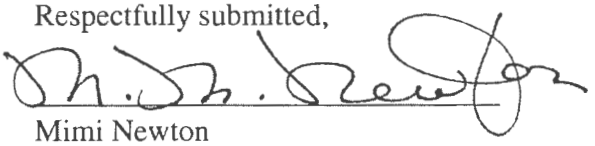
More specifically, the issuance of the Permit to the owner of the Facility, CRIT, as a co-permittee (Petition, Section V.A.) was based on considered judgment and clear explanation, and does not warrant review as a clear error of fact or law; the Permit conditions for the Facility's carbon regeneration furnace (RF-2) (Petition, Sections V.B., C., D., E., and F.) were based on the need to protect human health and on sound technical judgment and science, and as such the Board should defer to the Region's technical expertise; inclusion of the National Response Center's contact phone number in the Permit for 24-hour reporting for certain instances of non-compliance was appropriate (Petition, Section V.G.); the Permit's dispute resolution provision does not violate the Petitioner's due process rights (Petition, Section V.H.) or otherwise lack

[88] A number of Responses to Comments addressed T-11 and the Region requests the opportunity to re-evaluate these Responses insofar as they pertain to the regulation of T-11 under the Permit. See Responses to Comments III-7, RTC 003, at 42; IV-4, RTC 004, at 47-48 (explaining the Region's rationale for including T-11 in Permit condition IV.A.2.); IV-17, RTC 004, at 52-53; and IV-20, RTC 004, at 53.

considered judgment or clear explanation; and the Permit's requirement to base nitrogen oxides emissions in part on stack flow rate is appropriate (Petition, Section V.I).

Date: Dec. 3, 2018

Respectfully submitted,



Mimi Newton
Assistant Regional Counsel (ORC-3)
United States Environmental Protection Agency
75 Hawthorne Street
San Francisco, CA 94105
Office: 415-972-3941/ Fax: 415-947-3570
Newton.Mimi@epa.gov

Counsel for Respondent, U.S. EPA Region IX

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 Petition for Review" has been served on the following parties via the following methods on this 3rd day of December, 2018:

Sandra M. Lesch

12/3/2018

Sandra M. Lesch, Administrative Assistant
US EPA, Region IX
Office of Regional Counsel
75 Hawthorne Street
San Francisco, CA 94105
T: (415) 972-3454 / F: (415) 947-3570
lesch.sandra@epa.gov

Date

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

Eurika Durr, Clerk
US Environmental Protection Agency
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 [and via U.S. mail for documents over 50 pages] in accordance with 40 CFR § 124.19.

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 Petition for Review" has been served on the following parties via the following methods on this 03 day of December, 2018:

M Sanders-Curry

12/03/2018

Madison Sanders-Curry, Physical Scientist
US EPA, Region IX
Land Division
75 Hawthorne Street
San Francisco, CA 94105
T: (415) 972-3855/ F: (415) 947-3570
sanders-curry.madison@epa.gov

Date

Counsel for Petitioner Evoqua Water Technologies, LLC:

Stephen M. Richmond
BEVERIDGE & DIAMOND, PC
155 Federal Street, Suite 1600
Boston, MA 02110
T: 617-419-2310/F: 617-419-2301
srichmond@bdlaw.com

Bryan J. Moore
BEVERIDGE & DIAMOND, PC
98 San Jacinto Blvd., Suite 1420
Austin, TX 78701-4296
T: 512-391-8030/F: 512-391-8099
bmoore@bdlaw.com

Service on counsel for Petitioner Evoqua Water Technologies, LLC is made via electronic mail in accordance with 40 CFR § 124.19.

Counsel for Co-Permittee and beneficial landowner, the Colorado River Indian Tribes:

Rebecca A. Loudbear, Attorney General
Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344
T: (928) 669-1271 / F: (928) 669-5675
rloudbear@critdoj.com

Antoinette Flora, Deputy Attorney General
Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344
T: (928) 669-1271 / F: (928) 669-5675
aflora@critdoj.com

Sara A. Clark
SHUTE, MIHALY & WEINBERGER LLP
Attorneys for Colorado River Indian Tribes
396 Hayes Street
San Francisco, CA 94102
T: (415) 552-7272 / F: (415) 552-5816
clark@smwlaw.com

Rica Garcia
SHUTE, MIHALY & WEINBERGER LLP
Attorneys for Colorado River Indian Tribes
396 Hayes Street
San Francisco, CA 94102
T: (415) 552-7272 / F: (415) 552-5816
rgarcia@smwlaw.com

Service on counsel for Permittee the Colorado River Indian Tribes is made via electronic mail in accordance with 40 CFR § 124.19.