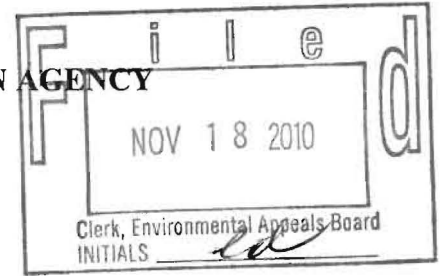


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Teck Alaska, Incorporated)
(Red Dog Mine))
)
NPDES Permit AK-003865-2)
_____)

NPDES Appeal No. 10-04

ORDER DENYING REVIEW

On February 16, 2010, the Native Village of Kivalina IRA Council, Native Village of Point Hope IRA Council, Alaska Community Action on Toxics, and Northern Alaska Environmental Center, (collectively, "Petitioners") filed a Petition for Review ("Petition") with the Environmental Appeals Board ("Board").¹ The Petition seeks review of the National Pollutant Discharge Elimination System ("NPDES") permit No. AK-003865-2 (the "Permit"), that the United States Environmental Protection Agency ("EPA" or "Agency"), Region 10 ("the Region") re-issued to Teck Alaska Incorporated ("Teck Alaska"), authorizing continued wastewater discharges associated with operating the Red Dog Mine. On March 2, 2010, the Board granted Teck Alaska and NANA Regional Corporation (the owner of the land on which

¹ Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan Sr. joined in the initial Petition for review, but subsequently withdrew from the portion of the Petition that remains before the Board. *Notice of Partial Withdrawal by Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan Sr.*, Docket No. 19 at 1 (Mar. 24, 2010) (indicating that the named Petitioners remain a party to the proceedings solely for issues related to the limitations set for Total Dissolved Solids ("TDS") which the Region has since withdrawn and, as explained below, are no longer an issue before the Board).

Red Dog Mine is located) leave to respond to the Petition. Briefing was complete on April 5, 2010.

I. *Issue Before the Board and Summary of Decision*

Petitioners identified four issues for review in their Petition, only one of which remains before the Board.² The remaining assertion, as presented, is that the Region “abused its discretion” in issuing the Permit’s monitoring conditions. *See* Petition at 37. Petitioners set forth this issue in very general terms, casting their entire argument on the issue in slightly more than two pages of their Petition. Petition at 37-39. In response, both Teck Alaska and the Region argue that Petitioners have failed to meet their burden to demonstrate that review is warranted by failing to demonstrate with specificity why the Region’s responses to comments concerning the monitoring provisions were clearly erroneous or otherwise merited review.³ As explained further below, the Board routinely denies review of petitions that fail to address the permitting authority’s responses to comments because they are deficient under 40 C.F.R. § 124.19(a). Thus, the question the Board must decide is: Did the Petitioners adequately set forth a monitoring issue warranting review as required by 40 C.F.R. § 124.19(a)? For the reasons articulated below, the Board concludes that the Petitioners did not meet their burden in this regard. Accordingly, the Board denies review.

² As explained below, subsequent to the filing of the Petition, Region 10 withdrew portions of the permit upon which Petitioners’ other objections were based. Region 10 simultaneously moved to dismiss portions of the petition, which the Board granted. *See Order Dismissing Petition for Review in Part and Denying Cross-Motion to Stay the Entire Permit*, Docket No. 41 at 12-13 (EAB Apr. 30, 2010).

³ Teck Alaska also argues that Petitioners fail to identify the specific monitoring provisions with which Petitioners take issue. The Board does not address this contention, however, because as explained further below, the Board concludes that Petitioners have otherwise failed to meet their burden to demonstrate that review of this Permit is warranted.

II. *Procedural and Factual History*

As stated above, Petitioners seek Board review of a February, 2010 NPDES Permit that the Region re-issued to Teck Alaska for its Red Dog Mine facility. The Red Dog Mine is a lead and zinc mine situated in the Northwest Arctic Borough of Alaska. *Region 10's Response to Petition*, Docket No. 28 at 2 (April 5, 2010). The Permit authorizes Teck Alaska to discharge treated wastewater and storm water from the Red Dog Mine within the parameters of the Permit. *See* Final NPDES Permit No. AK-003865-2, at 1 (Jan. 8, 2010).

