

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 RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the February 18, 2010 letter from the Clerk of the Environmental Appeals Board, Region 10 of the U.S. Environmental Protection Agency respectfully submits this response to the petition for review filed on February 16, 2010 by Trustees for Alaska and the Center on Race, Poverty and the Environment on behalf of various petitioners. The petition pertains to NPDES Permit No. AK-003865-2, which Region 10 reissued on January 8, 2010 to Teck Alaska Incorporated for the Red Dog Mine.¹ As set forth below, the petition for review fails to satisfy the minimum requirements of 40 C.F.R. § 124.19(a), which requires the petition to identify findings of fact or conclusions that are clearly erroneous or an exercise of discretion or important policy consideration that the Board should review. The petition for review should therefore be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Red Dog Mine – Facility Background

The NPDES permit at issue authorizes Teck to discharge wastewater from Red Dog Mine into Red Dog Creek. Teck operates the mine pursuant to a contract with NANA Regional Corporation.² The mine is located in a sparsely populated area of northwestern Alaska in the DeLong Mountains, approximately 46 miles inland from the Chukchi Sea.³ The nearest villages are Kivalina (approximately 50 miles to the southwest, population approximately 406), Noatak (approximately 30 miles to the south, population approximately 512), and Kotzebue

¹ See Final NPDES Permit No. AK-003865-2, issued January 8, 2010 (“2010 NPDES Permit”), Ex. 1.

² Final Supplemental Environmental Impact Statement (“SEIS”) Chapter 1, Ex. 2, at 1-1. NANA Regional Corporation owns the underlying land and mineral rights. NANA, which originally stood for Northwest Arctic Native Association, is a regional corporation owned by native Inupiat people of the Northwest Arctic Borough in Northwestern Alaska, where the mine is located. NANA was established under the Alaska Native Claims Settlement Act. See *Nana Regional Corporation’s Combined Motion for Leave to Intervene and Motion for Expedited Review* at 1-4 (NPDES Appeal No. 10-04, dated February 23, 2010).

³ SEIS Chapter 1, Ex. 2, at 1-1.

(approximately 80 miles to the south, population approximately 3,126).⁴ The vast majority of the local population consists of native Inupiaq people.

Red Dog is an open pit mine that extracts lead and zinc from a surface ore body. The mine facility also includes a mill that processes the ore into concentrate.⁵ To store wastewater and tailings (the finely ground waste rock separated during processing), Teck created a tailings impoundment by constructing a dam near the mouth of the South Fork Red Dog Creek.⁶ The mine's wastewater becomes highly contaminated with metals through contact with the areas disturbed by mining, through use in the milling process, and through contact with the tailings in the impoundment. Prior to discharge, this wastewater is treated to remove metals (primarily zinc, lead, iron and cadmium) using lime precipitation and sodium sulfide precipitation.⁷ This process introduces into the wastewater calcium and sulfate ions, which are constituents of total dissolved solids ("TDS").⁸

B. Receiving Waters Background

The mine is located within the headwaters of the Red Dog Creek system, which includes the South Fork, Middle Fork, North Fork, and Main Stem of Red Dog Creek.⁹ The tailings impoundment is located in the South Fork of Red Dog Creek.¹⁰ The Middle Fork historically flowed directly across the surface deposit that is being mined, and as a result had very high metals concentrations in its natural condition.¹¹ The mine discharges its treated wastewater to

⁴ Alaska Department of Commerce, Community and Economic Development, Community Database, <http://www.commerce.state.ak.us>.

⁵ 2008 Fact Sheet, Ex. 3, at 5-6.

⁶ SEIS Chapter 2, Ex. 4, at 2-20.

⁷ 2008 Fact Sheet, Ex. 3, at 8; SEIS Chapter 2, Ex. 4, at 2-21.

⁸ 2008 Fact Sheet, Ex. 3, at 35; SEIS Chapter 3, Ex. 5, at 3-59.

⁹ 2008 Fact Sheet, Ex. 3, at 5, 20; SEIS Chapter 1, Ex. 2, at 1-1.

¹⁰ SEIS Chapter 2, Ex. 4, at 2-21.

¹¹ 2008 Fact Sheet, Ex. 3, at 32; SEIS Chapter 3, Ex. 5, at 3-44.

the Middle Fork Red Dog Creek downstream of the mine pit. Discharge occurs when the surface waters are not frozen, typically mid-May through mid-October.¹² Approximately 1½ miles downstream of the outfall, the Middle Fork and North Fork converge and become the Main Stem. Main Stem Red Dog Creek is a tributary of Ikalukrok Creek, which ultimately enters the Wulik River.¹³ The Wulik River is a sizeable river that flows into the Chukchi Sea near the Native Village of Kivalina.¹⁴

Because of natural ore bodies present in the vicinity of the mine, including the one presently being mined, some water bodies in the vicinity had very high metals concentrations in their natural condition, prior to mining or any other human activity. As a result, not all of the area water bodies supported aquatic life, and the designated uses differ among various stream segments near the Mine.¹⁵ Six species of fish have been observed in the Red Dog and Ikalukrok Creek systems.¹⁶ None has been historically observed in the Middle Fork, due to high natural metals levels resulting from the surface ore deposit through which it flowed.¹⁷ Spawning occurs downstream of the mine's outfall at certain times and locations.¹⁸

As set forth in both the petition for review and Teck's Motion for Expedited Review filed on February 23, 2010, one of the primary NDPES issues at Red Dog Mine since at least 2003 has been effluent limitations for TDS.¹⁹ TDS consists of inorganic salts and small amounts of organic matter dissolved in water. The principal constituents of TDS are carbonates, chlorides,

¹² SEIS Chapter 3, Ex. 5, at 3-48.

