

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

**IN THE MATTER OF:  
TECK ALASKA INCORPORATED**

NPDES Permit AK 003865-3

NPDES Appeal No. 10-04

**TECK ALASKA INCORPORATED'S OPPOSITION  
TO PETITION FOR REVIEW**

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## **TECK ALASKA INCORPORATED'S OPPOSITION TO PETITION FOR REVIEW**

Teck Alaska Incorporated (“Teck”) is the operator of the Red Dog Mine and the permittee under NPDES Permit 003865-2. Teck opposes the Petition for Review.

### **I. BACKGROUND**

The Red Dog Mine is located in northwest Alaska, on land owned by NANA Regional Corporation. NANA is one of thirteen Alaska Native regional corporations formed under the Alaska Native Claims Settlement Act (ANCSA).

The mine produces zinc and lead concentrate. It is one of the world's largest zinc mines. The mine is the cornerstone of the local economy. The region where the mine is located is inhabited by approximately 7,400 residents, mostly NANA shareholders who are Alaska Natives.<sup>1</sup> The mine is one of the only private sector employers in the region. The mine provides approximately 465 full-time jobs and approximately 78 part-time jobs. The mine's payroll in 2007 was estimated at \$45.8 million.<sup>2</sup>

The mine contributes to the local economy in other significant ways. The mine is the main source of revenue for the local government in the region, the

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<sup>1</sup> Final Supplemental Environmental Impact Statement on the Red Dog Mine Extension (Oct. 2009)(“FSEIS”) at 3-289, 3-291. This population data is for the Northwest Arctic Borough, which includes an area of approximately 39,000 square miles. *Id.* at 3-288.

<sup>2</sup> *Id.* at 3-309.

Northwest Alaska Borough (NWAB).<sup>3</sup> Since 2003, almost 70% of NWAB revenues have come from payments by the mine.<sup>4</sup> The mine is also a significant source of revenue for Alaska Native corporations. Teck pays royalties to the landowner, NANA, and NANA shares these royalties with other Alaska Native Corporations as required by Section 7(i) of ANCSA.<sup>5</sup> In 2007, Teck paid NANA royalties of \$72.3 million, and NANA distributed almost 70% of these royalties to the other eleven regional Alaska Native Corporations.<sup>6</sup> In addition, NANA pays dividends to its Alaska Native shareholders from these royalties.<sup>7</sup> The mine also contributes to the Alaska economy by purchasing goods and services from Alaska businesses and organizations. In 2007, the mine spent approximately \$131 million on purchases

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<sup>3</sup> Unlike other states, Alaska does not have counties. Local government entities include boroughs and municipalities.

<sup>4</sup> FSEIS at 3-325.

<sup>5</sup> FSEIS at 3-314. Under Section 7(i) of ANCSA, Congress mandated that 70% of revenues received by “regional” Alaska Native Corporations, such as NANA, from natural resources development be divided annually among the State's twelve regional Alaska Native Corporations. The regional corporations, in turn, are obligated to further distribute these moneys to the 200+ “village” Alaska Native Corporations. This program carries out Congress's intent that the benefits of resource development on Alaska Native Corporation lands flow to Alaska Natives throughout the State. *Id.* at 3-314 to 3-315.

<sup>6</sup> FSEIS at 3-314 to 3-315.

<sup>7</sup> *Id.*

from Alaska businesses and organizations, including roughly \$71 million paid to NANA affiliates.<sup>8</sup>

The mine removes ore from an open pit. The ore in the mine's Main Deposit is nearly depleted, and will be mined out in early 2011. The next phase of mining would involve an adjacent ore deposit known as the Aqqaluk Deposit. Mining from the Aqqaluk Deposit is expected to extend the life of the mine for an additional twenty years. FSEIS at 1-1; EPA Record of Decision, Jan. 8, 2010 ("ROD") (Ex. H) at 2.

In addition to the open pit, the mine includes a mill for processing ore, a tailings impoundment, waste rock storage areas, and support facilities. FSEIS at 1-1. Water in the mine's tailings impoundment is pumped to two water treatment plants. During the discharge season (typically late May to early October), one of the water treatment plants treats water prior to discharge into the Middle Fork of Red Dog Creek, at a location designated as Outfall 001. FSEIS at 2-21, 3-52.

Discharge of mining-related wastewater into Red Dog Creek has been authorized by NPDES permits. FSEIS at 1-1. EPA issued the first NPDES permit for the mine in 1985. EPA reissued the permit with revisions in 1998. EPA modified the Permit in 2003. Portions of the 2003 permit modification were appealed to the EAB, which issued a decision in 2004, *In re Teck Cominco Alaska Incorporated*, 11 E.A.D. 457 (EAB 2004). The EAB denied review on most of the issues raised in

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<sup>8</sup> *Id.* at 3-316.

the Petition, but remanded one issue concerning the limit for Total Dissolved Solids (TDS) during the grayling spawning season.<sup>9</sup> In March 2007, EPA reissued the NPDES Permit, but EPA withdrew the reissued Permit six months later. FSEIS at 1-1.

In 2007, Teck requested modification of the NPDES Permit to include the proposed extension of the mine to include the Aqqaluk deposit. In 2008, Teck requested that EPA consider the Aqqaluk extension in connection with Teck's application for reissuance of the NPDES Permit. FSEIS at 1-4.

EPA issued a Final Supplemental Environmental Impact Statement on September 24, 2009. The FSEIS discusses four alternatives.<sup>10</sup> Alternative A is a “no action” alternative that would not reissue the NPDES permit or authorize other permits required for the Aqqaluk extension. Under this alternative, the mine would close in 2010 or 2011, and the mine would continue wastewater discharge under the 1998 NPDES Permit. FSEIS at 2-5. Alternative B provides for reissuance of the NPDES permit, and issuance of a Section 404 permit for the Aqqaluk expansion. Under this alternative, wastewater discharge for the existing and expanded mine will be at the current location in the Middle Fork of Red Dog Creek. FSEIS at 2-5.