The NPDES permitting history for the Red Dog Mine involves multiple permits and permitting processes as well as an alleged history of noncompliance, the details of which are not relevant to resolve the issue presently before the Board and, thus, will not be recited here. In brief, Region 10 issued to the Red Dog Mine its first NPDES permit in 1985, and operations began in 1988. That permit was administratively extended upon expiration and the Region issued a new permit in 1998. A series of permitting processes occurred and the most recent permit issued was the 2010 Permit at issue in this case. *See generally, In re Teck Cominco Alaska, Incorporated, Red Dog Mine*, 11 E.A.D. 457, 461-62 (EAB 2004); *Petition* at 1-2; *Region 10's Response to Petition for Review*, Docket No. 28 at 4-6 (Apr. 5, 2010).

Petitioners filed this petition for review of the 2010 Permit on February 16, 2010. As originally filed, Petitioners' primary challenge was the "illegal backsliding and degradation of water quality" that was allegedly allowed by the new and *less* stringent effluent limits for zinc, lead, selenium, TDS and cyanide.⁴ After this Petition was filed, the Region withdrew certain

⁴ More specifically, section II.C.1 challenged EPA's reliance on the "State's CWA section 401 certification because Alaska lacks the legally required antidegradation

(continued...)

challenged Permit conditions for further consideration. As a result, the Region filed two motions to dismiss the sections of the Petition that relate to the withdrawn conditions, i.e., sections II.C.1, II.C.2 and II.C.4. *See Region 10's Motion to Dismiss Petition for Review in Part*, Docket No. 20 (Mar. 18, 2010); *Region 10's Motion to Dismiss Section II.C.4. of Petition for Review*, Docket No. 25 (Apr. 1, 2010). Petitioners opposed the Region's motions and filed a Cross-Motion to Stay the Entire Permit on April 5, 2010 (Docket No. 27).

Ultimately, the Board dismissed the portions of the Petition for Review related to the withdrawn permit conditions as moot. *Order Dismissing Petition for Review in Part and Denying Cross-Motion to Stay the Entire Permit*, Docket No. 41 at 12-13 (EAB Apr. 30, 2010). The Board also denied Petitioners' Motion to Stay the Permit. *Id.* As explained in the Board's prior order, the only portion of the Petition remaining before the Board is Section II.C.3, which addressed the permit's monitoring conditions. The Region and Teck Alaska each filed a response to Petitioners' arguments in section II.C.3 of the Petition. NANA Corporation joined in Teck Alaska's response.

III. Analysis

As explained above, the issue the Board considers is whether Petitioners have adequately set forth a monitoring issue warranting Board review as required by 40 C.F.R. § 124.19(a). In any petition filed under section 124.19, the petitioner bears the burden of meeting certain threshold requirements including setting forth the basis for review. *See* 40 C.F.R. § 124.19(a)

⁴(...continued)

implementation procedures to perform a legally adequate antidegradation analysis.” Section II.C.2 challenged the “illegal backsliding” allowed by the permit. Section II.C.3 challenged the permit's monitoring provisions. Section II.C.4 challenged EPA's “failure to require Teck to discharge at an alternative location.”

(requiring petitioners to state in the petition the grounds for review and include a demonstration that any issues being raised were raised during the public comment period to the extent required); *see In re BP Cherry Point*, 12 E.A.D. 209, 216-17 (EAB 2005) (explaining that the petitioner bears the burden of demonstrating that review is warranted).

Among other things, petitions for review are required to “state the reasons supporting review, including a showing that the condition in question is based on: (a) a finding of fact or conclusion of law that is clearly erroneous, or (b) an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. *See* 40 C.F.R. § 124.19(a). The Board has interpreted this requirement as mandating two things: “(1) clear identification of the conditions in the permit at issue, and (2) argument that the conditions warrant review.” *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 14 (EAB 1994); *see also In re City of Pittsfield*, NPDES Appeal No. 08-19, at 6 (EAB Mar. 4, 2009) (Order Denying Review) *aff’d*, *City of Pittsfield v. EPA*, No. 09-1879 (1st Cir. Jul. 16, 2010) (citing *Beckman*, 5 E.A.D. at 14); *In re Chukchansi Gold Resort and Water Treatment Plant*, NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05, slip op. at 9 (Jan 14, 2009), 14 E.A.D. at ____.

Importantly, “it is not enough to simply rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the [r]egion’s response to those objections (the region’s basis for its decision) is clearly erroneous or otherwise warrants review.” *Chukchansi*, slip op. at 9, 14 E.A.D. at ____ (some citations omitted); *see also Pittsfield*, slip op. at 7. The Board routinely denies review of petitions that fail to address the permitting authority’s responses to comments in this manner. *See, e.g., In re Cherry Berry B1-25 SWD*, UIC Appeal No. 09-02 (EAB Aug. 13, 2010) (Order Denying Review) (denying review based in

part on petitioner's failure to state why the permitting authority's responses to comments were erroneous); *Chukchansi*, slip op. at 10, 15, 22, 14 E.A.D. at ____ (denying review of petitions based in part on the petitioner's failure to explain why the responses to comments were insufficient); *see also Pittsfield*, NPDES Appeal No. 08-19 at 12 (explaining that "a long and consistent line of Board authority" has required that petitioners explain why the permitting authority's response to comments is clearly erroneous or otherwise warrants review).

