

BEFORE THE ENVIRONMENTAL APPEALS BOARD
 U.S. ENVIRONMENTAL PROTECTION AGENCY
 WASHINGTON, D.C.

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ORAL ARGUMENT

IN THE MATTER OF: :

EVOQUA WATER TECHNOLOGIES, : RCRA Appeal No.
 LLC and COLORADO RIVER : 18-01
 INDIAN TRIBES :

RCRA Permit No. AZD982441263: :

Tuesday,
 April 9, 2019

Administrative Courtroom
 Room 1152
 EPA East Building
 1201 Constitution Avenue, NW
 Washington, DC

The above-entitled matter came on for
 hearing, pursuant to notice, at 10:30 a.m.

BEFORE:

THE HONORABLE MARY BETH WARD
 Environmental Appeals Judge

THE HONORABLE AARON P. AVILA
 Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN
 Environmental Appeals Judge

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ALSO PRESENT:

Eurika Durr, Clerk of the Board

1 P-R-O-C-E-E-D-I-N-G-S

2 10:30 a.m.

3 MS. DURR: The Appeals Board of the
4 United States Environmental Protection Agency is
5 now in session for oral argument In re Evoqua
6 Water Technologies LLC and Colorado River Indian
7 Tribes, Permit No. AZD982441263, RCRA Appeal
8 No. 18-01. The Honorable Judges, Kathie Stein,
9 Mary Beth Ward, and Aaron Avila, presiding.

10 Please turn off all cell phones, and
11 no recording devices allowed. Please be seated.

12 JUDGE WARD: Good morning. The Board
13 is hearing oral argument today in a petition for
14 review of a permit issued by EPA Region 9 to
15 Evoqua Water Technologies and the Colorado River
16 Indian Tribes, under the Resource Conservation
17 and Recovery Act.

18 In addition to those in the courtroom,
19 I'd like to note that counsel for the Colorado
20 River Indian Tribes is participating in the oral
21 argument by video conference, and the EPA
22 Regions 5, 7 and 9 are observing by video

1 conference, as are representatives from the
2 Colorado River Indian Tribes from the Attorney
3 General's office.

4 Let me just first check to make sure
5 that the counsel for the tribes in California can
6 hear us.

7 MS. CLARK: Yes, we can hear you.
8 Thank you, Your Honor. Can you hear us okay?

9 JUDGE WARD: Yes, we can hear you, as
10 well. And can you see us?

11 MS. CLARK: Yes, we can, although it's
12 a little bit jumpy. But we will make do.

13 JUDGE WARD: Excellent. Thank you.
14 So, today's argument will proceed as outlined in
15 the Board's March 8th order scheduling oral
16 argument. We'll first hear argument from counsel
17 for Evoqua Water Technologies. Evoqua will have
18 30 minutes for argument, with the option to
19 reserve five minutes for rebuttal.

20 And next, we'll hear from US EPA
21 Region 9 for 20 minutes. And finally, the Board
22 will hear from counsel for the Colorado River

1 Indian Tribes, again appearing by video
2 conference, for ten minutes.

3 On behalf of the Board, I want to
4 express to all the parties our appreciation for
5 the effort we know you've expended in terms of
6 preparing your papers, as well as preparing for
7 this argument. You should assume that we've
8 carefully read the pleadings. But do not assume
9 that the Judges have made up their minds about
10 the issues raised, even though we may ask you
11 some probing questions to assist us in our
12 deliberations.

13 Oral argument is an opportunity for
14 you to explain your positions to us, and for us
15 to explore with you the issues raised in the
16 case.

17 There is no photography, filming,
18 recording -- or recording of any kind during the
19 argument. You should know that we do have a
20 court reporter transcribing the oral argument,
21 and a transcript of the argument will be posted
22 to the docket in this matter.

1 So, with that, before we begin
2 argument, I would like all the parties to
3 introduce themselves and anyone who is with them,
4 to the panel. So, let's start with counsel for
5 Evoqua.

6 MR. MOORE: Good morning, Your Honor.
7 Bryan Moore, with the law firm of Beveridge &
8 Diamond.

9 MR. RICHMOND: Steve Richmond, also
10 with the law firm of Beveridge & Diamond.

11 MS. NEWTON: Good morning, Your
12 Honors. My name is Mimi Newton. I'm Assistant
13 Regional Counsel, Region 9, EPA. With me today
14 is my supervisor, Marie Rongone, and Laurel
15 Celeste from the Office of General Counsel, as
16 well as a number of representatives from OECA,
17 the Program Office, and OGC.

18 JUDGE WARD: Thank you. And counsel
19 for the Tribes.

20 MS. CLARK: Good morning, Your Honor.
21 My name is Sara Clark, of Shute, Mihaly &
22 Weinberger. With me today, I have Rica Garcia,

1 one of my associates. And I believe appearing by
2 video conference, we have Rebecca Loudbear and
3 Antoinette Flora, from the Attorney General's
4 office at the Tribes.

5 JUDGE WARD: Thank you, Ms. Clark. I
6 think if we could just pause for a moment,
7 because I think we're getting feedback and I'm
8 not quite sure where that is. If we could just
9 take a moment.

10 So, if the parties who are observing,
11 and I'm assuming -- does that also include
12 Ms. Clark, just for now while you're observing,
13 to mute your microphones. Is that -- would that
14 address the issue, do you think?

15 MR. MOORE: Yes.

16 JUDGE WARD: Yes. Thank you. So,
17 Ms. Clark, if you could mute your microphone
18 while you're listening to the rest of the
19 argument, that would be helpful to us in the
20 courtroom.

21 MS. CLARK: Of course. I'll do so
22 right now.

1 MS. NEWTON: Excuse me, Your Honor.
2 I believe Ms. Clark indicated that the Attorney
3 General for the Colorado River Indian Tribes was
4 also observing on video conference.

5 And I didn't hear that confirmed when
6 you introduced the participants by video
7 conference.

8 JUDGE WARD: I think that I did. But
9 if not, let me just reiterate or say that the two
10 attorneys from the Colorado River Indian Tribes
11 Attorney General's office are also viewing the
12 argument. I believe that's Ms. Loudbear and
13 Ms. Flora. Thank you. So, if counsel for Evoqua
14 could begin. And do you intend to reserve time
15 for rebuttal?

16 MR. MOORE: Yes, I do. I've -- looks
17 like I have reserved it. I'm showing 25 minutes
18 on my clock here.

19 Your Honors, Evoqua's petition
20 presents ten issues for the Board's review. Of
21 course, subject to your questions and inquiries,
22 and the time that I have before you in 25 minutes

1 that I have, I'd like to focus my opening
2 arguments on a subset of those ten issues.

3 Specifically, those issues that
4 concern the contested permit conditions derived
5 from the regulations in 40 CFR, Part 63,
6 subpart EEE, the Maximum Achievable Control
7 Technology Standards for Hazardous Waste
8 Combusters, or MACT EEE, as it is commonly known
9 in RCRA parlance, if you will.

10 I'll also address the contested permit
11 conditions that impose requirements for
12 performance demonstration testing, or PDTs, as
13 I'll refer to it. That requirement is an every-
14 five-year requirement.

15 And I'd also like to address the
16 requirement in the permit for an additional Human
17 Health and Ecological Risk Assessment, or HHERA,
18 H-H-E-R-A.

19 So that you can readily align my
20 comments with the issues and arguments presented
21 in Evoqua's petition, I'll be addressing issues
22 two through six in Section 4 of our petition,

1 which correspond to arguments B through F in
2 Section 5 of the petition.

3 Again, of course, I'm prepared to
4 address and happy to answer any questions you
5 have about these issues, or any other issues in
6 the petition.

7 JUDGE WARD: Thank you.

8 MR. MOORE: And as you see, I do have
9 a PowerPoint presentation here. I believe hard
10 copies have been handed out to Your Honors and to
11 all the parties. I've also emailed a copy of the
12 presentation to Ms. Clark, who's participating by
13 video conference.

14 JUDGE WARD: And if I could just
15 interject, we've allowed you to share that
16 PowerPoint presentation as a demonstrative aid.

17 MR. MOORE: Yes.

18 JUDGE WARD: It is not part of the
19 record in this case.

20 MR. MOORE: That is correct, and I
21 understand. Yes. The Region claims authority to
22 impose the MACT EEE standards and the

1 requirements for PDTs and the requirement for the
2 additional HHERA, in Evoqua's RCRA permit under
3 one or more of the regulatory and statutory
4 provisions that appear on this slide.

5 Each of these provisions, each of
6 them, requires the Region to make a necessity
7 determination as a prerequisite, or as a
8 condition precedent to imposing permit terms and
9 conditions under these provisions.

10 Specifically, the Region must make a
11 determination that each permit term or condition
12 imposed under one or more of these provisions, is
13 necessary to protect human health and the
14 environment.

15 The dictionary definition of necessary
16 is absolutely needed or required. Thus, this
17 necessity determination that the Region is
18 required to make inherently involves a weighing
19 of alternative permit conditions, or a
20 determination that there is no alternative to a
21 proposed permit condition that will achieve
22 protection of public health and the environment.

1 JUDGE AVILA: So, can I just interrupt
2 just so -- I want to be clear. On the owner-
3 operator, who are the proper permittees? What
4 exactly is your argument on that? As a matter of
5 law the Tribes should not be a co-permittee, or
6 that as a matter of discretion the EPA should
7 have made distinctions in the permit about
8 whether the Tribe or Evoqua was a permittee?

9 MR. MOORE: It --

10 JUDGE AVILA: I'm sorry. Whether the
11 Tribe or Evoqua was the proper party to be doing
12 a particular task.

13 MR. MOORE: Your Honor, it's a matter
14 of discretion, not as a matter of law. And the
15 reason it's a matter of discretion is because the
16 term permittee is not defined in RCRA, it's not
17 defined in the statute. It's not used in the
18 statute, as far as I know. It's not defined in
19 EPA's regulations.

20 The terms that are defined in EPA's
21 regulations are owner and operator. And the
22 regulations require that in a case such as this,

1 where the facility is owned by one party, CRIT,
2 and operated by another, Evoqua, it is the
3 obligation of the operator to obtain the permit,
4 except that the owner has to sign the permit
5 application.

6 So --

7 JUDGE AVILA: And the owner and
8 operator are jointly and severally liable for any
9 violations of the permit.

10 MR. MOORE: You retain that liability
11 under RCRA, that is correct.

12 For permit violations, for
13 contamination, that may result as an operation of
14 the facility on the property. The owner and
15 operator retain that liability.

16 JUDGE WARD: And what has changed --
17 what's different now under the permit than was
18 the case under interim status?

19 MR. MOORE: Well, we didn't have a
20 permit under interim status.

21 JUDGE WARD: But the regulations apply
22 to both the owner and the operator.

1 MR. MOORE: But in terms of how the
2 facility was operated under interim status, there
3 is no change in the operation of the facility.
4 Let me be clear about that.

5 Evoqua is charged, as between the two
6 parties, Evoqua and CRIT, with operation of the
7 facility. Evoqua has operational control of the
8 facility itself.

9 Evoqua has the expertise and
10 experience to operate the facility. CRIT is a
11 sovereign entity. It's also a regulator of the
12 facility itself. It doesn't have operation --

13 JUDGE WARD: I think to your point I'm
14 sorry to interrupt. I think reading the interim
15 status regulations, it seems as if they don't
16 distinguish between the responsibility of the
17 owner or the operator. Again, they're jointly
18 and severally liable.

19 And so, in terms of operation of this
20 facility, is there really anything different now
21 under the permit than was the case under interim
22 status?

1 MR. MOORE: Well, the permit for the
2 first time defines co-permittees, and then goes
3 throughout their permit and says, the co-
4 permittee shall do the following.

5 And also, CRIT is now required to
6 sign, for instance, permit modification requests
7 or applications, if you will.

8 And as CRIT itself pointed out in its
9 brief, it has some concerns, and I'll let
10 Ms. Clark speak to those concerns, about
11 identifying both Evoqua and CRIT as permittees.

12 We're not asking for CRIT, or
13 requesting that CRIT, or arguing that CRIT should
14 be wiped off the face of the permit, that CRIT
15 should not be identified on the permit.

16 What we are asking, what we are
17 arguing, is that CRIT should be identified on the
18 permit for who they are and what role they play
19 with respect to the facility. They are the
20 beneficial landowner of the land on which the
21 facility is located. They should be identified
22 as the owner on the face of the permit. That is

1 required.

2 I'll submit that that's required by
3 the law and that that's required by the
4 regulations. The owner and operator are required
5 to have a permit.

6 It's entirely discretionary upon EPA
7 as to who they identify as a permittee, if
8 anyone, on the face of the permit, as that is not
9 a regulatory or statutorily defined term.

10 JUDGE AVILA: Why doesn't permit
11 Module 1.A.6 that says, compliance with the
12 requirements of this permit -- I'm
13 paraphrasing -- by either the Tribe or the
14 operator, is regarded as sufficient for both.
15 Why doesn't that alleviate any concern you might
16 have?

17 I mean, you can do -- you can comply
18 with the terms of the permit and that's
19 compliance for both. So --

20 MR. MOORE: Well one, it still retains
21 the, for lack of a better word, awkwardness of
22 having to obtain CRIT's signature and approval

1 for permit mods in day-to-day things regarding
2 the operation of the facility.

