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8 **BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
9 **ENVIRONMENTAL APPEALS BOARD**  
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11  
12 In re:

13 TECK COMINCO ALASKA INC.  
Red Dog Mine  
14 NPDES Permit AK-003865-3  
15  
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Appeal Nos. NPDES 07-08 and 07-09

**KIVALINA PETITIONERS'  
OPPOSITION TO MOTION TO  
INTERVENE BY NANA REGIONAL  
CORPORATION, INC.**

17 **I. INTRODUCTION**

18 Petitioners Native Village of Kivalina IRA Council; Jerry Norton, as an individual and in  
19 his capacity of President of the Native Village of Kivalina IRA Council; Austin Swan, as an  
20 individual and in his capacity as Mayor of the City of Kivalina; Colleen Swan, as an individual  
21 and in her capacity as Administrator of the Native Village of Kivalina IRA Council; Enoch  
22 Adams, Jr., as an individual and in his capacity as Vice Mayor of the City of Kivalina; Kivalina  
23 residents Leroy Adams, Andrew Koenig, and Joseph Swan, Sr.; the Alaska Center for the  
24 Environment; Alaska Community Action on Toxics; and Northern Alaska Environmental Center  
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1 oppose the Motion to Intervene filed by NANA Regional Corporation, Inc. (NANA).<sup>1</sup> Petitioners  
2 will be collectively referred to as “Kivalina” in this Opposition.

3 Despite its citation to authority on intervention by Tribes, NANA is not a Tribe. Further,  
4 it has neither a significant interest in this proceeding that would be substantially and specifically  
5 affected by the decision, nor are its interests threatened by Kivalina’s petition. Finally, NANA’s  
6 legal interests are adequately represented by the existing parties.

7 **II. NANA IS NOT A TRIBE WITH AUTHORITY TO REGULATE WATER**  
8 **QUALITY ISSUES.**

9 In a motion to intervene, the Board has discretion to decide whether or not to allow the  
10 movant to join the action as an intervenor. NANA correctly acknowledges that intervention has  
11 been granted in cases where the movant was a Tribe whose authority to regulate water quality  
12 was at issue. *In re US Gen New England, Inc.*, NPDES Appeal No. 03-12, Order Granting  
13 Review at 7 n.13 (Feb. 20, 2004); NANA Motion at n. 13. However, NANA fails to mention  
14 that it is not a Tribe, nor does it have authority to regulate water quality.<sup>2</sup> NANA is a  
15 corporation, as it concedes. NANA Motion at 2. As such, the cases it cites are inapposite and do  
16 not support its motion.

17 **III. NANA DOES NOT MEET THE REQUIREMENTS FOR INTERVENTION.**

18 While NANA’s application may be timely, it does not meet any of the three substantive  
19 criteria used by the EAB in deciding such intervention motions. While the NPDES regulations  
20 do not explicitly provide for intervention, regulations on permit termination proceedings (at 40  
21 C.F.R. § 22.11(a), the CROP regulations) offer guidance and appear to parallel the criteria the  
22 EAB has previously applied. In order to intervene, in addition to a timely filing its motion,  
23 NANA must (1) claim an interest relating to the cause of action; (2) show that a decision may as

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24 <sup>1</sup>Petitioner City of Kivalina has not had an opportunity to meet to discuss and decide on a  
25 position on NANA’s motion. This Opposition is filed late as it had not been possible for counsel  
26 to meet with the IRA Council to determine its position until recently. As the motion has not yet  
27 been decided and there is no prejudice to any party, Kivalina hopes its Opposition will be  
28 considered by the EAB.

<sup>2</sup>See “Indian Entities Recognized and Eligible to Receive Services from the United States  
Bureau of Indian Affairs,” 70 Fed. Reg. 71194 (November 25, 2005).

1 a practical matter impair its ability to protect that interest; and (3) show that NANA's interest is  
2 not adequately represented by the existing parties. NANA must meet *each* of these three criteria,  
3 but it meets none of them. NANA's motion to intervene should be denied.

4 **A. NANA does not have a legal interest in the proceeding**

5 NANA's interest in the proceeding is, apparently, the protection of Teck Cominco's  
6 profits. This does not give it a legal interest in the proceeding.

7 NANA relies on *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810 (9<sup>th</sup> Cir.  
8 2001) to argue that its interests are sufficient to warrant intervention in the present case.

