

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

IN THE MATTER OF:
TECK ALASKA, INCORPORATED

NPDES Permit AK-003865-2

NPDES Appeal No. 10-04

**PETITIONERS' OPPOSITION TO REGION 10'S MOTION TO DISMISS PETITION
FOR REVIEW IN PART AND PETITIONERS' CROSS MOTION TO STAY THE
ENTIRE PERMIT**

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I. INTRODUCTION.

After Teck Alaska, Incorporated (“Teck”) chronically violated its 1998 National Pollution Discharge Elimination System Permit (“1998 Permit”) for the Red Dog Mine, EPA Region 10 issued Teck a new permit that, *inter alia*, was based on a legally defective certification by the Alaska Department of Environmental Conservation and relaxed limits for lead, zinc, cyanide, selenium, and total dissolved solids. On March 17, 2010, EPA withdrew these five effluent limits and now asks the Board to dismiss this Petition in part as moot. *See* EPA Region 10 Motion to Dismiss Petition for Review In Part (hereafter “Motion”).

The Board should deny the Motion because EPA fails to demonstrate that its illegal actions will not recur. This Petition presents a justiciable controversy because EPA’s *de facto* relaxation of the 1998 Permit and Alaska’s future plans to develop an “interim guidance” for antidegradation implementation do not eliminate EPA’s illegal conduct challenged in this Petition.

In addition, the Board should grant Petitioner’s Cross Motion to Stay the Entire Permit.¹ EPA only stayed a portion of the 2010 Permit, but because EPA issued the permit based upon a legally defective 401 Certification, the entire permit is *ultra vires* and should be stayed.

II. BACKGROUND

Teck operates the Red Dog Mine, one of the world’s largest zinc mines. The mine is located approximately 40 miles upstream from the Native Village of Kivalina and 70 miles north of the Arctic Circle in northwest Alaska.

Teck has a long history of violating its NPDES permits. In the 1990s, the United States prosecuted Teck for violations of the federal Clean Water Act (“CWA”).² In 2002, Kivalina

¹ Petitioners have notified EPA of their intent to file the Motion to Stay the Entire Permit and EPA represented that it will oppose the motion.

residents filed a Clean Water Act citizen suit when EPA failed to enforce Teck's violations of the 1998 Permit. After several years of litigation, the U.S. District Court for the District of Alaska granted summary judgment to the Kivalina residents for 621 violations, establishing liability against Teck Cominco for illegal discharges of total dissolved solids ("TDS") (618 violations), total suspended solids (1 violation), and two illegal discharges to the tundra.³

Before the U.S. District Court granted summary judgment in 2006, EPA had issued four Compliance Orders by Consent ("COBCs") because Teck could not meet the daily or monthly TDS effluent limitations established in the 1998 Permit.⁴ The COBCs collectively stated that Teck violated both the daily maximum and monthly average TDS effluent limitations contained in the 1998 NPDES permit during the months of September 1998, May through October of 1999, May through October of 2000, and May through October of 2001.⁵

On January 8, 2010, EPA, through its Region 10 office, reissued NPDES Permit No. AK-003865-2 ("2010 Permit"). The 2010 Permit covers Teck's continued wastewater discharges in operating the Red Dog Mine and the expansion into the Aqqaluk Deposit, which is adjacent to the main pit. The 2010 Permit attempts to legalize decades of CWA violations by relaxing effluent limitations governing the discharge of mining waste.

On February 14, 2010, Petitioners filed a Petition for Review to challenge EPA's issuance of the 2010 Permit. Petitioners allege that: (1) EPA unlawfully issued the 2010 Permit because Alaska had not adopted, and EPA has not approved, implementation procedures for the State's antidegradation policy and the State therefore performed a legally defective

² See Consent Decree, *United States v. Cominco Alaska, Inc.*, attached as Exhibit 1 (assessing a \$1.7 million civil penalty in 1997).

³ See *Adams v. Teck Cominco Alaska, Inc.*, 2006 Summary Judgment Order, attached as Exhibit 2, at 3-4.

⁴ See *id.* at 2.

⁵ See *id.*

antidegradation analysis when it certified the permit pursuant to section 401 of the CWA; (2) the 2010 Permit allows illegal backsliding and degradation of water quality; (3) EPA abused its discretion when it reduced water quality monitoring and biomonitoring; and (4) EPA abused its discretion when it failed to consider and require an alternative discharge location on the Chukchi Sea.

Petitioners are concerned about the significant changes authorized by the 2010 Permit and the resulting impacts to water quality in the Kivalina vicinity and the Wulik River watershed. The continued protection and maintenance of water quality is of vital significance and importance to the health of present and future Alaskans, the quality of fish harvested from State and federal waters, and the maintenance of subsistence hunting and fishing grounds in northwest Alaska. Many Kivalina and Point Hope residents, including Petitioners here, are subsistence hunters and fishers. The Village of Kivalina is downstream of Teck's Red Dog Mine; the 2010 Permit challenged here allows Teck to discharge more pollution into Red Dog Creek, which flows to Ikalukrok Creek, which flows to the Wulik River, which is the Village's drinking water source. The Native Village of Kivalina and the Native Village of Point Hope are federally recognized tribes.