3 It also, while simply naming CRIT as
4 the owner of the facility on the permit, which
5 again we submit is the right thing to do, CRIT
6 retains that RCRA liability that Your Honor
7 noted.

8 But the way the permit is structured,
9 it -- by naming CRIT as a co-permittee, it puts
10 them on -- liable or responsible for the day-to-
11 day operation of the facility, which it has no
12 control over on a day-to-day operational basis.

13 It's not a matter of absolving CRIT of
14 its RCRA liability or potential liability should
15 the facility become contaminated, should Evoqua
16 for some reason go insolvent, or something like
17 that. They're still on the hook. And EPA still
18 has a hook to reach out and take enforcement
19 against CRIT if that need arises.

20 But in the day-to-day operations of
21 the facility, there is no need or reason to name
22 CRIT as a co-permittee responsible for the day-

1 to-day operations of the facility.

2 JUDGE AVILA: Aside from the permit
3 modifications, what is another real world
4 negative impact that you're concerned about? I
5 mean, you keep saying there's no reason to
6 include them. But what real world impact does it
7 have on Evoqua to have the Tribe defined to be a
8 permittee?

9 MR. MOORE: Well, I would submit that
10 it likely has more real world impact, or more
11 potential real world impact, on CRIT than it has
12 on Evoqua.

13 Because Evoqua is going to carry out
14 the understood role, if you will, of a permittee.
15 And it not being a defined role, but the role of
16 the permittee as it's set forth in the permit,
17 that is what Evoqua is signed up for. That's
18 what Evoqua's been doing since 1992.

19 That's not what CRIT has been doing
20 since 1992. It hasn't had any responsibility for
21 the day-to-day operations of the facility.
22 Naming them as a co-permittee says that they do.

1 JUDGE WARD: But on the issue of a
2 signature on permit modifications of Module 1.K,
3 why can't the permit be read as suggesting that
4 if you sign, that's sufficient?

5 Since the provision in 1.A.6. says
6 that compliance by one constitutes compliance by
7 both, effectively, then I think a fair reading of
8 the permit could be that only you need to sign
9 the permit modification. Why do you read it
10 differently?

11 MR. MOORE: My -- I don't read it --
12 well, I appreciate your argument and I hope it
13 prevails with the EPA. I don't know that it --
14 or with the Region. I don't know that it will.

15 JUDGE WARD: So -- but there is Board
16 precedent that if the Region, we'll ask them the
17 same question, if they read the permit term, that
18 particular permit term, in the way that I just
19 suggested, would that satisfy your concern, at
20 least as to permit modifications?

21 MR. MOORE: That would for Evoqua's
22 purposes. And I'm speaking only for Evoqua here

1 and will defer to CRIT on what its concerns are
2 with respect to the co-permittee and what they
3 prefer.

4 But for Evoqua's purposes, that would
5 alleviate a great deal of awkwardness and allow
6 us to get permit modifications in on time.

7 JUDGE STEIN: Can I turn for a moment?
8 Are we done with that first issue? Or do you
9 still have more questions? Because I wanted to
10 ask you a question about the argument you were
11 just making about a necessity determination --

12 MR. MOORE: Yes, Your Honor.

13 JUDGE STEIN: -- with respect to
14 Part 63, subpart EEE. And as I read 264.601, it
15 talks about permit terms and provisions must
16 include those requirements, the Part 63,
17 subpart EEE, that are appropriate for the
18 miscellaneous unit being permitted.

19 Why isn't what EPA has to establish
20 here, based on the regulations, a showing that
21 the permit conditions are appropriate?

22 You seem to be suggesting, at least in

1 the argument, a demonstration of necessity, which
2 strikes me as you're asking EPA to go beyond what
3 the regulations, as to that particular provision,
4 require.

5 And hasn't EPA already made a
6 determination in its regulations that what needs
7 to be shown here is the determination of
8 appropriateness, not necessity?

9 MR. MOORE: Well, I would submit to
10 you, Your Honor, that 40 CFR 264.601, the
11 overarching requirement is that any permit for a
12 miscellaneous unit has to contain such terms and
13 provisions as are necessary. And I believe that
14 appropriate should be interpreted to refer back
15 to necessary.

16 Every permit condition in a permit for
17 a miscellaneous unit has to be necessary to
18 protect human health and the environment. And I
19 believe that's what appropriate refers to.

20 And I believe, at least in the
21 administrative record, I believe in the Region's
22 brief, the Region takes the position, too, that

1 they need to find that the permit terms are
2 necessary for the protection of human health and
3 environment, including the permit terms that were
4 added by reference to 40 CFR Part 63,
5 subpart EEE.

6 JUDGE STEIN: So, are you arguing that
7 appropriate and necessary mean the same thing?

8 MR. MOORE: I am. I'm arguing that
9 appropriate refers back to the necessity
10 determination that the necessary provision in
11 264.601 is overarching, and applies to every
12 permit provision that is added to the permit for
13 a miscellaneous unit.

14 JUDGE STEIN: And was this distinction
15 made in your comments?

16 MR. MOORE: We, I believe, commented
17 that the permit conditions must be necessary to
18 achieve protection of human health and the
19 environment. We didn't -- I don't recall whether
20 we parsed whether appropriate means necessary.

21 JUDGE WARD: Could I draw your
22 attention to Attachment D to the permit? And

1 specifically, page D12? This is cited --

2 MR. MOORE: Attachment D?

3 JUDGE WARD: Yes. And this is
4 relevant to the MACT EEE issue --

5 MR. MOORE: Okay.

6 JUDGE WARD: -- and this is something
7 that you had cited in your petition as
8 representing an agreement by your predecessor,
9 that at least you would comply with the emissions
10 limits. But I wanted to ask you if you could
11 find that page and --

12 MR. MOORE: Okay.

13 JUDGE WARD: -- take a look at the
14 language together.

15 MR. MOORE: I don't have the permit
16 attachments with us. We could only lug so much.

17 JUDGE WARD: It's short.

18 MR. MOORE: Okay.

19 JUDGE WARD: So, this is what the
20 attachment states in relevant part. Siemens
21 Industry, which is your predecessor --

22 MR. MOORE: Yes.

1 JUDGE WARD: Believes that it is
2 appropriate to regulate emissions in accordance
3 with the provisions of 40 CFR 63, subpart EEE,
4 applicable to existing hazardous waste
5 incinerators, although this unit is not an
6 incinerator.

7 And then, I believe that Evoqua
8 resubmitted this document without change, and
9 certified in resubmission, that everything they
10 had submitted was true, accurate and complete for
11 the regulations.

12 So, haven't you effectively agreed
13 that not just the emission limits, but that all
14 of the Part 63 provisions are appropriate for
15 your facility?

16 MR. MOORE: No. What we agreed to
17 have applied to the facility were the emission
18 limits from MACT EEE and the startup/shutdown
19 malfunction plan requirements from MACT EEE.
20 Those are the specific requirements. Again, the
21 numeric emission limits in MACT EEE and the
22 startup/shutdown malfunction plan requirements in

1 MACT EEE is what we agreed should apply to the
2 facility.

3 JUDGE WARD: Specifically, which
4 provisions in the permit are those. It's not
5 clear from your petition which ones you are not
6 objecting to on this agreement.

7 MR. MOORE: Okay. And so, the ones
8 that we -- perhaps easier to list out the ones
9 that we are objecting to, because we didn't list
10 out the ones that we are not objecting to.

11 JUDGE WARD: Well, you objected to
12 Table V-1. Module V, Table V -- Module V.1.

13 MR. MOORE: Mm-hmm.

14 JUDGE WARD: Which would seem to me to
15 be -- include at least some, if not all, of the
16 emission limits under subpart EEE. So, I'm not
17 clear why you're objecting to the provisions of
18 that table, given the -- at least your
19 description of this as an agreement, to go that
20 far.

21 MR. MOORE: Yeah. We are not
22 objecting to the emission limits. I believe

1 Table -- yeah, so Table V-1. That was your
2 question, Your Honor, I believe. In addition to
3 the emission limits, I believe it also includes
4 the feed rate hours, performance demonstration
5 testing, the destruction and removal efficiency,
6 99.99 percent, and certain operating conditions
7 that are derived from MACT EEE, in addition to
8 the emission limits.

9 JUDGE WARD: But does the table -- in
10 your view, Table V-1. --

11 MR. MOORE: Yes.

12 JUDGE WARD: -- include some emission
13 limits, but other provisions, as well? That's
14 your position?

15 MR. MOORE: That were derived from
16 MACT EEE. That's correct.

17 JUDGE WARD: If the Board, though,
18 were to read -- let's assume hypothetically that
19 the Board were to read the statement in
20 Attachment D at D.12 as encompassing all the MACT
21 EEE requirements.

22 If we read it that broadly -- I

1 understand you're reading it more narrowly, but
2 if we read it that broadly, wouldn't that
3 preclude you from challenging those provisions
4 here?

5 MR. MOORE: If you read --

6 JUDGE WARD: The statement in
7 Attachment D at D.12.

8 MR. MOORE: If you read what Siemens
9 agreed to more broadly than what we believe
10 Siemens intended, that would preclude us from
11 challenging --

12 JUDGE WARD: Any of the MACT EEE
13 requirements to which you object.

14 MR. MOORE: Well, we would challenge
15 the interpretation and say that we don't agree
16 with it. But that would be the basis of our
17 challenge, in addition to the legal arguments
18 that we've raised with respect to the application
19 of those MACT EEE requirements.

20 JUDGE WARD: But if it were read more
21 broadly, that would foreclose your challenge.
22 Yes?

1 MR. MOORE: If it were read more
2 broadly to say that Siemens agreed to the
3 entirety of MACT EEE being applied to their
4 carbon regeneration unit, I would still argue
5 that that's an incorrect interpretation, and
6 would submit that it is.

7 But it would -- I would assume it
8 would answer your question and foreclose our
9 arguments.

10 JUDGE WARD: So -- and just to
11 reiterate, I'm reading this submission by Evoqua.
12 It's not just Siemens' agreement, but it's your
13 statement, because you submitted it when you
14 resubmitted the application in 2016. Isn't that
15 kind of a fair reading of how this transpired?
16 It's not just your predecessor's agreement.

17 MR. MOORE: Oh no. We've certainly
18 endorsed what we understand to be our
19 predecessor's agreement. And what we understand
20 to be our own agreement, and I believe what the
21 Region quite clearly understands to be our own
22 agreement, and that is, as to MACT EEE, we will

1 take the emission limits, the numeric limits, and
2 we will take the startup/shutdown and malfunction
3 plan parts.

4 JUDGE STEIN: I want to go back to the
5 question I posed a few minutes ago about the
6 difference between appropriateness and necessity.
7 Because it strikes me that the argument that
8 you're making is essentially that the Region has
9 effectively made the 3005 determination of
10 necessity for human health and the environment
11 for each and every permit condition,
12 notwithstanding with what the regulations say.
13 And I'm troubled by that.

14 So, I want to be sure that I'm
15 understanding you to say that effectively, the
16 subpart X regulations don't seem to have, you
17 know, much weight on their own, but that for each
18 and every condition in this permit, you have to
19 make a basically a 3005 determination, which my
20 historical understanding is, it's only required
21 when you're going beyond what's in the
22 regulations.

1 So, if you could clarify your argument
2 for me, that would be very helpful.

3 MR. MOORE: Sure. Well, the subpart X
4 requirements for miscellaneous units are, let's
5 say rather thread, thin, bare. There's not much
6 there, for good reason.

7 Because it's a catch-all category. As
8 the name suggests, it's miscellaneous units. EPA
9 could not have come up with prescriptive
10 requirements for each and every one of the
11 various different types of miscellaneous units
12 that will be regularly permitted under subpart X.

13 Instead, what we see is the provision
14 of 40 CFR 264.601, that says, basically, go out
15 and look at other regulatory requirements, craft
16 your own permit terms, you don't have to pluck a
17 permit term from an existing regulation.

18 I would submit that 264.601 allows the
19 agency to craft its own permit terms. They can
20 look at other permits, they can look at other
21 sources, for requirements that are protective of
22 human health and the environment.

1 But the overarching provision of
2 264.601, and I submit I don't see how it can be
3 ignored, whether you're applying MACT EEE or any
4 other permit provision, to a permit for a
5 miscellaneous unit, and that is permits for
6 miscellaneous units are to contain such terms and
7 provisions as necessary to protect human health
8 and the environment. That's what the regulation
9 says.

10 JUDGE STEIN: But aren't you reading
11 the language of appropriate out of the
12 regulations? Tell me how your interpretation
13 takes account of the language in 601 for
14 subpart EEE, for a determination of
15 appropriateness.

16 I mean, the agency could have used
17 necessary there and they didn't. You know? I
18 don't know why they didn't, but you're saying
19 appropriate and necessary are two different
20 things. Why shouldn't we be looking, at least
21 with respect to subpart EEE, at the term
22 appropriate?

1 MR. MOORE: I don't think in this
2 context that appropriate and necessary refer to
3 two different things. I think what is appropriate
4 in the context of 40 CFR 264.601, is a permit
5 provision that is necessary to protect human
6 health and the environment.