As explained above, the only portion of the Petition remaining before the Board is set forth in Section II.C.3 of the Petition in only slightly more than two pages. That section begins with the following assertion: "EPA's Issuance of the Permit's Monitoring Conditions Constitutes an Abuse of Discretion." Petition at 37. Petitioners then provide a one-sentence summary of the Region's responses to comments that apparently is intended to summarize the issues Petitioners intend to challenge. In particular, Petitioners state that the Region:

responded to comments concerning reduced monitoring by claiming that (1) the only monitoring necessary is that which ensures compliance with the Permit's effluent limitations; (2) bioassessment monitoring is consistent with the [State's] 401 Certification and it is appropriate to defer to [the State]; and (3) EPA has no authority to require third-party monitoring and the Act permits self monitoring.

Petition at 37 (citing EPA Responses to Comments at 14-16, 19, and 31-32). Reading this petition generously, the Board assumes from this summary of the Region's responses to comments, that Petitioners intend to argue that Region 10 abused its discretion and committed clear error by: 1) failing to include monitoring requirements for compounds not governed by effluent limitations; 2) failing to include adequate bioassessment monitoring requirements in the

2010 NPDES permit; and 3) failing to require third-party monitoring.⁵ The Board addresses each of these alleged errors in turn and considers whether Petitioners adequately articulated why the Region's responses to comments were insufficient as to each.

With respect to the alleged failure to include monitoring requirements for compounds not governed by effluent limitations, we note first that the Region does not state (in the comments cited by Petitioners) that "the only monitoring necessary is that which ensures compliance with the Permit's effluent limitations," as is suggested by the Petitioners. Petition at 37. Rather, the Region states:

The Final Permit includes all of the effluent and ambient monitoring necessary to determine compliance with permit limits. The basis for the effluent limits and monitoring were described in the Fact Sheet. In addition, the facility has to meet [whole effluent toxicity, ("WET")] limitations which account for toxic effects of parameters that may not have been limited. Influent monitoring is not required or necessary because it is irrelevant to determining compliance and effects on the receiving waters. Teck may sample the influent to the treatment plant to ascertain treatment performance but the Final Permit does not require this type of monitoring.

EPA's Responses to Comments at 31 (Ex. 6 to Region 10's Response to Petition for Review).⁶

The Region also responded that "the monitoring that has been performed [to date] provides a long-term record of the background conditions throughout the watershed, including the tributaries. Ceasing monitoring in the tributaries [upstream from the mine and that feed into the

⁵ Because Petitioners have not identified any specific monitoring provisions in their Petition, the Board assumes that Petitioners object generally to all monitoring provisions on each of these three grounds.

⁶ The Region also references WET limits, in a separate response that is not cited by Petitioners, in explaining how WET testing and WET limits address the overall potential toxic effects of the discharge on the receiving water from parameters that do not have water quality standards on which to base effluent limits. *See Region's Response to Comments* at 48.

mine] will not have any effect on protection of water quality in the streams downstream of the NPDES discharge.” EPA’s Responses to Comments at 14. The Region also explained that it moved one monitoring station further downstream from its original location “to establish a monitoring location at the boundary of the mixing zone in the main stem of Red Dog Creek.” *Id.* at 15. Each of the responses above provide the Region’s rationale for various effluent and ambient monitoring required or omitted, and Petitioners do not address this rationale at all, let alone sufficiently to explain why the Region’s responses are irrelevant, erroneous, insufficient or otherwise constitute an abuse of discretion. *Chukchansi*, slip op. at 22, 14 E.A.D. at ____ (denying petition based on petitioner’s failure to explain with sufficient specificity why the region’s previous responses to comments were clearly erroneous, an abuse of discretion, or otherwise warranted review).

Next, Petitioners assert as error the Region’s failure to require third-party monitoring. Region’s Br. at 9 (interpreting Petition at 37). More specifically, Petitioners argue that the Region has “broad discretion” under CWA section 308(a)(A), 42 U.S.C. § 1318(a)(A), to require the Permittee to retain a consultant for independent monitoring.

