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. RCRA 18-01

EVOQUA WATER TECHNOLOGIES LLC'S SUPPLEMENTAL BRIEF ON EVOQUA'S MOTION FOR STAY OF PERMIT PROVISIONS PENDING BOARD REVIEW

Per the Environmental Appeals Board's ("***Board's***") *Order for Further Briefing on Evoqua's Motion for Stay of Permit Provisions Pending Board Review* (Dec. 14, 2018), Petitioner Evoqua Water Technologies LLC ("***Evoqua***") provides this supplemental brief addressing the three questions presented in the Board's order. In accordance with 40 C.F.R. § 124.19(f)(2) and the Board's order, the parties met and conferred on two telephone conferences regarding the issues raised in Evoqua's pending motion and the questions presented in the Board's order. Unfortunately, the parties were not able to resolve their differences.

EVOQUA'S RESPONSES TO THE BOARD'S QUESTIONS

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

The Board has ample authority under 40 C.F.R. § 124.19(n) ("***§ 124.19(n)***") to review a Region's notification of stayed permit conditions. The Board's authority under § 124.19(n) is limited only in that it must be exercised in furtherance of "the efficient, fair, and impartial

adjudication of issues arising in an appeal." The Board may otherwise "do all acts and take all measures necessary . . . including, but not limited to, imposing procedural sanctions against a party who, without adequate justification, fails or refuses to comply" with the provisions of 40 C.F.R. Part 124 ("***Part 124***").

Since § 124.19(n) authorizes the Board to sanction the Region for failing or refusing to comply with the provisions of Part 124, including those in 40 C.F.R. § 124.16(a) ("***§ 124.16(a)***") for stays of contested and non-severable permit conditions, it is beyond any reasonable dispute that § 124.19(n) authorizes the Board to review the Region's compliance with § 124.16(a). The Region's compliance with § 124.16(a) – i.e., the sufficiency and legality of the Region's notification of the stayed permit conditions – is an issue "arising in [this] appeal" and the Board's review of the Region's notification under § 124.19(n) would further "the efficient, fair, and impartial adjudication" of the issue.

On at least one occasion, the Board admonished petitioners in a permit appeal for failing to object to a Region's notification of stayed permit conditions issued under § 124.16(a). *See Upper Blackstone Water Pollution Abatement Dist.*, 15 E.A.D. 297, 308 (EAB 2011) ("The Region's November 2008 Notice identified the contested conditions that were stayed as a result of the petitions for review . . . . [Petitioners] did not immediately or at any time after the November 2008 Notice object that the Region's Notice was in error."). Presumably, the Board would not have admonished the petitioners for failing to object to the Region's notification of stayed permit provisions if the Board lacked the authority to hear any such objection.

Moreover, on multiple occasions, the Board has exercised its considerable authority under § 124.19(n) to address issues that were not specifically contemplated by other Part 124 regulations. For example, in *Town of Newmarket, New Hampshire*, the Board addressed a situation where the

procedural rule at issue (40 C.F.R. § 124.19(k)) did not provide a unilateral right to withdraw a petition. 16 E.A.D. 182, 255-56 (EAB 2013). The Board determined that its "full authority and discretion to manage its docket" under § 124.19(n) was sufficiently broad to allow the Board to deny the motion to withdraw. *Id.* & n.5 (citing cases "articulating [the] Board's inherent authority to rule on motions and fill other 'gaps' in its procedural rules" and "manage its docket [under] general and well-established principles of administrative law").

Similarly, in *Sterling Suffolk Racecourse*, the Board allowed the Region to publish a draft permit modification, and the petitioner to withdraw its petition, citing § 124.19(n) for the proposition that this course of action "will serve administrative efficiency." No. 15-12, 2016 WL 4053038, at *1 (EAB, July 22, 2016) (unpublished final decision). Additionally, in *Savoy Energy*, the Board cited § 124.19(n) for the proposition that "the Board has broad discretion to grant a remand request." 17 E.A.D. 200, 202, 203 (EAB 2016). And in *Los Alamos Nat'l Security*, the Board relied upon § 124.19(n) to justify its adoption of a standard of review for informal appeals from denials of requests to terminate a permit, where the rules in Part 124 did not specify a standard of review. 17 E.A.D. 586, 596-97 (EAB 2018).

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

The appropriate standard of review for the Board's review of a Region's notification of stayed permit conditions is the same as the standard of review for permit appeals under 40 C.F.R. § 124.19(a)(4)(i)(A)-(B) – i.e., clearly erroneous or abuse of discretion. In *Los Alamos Nat'l Security*, the Board adopted "for informal appeals the same standard used for appeals of permit determinations under 40 C.F.R. § 124.19." 17 E.A.D. at 596. "Specifically, a party seeking review . . . must demonstrate that the Region's determination was based on either a finding of fact or

conclusion of law that was clearly erroneous or was an abuse of discretion." *Id.* The Board reasoned that:

> The issues that may arise in [an informal appeal] are not necessarily different or less significant than the issues that arise in a proceeding under 40 C.F.R. § 124.19. Where, as here, the Board has decided to consider an informal appeal . . ., the issues presented warrant Board consideration under the same standard of review as issues arising in proceedings under 40 C.F.R. § 124.19. Moreover, adopting this standard will serve administrative efficiency and will provide for consistency in addressing future appeals to the Board whether formal or informal.

