

**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 PETITIONERS'
MOTION TO STAY THE ENTIRE PERMIT (EAB Dkt. No. 27)**

On January 8, 2010, EPA renewed the NPDES Permit for the Red Dog Mine, last renewed twelve years ago. Petitioners filed a petition for review contesting five permit conditions. EPA stayed, and later withdrew, the five contested 2010 permit conditions, but EPA ordered that the other permit conditions would go into effect on March 31, 2010.¹

Petitioners now seek to stay the entire renewed 2010 permit, thus reinstating the 1998 NPDES permit in its entirety for an undefined period. EAB Dkt. No. 27. Teck Alaska Incorporated ("Teck") strongly urges the Board to deny Petitioners' motion.

¹ By letter dated March 17, 2010, EPA Region 10 withdrew five contested permit conditions pursuant to 40 C.F.R. § 124.19(d). EAB Dkt. No. 19. The remainder of the Permit became effective on March 31, 2010. *See* EAB Dkt. No. 13.

Petitioners' argument for staying the entire 2010 permit consists of five sentences. Petitioners' Opposition & Cross Motion at p. 10. Petitioners argue that the State's section 401 certification was invalid due to the State's alleged lack of antidegradation implementation procedures.² Petitioners argue that by challenging the validity of the State's section 401 certification, they have challenged the entire 2010 permit, and therefore the entire permit must be stayed. Petitioners cite no legal authority supporting this proposition. It is wrong on several levels.

As a threshold matter, Petitioners' argument rests on the premise that their Petition challenged the validity of the entire Permit. Review of the Petition demonstrates otherwise. In Part II.C.1 of their Petition, Petitioners argued that due to inadequate antidegradation implementation procedures, ADEC could not and did not properly analyze alleged backsliding in the proposed permit's terms. Petition at 20. Petitioners then discussed the five permit conditions allegedly affected by the deficient backsliding analysis. These conditions address effluent limits for zinc, lead, cyanide, selenium and TDS. Petition at pp. 20-37. Fairly read, the argument in Part II.C.1 of the Petition is directed at these five effluent limits, and not at the Permit as a whole. Based on the Petition's content, EPA

² Teck does not concede that there is any inadequacy in Alaska's antidegradation laws or regulations. Even if there is any deficiency in Alaska's antidegradation implementation procedures, any such deficiency is not a basis for invalidating section 401 certifications, or NPDES permits that have been issued on the basis of such certifications. Petitioners cite no authority holding otherwise.

appropriately identified these five effluent limits as "contested permit conditions" and stayed only these five limits.

Petitioners now apparently seek to recast their Petition as a challenge to the entire permit. That is not what Petitioners said in their Petition, where they stated that their appeal was directed to "certain conditions included in the Permit, and certain conditions omitted from the Permit." Petition at 11. The Board should reject Petitioner's argument on the basis that the Petition did not raise the broader challenge to the entire permit now being presented to the Board as the basis for a stay.³

Even if the Petition is construed to challenge the entire 2010 permit, the conclusion that the entire permit should be stayed must be rejected.

First, the argument is inconsistent with the applicable stay regulations. 40 C.F.R. § 124.16 does not authorize a stay of a "permit." This provision only authorizes stays of *permit conditions*. Section 124.16(a) requires the Regional Administrator to identify "contested *permit conditions*" and "uncontested *permit conditions*." Contested permit conditions and uncontested permit conditions that cannot be severed from the contested permit conditions are stayed. 40 C.F.R. §§ 124.16(a)(1), 124.16(a)(2)(i). All other permit conditions are not stayed, and

³ A petition must state claims with specificity. *In re City of Attelboro, MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 61 (EAB Sept. 15, 2009), 14 E.A.D. ___; *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001).

become effective in thirty days. *Id.*; *see also* 40 C.F.R. § 124.60(b)(5). The proposed stay of the entire 2010 permit is directly contrary to section 124.16's express directive that the permit itself and any uncontested *permit conditions* become effective despite the filing of a petition.

Second, Petitioners' argument that a defect in a section 401 certification renders the entire permit invalid is inconsistent with the review framework established by EPA in Part 124. The regulations in Part 124 contemplate that a permit can go into effect while alleged deficiencies on the federal or state side are addressed. For example, section 124.19(d) allows EPA to withdraw portions of permits while the remainder of the permit remains in effect. Similarly, section 124.55(b) allows revision of permits to reflect changes required by post-permit challenges to section 401 certifications brought in state administrative and judicial forums. This regulation contemplates that certifications can be changed after the permit goes into effect, without affecting the overall validity of the underlying permit. Similarly, in this instance the 2010 Permit can and should remain in effect while disputed provisions are addressed.

Third, Petitioners' motion is inconsistent with sound policy. If Petitioners' position is accepted, it means that if any petition for review asserts similar arguments about the adequacy of a state's section 401 certification based upon alleged deficiencies in state laws, regulations or programs, the entire NPDES permit must be stayed. This approach would place great and unchecked power in

the hands of petitioners. By merely including such allegations in a petition, petitioners would automatically obtain a stay of the entire permit, without regard to the ultimate merit of their position, the likelihood of success, or the harm caused to the permittee or third parties by the stay. By merely including such allegations in a petition, petitioners would override the provisions of section 124.16 to obtain a stay of the entire permit, effectively rendering section 124.16's specific provisions null and void.

This case illustrates the hazard inherent in Petitioners' argument. In order to continue producing ore at Red Dog, Teck must begin mining the Aqqaluk deposit. The 2010 permit was developed under an SEIS in contemplation of the Aqqaluk project. EPA has not told Teck that it can proceed with the Aqqaluk expansion without the 2010 permit in place. If petitioners' motion is granted and the entire 2010 permit is stayed, Teck would likely be unable to proceed with the Aqqaluk expansion and would make a decision in the next 30-45 days to shut down the mine. A mine shutdown would inflict serious harm on Teck, its employees, the mine's owner, NANA, and its Alaska Native shareholders, and many other Alaska Native corporations and their shareholders.⁴ This result cannot be justified.

⁴ See NANA Regional Corporation's Combined Motion for Leave to Intervene, and Motion for Expedited Review (EAB Dkt. No. 8) and Teck Alaska Incorporated's Motion for Expedited Review (EAB Dkt. No. 9).

For these reasons, Teck urges the Board to deny Petitioners' motion to stay the entire 2010 Permit.

DATED: April 20, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **TECK ALASKA INCORPORATED'S OPPOSITION TO PETITIONERS' MOTION TO STAY THE ENTIRE PERMIT (EAB Dkt. No. 27)** 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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