

**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

**PETITIONERS' RESPONSE TO NANA REGIONAL CORPORATION'S NOTICE
REGARDING THE TIMING OF THE BOARD'S DECISION**

I. INTRODUCTION

On September 9, 2010, NANA Regional Corporation (NANA) submitted a Notice of Timing to the Environmental Appeals Board (EAB) stating that unless the EAB decides this appeal by October 31, 2010, the jurisdiction over the appeal would become hopelessly clouded and the permit would be fragmented. Despite NANA's assertions to the contrary, the transfer of the National Pollutant Discharge Elimination System (NPDES) authority to administer the program for the mining sector will have no impact on the Environmental Protection Agency's (EPA) or the EAB's jurisdiction to decide the present appeal; the Memorandum of Agreement executed between the State of Alaska and the EPA clearly states that the EPA will retain full jurisdiction over permits that are appealed prior to program authority being transferred. Thus, regardless of the October 31, 2010, transfer of NPDES program authority from EPA to the

Alaska Department of Environmental Conservation (DEC) for mining, jurisdiction over the permit remains with the EPA until all permitting issues are resolved, and accordingly, the EAB will maintain its jurisdiction to decide the present appeal and EPA's resolution of the five withdrawn effluent limitations beyond October 31, 2010.

II. BACKGROUND

Teck Alaska Incorporated (Teck) operates the Red Dog Mine, one of the world's largest zinc mines. On January 8, 2010, the EPA Region 10 reissued a five-year NPDES permit to Teck, Permit No. AK-003865-2 (2010 Permit). Pursuant to 40 C.F.R. § 124.19, Petitioners filed a Petition for Review with the EAB challenging parts of the 2010 Permit. On February 26, 2010, the EPA notified Teck that the effluent limitations for five pollutants (total dissolved solids (TDS), lead, zinc, selenium, and cyanide) in the 2010 Permit were stayed and that the corresponding effluent limits for those pollutants from the 1998 permit were reinstated. *See* February 26, 2010 letter from Michael Bussell to Mike Bonneau, attached as Exhibit 1 to Region 10's Opposition to Motions for Expedited Review, March 1, 2010. On March 17, 2010, the EPA withdrew the five contested effluent limits in the 2010 Permit that it had previously stayed, and reinstated the corresponding limits from the 1998 Permit pending additional agency process regarding the withdrawn limits. *See* March 17, 2010 letter from Michael Bussell to Mike Bonneau, attached as Exhibit 1 to Region 10's Motion to Dismiss Petition for Review in Part, March 18, 2010. The remainder of the 2010 Permit with the five substituted limits from the 1998 Permit is currently in effect. After the EPA withdrew the five permit limits, the Board dismissed the Petitioners' claims relating to the withdrawn permit limits, but retained jurisdiction over Petitioners' claims regarding monitoring. *See* Order Dismissing Petition for Review in Part, April 30, 2010.

Prior to its work on the 2010 Permit, on November 7, 2008, the EPA approved Alaska's application to administer the NPDES program with the program transferring to the DEC in three phases. 73 Fed. Reg. 66243 (Nov. 7, 2008). Authority to administer the NPDES program for individual and general permits for mining will transfer from the EPA to the DEC on October 31, 2010. *See* Memorandum of Agreement between the State of Alaska and United States Environmental Protection Agency Region 10 (hereinafter MOA), Oct. 29, 2008, Appendix B, attached as Exhibit A. However, pursuant to the MOA executed between the State of Alaska and the EPA, the EPA retains jurisdiction over permits that were appealed prior to the transfer of permitting authority. *See* MOA § 3.03(2)(b), attached as Exhibit B.

III. THE EPA WILL RETAIN FULL JURISDICTION OVER THE 2010 PERMIT UNTIL ALL ISSUES REGARDING THE PERMIT, INCLUDING THIS APPEAL AND THE WITHDRAWN PERMIT LIMITS, ARE RESOLVED AND THE EPA NOTIFIES THE DEC THAT JURISDICTION OVER THE 2010 PERMIT IS TRANSFERRED.