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<sup>9</sup> As discussed below, even though the EAB denied the 2003 Petition as to all issues except the grayling spawning limit in Main Stem Red Dog Creek, Region 10 subsequently took the position that none of the 2003 Permit modifications ever became effective, and that all provisions of the 1998 Permit remained in force until the NPDES permit was reissued in 2010.

<sup>10</sup> FSEIS at ES-5 to ES-6 and 2-1 to 2-14. *See also* ROD at pp. 3-5.

Alternatives C and D also include NPDES and Section 404 permits for expansion and continued operation of the mine, but these two alternatives discuss other options for transportation of ore and discharge of mine effluent. Relevant to this Petition, both Alternatives C and D include a 52-mile wastewater pipeline from the mine to the Arctic Ocean (Chukchi Sea). FSEIS at 2-14. This wastewater pipeline would eliminate the current effluent discharge into Red Dog Creek, and replace it with discharge into the ocean. Additional permitting and authorizations would be required to build this wastewater pipeline. ROD App. B at 1.

The Alaska Department of Environmental Conservation (ADEC) issued a Certificate of Reasonable Assurance on December 15, 2009 (“ADEC Cert.”) (Ex. E). EPA issued its Record of Decision on January 8, 2010. EPA identified Alternative B as the Preferred Alternative. ROD at 7. EPA issued a renewed NPDES permit on January 8, 2010, with an effective date of March 1, 2010 (Ex. I).

Petitioners filed their Petition on February 16, 2010. EAB Dkt. No. 1. In response to the Petition, Region 10 issued a letter dated February 26, 2010 staying the effective date of five contested conditions, and stating that the uncontested conditions in the Permit would become fully effective on March 31, 2010. EAB Dkt. No. 13 (Ex. J). In a letter dated March 17, 2010, Region 10 withdrew the five contested permit conditions, as follows:<sup>11</sup>

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<sup>11</sup> EAB Dkt. No. 19 (Ex. K).

- **Part I.A.1, Table 1**—effluent limitations for lead (monthly average limit), selenium (daily maximum limit), zinc, and weak acid dissociable (WAD) cyanide, and
- **Part I.A.7.a**—effluent limitations for Total Dissolved Solids (TDS).

After Region 10 withdrew these five contested permit conditions, Region 10 filed a Motion to Dismiss Petition for Review in Part (EAB Dkt. No. 20), seeking dismissal of sections II.C.1 and II.C.2 of the Petition and any associated claims for relief as moot. Region 10 further requested that if the Board denied its Motion to Dismiss, Region 10 would be granted at least 15 days from the date of the Board's denial to respond to sections II.C.1 and II.C.2 of the Petition. Teck filed a response to Region 10's motion on March 31, 2010 (EAB Dkt. No. 24), similarly requesting that if Region 10's Motion to Dismiss is denied, Teck will have at least 15 days from the date of the Board's denial of the motion to file a response to these sections. Accordingly, this brief addresses the issues raised in sections II.C.3 and II.C.4 of the Petition, and Teck reserves all arguments related to sections II.C.1 and II.C.2 in the event that EPA's Motion to Dismiss is denied.

## **II. RESPONSE TO PETITIONERS' STATEMENT OF FACTS**

Two issues remain for consideration in this Petition: 1) the 2010 Permit's monitoring requirements, and 2) the Petitioners' argument that EPA abused its discretion by failing to require construction of a wastewater pipeline and relocation of the outfall to the Chukchi Sea. Teck will not respond to portions of Petitioners'

statement of facts that are not relevant to these two issues. Teck will respond on two topics discussed in Petitioners' statement of facts, because the Board may consider these topics as context for the two remaining issues, and Petitioners' discussion on these topics is misleading and incomplete.

**A. Limits for Total Dissolved Solids in Teck's NPDES Permit**

The Petition includes a short discussion that Petitioners describe as a “history of violations at Red Dog,” attacking Teck's compliance with the 1998 Permit. Petition at 6-7. This attack distorts and omits critical facts that provide the context for these compliance issues.

Virtually all of Teck's compliance issues involve the limits for Total Dissolved Solids (TDS). The 1998 NPDES permit adopted water quality-based limits for TDS based on then-current statewide TDS standards, which limited TDS concentrations to “one-third over background.” Based on this standard, in the 1998 Permit EPA set TDS limits of 170 mg/L (monthly average) and 196 mg/L (daily maximum). The mine could not comply with the TDS limits in the 1998 permit.<sup>12</sup> Since 1998, Teck has engaged in a continuous effort to modify these TDS limits.

Following issuance of the 1998 permit, EPA issued Compliance Orders by Consent to the mine for the 1999-2006 discharge seasons, addressing TDS. In general, these Compliance Orders required the mine to limit TDS to 1500 mg/L in the Main Stem of Red Dog Creek. In addition, some of the Compliance Orders

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<sup>12</sup> See *Teck*, 11 E.A.D. at 466, 468.

imposed lower limits on TDS during grayling spawning season, or in Ikalukrok Creek.<sup>13</sup>

In 1999, ADEC revised the statewide standards for TDS to 1000 mg/L, with the further limitations that TDS could not be present in concentrations that would adversely affect aquatic life, and that if a permit applicant proposed to raise TDS levels in receiving waters to a TDS concentration between 500 mg/L and 1000 mg/L, the permit applicant would have the burden to provide information necessary to determine if adverse effects to aquatic life would result. *Teck*, 11 E.A.D. at 466-67. EPA approved the revised statewide TDS standard in 2002. *Id.* at 467. In 2001, Teck requested site-specific criteria for TDS in Main Stem Red Dog Creek, and in 2003, ADEC approved site-specific criteria for the Main Stem of 500 mg/L during grayling spawning season and 1500 mg/L after grayling spawning season. *Id.*<sup>14</sup>

