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No. of Pages:	8 (including cover)		
Date:	September 4, 2007		

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38576.0001 (113)

Message: NPDES Appeal Nos.: 07-08 & 07-09

NANA Regional Corporation Reply Memorandum in Support of NANA Motion to Intervene

Please file this reply to motion to intervene. A hard copy is being sent today via U.S. first class mail to the Board and opposing counsel.

SE 2224480 v1
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ENVIR. APPEALS BOARD

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY -
ENVIRONMENTAL APPEALS BOARD

<p>11 In re Teck Cominco Alaska Incorporated Red) 12 Dog Mine) 13 NPDES Permit AK-003865-2) 14)</p>	<p>NPDES Appcal Nos.: 07-08 & 07-09 NANA REGIONAL CORPORATION REPLY MEMORANDUM IN SUPPORT OF NANA MOTION TO INTERVENE</p>
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On June 21, 2007 NANA Regional Corporation, Inc. ("NANA") served and filed its motion for leave to intervene in this proceeding. On August 23 petitioners City of Kivalina et al. ("Kivalina") filed a memorandum opposing NANA's motion. After taking 63 days to answer NANA's motion,¹ Kivalina leads with the observation that NANA is not a Tribe, and concludes by assuring the Board that between Kivalina and Teck Cominco, all of NANA's interests will be protected by other parties. Kivalina Opposition at 3.

Kivalina's tardy response misstates NANA's grounds for seeking intervention and misapplies the relevant criteria for granting intervention. NANA urges the Board to promptly grant NANA's motion.

¹ The Board's Practice Manual recommends but does not compel parties in a permit appeal to file any response to a motion within 15 days after service. Environmental Appeals Board Practice Manual at 38 (June 2004).

1 **A. NANA Holds Legally Protected Interests In These Proceedings.**

2 NANA's motion documents NANA's significant economic and environmental interests
3 in the Red Dog Mine NPDES permit and in the above-captioned appeals. Those interests
4 include ownership of the land underlying the Mine, contractual interests in the revenues from
5 operation of the Mine, and charter responsibilities to protect the subsistence resources of the
6 Region. NANA Motion at 2-3. In support of its motion NANA cited *Southwest Center For*
7 *Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), a case in which the Court of
8 Appeals affirmed the right of home builders to intervene in an Endangered Species Act
9 challenge to a land use management plan.

10 Kivalina claims that NANA lacks a legally protected interest in Kivalina's challenge to
11 the Red Dog NPDES permit. Kivalina Opposition at 2. Kivalina cites no authority for this
12 contention, but tries to distinguish *Berg* by arguing that NANA's contractual entitlement to
13 royalties from the Mine "does not become unenforceable simply because Teck Cominco may
14 not receive its previous level of profits from the Red Dog Mine." *Id.*

15 NANA never claimed that its contract rights to Red Dog royalties would become
16 unenforceable if Kivalina prevails, only that they will become less valuable. NANA Motion at
17 4-5. That is all courts require to justify intervention. In *Berg*, the Ninth Circuit explained that
18 "whether an applicant for intervention demonstrates sufficient interest in an action is a
19 practical, threshold inquiry."² Under this threshold analysis, "contract rights are traditionally
20 protectable interests."³ In so holding, the Ninth Circuit followed long-established precedent
21 recognizing that contract rights are protectable interests for purposes of intervention under
22 Rule 24(a) of the Federal Rules of Civil Procedure.⁴

23 ² *Berg*, 268 F.3d at 818, quoting *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.
24 1989).

25 ³ *Berg*, 268 F.3d at 820.

26 ⁴ See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co. et al.*, 331
27 U.S. 519, 530-531 (1947) (trade union entitled to intervene as of right in a civil proceeding
28 against a railroad that might affect the terms of a collective bargaining agreement).

1 Kivalina does not mention NANA's real property interest in the Mine. NANA's fee
2 ownership of the property underlying the Mine is another "significant protectable interest" that
3 may, in a practical sense, be injured by Kivalina's challenge. In *Sierra Club v. United States*
4 *EPA*,⁵ the Club challenged EPA's failure to timely adopt water quality standards for Arizona
5 waters. The City of Phoenix moved to intervene. The Ninth Circuit held that the City had a
6 protectable interest in the Sierra Club's action on two independent grounds: "the City's
7 ownership of real property and its status as an EPA permittee."⁶ Real property interests,
8 observed the Court, are "squarely in the class of interests traditionally protected by law."⁷
9 Under *Sierra Club*, NANA's ownership of the real property on which the Mine is located is
10 "squarely protectable." And as in *Sierra Club*, this proceeding has the potential to "affect the
11 use of real property owned by the intervenor" by restricting or curtailing mining operations.