¹³ SEIS Chapter 3, Ex. 5, at 3-50.

¹⁴ SEIS Chapter 3, Ex. 5, at 3-50.

¹⁵ 2008 Fact Sheet, Ex. 3, at 7.

¹⁶ SEIS Chapter 3, Ex. 5, at 3-145, Table 3.10-2.

¹⁷ SEIS Chapter 3, Ex. 5, at 3-44.

¹⁸ SEIS Chapter 3, Ex. 5, at 3-144 – 3-148.

¹⁹ As discussed further below, Region 10 has withdrawn the limit for TDS from the 2010 NPDES permit. Information on TDS is provided here for background purposes only.

sulfates, potassium, magnesium, calcium, and sodium.²⁰ Most of these ions are found in natural waters, typically at lower concentrations in fresh water and higher concentrations in marine waters, in comparison to the concentrations in Mainstem Red Dog Creek below the mine's outfall.

As discussed above, the process of removing metals contamination from the mine's wastewater involves the addition of calcium and sulfate ions, which are two of the constituents of TDS.²¹ The concentrations and quantities of TDS discharged by the mine do not cause TDS levels that exceed human health criteria in any of the receiving waters that are used as human drinking water sources.²²

C. Procedural History

Red Dog Mine commenced operations in 1988. In compliance with the National Environmental Policy Act and 40 C.F.R. § 122.29, EPA issued an environmental impact statement in 1984, followed by the original NPDES permit in 1985. The permit was administratively extended upon expiration and was reissued in 1998.

The 1998 permit included water quality-based effluent limitations for TDS of 170 mg/l (monthly average) and 196 mg/l (daily maximum).²³ In July 2003, Region 10 issued a permit modification establishing instream TDS limits of 500 and 1,500 mg/l during and after grayling spawning in the Mainstem of Red Dog Creek, respectively. The permit modification also established TDS limits of 1000 mg/l at the edge of the mixing zone in Ikalukrok Creek until the end of the discharge season, and 500 mg/l at Station 160 in Ikalukrok Creek starting on July 25

²⁰ 2008 Fact Sheet, Ex. 3, at 46.

²¹ 2008 Fact Sheet, Ex. 3, at 35; SEIS Chapter 3, Ex. 5, at 3-59.

²² SEIS Chapter 3, Ex. 5, at 3-60; Response to Comments on 2010 NPDES Permit, Ex. 6, at 60-61.

²³ 1998 NPDES Permit, Ex. 7, at 4, Table I.A.1.

through the end of the discharge season.²⁴

After an appeal challenging this permit modification, the Board denied review on a number of issues and remanded the instream TDS limit of 500 mg/l applicable in the Mainstem of Red Dog Creek during arctic grayling spawning.²⁵ Following that remand, the Alaska Department of Environmental Conservation proposed and EPA subsequently approved a site-specific water quality criterion (“SSC”) for TDS that establishes a 1,500 mg/l instream TDS limit for the Main Stem Red Dog Creek throughout the discharge season.²⁶ Region 10’s approval of this water quality standards change was based on new and existing information relating to the impacts of TDS on fertilization for fish species present.²⁷ No petitioner nor any other party challenged EPA’s approval of this site-specific water quality criterion.

Region 10 reissued the NPDES permit for the mine in March 2007.²⁸ After the Center on Race, Poverty and the Environment filed a petition for review that raised NEPA compliance and other issues, Region 10 withdrew the 2007 permit.²⁹

Region 10 completed a Supplemental Environmental Impact Statement in October 2009 that supports the permit and evaluates Teck’s plan to develop the adjacent Aqqaluk ore deposit.³⁰ Region 10 issued both its Record of Decision and the new permit on January 8, 2010.³¹ The petition for review was filed on February 16, 2010. By letter dated February 18, 2010, the Board notified Region 10 that the petition had been filed and set a response date of April 5, 2010.³²

²⁴ 2003 Permit Modification, Ex. 8, at 10.

²⁵ *In re Teck Cominco Alaska Inc., Red Dog Mine*, 11 E.A.D. 457, 494 (EAB 2004).

²⁶ TDS SSC Approval, Ex. 9, at 1-2.

²⁷ TDS SSC Approval, Ex. 9, Technical Justification attachment.

²⁸ 2007 NPDES Permit, Ex. 10, at 8.

²⁹ 2007 NPDES Permit Withdrawal, Ex. 11.

³⁰ SEIS Front Matter, Cover Letter, Ex. 12.

³¹ 2010 Record of Decision, Ex. 13.

³² In addition, on March 2, 2010, the Board granted Teck’s and NANA’s requests to respond to the petition for

Following receipt of the Board's letter, Region 10 notified the Board and the parties on February 26, 2010 that five effluent limitations in the January 2010 permit – lead (monthly average), selenium (daily maximum), zinc, weak acid dissociable cyanide and TDS – were stayed pending final agency action pursuant to 40 C.F.R. §§ 124.16(a)(2) and 124.60(b). The remaining January 2010 permit conditions were determined to be uncontested and severable from the contested conditions and became fully effective and enforceable on March 31, 2010, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d).

