

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

In re: )  
)  
Teck Alaska Incorporated ) NPDES Appeal No. 10-04  
Red Dog Mine )  
)  
NPDES Permit No. AK-003865-2 )  
)  
)

**REGION 10's OPPOSITION TO MOTIONS FOR EXPEDITED REVIEW**

**I. INTRODUCTION**

On January 8, 2010, Region 10 reissued NPDES Permit No. AK-003865-2 to Teck Alaska Incorporated for the Red Dog Mine. On February 16, 2010, Trustees for Alaska, representing regional environmental groups and the Alaska Native Village of Point Hope, and the Center on Race, Poverty and the Environment, representing the Alaska Native Village of Kivalina and several individual petitioners, filed a petition for review of the permit with the Environmental Appeals Board. By letter dated February 18, 2010, the Board notified Region 10 that this petition had been filed and set a response date of April 5, 2010. Teck filed a motion for expedited review with the Board on February 23, 2010.<sup>1</sup> NANA Regional Corporation also filed a combined motion for leave to intervene and motion for expedited review on February 23, 2010.

After the motions for expedited review were filed, Region 10 issued a notification on February 26, 2010 identifying the contested permit conditions that are stayed by the petition for review, pursuant to 40 C.F.R. §§ 124.16(a)(2) and 124.60(b). See Exhibit 1. The notification identified five effluent limitations in the January 2010 permit – lead (monthly average), selenium

---

<sup>1</sup> Teck also filed a separate Request for Leave to Respond on February 22, 2010. The Board has not yet ruled on that request.

(daily maximum), zinc, weak acid dissociable cyanide and total dissolved solids (TDS) – as stayed pending final agency action. The remaining January 2010 permit conditions were determined to be uncontested and severable from the contested conditions and will become fully effective and enforceable on March 31, 2010, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d). For the reasons set forth below, Region 10 opposes the motions for expedited review to the extent they seek expedited briefing.

## **II. ARGUMENT**

### **A. Neither Motion Demonstrates Cause for Expedited Review**

Teck and NANA argue that exigent circumstances warrant expedited review of this NPDES permit appeal and rely on several Clean Air Act cases in support. Both motions further describe Red Dog Mine's contribution to the regional economy and local communities along with potential consequences associated with any interruption in mine operations. Region 10 takes no position on the factual representations made regarding Red Dog Mine's economic and community contributions. Nevertheless, as described below, the current posture of this case does not support a finding of exigent circumstances sufficient to warrant expedited briefing and review. Moreover, this case is readily distinguishable from the Clean Air Act cases cited.

Teck and NANA argue that the Board has granted expedited review in similar cases involving exigent circumstances.<sup>2</sup> The cases relied on involved permits issued under the Clean Air Act program for the "prevention of significant deterioration of air quality" or "PSD" program, for areas of the nation that meet the National Ambient Air Quality Standards for

---

<sup>2</sup> Teck's Motion for Expedited Review at 4; NANA's Combined Motion for Leave to Intervene and Motion for Expedited Review at 13.

regulated pollutants.<sup>3</sup> Among other things, the PSD program requires that owners and operators obtain a permit *before constructing or modifying* certain stationary sources of air pollution.<sup>4</sup> Thus, the Board in *In re: Hawaii Electric Light Co., Inc.*, stated that it is “the Board’s practice to assign permit appeals under 40 CFR 124 *involving new source construction* the highest priority.”<sup>5</sup> Similarly, in *In re ConocoPhillips Co.*, the Board stated that “it is the Board’s practice to assign *PSD permit appeals* the highest priority in its docket, relative to other appeals *where resolution of the appeal is not a prerequisite to a facility’s construction or operation.*”<sup>6</sup> Teck and NANA thus assert that the Board has granted expedited review where resolution of the appeals was necessary to allow operations to go forward.<sup>7</sup> This is not such a case.

Despite Teck’s and NANA’s representations, resolution of the current appeal is not a prerequisite to continued mine operations. Region 10 has reissued an NPDES permit that authorizes wastewater discharges associated with continued mine operations, including the proposed development of Aqqaluk. The permit was reissued on January 8, 2010 and, with the exception of the five effluent limits identified above, *will take effect on March 31, 2010.*<sup>8</sup> See Exhibit 1. This result stems from the regulations governing NPDES permit appeals, which allow uncontested, severable NPDES permit conditions to take effect during the pendency of Board

---

<sup>3</sup> 42 U.S.C. §§ 7470-7492.

<sup>4</sup> 42 U.S.C. § 7475, 40 C.F.R. § 52.21(a).

<sup>5</sup> *In re: Hawaii Electric Light Co., Inc.*, PSD Appeal Nos. 01-24 through 01-29 (EAB Oct. 18, 2001) (emphasis added).

<sup>6</sup> *In re: ConocoPhillips Co.*, PSD Appeal No. 07-01 (EAB Oct. 1, 2007) (emphasis added). *See also Shell Offshore Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit*, OCS Appeal Nos. 07-01 and 07-02 (EAB July 20, 2007) (noting that request for expedited review stated, “*In order for this project to proceed SOI must have these final minor source air permits.*”) (emphasis added).

<sup>7</sup> Teck’s Motion for Expedited Review at 10; NANA’s Combined Motion for Leave to Intervene and Motion for Expedited Review at 13.

<sup>8</sup> Because the Region’s notification of the partial stay was not issued until after the motions to expedite were filed, Teck and NANA did not have the benefit of this information.

review.<sup>9</sup> This type of partial stay is not available in PSD appeals; in such cases the filing of a petition for review stays the effective date of the entire permit.<sup>10</sup> Teck's reliance on PSD cases to support expedited review here is therefore unavailing.