In response to comments suggesting that the Final Permit should require that certain monitoring “be conducted by some competent, independent party,” the Region explained:

CWA Section 308(a)(4)(A) requires that permits contain self-monitoring requirements:

“the Administrator shall require *the owner or operator* of any point source to (i) establish and maintain such 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 he may reasonably require[.]”

EPA supplements monitoring data through inspections and has no authority to require other federal agencies or [any] independent party to conduct required permit monitoring.

Note that the Permittee must certify the validity of its sampling results with each [daily monitoring report] submitted to EPA, and EPA and the State conduct periodic NPDES compliance inspections at the site.

The Final Permit authorizes point source discharges from the mine and does not address any potential non-point source discharges, which are outside the authority of the NPDES program.

EPA’s Responses to comments at 32 (emphasis added). Petitioners have not attempted to address the Region’s response to comment in any meaningful way. Although Petitioners acknowledge that the Region has “broad discretion” with respect to the monitoring provisions it imposes, Petition at 38, Petitioners make no attempt to explain how the Region’s adherence to the CWA’s self-monitoring provisions, and its reliance on certification requirements and periodic EPA and State inspections to conclude that self-monitoring is appropriate in this case (even after taking into account a history of noncompliance) constituted an abuse of that discretion. *Chukchansi*, slip op. at 22, 14 E.A.D. at ____.

Finally, Petitioners seem to argue that the Region’s bioassessment monitoring requirements have been transferred out of the permit or made unenforceable. *See* Petition at 37, 38. With respect to comments concerning bioassessment monitoring, the Region responded:

Consistent with the 1998 permit, EPA has deferred the ambient biomonitoring requirements to the State through the CWA § 401 Certification because they are directly related to ensuring implementation of the State’s WQS and protection of designated uses. It should be noted that all of the 1998 monitoring

requirements are incorporated into a broader program proposed in the State's Waste Management Permit.

EPA's Responses to Comments at 14-15. The Region also provided an additional response as to the provision concerning biomonitoring for certain invertebrates, explaining that it had been removed because it was not required by the current CWA § 401 Certification. *Id.* at 16. EPA further explained:

The bioassessment requirements in the Final Permit are consistent with the State's CWA § 401 Certification and intended to assure that the conditions of the Final Permit are protective of aquatic life in the receiving water. EPA believes that this it is appropriate to follow the State's recommendations [because] the State initially included bioassessment requirements in the CWA § 401 Certification of the 1998 Permit and has had the primary responsibility for reviewing the bioassessment data collected to date.

Bioassessment requirements that are included in the [P]ermit remain enforceable under the [P]ermit and the CWA[.]⁷

Id. at 19. Petitioners provide no explanation why the Region's response to comments regarding the bioassessment monitoring in the Final Permit is irrelevant, erroneous, insufficient or constituted an abuse of discretion. *Chukchansi*, slip op. at 22, 14 E.A.D. at ____.

Because Petitioners fail to adequately articulate why the Region's response to comments is clearly erroneous or otherwise warrants review, Petitioners have failed to meet their burden

⁷ Bioassessment monitoring requirements are included in the permit under section I.E. See Ex. 1 to Region 10's Response to Petition for Review at 12-13.

under 40 C.F.R. § 124.19(a).⁸ See *Chukchansi*, slip op. at 9, 14, 22 E.A.D. at ____ (some citations omitted); see also *Pittsfield*, slip op. at 7.


VII. Conclusion

Based on the foregoing, the Board concludes that the Petitioners have not identified any Permit condition warranting review as required by 40 C.F.R. § 124.19(a). As such, the Board denies review of this Petition.⁹

So ordered.

Dated: November 18, 2010

ENVIRONMENTAL APPEALS BOARD


Anna L. Wolgast
Environmental Appeals Judge

⁸ Because the Board concludes Petitioners have failed to demonstrate review is warranted based on Petitioners' failure to adequately explain why the Region's responses to comments were erroneous, the Board does not consider Teck's contention that Petitioners' failed to identify the permit conditions at issue in the first instance.

⁹ This matter was decided by the following three-member panel of Environmental Appeals Board Judges: Anna L. Wolgast, Edward E. Reich and Charles J. Sheehan. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in *In re Teck Alaska Incorporated*, NPDES Appeal No. 10-04, were sent to the following persons in the manner indicated:

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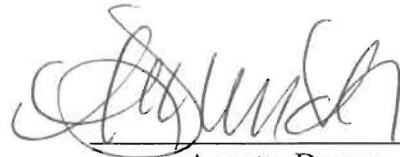
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