On March 17, 2010, Region 10 notified the Board and the parties that it had withdrawn the above five effluent limitations, pursuant to 40 C.F.R. § 124.19(d), and on March 18, 2010 the Region filed a motion to dismiss Sections II.C.1. and II.C.2. of the petition for review as moot. On April 1, 2010, the Region filed a similar motion to motion to dismiss Section II.C.4. The Board has not yet acted on these motions. In addition, both motions requested that if the Board does not dismiss these sections, the Region be granted 15 days from the date of denial to file a response. Accordingly, Region 10 files this timely response to Argument II.C.3 of the petition for review.³³

III. SCOPE AND STANDARD OF REVIEW

There is no appeal as of right from a Region's permitting decision.³⁴ In any appeal, the petitioner bears the burden of demonstrating that review of the Region's decision is warranted.³⁵

review, setting a response date of April 5, 2010, but declined to rule on the motions for expedited review.

³³ Section I of the petition for review includes numerous factual representations related to the five effluent limitations that have been withdrawn. As noted above, Region 10 has moved for dismissal of the arguments related directly to those limits and the Board has not yet issued a ruling on those motions. Region 10 therefore submits no response at this time and takes no position on petitioners' factual representations. If the Board denies the motions to dismiss, the Region will respond accordingly.

³⁴ *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB 1992).

³⁵ See 40 C.F.R. § 124.19(a); see also *In re Hecla Mining Co. Grouse Creek Unit*, Order Denying Review, 13 E.A.D. ___, NPDES Appeal No. 02-02, slip op. at 13 (EAB, July 11, 2002); *In re City of Moscow, Idaho*, 10 E.A.D.

For the EAB to grant review of an NPDES permit, the petition must demonstrate that the condition in question is based on “a finding of fact or conclusion of law which is clearly erroneous,” or “an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review.”³⁶ As stated in the preamble to 40 C.F.R. § 124.19 and consistently by the Board, this power of review should be exercised sparingly and most permit conditions should be finally determined by the permitting authority.³⁷

The regulation governing EAB review further requires that the petition include “a demonstration that any issues being raised were raised during the public comment period to the extent required by these regulations”³⁸ The NPDES permitting regulations similarly require that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner’s position be raised by the close of the public comment period.³⁹ The intent of this provision “is to ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality.”⁴⁰ Accordingly, the Board has consistently stricken arguments that were not submitted during the public comment period.⁴¹

To satisfy these requirements, issues raised in the public comment period must be raised with a reasonable degree of certainty to ensure that the agency need not guess the meaning of

135, 141 (EAB 2001); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997).

³⁶ 40 C.F.R. § 124.19(a). *See, e.g., Hecla*, slip op. at 13; *City of Moscow*, 10 E.A.D. at 140-41; *In re City of Jacksonville, Dist. II Wastewater Treatment Plant*, 4 E.A.D. 150, 152 (EAB 1992).

³⁷ 45 Fed. Reg. 33,290, 33,412 (1980). *See In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Elec. Co.*, 8 E.A.D. 1, 7 (EAB 1998).

³⁸ 40 C.F.R. § 124.19(a).

³⁹ 40 C.F.R. § 124.13; *see also City of Moscow*, 10 E.A.D. at 141; *In re New England Plating*, 9 E.A.D. 726, 731 (EAB 2001).

⁴⁰ *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *In re Steel Dynamics*, 9 E.A.D. 165, 229-30 (EAB 2000); *In re Encogen*, 8 E.A.D. 244, 249-50 (EAB 1999).

⁴¹ *Teck Cominco*, 11 E.A.D. at 481; *In re Caribe General Electric Products, Inc.*, 8 E.A.D. 626 (EAB 2000).

imprecise comments; the Region is not obligated to speculate about possible concerns not articulated.⁴² Similarly, petitions for review may not simply repeat objections made during the comment period. Instead, they must demonstrate with specificity why the permitting authority's response to those objections is clearly erroneous or otherwise merits review.⁴³

Finally, the Board "assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature."⁴⁴ When presented with technical issues in a petition, the EAB determines whether the record demonstrates that "the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record."⁴⁵ If the EAB determines that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the Board typically defers to the Region's position.⁴⁶

As demonstrated below, petitioners have failed to meet these threshold procedural requirements on several issues. In addition, petitioners have not demonstrated that the Region's decisions were based on clear error of law or fact or raise exercise of discretion or important policy considerations that merit Board review. The Board should therefore deny review of Section II.C.3 of the petition for review.

⁴² *Teck Cominco*, 11 E.A.D at 481 (citing *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2000) and *New England Plating*, 9 E.A.D. at 735).

⁴³ See *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 508-09 (EAB 2002); *In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17 & 01-19 through 0-23, slip op. at 16-17 (EAB, April 25, 2002); *City of Moscow*, 10 E.A.D. at 140; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998).

⁴⁴ *Hecla*, slip op. at 14-15; *City of Moscow*, 10 E.A.D. at 142; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *NE Hub Partners*, 7 E.A.D. 561, 567 (EAB 1998), *review denied sub nom, Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999)).

⁴⁵ *Hecla*, slip. op. at 15.

⁴⁶ *NE Hub Partners*, 7 E.A.D. at 568, *Hecla*, slip. op. at 15; *City of Moscow*, 10 E.A.D. at 142.

IV. ARGUMENT

A. Monitoring Requirements

Petitioners raise three separate arguments related to monitoring and allege that Region 10 abused its discretion and committed clear error by: 1) failing to include monitoring requirements for compounds not governed by effluent limitations; 2) failing to require third-party monitoring; and 3) failing to include certain bioassessment monitoring requirements in the 2010 NPDES permit.⁴⁷ The petition groups these alleged errors together in a manner that obscures the procedural and substantive defects in each claim. A more careful review reveals that petitioners have not met their burden under 40 C.F.R. § 124.19 to demonstrate with specificity why the Region's response on each of these issues was erroneous or otherwise merits review.