On February 26, 2010, EPA notified Teck that only effluent limitations for five pollutants in the 2010 Permit were stayed: Part I.A.1 Table 1 (TDS) and Part I.A.7 (lead monthly average, zinc, selenium daily maximum, and WAD cyanide).⁶ The Stay Letter therefore reinstates effluent limits from the 1998 Permit to govern TDS, lead, zinc, selenium, and cyanide pending resolution of this Petition. *Id.* EPA takes the position that the Stay Letter allows Teck to otherwise proceed under the 2010 Permit, including the Aqqaluk Expansion. EPA informed the

⁶ See February 26, 2010 letter from Michael Bussell to Mike Bonneau, attached as Exhibit 3 (hereafter "Stay Letter").

media that “[i]t’s our position that as of March 31 they (Teck) will have a permit that we have written that will allow them to continue operations at Red Dog Mine, including development of the Aqqaluk deposit.”⁷

On March 17, 2010, EPA withdrew the five contested effluent limits in the 2010 Permit that it had previously stayed, and again informed Teck that it must comply with the more stringent limits in the 1998 Permit.⁸

Teck claims that the Red Dog Mine cannot meet the TDS effluent limits in the 1998 Permit. “Teck has never been able to comply with the total dissolved [solids] limitations (“TDS”) contained in the 1998 permit, which is many orders of magnitude below what is achievable.”⁹

III. ARGUMENT

EPA fails to demonstrate that the withdrawal of the lead, zinc, cyanide, selenium, and TDS effluent limitations from the 2010 Permit partially moots the Petition for two reasons. First, while EPA concedes that Alaska has not adopted implementation procedures for its antidegradation policy, EPA did not demonstrate that the withdrawal of the effluent limitations means that this wrongful conduct will not likely recur. Alaska only commits to adopting informal implementation guidelines at some point in the future, not regulations as required by Alaska law, and EPA has not even approved these unadopted informal implementation procedures, as Clean Water Act requires.

⁷ See U.S. EPA SAYS RED DOG CLEARED FOR MINE EXTENSION, Yereth Rosen and Euan Rocha, *Reuters*, March 17, 2010, attached as Exhibit 4 and available at <http://www.reuters.com/article/idUSN1717852620100318>.

⁸ See March 17, 2010 letter from Michael Bussell to Mike Bonneau, attached as Exhibit 1 to EPA’s Motion (hereafter “Withdrawal Letter”).

⁹ Teck Alaska Incorporated’s Request for Leave to Respond at 3.

Second, EPA's elimination of a *de jure* relaxation of the lead, zinc, cyanide, selenium, and TDS effluent limitations in the 2010 Permit does not demonstrate that EPA's unlawful conduct allowing relaxation of these effluent limitations will not recur. Over the last twelve years, EPA has allowed Teck to routinely violate the 1998 Permit without requiring Teck to abate the Red Dog Mine's pollution. Teck also claims that it cannot operate and comply with the TDS limit in the 1998 Permit. Absent an affirmative demonstration that the mine will not be allowed to operate in violation of the five 1998 Permit effluent limits that EPA has withdrawn, EPA's historic *de facto* relaxation of effluent limits demonstrates that EPA's illegal conduct – impermissible backsliding from the 1998 Permit – will likely recur. Accordingly, the Board should deny the Motion.

Moreover, the Board should stay the entire 2010 permit. EPA's issuance of the 2010 Permit is an *ultra vires* action given that Alaska's Section 401 Certification lacked CWA-required antidegradation implementation procedures. Accordingly, EPA violated section 401(a)(1) of the CWA, 33 U.S.C. § 1341(a)(1), when EPA issued a permit without a legal state 401 Certification. Thus, the Board should stay the entire permit.

A. The Mootness Standard.

The Board must apply a stringent standard to determine whether EPA's Withdrawal Letter moots this Petition. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000) (voluntary cessation does not deprive Board of authority to determine legality of permit). "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). To establish mootness, EPA must show that the Board cannot order *any* effective relief. *San Francisco BayKeeper, Inc. v. Tosco Corp.*,

309 F.3d 1153, 1159 (9th Cir. 2002) (“*BayKeeper*”), citing *City of Erie v. Pap’s A. M.*, 529 U.S. 277, 287 (2000). Such a showing must satisfy a “heavy burden of persuasion.” *BayKeeper*, 309 F.3d at 1159, citing *Concentrated Phosphate Export Assn.*, 393 U.S. at 203.

1. The Petition for Review is not Moot because the Process that EPA has Developed to Address the Backsliding Issue Results in the Same Legal Flaws that Currently Exist.

While EPA has withdrawn the five effluent limits at issue in the Petition, EPA fails to demonstrate that its illegal conduct will not recur. EPA has withdrawn the effluent limits based upon a commitment by the State of Alaska to develop “interim procedures (staff guidance)” as its antidegradation implementation procedures by September 1, 2010.¹⁰ After that, the State likely will perform an antidegradation analysis to support the same effluent limits proposed in the 2010 Permit.

