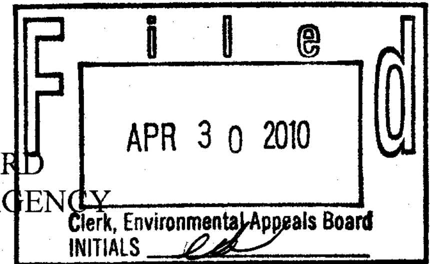


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:

Teck Alaska Incorporated
Red Dog Mine

NPDES Permit AK-003865-3

NPDES Appeal No. 10-04

ORDER DISMISSING PETITION FOR REVIEW IN PART AND DENYING CROSS-MOTION TO STAY THE ENTIRE PERMIT

On February 16, 2010, Native Village of Kivalina IRA Council, Native Village of Point Hope IRA Council, Alaska Community Action on Toxics, Northern Alaska Environmental Center, Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan Sr. (collectively, "Petitioners") petitioned the Environmental Appeals Board ("Board") for review of the National Pollutant Discharge Elimination System ("NPDES") permit that was reissued by EPA Region 10 authorizing the permittee, Teck Alaska Incorporated ("Teck"), to continue its wastewater discharges associated with operating the Red Dog Mine. In this appeal, Petitioners primarily challenge what is alleged to be "illegal backsliding and degradation of water quality" that is allowed by new and *less* stringent effluent limits for zinc, lead, selenium, TDS and Cyanide. *See* Petition at 14.

Teck, the permittee, previously requested leave to respond to the Petition, and Nana Regional Corporation ("NANA"), the owner of the land upon which the Red Dog Mine is located, requested leave to intervene. The Board granted both Teck and NANA leave to respond to the Petition on March 2, 2010. Both Teck and NANA filed motions to expedite review, arguing that the mining operations were at a critical phase,[1] and that a decision will soon be made as whether to continue operations or shut down the mine, depending at least in part on whether an NPDES permit to discharge is in place. The Region opposed the motions to expedite and those motions remain pending before the Board.

On March 8, 2010, the Region filed a notice with the Board that, pursuant to 40 C.F.R. § 125.16(a)(2), the Region was staying the contested effluent limits, specifically, those for lead (monthly average limit), selenium (daily maximum limit), zinc, weak acid dissociable ("WAD") cyanide, and total dissolved solids ("TDS"), but that it had determined the remainder of the permit was uncontested and severable and would become fully effective and enforceable on March 31, 2010. The Region also indicated that the effluent limitations for lead, selenium, zinc, cyanide and TDS from the 1998 NPDES permit (which was in effect immediately previous to the 2010 permit) would remain in effect, until final agency action.

---

[1] Teck explained that the present ore body, the "Main Deposit," is nearly depleted and Teck must soon transition mining from the Main Deposit into an adjacent ore body called "Aqqaluk." Teck states that "[i]f Aqqaluk development does not commence by May 2010, Teck would likely make a decision to shut down the mine in October 2010. Teck's Mot. for Expedited Rev. at 1.

Then on March 17, 2010, the Region notified the Board that it was withdrawing the contested effluent limitations pursuant to 40 C.F.R. § 124.19(d). The Region restated that the remainder of the permit would continue to become fully effective and enforceable on March 31, 2010. Based on its withdrawal of the contested permit provisions, the Region filed companion motions to dismiss sections II.C.1 and II.C.2 of the Petition (filed March 18, 2010), and section II.C.4 of the Petition (filed April 1, 2010).[2] The Region contends that its withdrawal of contested effluent limitations has rendered moot Petitioners' challenge to those limits, as well as all associated arguments. The Region requests that the Board dismiss sections II.C.1, II.C.2, and II.C.4 of the pending Petition for Review.

On April 5, 2010, Petitioners filed an Opposition to Region 10's Motions to Dismiss the Petition for Review in Part (addressing the Motion to Dismiss Parts II.C.1 and II.C.2) and simultaneously filed a Cross-Motion to Stay the Entire Permit pending review by the Board, which the Region has opposed. On April 23, 2010, Petitioner Native Village of Kivalina IRA Council ("Kivalina")[3] filed an opposition to Region 10's motion to dismiss section II.C.4. In response to all of these motions and oppositions, both Teck and NANA have renewed their requests to expedite review of this matter citing "serious harm" to the mine employees, owners and shareholders, as well as "catastrophic economic consequences" for the entire region if the

---

[2] The only challenge to the permit that the Region has not moved to dismiss is the one regarding monitoring provisions, addressed in section II.C.3 of the Petition.