7 So, as you go through MACT EEE and
8 look at, as the Region did, the requirements for
9 incinerators, and you ask yourself, is this
10 provision appropriate for the carbon regeneration
11 unit at the Evoqua facility, I think part of that
12 analysis must entail, is this provision from MACT
13 EEE that applies to incinerators, that combust
14 solid, hazardous waste in variable quantities and
15 variable concentrations of toxics, is this
16 provision necessary to protect human health and
17 the environment from emissions from that carbon
18 regeneration unit?

19 I believe and I submit that that's the
20 analysis that the Region is required to
21 undertake. But that's the definition here in
22 this regulation of appropriate. That's what

1 appropriate means in the context of the
2 regulation.

3 JUDGE AVILA: Could I ask you about
4 the quality assurance and quality control part of
5 the permit? It seems to me that all of -- the
6 only change was to add the term Appendix F to the
7 permit.

8 And I don't see anything else in
9 Part 60 that could be -- the Region, at least,
10 says there's nothing else in Part 60 that could
11 be quality assurance/quality control. So, what's
12 wrong with referring to Appendix F?

13 MR. MOORE: Appendix F, this --

14 JUDGE AVILA: I mean, what else could
15 the paragraph get at other than the Appendix F?

16 MR. MOORE: The Appendix F argument is
17 really among the MACT EEE arguments. It's the
18 same basis for the argument that is the Region
19 needed to make a determination that Appendix F is
20 necessary to protect human health and the
21 environment.

22 Appendix F, as among the QA/QC

1 provisions that the Region could have considered,
2 or we would submit that Appendix F sets forth the
3 most stringent QA/QC provisions, and that's the
4 one that was selected.

5 There again, a necessity determination
6 should be made to determine whether Appendix F
7 and the requirements in that appendix are
8 necessary to protect human health and the
9 environment from emissions from the Evoqua
10 facility.

11 JUDGE AVILA: Okay, so you're
12 admitting that substantive of kind of -- they
13 needed to make that necessary -- whether or not
14 this came out of the blue to you --

15 MR. MOORE: Well, it --

16 JUDGE AVILA: -- when you were
17 drafting the final permit.

18 MR. MOORE: It did show up, for the
19 first time, I believe, in the final permit. It
20 wasn't in the draft permit. So, we have that
21 issue. We've been able to say our piece in our
22 brief on that. But it ultimately reverts back to

1 the MACT EEE argument that we made.

2 JUDGE WARD: But I guess we did read,
3 or I read, your petition as raising two distinct
4 arguments, one generally, that it was
5 inappropriate.

6 For the larger reasons you're arguing,
7 in terms of a showing, the MACT EEE are
8 appropriate or necessary. And then, separately,
9 just that the reference to Appendix F wasn't
10 supported in the record, and that less burdensome
11 quality assurance/quality control provisions
12 could have been. And that was a separate section
13 in your petition. So, I read it as a separate
14 point.

15 MR. MOORE: And those are one and the
16 same argument. So, in terms of making the
17 necessity determination, the MACT EEE argument,
18 the 40 CFR 264.601 argument that we've been
19 talking about, appropriate and necessary, there
20 needs to be a showing on the record that the
21 agency considered less stringent alternatives
22 among the spectrum of alternatives for QA/QC

1 requirements, and they need to show their math
2 and how they arrived at the determination that
3 the QA/QC requirements in Appendix F are
4 necessary to protect human health and the
5 environment.

6 JUDGE WARD: In your comments I didn't
7 see -- but tell me if I'm wrong on this -- I
8 didn't see a comment on this specific provision
9 in Module V.C.4. It's a small number 1 then, but
10 it's 4.a. in the final permit.

11 But I didn't see a specific comment
12 suggesting that Appendix F would be
13 inappropriate, Appendix B, I think what you
14 referenced, would have been preferable. You
15 didn't make that specific point in your comments,
16 did you?

17 MR. MOORE: I don't recall. But
18 Appendix F was not in the draft permit that we
19 commented on, if I recall that correctly.

20 JUDGE WARD: That's correct. Although,
21 I think in reading the Part 60 and other
22 appendices, the only one it seems to me that

1 could have been a QA/QC provision were the
2 provisions in Appendix F. So, I don't know that
3 it was really so much a change, as just inserting
4 an additional reference to what one might have
5 thought was already clear --

6 MR. MOORE: Okay.

7 JUDGE WARD: -- in the draft.

8 MR. MOORE: I don't recall what our
9 exact comments on it, and whether we commented --
10 if we went the next step, we assume this is
11 Appendix F and if we assume correctly, then you
12 need to do a necessity determination. I don't
13 recall whether that was among our comments on the
14 draft permit.

15 JUDGE WARD: So, I want to give you an
16 opportunity to go back to what you started with.
17 But before you do, if I could ask you a question
18 about the dispute resolution provision and your
19 objection there, as I understand it, between
20 draft and final, the Region deleted the statement
21 that this couldn't be challenged.

22 It couldn't be challenged, as final

1 agency actions say the permit is now silent. Do
2 you read it then as at least allowing you to go
3 to federal court and make the argument, with
4 respect to a particular dispute, that it's been
5 resolved within the agency, and say, this is
6 final agency action and we can challenge it now?
7 Do you think the permit allows you to do that?

8 MR. MOORE: Well, I don't think the
9 permit prevents us, in terms of us attempting to
10 have our day in court. I would argue that no
11 matter what the permit says, we could file a
12 claim in court, and whether it would be heard or
13 not, it would be up to the presiding judge.

14 It's better. We appreciate that it
15 now is silent, rather than expressed that it's
16 not subject to judicial review. And so,
17 that's -- I don't know how high of a hurdle that
18 was to entry into the courthouse, but it's
19 certainly lower now that they've removed it.

20 JUDGE WARD: No, and I guess,
21 conversely, stating, I think the parties agree
22 that its final agency action doesn't necessarily

1 make it so, either.

2 MR. MOORE: No. We can agree with EPA
3 that it's final agency action and that may have
4 some persuasive weight before a court. But it's
5 not determinative of whether a judge or a panel
6 would conclude that it is final agency action.

7 JUDGE WARD: And on the stack flow
8 data, at least as we read the -- I'm reading the
9 record, Evoqua had submitted a letter saying
10 we're willing to live with a certain emission
11 limit for NOx, and we'll measure the stack
12 flow -- collect stack flow data so that we can
13 use those emissions or that data for purposes of
14 ensuring we remain within the limit for purposes
15 of practical enforceability of that limit. Yes?

16 MR. MOORE: Yes. We -- and not to
17 avoid your question, but let me cut to the point
18 here, maybe save us all some time.

19 Having reviewed the Region's brief and
20 become re-familiar with that letter, I believe it
21 was September of 2016, if I recall correctly, and
22 bringing it to the attention of our client, the

1 operator of the facility, they -- let's say they
2 reject the wording of it but understand that they
3 did submit the letter and are withdrawing, we're
4 not pursuing that argument in light of that
5 letter.

6 JUDGE WARD: Okay, that's something we
7 appreciate. Yeah.

8 MR. MOORE: Yeah.

9 JUDGE STEIN: Can I ask a question
10 about the automatic waste feed cutoff system?
11 Because there's been a lot of briefing. I'm not
12 sure if it's going sideways, or people are
13 talking past each other.

14 But I'm trying to understand if what
15 the Region has done in its response to comments
16 in its brief, satisfies your concern, or if there
17 is still a concern about this provision.

18 And I ask in light of my reading of
19 the application, which appeared to me Evoqua
20 represented that there was such a system. So, if
21 you could clarify for me what you think is still
22 in play with respect to that issue, it would be

1 very helpful.

2 MR. MOORE: I'm kind of in your camp
3 a little bit. Having read the Region's brief,
4 and no disrespect to the Region on their brief,
5 I'm not quite certain where we are on that.

6 I certainly still know our position.
7 And our position's a very simple one, I think.
8 There is an automatic waste feed cutoff system.
9 Our argument was really one of technical
10 feasibility.

11 And the permit, again a requirement
12 drawn from MACT EEE, required the automatic waste
13 feed cutoff system to cut off with any
14 malfunction of the continuous monitoring system,
15 or the waste feed system itself.

16 And our argument is that the automatic
17 waste feed cutoff system, while it does exist,
18 cannot detect the entirety of the range of the
19 malfunctions of the continuous monitoring system.
20 So, you might have a minor hiccup, or something
21 like that, that doesn't cause the automatic waste
22 feed cutoff system to trigger an automatic

1 cutoff.

2 The Region's brief I believe directs
3 us to the startup/shutdown malfunction plan. And
4 if I read it correctly, maybe suggests that
5 that's sufficient, which I believe requires that
6 the automatic waste feed cutoff system be cut off
7 as quickly as possible.

8 If that's now the standard, that seems
9 like it could be livable. Our problem with the
10 way that the permit was drafted, again drawing
11 from the MACT EEE requirements, was that it
12 wasn't technically feasible to meet that permit
13 condition with every potential malfunction of the
14 continuous monitoring system.

15 JUDGE STEIN: So, if we were to adopt
16 the Region's interpretation in its brief as an
17 authoritative interpretation of the permit -- we
18 can ask the Region the same question -- would
19 that resolve your concern?

20 MR. MOORE: Can I answer that on
21 rebuttal after I hear what the Region's --

22 JUDGE STEIN: Yes. I guess my point

1 is, there are a couple of issues in your list of
2 ten, which seems to me what the Region and Evoqua
3 ought to be able to resolve to -- on wording or
4 finessing it, you're not that far apart.

5 And I think it would behoove --
6 speaking for me, not for the Board -- the parties
7 to see if on some of these very technical issues,
8 you're not that far apart, that maybe there's a
9 way to work through those issues.

10 MR. MOORE: Well, speaking for Evoqua,
11 we would welcome the opportunity to sit down and
12 to work with the Region on crafting or addressing
13 any and all of the permit conditions that we've
14 contested.

15 Certainly, we're further apart on some
16 than we are on others. But Evoqua brings decades
17 of experience operating this facility to bear,
18 and we very much welcome the opportunity to have
19 a dialogue with the Region on resolving the
20 issues over these permit terms.

21 JUDGE WARD: I have a further follow-
22 up question, because I'm a little confused, as

1 well, by what's in dispute on the automatic waste
2 feed cutoff requirements. So, the provision in
3 the permit is in Module V.C.5.b, and there are
4 four conditions, as I read it, where the system
5 should kick in, I'll say.

6 And I think you're objecting to three
7 of those four, but I'm not sure that your
8 objection -- that the comments you raised, the
9 objection you're raising here, relates to all of
10 them.

11 I think the one thing I did see was
12 the comment that, how can it assuredly -- if the
13 automatic waste feed cutoff system fails, how can
14 it cut off the feed if it failed.

15 MR. MOORE: Exactly.

16 JUDGE WARD: And I think I get that
17 point. But I'm not -- and that's the fourth of
18 the four conditions. But the other two don't
19 seem to fit in that same box. The second
20 condition -- it's one, two, three, four, so it's
21 two, three and four which you're objecting to.
22 Did you want to see if you can --

1 MR. MOORE: Yeah, I want to take a
2 copy and follow.

3 JUDGE WARD: Thank you. Thank you.
4 I think that'll be helpful. Let me know when
5 you're ready.

6 MR. MOORE: Okay. Go right ahead.

7 JUDGE WARD: Okay. So, the second one
8 says it requires it to kick in when the span
9 value of a continuous monitoring system is met or
10 exceeded. When a span value is met or exceeded.

11 That doesn't seem really to be to the
12 same point that you were either objecting to in
13 your comments, or in your petition. So, I wasn't
14 quite sure why this provision was covered by the
15 argument you're raising to the Board.

16 MR. MOORE: Okay. When -- so, you're
17 at V.C.5.b.ii.

18 JUDGE WARD: Correct.

19 JUDGE AVILA: Okay. And I guess, more
20 specifically in your comments, it is not possible
21 to have a waste feed cutoff system automatically
22 shut off the flow whenever there is a CMS

1 malfunction or a WFCS system failure because, et
2 cetera, etc.

3 So, I can kind of see how that clearly
4 could cover -- seems to cover romanette iv, and
5 maybe romanette iii, but not romanette ii. I
6 think we're wondering, where did you comment on
7 romanette ii? Or, I am.

8 JUDGE WARD: I, am as well.

9 MR. MOORE: Looks like we have a typo
10 in our brief referring to -- four -- okay, and
11 thank you for that. So, we're back again to the
12 MACT EEE discussion that reminding of that.

13 And our argument as to roman
14 numeral iii and iv, is both a MACT EEE argument
15 and all of the automatic waste feed cutoff
16 arguments are MACT EEE arguments, as well,
17 because they are derived from the MACT EEE
18 requirements.

19 There's also the technical arguments
20 as to iii and iv upon malfunction of the CMS, or
21 upon any component of the automatic waste feed
22 system failing.

1 So, taking us back to the span value,
2 that's simply a MACT EEE argument. And we submit
3 that there's no evidence in the administrative
4 record to support this permit condition, which is
5 drawn from MACT EEE.

6 JUDGE AVILA: And so, that goes back
7 to your earlier -- the main argument for that is
8 that it's not necessary or -- to protect
9 anything.

10 MR. MOORE: Well, we're not even
11 taking a position that, at this point, whether
12 it's necessary or not. We are taking the
13 position that the Region has not made a necessity
14 determination.

15 JUDGE AVILA: Fair enough.

16 JUDGE WARD: Okay. That's helpful.
17 Thank you.

18 JUDGE AVILA: Can I -- I know we've
19 gone well over, but can I ask one question on the
20 performance demonstration test?

