

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION**

NATIVE VILLAGE OF POINT HOPE IRA)
 COUNCIL, NORTHERN ALASKA)
 ENVIRONMENTAL CENTER, ALASKA)
 COMMUNITY ACTION ON TOXICS, NATIVE)
 VILLAGE OF KIVALINA IRA COUNCIL,)
 ENOCH ADAMS, JR., LEROY ADAMS,)
 ANDREW KOENIG, JERRY NORTON &)
 JOSEPH SWAN, SR.)

Requestors,)

v.)

ALASKA DEPARTMENT OF)
 ENVIRONMENTAL CONSERVATION,)
 DIVISION OF WATER, and)
 TECK ALASKA, INC.,)

Respondents.)

OAH No. 10-0126-DEC
 CWA 401 Cert. of NPDES AK-003862-2

OFFICE OF THE
 ATTORNEY GENERAL
 APR 08 2010
 4th JUDICIAL DISTRICT
 STATE OF ALASKA

PRELIMINARY ORDER

I. INTRODUCTION

Teck Alaska, Inc. (Teck) sought certification from the State of Alaska under §401 of the federal Clean Water Act.¹ This certification requires a review of the federal National Pollutant Discharge Elimination System (NPDES) permit and a determination as to whether there is reasonable assurance that the proposed mining operations will not violate provisions of the Clean Water Act and Alaska’s water quality standards. After reviewing the permit and receiving public comment, the Department of Environmental Conservation, Division of Water (Division) issued a Certificate of Reasonable Assurance.

Several Native Villages, non-profit organizations, and individual residents have asked for an adjudicatory hearing to review the Division’s decision.² This group is referred to collectively as the Requestors. The Division, along with Teck, NANA Regional Corporation, Inc. (NANA),

¹ 33 U.S.C. 1341(a).

² The individual residents have partially withdrawn their request for an adjudicatory hearing. They maintain their request “only on the issues related to limits set for Total Dissolved Solids discharge into Red Dog Creek from when grayling begin spawning in Main Stem Red Dog Creek until the conclusion of that spawning as determined by the Alaska Department of Fish and Game.” Letter from attorney Brent Newell dated February 18, 2010.

and the Alaska Industrial Development and Export Authority (AIDEA) have responded to this request. This group is referred to collectively as the Respondents.³

Commissioner Hartig has recused himself from this matter. He has appointed Deputy Commissioner Easton to serve as his designee and make the final decision in this matter.⁴ As discussed below, a hearing is granted as to some, but not all of the issues raised by the Requestors.

II. DISCUSSION

A. Requirements for requesting a hearing.

A request for a hearing must identify the requestors and all persons represented by the requestors,⁵ as well as an explanation of how each requestor's interest will be affected by the decision.⁶ A request must also include

(B) a clear and concise statement of

(i) each disputed issue of material fact and question of law proposed for consideration at the hearing;

(ii) the relevance to the permit decision of each matter identified under (i) of this subparagraph; and

(iii) the hearing time estimated to be necessary for the adjudication.⁷

Finally, the request must include a discussion of why the request for a hearing should be granted and references to the contested terms of the department's decision along with proposed alternate terms.⁸

Requestors did not comply with 18 AAC 15.200(a)(3)(B)(i) & (ii). The regulatory scheme for determining whether a hearing should be granted contemplates examining each listed issue of material fact or question of law to determine whether a hearing should be granted. It is difficult to discern from Requestors' memoranda the precise factual or legal issues raised. While they have included a list of ten disputed facts and ten questions of law, the narrative sections of their briefs are not clearly tied to any of the listed issues. Some of the narrative discussion seems

³ NANA and AIDEA are only potential interveners at this time. 18 AAC 15.225(a). Teck is automatically a party to this proceeding pursuant to 18 AAC 15.225(b). Potential interveners are allowed to respond to a request for a hearing pursuant to 18 AAC 15.220(a).

⁴ The Commissioner is authorized by regulation to designate a department employee to make a final decision regarding whether a hearing will be granted. *See* 18 AAC 15.235(a)(1)(A).

⁵ 18 AAC 15 200(a)(1) & (2).

⁶ 18 AAC 15.200(a)(3)(A).

⁷ 18 AAC 15 200(a)(3)(B).

⁸ 18 AAC 15 200(a)(3)(C) & (D).

to relate to issues not contained within the two lists, while there are also issues on these lists that do not appear to be discussed in the narrative sections.

The Commissioner's designee has carefully reviewed the lists of asserted issues of fact and questions of law along with the narrative discussion of concerns raised by Requestors. From this, he has identified several issues for an adjudicatory hearing. These issues are discussed in section II C, below. To the extent Requestors believe the designee has not understood their request, they are given an additional opportunity to clarify their position as stated in section III, below.

Requestors also did not comply with 18 AAC 15.200(a)(3)(B)(iii) which asks for an estimate of the amount of time needed for a hearing. As discussed in section III, below, Requestors have an opportunity to submit additional information. They should include with that submittal an estimate of the hearing time that will be needed for adjudication.

B. Subsequent events.

After the parties completed the briefing on this Request for Hearing, the federal Environmental Protection Agency withdrew some of the NPDES permit effluent limits. This action may moot some of the pending issues. Even if issues are not moot, this recent action by the EPA may affect how the parties wish to proceed in this matter. The parties may wish to stipulate to a stay of this action, a narrowing of issues to be considered, or whether there is an opportunity for alternative dispute resolution pursuant to 18 AAC 15.205 and 2 AAC 64.200. Parties are invited to address this as part of the supplement requested in section III below.

