(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Evoqua Water Technologies LLC	)	RCRA Appeal No. 18-01
Permit No. AZD982441263	)	

[Decided June 13, 2019]

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Before Environmental Appeals Judges Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

IN RE EVOQUA WATER TECHNOLOGIES LLC

RCRA Appeal No. 18-01

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Decided June 13, 2019

Syllabus

Evoqua Water Technologies LLC ("Evoqua") petitions the Environmental Appeals Board ("Board") to review a Resource Conservation and Recovery Act ("RCRA") permit ("Permit") that the U.S. Environmental Protection Agency Region 9 ("Region") issued to Evoqua and the Colorado River Indian Tribes ("Tribes"). The Permit governs the treatment, storage, and disposal of hazardous waste at a carbon regeneration facility operated by Evoqua on land beneficially owned by the Tribes near Parker, Arizona. Evoqua challenges the Region's Permit decision on nine separate grounds.

Held: The Board denies review of most challenges to the Permit but remands three issues, one at the request of the Region. Evoqua has not established that the Region clearly erred or abused its discretion by issuing the Permit jointly to Evoqua and the Tribes as co-Permittees or by declining to specify the co-Permittees' respective obligations under the Permit. With respect to Evoqua's challenges to Permit provisions that derive from the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors (set forth at 40 C.F.R. part 63, subpart EEE), several challenges have not been preserved for review, and Evoqua has failed to demonstrate that the Region clearly erred or abused its discretion for all others. Evoqua has also failed to demonstrate that the Region clearly erred or abused its discretion with respect to the Permit provisions requiring periodic Performance Demonstration Testing, an update to the Human Health and Ecological Risk Assessment, and Quality Assurance/Quality Control procedures for the Continuous Emissions Monitoring System. Finally, Evoqua has not demonstrated that the Region clearly erred or abused its discretion in not providing for judicial review of a dispute resolution. Further, at the Region's request, the Board remands the issue of the appropriate regulation of Tank T-11 to allow the Region to further consider that issue. The Board also remands certain Permit provisions governing use of the Automated Waste Feed Cutoff system to allow the Region to fully consider and respond to comments regarding the technical feasibility of complying with those provisions. It also remands the Permit provision that requires reporting of certain instances of noncompliance to allow the Region

to explain why it added language to the Permit requiring that such reporting be made to the National Response Center. The Board otherwise denies review.

Before Environmental Appeals Judges Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

Opinion of the Board by Judge Ward:

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I. *STATEMENT OF THE CASE*

The United States Environmental Protection Agency ("EPA" or "Agency") Region 9 ("Region") issued a Resource Conservation and Recovery Act ("RCRA") permit ("Final Permit" or "Permit") to Evoqua Water Technologies LLC ("Evoqua") and the Colorado River Indian Tribes ("Tribes" or "CRIT") governing the treatment, storage, and disposal of hazardous waste at a carbon regeneration facility located near Parker, Arizona ("Facility"). The Facility is operated by Evoqua, on land beneficially owned by the Tribes, under a long-term lease agreement. Evoqua petitions the Environmental Appeals Board ("Board") to review nine issues.[1] For the reasons set forth below, the Board remands the Permit on three issues raised in the Petition, including one issue on which the Region requested a voluntary remand. The Board otherwise denies review.

II. *SUMMARY OF ISSUES ON APPEAL AND OUTCOME*

Evoqua's challenge to the Permit raises the following issues on appeal:

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[1] Evoqua's Petition also seeks review on a tenth issue: whether the Region clearly erred or abused its discretion by including in the Permit a provision requiring Permittees to record stack flow data for the purpose of calculating nitrogen oxide emissions. *See* Evoqua Water Technologies LLC's Petition for Review 29-30 (Oct. 25, 2018). At oral argument, Evoqua withdrew that challenge. Oral Argument Transcript 40-41 (Apr. 9, 2019). Consequently, the Board does not consider it.

1. **Co-Permittees**: Did the Region clearly err or abuse its discretion by issuing the Permit to Evoqua and the Tribes jointly as co-permittees?

2. **Application of the National Emission Standards for Hazardous Waste Combustors**: Did the Region clearly err or abuse its discretion by including in the Permit certain requirements derived from 40 C.F.R. part 63, subpart EEE (National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors)?

3. **Performance Demonstration Tests**: Did the Region clearly err or abuse its discretion by requiring periodic Performance Demonstration Tests?

4. **Human Health Ecological Risk Assessment**: Did the Region clearly err or abuse its discretion by requiring an updated Human Health and Ecological Risk Assessment?

5. **Automated Waste Feed Cutoff System**: Did the Region clearly err or abuse its discretion by requiring that the Automated Waste Feed Cutoff system shut off the feed of spent carbon under specified conditions?

6. **Quality Assurance/Quality Control for the Continuous Emissions Monitoring System**: Did the Region clearly err or abuse its discretion by requiring that Quality Assurance/Quality Control for the Continuous Emissions Monitoring System be conducted in accordance with Appendix F of 40 C.F.R. part 60?

7. **National Response Center**: Did the Region clearly err or abuse its discretion by adding a requirement to report certain instances of noncompliance to the National Response Center?

8. **Dispute Resolution**: Do the Permit's dispute resolution provisions violate Evoqua's due process rights by not specifying that a final decision on dispute resolution is subject to judicial review?

9. **Tank T-11**: Did the Region clearly err or abuse its discretion by concluding that Tank T-11 is only partially exempt from RCRA regulation?

The Board denies review of all but three of these issues. *First*, at the Region's request, the Board remands the issue of the appropriate regulation of Tank T-11 to allow the Region to further consider that issue. *Second*, the Board remands certain of the Automated Waste Feed Cutoff system provisions, Permit

provisions V.C.5.b.iii and .iv, to allow the Region to fully consider and respond to comments regarding the technical feasibility of complying with those provisions. *Third*, the Board remands the provision that requires reporting of certain instances of noncompliance, Permit provision I.E.13.a, to allow the Region to explain why it added language to the Final Permit requiring that such reporting be made to the National Response Center.

III. *PRINCIPLES GOVERNING BOARD REVIEW*

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of RCRA permitting decisions. EPA's intent in promulgating these regulations was that "review should be only sparingly exercised" and that "most permit conditions should be finally determined at the [permit issuer's] level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also In re Gen. Elec. Co.*, 17 E.A.D. 434, 446 (EAB 2018).

In considering a petition filed under 40 C.F.R. § 124.19, the Board first evaluates whether a petitioner has met threshold procedural requirements, including whether each issue raised has been preserved for Board review. 40 C.F.R. § 124.19(a)(2)-(4). A petitioner satisfies the preservation requirement by demonstrating that the issues and arguments it raises on appeal were raised previously—either in comments submitted on the draft permit during the public comment period or at a public hearing. *Gen. Elec.*, 17 E.A.D. at 445. If the Board concludes that a petitioner satisfies the threshold requirements, the Board evaluates the merits of the petition for review. *Id.*

Under 40 C.F.R. § 124.19(a), the burden of demonstrating that review of a permit decision is warranted rests with petitioner and the Board has the discretion to grant or deny review. *Gen. Elec.*, 17 E.A.D. at 445-46. The Board will ordinarily deny review of a permit decision, and thus not remand it, unless the decision either (1) is based on a clearly erroneous finding of fact or conclusion of law, or (2) involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *see, e.g.*, *Gen. Elec.*, 17 E.A.D. at 446; *In re ESSROC Cement Co.*, 16 E.A.D. 433, 435 (EAB 2014). To meet that standard, it is not enough for a petitioner to merely cite or reiterate comments previously submitted on the draft permit. *In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 111 (EAB 2016), *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019). Where the permit issuer responded to those comments, petitioner must explain why the permit issuer's response is clearly erroneous or otherwise warrants review. *Gen. Elec.*, 17 E.A.D. at 447.

When evaluating a permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised "considered judgment" in rendering its decision. *Id.* at 446. The Board does not find clear error simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. *Id.* at 446-47. On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record. *Id.* at 514-15.

When reviewing a permit issuer's exercise of discretion, the Board applies an abuse of discretion standard. *Id.* at 447. The Board will uphold a permit issuer's reasonable exercise of discretion if the decision is "cogently explained and supported in the record." *In re FutureGen Indus. All.*, 16 E.A.D. 717, 721 (EAB 2015) (citing *In re Guam Waterworks Auth.*, 15 E.A.D. 437, 443 n.7 (EAB 2011)).

IV. *STATUTORY AND REGULATORY FRAMEWORK*

Congress enacted RCRA to address the increasing risk to human health and the environment posed by the nation's growing volume of solid and hazardous waste. RCRA § 1002, 42 U.S.C. § 6901; *see generally* H.R. Rep. No. 94-1491 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6238. Subchapter III of RCRA governs the management of hazardous waste and directs EPA to implement a 'cradle to grave' system for regulating hazardous waste from the time it is generated until the time it is ultimately disposed of or destroyed. RCRA §§ 3001-3024, 42 U.S.C. §§ 6921-6939g; *see In re Leed Foundry, Inc.*, 13 E.A.D. 600, 603 (EAB 2008).

Section 3004(a) of RCRA directs EPA to promulgate regulations containing performance standards applicable to owners and operators of facilities that treat, store, or dispose of hazardous waste ("TSD facilities"). 42 U.S.C. § 6924(a). Section 3005(a) directs EPA to promulgate regulations requiring each person who owns or operates a new or existing TSD facility to obtain a permit. *Id.* § 6925(a). Permits for TSD facilities "shall contain such terms and conditions as the [permit issuer] determines necessary to protect human health and the environment." RCRA § 3005(c)(3), 42 U.S.C. § 6925(c)(3); *see also* 40 C.F.R. § 270.32(b) (mirroring the statutory language). The Board has interpreted this broad mandate—known as the "RCRA omnibus authority"—as authorizing permit conditions that are more stringent than those specified in other regulations that apply to a TSD facility. *See In re ESSROC Cement Co.*, 16 E.A.D. 433, 435 (EAB 2014).

In 1991, in the preamble to EPA's rule regulating air emissions from burning hazardous waste in boilers and industrial furnaces, EPA clarified that carbon regeneration units are not regulated as hazardous waste "incinerators," but instead as "thermal treatment units" subject to interim standards for TSD facilities set forth at 40 C.F.R. part 265, subpart P, and to permitting standards for "miscellaneous units" set forth at 40 C.F.R. part 264, subpart X. Burning of Hazardous Waste in Boilers and Industrial Furnaces, 56 Fed. Reg. 7134, 7200 (Feb. 21, 1991) ("1991 Boiler and Industrial Furnace Rule"). Thus, RCRA permits for carbon regeneration units, such as Evoqua's, must satisfy both the minimum requirements applicable to permits for all TSD facilities, *see* 40 C.F.R. part 270,[2] as well as the more specific requirements applicable to permits for miscellaneous units, *see* 40 C.F.R. part 264, subpart X.

The permitting regulations for miscellaneous units provide, in pertinent part:

> A miscellaneous unit must be located, designed, constructed, operated, maintained, and closed in a manner that will ensure protection of human health and the environment. *Permits for miscellaneous units are to contain such terms and provisions as necessary to protect human health and the environment*, including, but not limited to, as appropriate, design and operating requirements, detection and monitoring requirements, and requirements for responses to releases of hazardous waste or hazardous constituents from the unit. *Permit terms and provisions must include those requirements of * * * [40 C.F.R.] part 63 subpart EEE * * ** that are *appropriate for the miscellaneous unit being permitted.* Protection of human health and the environment includes, but is not limited to:
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> (c) Prevention of any release that may have adverse effects on human health or the environment due to migration of waste constituents in the air, considering: * * * (2) [t]he effectiveness and

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[2] Permits for TSD facilities must include, among other things, requirements for the proper operation and maintenance of the facility, 40 C.F.R. § 270.30(e); monitoring and recordkeeping, *id.* § 270.30(j); and reporting, *id.* §§ 270.30(*l*), .31.

> reliability of systems and structures to reduce or prevent emissions of hazardous constituents to the air.

40 C.F.R.§ 264.601 (emphasis added).

The referenced regulations at 40 C.F.R. part 63, subpart EEE, are the National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors, which include maximum achievable control technology emission limits and other regulatory requirements for hazardous waste combustors (collectively, the "MACT EEE requirements").[3] *See* 40 C.F.R. §§ 63.1200-.1221. The MACT EEE requirements ensure that hazardous waste combustors, including incinerators, implement processes and controls that will minimize negative impacts to human health and the environment. *See* NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828, 52,832 (Sept. 30, 1999).

V. *RELEVANT FACTUAL AND PROCEDURAL HISTORY*

The Facility is a spent carbon[4] regeneration facility located near Parker, Arizona. Region 9, U.S. EPA, *Final RCRA Permit Identification No. AZD982441263 issued to Colorado River Indian Tribes and Evoqua Water Technologies, LLC* § I, at module ("mod.") I, 1 (Sept. 25, 2018) (A.R. 1609) ("Permit"); Region 9, U.S. EPA, *Revised Statement of Basis, Proposed Permit for Storage and Processing of RCRA-Regulated Hazardous Wastes* 3 (Nov. 2016) (A.R. 1461) ("Stmt. of Basis"). The Facility processes over 5,000 tons of spent carbon annually, some of which is classified as hazardous waste because it contains hazardous constituents such as volatile organic chemicals, polynuclear aromatic

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[3] EPA promulgated the MACT EEE requirements pursuant to the Agency's joint authority under RCRA and the Clean Air Act. *See* NESHAPS: Final Standards for Hazardous Air Pollutants for Hazardous Waste Combustors, 64 Fed. Reg. 52,828, 52,828 (Sept. 30, 1999).