This process is legally flawed and will result in a very similar petition for review being filed once that process is complete. In Alaska, regulations must be adopted in accordance with the Alaska Administrative Procedure Act. *See* AS 44.62.010-.320. The definition of “regulation” is:

[E]very rule, regulation, order, or standard of general application or the amendment, supplement, or revision of a rule, regulation, order, or standard adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of a state agency; ... “regulation” includes “manuals,” “policies,” “instructions,” “guides to enforcement,” “interpretative bulletins,” “interpretations,” and the like, that have the effect of rules, orders, regulations, or standards of general application, and this and similar phraseology may not be used to avoid or circumvent this chapter; whether a regulation, regardless of name, is covered by this chapter depends in part on whether it affects the public or is used by the agency in dealing with the public.

¹⁰ *See* Declaration of Michael Bussell and Letter from Lynn J. Tomich Kent to Michael Bussell Letter, dated February 24, 2010, attached as Exhibit 5 (hereafter “Kent Letter”).

AS 44.62.640(a)(3). Under this definition, “[t]he label an agency places on a policy or practice does not determine whether that rule falls under the APA; the legislature intended for the term ‘regulation’ to encompass a variety of statements made by agencies.” *Jerrel v. State, Dep’t of Nat. Res.*, 999 P.2d 138, 143 (Alaska 2000) (citing *Messerli v. Department of Natural Resources*, 768 P.2d 1112, 1117 (Alaska 1989), *overruled on other grounds by Olson v. State, Dep’t of Natural Resources*, 799 P.2d 289 (Alaska 1990); *see also Kenai Peninsula Fisherman's Coop. Ass’n, Inc. v. State*, 628 P.2d 897, 905 (Alaska 1981)).

In this case, the State’s “interim procedures” will not be adopted as regulations because they are “guidance.” The “interim procedures,” however, will function as regulations: the “indicia of a regulation is that it implements, interprets or makes specific the law enforced or administered by the state agency.” *Kenai Peninsula*, 628 P.2d at 905. Since the “interim procedures” will implement the antidegradation policy (18 AAC 70.015) and used by the State to interpret that policy and certify NPDES permits, it is a regulation and must be promulgated as such. Moreover, EPA has not demonstrated that it will review and act upon the “interim procedures,” as required by the CWA. *See* 33 U.S.C. § 1313(c)(3) (EPA must review and act on water quality standards); 40 C.F.R. § 131.12 (implementation procedures are water quality standards). The process contemplated by EPA to “fix” the backsliding issues of the 2010 Permit is legally defective and will result in similar legal issues plaguing its next decision.¹¹ EPA has thus failed to demonstrate that its illegal conduct will not recur and the Board should not dismiss the Petition in part as moot.

¹¹ While EPA may argue that it approves antidegradation implementation procedures as “guidance” documents, EPA’s process does not overcome the legal invalidity of the state requirements. It may be permissible under the Clean Water Act to adopt antidegradation implementation procedures by methods other than regulation, but it is not permissible under Alaska law, as noted *supra*, for the State to implement a law by any means other than regulation.

2. The Petition for Review is not Moot because EPA Fails to Demonstrate that Teck will Comply with the 1998 Permit.

EPA's withdrawal of the zinc, lead, selenium, cyanide, and total dissolved solids permit limits in the 2010 Permit does not moot this Petition because EPA cannot demonstrate that Teck will comply with the 1998 Permit. EPA's Motion to Dismiss rests on the assumption that its withdrawal of those contested permit limits combined with the imposition of the 1998 Permit's limits moots Petitioners' challenge to EPA's action to allow more mining waste pollution in the Wulik River.¹²

However, EPA ignores the past twelve years of history and its role in that saga. EPA assumes that Teck will comply with the 1998 Permit limits for lead, zinc, selenium, cyanide, and total dissolved solids and implies that it will require Teck to comply.¹³ EPA's history with Teck demonstrates EPA's pattern and practice of allowing Teck to exceed the 1998 Permit's limits.¹⁴ While EPA has withdrawn the *de jure* relaxation of TDS effluent limitations from the 2010 Permit, EPA has failed to demonstrate that it will prohibit a *de facto* relaxation of those limits. EPA cannot dispute that the agency – through Compliance Orders by Consent, among others – relaxed TDS limits in the 1998 Permit even before issuing the 2010 Permit. EPA cannot now rely on the 1998 Permit as the justification that EPA's wrongful conduct will not recur, especially when Teck asserts that it cannot comply with the TDS limits in the 1998 Permit.¹⁵

EPA's reliance on a host of this Board's prior decisions is misplaced, Motion at 2-3, as those decisions are inapposite. None of those decisions address the issue presented here: whether withdrawal of permit limits from a new NPDES permit moots a petition when the point

¹² See Motion at 5.

¹³ See Withdrawal Letter.

¹⁴ See Ex. 2 at 3-4.

¹⁵ See Teck Alaska Incorporated's Request for Leave to Respond at 3.

source cannot comply with its prior permit and EPA has failed to demonstrate elimination of *de facto* permit relaxation. Accordingly, EPA has failed to meet its heavy burden here to demonstrate that the Withdrawal Letter moot portions of the Petition.

Since EPA fails to demonstrate that the Petition is partially moot, the Board should deny EPA's Motion and stay the entire 2010 Permit.