9 However, the basis for that case was the builders' contracts and the fact that the builders would  
10 not be able to enforce their contracts if the action resulted in overturning the regional land use  
11 planning agreement. In the present case, NANA has a contractual relationship with Teck  
12 Cominco, but the contract does not become unenforceable simply because Teck Cominco may  
13 not receive its previous level of profits from the Red Dog Mine. Therefore, the present case is  
14 not analogous to *Berg*.

15 In order to meet this requirement for intervention, NANA must show that its interest in  
16 the proceeding is a legally enforceable right, contract, or permit related to the proceeding. *Id.* at  
17 819. NANA's alleged economic interest is based on royalties that Teck Cominco pays to  
18 NANA. NANA does not have a contractual or other legally enforceable right to high royalties or  
19 indeed any fixed amount of royalties: the amount of royalties to which NANA is entitled is based  
20 on the profitability of the Mine. A governmental action that makes the Mine less profitable does  
21 not give rise to a cause of action for NANA to recover the royalties NANA would have received  
22 had no governmental action been taken. Therefore, NANA does not have a legally enforceable  
23 interest, economic or otherwise, in the proceeding.

24 **B. Kivalina's petition does not impair NANA's ability to protect its interest**

25 NANA fails to demonstrate that it will be adversely affected by the outcome of the permit  
26 appeal. With regard to the resource preservation interest, Kivalina is actually working in  
27 NANA's favor, because both Kivalina and NANA are advocating for the preservation of  
28 subsistence resources. NANA claims that the appeal will threaten its economic interest and that

1 the appeal may have a negative financial impact on NANA's shareholders through royalties, jobs,  
2 and service contracts. NANA itself admits that it is impossible to calculate NANA's costs as a  
3 result of this appeal. There is no evidence to show that any loss to NANA will occur. Therefore,  
4 NANA fails to show that it will be adversely affected by the appeal with regard to either its  
5 subsistence resource interest or its economic interest.

6 Even if it is established that NANA will be adversely affected financially by the appeal,  
7 NANA fails to show that the appeal will impair NANA's ability to protect its interests. There is  
8 no evidence to indicate that NANA will not be able to take measures to protect its financial  
9 interests. The appeal does not impair NANA's ability to protect its resource preservation interest  
10 because Kivalina is working to further the same interest. If anything, the appeal enhances  
11 NANA's ability to protect its interest in the natural resources. Therefore, NANA fails to meet  
12 this requirement for intervention.

13 **C. NANA's legal interests are adequately represented by existing parties**

14 NANA relies on *Trbovich v. United Mine Workers of America* to argue that the burden of  
15 showing inadequate representation is minimal. 404 U.S. 528, 538 (1972). However, this does  
16 not mean there is no burden whatsoever. An intervenor's legally cognizable interests must be  
17 different from those of the existing parties. *Id.* at 538. NANA's economic interest is the same as  
18 Teck Cominco's interest, and NANA's resource protection interest is the same as Kivalina's  
19 interest.

20 NANA states that it has an economic interest in the proceeding because it receives  
21 royalties from Teck Cominco, and this amount is based on the Mine's profitability. This  
22 economic interest is identical to that Teck Cominco is representing in the proceeding. Both  
23 NANA and Teck Cominco want to defeat the appeal in order to keep the Mine profitable and  
24 thereby maintain a certain level of profits from the Mine. Therefore, NANA's economic interest  
25 in the proceeding is adequately represented by Teck Cominco.

26 NANA also states that it has an interest in protection of subsistence resources in the area,  
27 in order to allow for subsistence hunting, fishing, and gathering. These are precisely the  
28 resources that Kivalina is attempting to protect in this proceeding. Both NANA and Kivalina

1 recognize the culture of the Inupiat people and that their way of life depends on natural resources  
2 native to the area. NANA does not state a different interest from Kivalina's interest in protecting  
3 the subsistence resources of the area. Both want to preserve these resources in order to assure  
4 that the Inupiat people are able to maintain their traditional way of life. Therefore, NANA's  
5 interests are adequately represented by existing parties, and NANA's motion to intervene should  
6 be denied.

7 **IV. CONCLUSION**

8 Because NANA meets none of the substantive requirements for intervention, the Kivalina  
9 appellants respectfully request that the EAB deny NANA's motion to intervene.

10 Submitted this 22nd day of August, 2007.

11  
12 CENTER ON RACE, POVERTY &  
13 THE ENVIRONMENT

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16 Luke W. Cole

17 Attorneys for Petitioners

18 Roshani Parekh  
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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2007, I served the foregoing Kivalina Petitioner's Opposition to NANA Regional Corporation's Motion to Intervene on the following counsel at the address and in the manner described below:

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I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



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