[4] Activated carbon is used in various forms of treatment equipment at industrial and clean-up sites to adsorb organic compounds from liquid and vapor phase waste streams. Permit attach. B § B.2.1, at B-3 (Sept. 2018) (A.R. 1611) (containing Siemens Indus., Inc., *Facility Description* (rev.1 Apr. 2012)). The carbon is said to become "spent" after it has reached its adsorptive capacity. *Id.* Spent carbon can be "reactivated" by using thermal treatment to remove organic compounds that have adsorbed to it, making the carbon available for re-use. *See id.*; Permit attach. D § D.5, at D-12 (Sept. 2018) (A.R. 1613) (containing Siemens Indus., Inc., *Process Information* (rev.1 Apr. 2012)).

hydrocarbons, phthalates, amines, and/or pesticides. Region 9, U.S. EPA, *Fact Sheet: Proposed Permit for the Evoqua Water Technologies LLC Facility Near Parker, Arizona* 1 (Nov. 2016) (A.R. 1466) ("Fact Sheet"); Permit attach. C § C.2.2, at C-2 & tbl.C-1 (Sept. 2018) (A.R. 1612) (containing Siemens Indus., Inc., *Spent Carbon Characteristics*, (rev.1 Apr. 2012)); *see* Evoqua Water Technologies LLC's Petition for Review 2 (Oct. 25, 2018) ("Pet.") (estimating that 10-15% of the spent carbon received by the Facility is subject to regulation as hazardous waste).

The Facility was constructed by Evoqua's predecessor-in-interest in the early 1990s on a ten-acre site located within the Colorado River Indian Tribes' Industrial Park near Parker, Arizona, through a long-term business lease with the Tribes. *See* Letter from Matthew P. Killeen, Manager, Envtl. Permitting, Wheelabrator Envtl. Sys. Inc., to Ray Fox, Alt. Techs. Section, Region 9, U.S. EPA (Aug. 30, 1993) (A.R. 96) (attaching excerpts from business lease between the Tribes and Westates Carbon-Arizona, Inc.); Colorado River Indian Tribes Response to Petition for Review 4-5 (Dec. 3, 2018) ("Tribes' Resp.").

The Facility houses a five-hearth reactivation furnace[5] (referred to in the record as "RF- 2") and an attached afterburner.[6] Permit attach. D § D.1.1, at D-2 (Sept. 2018) (A.R. 1613) (containing Siemens Indus., Inc., *Process Information* (rev.1 Apr. 2012)). Spent carbon is fed into the top of the furnace and, from there, flows downward through five hearths, where it is heated to a temperature of up to 1650 degrees Fahrenheit; the newly reactivated carbon then exits the bottom of the furnace through a cooling screw. *Id.* §§ D.1.1, at D-2; D.1.2, at D-3; D.5.1.1, at D-14. The hot gases generated during the reactivation process are routed to the afterburner to ensure that any remaining organic matter is oxidized. *Id.* §§ D.1.2, at D-3; D.2.2, at D-5. From the afterburner, the gases are routed through air pollution control equipment, including two different scrubbers and a precipitator. *Id.* § D.2.4, at D-5 to D-6. At the end of the process, the exhaust gases are vented

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[5] The furnace is approximately twenty feet high with an outside diameter of about thirteen feet; it is raised approximately ten feet off the ground. Permit attach. D § D.5.1.1, at D-14.

[6] The afterburner is a cylindrical chamber approximately thirty-three feet high with an inside diameter of five feet. Permit attach. D § D.5.1.2, at D-15. It is designed to oxidize over 99.99 percent of all organic matter from the furnace gas that enters it. *Id.*

to the atmosphere through a stack.[7] *Id.* A Continuous Emissions Monitoring System monitors carbon monoxide and oxygen concentrations in the emissions. *Id.* § D.5.1.9, at D-17. The reactivation furnace is controlled by a "process control computer," which includes an Automated Waste Feed Cutoff system[8] designed to stop the feed of spent carbon into the furnace when certain operating parameters are met or exceeded. *See* Permit attach. app. V, at 32 (Sept. 2018) (A.R. 1631) (containing Focus Envtl., Inc., *Carbon Reactivation Furnace Performance Demonstration Test Plan* (May 2003), and Focus Envtl., Inc., *Carbon Reactivation Furnace RF-2 Performance Demonstration Test Report* (June 30, 2006) ("PDT Report")); *see also* Permit attach. F § F.3.1.1.1, at F-9 (Sept. 2018) (A.R. 1615) (containing Evoqua Water Techs., *Procedures to Prevent Hazards* (rev.2 July 2014)).

The Facility has been operating under RCRA interim status since 1991. Stmt. of Basis at 3; *see generally* 40 C.F.R. pt. 265, subpt. P (providing the Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities—Thermal Treatment). In 1993, the Region asked the Facility operators to submit a RCRA Part B permit application. Letter from Michael Feeley, Chief, Permits and Solid Waste Branch, Region 9, U.S. EPA, to Monte McCue, Plant Manager, Westates Carbon–Arizona Inc. (Aug. 30, 1993) (A.R. 97).[9] Evoqua's predecessor-in-interest submitted a Part B permit application in 1995, initiating the permitting process. Letter from Monte McCue, Plant

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[7] The stack is 110-feet tall with an inside diameter of approximately twenty inches. *See* Permit attach. app. V, at 27. (Sept. 2018) (A.R. 1631) (containing Focus Envtl., Inc., *Carbon Reactivation Furnace Performance Demonstration Test Plan* (May 2003), and Focus Envtl., Inc., *Carbon Reactivation Furnace RF-2 Performance Demonstration Test Report* (June 30, 2006)).

[8] Both Evoqua and the Region refer to the system as an "Automatic Waste Feed Cutoff" system, *see* Pet. at 15, EPA Region 9's Response to Evoqua Water Technologies, LLC's Petition for Review 19 (Dec. 3, 2018), but the Permit refers to the system as an "Automated Waste Feed Cutoff system," Permit § V.C.5, at mod. V, 14. For consistency, we refer here to the system as an "Automated Waste Feed Cutoff system."

[9] The name of the Facility operator has changed over the years, and the record includes references to "Siemens Water Technologies LLC," "Siemens Industries Inc.," and "U.S. Filter-Westates" in addition to "Westates Carbon-Arizona, Inc." Stmt. of Basis at 3.

Manager, Westates Carbon–Arizona, Inc. to Michael Feeley, Chief, Permits and Solid Waste Branch, Region 9, U.S. EPA (Jan. 16, 1995) (A.R. 161).

In 2006, as part of the permitting process, Evoqua conducted a three-day Performance Demonstration Test of RF-2. *See* PDT Report at 9 (contained in Permit attach. app. V, at 79). The testing was conducted in accordance with the MACT EEE requirements and a plan that the Region had approved. *Id.* The purposes of the Performance Demonstration Test were to: (1) "Demonstrate Compliance with Applicable USEPA Regulatory Performance Standards (Based on [Hazardous Waste Combustor] MACT Standards for Existing Hazardous Waste Incinerators)"; (2) "Establish Permit Operating Limits"; and (3) "Gather Information for Use in a Site-Specific Risk Assessment." *Id.* at 10-11.

In 2008, based on the results of the Performance Demonstration Test, Evoqua completed a Human Health and Ecological Risk Assessment ("Risk Assessment") and submitted a report to the Region. Stmt. of Basis at 8; *see* Permit attach. app. XI, at 5-9 (Sept. 2018) (A.R. 1036) (containing CPF Assocs., Inc., *Executive Summary, Siemens Water Technologies Corp. Carbon Regeneration Facility Risk Assessment* (Mar. 13, 2008)). On the human health side, the Risk Assessment evaluated risks posed by air emissions from the Facility to various human subpopulations, including an assessment of excess lifetime cancer risk due to long-term exposure, an assessment of chronic non-cancer health effects from long-term exposure, and an assessment of health effects from acute inhalation exposure. *Id.* at 2-3. With respect to ecological risks, the Risk Assessment evaluated the potential effects of stack emissions on various plant and animal species found near the Facility. *Id.* at 3. The Risk Assessment concluded that the potential risks from air emissions were below regulatory and target risk levels for both human and ecological receptors. *Id.* at 4.

In April 2016, Evoqua submitted a revised RCRA Part B permit application. Evoqua Water Techs. LLC, *RCRA Part B Permit Application, Revision 3* (Apr. 2016) (A.R. 1321). Evoqua and the Tribes both signed the application, and the Tribes agreed to be jointly and severally responsible for compliance with the Permit. *Id.* § L.1.

In September 2016, the Region requested comments on its proposal to issue a permit and opened a three-month public comment period. Region 9, U.S. EPA, *Resource Conservation & Recovery Act Draft Permit EPA RCRA I.D. Number AZD982441263* (Sept. 27, 2016) (A.R. 1435) ("Draft Permit"). During the comment period, the Region accepted comments from the public on the Draft

Permit and held a one-day public hearing in Parker, Arizona. *See* Fact Sheet at 1. Evoqua submitted a statement of comments on the Draft Permit and a redline document showing Evoqua's proposed changes to the Draft Permit. *See* Letter from Stephen Richmond, Counsel to Evoqua Water Techs., LLC, to Mahfouz Zabaneh, Region 9, U.S. EPA (Jan. 6, 2017) (A.R. 1477) (attaching comments from Evoqua ("Evoqua's Cmts.") and a redline with Evoqua's proposed changes ("Evoqua's Redline")). The Tribes also submitted comments on the Draft Permit. *See* Letter from Dennis Patch, Acting Chairman, Colorado River Indian Tribes, to Mahfouz Zabaneh, Region 9, U.S. EPA (Dec. 27, 2016) (A.R. 1476).

The Region made a number of changes to the Draft Permit based on comments received. *See* Region 9, U.S. EPA, *Redline Final RCRA Permit v. Draft RCRA Permit* (Sept. 2018) (A.R. 1608) ("Final Permit Redline") (showing changes between the Draft Permit and the Final Permit). On September 25, 2018, the Region issued the Final Permit. Permit at intro. 1-2. At the same time, the Region released a document responding to comments received on the Draft Permit. Region 9, U.S. EPA, *Response to Public Comments on RCRA Permit No. AZD982441263* (Sept. 2018) (A.R. 1599-1606) ("Resp. to Cmts."). Evoqua timely filed this appeal on October 25, 2018. On April 9, 2019, the Board held oral argument. Following extension requests sought by the parties on merits briefing, certain procedural matters, and post-argument submissions, the final brief in this appeal was filed on May 28, 2019.[10]

VI. *ANALYSIS*

A. *Evoqua Fails to Demonstrate that the Region Clearly Erred or Abused its Discretion by Issuing the Permit to Evoqua and the Tribes Jointly as Co-Permittees or by Declining to Include Permit Provisions Specifying the Respective Obligations of the Co-Permittees*

Evoqua first challenges Permit provision I.A.6, which states:

> Unless set forth specifically otherwise herein, requirements of this Permit apply to both the Tribal trust landowner and the operator of the Facility, who are referred to herein collectively as the "Permittees." However, compliance with such requirements of this Permit by either the Tribe, as beneficial landowner, or the

[10] Due to a lapse in federal appropriations, EPA was also shut down from December 29, 2018, to January 26, 2019. During this period, the Board was closed.

> operator is regarded as sufficient for both. [See 45 Federal Register (FR) 33295/col. 3, (May 19, 1980).]

Permit § I.A.6, at mod. I, 2 (brackets in original). Evoqua objects to this provision as making Evoqua and the Tribes jointly responsible for Permit compliance. Because Evoqua fails to show that the Region clearly erred or abused its discretion, the Board denies review on this issue.

In its comments on the Draft Permit, Evoqua acknowledged that the Tribes were properly named as co-Permittees, stating that it understood "that EPA's policy is to consider a landowner to be a co-permittee under RCRA." Evoqua's Cmts. at 3; *see also* Evoqua's Redline § I.A.6, at mod. I, 2 (proposing revision to Draft Permit § I.A.6 to add "[a]s the owner of the real property, *CRIT is considered a co-permittee of this Permit.*" (emphasis added)). Evoqua requested, however, that—as a matter of discretion and as a policy matter—the Region clarify that while the Tribes are the owners of real property on which the Facility is located, Evoqua is primarily responsible for compliance and the day-to-day operations of the Facility. Evoqua's Cmts. at 3. Thus, according to Evoqua, "EPA does not need to issue a permit that treats [Evoqua and the Tribes] as co-equal permit holders and that identifies in every section that the 'Permitees' are responsible for individual compliance activities." *Id.*; *see also* Evoqua's Redline § I.A.6, at mod. I, 2 (proposing revisions to Draft Permit § I.A.6 to specify that "the operational requirements of this Permit that relate to the Facility are solely the responsibility of Evoqua * * *. Consequently, while CRIT is a co-permittee, references to the Permittee in this Permit are intended to refer solely to Evoqua * * *, except where otherwise specifically provided.").

The Region did not make Evoqua's requested changes and explained in its Response to Comments document that "[n]either RCRA Section 3004 nor the regulations promulgated pursuant to RCRA's hazardous waste provisions distinguish permittees based on whether they are the owner versus the operator," and instead require that "both owners and operators of hazardous waste management units have permits." Resp. to Cmts. § I-1, at 3 (referring to 40 C.F.R. § 270.1(c)). The Region continued: "[w]hile facility owners and operators may agree between themselves which will be primarily responsible for compliance, and while compliance by one in nearly all cases constitutes compliance by both, the Region will not identify the permittees as anything other than co-equals." *Id.*

In its Petition, Evoqua argues that the Region erred in "interpret[ing] RCRA § 3004 and 40 C.F.R. § 270.1(c) as requiring [the Tribes] to be a co-permittee."