Teck requested modification of the NPDES Permit to reflect these changes in applicable TDS criteria. In 2003, ADEC and EPA approved new TDS limits for the Permit. The 2003 permit modifications included 1500 mg/L in the Main Stem of Red Dog Creek, except during grayling spawning when the limit was set at 500 mg/L; 1000 mg/L in Ikalukrok Creek, except for a limit of 500 mg/L below station 160 after July 25; and mixing zones for TDS in Main Stem Red Dog Creek and Ikalukrok

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<sup>13</sup> ADEC has also repeatedly issued COBCs for the mine's discharge of TDS in excess of the 1998 limits. *See* ADEC Cert. at 3, and ADEC Cert., App. A at 5, 7.

<sup>14</sup> The grayling spawning season is a period of 5 to 16 days in the spring.

Creek. *Teck*, 11 E.A.D. at 470-71. In 2003, EPA also approved the site-specific criterion for TDS of 1500 mg/L for Main Stem Red Dog Creek, but EPA declined to act on ADEC's request to approve a 500 mg/L site-specific criterion for grayling spawning season, and indicated its intent to require tests concerning the effect of TDS on grayling spawning. *Id.* at 467.

Kivalina Relocation Planning Committee (KRPC) petitioned for review of the TDS limits in the 2003 Permit modification. The EAB denied review with respect to all of the modified TDS limits, except for one: the 500 mg/L limit in Main Stem Red Dog Creek during the grayling spawning season. *Id.* at 460-61. The EAB remanded the 500 mg/L limit to EPA for further proceedings. Although the EAB denied KRPC's Petition as to all issues except the 500 mg/L grayling spawning limit in Main Stem Red Dog Creek, Region 10 subsequently took the position that none of the 2003 Permit modifications ever became effective, and that all provisions of the 1998 Permit remained in force until EPA reissued the NPDES Permit in 2010.<sup>15</sup>

Following EPA's 2003 decision declining to act on ADEC's request to approve the site-specific criterion for Main Stem Red Dog Creek during grayling spawning season and the EAB's 2004 remand decision, additional studies were conducted to address the effect of TDS on grayling spawning. Based on additional studies and analysis, in January 2006 ADEC adopted a site-specific criterion of 1500 mg/L for

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<sup>15</sup> EPA Region 10 Letter to Teck Cominco Alaska, Inc., Nov. 17, 2008 (Ex. D).

TDS in Main Stem Red Dog Creek, applicable at all times (both during and outside the grayling spawning season).<sup>16</sup> No party appealed from ADEC's decision. EPA approved the site specific criteria of 1500 mg/L for TDS in Main Stem Red Dog Creek in April 2006, again without any appeal.<sup>17</sup>

Teck renewed its application for reissuance of the NPDES permit, and once again sought revision of the permit's TDS limits—including revision of the TDS limit for Red Dog Creek to reflect the site-specific criteria for TDS approved by ADEC and EPA. ADEC certified its approval of a renewed Permit, and in March 2007, EPA issued a renewed NPDES permit. FSEIS at 1-4. The 2007 Permit reflected the recently-approved site specific criterion for TDS in Main Stem Red Dog Creek by setting the limit for TDS in Red Dog Creek at 1500 mg/L applicable at all times (both during and outside the grayling spawning season).<sup>18</sup> The 2007 Permit also set limits for Ikalukrok Creek that were the same as the limits in the 2003 permit modification, i.e., 1000 mg/L, with a limit of 500 mg/L below station 160 after July 25.<sup>19</sup> The 2007

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<sup>16</sup> Alaska Department of Environmental Conservation Decision Document for a Total Dissolved Solids Site-Specific Criterion for Red Dog Creek, January 27, 2006. (Ex. A).

<sup>17</sup> EPA Region 10 EPA Letter to Lynn Kent, Alaska Department of Environmental Conservation, April 21, 2006. (Ex. B).

<sup>18</sup> U.S. EPA Region 10, Authorization to Discharge under the National Pollutant Discharge Elimination System, March 7, 2007, (Ex. C) Part I.A.7.b (at p. 8).

<sup>19</sup> *Id.*

Permit also provided for mixing zones for TDS in Main Stem Red Dog Creek and Ikalukrok Creek.<sup>20</sup>

Parties petitioned the EAB for review of the 2007 Permit, and in September 2007, EPA withdrew the 2007 Permit. FSEIS at 1-1.<sup>21</sup> Following EPA's withdrawal of the 2007 permit, Teck's permit reissuance application was merged into the process already underway to obtain permits necessary for mining the Aqqaluk deposit. *Id.* at 1-4. Teck once again sought revision of the 1998 TDS limits. In December 2009, ADEC certified the same TDS limits that it had certified in 2007,<sup>22</sup> and in 2010 EPA issued the 2010 permit with these TDS limits. However, after Petitioners filed this Petition, EPA stayed the 2010 TDS limits and four other conditions.<sup>23</sup> On March 17, 2010, EPA withdrew the 2010 TDS limits and the other four conditions previously stayed.<sup>24</sup> All other provisions of the 2010 permit became effective on March 31, 2010.<sup>25</sup>

In short, after twelve years, the unrealistic and unachievable 1998 TDS limits remain in place, despite 1) EPA-approved changes in the statewide water quality

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<sup>20</sup> *Id.* at Part I.A.7.a.

<sup>21</sup> See EAB Docket NPDES 07-08.

<sup>22</sup> ADEC Cert. (Ex. E).

<sup>23</sup> EPA Region 10 Letter dated February 16, 2010 (EAB Dkt. No. 13) (Ex. J).