21 MR. MOORE: Certainly.

22 JUDGE AVILA: I just want to -- I'm

1 kind of confused as to what's been in dispute
2 here. Is this a dispute over whether you do this
3 every 55 or every 61 months?

4 MR. MOORE: No. It's a dispute over
5 whether we should do it at all. Again, going
6 back to the argument that I started with, the
7 necessity determination.

8 Judge Stein and I have been talking
9 about the MACT EEE provisions and necessary. The
10 performance demonstration testing requirement and
11 the requirement to do it every five years, the
12 agency is at least relying in part, or the Region
13 is at least relying in part on RCRA's omnibus
14 authority for that provision, I believe.

15 It's not quite clear from the Region's
16 brief, but in any event, with respect to the
17 performance demonstration testing, it is the
18 argument that we've been talking about, and that
19 is that the agency needs to demonstrate that
20 performance demonstration testing on any interval
21 whatsoever, is necessary to protect human health
22 and the environment.

1 JUDGE AVILA: Well, I'm looking at
2 your comments, and you said, EWT would agree to
3 conduct a PDT within 61 months of the effective
4 date of the permit from the facility if emissions
5 remain at a consistent level.

6 MR. MOORE: Yeah. We still stand by
7 that. The agency did not take us up on that
8 offer.

9 JUDGE AVILA: Okay. They did it every
10 55 months. Right?

11 MR. MOORE: Well, no. We would agree
12 to one. Not a rolling, every 55 months. We
13 would agree to one additional performance
14 demonstration test.

15 JUDGE STEIN: Over what period of
16 time?

17 MR. MOORE: I believe in our letter it
18 was five years.

19 JUDGE AVILA: Well, actually, your
20 comment says, goes on to say, however, as
21 explained below, there's no basis for requiring a
22 PDT soon after the permit effective date, or for

1 requiring PDTs at a frequency that exceeds what
2 EWT has proposed. So, that seems to me to sound
3 like you proposed a frequency of some sort.

4 And as I read it, I read it to mean a
5 61 months frequency. But now, you're telling me
6 you meant one over the life of the entire time of
7 the permit?

8 MR. MOORE: Well, the permit is only
9 issued for a ten-year duration. So, we're
10 talking about a ten-year permit. And we agreed
11 to do one performance demonstration testing --
12 performance demonstration test in 61 months. So,
13 that's your five years right there.

14 JUDGE STEIN: But let me be sure I
15 understand the history correctly. We're talking
16 about an interim status permit in 2019. Excuse
17 me, a Part B permit issued in 2019, to a company
18 that's been operating under interim status since
19 the early 1990s, your Evoqua facility.

20 MR. MOORE: Mm-hmm.

21 JUDGE STEIN: And how long would you
22 envision that this RCRA Part B permit is going to

1 be in effect, given like the time that has passed
2 between the time you submitted the permit
3 application and where we are in 2019.

4 I mean, I think it's fair to say that,
5 you know, we're talking about a 20-year period
6 already, that -- of this facility has been
7 operating under an interim status. And I think
8 it's fair for the Board to at least think about
9 that as it looks at -- you know, to at least
10 consider what that means in the context of this
11 permit.

12 MR. MOORE: Sure. And this would not
13 be the first performance demonstration test that
14 the facility has conducted --

15 JUDGE STEIN: Correct.

16 MR. MOORE: -- in its 20-plus years of
17 existence. This would just be the next
18 performance demonstration test that the facility
19 conducts. So, we -- it's not the case that we
20 haven't previously conducted -- that the entire
21 time we were operating in interim status we
22 didn't conduct performance demonstrations,

1 because we did very robust, rather expensive and
2 complex performance demonstration tests.

3 And again, what we would object to, or
4 what we do object to, is the five-year rolling
5 interval for performance demonstration testing
6 without a demonstration on the record that that
7 testing and that interval, that that permit
8 provision, is necessary for the protection of
9 human health and the environment.

10 There are alternatives, certainly.
11 Less stringent alternatives to performance
12 demonstration testing. And there is no
13 indication in the record that the agency
14 considered those.

15 JUDGE WARD: But you're not objecting
16 at least to the one you proposed.

17 MR. MOORE: That's correct. We are
18 not objecting to the one that we proposed in an
19 effort to kind of put this issue to rest. And
20 again, these are considerably complex,
21 considerably time-consuming, and considerably
22 expensive performance tests that we previously

1 performed. And there are other ways, other
2 lesser burdensome ways of accurately assessing
3 whether the facility is operating within the
4 emissions.

5 We can monitor parameters, we can test
6 the operating controls, we can test the monitor
7 parameters. We can do stack tests during normal
8 operations of the facility.

9 This performance demonstration testing
10 is, you basically dial the facility down to
11 worst-case and run it in a way that you would
12 never run the facility to kind of create a worst-
13 case scenario. And then, you feed through the
14 carbon regeneration unit, spiked samples that are
15 highly toxic -- again, a worst-case dose of the
16 toxics that may be sequestered in the carbon.

17 There are other, again, less
18 burdensome ways to go about assuring that the
19 facility is operating within the permit limits
20 and is operating protective of human health and
21 the environment, short of doing the performance
22 demonstration test every five years.

1 JUDGE WARD: So, Mr. Moore, we kind of
2 took you off track. I think we've talked about a
3 lot of issues. I want to make sure that other
4 panel members don't have any further questions,
5 or make sure to ask. I wanted to give you five
6 minutes at least to go back to the beginning, or
7 make sure you have an opportunity to get out the
8 points that you wanted to get out so we have
9 them.

10 MR. MOORE: Well -- and I appreciate
11 that very much. We have -- the three things that
12 I wanted to talk about, that I came in hoping to
13 talk about, were the MACT EEE standards, the
14 performance demonstration testing, we talked
15 about those.

16 The third thing that I wanted to talk
17 about is the human health and the
18 environmental -- the HHERA Ecological Risk
19 Assessment.

20 So, let's jump to that real quick and
21 I think I can get through that in five minutes,
22 no problem.

1 So, there's a requirement in the
2 permit to conduct an additional HHERA. Again,
3 Human Health and Ecological Risk Assessment. And
4 that's a one-time requirement.

5 But here, and again like the PDT
6 requirement, the authority that the Region is
7 claiming for imposing that permit requirement is
8 either the RCRA omnibus authority under
9 Section 3005, or 264.601, or some combination of
10 the two, it's not quite clear.

11 Again, in any event we would submit
12 that regardless of the authority as between those
13 two, the statutory provision or the regulatory
14 one, the agency needs to make a necessity
15 determination.

16 Like the performance demonstration
17 testing, Evoqua previously did a HHERA, a risk
18 assessment, for purposes of the application that
19 resulted in the permit that we're here talking
20 about today.

21 That prior HHERA showed that the
22 likelihood of developing cancer from the Evoqua

1 facility's air emissions is less than 1 in
2 1,000,000.

3 EPA's threshold for unacceptable
4 cancer risks from facilities like Evoqua's is 1
5 in 100,000. So, we are orders of magnitude below
6 the risk threshold for cancer.

7 Based upon the results of that prior
8 HHERA, again done for purposes of the
9 application, the Region determined that impacts
10 from long-term exposure to the Evoqua's
11 facility's emissions are, quote, insignificant.

12 The Region also recognized that the
13 prior HHERA, much like the PDTs that we've been
14 talking about, use conservative assumptions. And
15 even with those conservative assumptions, again,
16 the HHERA demonstrated that the likelihood of
17 adverse health impacts from the facility is below
18 any levels of concern in any regulatory
19 thresholds.

20 The HHERA was completed in 2008 and it
21 was updated in 2014. So, as these things go,
22 it's of relatively recent vintage, given the 2014

1 update.

2 So, why does the Region seek to impose
3 a requirement for an additional HHERA? And why
4 is an additional HHERA necessary to protect human
5 health and the environment?

6 Well, one reason that the Region has
7 put forward, and they've done so in their
8 brief -- this is rather post-hoc justification,
9 it doesn't appear on the record -- but in any
10 event, the reason I wanted to address this here
11 today is because this is our opportunity. We
12 didn't file a reply brief.

13 And the Region's claims in regards to
14 the HHERA here, they just simply don't square
15 with the facts. The Region claims that the
16 exposure duration for the 2008 HHERA was a ten-
17 year time frame, and that exposures in excess of
18 this duration were not quantitatively assessed in
19 the HHERA.

20 The HHERA report itself that's
21 appended to the permit, the HHERA report itself
22 shows otherwise.

1 The 2008 HHERA, which again was
2 updated in 2014, was conducted in accordance with
3 EPA's 2005 human health risk assessment protocol
4 for hazardous waste combustion facilities.

5 JUDGE WARD: Mr. Moore, if I could
6 interject, I just want to focus you on the
7 statement in the response to comments at
8 page 115, and there the Region notes that the
9 risk assessment was conducted using methods and
10 procedures that are no longer supported, or have
11 been updated by EPA.

12 These include, but are not limited to,
13 updated air dispersion and deposition modeling
14 and analysis, updated toxicity criteria, and
15 updated exposure assessment analysis. What about
16 that statement is clearly erroneous in terms of
17 the Region's technical judgment on that question?

18 MR. MOORE: I'm not aware of exactly
19 what updates the Region is referring to. Was
20 it -- what provisions of each of those was
21 updated, how were they updated, and were those
22 updates substantive?

1 Are they material in any way? Have
2 the updates been assessed by the Region to
3 determine whether the HHERA should be updated in
4 light of a particular change.

5 For instance, the HHERA was updated in
6 2014 because of the TCE protocol -- I believe
7 it's protocol -- was revised at the, I think,
8 headquarters and regional level.

9 And so, the Region came in then and
10 requested an update to the HHERA in light of that
11 very specific change.

12 Not every change to an agency protocol
13 or an agency guideline, or an agency method, is
14 going to mandate -- I would hope not -- an update
15 to the risk assessment.

16 If that were the case, risk
17 assessments would be continually updated. And in
18 our experience that's just simply not the case.
19 But that is one justification that the Region
20 offered for requiring an additional HHERA.

21 Now, mind you, the HHERA's now being
22 required at a fixed point in time, regardless of

1 whether anything changes between now and that
2 fixed point in time, or whether anything changes
3 two days, two years, or ten years, after that
4 HHERA is conducted.

5 We think the better approach, if the
6 agency is concerned about keeping pace with
7 material updates to their protocols, to their
8 guidance, to their testing methods, is to
9 exercise the authority that they exercised when
10 we updated the 2014 HHERA.

11 That is, to come in and request an
12 update based upon the following things that have
13 changed, and not put a permit provision out there
14 in a fixed point in time, regardless of whether
15 anything material has changed, and regardless if
16 we do conduct the performance demonstration test.

17 Those two are very interrelated. The
18 results of the performance demonstration test
19 feed into the HHERA. We're going to have to do a
20 HHERA if this permit provision holds. We'll have
21 to do a HHERA regardless of what the performance
22 demonstration test shows.

1 The performance demonstration test may
2 show that we're performing even better than we
3 were in 2006. Yet, we're going to have to repeat
4 a HHERA.

5 JUDGE AVILA: Wouldn't that be an easy
6 HHERA to do if things are still operating the
7 same?

8 MR. MOORE: Well, if -- that's not
9 necessarily the case is my understanding. The
10 numbers are going to be different. I doubt the
11 performance demonstration test, while it may
12 yield better numbers, or perhaps, hopefully not,
13 slightly worse numbers, or just different
14 numbers, you're going to have different inputs
15 into the HHERA, is my understanding.

16 I'm certainly no risk assessment
17 expert by any means, so we rely upon an expert
18 consultant to do that. But our understanding is
19 that it was available, for instance, in 2014,
20 Your Honor, when we did it.

21 We didn't change the PDT numbers. We
22 didn't have any new PDT data. We just simply

1 changed the inputs for the TCE analysis. That's
2 easily done.

3 But if you're dealing with new PDT
4 data, you're really dealing -- and you're dealing
5 with, you know, the area of focus -- I believe in
6 2006 it was 152 square miles, if the town of
7 Parker develops and grows between now and when we
8 do the HHERA, you know, those things are going to
9 factor in.

10 So, it's slightly not fair to call it
11 an update ten years from now.

12 JUDGE AVILA: So, do you -- is it your
13 position that under the current permit, if there
14 is a material change in an EPA protocol, the
15 Region can come in today? While the permit's in
16 effect? And the day after it's in effect there's
17 a material change in EPA protocol that would
18 affect the HHERA?

19 Under the permit can the Region come
20 in and make you do a new HHERA, regardless of
21 this provision?

22 MR. MOORE: I don't know if authority

1 would be found in the permit versus EPA's
2 regulations in justifying the need for additional
3 risk assessment information under like an
4 information request type of approach.

5 I don't know whether it could be
6 justified under the permit. It very well may be.

7 JUDGE AVILA: Or under the regulation.
8 As long as whatever legal -- nothing in the
9 permit would preclude them from doing that.

10 MR. MOORE: No. Not that I'm aware
11 of.

12 JUDGE AVILA: And as long as they met
13 any legal requirements requiring a need to do a
14 new HHERA, you would have to do that.

15 MR. MOORE: I appreciate the way that
16 you phrased that. As long as they meet the legal
17 requirements to requesting an additional HHERA,
18 then we would say yes, that you meet the legal
19 requirements, and there we are.