Pet. at 6. Evoqua argues in the alternative that the Region abused its discretion in treating Evoqua and the Tribes as co-equal Permittees, and in not providing that Evoqua is "the party responsible for implementing and complying" with the Permit and "solely responsible for submittal and signing" permit modifications. *Id.* at 7-8.

As to Evoqua's first argument, while Evoqua sought revisions to the language of section I.A.6, Evoqua did not argue in its comments that the Region erred in its interpretation of RCRA and its implementing regulations as requiring that the Tribes be included as a co-Permittee. To the contrary, Evoqua acknowledged in its comments (and at oral argument, Oral Argument Transcript 13-17 (Apr. 9, 2019) ("Oral Arg. Tr.")) that the Permit properly identifies the Tribes as co-Permittees. Accordingly, because the issue Evoqua raises here was reasonably ascertainable but not raised during the public comment period (and, in any event, was conceded by Evoqua), this first argument was not preserved for review by the Board. 40 C.F.R. §§ 124.13, .19(a)(4)(ii); *see In re City of Attleboro*, 14 E.A.D. 398, 405, 431 (EAB 2009).

Evoqua next argues that, as a matter of discretion and as a policy matter, the Region should have specified in the Permit that Evoqua is responsible for Permit compliance. Pet. at 7. Nothing in the Petition, however, establishes that the Region clearly erred or abused its discretion in declining to do so.

RCRA and its implementing regulations impose joint and several liability on both landowners and facility operators, and require that they both obtain permits. *See* RCRA §§ 3004, 3005, 42 U.S.C. §§ 6924, 6925; 40 C.F.R. §§ 270.1(c), .10(b); *see also In re Nat'l Cement Co.*, 5 E.A.D. 415, 426 (EAB 1994) (by requiring a landowner entering into a ninety-nine year lease with a facility operator to sign the permit "the landowner is thereby reminded that it is jointly and severally responsible for compliance with the permit and RCRA regulations"); *In re Rybond, Inc.*, 6 E.A.D. 614, 638 (EAB 1996) (rejecting landowner's assertion that it should not be held liable for RCRA violations because it was unaware the hazardous wastes were stored at the facility and holding that "RCRA is a remedial strict liability statute"). Specifying that only Evoqua is responsible for permit compliance would be contrary to the goal of ensuring that both landowners and operators meet their legal obligations under RCRA. As the Board stated in *National Cement*:

> Th[e] emphasis on the important role of the owner is grounded in the language of RCRA itself. For example, section 3005 of RCRA requires the Administrator to promulgate regulations requiring

> *landowners* as well as operators to obtain permits. In requiring owners as well as operators to obtain permits, Congress obviously made a policy judgment that in situations where the owner of the facility was different from the operator, the operator could not always be counted on to ensure compliance with the permit and RCRA regulations. Given the large potential costs of ensuring compliance with RCRA, as well as the financial consequences of non-compliance, Congress wanted owners to be involved in fulfilling that responsibility.

5 E.A.D. at 432-33 (footnotes omitted).

Evoqua contends that the Region should nevertheless have specified that Evoqua is responsible for Permit compliance, given the Tribe's "unique role as a tribal government and sovereign entity." Pet. at 7. Evoqua, however, provides no authority to support treating a Tribal government or other sovereign entity differently from other RCRA permittees,[11] and its bare assertion is insufficient to counter the reasons discussed above for why owners and operators are treated as equally responsible for Permit compliance under RCRA.[12]

Instead, issues regarding the Permittees' respective Permit obligations are ones the Permittees can and should resolve between themselves. As stated in the preamble to the consolidated permit regulations governing, among other things, the hazardous waste management program under RCRA:

> To ensure that both the owner and the operator understand their joint responsibility, EPA is requiring both the owner and the operator to sign the permit application. In adopting this approach, however, EPA has no intention to require both owner and operator to take all or even most compliance actions in tandem. EPA will

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[11] To the contrary, we note that RCRA defines "person" as including a municipality and defines "municipality" as including "an Indian Tribe or authorized tribal organization." RCRA § 1004(13), (15), 42 U.S.C. § 6903(13), (15); *see also* 40 C.F.R. § 270.2 (defining "person" as including a municipality).

[12] Although the Tribes' counsel at oral argument stated that "further clarity in the permit as to who has primary responsibility could help EPA assess [liability] if something bad were to happen," the Tribes did not petition for review of the Permit and "are willing to live with" the Permit "as drafted." *See* Oral Arg. Tr. at 104-05.

> regard compliance by *either* owner or operator with any given obligation under the permit as sufficient for both of them. EPA anticipates that in most cases the operator will take the lead role in complying with all but the few conditions that only the owner can satisfy. The owner is free to make arrangements with the operator by contract or otherwise to assure itself that the operator will take most actions necessary for compliance activities beyond that. Nonetheless, EPA considers both parties responsible for compliance with the regulations.

45 Fed. Reg. 33,290, 33,295 (May 19, 1980); *see also Nat'l Cement*, 5 E.A.D. at 428-31 (owners and operators may enter into separate contractual agreements and should structure their relationship in a manner designed to ensure compliance).

In sum, the Board finds that the Region did not clearly err or abuse its discretion in issuing the Permit jointly to Evoqua and the Tribes as co-Permittees or in declining to specify that Evoqua is responsible for Permit compliance.[13] The Board therefore denies review on this issue.

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[13] Evoqua's Petition also asserts that including the Tribes as co-Permittees will require the Tribes to "undertake the onerous task of reviewing and signing every application [for a permit modification]." Pet. at 7. In its post-argument submission, however, the Region advised the Board and the parties that Permit provision I.A.6 allows Evoqua to submit a modification request without the Tribes' signature (and vice versa). *See* US Environmental Protection Agency Region 9's Post Hearing Brief Regarding the Environmental Appeals Board's Questions 2 (Apr. 16, 2019). The Board considers the Region's interpretation of this provision as controlling, resolving Evoqua's concern in this regard. *See In re Gen. Elec. Co.*, 17 E.A.D. 434, 553-54 (EAB 2018) (deeming the Region's representations concerning its interpretation of permit language to be binding (citing *In re Amoco Oil Co.*, 4 E.A.D. 954, 959-60 (EAB 1993))). In addition, following oral argument, Evoqua and the Tribes reached an agreement on a protocol for permit modification submittals and have submitted a Class 1 permit modification request to the Region to reflect this protocol. *See* Evoqua Water Technologies LLC's Post-Hearing Brief as to Issue 1, at 1 (May 28, 2019); The Colorado River Indian Tribe's Response to Order for Further Briefing Following Oral Argument 1 (May 28, 2019).

B. *Evoqua Fails to Demonstrate that the Region Clearly Erred or Abused its Discretion by Including Certain Permit Requirements Derived from the MACT EEE Requirements*

Evoqua contends that the Region clearly erred or abused its discretion by including in the Permit nine provisions that Evoqua identifies as having been impermissibly derived from the MACT EEE requirements at 40 C.F.R. part 63, subpart EEE.[14] Pet. at 8-14. As noted *supra* Part IV, the Facility is regulated as a "miscellaneous unit," 40 C.F.R. § 264.601, and permits for miscellaneous units must "contain such terms and provisions as necessary to protect human health and the environment" and MACT EEE requirements "that are appropriate for the miscellaneous unit being permitted." 40 C.F.R. § 264.601. The nine provisions that Evoqua challenges on this ground are summarized briefly as follows:

> **II.M.1.b and II.M.1.c (Recordkeeping and Reporting)** – Require maintaining certain monitoring and inspection data, compliance records, and operating and maintenance manuals in an Operating Record;
>
> **V.C.1.b and Table V-1 (General Operating Conditions)** – Prohibit treating or feeding spent activated carbon in concentrations that would cause exceedances of permissible emission limits or other operating parameter limits;
>
> **V.C.4.a and Table V-3 (Regulatory Compliance Instrumentation)** – Require operating and calibrating the carbon regeneration unit in accordance with specified parameters, frequencies, and procedures;
>
> **V.C.5 (Automated Waste Feed Cutoff Requirements)** – Requires an Automated Waste Feed Cutoff system that will stop feed to the unit if a specified condition occurs;
>
> **V. E. (Fugitive Emission Controls)** – Requires maintaining the combustion chamber as a sealed system to prevent fugitive emissions; and

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[14] Evoqua also challenges on this same ground Permit provision V.I (requiring periodic Performance Demonstration Testing and an update to the Human Health and Ecological Risk Assessment). Pet. at 8, 17-24. We address Evoqua's challenges to Permit provision V.I separately at *infra* Parts VI.C & VI.D.

V.G.2 (Recordkeeping and Reporting) – Requires a log of the date and time of all Automated Waste Feed Cutoff events and failures of the Automated Waste Feed Cutoff system.

Evoqua asserts that the challenged provisions are "not appropriate for the Facility" under 40 C.F.R. § 264.601, maintaining that they are "enormously complex, costly, and time-consuming" and that "it would be an absurd result" to impose them on the Facility. Pet. at 8, 10, 14. Evoqua further contends that under 40 C.F.R. § 264.601, "EPA must make a site specific, fact specific showing that the provisions EPA has crafted for the site are necessary to protect human health and the environment." *Id.* at 10. In its Petition, Evoqua advises that it "does not contest * * * either (a) the specific air emission limits established in MACT EEE, or (b) the requirements of the final permit that address the maintenance and use of a startup, shutdown, and malfunction plan, to the extent those provisions are derived from MACT EEE." *Id.*; *see also* Oral Arg. Tr. at 29-30. Evoqua does challenge, however, these nine Permit provisions, arguing that it "never agreed to comply with the general provisions of MACT EEE."[15] Pet. at 10.

Because Evoqua fails to demonstrate that the Region clearly erred or abused its discretion in including these provisions in the Permit, the Board denies review on this issue.

1. *Evoqua Has Not Preserved for Review the MACT EEE Challenge to Certain Permit Provisions*

A petitioner must demonstrate that the issue being raised on appeal was preserved for Board review by being "raised during the public comment period." 40 C.F.R. §§ 124.13, .19(a)(4)(ii); *see In re Gen. Elec. Co.*, 17 E.A.D. 434, 579 (EAB 2018). Here, the record shows that Evoqua failed to preserve its challenges

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[15] At oral argument, counsel for Evoqua maintained that "appropriate" and "necessary" mean the same thing in 40 C.F.R. § 264.601 and that "appropriate should be interpreted to refer back to necessary" and thus the term "appropriate" cannot serve as an independent basis for imposing MACT EEE requirements. Oral Arg. Tr. at 22-23. Because Evoqua did not raise this point during the comment period, it is not preserved for review before the Board. *See* 40 C.F.R. §§ 124.13, .19(a)(4)(ii). In any event, in addressing application of MACT EEE requirements in the Response to Comments document, the Region found that they were both "appropriate" and "necessary," and the Board finds that Evoqua has failed to demonstrate clear error or an abuse of discretion by the Region with respect to its findings in this regard.

to Permit provisions II.M.1.c, V.C.1.b, V.C.4.a, Table V-3, and V.G.2 because the MACT EEE argument Evoqua raises in its Petition with respect to these provisions was not raised during the public comment period.[16]

With respect to Permit provision II.M.1.c (Recordkeeping and Reporting Requirements), Evoqua's comments on the Draft Permit proposed making minor changes to the list of operating and maintenance manuals included in Table D-2 (attached to the Permit in Appendix XXI) and changing "Permitees" to "Permitee." *See* Evoqua's Cmts. at 21-22; Evoqua's Redline § II.M.1.c, at mod. II, 14. But Evoqua did not otherwise propose revising or deleting the Permit provision itself, nor did Evoqua object to the provision specifically as an inappropriate application of the MACT EEE requirements. *See* Evoqua's Cmts. at 21-22.

With respect to Permit provision V.C.1.b (General Operating Conditions),[17] Evoqua commented on perceived redundancies in the provision. *See id.* at 35. But Evoqua did not propose deleting the provision as a whole or otherwise object to it specifically as an inappropriate application of the MACT EEE requirements.[18] *See id.*; Evoqua's Redline § V.C.1, at mod. V, 3.

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[16] In its Petition, Evoqua states that it submitted numerous comments during the comment period "demonstrating why [the] MACT EEE standards are not appropriate for the Facility." Pet. at 8. The Petition cites to various places in the comments where Evoqua raised general arguments about including Permit provisions derived from MACT EEE requirements, *see* Pet. at 8 n.20, but none of the comments cited refers specifically to Permit provisions II.M.1.c, V.C.1.b, V.C.4.a, Table V-3, or V.G.2.

[17] Provision V.C.1.b was numbered V.C.1.ii in the Draft Permit. Resp. to Cmts. § V-9, at 64.

[18] To address the comments Evoqua did submit, Evoqua proposed changes to the Draft Permit language as follows, with its proposed new language underlined and its proposed deletions shown in strikeout mode:

> Permittees are not authorized to treat or feed hazardous waste ~~spent activated carbon~~ that contains hazardous constituents in concentrations that would cause exceedances of ~~permissible~~ emission limits shown in Table V-1; provided however, that the emission standards and operating requirements set forth in this Module V shall not apply during periods of startup, shutdown and malfunction, and when hazardous waste is not in the reactivation furnace (RF-2). ~~In addition, for each of the parameters listed in Table V-1, the Permittees shall ensure that the~~

With respect to Permit provision V.C.4.a (Regulatory Compliance Instrumentation), other than proposing to change "Permittees" to "Permittee," Evoqua did not propose revising or deleting the Permit provision itself, or otherwise object to it specifically as an inappropriate application of MACT EEE requirements.[19] *See* Evoqua's Cmts. at 39; Evoqua's Redline § V.C.4, at mod. V, 9.[20]

With respect to Table V-3 (Regulatory Compliance Instrumentation), Evoqua's only comments concerned the "weigh belt." *See* Evoqua's Cmts. at 39; Evoqua's Redline at mod. V, 9-11 tbl.V-3. The Region revised the Permit language to address those comments. *See* Final Permit Redline at mod. V, 16, 18 tbl.V-3.