<sup>24</sup> EPA Region 10 Letter dated March 17, 2010 (EAB Dkt. No. 19) (Ex. K).

<sup>25</sup> EPA Region 10 Letter dated February 16, 2010 (EAB Dkt. No. 13).

standards on which the 1998 TDS limits were based (over ten years ago); 2) adoption of site-specific criteria for TDS for a portion of the affected waters, also approved by EPA in 2003 and 2006; 3) EAB rejection of a petition to review revised TDS limits that were based on these changes in applicable water quality standards (with the sole exception of the limit in Main Stem Red Dog Creek during grayling spawning season) (nearly six years ago); and 4) Teck's continuous, diligent, and good-faith efforts to replace the 1998 limits with ones that are achievable, environmentally sound, and fully compliant with applicable laws. Unfortunately, EPA's recent withdrawal of the 2010 Permit's TDS provisions means that the unachievable 1998 TDS limits will remain in place for another undefined period, pending EPA's preparation of another draft permit and whatever follows.

**B. The Mine is Not Harmful to Water Quality or Aquatic Life**

Petitioners' fact statement attempts to create the impression that the mine's operation has been harmful to aquatic life. The record simply does not support these claims.

Prior to mining, portions of Red Dog Creek were highly acidic and contained high levels of metals, due to natural conditions related to the flow of water through this highly mineralized area. *See generally* FSEIS section 3.5.1 and Table 3.5-1. The lower reach of Red Dog Creek (from the area where the Middle Fork crosses and drains the ore body, downstream to the confluence of the Main Stem with Ikalukrok Creek) was “acutely toxic to fish and most other aquatic organisms.” FSEIS at 3-

141. Development of the mine has improved water quality in these waters, because the mine's diversion system largely captures flow from creeks that previously transported metals into Red Dog Creek, and because this contaminated water is now treated to reduce mineral content. Further, the treated water discharged into Red Dog Creek dilutes the naturally-occurring metals concentrations, moderates the pH, and reduces the toxicity of remaining metals by increasing the water's hardness. FSEIS at 3-59; ADEC Cert., App. A at 7. *See also* EPA Region 10's Response to Comments, Dec. 2009 ("RTC") (Ex. G) No. 36 at p. 18 ("data presented in Table 3.5-7 of the Final SEIS consistently show lower metals levels than pre-mining conditions in Red Dog Creek below Outfall 001.").

As a consequence, in the years since mining began, aquatic life in Red Dog Creek and connected waterways has increased. "As discussed in Section 3.10 of the Final SEIS, water quality and aquatic life conditions in the main stem of Red Dog Creek have improved from pre-mining conditions, particularly during the last five years. This has led to increased fish passage and usage of the Red Dog Creek watershed." RTC No. 5 at p. 5. *See also* RTC No. 67 at pp. 35-36; FSEIS at 3-143 ("the overall abundance and diversity of periphyton, invertebrate, and fish communities . . . downstream of the mine have increased since the mine opened"), 3-144 (the area downstream of the mine has shown increased productivity of invertebrate species compared to pre-mining conditions) & 3-145 (increased grayling

population in Main Stem Red Dog Creek, likely related to improved water quality); ADEC Cert., App. A at 7.

Throughout the mine's operation over the last 20 years, effects on aquatic life have been closely monitored by ADEC, the Alaska Department of Fish & Game, and EPA. “Aquatic biomonitoring and ambient water quality monitoring conducted for about 20 years of mine operations demonstrates that the effluent from the facility does not negatively affect existing uses in the Main Stem, Ikalukrok Creek, or local tributaries such as the North Fork.” ADEC Cert., App. A at 5; *see also id.* at 2, 7-8. “[T]here have been no observable negative impacts on existing uses, within the mixing zones or outside of them, since mining began.” ADEC Cert. at 3; ADEC Response to Comment Document for Section 401 Certification for NPDES Permit AK-003865-2, December 15, 2009 (“ADEC RTC”) (Ex. F) at 2.

The positive impact of the Mine on water quality and aquatic life is underscored by the fact that relocation of the mine's effluent discharge to the Chukchi Sea would likely have a negative impact on water quality and aquatic life in Red Dog Creek. “Moving the [wastewater] discharge would have adverse impacts on water quality and aquatic life in Red Dog Creek . . . because the treated effluent has a diluting effect on the naturally high metals levels in Red Dog Creek. The dilution would be lost if the discharge is moved and as a result, metals levels in the Mainstem of Red Dog Creek would increase.” ROD at 6. *See* FSEIS at 3-71, 3-159 (instream concentrations for some metals could be “substantially higher” with a wastewater

pipeline; projecting increases in dissolved zinc and cadmium in Main Stem Red Dog Creek by about 26% to 53%). The increased metals concentration could reduce production of periphyton, benthic invertebrates, and fish growth or survival in this reach. FSEIS at 3-159. As a consequence, even though relocation would reduce TDS levels, “the net effect to aquatic resources through discharge diversion would be negative.” *Id.*; *see also id.* at 3-160 (“because of increased metals concentrations and reduced flow, the overall effects of moving the discharge to the Chukchi Sea may be more negative than positive to aquatic resources of Red Dog Creek system . . .”).