NANA asserts that unless the EAB decides the present appeal by October 31, 2010, the EPA's authority to complete the permit and the EAB's jurisdiction to decide the appeal will be questioned and the 2010 Permit will be stuck in a jurisdictional quagmire between the EPA, the DEC and the EAB. NANA Notice of Timing at 3. NANA asserts that this will occur because authority over the 2010 Permit will transfer to the DEC on that date when the authority to administer the NPDES program for mining transfers from the EPA to the DEC. NANA Notice of Timing at 3-4. However, this assertion is incorrect under the MOA between the EPA and the State; the EPA will retain full jurisdiction over the 2010 Permit until all permitting issues are resolved, and the EAB will retain jurisdiction to complete this appeal.

The State of Alaska and the EPA contemplated a situation like the present one arising during the phased transfer of administration of the NPDES program and provided for a solution.

The MOA between the State of Alaska and the EPA outlining the responsibilities of the two agencies with regard to the transfer of administration of the NPDES program makes clear that the EPA retains jurisdiction over appealed permits issued prior to transfer of permitting authority: “Upon program approval and in accordance with the transfer schedule in Appendix B, EPA shall: . . . [r]etain *full* jurisdiction for permits for which an appeal has been filed at the time of program authorization until that matter is resolved.” MOA §3.03(2)(b) (emphasis added). Program authorization for individual and general permits for mining projects will not transfer from the EPA to the DEC until October 31, 2010. MOA Appendix B. Thus, because the 2010 Permit — the matter at issue — was challenged prior to the transfer of authority to administer the NPDES program for mining from the EPA to the DEC, pursuant to the MOA, the EPA retains *full* jurisdiction over the 2010 Permit until all issues regarding the permit are resolved — until the EAB resolves this appeal and the EPA resolves the withdrawn effluent limits — even if that date is after October 31, 2010. Because the EAB has jurisdiction to decide appeals of EPA-issued NPDES permits under 40 C.F.R. § 124.19, the EAB maintains jurisdiction to decide the present appeal beyond October 31, 2010.

The jurisdictional process set out in the MOA for appealed permits also makes practical sense. The EPA, having drafted the 2010 Permit, written the fact sheet and issued the final permit, is in the appropriate position to resolve and address the withdrawn permit limits and any other issues with the 2010 Permit. By providing that the EPA would retain full jurisdiction over challenged permits, the MOA ensures that the agency with the background knowledge and experience with that particular permit will carry out the process to completion.

Having foreseen the potential for a situation like the present appeal of the 2010 Permit arising during the phased transfer of permitting authority, the MOA also outlines the process to

transfer jurisdiction of challenged permits once all permit issues are resolved. Under the MOA, once all permitting issues are resolved, the EPA notifies the DEC that jurisdiction over the permit is transferred to the DEC. MOA §3.03(2)(b). Thus, contrary to NANA's assertion that jurisdiction will be "fragmented" between the EPA, the DEC and the EAB, NANA Notice of Timing at 3, once the EPA resolves the effluent limits for the five withdrawn parameters and once the EAB resolves this appeal, the EPA will notify the DEC that jurisdiction over the 2010 Permit is transferred to the DEC. Until that time, the EPA retains *full* jurisdiction over the 2010 Permit and the EAB maintains its jurisdiction to resolve the appeal.

By filing the Notice of Timing, NANA is attempting to create an artificial deadline for the EAB to decide the appeal and is again rushing the EAB to issue a decision. *See* NANA Regional Corporation's Combined Motion for Leave to Intervene and Motion for Expedited Review, Feb. 23, 2010. While resolution of the issues before the EAB is important to all of the parties, there is no exigency for the EAB to decide the appeal by October 31, 2010. Resolving this appeal when appropriate based on the necessary information and timing of the EAB's docket will not result in "challenging jurisdictional issues," "thorny jurisdictional disputes," or "another twist in the Gordian Knot." NANA Notice of Timing at 3, 4. The EAB will maintain jurisdiction to decide the issues before it when it determines that resolution is appropriate, even if that date is after October 31, 2010.

Respectfully submitted this 24th day of September, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONERS' RESPONSE TO NANA REGIONAL CORPORATION'S NOTICE REGARDING TIMING OF THE BOARD'S DECISION, 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:

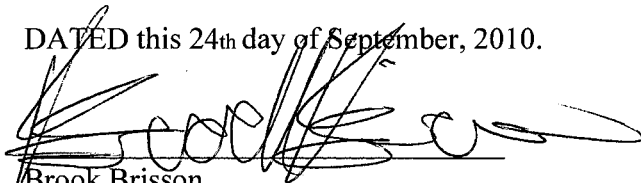
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DATED this 24th day of September, 2010.


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