As discussed above, petitions for review may not simply repeat objections made during the comment period. Instead, they must demonstrate with specificity why the permitting authority's response to those objections is clearly erroneous or otherwise merits review. Petitioners' claims regarding all three types of monitoring fail on both counts.

As an initial matter, petitioners fail to even demonstrate that they submitted specific comments on each monitoring issue. The petition for review states only that "[p]etitioners commented in opposition to EPA's deletion of effluent monitoring and biological monitoring."⁴⁸ Given the specific nature of the three monitoring issues raised, this generic statement fails to comply with 40 C.F.R. § 124.19(a), which requires that the petition include "a demonstration that any issues being raised were raised during the public comment period."

⁴⁷ Petition for Review at 37.

⁴⁸ Petition for Review at 37.

1. Petitioners' Challenge Regarding Compounds Not Covered by Effluent Limits Does Not Demonstrate With Specificity Why the Region's Response Merits Review

Petitioners argue that EPA abused its discretion by failing to include monitoring requirements for several compounds not subject to effluent limitations. Petitioners fail to address the Region's detailed response to comments on this technical issue and have wholly failed to demonstrate with specificity why the Region's response was clearly erroneous or otherwise merits review. The Center on Race, Poverty and the Environment commented as follows:

Teck Cominco should be required to report detailed chemical analyses for both the untreated water entering the water treatment plant and the treated water being discharged at Outfall 001. These analyses should be reported at least twice during each operating season, and should include, as a minimum, the following constituents: aluminum, antimony, arsenic, barium, cadmium, copper, chromium, cobalt, iron, lead, manganese, mercury, molybdenum, nickel, selenium, silver, thallium, vanadium, zinc; major cations (calcium, magnesium, sodium and potassium), and nonmetals (sulfate, nitrate, ammonia, boron, phosphorus, fluoride, chloride, alkalinity), and natural radioactive constituents (uranium, thorium, potassium-40, gross alpha and beta). These samples should also be analyzed for in an Organic Priority Pollutant Scan, together with oil and grease, WAD cyanide, thiocyanate and cyanate, water temperature, pH and WET Testing.

Several of the constituents listed above are potentially toxic to aquatic and other organisms and they are not monitored as part of either the existing or the proposed NPDES permit. All these constituents should be added to the required monitoring and effluent limitations should be developed and included in the Proposed NPDES Permit.⁴⁹

Petitioners' stated concern in these comments is potential toxicity to aquatic and other organisms. Region 10 directly addressed this concern in its response:

The Final Permit includes all of the effluent and ambient monitoring necessary to determine compliance with permit limits. The basis for the effluent limits and monitoring were described in the Fact Sheet. *In addition, the facility has to meet WET limitations which account for toxic effects of parameters that may have not been limited.* Influent monitoring is not required or necessary because it is irrelevant to determining permit compliance and effects on the receiving waters. Teck may sample the influent to the

⁴⁹ SEIS Appendix H, Ex. 14, at H-46.

treatment plant to ascertain treatment performance but the Final Permit does not require this type of monitoring.⁵⁰

Region 10 further addressed this issue in response to a separate comment by the same commentors that the permit fails to regulate organic compounds, oils and greases, fuels, nitrates or sulfates.⁵¹ There, the Region stated:

Of specific note, the permit includes limits for total ammonia, which addresses potential effects of explosives use. Sulfate is also addressed through the water quality-based effluent limitations for TDS. The organic pollutants of concern in fuels and oil and grease are addressed by the years of monitoring that the Permittee has conducted for volatile and semi-volatile organic pollutants. *This monitoring, which is continued at a reduced frequency in the Final Permit, has shown no organic pollutants at levels that approach the State's WQS. Finally, to address the overall potential toxic effects of the discharge on the receiving water (potentially from parameters that do not have WQS on which to base effluent limits), the permit includes chronic WET testing and limits.*⁵²

These responses directly address petitioners' concerns regarding potential toxicity and the need for monitoring or other regulation of the identified compounds. Petitioners fail to address the Region's detailed responses and technical rationale in any way whatsoever, let alone explain why the responses are clearly erroneous or otherwise merit review. Indeed, nowhere in their argument do petitioners even mention Whole Effluent Toxicity (WET) testing and limits or monitoring results for organic pollutants. Petitioners simply restate their comment that monitoring for the identified compounds should be required.⁵³ This does not satisfy the threshold requirements for Board review found in 40 C.F.R. § 124.19(a) or the Board's clear and consistent rulings on those requirements.⁵⁴

Because the petition fails to demonstrate with specificity why the Region's response

⁵⁰ Response to Comments on 2010 Permit, Ex. 6, at 31 (emphasis added).

⁵¹ SEIS Appendix H, Ex. 14, at H-43.

⁵² Response to Comments on 2010 Permit, Ex. 6, at 48 (emphasis added).

⁵³ Petition for Review at 37.

⁵⁴ See *supra*, at pp 6-7.

merits review— indeed the petition does not even address the Region’s response – the Board should decline to review petitioners’ challenge on this issue.