B. The Board should Stay the Entire Permit.

The Board should stay the entire 2010 Permit because Alaska's illegal 401 Certification, which EPA concedes, affects the entire permit and not just five effluent limitations. While these limitations constitute the heart of the 2010 Permit, the legally flawed 401 Certification promulgated by the Alaska Department of Environmental Conservation encompassed the entire permit.

EPA may not issue a permit until a 401 Certification is granted or waived. *See* 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.53(a). Because Alaska certified the 2010 Permit without having EPA-approved antidegradation implementation procedures and EPA concedes this defect, EPA's issuance of the entire permit is *ultra vires*. As such, the illegal certification infects the entire 2010 Permit, and the Board should stay entire permit.

IV. CONCLUSION

For the reasons set forth above, the Board should deny Region 10's Motion to Dismiss Petition for Review in Part and grant Petitioners' Motion to Stay Permit.

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Respectfully submitted this 5th day of April, 2010.

TRUSTEES FOR ALASKA
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Brent J. Newell, CA Bar No. 210312

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONERS' OPPOSITION TO REGION 10'S MOTION TO DISMISS PETITION FOR REVIEW IN PART AND PETITIONERS' CROSS MOTION TO STAY THE ENTIRE PERMIT 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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DATED this 5th day of April 2010.



Carl H. Johnson

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

To all to whom these presents shall come. Greeting:

By virtue of the authority vested in me by the Archivist of the United States, I certify on his behalf, under the seal of the National Archives and Records Administration, that the attached production(s) is a true and correct copy of documents in his custody.



SIGNATURE <i>[Handwritten Signature]</i>	
NAME Steven M. Edwards	DATE 3/11/05
TITLE Regional Administrator	
NAME AND ADDRESS OF DEPOSITORY National Archives and Records Administration 6125 Sand Point Way NE Seattle, WA 98115	

NA FORM 13040 (10-86)

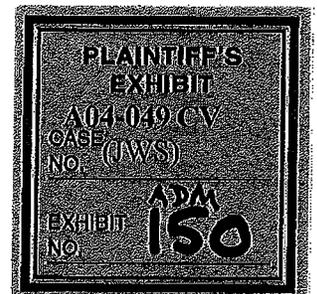
UNITED STATES OF AMERICA,
Plaintiff,

v.

COMINCO ALASKA INCORPORATED
Defendant.

Civil Action No.

CONSENT DECREE



1 of 121
Exhibit 1
Page 1 of 70

subject to this Paragraph. Cominco shall provide EPA with at least 30 days prior written notice of any action or transaction that could have a substantial material effect on Cominco's ability to meet its obligations under, or assure its compliance with, this Decree.

D. Contractors

9. Any contractor selected by Cominco to perform any of the activities required by this Decree must be approved, in writing, by EPA.

VI. CIVIL PENALTIES

10. Within 15 days of the later of the entry of this Decree, or receipt of the instructions from the United States as described below, Cominco shall pay to the United States \$1,700,000 as a civil penalty for claims asserted in the Complaint. Payment of this amount shall be made by Electronic funds Transfer ("EFT") to the United States Department of Justice lockbox bank, referencing this action and the DOJ number 90-5-1-1-5010. Payment by EFT shall be made in accordance with instructions provided to Cominco by the United States. Notice of payment pursuant to this Paragraph shall be sent to the United States as provided in Section XX (Notices and Submissions).

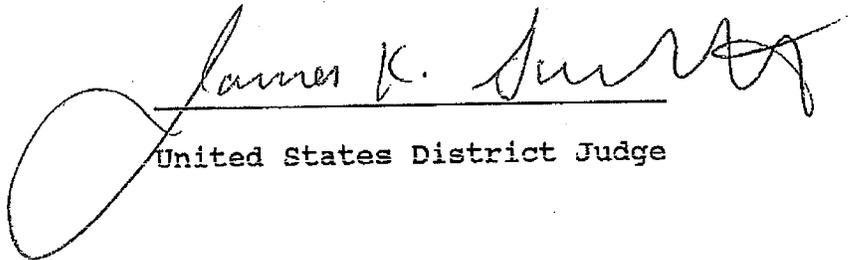
VII. INTERIM EFFLUENT LIMITATIONS AND RELATED REQUIREMENTS

11. Upon entry of this Decree and continuing until the time specified in Paragraph 12 below, Cominco shall at all times comply with all effluent limitations and all other requirements

XXVI. SIGNATORIES/SERVICE

78. Each undersigned representative of Cominco, the Assistant Attorney General for Environment and Natural Resources of the Department of Justice, and the Assistant Administrator for Enforcement and Compliance Assurance of the Environmental Protection Agency certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

SO ORDERED THIS 24 DAY OF November, 1997.


United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Cominco Alaska Incorporated.

FOR THE UNITED STATES OF AMERICA

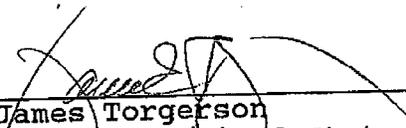
Date: 6/23/97


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Date: 7/14/97


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THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Cominco Alaska Incorporated.