20 We don't believe that there needs to
21 be a permit condition that thou shalt do a HHERA
22 no matter what, on X date, regardless of any

1 changes.

2 In that one last minute, the point
3 that I will make on the -- the argument that the
4 Region makes in its brief that the exposure
5 duration was limited to the term of the permit,
6 which is ten years.

7 And that not being the case, the point
8 here is that to conduct the HHERA, we -- again,
9 our risk assessment consultant who performed the
10 HHERA, relied upon EPA's 2005 protocol.

11 That protocol, as you see on this
12 screen, recommends exposure duration values.
13 Three of those values are above ten years. Two
14 are 30-year exposure durations for adult and the
15 fisher, and there is a 40-year exposure duration
16 for the farmer.

17 This is an excerpt from the references
18 in the HHERA report, in the risk assessment
19 report, showing that the report was prepared in
20 reliance upon this 2005 guidance.

21 And this is yet another excerpt from
22 the narrative of the report, discussing the fact

1 that the report used the values that were
2 recommended in the 2005 guidance, used the 30-
3 year and 40-year values, and we actually, in the
4 final slide, see the 30-year value in the
5 footnotes of Table 4.4-12, and a response to EPA
6 comments on the draft HHERA.

7 EPA actually inquired about the
8 exposure duration as shown in this table. And
9 there you see our response, that we used a 30-
10 year exposure duration for adults per EPA's own
11 2005 protocol.

12 JUDGE WARD: Thank you, counsel.

13 MR. MOORE: Thank you for your time.

14 JUDGE WARD: Ms. Newton?

15 Just before we begin, we'll likely --
16 I would expect we'll go over, the 20 minutes.
17 I'm sure Mr. Moore will have no objection to
18 that. No objection, sir?

19 MR. MOORE: None at all.

20 JUDGE WARD: Thank you.

21 MS. NEWTON: Good morning, Your
22 Honors. It's a pleasure to be here. Thank you

1 for giving us this opportunity to answer your
2 questions.

3 I have been working on this case for
4 a while, and there's a theme that I think runs
5 throughout the issues that have been raised by
6 the petitioner, and that is that the Region has
7 exercised its considered judgment in making its
8 decisions on each and every one of the issues
9 that are still on appeal here, and that that
10 considered judgment is clearly reflected in the
11 record.

12 Going to the issues that the judges
13 have raised this morning with petitioner's
14 counsel, I want to address a couple of things;
15 one, with respect to the suggestion that the
16 Tribe be identified on the permit as something
17 other than the co-equal permittee of the
18 operator, I don't believe there's anything in the
19 record to support this idea. I don't think
20 there's anything in the history of RCRA's
21 regulations, its preambles, the statute that
22 would support this.

1 I see nothing in the petitioner's
2 brief that suggests there's any support for
3 characterizing the Tribe as only subject to the
4 permit parts.

5 Rather, I think everything that I am
6 familiar with in RCRA suggests that the strict
7 joint several liability of both the owner and the
8 operator requires that they be coequals. There's
9 no RCRA light.

10 JUDGE AVILA: Could I ask, in light of
11 module 1.A.6. that talks about compliance by one
12 is compliance for both, what's the Region's view
13 on whether, with respect to 1.K, do both parties
14 have to sign the modification or does only one
15 entity?

16 MS. NEWTON: I think the language is,
17 in nearly all cases, compliance by one is
18 considered --

19 JUDGE AVILA: No, actually that was
20 going to be my next question because that's what
21 the response to comments says. It says, in
22 nearly all cases, but the permit provision does

1 not say that.

2 MS. NEWTON: All right, I'm misquoting
3 my permit here. Let me just go to it.
4 Compliance with such requirements by either the
5 Tribe, its beneficial owner, or the operator is
6 regarded as sufficient for both.

7 I think that question has not been
8 fully briefed in terms of whether or not the
9 request for a permit modification could be signed
10 just by the operator, putting aside the question
11 of the Tribe's current status during the stay of
12 that provision, but just like a permit
13 application needs both the owner and the
14 operator's signature, I would suggest that for a
15 request to modify a permit, you do need both
16 signatures.

17 JUDGE WARD: I'm not sure that the
18 regulations regarding modification expressly
19 state that both owner and operator need to sign,
20 so that's not support for that proposition.

21 In reading the permit term, I'm hard
22 pressed to see how you're arguing that given the

1 unqualified language in 1.A.6, how you could read
2 the submission requirement and signature
3 requirement in K under module 1 as anything other
4 than Evoqua alone can submit.

5 MS. NEWTON: Yeah, I see how you could
6 interpret it that way. However, before the
7 Region came out with a specific finding regarding
8 whose signature would be necessary on the permit
9 modification, we would want to consult with the
10 tribal government.

11 I think the tribal government, to some
12 extent, would be very interested in agreeing
13 beforehand as to what conditions of the permit
14 are being requested to be changed.

15 JUDGE WARD: I think there may be two
16 different issues here, the extent to which the
17 Tribe would play in that process and what their
18 rights would be as a co-permittee as distinct
19 from -- can Evoqua on its own successfully submit
20 a modification and be in compliance with section
21 K?

22 That's the question, because that's

1 really the only issue before us, which is what is
2 a review of this permit provision, at least to
3 that extent. What does it require independent of
4 what other things may be required or what might
5 follow when they do submit that request?

6 MS. NEWTON: I can see that that's a
7 reasonable interpretation of that permit
8 condition, that they would not be required to
9 sign the permit modification.

10 JUDGE WARD: Does the Region agree
11 with that interpretation?

12 MS. NEWTON: I can't tell you that
13 standing here today. I'm happy to submit a
14 supplemental brief to you, but I would need to
15 check in with the management in the Region before
16 I went and told you, oh, yes, we agree with that,
17 or not.

18 JUDGE WARD: Understood, so we'll
19 return to that perhaps at the end of argument in
20 terms of any further submissions by the parties.

21 MS. NEWTON: Okay, thank you.

22 JUDGE WARD: And while I'm on the

1 topic of owner and operator, I had asked counsel
2 for Evoqua this question. Is there any real
3 difference in terms of the relationship between
4 the owner and operator under interim status than
5 under this permit?

6 I guess where I'm coming from is
7 reading the regulations for interim status, it
8 suggests there are two. They are both coequally
9 responsible.

10 MS. NEWTON: That's how I would read
11 it as well, that under interim status, owners and
12 operators are jointly responsible for all of the
13 requirements and ensuring that all of the
14 requirements of the interim status requirements
15 are being met. And similarly with this permit,
16 both the owner and the operator are potentially
17 liable for any violations of the permit.

18 And I am pleased that the petitioner
19 appears to be now saying that they're not arguing
20 that CRIT should not be on the permit, and so I
21 think they are acknowledging that they are not
22 the owner of the facility, which is something

1 that they suggested in their briefs.

2 With respect to the MACT EEE
3 questions, I wanted to point out that with
4 respect to the question about the automatic waste
5 feed cutoff that you were questioning the
6 petitioner's counsel about, I did not understand
7 the challenge to be as much a question of if the
8 automatic waste feed cutoff system itself
9 malfunctions versus the inability of the
10 automatic waste feed cutoff system to detect a
11 malfunction of one of the other systems, and our
12 response focused on the ability of the automatic
13 waste feed cutoff system to cut off feed when it
14 itself is malfunctioning.

15 However, the Region is certainly
16 interested in understanding better the scope of
17 the automatic waste feed cutoff system's
18 capabilities such that if in fact there is some
19 inability of that system to detect a malfunction
20 in a continuous monitoring system of some sort,
21 we would certainly be willing to work with the
22 petitioner to clarify that and to hone down what

1 specific capabilities the automatic waste feed
2 cutoff system can perform.

3 JUDGE WARD: And could I ask on that,
4 as I'm reading about those comments on page 40,
5 they specifically made the comment that it's not
6 possible to have the waste feed cutoff system
7 automatically shut off flow whenever there is a
8 CMS malfunction or an automatic waste feed cutoff
9 system failure.

10 I didn't find in your response to
11 comments where you addressed that particular
12 point, and if I'm missing something, would you
13 tell me where in the response to comments you
14 did?

15 MS. NEWTON: Well, as I said, I think
16 we addressed the question of the failure of the
17 automatic waste feed cutoff system to properly
18 detect a malfunction when that malfunction is
19 with the automatic waste feed cutoff system
20 itself. You know, if it's malfunctioning, it's
21 unlikely to catch its own malfunction, and that
22 response to comments is in V-25.

1 But with respect to its purported
2 inability to detect the malfunctions of the
3 continuous monitoring systems, no, I don't think
4 we addressed that. As I said, I don't think I
5 had fully grasped that that was the scope of the
6 challenge.

7 JUDGE WARD: Could I turn your
8 attention to the MACT EEE arguments? And on
9 that, and this is with respect to the second
10 argument or the broader argument made by Evoqua,
11 in your brief at page 18, you had stated that
12 Evoqua didn't comment or make a specific comment
13 as to some of the challenge conditions that they
14 had listed in their petition, but I didn't see
15 you specify which ones were not commented on.
16 Can you tell us now?

17 MS. NEWTON: I can't tell you that off
18 the top of my head. I'm sorry. I do acknowledge
19 that there were some broad objections that the
20 petitioner raised in their comments on the draft
21 permit with a broad brush objecting to
22 application of MACT EEE standards, asking the

1 Region to further clarify the justification.

2 And in our response to comment 5-12,
3 we went through -- we kind of addressed that
4 broad brush, and in 5-12 we also pointed to the
5 shaded parts of our responses to comments, which
6 are throughout the responses to comments.

7 We tried to include those shaded parts
8 with the subject matter that they pertained to,
9 but they all came out of our response to 5-12.
10 And in there, I think we went through each and
11 every one of the requirements because we were
12 showing our basis for the specific permit
13 conditions that related to the MACT EEE
14 standards.

15 JUDGE WARD: And could I turn your
16 attention to, again, Attachment D to the permit
17 and page D-12 where the statement is made by
18 initially Evoqua's predecessor and then
19 resubmitted by Evoqua in 2016? I can read it --

20 MS. NEWTON: I don't have it, but I
21 know it somewhat.

22 JUDGE WARD: Okay, so I think an

1 argument, a fair argument could be made that it
2 is not just limited to emission, the emission
3 limits, but goes really to all of the standards
4 in Subpart EEE.

5 So I don't know that the Region's
6 brief delved into the meaning of this, what they
7 believe the meaning of this provision or this
8 statement, the significance of the statement and
9 the breadth of the statement.

10 MS. NEWTON: Well, we do acknowledge
11 that there are numerous pieces of the permit
12 application that set forth particular
13 requirements that were derived from the MACT EEE
14 standards.

15 And I have a demonstrative exhibit
16 which is in our record, which is a letter that
17 the Region sent to the facility in 2001. It's
18 dated 2001, January 18. And in this letter, the
19 attachment included a list of all of the sections
20 of MACT EEE that the Region intended to review
21 and potentially apply to the facility.

22 JUDGE WARD: Actually, just hold on

1 because we can't see the document. I want to
2 make sure that we can follow along with the
3 points that you're making.

4 JUDGE AVILA: And which document is
5 this?

6 MS. NEWTON: It's in the
7 administrative record with the date 2001 January
8 18. I can get the document number.

9 JUDGE AVILA: That's fine. That's
10 fine. Thanks.

11 JUDGE WARD: Could you turn it back to
12 the other side? I think that was the text I
13 wanted to finish reading if I could.

14 MS. NEWTON: Oh, sorry. There's a
15 second page, which I --

16 JUDGE WARD: Thank you.

17 MS. NEWTON: And this is the
18 attachment. And this is the page I really wanted
19 to draw your attention to because it demonstrates
20 that we've been working with the facility for a
21 long time in evaluating and identifying the
22 appropriate MACT EEE.

1 And I believe this correspondence
2 demonstrates why, when we received the permit
3 application, we had, for example, in the process
4 description, information about the specific
5 standards of MACT EEE that the facility was
6 agreeing to be subject to, and there were no
7 specific, but not this section, that I'm
8 personally familiar with.

9 JUDGE STEIN: Ms. Newton, can I ask
10 you some questions related to the question that I
11 asked counsel for Evoqua? This letter you refer
12 to, it's a determination of appropriateness,
13 which is the same language that's used in 40 CFR
14 264.601.

15 There was a view expressed earlier
16 that in order to uphold the permit provisions,
17 the Board should be looking at a necessity
18 determination for each and every condition, and I
19 want to be sure that I'm clear on the Region's
20 views on that topic and whether there is any
21 daylight between what you're saying and what
22 counsel for Evoqua was saying.

1 MS. NEWTON: I believe there is a
2 difference in our opinions on this issue. To be
3 clear, the Region has cited both 264.601 and the
4 omnibus authority as basis for many of the
5 requirements that they're imposing on the carbon
6 regeneration unit as arguments in the
7 alternative, but we specifically started with the
8 draft permit looking at 264.601.

9 We didn't add omnibus until we got to
10 the response to comments in the final permit.
11 That section of 264.601 is the language that
12 counsel for the petitioner refers to because in
13 the first sentence, there is another sentence,
14 which is a separate sentence.