Lastly, with respect to Permit provision V.G.2 (Recordkeeping and Reporting), Evoqua objected generally to provision V.G as inappropriately applying certain MACT EEE requirements, but proposed specific changes in connection with that objection only to V.G.1 and .3 and proposed deletion of V.G.4

~~permissible emission limit shown in Table V-1 is not exceeded.~~ [See 40 C.F.R. § 63.1206(b) and 63.1209.]

Evoqua's Redline § V.C.1.ii, at mod. V, 3. In response, the Region adopted some, but not all, of the language changes proposed by Evoqua. *Compare* Evoqua's Redline § V.C.1.ii, at mod. V, 3 (showing Evoqua's proposed changes to Draft Permit § V.C.1.ii) *with* Final Permit Redline § V.C.1.b, at mod. V, 3-4 (showing the Region's changes from Draft Permit § V.C.1.ii to Final Permit § V.C.1.b). The Region further explained its decision to incorporate only some of the changes Evoqua requested. *See* Resp. to Cmts. §§ V-9, at 64; V-10 at 64-65. As Evoqua does not address this response, the Board would deny the challenge in any event for failure to show the Region clearly erred or abused its discretion with respect to Permit provision V.C.1.b.

[19] In the Draft Permit, provision V.C.4.a was numbered V.C.4.i. Resp. to Cmts. § V-19, at 92.

[20] In one sentence in its objections to the emission limits in Table V-1, Evoqua states generally that the "insertion of the MACT EEE Rule emission limits and operating conditions into the Permit would violate EPA's statutory limitations under RCRA and the proposed provisions in Module V exceed EPA's authority." Evoqua's Cmts. at 37. While this statement standing alone might appear to encompass all of the provisions of Module V—including V.C.1.b and V.C.4.a—Evoqua qualified that statement by then referring to Evoqua's "proposed changes" to Module V in its redline of the Draft Permit, which did not include proposed changes to V.C.1.b or V.C.4.a on that basis.

and .5. *See* Evoqua's Cmts. at 41-42 (referring to provision V.G. generally); Evoqua's Redline §§ V.G.1-.5, at mod. V, 19-20. As to Permit provision V.G.2, Evoqua proposed only to change "Permittees" to "Permittee." *See* Evoqua's Redline § V.G.2, at mod. V, 19.

Having failed to object in its comments to these specific provisions as an inappropriate application of MACT EEE requirements, Evoqua did not preserve its MACT EEE challenge to these provisions for review by the Board. *See* 40 C.F.R. § 124.19(a)(4)(ii). The Board therefore denies review on Evoqua's MACT EEE challenge to these provisions

2. *Evoqua Fails to Confront the Region's Response to Comments on Certain Permit Provisions*

Where a petition raises an issue that the permit issuer addressed in its response to comments document, a petitioner must "explain why the [permit issuer's] response to the comment was clearly erroneous or otherwise warrants review." 40 C.F.R. § 124.19(a)(4)(ii); *see Gen. Elec.*, 17 E.A.D. at 549-50; *In re Penneco Envtl. Sols.*, 17 E.A.D. 604, 612 (EAB 2018). Here, Evoqua fails to confront the Region's responses to Evoqua's comments challenging Permit provisions II.M.1.b, V.C.5 and V.E.

Permit provision II.M.1.b requires Permittees to record and maintain "all monitoring, inspection, and other data compiled or reported" in accordance with the Permit. Permit § II.M.1.b, at mod. II, 12. In addition, Permittees must maintain a log "for use in determining the exemptions described in [compliance plans]" and maintain "test burn reports, data, calculations, and other RF 2-related records." *Id.* In its comments, Evoqua proposed deleting the provision in its entirety, arguing, among other things, that it is inappropriate to impose this MACT EEE requirement on the Facility. Evoqua's Cmts. at 20-21.

Although the Region revised the provision in the Final Permit to address, in part, Evoqua's concerns, the Region did not delete the provision as Evoqua had requested. *See* Final Permit Redline § II.M.1.b, at mod. II, 15-16. The Region explained that its intent in including the requirements in Permit provision II.M.1.b "was not to add additional obligations beyond what is required in accordance with 40 CFR § 264.73, except to the extent that records pertaining to RF-2 * * * are not specifically listed in Part 264." Resp. to Cmts. § II-16, at 37.

In its Petition, Evoqua fails to address the Region's specific response to comment on provision II.M.1.b—that the provision is based primarily on 40 C.F.R.

§ 264.73 and not MACT EEE requirements at 40 C.F.R. pt. 63—much less explain why the Region's response is clearly erroneous or otherwise warrants review. *See* 40 C.F.R. § 124.19(a)(4)(ii).

Section V.C.5 of the Permit establishes requirements for the Facility's Automated Waste Feed Cutoff system. The Region revised two provisions within this section in response to Evoqua's comment that the "waste feed cutoff should occur in accordance with the provisions of the Permit, not in accordance with the MACT EEE Rule, which does not apply to the Facility." Evoqua's Cmts. at 40; *see* Resp. to Cmts. § V-20, at 93. *First*, the Region revised Permit provision V.C.5.a (numbered as V.C.5.i in the Draft Permit) to require Permittees to "operate RF-2 with an automat[ed] waste feed cutoff * * * system that immediately and automatically cuts off the feed to RF-2 *in accordance with this Permit*." Permit § V.C.5.a, at mod. V, 14 (emphasis added). In the Draft Permit, that provision would have required the system to operate "in accordance with 40 CFR § 63.1206(c)(3)." *See* Final Permit Redline § V.C.5.a, at mod. V, 19. *Second*, the Region revised Permit provision V.C.5.e (numbered V.C.5.v in the Draft Permit) to require Permittees to "comply with the [Automated Waste Feed Cutoff] requirements of the [Startup, Shutdown, and Malfunction Plan] and *this Permit*" in the event of a malfunction of the system. Permit § V.C.5.e, at mod. V, 15 (emphasis added). Again, in the Draft Permit, that provision would have required compliance with certain parts of 40 C.F.R. § 63.1206(c)(3) rather than with "the Permit." *See* Final Permit Redline § V.C.5.e, at mod. V, 20. With respect to both changes, the Region stated that it "agrees with the comment to reference the Permit instead of the MACT EEE regulations for implementation of the [Automated Waste Feed Cutoff] procedures and has made revisions accordingly." Resp. to Cmts. § V-20, at 93.

The Region also revised Permit provision V.C.5.e.iii (numbered V.C.5.v.c in the Draft Permit) in response to Evoqua's comments. Final Permit Redline § V.C.5.e.iii, at mod. V, 21; *see* Evoqua's Cmts. at 39. That provision specifies the steps Permittees must take in the event the Facility exceeds an emission standard or operating requirement ten times during any sixty-day period.[21] *See* Permit

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[21] Within forty-five days of the tenth exceedance, Permittees must investigate and evaluate each exceedance to minimize the frequency, duration, and severity of such exceedances in the future. Permit § V.C.5.e.iii(1), at mod. V, 16. Within sixty days, Permittees must submit a report to the Region summarizing the investigation and

§ V.C.5.e.iii, at mod. V, 15-16. As originally drafted, the provision included two references to the MACT EEE requirements. *First*, Permittees would have had to "comply with the requirements of 40 C.F.R. § 63.1206(e)(2)(v)(A)(3)" by taking the action specified in the provision. *See* Final Permit Redline § V.C.5.e.iii, mod. V, 21-22. *Second*, Permittees would have had to submit a report that "meets the requirements of 40 C.F.R. § 63.10(e)(3)." *Id.* In its comments on the Draft Permit, Evoqua stated that the Permit should not include enforcement provisions taken from the MACT EEE requirements and suggested deleting the provision in its entirety. *See* Evoqua's Cmts. at 39; Evoqua's Redline § V.C.5.v.c, at mod. V, 14. In response, the Region revised the provision to delete both references to the MACT EEE requirements but otherwise retained the provision's substantive requirements. *See* Resp. to Cmts. § V-23, at 93-94; Final Permit Redline § V.C.5.e.iii, at mod. V, 21-22. The Region explained its reasoning:

> [T]he occurrence of 10 such events in any 60-day period would signal a serious problem with the operation of RF-2. The Region maintains that the serious nature of the occurrence of 10 exceedances within a 60-day window warrants investigation and evaluation of the causes of the exceedances and potential remedies. Thus, while the substance of the draft Permit condition V.C.5.v.c is preserved, unnecessary references to the MACT EEE regulations have been removed from Permit condition V.C.5.e.iii.

Resp. to Cmts. § V-23, at 93-94.

In its Petition, Evoqua continues to object to Permit provision V.C.5 on the grounds that it "impermissibly" subjects RF-2 to the MACT EEE requirements.[22] Pet. at 8. However, Evoqua does not explain why the Region's responses to Evoqua's comments presenting that argument were clearly erroneous or otherwise warrant review. *See* 40 C.F.R. § 124.19(a)(4)(ii). In addition, the Region appears to have largely addressed Evoqua's concerns about Permit provisions V.C.5.a, V.C.5.e, and V.C.5.e.iii by deleting embedded references to the MACT EEE

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evaluation, and recommending any changes to the Startup, Shutdown, and Malfunction Plan. *Id.* § V.C.5.e.iii(2), at mod. V, 16.

[22] Evoqua also argues that the Automated Waste Feed Cutoff system provisions are not supported by the record because compliance with those provisions is technically infeasible. *See* Pet. at 15-16. We address that argument separately at *infra* Part VI.E.

requirements, leaving the Board unable to discern what remains of Evoqua's challenge to Permit provision V.C.5.

Permit provision V.E requires Permittees to "control fugitive emissions from the combustion zone by maintaining the combustion chamber as a sealed system in accordance with 40 CFR § 63.1206(c)(5), and Permit Attachment Section D."[23] Permit § V.E, at mod. V, 18. Evoqua commented that this requirement exceeds the Region's authority and is not "supported in the record as a permissible use of agency discretion." Evoqua's Cmts. at 41.

In its response to Evoqua's comment, the Region explained, "[t]he basis for controlling fugitive emissions from RF-2 is that such a requirement is 'necessitated by the danger of escape of fugitive emissions—including hazardous waste constituents—that could threaten human health or the environment'" and that "[w]here feasible this should be through total sealing of the combustion zone." Resp. to Cmts. § V-32, at 98 (quoting 46 Fed. Reg. 7666 (Jan. 21, 1981)). The Region further explained that "operating parameters on combustion unit fugitive emissions * * * is necessary to ensure that these emissions do not leak from the combustion device, air pollution control devices, or any ducting connecting them." *Id.* (citing 61 Fed. Reg. 17,358 (Apr. 19, 1996)). The Region pointed out that the "Process Information" document that Evoqua submitted as part of its permit application—and that is attached to the Final Permit—states that the reactivation furnace is already designed to "constitute[] a complete seal such that fugitive emissions from the unit are not possible" in compliance with the MACT EEE requirements at 40 C.F.R. § 63.1206(c)(5). *Id.*; *see* Permit attach. D § D.5.6.3, at D-25 ("By design (no open feed systems), the combustion chamber constitutes a sealed system. There are no locations for combustion system leaks to occur."). The Region explained that it nevertheless retained the fugitive emissions requirement in the Final Permit "so that [the requirement] can be properly enforced if there are any leaks from the combustion zone for any reason, including any currently unforeseen reason." Resp. to Cmts. § V-32, at 98. In its Petition, Evoqua again does not address the Region's specific response to Evoqua's comment on

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[23] The Draft Permit contained two provisions concerning fugitive emissions, V.E.1 and V.E.2. In response to comments by Evoqua, the Region deleted provision V.E.2 from the Final Permit and renumbered the remaining provision as simply "V.E." *See* Final Permit Redline § V.E, at mod. V, 26.

Permit provision V.E. or explain why it is clearly erroneous or otherwise warrants review.

Having failed to address the Region's responses to its comments on the Permit provisions discussed above, Evoqua has failed to demonstrate that the Region clearly erred or abused its discretion. Therefore, the Board denies review on Evoqua's MACT EEE challenge to these provisions.

3. *Evoqua Fails to Demonstrate that the Region Clearly Erred or Abused its Discretion by Including Table V-1 in the Permit*

We turn now to Evoqua's remaining challenge—its objection to Table V-1, which contains emission limits and other operating parameter limits for RF-2. Permit at mod. V, 4-6 tbl.V-1.

Evoqua objected to the emission limits in Table V-1 during the comment period, arguing that "EPA may not impose MACT EEE Rule emission limits on this Facility under its RCRA authority" and that "there is no basis in the permitting record for the imposition of emission limits from the MACT EEE Rule." Evoqua's Cmts. at 35. In support of this comment, Evoqua contended that the MACT EEE emission limits for incinerators[24] should not be imposed on Evoqua's Facility because (1) EPA "previously determined [in the preamble to the 1991 Boiler and Industrial Furnace Rule[25]] that it would not make 'technical sense' to apply hazardous waste incinerator requirements to carbon reactivation facilities"; (2) "the emission limits imposed by hazardous waste incinerator standards may not be achievable or warranted for these facilities given the relatively low levels of toxics adsorbed onto spent carbon"; (3) "the Facility has been subjected to a comprehensive [Performance Demonstration Test] to evaluate emissions and a [Human Health and Ecological Risk Assessment] to assess the risks posed by those

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[24] The MACT EEE requirements apply to all "hazardous waste combustors," including incinerators. 40 C.F.R. § 63.1200. Evoqua and the Region, however, appear to use the terms "incinerator" and "hazardous waste combustor" interchangeably. For clarity and consistency, the Board will also use the term "incinerator" to refer to a "hazardous waste combustor" in this decision.