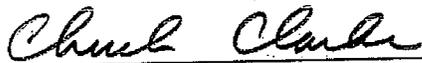
FOR THE UNITED STATES OF AMERICA
CONTINUED

Date: 7/8/97



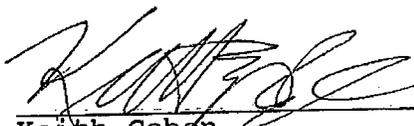
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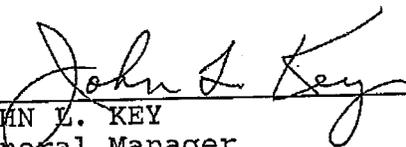


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THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Cominco Alaska Incorporated.

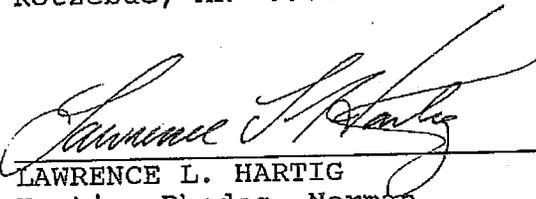
FOR COMINCO ALASKA, INC.

Date: May 20, 1997



JOHN L. KEY
General Manager
Cominco Alaska Incorporated
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Date: May 30, 1997



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Incorporated

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

ENOCH ADAMS, JR., LEROY ADAMS,)	
ANDREW KOENIG, JERRY NORTON,)	
DAVID SWAN, and JOSEPH SWAN,)	
)	
Plaintiffs,)	3:04-cv-00049-JWS
)	
vs.)	ORDER AND OPINION
)	
TECK COMINCO ALASKA, INC.,)	[Re: Motion at Docket 72 and
)	Order for Status Report]
Defendant.)	
)	
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NANA REGIONAL CORPORATION and)	
NORTHWEST ARCTIC BOROUGH,)	
)	
Intervenors-Defendants.)	
)	
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I. MOTION PRESENTED

At docket 72, plaintiffs Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan¹ move for partial summary judgment establishing defendant Teck Cominco Alaska, Inc.'s liability for 1,951 violations of its National Pollution Discharge Elimination System permits. At docket 100, defendant opposes the motion. Plaintiffs' reply is filed at docket 124. Oral argument was heard on June 15, 2006.

¹Plaintiff David Swan died on May 5, 2005.

pollutants may be authorized in accordance with National Pollution Discharge Elimination System (“NPDES”) permits.⁵ In Alaska, NPDES permits are issued by the federal Environmental Protection Agency (“EPA”). The EPA issued NPDES permit number AK-03865-2 for the Red Dog mine site in 1985, reissued the permit in 1998, modified the permit in July 2003, and administratively extended it when the permit expired on August 28, 2003. The permit authorizes Teck to discharge 2.418 billion gallons of effluent from the tailings pond via Outfall 001 each year. Eleven discharge parameters are found in the permit which uses two limitation types—daily maximum discharge limits and monthly average discharge limits.

The EPA issued NPDES permit number AK004064-9 for the port site, effective January 29, 1999. The permit authorizes Teck to discharge treated wastewater from a sewage treatment plant into the Chuckchi Sea via Outfall 001, and to discharge drainage from the concentrate storage buildings into the Chuckchi Sea or onto the tundra from Outfall 005. Under the terms of both the mine and port site NPDES permits, Teck is required to file discharge monitoring reports (“DMR”) with the EPA.

Between the effective date of the 1998 mine site NPDES permit and the date plaintiffs filed the underlying complaint, the EPA issued four Compliance Orders by Consent (“COBCs”) extending Teck’s schedule for compliance with the 170 mg/l monthly average and 196 mg/l daily maximum limits for TDS set out in the 1998 mine site NPDES permit. The July 1999 COBC states that Teck shall achieve compliance with the mine site permit limits for TDS by the beginning of the 2001 discharge season, and that during the 1999 and 2000 discharge seasons, Teck shall limit TDS discharged in its wastewater to maintain in-stream TDS concentrations at or below 1,500 mg/l at Station 10 during the entire discharge season, and at 500 mg/L at Station 7 from July 25 through August 31.⁶

scheme.

⁵33 U.S.C. § 1342(a).

⁶1999 COBC at 3, doc. 72, exh. 73.

downstream of the confluence of the North Fork Red Dog Creek and Middle Fork Red Dog Creek.⁹⁸

While defendant admits some of the past violations at Station 10, defendant argues that plaintiffs are not entitled to summary judgment on any the alleged violations of the applicable COBCs at Station 10 because the COBCs that implemented the limits at Station 10 are no longer in effect and the 2003 permit currently in effect does not contain the same limitations. Defendant further argues that plaintiffs have not demonstrated that violations of the 1,500 mg/l TDS limit at Station 10 are ongoing. The court concurs. Plaintiffs do not offer any evidence demonstrating that violations of the 1,500 mg/l TDS limit at Station 10 are ongoing, rather plaintiffs simply allege that because Teck "has repeatedly violated the 1500 mg/l in-stream limitation at Station 10, these violations are capable of repetition."⁹⁹

Because plaintiffs have failed to demonstrate that violations of the COBC limits for TDS at Station 10 are ongoing or have any reasonable probability of reoccurring in the future, plaintiffs are not entitled to summary judgment on their claims related to violations of the COBC limits for TDS at Station 10.