15 We don't think the second sentence,
16 which is the one that talks about including
17 permit terms from other sections of regulations
18 that are appropriate for the miscellaneous unit
19 is dependent on the first sentence that says
20 you've got to include all provisions in your
21 permit that are necessary to ensure protection of
22 human health and the environment.

1 So I see them as two separate
2 sentences, two separate requirements. One is
3 make sure you include everything you need to
4 include that is necessary to ensure protection of
5 human health and environment, but the second
6 sentence is you've also got to include, also got
7 to include those provisions that are appropriate
8 for the miscellaneous unit being permitted.

9 JUDGE STEIN: So is that two different
10 determinations that we need to look for or one?
11 I mean, I understand the point you're making that
12 you have justified many of these terms under the
13 omnibus authority as well as 601, and my
14 questions directed to counsel for Evoqua were not
15 predicated on the exercise of the omnibus
16 authority, but were predicated on what the
17 regulation 601 requires or doesn't require.

18 So, but within the scope of 601, are
19 you suggesting that there are two different
20 determinations that need to be made or just one?

21 MS. NEWTON: I'm suggesting that with
22 respect to the incorporation of requirements from

1 Subparts I through O and AA through CC of Part
2 270, and Part 63 Subpart EEE, and Part 146, that
3 the determination for any provisions with respect
4 to those specific authorities should be whether
5 or not they are appropriate.

6 Additional requirements beyond those
7 standards, if any, would necessitate the
8 necessity evaluation in my opinion.

9 JUDGE AVILA: So I hate to be
10 redundant, but just, I want to nail this down.
11 But you read the second sentence as saying, as
12 respect to Subpart EEE, the Region must include
13 any provisions from Subpart EEE that are
14 appropriate for the miscellaneous unit?

15 MS. NEWTON: Yes.

16 JUDGE AVILA: What makes this
17 miscellaneous unit different than other ones?
18 Why is this whole suite appropriate? I mean,
19 absent arguably whatever the representation about
20 the appropriateness of Subpart EEE is by Siemens
21 and now Evoqua, how is this miscellaneous unit --
22 I mean, how is it appropriate for this

1 miscellaneous unit to be subject to this full
2 suite of subpart -- or the suite of Subpart EEE
3 as compared to other miscellaneous units?

4 MS. NEWTON: Well, first off, this
5 miscellaneous unit is a thermal treatment unit
6 regulated under Subpart P when it was in interim
7 status, and many miscellaneous units are not
8 Subpart P thermal units. They may fall into
9 other categories. There are a few other carbon
10 regeneration units treating hazardous waste in
11 the country.

12 The full suite of MACT EEE regulations
13 have not been imposed on this unit. There are a
14 lot of requirements that were evaluated and
15 rejected by the Region for inclusion in the
16 permit.

17 JUDGE AVILA: Yeah, I overstated it.
18 My apologies.

19 MS. NEWTON: And I think with respect
20 to those MACT EEE requirements that were
21 included, we have certainly attempted to justify
22 the rationale for those provisions throughout the

1 responses to comments, but specifically with
2 respect to 5-12 and the shaded sections that you
3 see throughout the responses to comments.

4 JUDGE AVILA: Could I ask you about
5 the insertion of the National Response Center --

6 MS. NEWTON: Sure.

7 JUDGE AVILA: -- to the 24-hour
8 reporting requirement? How is that a
9 clarification of what was there? The new entity
10 that's part of the Coast Guard is added to the
11 permit. I don't see how that clarified anything.

12 MS. NEWTON: In reviewing the draft
13 permit and the responses to comments associated
14 with the draft permit, we realized that there was
15 a 24-hour reporting obligation as required by the
16 regulations, but there was no instruction as to
17 how to perfect that reporting obligation.

18 We were concerned that if an event
19 occurred after hours or on a weekend and there
20 was a 24-hour obligation to notify the Region,
21 and if the Region might have to act, that they
22 needed to have somebody who was able to pick up

1 the telephone and receive that notification
2 within that 24-hour period, so we wanted to make
3 sure that we had a phone number that was
4 available 24/7.

5 And EPA and the Coast Guard have a
6 relationship with respect to the National
7 Response Center that the Region felt was
8 appropriate to include that number simply to
9 clarify how the operator or the owner would be
10 perfecting this notice.

11 JUDGE AVILA: So I guess as it reads
12 now, how does it work? It says the permittee
13 shall report to the director any noncompliances
14 that may endanger human health or the
15 environment, period.

16 Any such information shall be reported
17 orally to the National Response Center phone
18 number within 24 hours from the time whichever
19 permittee first becomes aware of the
20 circumstances. So when do they have to inform
21 the director now?

22 MS. NEWTON: Well, the National

1 Response Center has a protocol where, I believe,
2 they have a protocol where they would notify EPA,
3 and there is an on-scene coordinator from the
4 Superfund program.

5 I don't think any of this is on the
6 record, but there is also in the permit, a five-
7 day written report that needs to be submitted
8 after the 24-hour reporting is perfected.

9 JUDGE AVILA: Yeah, there is a five-
10 day report to the director, but I guess --

11 MS. NEWTON: My understanding of --

12 JUDGE AVILA: What happens within 24
13 hours, ma'am?

14 MS. NEWTON: So if they report it to
15 the National Response Center, the notice to the
16 director would be deemed satisfied.

17 JUDGE AVILA: And is that
18 authoritative interpretation that is --

19 MS. NEWTON: It is --

20 (Simultaneous speaking.)

21 JUDGE AVILA: -- on the agency if we
22 adopt it?

1 MS. NEWTON: That the report to the
2 National Response Center would be deemed the
3 report to the director, yes.

4 JUDGE WARD: Just to follow up. I'm
5 still not sure I'm seeing how inserting the
6 reference to the National Response Center is a
7 clarification.

8 If you look at the provision at issue,
9 and the ones that precede it, and the ones that
10 follow it, and you also look at the regulation on
11 which it's based, I think the most natural
12 reading one might say is all of the reporting is
13 to the director.

14 I'm not sure how it's -- perhaps
15 clarification could have been, well, we mean, you
16 know, the director's person in this office at
17 this number in this place, but certainly within
18 EPA.

19 What I'm struggling with is how it is
20 a clarification to identify the different entity
21 outside of the agency and describe that as a
22 clarification?

1 MS. NEWTON: I think the clarification
2 was because we didn't provide a format or a
3 medium for them to provide notice to the Region,
4 and because we have limited ability to receive
5 information after hours, the clarification was,
6 here is the place that you can report 24/7 and it
7 will satisfy that requirement.

8 JUDGE WARD: Could I actually turn you
9 to another provision? Are you done with --

10 JUDGE AVILA: Yeah.

11 JUDGE WARD: On the QA/QC
12 requirements, this is the fourth argument in
13 Evoqua's petition and it is the objection to the
14 insertion of Appendix F procedures, but there's
15 also a discussion in Evoqua's petition and then
16 in your response as to how broadly that
17 provision, the Appendix F procedures, apply.

18 And there's a reference to oxygen
19 monitors, which, okay, that's consistent in both
20 of your papers. But then there's a reference,
21 kind of confusing references, I think, in both
22 the petition and the response to carbon monoxide,

1 monitoring for carbon monoxide and then carbon
2 dioxide monitors.

3 I think we read the permit as
4 referring just to carbon monoxide, so we're
5 trying to understand, is it -- are these one and
6 the same, that a carbon dioxide monitor is also
7 monitoring carbon monoxide? I mean, this is
8 unanswered in the papers thus far, so we wanted
9 to get some clarification.

10 MS. NEWTON: The facility has a carbon
11 monoxide continuous emission monitoring system
12 and an oxygen continuous emission monitoring
13 system. If there was a reference to carbon
14 dioxide monitoring as opposed to carbon monoxide,
15 that's probably due to the non-scientist lawyer
16 getting them confused, so I apologize.

17 JUDGE WARD: So, but Appendix F is
18 limited to those two continuous monitoring
19 systems and it goes no further?

20 MS. NEWTON: Yes, those are the only
21 two continuous emission monitoring systems at the
22 facilities, so I don't think there was ever a

1 question that it would apply to anything else.

2 JUDGE STEIN: I would be interested in
3 hearing a response from the Region to what we
4 heard from counsel for Evoqua on the
5 demonstration testing.

6 As I think we observed during
7 questioning of counsel for Evoqua, I think
8 there's still, at least in my mind, some
9 confusion as to what the arguments are and what
10 they aren't, and I want to be sure I believe the
11 argument that I have is clear in understanding
12 the Region's views, similar to wanting clear
13 understanding of what Evoqua's is.

14 MS. NEWTON: Well, we had addressed
15 the challenge not only to the idea of having any
16 PDT, any performance demonstration testing at
17 all, as well as the challenge to having a cycle
18 of five-year performance demonstration testing.

19 There are a number of reasons why we
20 want to see a performance demonstration test and
21 we want to see one sooner rather than later. One
22 is because the prior performance demonstration

1 test was performed over 10 years ago, the one
2 that was done in connection with the permit
3 application.

4 And there are a couple of other
5 reasons to require the performance demonstration
6 test. One is to verify that the facility is
7 meeting the emission limits that are set forth in
8 Table 5-1, and the other is to establish that the
9 facility is capable of meeting the MACT EEE
10 replacement standards that are also listed in
11 Table 5-1.

12 So we have two columns in that table,
13 one of which is the MACT EEE replacement
14 standards. Their prior performance demonstration
15 test demonstrated the facility was able to meet
16 those limits, but because the permit application
17 sought limits from the interim MACT EEE
18 standards, that column three are the currently
19 applicable emission limits for the facility.
20 Those need to be confirmed that the facility is
21 meeting them.

22 The second column was the replacement

1 standards, and we'd like the facility to show
2 that it can also meet the replacement standards
3 with an eye to potentially amending that table at
4 some point in the future or when there is a
5 renewal to list those replacement standards
6 because we think the facility is already there.

7 So those are sort of the reasons why
8 we need to have a performance demonstration test.
9 In terms of having one every five years, this is
10 the question where the Region exercised its
11 discretion, and I think it was incredibly
12 reasonable of the Region to set this five-year
13 limit, this frequency.

14 This coincides with the frequencies
15 for incinerators under the MACT EEE regulations
16 to perform its comprehensive trial burns, and in
17 fact, incinerators also have to do confirmatory
18 testing, which is not required at this facility.

19 JUDGE AVILA: And just so I'm clear,
20 I've found things a little confusing on this,
21 does the permit require some initial PDT within X
22 number of months of the effective date of the

1 permit and then every five years thereafter?

2 MS. NEWTON: Exactly, the timing would
3 be roughly five years. There are slight
4 differences between how the MACT EEE timing is
5 set forth and how the timing is set forth under
6 our permit. We wanted to put a time frame for
7 submitting the next work plan, but theoretically,
8 it should --

9 JUDGE AVILA: But I guess I just want
10 to be clear. Are there two PDTs that are at
11 least contemplated by the permit, an initial one
12 that's performed some period after the effective
13 date of the permit, and then another one 55 days
14 thereafter, 55 months or five years thereafter?

15 MS. NEWTON: Yeah, assuming a 10-year
16 permit term, we would see more than one
17 performance demonstration test during that
18 period. If the permit term was extended because
19 the applicant submitted a timely renewal
20 application, theoretically, depending on how long
21 that lasted, there might be another one.

22 JUDGE AVILA: And that would be

1 pursuant to the Administrative Procedure Act,
2 that a timely renewal would keep the permit in
3 place?

4 MS. NEWTON: Yeah, that's a regulation
5 in 270 as well.

6 JUDGE AVILA: Okay.

7 MS. NEWTON: So in addition to
8 verifying these appropriate limits, we also want
9 to make sure that as the system ages, it's still
10 effectively and efficiently destroying the
11 contaminants, and that was a significant concern
12 for the Region in terms of the aging system.

13 We don't really know if it is, in
14 fact, slowing down in terms of this efficiency or
15 not. There was a trial burn that was performed
16 in 1996, but that was at a steady temperature.
17 It was not overseen by the Region.

18 The Region oversaw the one in the mid-
19 2000s which was, as referenced by counsel for the
20 petitioner, a stress test, so it stresses spike
21 the feed and things like that to see how well
22 this thing is operating when it's stressed out to

1 its maximum potential.

2 Counsel for petitioner referenced TCE
3 where we had updated toxicity criteria for TCE.
4 We would want, at this point, to now include TCE
5 as a parameter for the next trial burn.

6 And so there are a number of different
7 reasons why we want this next one sooner rather
8 than later and why we want them repeated every
9 five years.

10 JUDGE WARD: Turning to the related
11 human health and ecological risk assessment and
12 the TCE, counsel for Evoqua referenced an update
13 in 2014 to be undertaken to address the TCE. Did
14 I understand that correctly? Is that a correct -
15 -

16 MS. NEWTON: That is correct. There
17 was an update to recalculate based on the updated
18 toxicity criteria. There was also additional
19 parameters that were evaluated during the risk
20 assessment that would need to be included in the
21 next trial burn, which, for example, the SO2 and
22 NOx emissions would also be included.

1 They were included in what was
2 referred to as a mini burn previously. They were
3 not part of the full performance demonstration
4 testing.

5 JUDGE WARD: And so therefore not part
6 of the human health and ecological risk
7 assessment?

8 MS. NEWTON: No, they were part of the
9 human health and ecological risk assessment.
10 They were required to be part of that, which is
11 why we've included emission limits for those
12 contaminants.