[3] This opposition was filed only by the Kivalina IRA Council. The remainder of Petitioners take no position on this motion. *See* Petitioner Native Kivalina IRA Council's Opp'n. to Region 10's Mot. to Dismiss section II.C.4. of Petition for Review (Apr. 23, 2010) at n.2.

mine operations are shut down as a result of any delay in proceeding with the permitted expansion.[4]

Motions to Partially Dismiss the Permit

We begin by taking notice of the withdrawn permit conditions. Under 40 C.F.R. 124.19(d), the Region may withdraw contested portions of a permit, so long as it is prior to the rendering of a decision by the Board to grant or deny review, which has not occurred. As stated above, and pursuant to 40 C.F.R. § 124.16(a)(2)(ii), the Region has determined that the remainder of the permit is uncontested and severable. *See* U.S. EPA Region 10's Notification of Withdrawal of Permit Conditions, EAB Dkt. Nos. 19 & 23 (Mar. 18, 2010); *see also* 40 C.F.R. § 124.19(d) ("Any portions of the permit which are not withdrawn and which are not stayed under § 124.16(a) continue to apply."). Additionally, the Region has indicated that, as a result of the withdrawal of the contested provisions, the relevant effluent limitations from the 1998 NPDES permit (No. AK 003865-2) will remain in effect until further agency action. U.S. EPA Region 10's Notification of Withdrawal of Permit Conditions, EAB Dkt. Nos. 19 & 23 (Mar. 18, 2010).

In numerous cases where contested permit conditions have been withdrawn, the Board has dismissed or partially dismissed, a pending petition for review. *See e.g., In re Marlborough Westerly*, NPDES Nos. 10-1, 10-2, 10-3 (Mar. 2, 2010) (Order Dismissing Petition for Review); *In re CH2M Hill Plateau Remediation Co.*, NPDES No. 09-08 (Order Dismissing Petition as

---

[4] Both Teck and NANA support the Region's partial motions to dismiss and oppose Petitioners' cross-motion to stay the entire permit.

Moot) (EAB Nov. 4, 2009); *In re City of Haverhill Wastewater Treatment Facility*, NPDES No. 08-01 (EAB Feb. 28, 2008) (Order Dismissing Petition for Review); *In re San Jacinto,* NPDES No. 07-09 (Mar. 28, 2008) (Order Dismissing Petition for Review); *In re District of Columbia Municipal Separate Storm Sewer System*, NPDES Nos. 06-07, 06-08 (Nov. 8, 2007); *In re City of Keene*, NPDES No. 07-18 (Dec. 5, 2007) (Order Noticing Partial Withdrawal of Permit and Dismissing Portion of Petition for Review as Moot).

As stated above, the Region has moved to dismiss the portions of the Petition for Review that challenge these now-withdrawn conditions. Specifically, the Region has moved to dismiss section II.C.1 (challenging EPA's reliance on the "State's CWA section 401 Certification Because Alaska Lacks the Legally Required Antidegradation Implementation Procedures to Perform a Legally Adequate Antidegradation Analysis"), II.C.2 (challenging "Illegal Backsliding in the Permit") and II.C.4 (challenging EPA's "Fail[ure] to Require Teck to Discharge at an Alternative Location"). The only portion of the Petition that the Region has not moved to dismiss is section II.C.3, which challenges the permit's monitoring provisions.

Our review of the Petition confirms that the three sections proposed to be dismissed by the Region are directly related to the now-withdrawn permit conditions. As stated by Petitioners, "[t]he primary issues in the reissuance of the [p]ermit are the illegal backsliding and degradation of water quality allowed." Petition at 14. By "backsliding," Petitioners refer to the "new water quality standard[s]" that are less stringent "when compared to previous permit conditions." Petition at 14, 20. In particular, Petitioners point to the weaker effluent limitations in the 2010

permit for: zinc, lead, selenium, cyanide and TDS. Thus, at its core, this Petition for Review challenges effluent limitations that have since been withdrawn. Because these limits have been withdrawn, and the more stringent effluent limitations from 1998 have been restored, no present controversy exists as to the less-stringent limits, or as to backsliding, or any justification therefor. Consequently, any arguments made that are based on these limits (including arguments regarding backsliding or any justification for backsliding) are moot.