Petitioners refer to data concerning the density of invertebrates and larval grayling in 2004, attempting to associate this data with supposed changes in TDS levels. Petition at 10. As EPA's response to a similar comment indicated, this data is from only one year. It does not contradict the extensive longer term data demonstrating that “current conditions are consistently improved over pre-mining conditions. This includes both fish and periphyton levels . . .” RTC No. 36 at p. 18.<sup>26</sup> Moreover, Petitioners do not refer to any evidence to support a cause-and-effect relationship between TDS levels in the effluent and the 2004 observations of invertebrates and larval grayling. Petitioners can only hint at a cause/effect relationship by stating that the NPDES Permit was modified in 2003 to raise the TDS

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<sup>26</sup> *See also* FSEIS at 3-144 (the area downstream of the mine has shown increased productivity of invertebrate species compared to pre-mining conditions) and 3-153 (invertebrate growth and survival would not be affected by TDS concentrations of 1500 mg/L, consistent with proposed permit limits).

limit, thereby implying that these 2004 aquatic life observations must be explained by an increase in TDS in 2003 or 2004. But even this effort fails, because as Petitioners know, Teck did not increase TDS levels in the effluent in 2003 or 2004 in response to the 2003 permit modification. Teck has been metering the discharge from Outfall 001 to achieve a TDS level of 1500 mg/L at Station 151 since at least 1998. FSEIS at 3-59. Thus, isolated declines in aquatic life in 2004 cannot be attributed to an increase in TDS levels in the effluent, and Petitioners do not refer to any qualified observer who has made this causal connection.

### **III. ARGUMENT**

#### **A. EPA DID NOT ABUSE ITS DISCRETION WITH RESPECT TO THE PERMIT'S MONITORING REQUIREMENTS**

The Petition includes a two-page argument that EPA abused its discretion with respect to conditions in the Permit concerning monitoring. Significantly, Petitioners do not identify any claimed error of fact or law by EPA with respect to monitoring requirements in the Permit. Their argument is restricted solely to a claim that EPA abused its discretion.

Petitioners have the burden of demonstrating that review is warranted. *In re Hecla Mining Co.*, NPDES Appeal Nos. 03-10 & 06-05, slip op. at 10 (EAB Oct. 31, 2006), 13 E.A.D. \_\_\_; 40 C.F.R. § 124.19(a)(1)-(2). To meet their burden, petitioners must “*demonstrate* the specific reasons why review is appropriate.” *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001). Petitioners'

demonstration of error must be both “specific and substantiated.” *In re Dominion Energy Brayton Point LLC*, 12 E.A.D. 490, 509-10 (EAB 2006); *New England Plating*, 9 E.A.D. at 737.

Petitioners have not met their burden of identifying an abuse of discretion by EPA. For their argument concerning monitoring requirements, Petitioners simply refer generically to CRPE's comments on monitoring spread over six pages of CRPE's February 3, 2009 comment letter. Petition at 37, n.187. Petitioners do not identify any particular comment that is the basis for the Petition's argument concerning monitoring. Petitioners then refer to EPA's responses, but again they do not identify any particular response that is the basis for the Petition's argument on monitoring. They simply drop a footnote referring to six pages of EPA's Response to Comments on the Draft Permit. Petition at 37, n.188.

The Petition fails to do two essential things. First, Petitioners fail to identify what specific points in CRPE's comments EPA allegedly failed to properly address in the Permit. It is impossible to tell from reading the Petition what specific monitoring the Petitioners claim the Permit should have required and does not.

Second, EPA made detailed responses to CRPE's comments, thoroughly discussing specific reasons for its decisions on each monitoring issue that was raised in the comments.<sup>27</sup> The Petition does not discuss any of EPA's responses. Instead,

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<sup>27</sup> See RTC No. 27 at pp. 14-15 (responding regarding monitoring in tributary streams and ambient biomonitoring and monitoring); RTC No. 28 at p. 15

Petitioners just lump EPA's detailed responses together and recharacterize them into a single sentence that supposedly summarizes EPA's responses and gives rise to three alleged errors. Petition at 37 (the sentence starting “EPA responded . . .”). But the Petition never discusses or even identifies any specific EPA responses in which EPA supposedly committed the three errors that are described in this sentence. Thus, Petitioners utterly fail to meet their burden of demonstrating error by EPA. Part II.C.3 of the Petition should be rejected on this basis alone.

Turning to the alleged errors that are mentioned in the Petition, Petitioners first assert that CWA § 308(a) confers broad authority on EPA to require monitoring, and that EPA has authority to ensure that the mine complies with water quality standards. Petition at 37-38. There is no reason to debate these propositions here, because Petitioners have not identified any instance where EPA refused to require monitoring because it claimed or believed that it lacked legal authority to do

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(responding regarding change in ambient monitoring from Station 10 to Station 151, and regarding monitoring for cyanide); RTC No. 29 at pp. 15-16 (responding regarding monitoring for dissolved oxygen and hydrogen sulfide and total cyanide ambient monitoring); RTC No. 30 at p. 16 (responding regarding biomonitoring for benthic invertebrates); RTC No. 31 at p. 16 (responding regarding monitoring for total solids); RTC No. 32 at p. 17 (responding regarding including ambient monitoring in DMRs); RTC No. 37 at p. 19 (responding regarding bioassessment monitoring in area streams and reporting in monthly DMRs); RTC No. 56 at p. 31 (responding regarding requiring reports with detailed chemical analyses and adding a long list of constituents to required monitoring and effluent limitations); RTC No. 57 at p. 32 (responding regarding additional water quality monitoring, stream sediment sampling, flow measurement and toxicity tests by independent party, and regarding request to include collection field measurements in outlying areas on the margins of the Red Dog facilities and winter surveys to define non-point source seepages); RTC No. 58 at p. 32 (responding regarding requiring independent monitoring).

so under the Clean Water Act. As indicated above, Petitioners have not discussed or challenged the actual reasons stated by EPA for its monitoring decisions.

As part of their monitoring argument, Petitioners make the off-hand comment that EPA has made biomonitoring unenforceable by transferring biomonitoring requirements to the state solid waste permit. Petition at 38. To the contrary, the permit specifically incorporates a biomonitoring plan that includes the entire biomonitoring program contained in the 1998 NPDES permit, with the exception of biomonitoring that was originally required in order to establish baselines.<sup>28</sup>

Implementation of this plan and annual reporting of results is a specific condition of the re-issued permit. 2010 Permit Part I.E. At one point, EPA and ADEC proposed moving all biomonitoring requirements to the mine's solid waste permit. EPA Fact Sheet at 14-15. However, based in part on comments received on this issue, EPA decided to retain biomonitoring requirements in the final Permit. *See* RTC No. 35 at p. 18; ADEC's Response to Comments at 6; 2010 Permit Part I.E. The net effect is that biomonitoring is required under both the re-issued NPDES permit and the State solid waste management permit.