13 JUDGE WARD: But based on a different
14 PDT test --

15 MS. NEWTON: Yeah.

16 JUDGE WARD: -- or a less robust --

17 MS. NEWTON: It only looked at those
18 two contaminants.

19 JUDGE WARD: So, and could I turn your
20 attention to the statement in response to
21 comments? And again, this is the human health
22 and ecological risk assessment.

1 And I had asked counsel for Evoqua,
2 you know, why wasn't this statement here in the
3 response to comments referencing -- and this is
4 why you need to update it, because there had been
5 changes, and they include updated air dispersion
6 and deposition modeling analysis, updated
7 toxicity criteria, and updated exposure
8 assessment analysis.

9 And I think I understood Evoqua's
10 counsel to say, yes, but what are they? And I
11 guess, is there anything else in the record that
12 would shed a little more light on what's meant by
13 this sentence in the response to comments?

14 MS. NEWTON: Well, I do believe there
15 have been updated air dispersion models since the
16 original HHERA was performed. I don't have the
17 citation to those models handy at the moment, but
18 I'm happy to supplement our briefing with a
19 citation.

20 JUDGE WARD: We'll deal with that at
21 the end of argument, but, okay, thank you. I
22 appreciate that. And is there -- and the updated

1 TCE criteria is more than the -- is there for the
2 --

3 MS. NEWTON: Again, there may be. I'm
4 not sure where. I remember in the -- again, I'd
5 have to look back at the administrative record
6 and provide a citation at that point because I
7 don't know off the top of my head.

8 JUDGE WARD: Other questions? So one
9 last question. I didn't have a chance to ask
10 counsel for Evoqua, and I will on rebuttal, so
11 they'll want to listen to this too.

12 So the question is, I know there's the
13 pending motion that Evoqua had filed regarding
14 status for permit conditions, so what effect
15 would our ruling on the merits of the petition
16 have on the motion for stay?

17 MS. NEWTON: Well, I believe it would
18 make the motion for stay moot, frankly.

19 JUDGE WARD: So we had given counsel
20 for Evoqua a chance to -- an additional five
21 minutes to say any additional, any further
22 comments or present anything further to the

1 Board, so we wanted to give you the same
2 opportunity.

3 MS. NEWTON: I have no further burning
4 matters to address at this moment, but thank you
5 very much.

6 JUDGE WARD: All right, thank you.
7 Now we'll hear from counsel for the Tribes, Ms.
8 Clark, and thank you for waiting patiently.

9 MS. CLARK: Not a problem. Good
10 morning. Can you hear me okay?

11 JUDGE WARD: We can hear you fine.
12 Thank you.

13 MS. CLARK: Thank you. I'm receiving
14 a little bit of reverb back and it's distracting.
15 Is it possible to change that or no?

16 JUDGE AVILA: I think we're working on
17 it.

18 JUDGE WARD: The technician is working
19 on that.

20 MS. CLARK: Thank you. I appreciate
21 it.

22 JUDGE WARD: Please proceed. Thank

1 you.

2 MS. CLARK: Thank you. Good
3 afternoon, I suppose, at this time, and thank you
4 for the opportunity to present on behalf of the
5 Colorado River Indian Tribes.

6 I'm going to limit my limited time to
7 two issues. I'm focusing first on the question
8 of the Tribe as co-permittee and second on the
9 issue of the additional testing and human health
10 risk assessment.

11 So on the question of the Tribe as co-
12 permittee, I'm pleased, as EPA is, to see that
13 Evoqua has clarified its argument to demonstrate
14 that CRIT should be a co-permittee on this
15 permit.

16 We had been concerned at the request
17 to remove CRIT as a co-permittee and whether that
18 would expose the Tribes to liability under RCRA,
19 and so we are pleased to note that CRIT should
20 remain in all circumstances a co-permittee on
21 this permit.

22 I think the question then becomes

1 whether there is any room or possibility of
2 modifying the permit to clarify the roles of CRIT
3 and of Evoqua moving forward. The Tribes
4 recognize that there is joint and several
5 liability under RCRA and that the permit in no
6 way would remove or alter that joint and several
7 liability.

8 However, we believe that there could
9 be room for further clarity about the roles of
10 CRIT and Evoqua, particularly in the time frame
11 in which Evoqua is the primary operator of the
12 facility, and we focused in on the language in
13 Subsection 1.A.6 about compliance with the
14 obligations of one satisfies the compliance
15 obligations of all.

16 And while Evoqua is in compliance with
17 the permit, that language helps satisfy CRIT's
18 concerns, and so if Evoqua is complying with all
19 obligations, we understand that CRIT has no
20 further obligations under the permit.

21 Our concern is what happens if Evoqua
22 is not complying with those performance

1 obligations, and I would use an example of
2 perhaps record maintenance or maintenance of
3 materials at the facility.

4 CRIT is not involved in the day-to-day
5 oversight of operations at the facility and it
6 would be difficult for CRIT to comply with those
7 obligations if Evoqua was not doing so. And so
8 in this particular realm, we could see
9 possibility of clarity around who has primary
10 responsibility under the permit during the time
11 in which Evoqua is the operator.

12 JUDGE WARD: Ms. Clark?

13 MS. CLARK: I wanted to focus --

14 JUDGE WARD: If I could ask you a
15 question? I'm sorry and I appreciate your
16 stopping. Sometimes it's a little difficult when
17 we're doing it this way to know and not feel --

18 MS. CLARK: Thank you.

19 JUDGE WARD: -- like we're cutting you
20 off. So on the issue of the relative
21 responsibilities and who is primary and who is
22 secondary, aren't those things that you and --

1 I've been saying Evoqua, so I apologize is that's
2 incorrect. Evoqua is correct? Okay, Evoqua.

3 Are there -- isn't that something that
4 you and Evoqua could negotiate, I guess, perhaps
5 as much as I imagined to the extent it became
6 relevant you would have done under interim
7 status?

8 MS. CLARK: Certainly, and I believe
9 that there are procedures in place to clarify who
10 has responsibility at this point in time. I
11 think the concern that CRIT has is what happens
12 if Evoqua becomes a bad actor.

13 We're not implying that the facility
14 operator is currently out of compliance or
15 anything like that, but just thinking about
16 worst-case scenarios, if we had an agreement with
17 Evoqua that they had the primary responsibility
18 role, but then they failed in that, I suppose
19 then you could work on that problem under the
20 lease agreement, but we also see that it would be
21 helpful to have clarity under RCRA and our
22 obligations under RCRA as well.

1 JUDGE AVILA: But even if the permit
2 were changed to say, Evoqua and only Evoqua shall
3 do X, and X doesn't get done, wouldn't the Tribe
4 as a co-permittee still be jointly and severally
5 liable for that? I'm not sure that just calling
6 out Evoqua as the only person that has to do
7 something under the permit really solves your
8 underlying concern.

9 MS. CLARK: Certainly, I appreciate
10 that concern. I think that leads to a question
11 of impracticality, whether EPA would enforce
12 against the Tribes, and I think further clarity
13 in the permit as to who has primary
14 responsibility could help EPA assess that if
15 something bad were to happen.

16 Again, however, I do want to note that
17 CRIT was not a petitioner on this regard. The
18 Tribes were willing to live with the permit as
19 drafted. Evoqua is the one that brought this to
20 the EAB's attention.

21 And I think it was interesting in
22 Evoqua's argument today that they were doing this

1 on behalf of the Tribes or because it was a
2 problem for the Tribes, and I do want to point
3 out to the panel that the Tribes were not the
4 ones that petitioned on this regard and are
5 willing to live with the petition as drafted.

6 I want to turn to the question of the
7 permit modification applications and the line of
8 questioning that we had around whether it's
9 appropriate for Evoqua to be the sole signatory
10 on such applications.

11 I see that we're reading the language
12 in Section 1.A.6, or the panel is inquiring about
13 the language in 1.A.6 and whether that implies
14 that Evoqua only could sign the permit
15 modification applications, and CRIT would have
16 concerns with such a reading.

17 I don't think it's warranted by the
18 language in the permit, and particularly the
19 language in the regulations regarding permit
20 modification applications. I also think it's a
21 problem as a practical matter, so I want to walk
22 through both of those things. So with respect --

1 JUDGE AVILA: Go ahead. Go ahead.

2 MS. CLARK: No, please ask your
3 question.

4 JUDGE AVILA: Go ahead. Go, please.

5 MS. CLARK: Okay. With respect to the
6 legal arguments and the interpretation of the
7 language in the permit, Section 1.A.6 says that
8 compliance with the permit can be achieved by
9 either Evoqua or by CRIT. The permit then lays
10 out the requirement to submit permit modification
11 applications, but the permit says nothing about
12 who should sign those applications and what
13 format those applications should take.

14 Instead, that's dictated by the
15 regulations at 40 CFR 270.42, and those
16 regulations very specifically say that the
17 permittee must submit the permit modification
18 applications.

19 And I think in this particular
20 context, permittee must be read to include both
21 CRIT and Evoqua, that there's no room for having
22 only one permittee sign off on a permit

1 modification application.

2 JUDGE WARD: Under the regulations or
3 under the permit?

4 MS. CLARK: Under the regulations,
5 which is what dictates how a permit modification
6 is processed.

7 JUDGE AVILA: And so I take it your
8 point is, and I just want to make sure I'm
9 understanding your argument, it would be somewhat
10 incongruous under the regulations if the
11 regulations mandated that both of you be
12 signatories to the initial permit, but then not
13 to a modification?

14 MS. CLARK: That's exactly correct.
15 We believe that --

16 (Simultaneous speaking.)

17 JUDGE AVILA: -- feedback.

18 MS. CLARK: -- that both CRIT and
19 Evoqua must sign off on a permit modification
20 application, and I wanted to speak to sort of the
21 practical reasons as to why that's important.

22 There are certain permit modification

1 applications that are dictated by the permit, and
2 CRIT and Evoqua have been working together to
3 process some of those in this period immediately
4 after the permit being approved. And that
5 process, I think, is the appropriate place for
6 CRIT and Evoqua to work out any disputes
7 regarding the permit modification application.

8 For now, they are simply bringing the
9 permit up to speed and making sure that the
10 permit as a whole comports to all of its
11 requirements, but in the future, there may be
12 permit modification applications that involve a
13 change to the facility, a change in how it's
14 operated, or the equipment on site, and we would
15 want that question as to whether such a change is
16 appropriate to happen prior to the permit
17 modification application being submitted.

18 If CRIT is excluded from that process,
19 then we'll be in the position of having to either
20 comment on that permit modification application
21 or seek consultation with the EPA during that
22 process, and it's not clear to me that that would

1 be an effective means of communicating our
2 concerns, and so we prefer to have that initial
3 requirement of CRIT and Evoqua working on and
4 approving together any modifications to the
5 facility that would require such a permit
6 modification.

7 So, if there are no further questions
8 on that, I'd like to turn to the question of the
9 performance demonstration test and the human
10 health and ecological risk assessment.

11 So I think it's important to note that
12 Evoqua appears to now have conceded that EPA has
13 authority to require both of these tests, as well
14 as the additional MACT EEE standards, and the
15 question is only whether it is necessary or
16 appropriate.

17 CRIT agrees with the argument advanced
18 by EPA here today about the difference between
19 necessary and appropriate, and disagrees with
20 Evoqua's position that appropriate somehow should
21 be read in the same manner as the word necessary.

22 As EPA laid out, necessary -- or the

1 term appropriate is to determine whether to apply
2 MACT EEE, you look at whether something is
3 appropriate, while the term necessary is used to
4 determine whether any other conditions should be
5 influenced on the permit that are derived from
6 other sources outside of those listed in the
7 regulation.

8 So I believe here with respect to both
9 the performance demonstration test and the risk
10 assessment that EPA has demonstrated that these
11 are appropriate conditions of the permit.

12 The CRIT tribal council is very much
13 in support of these tests, and as part of the
14 government to government consultation that
15 occurred with EPA, EPA assured tribal council
16 that additional tests would occur in the future
17 to ensure that the facility would remain in
18 compliance and protective of human health.

19 And I believe that the letter shown by
20 counsel for EPA on the ELMO screen indicated
21 this. It spoke about how EPA was in
22 consultations with CRIT tribal council regarding

1 the addition of the MACT EEE requirements.

2 In its briefing, Evoqua implied that
3 these tests were only imposed because of an
4 outside activist group and pressure from that
5 organization, but I wanted to make clear to the
6 panel that it is also very much of interest of
7 the tribal council to have these tests imposed.

8 And CRIT believes that EPA properly
9 supported its decision to require both the
10 repeated performance demonstration tests, and I
11 understand there's been questions from the panel
12 about what the permit says, and we agree with
13 EPA's interpretation that it would be one
14 performance test in this initial period after the
15 permit is finalized, and then one every five
16 years thereafter, and the additional HHERA would
17 happen after that first performance demonstration
18 test is finalized, so that's the time frame that
19 CRIT tribal council understood as well.

20 So the reasons that EPA gave for
21 supporting these additional tests are also the
22 ones that were given to CRIT tribal council. And

1 so there was concerns about whether we could know
2 that certain pollutants were being contained at
3 the facility or whether they were being emitted
4 into the air and may cause human health impacts.

5 And the performance demonstration
6 tests were described as a mechanism for ensuring
7 that certain pollutants are indeed captured
8 effectively at the facility, and in particular,
9 as the facility continues to age.