2. Region 10 Appropriately Determined that Additional Monitoring For Compounds Not Subject to Effluent Limitations Was Unnecessary

If the Board decides to consider petitioners’ challenge regarding monitoring for compounds not subject to effluent limitations, it should uphold the Region’s determination that such monitoring was not necessary in this case. As noted in Section III (Scope and Standard of Review), petitioners bear a heavy burden when seeking review of technical issues. The Board typically defers to the Region on technical issues in cases where the Region duly considered the issues raised in comments and adopted an approach that is rational and supportable in light of the record.⁵⁵ Applying this standard, the Region’s determination regarding the sufficiency of existing permit requirements to address potential toxicity is entitled to deference and should be upheld.

Commenters’ stated concern on this issue was potential toxicity to aquatic and other organisms from compounds not subject to effluent limitations.⁵⁶ As noted above, the Region’s response to comments explained that overall potential for toxicity from compounds not subject to effluent limits is addressed through WET limitations and testing requirements included in the 2010 NPDES permit.⁵⁷ The Fact Sheet supporting the permit further states:

The WET limits proposed in the draft permit for this facility fully account for the ambient toxicity of the receiving system that naturally occurs. These limits have been tailored to allow the mine to discharge effluent that contains toxic concentrations of various compounds, but at limits that will not increase the background toxicity. Although aquatic life is not a designated use at the point of discharge, the state water quality criterion for toxicity applies downstream of the discharge point, and the permit must ensure that the

⁵⁵ *Hecla*, slip. op. at 15; *NE Hub Partners*, 7 E.A.D. at 568; *City of Moscow*, 10 E.A.D. at 142.

⁵⁶ SEIS Appendix H, Ex. 14, at H-46.

⁵⁷ Response to Comments on 2010 Permit, Ex. 6, at 31, 48.

discharge does not cause or contribute to exceedances of that criterion when it does apply downstream.⁵⁸

In addition, the Region concluded that for organic pollutants of concern in fuels, oil and grease, long-term monitoring has shown no such pollutants at levels that approach the State's water quality standards.⁵⁹ Petitioners have not pointed to anything in the record that refutes the Region's technical analyses and conclusions and have failed to demonstrate that the Region's decision not to require the requested monitoring lacks a rational basis.

In sum, petitioners have failed to satisfy their heavy burden to demonstrate that the Region's decision on this technical issue lacks a rational basis or is clearly erroneous. Because the Region has articulated a rational basis for not requiring the requested additional monitoring, that decision is entitled deference. Accordingly, if the Board determines that review of this issue is warranted, the Region's decision should be upheld.

3. Petitioners' Challenge Regarding Third-Party Monitoring Does Not Demonstrate With Specificity Why the Region's Response Merits Review

Petitioners also argue that Region 10 abused its discretion by not requiring that Teck retain an independent third party to conduct monitoring.⁶⁰ Petitioners have failed to demonstrate with specificity why the Region's response was clearly erroneous or otherwise merits review.

The Center on Race, Poverty and the Environment commented as follows:

The Final Permit should require that additional water quality monitoring, stream sediment sampling, flow measurement and toxicity testing be conducted by some competent, independent party, such as the U.S. Geological Survey, at the 001 Outfall and other strategic locations. This party should be both financially and politically independent of both Teck and the regulatory agencies. This independent monitoring should also include collection of field measurements of pH, water temperature and specific conductance throughout the margins of the Red Dog facilities and along both banks of the local

⁵⁸ 2008 Fact Sheet, Ex. 3, at Appendix C, p. 48.

⁵⁹ Response to Comments on 2010 Permit, Ex. 6, at 48.

⁶⁰ Petition for Review at 38.

tributaries to define the possibilities of non-point source seepages from the site. Comparable surveys should be conducted during the winter months to evaluate the existence / degree of non-point seepage that might be occurring during the months when the treatment plant is not operating. Such surveys could easily employ the use of various remote sensing techniques.⁶¹

Region 10 responded directly to this comment as follows:

CWA Section 308(a)(4)(A) requires that permits contain self-monitoring requirements: “the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including, where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require.”

EPA supplements monitoring data through inspections and has no authority to require other federal agencies or other independent party to conduct required permit monitoring.

Note that the Permittee must certify the validity of its sampling results with each DMR submitted to EPA, and EPA and the State conduct periodic NPDES compliance inspections at the site.⁶²

The Region’s response thus relies on the Clean Water Act’s self-monitoring provisions, certification requirements and periodic EPA and State inspections to conclude that self-monitoring is appropriate in this case.⁶³ Not satisfied with these Congressionally authorized provisions, petitioners point to Teck’s compliance history to argue that Teck “cannot be relied upon to self-monitor and report its own compliance.”⁶⁴

Petitioners fail to note, however, that the hundreds of violations referenced were revealed *through Teck’s own discharge monitoring reports*. In particular, the petition for review describes the citizen suit filed by Kivalina residents and describes hundreds of permit violations

⁶¹ SEIS Appendix H, Ex. 14, at H-46.

⁶² Response to Comments on 2010 NPDES Permit, Ex. 6, at 32.

⁶³ Section 308 of the Clean Water Act also authorizes EPA to conduct inspections. 33 U.S.C. § 1318(a)(4)(B).