[25] As noted *supra* Part IV, the 1991 Boiler and Industrial Furnace Rule, which regulates air emissions from burning hazardous waste in boilers and industrial furnaces, clarifies that carbon regeneration units are regulated as "thermal treatment units" and not as "incinerators." 56 Fed. Reg. 7134, 7200. (Feb. 21, 1991).

emissions"; and (4) "EPA has concluded that the [F]acility poses insignificant risk on the basis of those evaluations."[26] *Id.* at 35-37.

Evoqua further commented that the Region did not need to impose the MACT EEE emission limits in Table V-1 because the feed rate controls and limits on the emissions of carbon monoxide, nitrogen oxides, and sulfur oxides (which are not based on MACT EEE) along with appropriate monitoring and other operational controls are sufficient to "ensure continuous operation within the parameters that were established * * * for the safe operation with insignificant risk." *Id.* at 37.

The Region addressed Evoqua's comments on Table V-1 and explained its decision to include in Table V-1 emission limits and other operating parameter limits derived from the MACT EEE requirements. *See* Resp. to Cmts. §§ V-11, at 66-68; V-12, at 68-79. We highlight below the key points made by the Region.

First, the Region stated that it possesses the authority to impose Permit conditions that are "necessary to protect human health and the environment" as well as Permit conditions derived from the MACT EEE requirements that are "appropriate" for the Facility:

> The regulations for Miscellaneous Units specifically authorize the Region to incorporate terms and provisions in permits for Miscellaneous Units "as necessary to protect human health and the environment." 40 CFR. § 264.601. These regulations specifically identify the requirements of 40 CFR * * * Part 63 Subpart EEE * * * that should be considered as potentially appropriate for the miscellaneous unit being permitted.

Id. § V-11, at 66.

Second, the Region explained that, in writing the Permit, it had relied on Evoqua's representation that the MACT EEE requirements are appropriate for the Facility and had thus incorporated into the Permit "the standards that [Evoqua's] application had envisioned would apply." *Id.* § V-11, at 66-67. Specifically, the Region relied on the following representation, which Evoqua's predecessor-in-

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[26] Evoqua also objected separately to the particulate matter and dioxin limits in Table V-1 by incorporating the comments and objections stated for Table V-1 "in their entirety." Evoqua's Cmts. at 37-38.

interest made, and which Evoqua subsequently adopted by submitting the revised permit application in 2016:[27]

> Specific to the carbon reactivation furnace and associated equipment, [the operator] *believes that it is appropriate to regulate emissions in accordance with the provisions of 40 CFR [Part] 63 Subpart EEE* applicable to existing hazardous waste incinerators (although this unit is not an incinerator).

Id. § V-11, at 67 (emphasis added) (quoting Permit attach. D § D.5, at D-12).

Third, the Region pointed out that Evoqua had represented in its permit application that the Facility is already meeting the MACT EEE standards, both those that were in effect at the time of the Performance Demonstration Testing in 2006 as well as the more stringent replacement standards that were established later.[28] *Id.* §§ V-10, at 65; V-11, at 67. The Region explained that the interim standards "were used as guidance at the time of the [P]erformance [D]emonstration [T]est * * * to develop proposed Permit conditions, which were included in the Permit application as appropriate to RF-2." *Id.* § V-10, at 65. And the Region further explained that "[a] review of the [Performance Demonstration Test] results for RF-2 indicated that, in addition to the MACT EEE standards that were in place at the time of the trial burn, RF-2 was also operating within the more stringent

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[27] The representation is contained in a document entitled "Process Information," which Evoqua submitted to the Region as part of its revised application for a permit in 2016 and which the Region included in the Permit as attachment D. *See* Evoqua Water Techs. LLC, *RCRA Part B Permit Application, Revision 3*, § D.5, at D-12 (Apr. 2016) (A.R. 1321). Although the document appears to have been originally prepared by Evoqua's predecessor-in-interest in April 2012, *id.* at D-i, Evoqua subsequently certified that all of the information in the permit application, including the "Process Information" document, was "true, accurate and complete," Permit attach. L § L.1, at L-1 (Sept. 2018) (A.R. 1621) (containing Evoqua Water Techs. LLC, *Certification* (rev.3 Apr. 2016)). Thus, Evoqua adopted the representation as its own.

[28] The 2006 Performance Demonstration Test used the interim MACT EEE standards set forth at 40 C.F.R. § 63.1203. Permit attach. D § D.5.5, at D-20. The standards were revised after the testing, but before Evoqua submitted its permit application, and the new standards are listed at 40 C.F.R. § 63.1219. *Id.* Table V-1 references both sets of standards. Resp. to Cmts. § V-10, at 65.

parameters established under the Replacement Standards at 40 C.F.R. § 63.1219." *Id.* § V-11, at 67; *see also* Permit attach. D § D.5.5, at D-20.

Fourth, the Region explained that the MACT EEE requirements in Table V-1 are appropriate here because the Facility, like hazardous waste incinerators, uses thermal treatment with installed air pollution control equipment. Specifically, the Region stated:

> This thermal treatment, with the associated air pollution control equipment, destroys, controls and reduces the toxic organic compounds that desorb from the carbon to less harmful or innocuous byproducts. For this reason, the Region deems it necessary to regulate this unit using certain relevant MACT EEE standards. The inclusion of these MACT EEE standards in the Permit ensures that volatile organic compounds are controlled before emissions reach the stack. The inclusion of these MACT EEE standards in the Permit ensures that the destruction of organic compounds is sufficiently completed before emissions reach the stack. It also ensures that the emissions levels from the stack (*e.g.*, unburned organics that may be present at very low levels, byproducts of organic compound decomposition, low-volatile and semi-volatile metals) do not pose an unacceptable risk to human health or the environment, as demonstrated by the risk assessment.

Resp. to Cmts. § V-11, at 67.

Fifth, the Region rejected Evoqua's contention that the preamble to the 1991 Boiler and Industrial Furnace Rule precludes the Region from subjecting the Facility to MACT EEE requirements. *Id.* § V-12, at 68-69. As the Region explained, in the 1991 Boiler and Industrial Furnace Rule, EPA recognized the similarities in the risks posed by incinerators and carbon regeneration units "by classifying [the latter] as thermal treatment units" because of its concern that "emissions from the [carbon] regeneration process can pose a serious hazard to public health if not properly controlled." *Id.* § V-12, at 69 (quoting preamble to 1991 Boiler and Industrial Furnace Rule, 56 C.F.R. at 7200). In support of this explanation, the Region further noted EPA's long-held view that risks posed by thermal treatment units are "similar to those posed by hazardous waste incinerators." *Id.* § V-12, at 69 (quoting Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities, 45 Fed. Reg. 33,153, 33,161 (May 19, 1980)). The Region acknowledged that differences exist between

incinerators and carbon regeneration units but explained that the similarities in terms of risks posed—as recognized in the preamble to the 1991 Boiler and Industrial Furnace Rule—are sufficient to "justify the imposition of similar standards on the units." *Id.* § V-12, at 69.

And *sixth*, the Region provided references to EPA databases that characterize the negative impacts to human health that may result from acute and long-term exposure to the air pollutants for which Table V-1 imposes emission limits, specifically hydrogen chloride and chlorine gas, low-volatile and semi-volatile metals, mercury, carbon monoxide, total hydrocarbons, dioxins/furans, particulate matter, and sulfur and nitrogen oxides. *Id.* § V-12, at 72-78.

The Region explained that it made a "concerted effort" to include in the Permit only those obligations that are "necessary for the protection of human health and the environment" given the Region's recognition, (1) that "the Facility provides an environmentally beneficial service in terms of regenerating spent carbon"; and (2) that "incinerators and carbon regeneration units are different in several ways." *Id.* § V-12, at 68-69. The Region stated that it "has no interest in unnecessarily burdening or putting the Facility at a financial disadvantage with respect to its competitors." *Id.* § V-12, at 68. For example, the Region deleted a provision from the Draft Permit that would have required the Permittees to resubmit revised personnel training materials, noting that the requirement "is not justified considering the expertise and knowledge of the operator when it comes to operating RF-2, which the Region acknowledges is *not* an incinerator." *Id.* § I-39, at 27; *see* Final Permit Redline § I.K, at mod. I, 29-30 (showing deletion of Draft Permit § I.K.13). The Region also deleted as duplicative a provision in the Draft Permit that would have required Permittees to submit certain notifications regarding standards derived from the MACT EEE requirements. Resp. to Cmts. § I-27, at 12; *see* Final Permit Redline § I.G.4, at mod. I, 15-16.

The Board denies review on Evoqua's claim that Table V-1 inappropriately imposes MACT EEE requirements on the Facility. As explained above, in its Petition, and at oral argument, Evoqua advised the Board that it is not seeking review on the Permit's emission limits, which are contained in Table V-1. *See* Pet. at 10; Oral Arg. Tr. at 25-26.[29] To the extent Evoqua is seeking review on

[29] In objecting to the MACT EEE emission limits in its comments on the Draft Permit, Evoqua did not mention or acknowledge—as it does now on appeal—that it agreed at a minimum that the MACT EEE emission limits are appropriate for this Facility.

other aspects of Table V-1—*e.g.*, the feed rate or destruction efficiency—Evoqua, in its comments, did not object to those aspects of Table V-1, but rather focused its objections solely on Table V-1's emission limits. In fact, as noted above, Evoqua cited in its comments the inclusion of feed rate controls as a reason for not imposing the MACT EEE emission limits, Evoqua's Cmts. at 37, and acknowledged in its Petition that the Facility can achieve the required 99% destruction and removal efficiency, Pet. at 14. Having not objected in its comments to other aspects of Table V-1, Evoqua failed to preserve any challenge to Table V-1 for Board review.

In any event, Evoqua has failed to show the Region clearly erred or abused its discretion with respect to the requirements included in Table V-1. Evoqua's Petition merely reiterates the comments on the Table V-1 emission limits that Evoqua submitted during the public comment period: (1) that EPA previously determined MACT EEE requirements do not make technical sense for this Facility; (2) that the MACT EEE standards may not be achievable or warranted for this Facility; (3) that Evoqua has already conducted a comprehensive Performance Demonstration and performed a risk assessment for the Facility; and (4) that the Region has concluded that the Facility poses an insignificant risk. *Compare* Pet. at 14 *with* Evoqua's Cmts. at 36. As the Board has made clear, "[s]imply repeating concerns before the Board that have been previously presented to and answered by the permit issuer does not satisfy Petitioner's obligation to confront the permit issuer's responses and explain why the responses were clearly erroneous or otherwise warrant Board review." *In re Sammy-Mar, LLC*, 17 E.A.D. 88, 96 (EAB 2016).

Moreover, by limiting, in large part, the arguments in its Petition to the arguments it presented previously in its comments, Evoqua fails to confront several specific reasons the Region gave in its Response to Comments document for imposing MACT EEE requirements on this Facility. Evoqua thus fails to meet its burden of demonstrating that the Region clearly erred or abused its discretion in establishing the emission limits and other operating parameter limits set forth in Table V-1. *First*, Evoqua does not address in its Petition the Region's reliance on the representation in Evoqua's 2016 application that "[the operator] believes that it is appropriate to regulate emissions in accordance with the provisions of 40 CFR [Part] 63 Subpart EEE," nor does Evoqua in any way seek to explain why the Region's reliance on this representation is clearly erroneous or an abuse of discretion. Resp. to Cmts. § V-11, at 67.

Second, Evoqua does not address in its Petition the Region's response to Evoqua's assertion that EPA has determined that MACT EEE requirements do not

make technical sense—and may not be achievable or warranted—for this type of facility. Specifically, Evoqua does not confront the Region's point that the Facility has demonstrated it can meet the MACT EEE requirements. *Id.* §§ V-10, at 65; V-11, at 67. Further, Evoqua does not confront the Region's response that the 1991 Boiler and Industrial Furnace Rule supports, rather than precludes, application of the MACT EEE requirements to this Facility, given EPA's determination in the preamble that carbon regeneration facilities pose risks to human health and the environment similar to those posed by incinerators. *Id.* § V-12, at 69.

Third, Evoqua does not address in its Petition the Region's detailed discussion in the Response to Comments document of the negative health effects from exposure to the pollutants addressed in Table V-1, in support of the Region's conclusion that the "inclusion of these MACT EEE standards * * * ensures that the emission levels * * * do not pose an unacceptable risk to human health or the environment." *Id.* §§ V-11, at 67; V-12, at 72-79.

As the foregoing demonstrates, Evoqua's arguments on appeal largely mirror its comments on the Draft Permit and merely present a different opinion as to the appropriate terms to be included in its Permit. "[C]lear error or a reviewable exercise of discretion is not established simply because the petitioner presents a difference of opinion" on technical matters such as these. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). While Evoqua may believe that less stringent controls would still be protective, that disagreement does not overcome the deference the Board typically affords the Region on technical issues where, as here, the Region has documented its rationale and included supporting evidence in the record.

In addition, as discussed above, the Region did not just import MACT EEE requirements into the Permit wholesale but, instead, tailored these requirements in light of the specific circumstances of the Facility. Where the Region did not make the changes proposed by Evoqua, it set forth in the Response to Comments document its reasons for rejecting the proposed changes. *See* EPA Region 9's Response to Evoqua Water Technologies, LLC's Petition for Review 18 & n.34 (Dec. 3, 2018) ("Region's Resp.") (citing responses to comments); *see also* Resp. to Cmts. § V-12, at 68 ("[T]he Region has made a concerted effort to ensure that the Permit only imposes obligations on the Permittees that are necessary for the protection of human health and the environment."). Taken together, the explanations provided by the Region in the Response to Comments document and the revisions it made between the Draft Permit and the Final Permit, in part based

on Evoqua's comments, are sufficient to demonstrate considered judgment by the Region.