Finally, Petitioners argue that EPA erred by not requiring that monitoring at the mine be undertaken by an independent consultant. Petitioners concede that EPA cannot require third-parties to monitor compliance. Petition at 38. Section

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<sup>28</sup> Given that the mine has now been operating for over twenty years, EPA was well within its discretion to issue a permit that no longer requires certain monitoring to establish baselines. RTC No. 27 at p. 14.

308(a)(4)(A) of the CWA expresses Congress's clear intent that the permittee self-monitor:

The Administrator shall require the owner or operator of any point source to (i) establish and maintain records; (ii) make such reports; (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods); (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe); and (v) provide such other information as [the Administrator] may require. . . .

(Emphasis added.) As EPA explained in responding to CRPE's comment, EPA has adopted appropriate enforcement mechanisms to ensure the validity of monitoring data. EPA requires certification of sampling results, and both EPA and ADEC conduct compliance inspections. RTC No. 57 at p. 32. Petitioners fail to identify any abuse of discretion in EPA's conclusion that these enforcement mechanisms are appropriate here.

Petitioners have not demonstrated that review of the Permit's monitoring conditions is warranted. The Board should deny review on this issue.

**B. EPA DID NOT ABUSE ITS DISCRETION BY NOT REQUIRING TECK TO RELOCATE THE POINT OF DISCHARGE TO THE CHUKCHI SEA BY BUILDING A 52-MILE PIPELINE**

Some of the Petitioners argue that EPA abused its discretion because it did not require Teck to build a 52-mile pipeline to discharge wastewater into the Chukchi Sea, rather than allowing Teck to continue using the current discharge location in the

Middle Fork of Red Dog Creek.<sup>29</sup> This argument is without merit, and review should be denied.

**1. EAB Review of the Permit for Failure to Require Construction of a Pipeline is Barred Because No Comment on the Draft Permit Raised This Issue.**

Persons seeking review of permitting decisions must demonstrate that the issues raised in their Petition were raised during the public comment period. *Teck*, 11 E.A.D. at 479. “In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.” *Id.*

No comments were submitted in response to the draft permit claiming that the permit should require construction of a wastewater pipeline in place of the current outfall at Red Dog Creek. Because this argument was not preserved for review, the Board need not address it further. *Teck*, 11 E.A.D. at 481-82.

Petitioners refer to comments concerning the proposed pipeline that CRPE submitted in a letter to EPA dated February 3, 2009. (FSEIS App. H at pp. H-13 to H-56). But these comments were directed to the adequacy of the SEIS, not the draft NPDES Permit. CRPE's comments on the proposed pipeline appeared in two places—a brief introductory statement, and a section headed “The SEIS Demonstrates EPA's Failure to Meaningfully Regulate Teck Cominco's Discharges or

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<sup>29</sup> Northern Alaska Environmental Center, Alaska Community Action on Toxics and Native Village of Point Hope IRA Council do not join in this argument. Petition at 39, n.196.

Enforce the Discharge Limitations Imposed on the Mine.”<sup>30</sup> This heading clearly indicates that the comments about the pipeline go to the adequacy of the draft SEIS, not the adequacy of the draft permit.<sup>31</sup> The distinction between SEIS comments and Permit comments is further demonstrated by the fact that the same letter includes other sections that are directed toward the Permit, as plainly indicated by headings stating that “The Permit Must Have Easier, Better Enforcement Mechanisms,” “The Draft Permit is Inadequate,” and “The Permit and Certification Violate the Prohibitions in State and Federal Law Against Back-Sliding and Anti-Degradation.” CRPE Letter at pp. 20-34 (FSEIS App. H at H-35 to H-49). The sections of CRPE's letter that are directed to the NPDES Permit do not contain any comment to the effect that the Permit should require Teck to relocate the discharge location to the Chukchi Sea. Notably, CRPE's letter listed specific changes that it wanted EPA to make in the NPDES Permit, and this list says nothing about adding a provision requiring Teck to build a wastewater pipeline in order to relocate the effluent discharge to the Chukchi Sea.<sup>32</sup> Thus, CRPE's letter did not alert EPA to the existence of an issue that allegedly affected the NPDES permit.

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<sup>30</sup> FSEIS App. H at H-14 & H-24.

<sup>31</sup> The referenced section of CRPE's letter is one of seven sequential sections in the letter, all plainly and expressly directed to the SEIS rather than the Permit. See Sections II through VIII of CRPE's Letter, pp. 3-19 (FSEIS App. H at H-15 to H-34).

<sup>32</sup> CRPE Letter at pp. 30-31, FSEIS App. H at H-45 to H-46.

Petitioners attempt to turn the obligation to raise comments on its head, by criticizing EPA for failing to respond to the pipeline issue in EPA's Response to Comments on the Draft NPDES Permit. But as explained above, EPA had no reason to respond to this issue in its Response to Comments on the Draft Permit, because CRPE did not raise this comment in the portions of its comment letter that were directed to the adequacy of the NPDES permit.<sup>33</sup> EPA was not obligated to guess that CRPE's comments concerning the draft SEIS were really intended to be comments on the draft Permit--especially when such a guess would have been directly contrary to the presentation of the comments in the comment letter.<sup>34</sup>

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<sup>33</sup> EPA responded to the comment regarding the pipeline alternative in Appendix H of the FSEIS (Responses to Written and Oral Comments on the Draft SEIS).

