

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 NANA CORPORATION'S  
NOTICE REGARDING THE TIMING OF THE BOARD'S DECISION**

**I. INTRODUCTION**

Region 10 of the United States Environmental Protection Agency files this response to NANA Corporation's Notice Regarding the Timing of the Board's Decision, filed with the Board on September 9, 2010. Although styled as a "notice", NANA's filing specifically requests that the Board rule on the outstanding issues in this appeal by October 31, 2010, and should therefore be treated as a motion. As an initial matter, Region 10 notes that NANA's filing fails to comply with the Board's practice manual governing motions in that it: 1) fails to provide documentation on which the argument relies, namely the referenced Memorandum of Agreement with the State of Alaska (MOA); and 2) fails to state whether the opposing party concurs or opposes the request.<sup>1</sup> NANA's attempt to style its request for relief as a "notice" should be rejected.

In support of its motion, NANA asserts that "the jurisdictional status of the Red Dog Mine NPDES permit will be fragmented" if this appeal is still pending on October 31, 2010.<sup>2</sup> To

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<sup>1</sup> See Environmental Appeals Board Practice Manual at 38.

<sup>2</sup> NANA Corporation's Notice Regarding the Timing of the Board's Decision at 1, NPDES Appeal No. 10-4, Docket No. 44, Sept. 9, 2010. NANA's motion is filed "on behalf of itself and Teck Alaska Incorporated." *Id.*

the contrary, as discussed below, the referenced MOA includes a provision that specifically addresses pending appeals to avoid the very fragmentation NANA fears. Although Region 10 does not object to a Board ruling by October 31, this response provides pertinent information for the Board's consideration and corrects the record regarding the transfer of NPDES permitting authority to the State of Alaska.

## II. BACKGROUND

On October 31, 2008, EPA Region 10 approved the application by the State of Alaska to administer and enforce an Alaska version of the NPDES program pursuant to Section 402 of the Clean Water Act.<sup>3</sup> The State administers the approved program through the Alaska Department of Environmental Conservation (ADEC). The EPA-approved implementation plan transfers administration of specific NPDES program components from EPA to the State over a three-year period from the date of program approval, subject to continuing EPA oversight and enforcement authority. Under the agreed-upon transfer schedule, ADEC will be authorized to administer the NPDES program for the mining sector on October 31, 2010.<sup>4</sup>

Importantly, the MOA between Region 10 and ADEC includes the following provision:

Upon program approval and in accordance with the transfer schedule in Appendix B, EPA shall....

Retain *full jurisdiction* for permits for which an appeal has been filed at the time of program authorization *until that matter is resolved*. Upon resolution of the administrative or judicial challenge and in accordance with the transfer schedule in Appendix B, EPA will notify the DEPARTMENT and the permittee that jurisdiction over the permit has been transferred to the DEPARTMENT....<sup>5</sup>

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<sup>3</sup> 33 U.S.C. § 1342.

<sup>4</sup> 73 Fed. Reg. 66243, 66244 (Nov. 7, 2008).

<sup>5</sup> Section 3.03-2(b), National Pollutant Discharge Elimination System, Memorandum of Agreement Between State of Alaska and United States Environmental Protection Agency Region 10 at 10 (Oct. 31, 2008), relevant pages attached as Exhibit 1 (emphasis added).

Because the current appeal was filed in February 2010 and ADEC's authorization to administer the NPDES program for the mining sector begins October 31, 2010, this provision applies to the Red Dog Mine permit. The MOA also includes specific provisions addressing the transfer of permits on which EPA has already started work.<sup>6</sup>

### III. ARGUMENT

A careful review of NANA's "notice" reveals that it is in fact a motion for expedited review. In particular, NANA states the following:

Under the present circumstances, and subject to competing claims on the Board's resources, issuance of a decision on or before October 31, 2010 would enable the parties and the Board to avoid a set of challenging jurisdictional issues affecting EPA's authority to complete work on the 2010 Red Dog NPDES permit, and the Board's jurisdiction to entertain appeals related to that permit.<sup>7</sup>

As noted above, Region 10 does not object to the Board issuing a ruling by October 31, 2010. Nevertheless, NANA appears to be seeking expedited review in circumstances where there is no urgency and no "challenging jurisdictional issues" exist. Region 10 notes that on February 23, 2010, NANA also filed a motion for expedited review, warning of irreparable harm and a "grave risk of economic devastation" if the appeal was not expedited.<sup>8</sup> The Board declined to rule on NANA's motion,<sup>9</sup> the appeal was not expedited, and no irreparable harm or economic devastation ensued.