⁶⁴ Petition for Review at 39.

found by the court against Teck.⁶⁵ What petitioners do not explain is that the violations alleged in that lawsuit were based on entirely Teck's own discharge monitoring reports. Indeed, in describing plaintiffs' allegations against Teck in the citizen suit, the court noted:

Plaintiffs move for partial summary judgment establishing defendant's liability for violations of the TDS daily maximum and monthly average limits, and monitoring and reporting requirements. *The alleged violations are based solely on self-monitoring reports that Teck has submitted to the EPA.*⁶⁶

And in commenting on the draft NPDES permit, the Center on Race, Poverty and the Environment itself noted that:

Over the period 1998 through at least 2007 (we have not yet analyzed 2008 data), Teck Cominco committed thousands of permit violations of its NPDES mine permit. *These permit violations are documented in Teck Cominco's DMRs from the period*, which are filed monthly with EPA and are incorporated here by reference.⁶⁷

The same comment letter later references "the thousands of violations *documented in Teck Cominco's own DMRs* filed under penalty of law with EPA."⁶⁸ The concern that Teck cannot be relied upon to self-monitor appears unfounded in light of petitioners' own statements and the nature of the evidence presented in the Kivalina residents' citizen suit. Petitioners have offered no compelling argument that the Region's response was erroneous.

Because the petition fails to demonstrate with specificity why the Region's response merits review, the Board should decline to review petitioners' challenge calling for third-party monitoring.

⁶⁵ Petition for Review at 6-7.

⁶⁶ See *Adams v. Teck Cominco Alaska, Inc.*, No. 3:04-cv-00049-JWS, Order and Opinion at 10 (D. Alaska, July 28, 2006), attached as Exhibit 8 to Petition for Review (emphasis added).

⁶⁷ SEIS Appendix H, Ex. 14, at H-36 (emphasis added).

⁶⁸ SEIS Appendix H, Ex. 14, at H-36 (emphasis added).

4. Region 10 Appropriately Relied on the Clean Water Act's Provisions Authorizing Self-Monitoring

If the Board decides to consider petitioners' challenge regarding third-party monitoring, it should uphold the Region's reliance on the Clean Water Act's provisions for self-monitoring and reporting. As both the Board and federal courts have recognized, the Clean Water Act relies on self-monitoring and reporting as a means of ensuring compliance with NPDES permits.⁶⁹ Thus, the Board has noted that the NPDES regulations reflect "Congress' interest in establishing a CWA regulatory regime that relies heavily on accurate self-monitoring and reporting of pollutant discharges."⁷⁰ The Ninth Circuit has similarly noted that the NPDES program "fundamentally relies on self-monitoring" and that accurate self-reporting is "critical to effective operation of the Clean Water Act."⁷¹

To ensure accurate self-monitoring and reporting, section 309 of the Clean Water Act authorizes administrative, civil, and criminal penalties for violations of requirements imposed under the information gathering authorities in section 308.⁷² NPDES regulations incorporate these authorities by reference along with the Clean Water Act's criminal penalties for knowing falsification of reports or false statements.⁷³ Accordingly, the NPDES certification statements set forth in the regulations and included on discharge monitoring reports include the signatory's acknowledgment that there are "significant penalties" for submitting false monitoring information, including the possibility of fines and imprisonment.⁷⁴ The Board and federal courts do not treat the duty to self-monitor and report under the NPDES program lightly and consider

⁶⁹ *In re City Of Salisbury*, 10 E.A.D. 263, 267, 284 (EAB 2002).

⁷⁰ *Id.* at 267.

⁷¹ *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1492 (9th Cir. 1987), *vacated on other grounds*, 108 S. Ct. 1102 (1988), *judgment reinstated*, 853 F.2d 667 (9th Cir. 1988).

⁷² 33 U.S.C. §§ 1318(a), 1319(a), (c), (g).

⁷³ 40 C.F.R. §§ 122.41(j) and (k).

⁷⁴ 40 C.F.R. § 122.22(d).

this duty central to NPDES compliance.⁷⁵ Petitioners have offered no argument that supports departing from this Congressionally authorized design for ensuring permit compliance.

Petitioners' rely on Teck's history of permit violations to argue that EPA abused its discretion by not requiring third-party monitoring.⁷⁶ As described above, however, the primary evidence of these violations was Teck's own monitoring reports. Petitioners thus rely on violations established through self-monitoring to argue that these same violations prove self-monitoring is inappropriate. This argument defies logic and should be rejected.

In sum, petitioners have failed to demonstrate that Region 10's decision to continue the Congressionally authorized system of self-monitoring in the reissued permit, without requiring third-party monitoring, is clearly erroneous. If the Board determines that review of this issue is warranted, the Region's decision should be upheld.

5. Petitioners' Challenge Relating to Bioassessment Monitoring Requirements Does Not Demonstrate With Specificity Why the Region's Response Merits Review

Petitioners also argue that Region 10 abused its discretion by not including certain bioassessment monitoring requirements in the 2010 NPDES permit. Petitioners have failed to demonstrate with specificity why the Region's response was clearly erroneous or otherwise merits review. Specifically, the Center on Race, Poverty and the Environment commented on the removal of bioassessment monitoring requirements for the Middle Fork Red Dog Creek,

⁷⁵ *City of Salisbury* 10 E.A.D. at 268 (nothing that monitoring duties are "not to be treated lightly but rather are central to CWA compliance efforts"). See also *United States v. Holden*, 557 F.3d 698 (6th Cir. 2009) (affirming conviction of father and son for falsifying discharge monitoring reports; "reporting requirements are a primary means of enforcing the Clean Water Act"); *United States v. Hopkins*, 53 F.3d 533 (2nd Cir. 1995) (affirming conviction for knowingly falsifying monitoring reports); *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338 (E.D. Va. 1997), *aff'd in part, rev'd in part*, 191 F.3d 516 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000) (court does not assume that violations of NPDES monitoring and reporting requirements are trivial; "such violations undermine the Act and are considered serious by this court, despite the fact that they are not discharge violations").

⁷⁶ Petition for Review at 38-39.