F. PENALTIES

Plaintiffs request the court to find that defendant is subject to civil penalties of up to \$27,500 for each day of violation and further request the court to levy the above amount against defendant at the penalty phase. Because plaintiffs' motion for partial summary judgment concerns liability only, the court reserves judgment on the appropriate amount of penalties and/or other relief.

V. CONCLUSION AND ORDER FOR STATUS REPORT

For the reasons set out above, plaintiffs' motion for partial summary judgment at docket 72 is **GRANTED IN PART** and **DENIED IN PART** as follows. Plaintiffs' motion for partial summary judgment is **GRANTED** and defendant's liability is established as to

⁹⁸Doc. 72, exh. 73 at 2; exh. 71 at 48.

⁹⁹Doc. 100 at 97.

the 618 violations of the daily maximum limit for TDS, two unpermitted discharges at the port site on May 9 and 10, 2002, and one port site TSS violation in May 2002.

Plaintiffs' motion for partial summary judgment is **DENIED** as to the 618 violations of the monthly average TDS limit, fifteen violations of the daily maximum cyanide limit, 418 violations of the monthly average cyanide limit, four WET reporting violations, nine violations of the daily maximum WET limit, 199 violations of the monthly average WET limits, three unpermitted discharges to the tundra at the mine site on May 19, 22, and 23, 2002, one mine site reporting claim on July 12, 2001, two port site monitoring violations, and 38 violations of the COBCs. The court declines to address any penalty issue at this time. In addition,

IT IS ORDERED that the mine site reporting claim on July 12, 2001, is **DISMISSED**.

Complete resolution of this case appears to require trial as to the remaining disputed violations and the appropriate remedy. The court is of the preliminary view that there should be separate trials of the two issues. The court also considers it possible that the first issue might be amenable to settlement—especially given the high cost of resolving so many alleged violations at trial. The court is less sanguine about the possibility of a settlement with respect to the remedy. In any event, in order to draw this case to a conclusion, the court needs further input from the parties. Therefore,

IT IS FURTHER ORDERED that on or before August 18, 2006, the parties shall file a joint status report which advises the court of the following:

- 1) What further tasks, if any, remain to be completed by the parties before the court issues a standard final pre-trial order calling for identification and marking of exhibits, objections to exhibits, final trial witness lists, trial briefs, etc.
- 2) The prospects for settling some or all of the remaining alleged violations and remedy issues.
- 3) The parties' views regarding separate trials as to (a) the remaining unresolved alleged violations and (b) the remedy or remedies.

4) The length of time the parties' estimate for each trial of the two trials if the court determines to separate the issues as suggested above, and the parties' estimate for the length of trial if a single trial is to be conducted.

DATED at Anchorage, Alaska, this 28th day of July 2006.

/s/

JOHN W. SEDWICK
UNITED STATES DISTRICT COURT JUDGE



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

FEB 26 2010

OFFICE OF
WATER AND WATERSHEDS

Reply To

Attn Of: OW-135

Mr. Mike D.J. Bonneau
General Manager,
Teck Alaska Incorporated
Red Dog Operations
3105 Lakeshore Drive, Bldg. A, Suite 101
Anchorage, Alaska 99517

Re: Notification of Stayed Permit Conditions - Teck Alaska Incorporated,
Red Dog Mine, NPDES Permit No. AK-003865-2

Dear Mr. Bonneau:

On January 8, 2010, the U.S. Environmental Protection Agency Region 10 issued the above-referenced National Pollutant Discharge Elimination System (NPDES) permit to Teck Alaska Incorporated. On February 18, 2010, the Environmental Appeals Board notified Region 10 that Trustees for Alaska and the Center on Race, Poverty and the Environment, on behalf of several entities and individuals, filed a petition for review of the permit (Appeal No. NPDES 10-04). This letter serves as notification pursuant to 40 C.F.R. § 124.16(a)(2) of those permit conditions that are stayed as a result of the petition for review.

The following contested conditions of NPDES Permit No. AK-003865-2 are stayed until final agency action under 40 C.F.R. § 124.19(f):

- Part I.A.1, Table 1 – effluent limitations for lead (monthly average limit), selenium (daily maximum limit), zinc and weak acid dissociable (WAD) cyanide
- Part I.A.7.a – effluent limitations for Total Dissolved Solids (TDS)

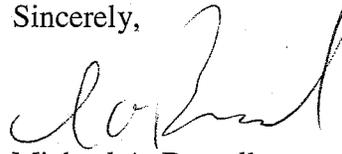
Until final agency action, the following conditions in the 1998 NPDES Permit No. AK-003865-2 remain in effect:

- Part I.A.1 – effluent limitations for lead (monthly average limit), selenium (daily maximum limit), zinc, TDS, and total cyanide

The remainder of the January 8, 2010, permit conditions are uncontested and severable from the contested conditions and, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d), will become fully effective and enforceable 33 days after the date this notice is mailed.

Please feel free to contact Patty McGrath at (206) 553-0979 or Cindi Godsey at (907) 271-6561 should you have questions regarding this letter.