More specifically, section II.C.1 of the Petition essentially challenges EPA's reliance on the State's certification, pursuant to CWA § 401, 33 U.S.C. § 1341, that any discharge permitted will comply with all appropriate CWA provisions. The argument rests on the status of Alaska's antidegradation implementation procedures and whether the antidegradation analysis performed was adequate, but at its core the argument is a challenge to the Region's rationale for the less-stringent effluent limitations imposed. Consequently, the arguments in the Petition section II.C.1 are moot.

Section II.C.2 focuses on allegedly "illegal backsliding," which, again, is alleged to be the result of the less-stringent effluent limitations imposed in the permit. Thus, at its core, the argument in section II.C.2 challenges permit conditions that have since been withdrawn. Thus, section II.C.2 is also moot.

Finally, section II.C.4 asserts EPA abused its discretion by failing to require Teck to discharge at an alternate location. According to Petitioners, EPA's authority to require Teck to

discharge at an alternative location is derived from the fact that no effluent limit guidelines exist for TDS and therefore the Region is obligated to use its best professional judgment in determining the best available technology economically achievable or "BAT." Petition at 40-43. The inference, then, is that EPA had authority to require and should have required an alternate discharge location *in lieu of* the effluent limit it selected for TDS. *Id.* As such, the withdrawal of the TDS effluent limitation from the permit moots the argument presented in section II.C.4 of the Petition for Review.

Petitioners do not dispute that these sections of the Petition are tied to the withdrawn permit conditions. Rather, Petitioners cite, inter alia, *Friends of the Earth v. Laidlaw,* 528 U.S. 167, 189 (2000), as articulating the appropriate standard for mootness and as support for why this Petition should not be dismissed. *See* Petitioners' Opp'n. to Mot. to Dismiss sections II.C.1 and II.C.2 at 6-7 (citing *U.S. v. Concentrated Phosphate Export Assn., Inc.,* 393 U.S. 199, 203 (1968); *San Francisco BayKeeper, Inc. v. Tosco Corp.,* 309 F.3d 1153 (9th Cir. 2002)); Petitioner Kivalina's Opp'n. to Mot. to Dismiss section II.C.4 (citing same cases). *Laidlaw* involved a citizen suit enforcement action for civil penalties and a request for an injunction, based on the failure to comply with a permit. The defendant asserted mootness based on the defendant's voluntary achievement of substantial compliance with its NPDES permit and the shutdown of one facility. The Supreme Court held that the case could only be considered moot "if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur." *Laidlaw,* 528 U.S. at 189. Petitioners' reliance on *Laidlaw*, and similar cases, is misplaced. The matter before the Board is not an enforcement case and the

"wrongful behavior" is not the failure to comply with a permit. Instead, this is a Petition to review a permit issuance based on Petitioners' challenge to certain permit provisions that have since been withdrawn. Thus, these permit conditions are no longer part of a final agency action that is reviewable by the EAB. *See* 40 C.F.R. § 124.19. If the Region determines at some point in the future that these same permit conditions should be reinstated in a future draft permit, that draft permit will proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit, including the availability of a subsequent appeal. *See* 40 C.F.R. 124.19(d). Thus, Petitioners will have the ability to challenge the Region's actions if and when the same (or any other) offending permit conditions are imposed in the future. As such, *Laidlaw* is inapposite, as are the other similar cases cited by Petitioners.