12 **B. Kivalina's Appeal Threatens NANA's Protected Interests.**

13 In support of its motion NANA cited specific and tangible economic impacts that
14 NANA would sustain if Kivalina persuaded the Board to overturn the Red Dog NPDES
15 permit. NANA Motion at 4-5. In response Kivalina blandly asserts that "There is no evidence
16 to show that any loss to NANA will occur." Kivalina Opposition at 3. Once again, Kivalina
17 misconstrues the criteria for intervention. In evaluating a motion to intervene courts must
18 accept as true "the non-conclusory allegations made in support of an intervention motion."⁸
19 NANA need not estimate the cost of its injuries to the nearest dollar. The *Sierra Club* opinion
20 describes precisely the threat that Kivalina's appeal poses to NANA's interests:

21 [T]he lawsuit would affect the use of real property owned by the intervenor by
22 requiring the defendant [EPA] to change the terms of permits it issues to the would-be

23
24 ⁵ 995 F.2d. 1478 (9th Cir. 1993).

25 ⁶ *Id.* at 1482.

26 ⁷ *Id.* at 1483.

27 ⁸ *Berg*, 268 F.3d at 819 (citing decisions from numerous appellate courts).

1 intervenor, which permits regulate the use of that real property. These interests are
2 squarely in the class of interests traditionally protected by law.⁹

3 Kivalina's appeal threatens NANA's real property and contractual interests in the Red
4 Dog Mine in the ways described by the Ninth Circuit in *Sierra Club*.

5 **C. Neither Teck Cominco Nor Kivalina Adequately Represent NANA's**
6 **Interests.**

7 Kivalina does not challenge NANA's contention that Region 10 cannot be relied upon
8 to protect NANA's diverse interests in these appeals. But Kivalina contends that NANA's
9 interests are covered because "NANA's economic interest is the same as Teck Cominco's
10 interest, and NANA's resource protection interest is the same as Kivalina's interest."¹⁰

11 The contention that two diametrically opposed litigants together will protect the
12 interests of a third party intervenor exhibits ample imagination but minimal common sense.
13 NANA's obligation to balance the economic interests of its shareholders against its mandate to
14 protect subsistence resources in no way resembles Kivalina's interests. Nor are NANA's
15 economic interests identical to those of Teck Cominco. In its motion NANA pointed out that
16 long after the Mine shuts down NANA will own the land and monitor the operation of the Red
17 Dog wastewater treatment system. NANA Motion at 3. Teck Cominco does not share these
18 interests, and the Board cannot presume that Teck Cominco and NANA will strike the same
19 balance between Mine operation and subsistence resource protection.

20 To show inadequacy of representation by the existing parties, NANA "need only show
21 that representation of [its] interest 'may be' inadequate, not that representation will in fact be
22 inadequate."¹¹ This is not an onerous burden and NANA amply satisfies it.

23
24 ⁹ 995 F.2d at 1483, *quoted in Berg*, 268 F.3d at 819.

25 ¹⁰ Kivalina Opposition at 3.

26 ¹¹ *Dimond v. District of Columbia*, 753 F.2d 179, 192 (D.C. Cir. 1986) (emphasis
27 added).

1 **D. Conclusion**

2 Kivalina's untimely Opposition misrepresents the criteria for intervention in federal
3 court, and ignores the detailed factual allegations, supported by the declaration of NANA Vice
4 President Walter Sampson, that document the ways in which Kivalina's appeal threatens
5 NANA's interests. Kivalina's objections are without merit, and no other party objects to
6 NANA's intervention. NANA respectfully urges the Board to grant NANA's Motion for
7 Leave to Intervene well ahead of the September 28 deadline for parties to file responses to the
8 pending petitions for review.¹²

9 Respectfully submitted this 4th day of September, 2007.

11 HELLER EHRMAN LLP

13 By Matthew Cohen
14 MATTHEW COHEN
15 JUSTO GONZALEZ

16 Attorneys for
17 NANA REGIONAL CORPORATION, INC.

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19 9/3/07 1:26 PM (38576.0001)

26 _____
27 ¹² Order Granting Second Extension of Time For Filing Responses (filed July 24,
28 2007).

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY -
ENVIRONMENTAL APPEALS BOARD

In re Teck Cominco Alaska Incorporated Red Dog
Mine

NPDES Appeal Nos.: 07-08 & 07-09

NPDES Permit AK-003865-2

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2007 a copy of

**NANA Regional Corporation Reply Memorandum in Support of NANA Motion
to Intervene**

was served upon counsel of record at the addresses and in the manner described below:

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12 Attorneys for
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14 I certify under penalty of perjury under the laws of the State of Washington, that the
 15 foregoing is true and correct.

16 DATED this 4th day of September, 2007, at Seattle, Washington.

18 By: Sharman D. Loomis
 19 Sharman D. Loomis

21 SE 2215714 v1

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