Sincerely,



Michael A. Bussell
Director, Office of Water

cc: Environmental Appeals Board
Millie Hawley, President, Native Village of Kivalina IRA Council
Caroline Cannon, President, Native Village of Point Hope IRA Council
Pamela Miller, Alaska Community Action on Toxics
Brook Brisson, Northern Alaska Environmental Center
Enoch Adams, Jr., Kivalina
Leroy Adams, Kivalina
Andrew Koenig, Kivalina
Jerry Norton, Kivalina
Joseph Swan, Sr., Kivalina
Brent Newell, Center for Race, Poverty, & the Environment
Victoria Clark, Trustees for Alaska
Don Kuhle, U.S. Army Corps of Engineers
George Helfrich, National Park Service
Jack DiMarchi, State of Alaska Department of Natural Resources
Ukallaysaaq Tom Okleasik, Northwest Arctic Borough
Jackie Hill, Maniilaq Association
Marie Greene, NANA Regional Corporation, Inc.
Tim Pilon, State of Alaska, Department of Environmental Conservation

UPDATE 2-U.S. EPA says Red Dog cleared for mine extension

Thu Mar 18, 2010 3:17am EDT

EPA clears most aspects of contentious Red Dog permit

* Provisions cleared should allow for mine extension

(Adds background, detail)

By Yereth Rosen and Euan Rocha

ANCHORAGE/TORONTO, March 17 (Reuters) - The U.S. Environmental Protection Agency has cleared crucial aspects of a contentious permit that should allow Canadian miner Teck Resources (TCKb.TO) to continue operations at its Red Dog zinc mine in Alaska, an EPA official said on Wednesday.

Last month, Teck said it may be forced to curtail operations at Red Dog, the world's largest zinc mine, after environmental and native groups appealed against a wastewater discharge permit, issued by the EPA.

At the time, Teck said that until the EPA issues a notice clarifying which provisions of the permit are subject to appeal, the entire permit remained suspended.

Teck argues that the permit is crucial for extending mining into a new ore deposit called Aqqaluk and preventing a shutdown after the original Red Dog deposit is depleted next year. [ID:nN17111233]

However, the EPA has determined that the appeal affects only a portion of the permit, issued Jan. 8, and that the rest of the document will be in effect in two weeks, said Patty McGrath, the agency's regional mining coordinator who has been serving as the Red Dog project manager.

"It's our position that as of March 31 they (Teck) will have a permit that we have written that will allow them to continue operations at Red Dog Mine, including development of the Aqqaluk deposit," McGrath told Reuters, adding that the EPA notified Teck of its decision in a letter sent on Feb. 26.

A spokesman for Teck said the company was in talks with the EPA, but he was unable to comment on Teck's plans for the zinc mine at this time.

ZINC DEMAND

Global demand for zinc, which is primarily used to galvanize steel, has begun to improve recently mainly due to increased demand in emerging economies.

However, pricing for the commodity has been somewhat weighed down by oversupply concerns, caused by a wave of production restarts in the second half of 2009. [ID:nLDE60S1HG]

In January, analysts polled by Reuters forecast a roughly 210,000-tonne surplus in the world zinc markets in 2010, 17 times higher than the 12,000-tonne surplus they had predicted in a Reuters poll six months earlier.

Moreover, this follows a 445,000-tonne surplus in the world zinc markets in 2009, according to the International Lead and Zinc Study Group. [ID:nLDE61G0Y7]

Any tightening in zinc supply this year, is likely to help strengthen zinc pricing. The London Metal Exchange (LME) three-months price MZN3 was last indicated at \$2,330 a tonne.

AQQALUK DEPOSIT

Vancouver-based Teck has said it plans to operate the main deposit at Red Dog under existing permits until 2011, but to maintain efficient production rates, ore from the main deposit would need to be supplemented by ore from Aqqaluk.

Teck contends that if issues regarding the permit drag on beyond May, its transition plan will be affected and production at Red Dog will likely be curtailed in October.

The EPA in a two-page letter obtained by Reuters, specifies that the only part of the permit contested was the part that set effluent limits for total dissolved solids (TDS), along with lead, selenium, zinc and cyanide levels. Until the appeal is resolved, effluent limits for these five compounds will stay at levels set in a prior wastewater permit, issued in 1998.

Jim Kulas, environmental and public affairs manager for the Red Dog Mine, said the limits in the 1998 permit are too restrictive to allow Teck to move into the Aqqaluk deposit.

"Right now, we will have a permit that will have conditions we can't comply with," he said. "Going back to the 1998 permit, that leaves us with permit conditions we can't meet."

McGrath said the major problem for Teck is the limit placed on its TDS discharges as the mine has never been able to meet the limit set in the 1998 permit.

Red Dog has operated since then under a series of compliance orders that allow larger discharges, but require improvements over time, she said.

The new permit raised allowable discharges of dissolved solids from the 200 milligrams-per-liter limit set in 1998 to a 1,500 milligram-per-liter. The new limit is a major target of the appeal, filed Feb. 16.