In their opposition to the Region's motion to dismiss section II.C.4., Petitioner Kivalina also cites *Alaska Center for the Environment*, 189 F.3d 851 (9th Cir. 1999), and related cases, for the proposition that this matter is "capable of repetition yet evading review" and, therefore, is subject to the exception to the general principal of mootness. Petitioner Kivalina's Opp'n. to Mot. to Dismiss section II.C.4. at 4-5 (also citing *Alaska Center for the Environment*, 189 F.3d at 854-855; *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002); *Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 453-454 (9th Cir. 1994); *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cr. 1992)). Again, the Board disagrees that these cases apply to the matter at hand. We note first that this exception to the mootness doctrine is limited to extraordinary cases. *See Alaska Ctr. for the Envt.*, 189 F.3d at 854. It applies where "(1) the challenged action is too short to allow full

litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again." *Id.* (citing *Greenpeace*, 14 F.3d at 1329). The cases cited by Kivalina in which the court determined an agency action was moot, but the exception applied, involved: a one-year permit that had expired (*Alaska Ctr. For the Envt.*, 189 F.3d at 855); a regulation in effect for less than one year (*Greenpeace*, 14 F.3d at 1329-30); an agency requirement to act within one year that was routinely violated until challenged by the same plaintiff, which then routinely resulted in agency action shortly after litigation had commenced (*Biodiversity Legal Foundation*, 309 F.F.3d at 1173-74); and an appeal from a preliminary injunction which by its very nature is short-lived (*Nat'l Labor Relations Brd v. Cal. Pac. Med. Ctr*, 19 F.3d 449). None of these cases are analogous to the case before us. Here, the permit conditions were not short-term. The agency has completely withdrawn the permit conditions relating to the challenged effluent limitations. Those conditions can have no effect on Petitioners. Further, there is no reason to assume that, even if the Region does impose the same or different effluent limitations in a future permitting decision for this site or any other, that it will do so using the same rationale that is being challenged in this Petition, or that would-be petitioners would be prevented from fully litigating these same issues if such a permit decision did occur. In sum, there is no basis for imposing the extraordinary exception to the mootness doctrine under these facts.

Additionally, the concerns Petitioners raise regarding possible future action by the State of Alaska (*i.e.*, conducting a "likely" antidegradation analysis to support the same effluent limitations now withdrawn from the 2010 permit) and whether that action is likely to be legally appropriate are not reviewable by the EAB. *See* Petitioners' Opp'n. to Region 10's Mot. to

Dismiss Petition in Part at 7. We will not speculate on what the State of Alaska may or may not do in response to the Region's withdrawal of permit conditions or the partial dismissal of this Petition, except to say that this is not the appropriate time or case in which to challenge such future actions.

Petitioner also asserts that EPA's reinstatement of the 1998 permit conditions in place of those withdrawn may result in the recurrence of unlawful conduct – i.e., the permittee may continue to be out of compliance with those permit conditions. Again, this petition for review of the 2010 permit, brought pursuant to 40 C.F.R. § 124.19, is not the appropriate forum in which to pursue an enforcement action for any noncompliance that has occurred or may occur in the future. Appropriate avenues for such enforcement, however, do exist, as Petitioners are well aware. *See Adams v. Teck Cominco*, No. 3:04-cv-00049-JWS (D. Ak. Jul. 28, 2006 (Order and Opinion granting partial summary judgment against Teck Cominco Alaska for more than 618 violations in a citizen suit brought by some of the same petitioners that have filed the Petition in this matter) *attached as* Ex. 2 to Pet'rs. Opp'n. to Reg. 10's Mot. to Dismiss Petition in Part.

Based on the foregoing, the Board concludes that the arguments in sections II.C.1, II.C.2, and II.C.4 of the Petition for Review are inseverably reliant upon the now-withdrawn permit conditions. As such, the arguments raised in these sections of the Petition are moot.

Motion to Stay Entire Permit

We now turn to Petitioners' simultaneous motion to stay the entire permit. Petitioners argue that the permit should be stayed because the Petition for Review is a broad challenge to the permit based on the Region's reliance on the State's "illegal" section 401 certification pursuant to CWA § 401. *See* 33 U.S.C. § 1341(a)(1) (requiring the permit applicant to obtain certification from the effected State that any permitted discharge will comply with applicable water quality requirements). Stays of contested permit conditions pending review by the Board are governed by 40 C.F.R. § 124.16. Section 124.16 grants the Region the authority to determine whether the contested conditions of the permit are severable from uncontested provisions and, if they are, then the regulation requires that the effect of the contested permit conditions "shall be stayed" pending final agency action. If the contested and uncontested portions are not severable, then the entire permit shall be stayed pending final agency action. 40 C.F.R. § 124.16. In this case, the Region determined that the contested provisions of the permit – i.e., the contested effluent limitations – were severable from the uncontested provisions of the permit and, therefore, the Region stayed (and eventually withdrew) only the contested effluent limitations. Petitioners have not argued the inseverability of the permit provisions or any basis for reviewing the Region's determination in this regard.