NANA again seeks to convince the Board of looming, dire circumstances: "Unless the Board issues a decision by October 31, 2010, agency jurisdiction will be added as another twist to the Gordian Knot of complexities and disputes that cloud issuance of a final and fully

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<sup>6</sup> *Id.* at section 3.03-3.

<sup>7</sup> NANA Notice at 4.

<sup>8</sup> NANA Regional Corporation's Combined Motion for Leave to Intervene and Motion for Expedited Review at 1, 13, 15, NPDES Appeal No. 10-4, Docket No. 8, Feb. 23, 2010.

<sup>9</sup> Order Granting Leave to Respond to Petition at n.1, NPDES Appeal No. 10-4, Docket No. 12, March 2, 2010.

functional NPDES permit for the Red Dog Mine.”<sup>10</sup> NANA’s dramatic warning fails to advise the Board of controlling language in the MOA that addresses this very circumstance.

As noted above, the MOA provides that Region 10 will retain full permitting jurisdiction for cases in which an appeal is pending on October 31, 2010 - the date ADEC is authorized to administer the NDPEs program for the mining sector - until administrative or judicial appeals are resolved. This unambiguous language is intended to ensure that Region 10 retains jurisdiction over all permitting matters throughout the pendency of an appeal – in other words, to *prevent fragmentation*. Under Section 3.03-2(b), Region 10 will retain full jurisdiction over the Red Dog Mine permit until the current appeal is resolved.

Moreover, Region 10 takes the position that such resolution will not occur until EPA completes any required remand activity on the monitoring provisions currently before the Board and any subsequent administrative and judicial appeals of these provisions are completed or the appeal periods have run without appeal. This ensures that Region 10 remains responsible for the current appeal through its procedural end, thereby avoiding any question regarding the Board’s or appellate court’s jurisdiction. For purposes of administrative efficiency and jurisdictional clarity, no other result makes sense.

NANA’s motion suggests a fundamental misunderstanding of this result and the current posture. As of the date of this filing, just 39 days remain until October 31. When the 120-day period for a circuit court appeal is considered, the *earliest* date this matter could be “resolved” for MOA purposes is January 22, 2011 or thereabouts.<sup>11</sup> This conservative estimate assumes a Board ruling by tomorrow – September 24, 2010 – with no remand or judicial appeal. Thus,

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<sup>10</sup> NANA Notice at 3.

<sup>11</sup> See 33 U.S.C. § 1369(b)(1).

even an immediate Board ruling will not result in a transfer of Red Dog Mine permitting authority to ADEC on October 31, 2010.

NANA's complaint about fragmentation is similarly unavailing. NANA complains in particular that: 1) portions of the permit have been implemented; 2) portions of the permit are "subject to ongoing agency review and process that should transfer to ADEC"; and 3) portions of the permit remain under federal jurisdiction awaiting this Board's decision.<sup>12</sup> Taken together, NANA's first and third points are the direct, unremarkable result of the operation of 40 C.F.R. § 124.16, which allows uncontested and severable portions of the permit to take effect during an EAB appeal. NANA's novel complaint that this somehow contributes to "fragmentation" is a curiosity. Indeed, operation of 40 C.F.R. § 124.16 is precisely what allowed the Board to determine that the entire Red Dog permit was not stayed by the petition for review – a result that NANA sought and supported vigorously.<sup>13</sup>

That leaves only NANA's second complaint that portions of the permit are "subject to ongoing agency review and process that *should* transfer to ADEC." This appears to be a reference to Region 10's action to reissue 5 withdrawn permit limits, which is currently underway.<sup>14</sup> As noted above, under section 3.03-2(b) of the MOA, Region 10 retains full permitting jurisdiction over the Red Dog Mine permit until the current appeal is resolved. Region 10 is therefore continuing to work on the reissuance. Thus, at present there is no permitting process that "should" transfer to ADEC. If the current appeal on monitoring

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<sup>12</sup> NANA Notice at 3 (emphasis added).

<sup>13</sup> See Order Dismissing Petition for Review in Part and Denying Cross-Motion to Stay the Entire Permit at 11-12, NPDES Appeal No. 10-4, Docket No. 41, April 30, 2010; NANA Regional Corporation's Opposition to Petitioners' Motion to Stay the Entire NPDES Permit, NPDES Appeal No. 10-4, Docket No. 37, April 20, 2010.

<sup>14</sup> On March 17, 2010, Region 10 withdrew 5 effluent limitations from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d). See Notification of Withdrawal of Permit Conditions, NPDES Appeal No. 10-4, Docket No. 19, March 17, 2010.



## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Region 10's RESPONSE TO NANA CORPORATION'S NOTICE REGARDING THE TIMING OF THE BOARD'S DECISION 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 23<sup>rd</sup> day of September 2010.

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/S/  
Kimberly A. Owens  
EPA Region 10