

Robert Reges, of Counsel  
HARTIG RHODES HOGE & LEKISCH, P.C.  
717 K Street  
Anchorage, Alaska 99501  
Phone: 907-276-1592  
Fax: 907-277-4352  
Attorneys for Permit Applicant

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

|                                  |   |                        |
|----------------------------------|---|------------------------|
| In re:                           | ) |                        |
|                                  | ) |                        |
| Teck Cominco Alaska Incorporated | ) |                        |
| Red Dog Mine                     | ) | NPDES Appeal No. 07-08 |
|                                  | ) |                        |
| NPDES Permit No. AK-003865-2     | ) |                        |
|                                  | ) |                        |

**PERMIT APPLICANT'S REQUEST  
FOR OPPORTUNITY TO RESPOND TO PETITION FILED BY  
THIRD PARTY PETITIONERS, CITY OF KIVALINA, ALASKA, et al.  
AND MOTION FOR EXPEDITED REVIEW OF SAID PETITION**

Teck Cominco Alaska Incorporated ("Teck Cominco") is the applicant for, and holder of, National Pollutant Discharge Elimination System (NPDES) Permit No. AK-003865-2, which was issued for renewal on or about March 12, 2007 and which is the subject of a Petition for Review filed by the City of Kivalina, several individuals functioning in a governmental capacity, and three citizen organizations. Those Petitioners are "Third Parties" in that they neither issued, nor hold, the subject permit.

HARTIG RHODES  
HOGE &  
LEKISCH, P.C.  
ATTORNEYS AT LAW  
717 K STREET  
ANCHORAGE,  
ALASKA  
99501-3397  
TELEPHONE:  
(907) 276-1592  
FAX:  
(907) 277-4352

While cognizant that a federal regulation, 40 C.F.R. §124.19(c), contemplates that requests for *amicus* status will be filed only after this Board grants review, Teck Cominco takes note of the procedures described by this Board on page thirty of the Board's Practice Manual. In accord with the comment in said Manual, that: "the Board will also generally allow the permit applicant to respond to a petition filed by a third party petitioner if the permit applicant has filed a request to respond," Teck Cominco hereby requests an opportunity to respond to the Petition filed by the City of Kivalina et al.

Teck Cominco also moves for expedited consideration of said Petition. Although Teck Cominco was unable to locate any reference to expedited review in this Board's Practice Manual, the Manual does reference "prompt resolution of permit appeals." Manual at 30. Also, Teck Cominco notes that expedited review has been granted in the past. E.g., In Re Hawaii Electric Light Company, Inc., 10 E.A.D. 219, 223 n.5 (Nov. 27, 2001). Therefore, Teck Cominco seeks expedited review of the Third Party Petition.

Teck Cominco's operations at the mine would be significantly and seriously impacted if Kivalina's Petition resulted in a stay of the entirety of the new permit. The Kivalina Petition articulates various concerns with the new permit, including allegations that the permit is illegal under

the National Environmental Policy Act (NEPA). While this forum's jurisdiction over NEPA subject matter is not yet clear to Teck Cominco, the possibility exists that Kivalina's foundational challenge could stay the entire permit. This would constrain Teck Cominco to function under the 1998 permit. 40 C.F.R. §124.16(c)2).

As will be made clear when the administrative record is compiled, some important conditions of the 2007 Permit are predicated upon information, insight and regulatory improvements that were not available in 1998. Discharging in full compliance with the 1998 permit has been problematic. In re Teck Cominco Alaska Incorporated, Red Dog Mine, 11 E.A.D. 457, 468 n.12 (June 15, 2004). Teck Cominco does not discharge during winter months due to the arctic climate, but the 2007 discharge season must start within the next few weeks. Teck Cominco must, as a practical matter, discharge when the discharge season begins because the mine's impoundment area has finite capacity. Given that Teck Cominco's discharge is more likely to comply with the refined limitations found in the 2007 permit, while Teck Cominco remains susceptible to liabilities for non-compliance with the now atavistic provisions of the 1998 permit, justice demands that the permit writers be allowed to demonstrate the accuracy and legitimacy of their 2007 permit conditions as soon as

HARTIG RHODES  
HOGE &  
LEKISCH, P.C.  
ATTORNEYS AT LAW  
717 K STREET  
ANCHORAGE,  
ALASKA  
99501-3397  
TELEPHONE:  
(907) 276-1592  
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possible. Teck Cominco can assist with that demonstration if allowed to participate.