Moreover, our review of the Petition reveals that the Petitioners' challenge to the 401 certification is directly related to their argument regarding illegal backsliding based on less-stringent effluent limitations that have since been withdrawn. *See* Petitioners Opp'n. to Region 10's Mot. to Dismiss Petition at 10; Petition at II.C.1. and II.C.II. (arguing in section II.C.1. that

the EPA is precluded from relying on the State's section 401 certification because Alaska lacks the legally required antidegradation implementation procedures to perform a legally adequate antidegradation analysis, and arguing in II.C.2 that EPA authorized illegal backsliding in the permit based on its erroneous reliance on the 401 certification). As discussed above, the arguments concerning the antidegradation implementation procedures, backsliding, and the 401 certification were rendered moot by the withdrawal of the offending permit conditions. *See* above discussion on sections II.C.1. and II.C.2. As such, Petitioners' challenge to the permit based on the State's 401 certification is directly linked to the contested permit provisions that have since been withdrawn. As noted above, the Region has determined that those provisions are severable from the remainder of the permit. Consequently, there is no basis for which to stay the entire permit based on Petitioners' 401 certification arguments.

Conclusion

Upon consideration and for good cause shown, the Board concludes that the Region's withdrawal of the effluent limitations for lead, selenium, zinc, WAD cyanide and TDS render the portions of the Petition challenging those conditions – i.e., sections II.C.1, II.C.2, and II.C.4 – moot. Thus, those portions of the Petition are **DISSMISSED WITH PREJUDICE** and the Motion to Stay is **DENIED.** The dismissal with prejudice has no effect on Petitioner's right to submit comments on draft permit revisions or modifications, or to challenge any future EPA

action with respect to NPDES permit no. AK 003865-3, or any other permit. The Board will take under advisement and consider the remaining arguments in the Petition – i.e., section II.C.3.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: April 30, 2016

Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing the Petition for Review in Part and Denying Cross-Motion to Stay the Entire Permit in the matter of *Teck Alaska, Inc.*, NPDES Appeal No. 10-04, were sent to the following persons in the manner indicated.

By Facsimile and Certified Mail Return Receipt Requested:

Victoria Clark
Carl Johnson
Trustees for Alaska
1026 W. Fourth Ave., Suite 201
Anchorage, AK 99501
Fax: (907) 276-7110

Brent J. Newell
Center on Race, Poverty & the Environment
Kearney Street, Suite 804
San Francisco, CA 94108
Fax: (415) 346-8723

Eric B. Fjelstad
Perkins Coie LLP
1029 W. Third Ave., Suite 300
Anchorage, AK 99501
Fax: (907) 276-3108

Jeffrey W. Leppo
Stoel Rives LLP
600 University Street, Suite 3600
Seattle, WA 98101-3197
Fax: (206) 386-7500

By Facsimile and Pouch Mail:

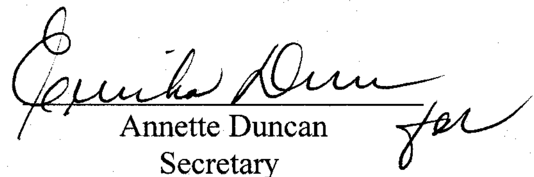
Kimberly Owens
Office of Regional Counsel
U.S. EPA Region 10
1200 Sixth Ave.
Seattle, WA 98101
MAIL CODE: ORC-158
Fax: (206) 553-0163

Michael A. Bussell
Office of Water
U.S. EPA Region 10
1200 Sixth Ave.
Seattle, WA 98101
MAIL CODE: OWW-135

By Facsimile and Interoffice Mail:

Pooja Parikh
Water Law Office
Office of General Counsel
U.S. EPA
1200 Pennsylvania Ave., NW
Washington, DC 20460
Mail Code: 2355A
Fax: 202-564-5477

Dated: 4/30/2010



Annette Duncan
Secretary