Meanwhile, the U.S. Army Corps of Engineers on Tuesday issued a wetlands-fill permit -- the only remaining permit for the mine expansion that had not yet been issued. (Reporting by Yereth Rosen in Anchorage and Euan Rocha in Toronto; Editing by Ed Lane)

1. I am the Director of the Office of Water and Watersheds, in Region 10 of the EPA. I have held this position since January 20, 2009. Region 10 includes the states of Alaska, Idaho, Oregon, and Washington.

2. In this position, I have supervisory responsibility for implementing programs in EPA Region 10 under the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1251, *et seq.*, concerning, among other things, the issuance of National Pollutant Discharge Elimination System ("NPDES") permits in the State of Alaska. In particular, I have management authority over matters involving EPA's June 14, 2007, re-issuance of the *Authorization to Discharge Under the National Pollutant Discharge Elimination System (NPDES) for Oil and Gas Extraction Facilities in Federal and State Waters in Cook Inlet* ("General Permit").

3. On February 24, 2010, I received a letter from Lynn J. Tomich Kent, Director of the State of Alaska's Department of Environmental Conservation ("ADEC"), Division of Water. A copy of that letter is attached hereto. Ms. Kent's letter, quoted below, expressed ADEC's commitment to do the following:

- Develop interim procedures (staff guidance) for how the State implements its anti-degradation policy found at 18 AAC 70.015. ADEC anticipates having the interim guidance available by September 1, 2010.
- Participate in EPA's public notice on the Cook Inlet Oil and Gas Exploration General Permit, or conduct a separate public notice and

comment period on the State's draft Section 401 certification and draft anti-degradation analysis of the General Permit with a goal to start the minimum 30-day comment period by October 1, 2010.

- Depending on the volume and nature of comments received, plan to issue a final Section 401 certification and final anti-degradation analysis by December 1, 2010.

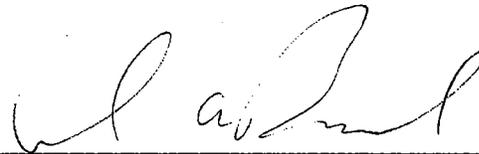
4. On remand, if granted by the Court, EPA Region 10 will re-propose two sets of effluent limits for the parameters that received less stringent limits in the current General Permit compared to the previous Cook Inlet general permit. Pursuant to CWA section 303(d)(4)(B), such less stringent limits are those that would rely on ADEC's antidegradation analysis (*i.e.*, those limits in the current General Permit that are *less stringent than* corresponding limits for the same parameters in the previous general permit). If ADEC participates in EPA's public notice period, as described in the first part of the second bullet in Ms. Kent's letter, EPA Region 10 will re-propose *both* the less stringent limits in the current General Permit *and* the corresponding effluent limits as they existed in the previous general permit concurrent with ADEC's draft antidegradation analysis. In the alternative, if ADEC conducts a separate public notice and comment period on the State's draft CWA section 401 certification and draft antidegradation analysis, as described in the second part of the second bullet in Ms. Kent's letter, EPA Region 10 will re-propose *both* the less stringent effluent limits in the current

General Permit *and* the corresponding effluent limits as they existed in the previous general permit as soon as practicable after ADEC's public notice period begins. In either event, EPA Region 10 will provide a minimum 30-day comment period.

5. EPA Region 10 will finalize its re-proposal as soon as practicable after ADEC submits to EPA its final CWA section 401 certification and final antidegradation analysis.

I declare under penalty of perjury that the foregoing is true and correct, based on my personal knowledge and on information provided to me by employees of Region 10 of the EPA.

Dated: March 9, 2010



Michael Bussell
Director, Office of Water and Watersheds
U.S. Environmental Protection Agency
Region 10

STATE OF ALASKA

DEPT. OF ENVIRONMENTAL CONSERVATION
DIVISION OF WATER
DIRECTOR'S OFFICE

SEAN PARNELL, GOVERNOR
555 Cordova Street
Anchorage, AK 99501
PHONE: (907) 269-7599
FAX: (907) 269-2415
<http://www.dec.alaska.gov>

February 24, 2010

Michael Bussell, Director
Office of Water and Watersheds
US EPA Region 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

Re: Anti-degradation Implementation and the Cook Inlet Oil and Gas Exploration
General Permit

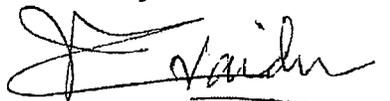
Dear Mr. Bussell:

Per our recent conversation regarding the appeal of the Cook Inlet Oil and Gas
Exploration General NPDES Permit, the Department of Environmental Conservation
(DEC) plans to do the following:

- develop interim procedures (staff guidance) for how the State implements its anti-degradation policy found at 18 AAC 70.015. We anticipate having the interim guidance available by September 1, 2010.
- participate in EPA's public notice period on the Cook Inlet Oil and Gas Exploration General Permit, or conduct a separate public notice and comment period on the State's draft Section 401 certification and draft anti-degradation analysis of the General Permit with a goal to start the minimum 30-day comment period by October 1, 2010.
- depending on the volume and nature of comments received, DEC will plan to issue a final Section 401 certification and final anti-degradation analysis by December 1, 2010.

I understand that time is of the essence and DEC will proceed with these steps as quickly as possible.

Sincerely,



Fd Lynn J. Tomich Kent
Director