In light of the foregoing, the Board concludes that Evoqua has not demonstrated that the Region clearly erred or abused its discretion in imposing the requirements set forth in Table V-1. The Board therefore denies review on this issue.

C. *Evoqua Fails to Demonstrate that the Region Clearly Erred or Abused its Discretion by Requiring Additional Performance Demonstration Testing*

We turn next to Evoqua's challenge to Permit provisions V.I.1 through V.I.3, which require Permittees to conduct periodic Performance Demonstration Testing, with the first test to be conducted within nine months of the Permit's effective date and subsequent tests approximately every five years thereafter.[30] In its comments, Evoqua offered to conduct one additional Performance Demonstration Test within sixty-one months of the Permit's effective date but opposed more frequent testing. *See* Evoqua's Cmts. at 12-13. Evoqua argues that additional testing is not "necessary to protect human health and the environment" and, therefore, according to Evoqua, the Region has not met its burden of justifying the testing requirements. Pet. at 17-21 (quoting 40 C.F.R. § 264.601); *see also id.* at 8, 10 (arguing that Permit provision V.I, along with other provisions, are "not appropriate" and not "necessary"). Because Evoqua fails to show that the Region clearly erred or abused its discretion in requiring additional Performance Demonstration Tests, the Board denies review on this issue.

In its comments, Evoqua argued that the Facility is "not an incinerator," that the previous "extremely comprehensive [Performance Demonstration Test] results demonstrated that the Facility is operating safely," and that such tests "are extremely burdensome and expensive." Evoqua's Cmts. at 12-13. Evoqua further

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[30] Permittees must submit a work plan for each Performance Demonstration Test to the Region for its review and approval. Permit § V.I.1.a, at mod. V, 21. The work plan for the initial test is due within 120 days of the Permit's effective date, and each subsequent work plan is due within forty-nine months of the start date of the previous test. *Id.* § V.I.1.a, .b, at mod. V, 21. The test itself must be conducted within six months of approval of the work plan, and a Performance Demonstration Test report is due ninety days after completion of the test. *Id.* at §§ V.I.1.b, I.3, at mod. V, 21, 23.

claimed that the Region "seems to have pre-committed itself to overregulation of this facility" by stating in a press release that the Final Permit would include "the most stringent environmental controls for this type of facility in the nation." *Id.* at 13.

The Region rejected Evoqua's offer to conduct just one additional Performance Demonstration Test within five years, explaining that earlier testing is warranted based on the age of the RF-2 unit, the length of time since the last Performance Demonstration Test, and the nature of the carbon regeneration process:

> The carbon reactivation unit (RF-2) started operating in 1996 and had its first EPA-monitored trial burn test 10 years later, in March 2006. It has now been over 10 years since the last trial burn test was performed and the Region has scheduled the next trial burn test to occur within a reasonably expeditious time after the Permit is effective. Subsequent trial burn tests will be conducted periodically every 5 years. *By the time the first trial burn test required by the Permit is performed, the unit will be over 22 years old and more frequent trial burn tests, (i.e., one every 5 years instead of every 10 years), are appropriate as the system continues to age further.* For example, long-term stress to the critical components of RF-2, such as its firing systems and emission control equipment, could adversely affect emissions. This is one of the reasons that the Agency requires both large and small sources regulated under the MACT EEE regulations to undergo comprehensive performance testing every five years. See 54 FR 52828, 52913 (Sept. 30, 1999). In addition, *the carbon being regenerated at the Facility has been used to remove contaminants from processes where hazardous or toxic materials are being handled. Given the toxicity and quantity of hazardous or toxic organics desorbed from the carbon in this regeneration process, a five-year cycle of trial burn testing is warranted.*

Resp. to Cmts. § V-39, at 107 (emphasis added).

The Region further explained that it will be relying on the results of the testing "to ensure that the operations continue to meet the [Permit's] operating parameter limits * * * and can be demonstrated to be protective of human health and the environment." *Id.* The Region acknowledged the burden associated with

additional Performance Demonstration Testing but justified it given the importance of the testing. *Id.* § V-39, at 106. As the Region explained:

> A 5-year interval between [Performance Demonstration Tests] is appropriate for this Facility because several performance and emissions standards are being verified during the periodic [Performance Demonstration Tests] because they do not have continuous emission monitoring. In addition, as RF-2 continues to age, it is important to make sure it remains efficient in destroying and removing contaminants and that it continues to operate in a manner that does not pose an unacceptable risk to human health or the environment and the [Performance Demonstration Test] is an efficient way to make that determination.

Id.

The Region stated that it considered the requirements for permitting miscellaneous units set forth at 40 C.F.R. § 264.601 to be "the controlling standards for the Region's consideration of the appropriate Permit conditions applicable to RF-2." *Id.* § V-39, at 105. Nevertheless, the Region stated that it also viewed RCRA's omnibus authority, requiring RCRA permits to include terms and conditions determined to be "necessary to protect human health and the environment," 42 U.S.C. § 6925(c)(3), as providing "additional authority" for the Performance Demonstration Testing requirements. *Id.* § V-39, at 104 & n.36, 106. And, as additional justification, the Region pointed to its authority under 40 C.F.R. § 270.23(e), which requires owners and operators of miscellaneous units to provide "[a]ny additional information determined * * * to be necessary for evaluation of compliance of the unit with [applicable] environmental performance standards." *Id.* § V-39, 105-06 & n.38 (quoting 40 C.F.R. § 270.23(e)).

Echoing its comments on the Draft Permit, Evoqua's Petition objects to the periodic Performance Demonstration Tests because, according to Evoqua, the initial test, conducted in 2006, demonstrated that "the Facility is safe and its operations are protective of human health and the environment" and that additional testing would be "burdensome" and "expensive." Pet. at 19-20. Further, Evoqua again asserts that the Region's decision to require additional testing is part of the Region's "commit[ment] to overregulate the Facility" in response to "spirited criticism" from a community activist group. *Id.* at 20.

Before turning to the specific points Evoqua makes in its Petition, we again note that on questions that are fundamentally technical in nature—such as whether to require additional Performance Demonstration Tests and, if so, how many—the Board "typically defers to a permit issuer's technical expertise and experience, as long as the permit issuer has adequately explained its rationale and supported its reasoning in the administrative record." *In re Gen. Elec. Co.*, 17 E.A.D. 434, 447 (EAB 2018).

Evoqua first argues that there is no basis for "EPA's position that aging of a system necessarily will result in an increase in emissions." Pet. at 18. Evoqua similarly argues that there is no support in the record for the Region's position that periodic testing is warranted because the system is "remov[ing] contaminants from processes where hazardous or toxic materials are being handled." *Id.* (quoting Resp. to Cmts. § V-39, at 107).

On these two points, however, Evoqua provides nothing to contradict the Region's technical judgment that emissions could increase as the RF-2 unit ages, given that "long-term stress to the critical components of RF-2 * * * could adversely affect emissions," Resp. to Cmts. § V-39, at 107. Neither does Evoqua rebut the Region's view that the periodic testing requirement is further supported by the nature of the carbon regeneration process itself, which involves removal of hazardous or toxic materials. *See id.*

Evoqua also claims that there is no basis for the Region's "apparent position that all carbon regeneration facilities now need to conduct frequent [Performance Demonstration Tests]." Pet. at 18. Evoqua, however, does not identify any language in the Response to Comments document that shows the Region has taken this position, and we do not read the Region's response as suggesting it has.

In addition, Evoqua fails to address the Region's explanation that Performance Demonstration Testing is needed where there is an absence of continuous emission monitoring, to assess compliance with the Permit's emission limits and other operating parameter limits. *See* Resp. to Cmts. § V-39, at 106. And, as to Evoqua's contention that the Region imposed this requirement "in response to pressure from [an] activist group," Pet. at 20, the Board finds nothing in the record to support that argument, particularly in view of the lengthy and detailed justifications for the requirement provided by the Region.

Here again, Evoqua merely presents a different opinion concerning the need for periodic Performance Demonstration Testing. But "clear error or a reviewable

exercise of discretion is not established simply because the petitioner presents a difference of opinion" on a technical matter such as this one. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). While Evoqua may believe that one Performance Demonstration Test five years after the Permit's effective date would suffice, Evoqua's disagreement with the Region on that point does not overcome the deference on technical issues the Board affords the Region in light of the Region's rationale and record support.

Based on the foregoing, the Board concludes that Evoqua has not demonstrated that the Region clearly erred or abused its discretion in requiring periodic Performance Demonstration Testing. The Board therefore denies review on this issue.

D. *Evoqua Fails to Demonstrate that the Region Clearly Erred or Abused its Discretion by Requiring an Updated Risk Assessment*

We next address Evoqua's challenge to Permit provision V.I.4, which requires Permittees to conduct a Human Health and Ecological Risk Assessment within ninety days after the Region approves the initial Performance Demonstration Test report. Evoqua opposes this requirement, arguing that a comprehensive Risk Assessment took place in 2008 and that the record fails to show that an updated Risk Assessment is "necessary to protect human health and the environment." Pet. at 21; *see also id.* at 8, 10 (arguing that Permit provision V.I, along with other provisions, is "not appropriate" and not "necessary"). Because Evoqua fails to show that the Region clearly erred or abused its discretion in requiring an updated Risk Assessment, the Board denies review on this issue.

In its comments, Evoqua argued that there is "no justification, either technically or in the permitting record, that would support a requirement to re-conduct [a risk assessment] for a carbon reactivation facility every five years," given that risk assessments "are extremely burdensome and expensive" and that the prior one "confirmed that the Facility meets and exceeds all risk criteria" and that "emissions impacts from this [F]acility are insignificant." Evoqua's Cmts. at 14. Evoqua further claimed that the Region appears to have "commit[ted] the Agency to the overregulation of the Facility" by stating in a press release that the Final Permit would include "the most stringent environmental controls for this type of facility in the nation." *Id.*

In response to these comments, the Region noted that the previous Risk Assessment was conducted over ten years ago, in 2008, and explained why an update is needed:

> As the carbon regeneration system ages, efficiency of the system potentially changes. In addition, the toxicity criteria and associated response actions for some of the contaminants are also subject to update by EPA. The air dispersion models used to predict the fate and transport of constituents that are released from the stack are also dependent upon site-specific meteorological data, which itself is variable with time. EPA's recommended models for site-specific analysis are also periodically updated based on the best available science.
>
> To continue to ensure appropriate protection of human health and the environment, it is imperative that the [Risk Assessment] be updated to verify that the Facility's emissions remain protective of human health and the environment. * * * * The Region notes that the 2008 [R]isk [A]ssessment was conducted using methods and procedures that are no longer supported or have been updated by EPA. These include but are not limited to: updated air dispersion and deposition modeling analysis, updated toxicity criteria, and updated exposure assessment analysis.

Resp. to Cmts. § V-41, at 115.

The Region explained that it considers the Agency's authority to regulate miscellaneous units under 40 C.F.R. § 264.601 "sufficient to justify" the requirement to update the Risk Assessment. *Id.* To clarify its authority, the Region included in the Permit a bracketed reference to RCRA's omnibus authority provision, *id.*, which requires RCRA permits to contain terms and conditions determined to be "necessary to protect human health and the environment," RCRA § 3005(c)(3), 42 U.S.C. § 6925(c)(3). As additional support for this requirement, the Region pointed to its information-gathering authority under 40 C.F.R. §§ 270.10(k)[31] and 270.23(c).[32] Resp. to Cmts. § V-41, at 115 & n.46.

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[31] "The [Regional Administrator or an authorized representative] may require a permittee or an applicant to submit information in order to establish [specified] permit conditions." 40 C.F.R. § 270.10(k).

[32] Owners and operators of TSD facilities must provide "[i]nformation on the potential pathways of exposure of humans or environmental receptors to hazardous waste

In its Petition, Evoqua argues that "nearly all" of the Region's justifications for the updated Risk Assessment requirement are based on "mere potentialities" rather than on any evidence of changed circumstances. Pet. at 22. Evoqua further claims that "updated methods and procedures" for risk assessments provide no basis for an update here because the "record is devoid of any determination by EPA that [risk assessments] at facilities across the country must be repeated because of a substantive change in EPA's methods or procedures." *Id.* at 22-23. And, as it argued with respect to the Performance Demonstration Test requirements, Evoqua contends that the Region's decision to require an updated Risk Assessment was made "in response to pressure from [an] activist group." *Id.* at 24.

As with Evoqua's other challenges to fundamentally technical questions, the Board typically defers to the permit issuer on technical questions, as long as the permit issuer's reasoning is adequately explained in and supported by the administrative record. *See In re Gen. Elec Co.*, 17 E.A.D. 434, 514-15 (EAB 2018); *In re ESSROC Cement Corp.*, 16 E.A.D. 433, 455 (EAB 2014); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 403 (EAB 1997) (describing risk assessments as "a multi-disciplinary and technical exercise" involving issues that are "quintessentially technical").