Additionally, the uncertainty created by the Petition affects litigation that is ongoing in the Alaska Federal District Court, Adams et al v. Teck Cominco Alaska Incorporated, Case No. A-04-0049 CV (JWS). There is a strong likelihood that Kivalina's Petition is designed to stay the 2007 Permit for the inappropriate purpose of evading mootness in that forum. Adams is a pending Clean Water Act citizen suit that certain residents of Kivalina have launched. In that suit, City of Kivalina residents are seeking millions of dollars in penalties against Teck Cominco for past non-compliance with the 1998 permit. Such claims may well be mooted by a replacement permit because the new permit prevents the District Court from granting effective relief under the old permit. Communities for a Better Environment v. Tosco Refining Co. Inc., 2001 WL 114441, \*4 - \*8 (N.D. Cal. 2001) and cases cited therein.

The underlying purpose of the Clean Water Act's citizen suit provision is to compel compliance with the Act's provisions. Williams Pipe Line Co. v. Bayer Corp., 964 F.Supp. 1300, 1317 (S.D. Iowa 1997) and cases cited therein. It is both disingenuous and contrary to public policy to stay compliance for the purpose of penalizing wholly past acts and collecting attorney's fees. An expedited decision by this Board will

provide direction to the Federal District Court and will defuse any potential abuse of the automatic stay in this forum.

For all these reasons Teck Cominco Alaska Incorporated respectfully requests an opportunity to respond to the petition filed by Third Party Petitioners, City of Kivalina, et al. and asks that this Board expedite its consideration of that Petition.

RESPECTFULLY SUBMITTED this 19 day of April, 2007.

HARTIG RHODES HOGE & LEKISCH  
Attorneys for Teck Cominco  
Alaska, Incorporated

By: \_\_\_\_\_

  
Robert Reges  
Alaska Bar No. 8612152

HARTIG RHODES  
HOGE &  
LEKISCH, P.C.  
ATTORNEYS AT LAW  
717 K STREET  
ANCHORAGE,  
ALASKA  
99501-3397  
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In re Teck Cominco Alaska Inc.)  
Red Dog Mine )  
Permit No. NPDES ) Appeal No. NPDES 07-08  
AK-003865-2 )

CERTIFICATE OF SERVICE

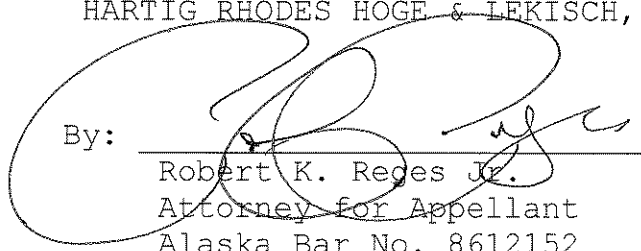
I hereby certify that copies of the foregoing PERMIT APPLICANT'S REQUEST FOR OPPORTUNITY TO RESPOND TO PETITION FILED BY THIRD PARTY PETITIONERS, CITY OF KIVALINA, ALASKA, et al. AND MOTION FOR EXPEDITED REVIEW OF SAID PETITION in the matter of Teck Cominco Alaska Inc. Permit No. AK-003865-2, Appeal No. 07-08, were served by United States First Class Mail on the following persons, this 19<sup>th</sup> day of April, 2007.

Keith Cohon, EPA-ORC  
EPA Region X  
1200 Sixth Avenue, MS ORC-158  
Seattle, WA 98101

Luke Cole  
Center on Race, Poverty & the  
Environment  
47 Kearny Street, Suite 804  
San Francisco, CA 94108

HARTIG RHODES HOGE & LEKISCH, P.C.

By: \_\_\_\_\_

  
Robert K. Reges Jr.  
Attorney for Appellant  
Alaska Bar No. 8612152  
717 K Street  
Anchorage, Alaska 99501  
Ph. (907) 276-1592 / Fax (907) 277-4352

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