

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

In re:)
)
Teck Alaska Incorporated) NPDES Appeal No. 10-04
Red Dog Mine)
)
NPDES Permit No. AK-003865-2)
)
)

**REGION 10's OPPOSITION TO PETITIONERS'
CROSS MOTION TO STAY THE ENTIRE PERMIT**

I. INTRODUCTION

Region 10 of the United States Environmental Protection Agency files this opposition to petitioners' cross motion to stay NPDES Permit No. AK0003865-2 in its entirety. Petitioners filed their cross motion on April 5, 2010, in the same filing that opposed Region 10's Motion to Dismiss Petition for Review in Part. Petitioners have not refuted Region 10's determination to stay the five effluent limitations specifically challenged in the petition for review. Similarly, petitioners offer no authority to support their assertion that the alleged defect in the State of Alaska's antidegradation analysis should stay the entire 2010 NPDES Permit. Petitioners' cross motion to stay the entire permit should therefore be denied.

II. BACKGROUND

Relevant background information is summarized in Region 10's Motion to Dismiss Petition for Review in Part, filed on March 18, 2010. In particular, on February 26, 2010, Region 10 notified the Board and the parties that the following contested permit conditions were stayed by the petition for review, pursuant to 40 C.F.R. §§ 124.16(a)(2) and 124.60(b): lead

(monthly average), selenium (daily maximum), zinc, weak acid dissociable cyanide, and total dissolved solids (TDS). The Region further determined that the remaining January 2010 permit conditions were uncontested and severable from the contested conditions and would become fully effective and enforceable on March 31, 2010, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d).¹

On March 17, 2010, Region 10 withdrew these same five effluent limitations from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d), and on March 18 and April 1, 2010, moved to dismiss Sections II.C.1, II.C.2, and II.C.4 of the petition for review as moot.² Petitioners' opposition to the March 18 motion to dismiss and their cross motion to stay the entire permit followed.³

III. ARGUMENT

Petitioners' cross motion fails to demonstrate that the entire permit should be stayed. The regulations governing NPDES appeals provide that contested permit conditions are stayed by a petition for review and not subject to judicial review pending final agency action.⁴ The regulations further authorize the Regional Administrator to identify the uncontested and severable permit conditions that will become fully effective and enforceable 30 days after the parties are so notified.⁵ Accordingly, by notice filed with the Board on February 26, 2010, Region 10 identified the five effluent limitations listed above as contested and stayed by the

¹ Notification of Stayed Permit Conditions, NPDES Appeal No. 10-04, Docket No. 13, February 26, 2010.

² Notification of Withdrawal of Permit Conditions, NPDES Appeal No. 10-04, Docket No. 19, March 17, 2010.

³ Petitioners' Opposition to Region 10's Motion to Dismiss the Petition for Review in Part and Petitioners' Cross Motion to Stay the Entire Permit at 10, NPDES Appeal No. 10-04, Docket No. 27, April 5, 2010 ("Opposition and Cross Motion").

⁴ 40 C.F.R. § 124.16 (a)(1).

⁵ 40 C.F.R. § 124.16(a)(2). Uncontested conditions that are not severable are stayed together with the contested conditions.

petition for review. Region 10 further determined that the remaining permit conditions were uncontested and severable and would take effect on March 31, 2010.

To avoid this result, petitioners attempt to characterize the petition for review as a broad challenge to the entire Section 401 Certification and thus EPA's authority to issue a permit. A careful reading of the petition belies this characterization. As described in Region 10's March 18 motion to dismiss, the petition for review focuses on the State's lack of antidegradation implementation procedures for conducting the antidegradation analysis.⁶ Indeed, much of the argument focuses on requirements for both an antidegradation policy and implementation procedures.⁷ Based on these requirements, the petition for review specifically argues that the lack of implementation procedures makes "a legally adequate *antidegradation analysis* impossible."⁸

Importantly, the conclusion to Section II.C.1 of the petition states, "It is an abuse of discretion for the EPA to rely on the State's *antidegradation analysis* when it is EPA's duty to ensure that backsliding does not occur when reissuing an NPDES permit."⁹ Petitioners further cite comments submitted by the Native Villages of Point Hope and Kivalina, arguing that because the State cannot legally perform an antidegradation analysis, "the certification to *allow for backsliding* of the effluent limitations . . . is illegal."¹⁰ Backsliding, in turn, is only relevant to permit limits that are less stringent than in the 1998 permit and contested in the petition for review. Thus, Region 10 appropriately determined that these five contested limits were stayed

⁶ Petition for Review at 15, NPDES Appeal No. 10-4, Docket No.1, February 16, 2010.