With respect to Evoqua's first point—that nearly all of the Region's justifications requiring an updated Risk Assessment are based on "mere potentialities"—the Region explained that it based its decision on a number of relevant factors that reasonably can be expected to change, particularly with respect to toxicity criteria and changes in site-specific meteorological data, "which itself is variable with time." Resp. to Cmts. § V-41, at 115. In any event, the Region explained that it did not rely solely on "mere potentialities." According to the Region, "the 2008 [R]isk [A]ssessment was conducted using methods and procedures that are no longer supported or have been updated by EPA," including updated air dispersion and deposition modeling and updated toxicity criteria. *Id.*

Evoqua also argues that the Region's decision to require an updated Risk Assessment for this Facility constitutes an abuse of discretion because EPA has not required updates at similar facilities. Pet. at 24. But Evoqua's observation does not suffice to show that the Region lacked a site-specific basis for requiring an update to the Risk Assessment here. The Region explained its site-specific basis

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or hazardous constituents and on the potential magnitude and nature of such exposures." 40 C.F.R. § 270.23(c).

for the requirement—emphasizing that the last Risk Assessment was performed over ten years ago—and the record supports its reasoning.

Lastly, the Board finds nothing in the record to support Evoqua's contention that the Region imposed the Risk Assessment requirement solely "in response to pressure from [an] activist group," Pet. at 24, particularly in view of the lengthy and detailed justifications the Region provided.

As with its argument against requiring periodic Performance Demonstration Testing, Evoqua again presents merely a difference of opinion on the need to update the Risk Assessment. But "clear error or a reviewable exercise of discretion is not established simply because the petitioner presents a difference of opinion" on a technical matter, such as this one. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). While Evoqua may believe that an updated Risk Assessment is not warranted, Evoqua's disagreement with the Region on that point does not overcome the deference on technical issues the Board affords the Region, and it does not satisfy Evoqua's burden on appeal to the Board. 40 C.F.R. § 124.19(a)(4)(i).

In light of the foregoing, the Board concludes that Evoqua has not demonstrated that the Region clearly erred or abused its discretion in requiring an update to the Risk Assessment. The Board therefore denies review on this issue.[33]

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[33] There is one additional issue that arises in connection with Evoqua's challenge to the updated Risk Assessment requirement. In a post-argument submission, Evoqua requests that the administrative record be supplemented to include a document that Evoqua asserts was omitted. Evoqua Water Technologies LLC's Partial Response to Region IX's Post-Hearing Brief 3 (Apr. 23, 2019) ("Evoqua's Post-Arg. Resp."). Evoqua states that on July 21, 2014, it sent an e-mail to the Region responding to the Region's request for additional information to supplement Evoqua's permit application. *Id.*; *see* Letter from Mike Zabaneh, Evoqua Project Manager, Region 9, U.S. EPA, to Monte McCue, Evoqua Water Techs. 1 (May 15, 2014) (A.R. 1247). According to Evoqua, that e-mail attached Evoqua's responses to the Region's request for additional information, but, while the text of the e-mail is included in the administrative record, the responses themselves are not. Evoqua's Post-Arg. Resp. at 3; *see* E-mail from Monte McCue, Dir. of Plant Operations, Evoqua Water Techs. LLC, to Mahfouz Zabaneh (July 21, 2014, 2:50 PM) (A.R. 1250) (referring to attachment "FINAL Evoqua Response - Request for Information July 22 2014.pdf"). Evoqua appended the missing attachment to its post-argument submittal for the Board's consideration. *See* Evoqua's Post-Arg. Resp. attach. A. Although several of the comments in the document—specifically, comments 8, 9, and

E. *The Region Did Not Fully Respond to Comments with Respect to Certain of the Automated Waste Feed Cutoff System Requirements*

In addition to objecting to the Automated Waste Feed Cutoff requirements contained in Permit provision V.C.5 on the ground that they are not justified as MACT EEE requirements, discussed *supra* Part VI.B.3, Evoqua raises another, more specific, objection to two requirements set forth in Permit provisions V.C.5.b.iii and .iv.[34] Pet. at 15-16. Those provisions identify two circumstances in which the Automated Waste Feed Cutoff system is required to stop the feed of spent carbon into RF-2.

In its comments on the Draft Permit, Evoqua objected to Permit provisions V.C.5.b.iii and .iv on the ground of technical infeasibility, stating that "it is not possible to have the waste feed cutoff system automatically shut off flow" in the two circumstances identified. Evoqua's Cmts. at 40. Because the Region did not fully respond to this particular comment, the Board remands Permit provisions V.C.5.b.iii and .iv.

In the Draft Permit, provisions V.C.5.b.iii and .iv (then numbered as V.C.5.ii.c and V.C.5.ii.d) read as follows:

10—concern the 2008 Risk Assessment, nothing in the document alters the Board's conclusion that Evoqua has not overcome its burden on appeal with respect to its challenge to the requirement to update the Risk Assessment. Nevertheless, as the Region has not objected to Evoqua's request to supplement the record, the Board directs the Region to include the missing attachment in the administrative record on remand.

[34] In the section of the Petition that raises objections to these Automated Waste Feed Cutoff system requirements, Evoqua states that it contests three provisions: V.C.5.b.ii, .iii, and .iv. Pet. at 15. Provision V.c.5.b.ii concerns operation of the Automated Waste Feed Cutoff system "[w]hen the span value of any continuous monitoring system * * * is met or exceeded." Permit § V.C.5.b.ii, at mod. V, 14. That requirement does not appear to be the focus of Evoqua's objections, and, at oral argument, counsel for Evoqua stated that including provision V.C.5.b.ii within this objection was a typographical error. Oral Arg. Tr. at 47. We therefore do not address here Evoqua's challenge to Permit provision V.C.5.b.ii. In addition, while Evoqua also refers to Permit provision V.G.2 in the first sentence of the section of the Petition raising this objection, Pet. at 15, that provision is not the focus of this objection and so we also do not address it here.

> V.C.5. Automated Waste Feed Cutoff Requirements
>
> * * *
>
> V.C.5.ii. The Permittees shall automatically cut off the hazardous waste feed to RF-2 if any of the following occur:
>
> * * *
>
> V.C.5.ii.c. Upon malfunction of a [continuous monitoring system]; [See 40 CFR § 63.1206(c)(3)(i)(C).] or
>
> V.C.5.ii.d. When any component of the [Automated Waste Feed Cutoff] system fails. [See 40 CFR § 63.1206(c)(3)(i)(D).]

Draft Permit §§ V.C.5.ii, ii.c, ii.d, at mod. V, 12-13.

In its comments on the Draft Permit, Evoqua objected to these two provisions, arguing that compliance is technically infeasible. The complete text of Evoqua's comment on this point reads as follows:

> [I]t is not possible to have the waste feed cutoff system automatically shut off flow whenever there is a [continuous monitoring system] malfunction or [an Automated Waste Feed Cutoff] system failure *because the instrumentation cannot detect the wide range of malfunctions that could occur and the system cannot be set to respond in the manner that the draft Permit dictates.*

Evoqua's Cmts. at 40 (emphasis added). In issuing the Permit, the Region retained these two provisions without change, simply renumbering them as Permit provisions V.C.5.b.iii and .iv.

The permitting regulations require the Region to issue a response to comments at the time a final permit decision is issued. 40 C.F.R. § 124.17(a). It is incumbent on the permit issuer to "duly consider[] the issues raised in the comments," *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002), and respond to the comments in a "meaningful fashion." *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004). While the Region's response to a comment may be succinct, the response must be "thorough enough to adequately encompass the issues raised by the commenter." *Wash. Aqueduct*, 11 E.A.D. at 585.

With these principles in mind, we now turn to Evoqua's argument that the Region did not respond to the specific comment Evoqua raised about its inability to comply with Permit provisions V.C.5.b.iii and .iv. *See* Pet. at 15. The Region argues that it dealt with Evoqua's comment concerning technical infeasibility by deleting a different Draft Permit provision—Draft Permit provision V.C.5.viii, titled "Failure of an [Automated Waste Feed Cutoff]." Region's Resp. at 20-21. That provision would have required Permittees to "cease feeding hazardous waste as quickly as possible" in the event the Automated Waste Feed Cutoff system were to fail. Draft Permit § V.C.5.viii, at mod. V, 15. The Region removed the draft provision from the Final Permit, finding the provision to be "duplicative" of the Final Permit's Startup, Shutdown, and Malfunction Plan and noting that "[i]f the [Automated Waste Feed Cutoff] system fails to cut off the flow of spent carbon, the [Plan] requires the feed be cut off as quickly as possible as a fallback, safety precaution." Resp. to Cmts. § V-25, at 94; *see also* Oral Arg. Tr. at 74 (referring to Resp. to Cmts. § V-25); Permit att. app. XXII (containing Evoqua Water Techs., *Startup, Shutdown, Malfunction Plan* (rev.1 June 2014)) (A.R. 1648).

But the Startup, Shutdown, and Malfunction Plan speaks only to what the Permittees must do *if* the Automated Waste Feed Cutoff system were to fail: "the feed [must] be cut off as quickly as possible." Resp. to Cmts. § V-25, at 94. The Region did not address Evoqua's concern about the limits of the installed technology, namely that "it is not possible to have the waste feed cutoff system automatically shut off flow whenever there is a [continuous monitoring system] malfunction or a [Automated Waste Feed Cutoff] system failure." Evoqua's Cmts. at 40. Further, the Region's response to Evoqua's comment pertains only to a potential failure of the Automated Waste Feed Cutoff system itself, not a malfunction of a continuous monitoring system, a point the Region conceded at oral argument. Oral Arg. Tr. at 74-75.

Based on the Board's review of the record and the Region's concession at oral argument, the Board concludes that the Region did not fully respond to Evoqua's specific comment about the technical infeasibility of Permit provisions V.C.5.b.iii and .iv, and that a remand of Permit provisions V.C.5.b.iii and .iv is therefore appropriate.

F. *The Region Did Not Clearly Err or Abuse its Discretion by Requiring that Quality Assurance/Quality Control for the Continuous Emissions Monitoring System be Conducted in Accordance with Appendix F of 40 C.F.R. Part 60*

In addition to the objection addressed *supra* Part VI.B.2, Evoqua raises a second objection to Permit provision V.C.4.a, which requires Permittees to follow the quality assurance and quality control ("QA/QC") procedures set forth in Appendix F of 40 C.F.R. part 60 to document that the Facility's Continuous Emissions Monitoring System is operating properly. Pet. at 16-17. Evoqua objects to language the Region added to the Final Permit requiring the use of the QA/QC procedures in Appendix F. *Id.* Because the language the Region added simply clarified the provision and did not change what was required of Permittees, the Board denies review on this issue.

In the Draft Permit, this provision (then numbered V.C.4.i) referenced the QA/QC requirements of 40 C.F.R. part 60 without specifying "Appendix F":

> V.C.4. Regulatory Compliance Instrumentation
>
> V.C.4.i. The Permittees shall operate RF-2 and calibrate the RF-2-related instrumentation listed in Table V-3 pursuant to the parameters—including the frequencies—set forth in Table V-3. Quality assurance and quality control shall be done in accordance with 40 CFR Part 60 QA/QC requirements.

Draft Permit § V.C.4.i, at mod. V, 9.

As noted *supra* Part VI.B.2, Evoqua neither objected to this provision nor proposed changes to it during the comment period, other than proposing to change "Permittees" to "Permittee." *See* Evoqua's Cmts. at 38-39; Evoqua's Redline § V.C.4, at mod. V, 9-12 (commenting and requesting changes to the two subsequent provisions, Draft Permit §§ V.C.4.ii and iii, but not to Draft Permit § V.C.4.i).

In the Final Permit, the provision (renumbered as V.C.4.a) includes a reference to Appendix F, but otherwise remains the same, with the added language highlighted in bold italics:

> V.C.4. Regulatory Compliance Instrumentation
>
> V.C.4.a. The Permittees shall operate RF-2 and calibrate the RF-2-related instrumentation listed in Table V-3 pursuant to the

> parameters—including the frequencies—set forth in Table V-3. Quality assurance and quality control shall be done in accordance with 40 CFR Part 60 ***Appendix F*** QA/QC requirements and the Permittees shall document such activities in the Operating Record. [See Permit Conditions V.G.5. and V.I.1.c.vi.]

Permit § V.C.4.a, at mod. V, 9 (emphasis added). The Region stated that it added the reference to Appendix F in order "to provide more clarity." Resp. to Cmts. § V-37, at 103.

In its Petition, Evoqua objects to the addition of "Appendix F," arguing that the Region "did not provide a site-specific explanation to demonstrate that this requirement was necessary to protect human health and the environment." Pet. at 16. Evoqua argues that the Region instead "could have selected from a number of other options to ensure that the [monitoring equipment] data were quality assured," either by requiring "daily calibration and periodic relative accuracy tests" or by "requiring use of the specification and test procedures" in Appendix B to 40 C.F.R. part 60 (titled "Performance Specifications"). *Id.* at 16-17.

In response, the Region states that it added "the more specific reference to Appendix F's procedures" for clarification purposes. Region's Resp. at 24.

The Board denies review on this issue. Appendix F is the only component of 40 C.F.R. part 60 that addresses QA/QC procedures. Titled "Quality Assurance Procedures," Appendix F establishes appropriate QA/QC procedures for various types of monitoring equipment. 40 C.F.R. pt. 60, app. F procedures 1-6. Hence, the Region's intention to require use of the Appendix F QA/QC procedures was a "reasonably ascertainable" issue and Evoqua should have raised any objections to this requirement, and proposed any alternatives, during the public comment period. *See* 40 C.F.R. § 124.13. If Evoqua had done so, the Region could have then considered use of the proposed alternatives during the permitting process. But, because Evoqua did not, this issue was not preserved for the Board's review. 40 C.F.R. § 124.19(a)(4)(ii); *see In re Gen. Elec. Co.*, 17 E.A.D. 434, 579-81 (EAB 2018).