C. Issues for hearing.

An adjudicatory hearing is granted when a requestor has raised a genuine issue of disputed fact that is material to the permitting decision.⁹ A hearing on the existing record and written briefs is granted when a requestor does not raise a genuine issue of disputed fact, but does raise a disputed and significant issue of law or policy.¹⁰ In this case, while there are some purely legal issues, many of the remaining issues are either pure factual questions or mixed questions of law and fact. To the extent a hearing is granted, it will be an adjudicatory hearing as to all issues, and not a hearing on the existing record and written briefs.¹¹

⁹ 18 AAC 15.220(b)(1)(B).

¹⁰ 18 AAC 15.220(b)(3)

¹¹ This does not preclude any party from seeking summary adjudication of one or more issues.

Respondents assert that several of the issues raised by Requestors may not be raised now because they were not raised in the comments submitted to the department on the draft certification.¹² At any hearing granted,

[a] party may not raise an issue of fact or question of law that was not raised timely to the department before the department's issuance of the contested decision unless the party shows good cause for the failure to raise each matter.¹³

Whether these issues were raised before need not be decided at this time. Even if there are new issues being raised, Requestors are allowed to raise them if they show "good cause" to do so. Whether they have good cause would be decided at the hearing, and not at this preliminary stage.

In determining which issues should be covered by a hearing, the focus is on whether Requestors have raised a genuine issue of material fact or a disputed question of law, and not whether they would prevail, after a hearing. The issues that have been identified as appropriate for a hearing follow.

1. Anti-degradation.

It is undisputed that Alaska has an anti-degradation policy. It is also undisputed that Alaska is required to adopt procedures or guidelines for implementing that policy. The Division concedes that Alaska has not yet adopted implementation procedures or guidelines. Requestors argue that the Division cannot conduct a legal anti-degradation analysis without first promulgating implementation procedures for conducting that analysis.

This legal question has been addressed before and the Deputy Commissioner, acting as the Commissioner's designee, rejected arguments which appear to be identical to those raised here.¹⁴ At this stage, however, the only question is whether the Requestors have identified a disputed and significant issue of law.¹⁵ Requestors are entitled to a hearing on whether the Division can legally conduct an anti-degradation analysis pending its adoption of implementing procedures or guidelines. Requestors are also entitled to a hearing on whether the Division complied with applicable requirements concerning opportunity for public notice and comment on the anti-degradation analysis and decision. Finally, Requestors may include in the hearing on anti-degradation issues the issue of whether Teck is using the most effective and reasonable pollution prevention, control, and treatment methods. 18 AAC 70.015(a)(2)(D).

¹² Division's Opposition at 6.

¹³ 18 AAC 15.245.

¹⁴ *Kivalina Residents v. Teck Cominco*, OAH No. 07-0284 DEC.

¹⁵ 18 AAC 15.220(b)(3).

2. *Zinc.*

Apart from the question of anti-degradation, do the effluent limits for zinc comply with applicable provisions of 18 AAC 70?

3. *Lead.*

Apart from the question of anti-degradation, do the effluent limits for lead comply with applicable provisions of 18 AAC 70?

4. *Cyanide.*

Apart from the question of anti-degradation, do the effluent limits for WAD Cyanide comply with applicable provisions of 18 AAC 70?

5. *TDS.*

Apart from the question of anti-degradation, do the effluent limits for TDS comply with applicable provisions of 18 AAC 70?

6. *Mixing Zones.*

Apart from the question of anti-degradation, do the mixing zones comply with applicable provisions of 18 AAC 70? This includes whether Teck is using the most effective, technologically and economically feasible treatment methods. 18 AAC 70.240(c)(1).

7. *Backsliding.*

A hearing is granted as to how federal anti-backsliding rules apply to state §401 certifications and whether the Division complied with applicable provisions of law.

III. ADDITIONAL BRIEFING

Requestors shall file a supplement to their Request for a Hearing within 14 calendar days of the date of this order. That supplement should be limited to clarifying an issue identified above or explaining why a hearing should be granted as to an additional issue, and should also estimate the amount of time needed for a hearing. In doing so, Requestors are reminded to consider the requirements of 18 AAC 15.200(a)(3). The Division and Teck may reply to this supplement within 7 calendar days of Requestors' brief. The Requestors, the Division, and Teck

//

//

may also use this opportunity to discuss the recent withdrawal of permit conditions by the federal EPA. No other briefing is allowed at this time. A final order pursuant to 18 AAC 15.220(b) will be issued after reviewing any briefs filed.¹⁶

DATED this 6th day of April, 2010.

By: Dan Easton
Dan Easton
Deputy Commissioner
Department of Environmental Conservation

Certificate of Service: The Undersigned hereby certifies that on the 6th day of April, 2010, a true and correct copy of this document was mailed to the following: Carl Johnson & Victoria Clark, counsel for requestors Native Village of Point Hope IRA Council, Northern Alaska Environmental Center & Alaska Community Action on Toxics; Brent Newell, counsel for requestors Native Village of Kivalina IRA Council, Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton and Joseph Swan, Sr.; Eric Fjelstad, counsel for Teck Alaska, Inc; Ryan Steen, counsel for NANA Regional Corporation; Ted Leonard, AIDEA; Cameron Leonard, AAG. A courtesy copy was provided to Gary Mendivil, DEC.

By: Kim DeMoss/Linda Schwass
Kim DeMoss/Linda Schwass

¹⁶ The due date for this decision is extended by 21 days to allow time for this clarification.