Id. at 596-97 (citing § 124.19(n)).

The standard of review for permit appeals under 40 C.F.R. § 124.19(a)(4)(i)(A)-(B) is one that the Board and the Region are well-versed in applying, and is one that closely squares with the standard of review under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (providing that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

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

As set forth above, Evoqua contends that the Board has the authority to review the Region's notification of stayed permit provisions. The Region maintains that Evoqua has no recourse to the Board or any other tribunal and may only seek review of the Region's notification by the Regional Administrator, although there is no formal process for such review set forth in EPA's rules. While Evoqua appreciates the opportunity to address this issue with the Regional Administrator, the Region did not communicate this position until February 20, more than three months after Evoqua filed its motion to remand the Region's notification (or, in the alternative, stay the permit pending appeal). At this point in the process, review by the Board is the most administratively efficient approach.

If the Board finds that it lacks authority to review the Region's notification, or otherwise refuses to undertake such review, then Evoqua's only recourse to an independent and impartial third-party tribunal would be an interlocutory appeal to federal court. The availability of federal court review would hinge on whether the Region's notification is "final agency action," which no court has yet addressed. *See* 5 U.S.C. 551(13) (defining "agency action" to "include[] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). Even if federal court review were available to Evoqua, it would be fundamentally contrary to the purposes of administrative efficiency if Evoqua had to resort to a federal court appeal to resolve the procedural issue of what permit provisions should be stayed pending the Board's review of the substantive issues raised in Evoqua's petition. *Cf. Savoy Energy*, 17 E.A.D. at 202 ("Allowing the Region to proceed with this process will serve administrative efficiency."); *Sterling Suffolk Racecourse*, No. 15-12, 2016 WL 4053038, at *1 (citing "administrative efficiency" to support allowing the Region to proceed with a draft permit modification under § 124.19(n)); *Los Alamos National Security*, 17 E.A.D. at 597 (citing "administrative efficiency" to support the adoption of a standard of review under § 124.19(n)).

CONCLUSION

For the foregoing reasons, Evoqua respectfully submits (1) that the Board has ample authority under § 124.19(n) to review the Region's notification of stayed permit conditions; (2) that the standard of review for the Board's review of the Region's notification should be the same as the standard of review for permit appeals under 40 C.F.R. § 124.19(a)(4)(i)(A)-(B) – i.e., clearly erroneous or abuse of discretion; and (3) that it would be administratively inefficient if Evoqua had to resort to an interlocutory appeal to federal court to resolve the procedural issue of what permit provisions should be stayed pending the Board's review of the substantive issues

raised in Evoqua's petition. Accordingly, Evoqua respectfully requests that the Board review the Region's notification of stayed permit conditions and remand the notification to the Region with instructions to stay the permit conditions listed in ***Attachment 2*** to Evoqua's pending motion or, in the alternative, that the Board stay the permit in its entirety pending the final resolution of Evoqua's permit appeal.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Undersigned counsel for Evoqua hereby certifies that this motion complies with the word limit of 40 C.F.R. § 124.19(f)(5) because this supplemental brief contains 1,539 words.

Date: February 25, 2019

Respectfully submitted,

/s/ Bryan J. Moore

Bryan J. Moore
BEVERIDGE & DIAMOND, P.C.
98 San Jacinto Boulevard, Suite 1420
Austin, Texas 78701-4039
t: 512.391.8000 / f: 512.391.8099
bmoore@bdlaw.com

Stephen M. Richmond
BEVERIDGE & DIAMOND, P.C.
155 Federal Street, Suite 1600
Boston, Massachusetts 02110
t: 617.419.2310 / f: 617.419.2301
srichmond@bdlaw.com

Counsel for Petitioner
Evoqua Water Technologies LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been served on the following parties via the following method on this 25th day of February 2019:

Mimi Newton, Assistant Regional Counsel — *via email*
Marie Rongone, Section Chief
U.S. EPA Region IX
75 Hawthorne Street
MC ORC-3-2
San Francisco, CA 94105
Newton.mimi@Epa.gov
Rongone.marie@Epa.gov

Rebecca A. Loudbear, Attorney General — *via email*
Antoinette Flora, Deputy Attorney General
Office of the Attorney General
Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344
rloudbear@critdoj.com
aflora@critdoj.com

Sara A. Clark — *via email*
Rica Garcia
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, CA 94102
clark@smwlaw.com
rgarcia@smwlaw.com

Eurika Durr, Clerk — *via EAB's electronic filing system*
U.S. EPA, Environmental Appeals Board

/s/ Bryan J. Moore
Bryan J. Moore