<sup>34</sup> Neither EPA nor the Board is required to guess the meaning behind imprecise comments. *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002). *See, e.g., In re ConocoPhillips Co.*, PSD Appeal No. 07-02, slip op. at 45-46 (EAB June 2, 2008), 13 E.A.D. \_\_\_\_ (concluding that comments expressing “extensive concern” regarding greenhouse gas emissions did not reflect the requisite level of specificity required to properly preserve the issue of whether best available control technology for CO<sub>2</sub> and methane was required).

CRPE's comment letter includes a line indicating that although its comments are included under headings that refer to the SEIS or the permit, all comments are directed to the SEIS, the permit and the State's 401 Certification wherever relevant. Letter at 2, FSEIS at H-14. A catch-all statement of this nature cannot override the specific statements in the letter. EPA cannot be expected to disregard the express statements in the letter and guess at the commenter's intent to comment otherwise based on a one-line statement of this nature.

**2. EPA Did Not Abuse its Discretion by Declining to Require Teck to Discharge at an Alternative Location.**

EPA responded to the comments on the FSEIS by stating that “it is not within our NPDES authority to require Teck to construct the pipeline and change the discharge point.” FSEIS App. H at H-14. “EPA's authority is limited to reissuing the permit or denying the application for reissuance.” *Id.* at H-24.

EPA was correct. The Board previously upheld the agency's position in *In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 815-17 (EAB 1993). In that case, the petitioner had originally commented that EPA had failed to consider alternative locations for the outfall and therefore could not be assured it was at the best possible location. EPA responded that it had no obligation to consider alternative locations:

EPA has reviewed the proposed plan for its ability to meet existing environmental standards and criteria. If the plan does meet those standards and criteria, then the applicant may move forward with their project. Conversely, if the plan does not meet those standards or criteria, the project as proposed cannot move forward. If a proposed project is unacceptable as designed, an applicant may modify the proposed project/plan to meet EPA criteria and standards. The way in which an applicant decides to modify a project is their decision.

4 E.A.D. at 816 n.16. On appeal, the Board agreed. “[T]he Agency reviews NPDES permit applications for a facility's ability to meet the requirements of the Clean Water Act implemented by the NPDES program . . . . As part of the NPDES permit decision-making process, the Region is not required to evaluate alternative sites for

an outfall that meets such requirements unless review is required under the National Environmental Policy Act.” 4 E.A.D. at 816.<sup>35</sup>

EPA's position makes great practical sense. Before issuing a permit for a discharge at another location, in this case, a marine location over fifty miles away, Teck would have to prepare a new application with detailed analysis of the receiving waters as well as the relevant water quality standards and ocean discharge criteria. Before submitting such an application, Teck would also have to confirm access rights, including access across Cape Krusenstern National Park. EPA would also have to engage in additional consultation under the Endangered Species Act. When Teck's discharge from the proposed outfall complies with Clean Water Act requirements, EPA cannot simply require a different outfall location.

Some of Petitioners in this case, nonetheless, argue that EPA was required to consider moving the outfall either as an available “technology” to control TDS, or as a condition authorized by Clean Water Act section 402(a)(1)(B) to protect receiving

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<sup>35</sup> See also *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 734 n.12 (EAB 2006) (a permit holder may consider alternative outfalls as a means of complying with water quality based effluent limitations, but the EAB has no jurisdiction to consider such issues; the Board has jurisdiction to review permit conditions).

Petitioners do not argue that EPA failed to meet NEPA requirements with respect to the wastewater pipeline, or in any other respect. In fact, EPA fully satisfied NEPA's requirements in all respects, including with respect to the proposed pipeline, in its consideration of alternatives. Having done so, NEPA affords no basis for challenging EPA's permit decisions. It is well-settled that NEPA “does not mandate particular results, but simply prescribes the necessary process” for agency decision-making. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *Cascadia Wildlands Project v. U.S. Forest Service*, 386 F. Supp. 2d 1149,

water quality. Neither argument is consistent with the statute, EPA's regulations or the developed case law.

Petitioners' argument focuses on the TDS limit in the permit. Under the Clean Water Act, permits may contain technology-based and water quality-based effluent limitations. Pollutants must be controlled at least to the levels required by technology-based limitations. 33 U.S.C. §§ 1311(a), 1342(a); 40 C.F.R. § 125.3(a). More stringent water quality-based limitations may be applied if necessary to ensure compliance with state water quality standards. 33 U.S.C. § 1311(b)(1)(C). In this case, EPA has set the TDS permit limits at levels necessary to ensure compliance with Alaska's water quality standard. *See* 2010 Permit Condition I.A.7. A change in the outfall location would not be an appropriate technology-based or water quality-based permit condition.

### **3. An Alternative Outfall Location is Not a “Technology” That Must be Considered in Evaluating BAT.**

If water quality standards do not require more stringent limitations, NPDES permits contain technology-based effluent limitations for nonconventional pollutants, such as TDS, that are based on the best available technology economically achievable, commonly known as BAT. 33 U.S.C. § 1311(b)(2)(F); 40 C.F.R. § 125.3(a)(2)(v). For many industries, EPA has established BAT requirements by promulgating effluent limitations guidelines pursuant to Clean Water Act section

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1159-60 (D. Ore. 2005) (agency not required to choose environmentally preferable alternative).

304(b). *See* 33 U.S.C. § 1314(b). When no applicable guideline exists, permit writers determine technology-based limitations using their “best professional judgment.” *United States Steel Corp. v. Train*, 556 F.2d 822, 844 (D.C. Cir. 1977); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 538 (EAB 2006); *see also* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c). Whether a technology-based effluent limitation is based on a national guideline or best professional judgment, however, it should still be designed to require the pollutant to be controlled to the level possible with the best available technology economically achievable.