In its Petition, Evoqua seems to suggest that it did object to this provision in the Draft Permit, "comment[ing] that EPA did not have the authority to impose MACT EEE standards," including Continuous Emissions Monitoring System "monitoring, repair, and maintenance procedures." Pet. at 16. As Evoqua's Petition acknowledges, however, its comments did not address the provision at

issue here, but instead pertained to the two subsequent provisions, Draft Permit provisions V.C.4.ii and iii. *See* Evoqua's Cmts. at 39 (objecting to Draft Permit §§ V.C.4.ii and iii); Pet. at 16 n.42 (citing Evoqua's Cmts. at 39).

Evoqua also challenges a statement in the Region's Response to Comments document that "requiring periodic calibration and maintenance are self-evident," Resp. to Cmts. § V-18, at 92, by arguing that this statement does not support requiring use of Appendix F procedures. Pet. at 16. However, that statement is not the Region's response as to why the Final Permit references Appendix F but rather a response to a more general comment about requiring "maintenance, calibration and operation of monitoring equipment." Resp. to Cmts. § V-18, at 91. Evoqua does not address the Region's explanation that the reference to Appendix F was added "to provide more clarity," *id.* § V-37, at 103. Thus, even if this issue were preserved, the Board would deny review because in failing to confront the Region's explanation, Evoqua fails to show that the Region clearly erred. *In re Penneco Envtl. Sols., LLC*, 17 E.A.D. 604, 615-16 (EAB 2018) (denying petition where Region's response to comments on issue was not confronted such that petitioner failed to show clear error).

In sum, by adding the reference to Appendix F, the Region simply clarified Final Permit provision V.C.4.a. and did not change Permittees' obligations. Because Evoqua failed to challenge the use of 40 C.F.R. part 60 QA/QC procedures in its comments, and otherwise fails in its Petition to confront the Region's explanation that the reference to Appendix F was a clarification (and not a change), the Board denies review on this issue.[35]

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[35] Evoqua also objected to Permit provision V.C.4.a to the extent it could be read as applying to more than "the equipment at the Facility used to monitor emissions of oxygen and carbon monoxide." Pet. at 17. In its response and at oral argument, the Region agreed that Permit provision V.C.4.a applies only to that equipment. Region's Resp. at 24; Oral Arg. Tr. at 88-90. The Board considers the Region's interpretation of this provision as controlling, resolving Evoqua's concern in this regard. *See In re Gen. Elec. Co.*, 17 E.A.D. 434, 553-54 (EAB 2018) (deeming the Region's representations concerning its interpretation of permit language to be binding (citing *In re Amoco Oil Co.*, 4 E.A.D. 954, 959-60 (EAB 1993))).

G. *The Region Did Not Adequately Explain Why It Added Language Requiring Reporting of Certain Instances of Noncompliance to the National Response Center*

Permit provision I.E.13.a contains a "twenty-four hour reporting" requirement whereby Permittees must report within twenty-four hours "any noncompliance which may endanger human health or the environment." Permit § I.E.13.a, at mod. I, 10. Evoqua objects to language the Region added to the Final Permit requiring Evoqua to make such reports to the National Response Center, located at the U.S. Coast Guard's headquarters. Pet. at 24-26; *see* Final Permit Redline § I.E.13.a, at mod. I, 11; 40 C.F.R. § 300.125(a). Because the Region failed to adequately explain why it changed the twenty-four hour reporting requirement, remand of Permit § I.E.13.a is appropriate.

In the Draft Permit, the introductory paragraph to the "Twenty-Four Hour Reporting" provision read as follows:

> I.E.13. Twenty-Four Hour Reporting
>
> I.E.13.a. The Permittees shall report to the Director any noncompliance which may endanger human health or the environment. Any such information shall be reported orally within 24 hours from the time whichever Permittee first becomes aware of the circumstances.

Draft Permit § I.E.13.a, at mod. I, 11. This language generally tracks the reporting requirements applicable to all RCRA permits set forth at 40 C.F.R. § 270.30, including the "[t]wenty-four hour reporting" requirement set forth at 40 C.F.R. § 270.30(*l*)(6). Notably, the Region did make one edit when incorporating this requirement into the Draft Permit: to specify that reports are to be made "to the Director." *See* Draft Permit § I.E.13.a, at mod. I, 11.

In its comments on this introductory paragraph, Evoqua proposed changing the term "Permittees" to "Permittee" and striking the word "whichever." Evoqua's Cmts. at 7; Evoqua's Redline § I.E.13.a, at mod. I, at 11. In issuing the Final Permit, the Region declined to make those proposed changes but did add language directing Permittees to report such instances of noncompliance to the National Response Center. The Final Permit language reads as follows, with the added language highlighted in bold italics:

> I.E.13. Twenty-Four Hour Reporting

> I.E.13.a. The Permittees shall report to the Director any noncompliance which may endanger human health or the environment. Any such information shall be reported orally ***to the National Response Center (800-424-8802)*** within 24 hours from the time whichever Permittee first becomes aware of the circumstances.

Permit § I.E.13.a, mod. I, 10 (emphasis added). The Region stated that it added the reference "to clarify to whom the verbal notice should be provided." Resp. to Cmts. § I-23, at 9.

In its Petition, Evoqua objects to the requirement that reports be made to the National Response Center, arguing that the Region "has not justified its rationale for the change." Pet. at 25. According to Evoqua, reporting under this provision of the Permit is "rarely (if ever) going to rise to the level of requiring the invocation of the federal government's emergency response or national security capabilities." *Id.* Evoqua further argues that the requirement to notify the National Response Center is inconsistent with the regulation at 40 C.F.R. § 270.30(*l*)(6), on which this Permit provision is based. *Id.* at 26.

In response, the Region argues that it provided a "cogent explanation" for requiring reporting to the National Response Center and that the Board should "defer to the Region's experience and expertise in terms of what phone number within the Federal government family might best be equipped to respond to this type of urgent call that could come at any time." Region's Resp. at 30-31.

The permit issuer must "specify" in the response to comments document "which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." 40 C.F.R. § 124.17(a)(1); *see, e.g.*, *In re Town of Concord Dep't of Pub. Works*, 16 E.A.D. 514, 523 (EAB 2014) (remanding where rationale for change between draft and final permit was deficient such that the Board was unable to determine if change reflected Region's considered judgment); *In re City of Marlborough*, 12 E.A.D. 235, 244-45 (EAB 2005) (same).

Here, the Region purported to explain why the new language was added, but the Region's explanation—that the added language was simply a clarification—does not suffice because the new language is more than a clarification. The first sentence of the provision requires Permittees to "report to the Director any noncompliance which may endanger human health or the environment." Permit

§ I.E.13.a, at mod. I, 10. In light of that directive, the second sentence—prior to insertion of the reference to the National Response Center—was more naturally read as requiring that "such information shall be reported orally within 24 hours" to the Director. *See* Draft Permit § I.E.13.a, at mod. I, 11. This reading is further supported by the fact that this Permit provision is based on the reporting requirements at 40 C.F.R. § 270.30(*l*)—which repeatedly refer to reporting "to the Director." *See, e.g.*, 40 C.F.R. §§ 270.30(*l*)(1), (2), (3), (7), (8), (11). Thus, requiring Permittees to report to the National Response Center is not a clarification but rather a substantive change to Permit provision I.E.13.a that requires a more detailed explanation. Given that the Region did not adequately explain why it added the language requiring reporting to the National Response Center, a remand of Permit provision I.E.13.a is appropriate.

H. *The Permit's Dispute Resolution Provisions Do Not Violate Evoqua's Due Process Rights*

Evoqua also challenges the Permit's dispute resolution provisions, I.G.5 through I.G.8 and I.L. Pet. at 27-29. These Permit provisions require that Evoqua submit various documents, which are then subject to the Region's review. *E.g.*, Permit § I.G.5, at mod. I, 14 ("Deliverables Submitted for the Director's Review and Approval"). Upon review, the Region can approve, deny, or require modifications of these submittals. *E.g.*, *Id.* § I.G.5.b, at mod. I, 14. Disagreements regarding the Region's review are resolved in accordance with the Permit's dispute resolution procedures in Permit provision I.L. These procedures include: (1) submission of a written Dispute Resolution Notice, *id.* § I.L.1.a, at mod. I, 23; (2) a fourteen-day period in which the RCRA Branch manager will attempt to resolve the dispute, including the right to a meeting between the manager and Permittee(s), *id.*; (3) a written appeal to the Division Director within 30 days of the initial fourteen day period, *id.* § I.L.1.b, at mod. I, 23; and (4) a written decision by the Director stating the basis for the decision, *id.* § I.L.1.c, at mod. I, 24. The Permit states that "[t]he Permittee(s) shall comply with the Director's decision regardless of whether the Permittee(s) agree with the decision." *Id.* § I.L.1.c, at mod. I, 24.

In its comments, and on appeal, Evoqua argues that this provision violates Evoqua's right to due process by failing to provide for judicial review of the Director's decision. *See* Evoqua's Cmts. at 9-11; Pet. at 27-29 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). According to Evoqua, "[a]bsent a change in this language, Evoqua may in the future be forced to either comply with an objectionable decision made by EPA, at potentially significant cost, or defend an enforcement action brought by EPA * * *. Evoqua cannot be forced to surrender

its constitutional and statutory rights in order to receive permissions to operate its facility under RCRA." Pet. at 29. Because Evoqua fails to show the Region clearly erred or abused its discretion, the Board denies review on this issue.

As the Board has held on multiple occasions, due process does not mandate immediate recourse to the courts following exhaustion of a permit's dispute resolution process. *See In re Caribe Gen. Elec. Prods. Inc.*, 8 E.A.D. 696, 723 (EAB 2000); *In re Delco Elecs. Corp.*, 5 E.A.D. 475, 486 n.12 (EAB 1994); *In re Allied-Signal, Inc.*, 5 E.A.D. 291, 300 (EAB 1994); *In re Gen. Elec. Co.*, 4 E.A.D. 615, 637-39 (EAB 1993).[36] While Evoqua recognizes the Board's prior decisions holding that permits need not provide for judicial review under these circumstances, Evoqua states, without analysis, that it "disagrees with the Board's conclusions in those decisions," Pet. at 28, and opines, without explanation, that "their reasoning would not be upheld if subject to judicial review," Evoqua's Cmts. at 10. Such conclusory assertions are insufficient to justify Board review, especially in light of Board precedent upholding similar dispute resolution provisions as sufficient to satisfy due process.

Further, in response to Evoqua's comments on the Draft Permit, the Region deleted language from Draft Permit provision I.L.1.c stating that resolution of disputes would not be subject to administrative or judicial review (thereby leaving the Permit silent on the question of whether the resolution of a dispute constitutes final agency action subject to judicial review). *See* Resp. to Cmts. § I-42, at 30. The Region explained, "the Region * * * endeavors to ensure that it does not make it more difficult for a Permittee to exercise its constitutional rights by including language in its permits that could be interpreted as foreclosing any due process options that might otherwise be available to the Permittees." *Id.* As Evoqua acknowledged at oral argument, the Permit does not prevent Evoqua from

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[36] In response to Evoqua's comments on the Draft Permit, the Region made what Evoqua has referred to as "reasonable revisions" to the Permit's dispute resolution procedure. Pet. at 27. In particular, the Region: (1) revised Permit provision I.L.1.a to provide that during the initial 14-day dispute resolution period the RCRA Branch Manager, rather than an EPA staff person, will attempt to resolve the dispute; and (2) revised Permit provision I.L.1.c to require that the Division Director state the basis for any decision. *See* Resp. to Cmts. §§ I-40, at 27-28; I-41, at 28. As modified, the Permit's dispute resolution process contains the indicators that the Board has deemed sufficient to satisfy a permittee's due process rights. *See Caribe*, 8 E.A.D. at 723; *Gen. Elec.*, 4 E.A.D. at 629-638.

challenging the Region's decision, following completion of the Permit's dispute resolution procedure, in federal court. *See* Oral Arg. Tr. at 39-40.

Finally, as the Region stated in its Response to Comments document, substantial and consequential changes to the Permit or its attachments or appendices will be made in accordance with applicable formal permit modification procedures, which provide for administrative and judicial review. *See* Resp. to Cmts. § 1-42, at 29.

For these reasons, the Region did not clearly err or abuse its discretion in not providing for judicial review of a dispute resolution. The Board therefore denies review on this issue.

I. *The Region Requests Voluntary Remand of the Tank T-11 Issue*

Lastly, Evoqua argues that Tank T-11 should be removed from Permit provision IV.G.1, which establishes air emission controls for the Facility's above-ground, spent-carbon storage tanks. Pet. at 30-32; *see* Permit attach. D § D.4, at D-9. Evoqua maintains that the 40 C.F.R. part 264, subpart CC, air emission standards do not apply to Tank T-11 because "annual testing confirms the low volatile organic concentration in the incoming water exempts Tank T-11 from [those] requirements." Pet. at 30; *see* Evoqua's Cmts. at 27.

The Region opposes Evoqua's request to remove Tank T-11 from Permit provision IV.G.1 and, instead, requests that the Board remand the issue of the appropriate regulation of Tank T-11 to the Region for further consideration. Region's Resp. at 39-40. Accordingly, the Board remands the issue of regulation of Tank T-11 under RCRA for further consideration by the Region.

VII. *CONCLUSION*

For the foregoing reasons, the Board remands in part and otherwise denies Evoqua's Petition for Review.[37]

So ordered.

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[37] Anyone dissatisfied with the Region's decision on remand must file a petition seeking Board review in order to exhaust administrative remedies under 40 C.F.R. § 124.19(*l*). Also, in light of the Board's order disposing of this matter, all pending motions are denied as moot.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing ORDER REMANDING IN PART AND DENYING REVIEW IN PART in the matter of *Evoqua Water Technologies LLC*, RCRA Appeal No. 18-01, were sent to the following persons by email:

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Eurika Durr
Clerk of the Board