10 The facility is nearly 30 years old
11 and I think the EPA has persuasively argued that
12 at this point in its life span, it's necessary to
13 have these testing -- the testing done in order
14 to be assured that the mechanics of the facility
15 are still working appropriately.

16 We also think it's important to note
17 that the health and ecological risk assessment is
18 necessary because we're getting new data from
19 that PDT, so it's not just a simple redo of a
20 risk assessment because there is new
21 methodologies.

22 It's because we're getting a new PDT

1 and that will demonstrate what emission levels
2 we're seeing at the facility, and that then feeds
3 into the risk assessment. That's one of the
4 reasons why it's triggered and why the permit
5 specifically ties it to the timing of that
6 performance demonstration test.

7 It's not just a random date as Evoqua
8 had suggested in its argument today. Instead,
9 it's a date that's triggered by the fact that we
10 have new data coming out about the performance
11 demonstration test.

12 I'd finally like to close just briefly
13 on a question about remedy, and if the panel is
14 inclined to believe that EPA has not adequately
15 supported its determinations today, particularly
16 around the performance demonstration tests and
17 the HHERA, we believe that it would be
18 appropriate for this to go back to EPA to further
19 assess the necessity and/or the appropriateness
20 of these testing requirements.

21 I don't think it would be fair to the
22 Tribes if we know that these are necessary and

1 are appropriate and they were simply stripped out
2 of the permit because EPA was found to not have
3 adequately supported its conclusion.

4 Because we're within this standard of
5 review where we're looking at the adequacy of the
6 evidence that EPA put forth, on remand we would
7 like the opportunity to help supplement that to
8 show that they are both necessary and
9 appropriate.

10 And finally on the question you posed
11 to counsel for EPA on the motion for the stay, we
12 also agree that the motion for a stay would be
13 moot should the panel make its decision.

14 And with that, I will rest my argument
15 unless you have further questions on our briefing
16 or the other aspects of the permit.

17 JUDGE WARD: No, and thank you, Ms.
18 Clark, and also thank you to Ms. Loudbear and Ms.
19 Flora for joining us today. We appreciate that.

20 All right, I think that Evoqua has
21 five minutes in rebuttal. And before you start,
22 if I could ask you to address the two questions.

1 The one is what would be the effect of a ruling
2 on the merits on your motion is the first
3 question.

4 MR. MOORE: Okay, so a ruling on the
5 merits, what would be the effect on the motion?
6 I don't know whether it would depend on what the
7 ruling on the merits is.

8 Let's say you remand a portion of the
9 permit for reconsideration. Let's say you remand
10 the PDT and the HHERA requirement. I don't have
11 a rule book in front of me here to know whether
12 that would stay the entirety of the permit.

13 So if it did not stay the entirety of
14 the permit, then I would say that your ruling on
15 the merits, if your ruling on the merits were to
16 remand to the Region a portion of the permit, or
17 remand, and if that didn't act to stay the
18 entirety of the permit, then your ruling on the
19 merits would not moot the motion for a stay.

20 If your ruling on the merits is to
21 deny a review and to basically not to remand, to
22 uphold the permit as issued, then I would say

1 that that would moot the motion for a stay. Not
2 to encourage you to moot the motion for stay, but
3 I would have to concede that at that point,
4 that's not a fight worth having.

5 JUDGE WARD: Thank you for that,
6 addressing that issue. And then the second issue
7 concerns at least the confusion as we saw it in
8 the papers about carbon monoxide versus carbon
9 dioxide in the Appendix F procedures.

10 MR. MOORE: Yeah.

11 JUDGE WARD: And I guess the question
12 is it appeared to us, it appeared to me reading
13 your petition that you were objecting to the
14 Appendix F requirements to the extent they went
15 beyond the carbon monoxide and oxygen monitors,
16 and I heard EPA's counsel saying we read the
17 permit as -- those Appendix F procedures do not
18 go beyond those two monitors.

19 MR. MOORE: It's correct that we are
20 objecting. I believe it was more of an assertion
21 that the way that the Region approached it, it's
22 ambiguous. The Region says, no, it's not.

1 Again, not to belabor this issue, but
2 that's not our only objection. We're objecting
3 on the MACT EEE grounds as well, just --

4 JUDGE WARD: Right, I just wanted to
5 narrow -- if there are narrow issues or we can
6 narrow, that's helpful.

7 MR. MOORE: Yeah, absolutely,
8 absolutely.

9 JUDGE WARD: Okay, thank you.

10 MR. MOORE: Okay.

11 JUDGE WARD: Please continue.

12 MR. MOORE: I think I have really two
13 topics that I want to take up in the limited time
14 I have left. In the -- I want to get back to
15 264.601 and whether there is a necessity standard
16 and an appropriateness standard in that
17 regulation, that is two different standards in
18 one regulation, one of necessity and one of
19 appropriateness.

20 If the Region has been applying two
21 different standards all along, I'm absolutely
22 unaware of that from reviewing the record. There

1 is no indication in the record that I am aware of
2 that the Region has said, here we're applying
3 necessity, and here we're applying appropriate.
4 Here is why we're applying necessity. Here is
5 why we're applying appropriate. Throughout the
6 record --

7 JUDGE STEIN: Is that just related to
8 264 as opposed to omnibus?

9 MR. MOORE: Well, I don't think that
10 --

11 JUDGE STEIN: I just want to be clear
12 that you're excluding -- you're talking 264 only?

13 MR. MOORE: Well, the term appropriate
14 doesn't come up in the omnibus discussion. That
15 is --

16 JUDGE STEIN: Right.

17 MR. MOORE: -- without question a
18 necessity determination. Our argument there is
19 the Region -- well, the problem with the Region
20 applying the omnibus authority, it's not clear
21 where it's applying it and where it's not because
22 it claims this mixture of authority under 264.601

1 and omnibus, but it's not clear which one it's
2 actually claiming for a certain permit condition.

3 But I will say that as to the omnibus
4 authority, there is no on the record, fact
5 specific, permit specific, which your precedent
6 in Allied Signal and the Caribe General Products
7 case requires.

8 Permit specific, fact specific,
9 thorough analysis on the record that a permit
10 condition is necessary for the protection of
11 human health and the environment, you will not
12 find that in this administrative record.

13 So to the extent that the Region --
14 just putting aside the 264.601 discussion and
15 whether appropriateness is somehow different from
16 necessity, that is not at issue with the omnibus
17 authority. To the extent that the Region has
18 exercised omnibus authority to impose a PDT
19 requirement, to impose a HHERA requirement, or to
20 pose any requirement beyond the MACT EEE
21 requirements, because appropriate only comes into
22 question there if we're going to have that

1 discussion.

2 There is not an on the record
3 necessity determination that meets the
4 requirements of the Board's precedent for
5 exercising authority under the omnibus provision.

6 And going back to 264.601, hearing
7 from the Region today that there is a different
8 standard for appropriate and a different standard
9 for necessity, again, I can't find that in the
10 record.

11 I don't know what standard the Region
12 would be applying when they're determining
13 appropriateness. I don't know what that means to
14 the Region. I don't see any analysis in the
15 record that something is or is not appropriate.

16 If there are, if -- just for the sake
17 of argument, if necessity and appropriate mean
18 something different in 264.261, I submit that
19 there still must be an on the record
20 demonstration of appropriateness under some
21 standard that can be tested by this Board, that
22 can be analyzed by this Board.

1 It is not enough for the Region to
2 simply proclaim that something is appropriate,
3 just to say the word appropriate. And they say
4 throughout the administrative record that word
5 and many different others when referring to
6 something like the necessity standard.

7 They use the word necessity,
8 necessary. They use the word appropriate. They
9 use the word justified. They use the word
10 warranted. They use the word reasonable, and I
11 could go on, but they're just words. There's no
12 analysis to back them up.

13 There's no fact specific, permit
14 specific, on the record determination that
15 something is necessary or that something is
16 appropriate.

17 JUDGE WARD: Mr. Moore, if you could
18 -- if there are no further questions, I wanted to
19 give you another minute to wrap up.

20 MR. MOORE: Sure.

21 JUDGE WARD: I did take up some of
22 your five minutes.

1 MR. MOORE: Well, and I will wrap up
2 on this point very quickly. If you still have
3 your handout of my PowerPoint presentation, I
4 won't go through it, but on slide eight, this is
5 further to my point on the use of buzzwords.

6 If you turn to slide eight, the MACT
7 EEE standards, the response to comment V or 5-11
8 at page 67, there the Region says unequivocally,
9 the Region deems it necessary to regulate this
10 unit using certain relevant MACT EEE standards.

11 That tells me that the agency thinks
12 it has to make -- it believes it has to make a
13 necessity determination, and I submit to you that
14 it hasn't made one, not that it has to make an
15 appropriateness determination for the MACT EEE
16 standards.

17 We also see this in the agency's brief
18 on page 15, quote, both the miscellaneous unit
19 requirements, those are in subpart X, and the
20 omnibus authority, which we've been talking
21 about, mandate, mandate that the Region impose
22 permit conditions, quote, necessary to protect

1 human health and the environment.

2 That's what the Region says. That's
3 what they said in the response to public comment.
4 That's what they said in their brief. Thank you
5 for your time.

6 JUDGE WARD: First, let me thank
7 everyone for their patience in answering all of
8 our questions and lasting through this marathon,
9 which we very much appreciate. It's been very
10 helpful, I know, to the panel in making sure that
11 we understand your arguments and can address them
12 accordingly.

13 So there were a couple of issues that
14 came up in the course of the argument, questions
15 that we had and I'd like to get -- and I think
16 they were mostly directed to EPA, at least
17 initially, so I'm going to ask the Region to file
18 a further pleading by next, I believe it's
19 Tuesday, April 16.

20 I think you're all serving by email,
21 correct, so that's helpful, and this is really
22 more, I'm looking more for statements or

1 citations and not argument. I just want to make
2 that very clear.

3 So the first question we asked was
4 whether the Region read -- this is Module 1.K and
5 the submissions there as requiring that both
6 permittees make those submissions or could it be
7 done just by one, and I'll add to that, as
8 distinct from some separate regulatory
9 requirement?

10 We're really looking for what does the
11 permit require, which does not mean necessarily
12 what the regulations may require separate and
13 apart.

14 The second question had to do with the
15 MACT EEE requirement and the statement in the
16 Region's brief at page 18. Give me a moment to
17 turn to that so I'm referencing specifically the
18 point I'd like to have addressed.

19 So on page 18 of the Region's brief,
20 it states, for some of the challenged permit
21 conditions, no specific comments or objection was
22 raised during the public comment period by the

1 petitioner, and then there's a footnote 35, but
2 neither the footnote nor the text identifies
3 specifically which conditions the Region is
4 referencing among the conditions listed in the
5 petitioner's brief on this issue. Sorry, give me
6 a moment. I want to make sure I'm giving you the
7 specific page.

8 At page eight of the petitioner's
9 brief, there's a paragraph that walks through the
10 specific provisions being challenged for purposes
11 of the second argument regarding MACT EEE. So
12 we'd like to know which of those provisions the
13 Region is contending were not specifically
14 objected to in the comments.

15 And the third and last issue I'd like
16 the Region to address concerns the statement at
17 page 115 of the response to comments and the
18 sentence that references the updated air
19 dispersion and deposition modeling analysis,
20 updated toxicity criteria, and updated exposure
21 assessment analyses.

22 And I'd like the Region to identify by

1 citation any specific additional documents in the
2 administrative record that support that
3 statement, and please give specific page
4 citations to those documents. That's most
5 helpful to us, and again, what I'm describing is
6 a pleading that is short and specific with
7 citations, not argument.

8 I'd like to give both Evoqua and the
9 Tribes an opportunity to respond, and
10 specifically to the second question, the question
11 regarding provisions that were, in EPA's view,
12 not commented on by Evoqua.

13 And if Evoqua has a different position
14 on that, I would ask Evoqua to file a pleading
15 identifying with respect to the specific
16 provision where in their comments they made the
17 objection.

18 And if it's reasonable to ask you to
19 do that by April 23? All right, and the Tribes,
20 if -- Ms. Clark, is there any one of those three
21 issues that you have a particular -- you'd have a
22 request to at least have an opportunity to

1 address?

2 I'm not looking to make work for you
3 if none of those are things you want to speak to,
4 but if there is something there that you think
5 are relevant to the tribes' concerns?

6 MS. CLARK: I think depending on EPA's
7 position on the first question about the permit
8 signatures, we may wish to respond.

9 JUDGE WARD: So I think if you're
10 going to have an opportunity to speak to that,
11 and again, I would make it a paragraph or two,
12 not a --

13 MS. CLARK: Of course.

14 JUDGE WARD: -- several pages, I would
15 give then Evoqua a similar opportunity, again in
16 brief, to address the first question regarding
17 whether signatures are required. What is
18 required by Module 1.K as it relates to those
19 submissions, again, in brief.

20 All right, again, April 16th for the
21 Region's submission, April 23 for the Tribes and
22 for Evoqua. The Region will address three of the

1 questions. The Tribes and Evoqua will address
2 the first two, again, in brief. We would
3 appreciate that. All right, thank you.

4 MS. CLARK: Thank you.

5 MS. DURR: All rise. Thank you.

6 (Whereupon, the above-entitled matter
7 went off the record at 12:40 p.m.)
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