

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

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

**NANA REGIONAL CORPORATION’S OPPOSITION TO
PETITIONERS’ MOTION TO STAY THE ENTIRE NPDES PERMIT**

I. INTRODUCTION

NANA Regional Corporation (“NANA”)¹ opposes Petitioners’ belated motion to stay the entire 2010 Red Dog Mine NPDES permit. *See* Dkt. #27 at p.10. Petitioners’ motion is contrary to the allegations in their Petition, contrary to their representations and arguments in opposition to NANA’s and Teck Alaska’s motions for expedited review and otherwise without merit.

In addition, and in the alternative, NANA hereby renews its pending request for an expedited decision. As NANA forecast at the outset, and as has now been made clear by Petitioner’s motion, the procedural uncertainties associated with this pending challenge are being leveraged to threaten mine closure and ruinous economic consequences for the NANA region.

¹ The Board’s order of March 2, 2010 granted NANA leave “to respond to the petition and to participate in these proceedings.” *See* Order Granting Leave to Respond to Petition (Dkt. #12).

II. CONTEXT

The pending Petition for Review was filed on February 15, 2010, following a multi-year public regulatory permitting process that included preparation of a Supplemental Environmental Impact Statement (“SEIS”). Petitioners primary, but not exclusive, contention in the Petition for Review is twofold: (i) that the State of Alaska has not adopted adequate antidegradation implementation procedures; and (ii) in the absence of such procedures, certain new effluent limitations in the 2010 NPDES permit are unlawful, particularly the total dissolved solids (“TDS”) effluent limitation.

In response to the Petition for Review, NANA sought intervention in this proceeding and requested expedited review. *See* Dkt. #8. As explained in NANA’s motion (and in a separate motion for expedited review filed by Teck Alaska), unless development of the Aqqaluk deposit as an expansion of the Red Dog Mine is able to proceed, NANA’s shareholders and the residents of the NANA region face economic devastation. *See, e.g., id.* § IV.

EPA opposed NANA’s and Teck Alaska’s motion to expedite on the primary grounds that the pending appeal does not present any exigent risk to Red Dog Mine operations, including development of the Aqqaluk deposit. *See* Dkt. #11. Petitioners expressly joined in Region 10’s opposition to expedited review “for the reasons stated therein,” and characterized NANA’s concerns regarding a potential mine closure resulting from this proceeding as “overblown.” Dkt. #15 at 1. This Board deferred ruling on NANA’s and Teck Alaska’s motions to expedite, reserving further consideration of these motions until “completion of briefing.” Dkt. #12 at n.1.

On March 17, 2010, Region 10 withdrew the effluent limitations subject to the

objections of Petitioners, thereby mooting most of the Petition for Review. *See* Dkt. #19. As a consequence, on March 19, 2010, Region 10 moved to dismiss those specific claims asserted in the Petition for Review that are moot. *See* Dkt. #20.² On April 5, 2010, Petitioners' responded to Region 10's motion to dismiss by tacking on a five-sentence "cross-motion" in which they seek for the first time to stay the entire Red Dog Mine NPDES permit. *See* Dkt. #27 at 10. Petitioners now contend, without any cited authority, that the alleged defects in the State of Alaska's antidegradation implementation procedures undermine the entire 401 Certification issued by the State of Alaska, thereby compelling invalidation of the entire Red Dog Mine NPDES permit. *Id.*

III. PETITIONERS' MOTION IS BASELESS

Petitioners' motion for a stay of the entire permit should be denied for the following reasons:

1. The contention Petitioners now make is contrary to the Petition for Review. The Petition for Review does not state a claim that the entire 2010 NPDES permit is invalid because it is premised upon a 401 Certification from the State of Alaska that is similarly invalid. To the contrary, the Petition for Review expressly limits Petitioners' challenges to "certain conditions included in the Permit, and certain conditions omitted from the Permit." Dkt. #1 at 11; *see also* Teck Alaska Incorporated's Opposition to Petitioners' Motion to Stay the Entire Permit at 2-3.

2. The contention Petitioners now make is contrary to their representations to this Board in opposing NANA's and Teck Alaska's motions for expedited review.

² Region 10 subsequently filed a second motion to dismiss. *See* Dkt. #25. Region 10's second motion to dismiss contends that an additional claim in the Petition for Review is moot as a consequence of the agency's withdrawal of the TDS effluent limitation in the 2010 NPDES permit. *Id.*

NANA's principal concern with this proceeding has always been that otherwise meritless claims may be exploited by Petitioners to procure procedural delays that shutdown the Red Dog Mine. NANA's fears regarding such motives by Petitioners have now been confirmed. Having characterized NANA's concerns as "overblown," and having expressly joined Region 10 in opposing NANA's motion to expedite on the grounds that these proceedings are sufficiently specific and narrow in scope that mine operations, including expansion of the Aqqaluk deposit, are not threatened, Petitioners now reverse field and request the very thing they represented could not and would not occur – a procedural stay of the NPDES permit that would cause a shutdown of the mine.

At a minimum, Petitioners' express adoption of EPA's arguments without reservation was a knowing and intentional admission about the limited scope of the claims asserted in the Petition for Review. Moreover, having represented to the Board that it need not expedite proceedings because timely development of the Aqqaluk deposit is not at risk, Petitioners are barred by estoppel principles from obtaining two months later the very relief and result they previously argued was discountable.³ In sum, Petitioners arguments for a complete stay are neither credible nor permissible.

3. Even if, contrary to Petitioners' statement and representations, the Petition for Review could be read to challenge the entire NPDES permit, the motion for a stay should be denied. In order to avoid duplication, NANA incorporates the arguments presented by Teck Alaska in opposition to Petitioners' motion for a stay. *See* Teck

³ Estoppel principles bar a party from arguing and prevailing upon a certain position in one phase of a legal proceeding, and then relying upon a contradictory argument to prevail in another phase of the same proceeding. *See, e.g., In re Julie's Limousine & Coachworks, Inc.*, CAA Appeal No. 03-06, 2004 EPA App. LEXIS 23, *44-*47 (EAB July 23, 2004) (citing *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001)). This is precisely what Petitioners now seek to do.

IV. THIS PROCEEDING SHOULD BE EXPEDITED

In addition, and in the alternative to opposition to Petitioners' motion for a stay, NANA respectfully requests that the Board further consider and grant NANA's request for expedited review. Having been assured by Petitioners and by EPA at the outset that this proceeding presents no threat to continuing mine operations and the Aqqaluk expansion, two months into this proceeding, NANA now regrettably finds that its "overblown" concerns have been validated. Without regard to the merits, this proceeding, and more specifically, Petitioners' terse and belated motion for a stay, threatens catastrophic economic consequences for NANA's region. *See* Dkts. #8, #8.1.

Respectfully, Petitioners have demonstrated that their word cannot be trusted. This proceeding is a genuine, direct *and certain* threat to the economic and social stability of an entire region. *See* Dkt. #8.1 at ¶¶ 24-29. For the reasons stated in NANA's deferred motion, exigent circumstances exist. *Id.* The Board should grant expedited review, and address as quickly as is practicable: (i) both of Region 10's pending and briefed motions to dismiss; and (ii) the parties' respective briefing as to the remaining claims asserted in the Petition for Review.

DATED this 20th day of April, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *NANA Regional Corporation's Opposition to Petitioners' Motion to Stay the Entire Permit* in the matter of Teck Alaska Incorporated, Red Dog Mine, NPDES Appeal No. 10-04, was served by United States First Class Mail on April 20, 2010 upon the following:

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