Ikalukrok Creek, the Wulik River, Anxiety Ridge, Evaingiknuk Creek and Buddy Creek.⁷⁷

Petitioners requested that bioassessment monitoring requirements for these locations be retained in the 2010 NPDES permit, thereby ensuring that they will be enforceable under the Clean Water Act.⁷⁸

Region 10's responses explained that these bioassessment monitoring requirements were initially required by the State of Alaska in the 1998 Section 401 Certification, but are not required by the current Section 401 Certification.⁷⁹ Thus, the Region concluded that it was "appropriate to follow the State's recommendations since the State initially included bioassessment requirements in the CWA § 401 Certification of the 1998 Permit and has had the primary responsibility for reviewing the bioassessment data collected to date."⁸⁰ The Region further pointed out that several bioassessment monitoring requirements were indeed retained in the 2010 NPDES permit and remain enforceable under the Clean Water Act.⁸¹ These requirements "are intended to assure that the conditions of the Final Permit are protective of aquatic life in the receiving water."⁸²

Petitioners have wholly failed to explain why the Region's responses on bioassessment monitoring are clearly erroneous or otherwise merit review. Indeed, petitioners fail to address the Region's specific responses in any way whatsoever. The petition merely restates the comment that the monitoring provisions are made unenforceable under the Clean Water Act, without any further argument or analysis.⁸³ This does not satisfy the threshold requirements for

⁷⁷ SEIS Appendix H, Ex. 14, at H-38.

⁷⁸ SEIS Appendix H, Ex. 14, at H-38, H-44.

⁷⁹ Response to Comments on 2010 NPDES Permit, Ex. 6, at 16.

⁸⁰ Response to Comments on 2010 NPDES Permit, Ex. 6, at 19.

⁸¹ Response to Comments on 2010 NPDES Permit, Ex. 6, at 16, 19.

⁸² Response to Comments on 2010 NPDES Permit, Ex. 6, at 19.

⁸³ Petition for Review at 37.

Board review found in 40 C.F.R. § 124.19(a) or the Board's clear and consistent rulings on those requirements.⁸⁴

Because the petition fails to demonstrate with specificity why the Region's response merits review, the Board should decline to review petitioners' challenge related to bioassessment monitoring.

6. Region 10's Decision to Impose Bioassessment Monitoring Requirements for the Three Identified Monitoring Locations Should be Upheld

If the Board decides to consider petitioners' challenge relating to bioassessment monitoring requirements, it should uphold the Region's decision to impose bioassessment monitoring at the three locations identified in the 2010 NPDES Permit. The bioassessment monitoring provisions that were retained in the 2010 NPDES permit remain enforceable under the Clean Water Act and will provide sufficient information to ensure that the permit is protective of aquatic life. Petitioners' concerns regarding unenforceability are therefore unfounded.

As described in the Region's response to comments cited above, the 1998 NPDES permit included a series of bioassessment monitoring provisions in response to the State's specific requirements in the 1998 Section 401 Certification. There, the State required monitoring at a number of locations for one or more of the following: periphyton (as chlorophyll-a concentrations); aquatic invertebrates – taxonomic richness and abundance; fish presence and use; fall aerial surveys for returning chum salmon and overwintering Dolly Varden; and metals concentrations in Dolly Varden.⁸⁵

The State further required that Teck submit a monitoring plan to the Alaska Department

⁸⁴ See *supra* at pp. 6-8.

⁸⁵ 1998 401 Certification, Ex. 15, at 2; 1998 NPDES Permit, Ex. 7, at 14-16.

of Environmental Conservation and Alaska Department of Fish and Game for approval prior to implementation. Notably, under the terms of the 1998 Section 401 Certification and the 1998 NPDES Permit, Region 10 did not have a role in reviewing or approving that plan.⁸⁶ Similarly, as noted in the Region's response to comments, the State has had the primary responsibility for reviewing the bioassessment data collected since 1998.⁸⁷

Recently, the State included these same bioassessment monitoring requirements in Waste Management Permit No. 0132-BA002, issued to Red Dog Mine on December 2, 2009.⁸⁸ As a result, the State noted in its Section 401 Certification for the 2010 permit that:

Bioassessment Program Requirements could be removed from the NPDES Permit. The bioassessment program for Red Dog Creek is part of a larger monitoring program that requires aquatic and biomonitoring in Red Dog and Bons Creek drainages. To keep that larger program consistent and intact, it is being incorporated into the Department's Waste Management Permit, and duplication here could lead to future inconsistencies.⁸⁹

Importantly, the State also noted that a certain subset of these bioassessment monitoring requirements – specifically for periphyton, aquatic invertebrates, and fish presence and use in the North Fork Red Dog Creek, Main Stem Red Dog Creek, and Ikalukrok Creek – could be retained in the 2010 NPDES permit. These requirements were indeed retained in the 2010 NPDES permit and, as noted by the Region in response to comments, remain enforceable under the Clean Water Act.⁹⁰ As in 1998, the 2010 NPDES Permit does not provide Region 10 with a role in reviewing

⁸⁶ 1998 401 Certification, Ex. 15, at 2; 1998 NPDES Permit, Ex. 7, at 15.

⁸⁷ Response to Comments on 2010 NPDES Permit, Ex. 6, at 19.