Petitioners argue that EPA should have considered requiring an alternative discharge location in determining BAT. This argument fails because an alternative discharge location is not a pollutant control “technology” for purposes of determining BAT.

Under the Clean Water Act, technologies considered in determining the best practicable technology (BPT) or the best available technology (BAT) are “control” or “treatment” technologies.<sup>36</sup> These technologies reduce or eliminate the discharge of pollutants.<sup>37</sup> They are treatment technologies that apply “prior to or at the point of discharge,” 40 C.F.R. §125.3(e), not “non-treatment’ techniques such as flow

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<sup>36</sup> 33 U.S.C. § 1311(b)(1)(A) (“application of the best practicable control technology currently available”) (underline added); 40 C.F.R. § 125.3(e) (“[t]echnology-based treatment requirements”) (underline added).

<sup>37</sup> *See Dominion Energy*, 12 E.A.D. at 543 (explaining that the BAT standard “is intended to be technology-forcing” . . . “pushing industries toward the no-discharge goal”).

augmentation and in-stream mechanical aerators.” 40 C.F.R. § 125.3(f).<sup>38</sup>

Technologies selected as BAT apply to an entire category of dischargers.<sup>39</sup> After determining the best available technology for the category, a numeric effluent limitation (usually concentration or mass limit) is set based on the capabilities of that technology.<sup>40</sup>

Changing the location of an outfall is not a “technology” in any of these senses. It would not control or treat TDS. It would not reduce or eliminate the discharge of TDS to waters of the United States. It is not a technology that is applied prior to the discharge. It is not a requirement that could apply to an entire class of dischargers, and a permit writer could not base a concentration or mass TDS limitation on it.

Petitioners are not able to point to any instance in which EPA has evaluated an alternative discharge location as a technology in its BAT determination. Petitioners' reliance upon *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420 (9th

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<sup>38</sup> Surprisingly, Petitioners also cite this regulation. Although they point out that it allows consideration of non-treatment techniques to be used if necessary to comply with water quality standards, they fail to mention that the regulation clearly excludes these kinds of non-treatment techniques from the BAT determination. Petition at 42, n.216.

<sup>39</sup> 40 C.F.R. 125.2(c)(2); *Dominion Energy*, 12 E.A.D. at 539 n.76; *see also United States Steel*, 556 F.2d at 844 (using best professional judgment under section 401(a)(1), “the BPT to be ascertained by EPA is still a uniform national standard for the class or category....”)

<sup>40</sup> *Dominion Energy*, 12 E.A.D. at 547 (“NPDES permits generally do not mandate a specific technology; they instead establish ... limits based on the best technology and the permittee may meet these limits as it sees fit”); *see also* 40 C.F.R. 122.2.

Cir. 1988), is mistaken. In that case, the Ninth Circuit addressed whether EPA should have considered underground reinjection of drilling wastes to be an available technology. As the court described it, “[r]einjection is a disposal technique in which the produced water is reinjected into a sub-surface geologic formation so that none of the pollutants it contains are released to the sea.” 863 F.2d at 1425. It is a technology that not only reduces, but entirely eliminates discharges to the surface waters governed by the Clean Water Act. If considered BAT, this reinjection technology would justify an effluent limitation of zero, prohibiting all discharge to waters of the United States consistent with the Clean Water Act's goals. In contrast, Petitioners' suggestion of moving Teck's outfall from one surface water location to another would not change the amount of TDS being discharged into waters of the United States. Therefore, the Ninth Circuit decision in *NRDC v. EPA* is entirely consistent with EPA's position in this case.

**4. EPA is Not Authorized to Require an Alternative Outfall Location as a Condition to Protect Water Quality.**

As an alternative to arguing that moving the discharge location is a treatment “technology,” Petitioners also argue that the language in CWA section 402(a)(2)(B), authorizing EPA to include “such conditions as the Administrator determines are necessary to carry out the provisions of this chapter,” authorizes EPA to change the outfall location.<sup>41</sup>

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<sup>41</sup> Section 402(a)(1) provides, in relevant part:

Section 402(a)(2)(B), however, authorizes only those conditions that are necessary to carry out the provisions of this chapter. Petitioners do not point to any provision of the Clean Water Act that necessitates a change in the discharge location. The NPDES permit contains conditions requiring discharges to comply with Alaska's water quality standard for TDS. *See* Permit Condition I.A.7. Indeed, the State of Alaska has adopted site-specific criteria as the TDS water quality standard for these waters, and the NPDES permit requirements precisely mirror that site-specific water quality standard. Additional conditions are not, therefore, necessary to ensure compliance with Alaska's water quality standard.

Petitioners appear to argue that the mixing zones included in the permit would not be necessary if the outfall were moved. Their point is irrelevant to the analysis under section 402(a)(2)(B). The mixing zones authorized in the permit are part and parcel of Alaska's water quality standard for TDS at this location. As long as Teck's discharge complies with that water quality standard, section 402(a)(2)(B) does not authorize EPA to impose additional permit conditions. Not surprisingly, Petitioners

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the Administrator may . . . issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

33 U.S.C. § 1342(a)(1).

cite no authority in support of their novel claim, and point to no instance in which a permit has required the relocation of the proposed discharge location pursuant to section 402(a)(2)(B).

#### **IV. CONCLUSION**

Petitioners have not demonstrated any reason for the Board to review the Permit's provisions governing monitoring, or EPA's omission of a provision requiring Teck to relocate the effluent discharge by building a pipeline. The Petition for Review should be denied.

DATED: April 5, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **TECK ALASKA INCORPORATED'S OPPOSITION TO PETITION FOR REVIEW** in the matter of **TECK ALASKA INCORPORATED, RED DOG MINE**, NPDES Appeal No. 10-04, has been filed electronically with the Environmental Appeals Board and was served by United States First Class Mail this day upon the following:

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