Teck also points to "extreme urgency" in the current permitting situation and both motions raise the specter of mine shut-down in an effort to demonstrate exigency.<sup>11</sup> These arguments are equally unavailing. The primary matter of urgency described is Teck's apparent need to begin developing the Aqqaluk deposit before the main deposit is exhausted. According to Teck's motion, ore from Aqqaluk will be needed during the first quarter of 2011 to maintain continued operations.<sup>12</sup> Teck anticipates being able to meet this schedule if required preparatory activities can get underway by May 2010.<sup>13</sup> As discussed above, Teck has been reissued a permit that authorizes wastewater discharges associated with Aqqaluk development and which will take effect on March 31. The need for NPDES authorization, to the extent required to cover the preparatory activities Teck describes, is therefore not an issue.

The only remaining argument offered to support the asserted urgency and potential for mine shut-down is a need to resolve TDS limits. Teck goes so far as to state:

The TDS limitations from the prior (1998) permit are unattainable, and should the present, highly uncertain regulatory environment preclude the development of Aqqaluk by May 2010, Teck would likely shut down operations after the Fall 2010 shipping season.<sup>14</sup>

---

<sup>9</sup> See 40 C.F.R. §§ 124.16(a)(2), 124.60(b).

<sup>10</sup> See 40 C.F.R. § 124.16(a)(1) ("No stay of a PSD permit is available under this section."). Region 10 points out this regulatory difference only for the purpose of distinguishing the current case from PSD appeals. Region 10's argument should not be read to suggest that expedited consideration is warranted in all PSD cases. Any movant seeking expedited consideration must demonstrate case-specific, exigent circumstances sufficient to support its request.

<sup>11</sup> Teck's Motion for Expedited Review at 4, 5-7; NANA's Combined Motion for Leave to Intervene and Motion for Expedited Review at 14-15.

<sup>12</sup> Teck's Motion for Expedited Review at 5.

<sup>13</sup> *Id.* at 6-7.

<sup>14</sup> *Id.* at 10.

Any assertion that Teck would suddenly be forced to shut down Red Dog Mine absent an expedited resolution of TDS limits is belied by Teck's own operations. As set forth in Teck's motion, issues relating to TDS limits and efforts to resolve those issues have been ongoing since at least 2003.<sup>15</sup> *And for the past 12 years* Teck has apparently determined that continued mining operations are possible despite an "unattainable" 1998 permit limit for TDS. Teck has offered no compelling argument for a sudden need to shut down mining operations – and to bring about the economic impacts warned of in its motion – if issues surrounding the TDS limits are not resolved by May 2010. The motions for expedited review should therefore be denied to the extent they seek expedited briefing.

**B. Region 10 Supports the Current Response Deadline of April 5, 2010**

If the Board determines that expedited review is warranted, Region 10 would like to clarify that it would object to a briefing schedule imposing an earlier response deadline than April 5. Both Teck and NANA have requested that the Board establish an expedited schedule for this proceeding without providing additional detail or requesting particular deadlines. Teck has further requested "establishment of an expedited briefing schedule."<sup>16</sup>

By letter dated February 18, 2010, the Board has already notified Region 10 that its response is due April 5. In response to the petition for review, the Region has engaged its technical staff and attorneys, who are working diligently on the appeal. The Region is also in the process of assembling and indexing the record, and conducting procedural and substantive analyses on all issues raised. Given the complex technical and legal issues raised, the Region will require the full response time already allotted to conduct a thorough briefing.

---

<sup>15</sup> *Id.* at 2-3.

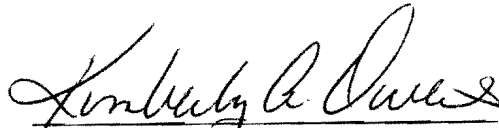
<sup>16</sup> Teck's Motion for Expedited Review at 10.

### III. CONCLUSION

For the reasons stated above, Teck and NANA have not demonstrated sufficient cause for the Board to grant expedited review of this case. Region 10 therefore requests that the Board deny the motions for expedited review to the extent they seek expedited briefing. If the Board grants expedited review, Region 10 requests that the Board not alter the Region's response deadline of April 5, 2010.

Dated this 1<sup>st</sup> day of March, 2010.

Respectfully submitted,



Kimberly A. Owens  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
1200 Sixth Avenue  
Seattle, Washington 98101  
Tel: (206) 553-6052  
Fax: (206) 553-0163

Of Counsel to the Region:

Pooja Parikh  
Attorney Advisor  
Water Law Office  
Office of General Counsel  
(202) 564-0839

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Region 10's **OPPOSITION TO MOTIONS FOR EXPEDITED REVIEW** in the matter of **TECK ALASKA INCORPORATED, RED DOG MINE**, NPDES Appeal No. 10-04, were served by United States First Class Mail on March 2, 2010 upon the following:

Eurika Durr  
USEPA Headquarters  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
M/C 1103B  
Washington, DC 20460


Eric B. Fjelstad  
Perkins Coie, LLP  
1029 W. Third Avenue, Suite 300  
Anchorage, AK 99501

Brent J. Newell, Attorney  
Center on Race, Poverty & the Environment  
47 Kearny Street, Suite 804  
San Francisco, CA 94108

Victoria Clark, Attorney  
Carl Johnson, Attorney  
Trustees for Alaska  
1026 W. Fourth Avenue, Suite 201  
Anchorage, AK 99501

Jeffrey W. Leppo  
Stoel Rives LLP  
600 University Street, Suite 3600  
Seattle, WA 98101-3197

DATED this 2<sup>nd</sup> day of March 2010.

  
\_\_\_\_\_  
Signature  
Print Name: Carl D. Kennedy  
EPA Region 10