⁸⁸ State Waste Management Permit, Ex. 16, at 12, Section 1.6.1.1 (incorporating by reference bioassessment monitoring program in Teck's Monitoring Plan); Teck Monitoring Plan, Ex. 17, at Table 1-1. It is not clear that petitioners have reviewed that permit, as the petition states "apparently ADEC will include these requirements in a state solid waste permit." Petition for Review at 5. By the time the petition was filed, the State had already issued the waste management permit including these bioassessment monitoring provisions. Later, petitioners appear to concede that "the biological monitoring is not actually being reduced." Petition for Review at 38.

⁸⁹ 2009 401 Certification, Ex. 18, at 9.

⁹⁰ Response to Comments on 2010 NPDES Permit, Ex. 6, at 19; 2010 NPDES Permit, Ex. 1, at 12-13.

or approving Teck's updated biomonitoring plan.⁹¹

Retention of these particular requirements allowed the Region to conclude that the bioassessment monitoring provisions in the 2010 NPDES permit "are intended to assure that the conditions of the Final Permit are protective of aquatic life in the receiving water."⁹² Indeed, the three sampling locations retained – the North Fork and Main Stem of Red Dog Creek and Ikalukrok Creek – are those located closest to the NPDES discharge that will provide data reflecting changes in the aquatic environment most directly linked to the mine's effluent. In particular, the Main Stem Red Dog Creek and Ikalukrok Creek are the most immediate downstream locations where aquatic life has generally existed and where the designated uses protected by Alaska water quality standards include growth and propagation of fish, shellfish, other aquatic life, and wildlife.⁹³ The North Fork station, which is located upstream of the ore body and is relatively uncontaminated, provides baseline information.⁹⁴ Together, these three stations will provide Region 10 with the most direct information regarding the mine effluent's impact on aquatic life.⁹⁵

At the same time, the 2010 NPDES permit is consistent with the current Section 401 Certification, which in turn recommended this approach to avoid potential inconsistencies and duplicative effort, given the requirements in the State's waste management permit.⁹⁶ Following this approach is appropriate where, as noted in the response to comments, the bioassessment monitoring requirements were initially imposed by the State and the State has taken primary

⁹¹ 2010 NPDES Permit, Ex. 1, at 12.

⁹² Response to Comments on 2010 NPDES Permit, Ex. 6, at 19.

⁹³ 2008 Fact Sheet, Ex. 3, at 7; Teck Monitoring Plan, Ex. 17, at Figure 3.

⁹⁴ SEIS Chapter 3, Ex. 5, at 3-44.

⁹⁵ The Middle Fork station, although closest to the NPDES discharge, is located in an area that had very high metals concentrations in its natural condition, did not historically support aquatic life, and is not protected by a designated use for aquatic life. 2008 Fact Sheet, Ex. 3, at 7, 32; SEIS Chapter 3, Ex. 5, at 3-44.

⁹⁶ 2009 401 Certification, Ex. 18, at 9.

responsibility for implementation and review of results.

Accordingly, the Region appropriately determined that the three monitoring locations retained in the 2010 NPDES permit provide sufficient information to ensure that the permit is protective of aquatic life in the receiving water. Petitioners have failed to demonstrate, as required by 40 C.F.R. § 124.19(a), that the Region's decision to include bioassessment monitoring requirements for these three identified locations was clearly erroneous or an abuse of discretion. If the Board determines that review of this issue is warranted, the Region's decision should be upheld.

7. Petitioners Have Failed to Demonstrate Abuse of Discretion With Regard to Monitoring Requirements

Petitioners have failed overall to demonstrate that Region 10 abused its discretion in declining to include the three categories of requested monitoring in the 2010 NPDES permit. Instead, petitioners simply reference EPA's broad authorities under the Clean Water Act. For example, for bioassessment monitoring, petitioners refer to EPA's "authority to ensure that the mine complies with water quality standards established under Section 303."⁹⁷ On third-party monitoring, petitioners refer to EPA's broad discretion in Section 308(a) of the Clean Water Act to require a permittee to retain and pay for an independent third party to conduct monitoring.⁹⁸ Petitioners similarly argue that Section 308(a) of the Clean Water Act "confers broad authority on EPA to require monitoring beyond the permit's effluent limitations."⁹⁹ These empty references are unavailing.

Region 10 acknowledges the broad nature of EPA's Clean Water Act authorities. The

⁹⁷ Petition for Review at 38.

⁹⁸ Petition for Review at 38.

⁹⁹ Petition for Review at 37, citing 33 U.S.C. § 1318(a)(4)(A).

existence of such broad general authorities, however, does not equate to an obligation to impose the precise monitoring requirements requested by petitioners. For the reasons discussed above, the Region appropriately determined that the requested monitoring was not necessary. Petitioners' broad statements regarding the existence of Clean Water Act authorities do not change that result.

III. CONCLUSION

Section II.C.3 of the petition for review fails to satisfy the minimum requirements of 40 C.F.R. § 124.19(a), which requires the petition to identify findings of fact or conclusion of law that are clearly erroneous or an exercise of discretion or important policy consideration that the Board should review. Petitioners have not met their burden of demonstrating with specificity why the Region's responses on the three separate monitoring issues were erroneous. In any event, the Region's determination on each of these issues should be upheld. Accordingly, Region 10 requests that the Board issue a final decision denying review of Section II.C.3 of the petition for review and upholding the Region's decisions on the issues raised therein.

Dated this 5th day of April, 2010.

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing “Response to Petition for Review,” together with the referenced exhibits and “Certified Index of the Administrative Record – NPDES Permit No. AK-003865-2” were this day sent to the following persons in the manner specified:

By Electronic Filing and Federal Express (for Relevant Excerpts to the Administrative Record only) to:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

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DATED this 5th day of April 2010.

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