⁷ *Id.* at 16-18.

⁸ *Id.* at 19 (emphasis added).

⁹ *Id.* at 20 (emphasis added). "Backsliding" refers to the Clean Water Act's prohibition on effluent limitations in reissued permits that are less stringent than comparable limitations in the previous permit, unless certain exceptions are met. 33 U.S.C. § 1342(o)(1).

¹⁰ *Id.* at 15 (emphasis added).

by the petition and that the remaining permit conditions were uncontested and severable. Those remaining provisions took effect on March 31, 2010.

Petitioners' cross motion has not refuted these determinations. Rather, petitioners include only the broad, conclusory assertion that because Alaska lacks antidegradation implementation procedures, both the entire Section 401 Certification and EPA's entire permitting decision were illegal and the entire permit should therefore be stayed.¹¹ Petitioners offer no legal authority or support for this sweeping assertion. Moreover, petitioners overlook the fact that the Section 401 Certification here addresses various other issues not challenged in this proceeding, including water quality impacts of pH limits, requirements for blasting practices to minimize ammonia levels in the effluent, and compliance with state regulations on mixing zones.¹²

Even assuming petitioners are correct – *i.e.*, the antidegradation analysis is flawed for lack of implementation procedures – the end result would be, at most, a 2010 permit authorizing revised effluent limits that were subject to an inadequate *antidegradation analysis*. Here, Region 10's stay of those same revised limits allows the parties and the Board to evaluate any alleged legal deficiencies. Petitioners have simply not demonstrated that the remaining permit conditions are inseverable from the five contested limits for purposes of resolving issues raised in the petition for review. Nor have petitioners demonstrated that their claims regarding the antidegradation analysis are inseverable from EPA's overall permitting decision.

¹¹ Opposition and Cross Motion at 2, 6, 10. Petitioners further suggest that Region 10 has conceded the illegality of both the Section 401 Certification and the lack of antidegradation implementation procedures. *Id.* at 10. Region 10 has made no such concession.

¹² See 2009 Section 401 Certification, attached as Exhibit 18 to Region 10's Response to Petition for Review, NPDES Appeal No. 10-04, Docket No. 28, April 5, 2010.

Following petitioners' line of argument, any challenge to a state's Section 401 certification would result in an automatic stay of EPA's NPDES permitting decision. The NPDES permitting regulations do not contemplate such a sweeping result. To the contrary, 40 C.F.R. § 124.55(b) specifically contemplates that state certifications may be modified as a result of court or administrative challenges.¹³ That regulation specifies the actions EPA may take to incorporate such modifications, depending on whether the modification is received before or after final EPA action on the permit. Thus, a deficiency in a Section 401 Certification does not automatically "infect" an entire NPDES permitting decision as petitioners assert.¹⁴

Here, the petition for review specifically challenges EPA's reliance on the State's antidegradation analysis, which underlies a limited set of permit conditions. Accordingly, Region 10 appropriately determined that this same limited set of permit conditions is contested and stayed by the petition for review under 40 C.F.R. § 124.16(a)(1). Petitioners' cross motion to stay the entire permit should therefore be denied.

Dated this 20th day of April, 2010

Respectfully submitted,

/S/

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¹³ Petitioners have also requested an adjudicatory hearing on the 401 Certification at the state level. On April 6, 2010, the Deputy Commissioner of Alaska's Department of Environmental Conservation issued a preliminary order granting the hearing request and requesting additional briefing on specific issues. *See* Exhibit 1.

¹⁴ Opposition and Cross Motion at 10.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Region 10's OPPOSITION TO PETITIONERS' CROSS MOTION TO STAY THE ENTIRE PERMIT 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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DATED this 20th day of April 2010.

_____/S/_____
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