

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 MOTION TO DISMISS SECTION II.C.4
OF PETITION FOR REVIEW**

I. INTRODUCTION

Region 10 of the United States Environmental Protection Agency files this motion to dismiss Section II.C.4 of the petition for review filed by Trustees for Alaska and the Center for Race, Poverty and the Environment on behalf of various petitioners in the above-referenced case. On March 17, 2010, Region 10 notified the Environmental Appeals Board and the parties that it had withdrawn five effluent limitations – including the limitation for Total Dissolved Solids (“TDS”) – from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d). 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. Upon further analysis of petitioners’ claims, Region 10 submits that Section II.C.4 should similarly be dismissed as moot.

II. BACKGROUND

On January 8, 2010, Region 10 reissued NPDES Permit No. AK-003865-2 to Teck Alaska Incorporated (“Teck”) for the Red Dog Mine. On February 16, 2010, Trustees for Alaska and the Center on Race, Poverty and the Environment, representing regional environmental

groups, local individuals and the Native Villages of Kivalina and Point Hope, filed a petition for review of the permit with the Board. By letter dated February 18, 2010, the Board notified Region 10 that this petition had been filed and set a response date of April 5, 2010.¹

On February 26, 2010, Region 10 issued a notification letter identifying the contested permit conditions that are stayed by the petition for review, pursuant to 40 C.F.R.

§§ 124.16(a)(2) and 124.60(b). The Region's letter stated that the remaining January 2010 permit conditions were uncontested and severable from the contested conditions and would become fully effective and enforceable on March 31, 2010, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d).

By notice filed March 17, 2010, Region 10 withdrew the following effluent limitations from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d): lead (monthly average), selenium (daily maximum), zinc, weak acid dissociable cyanide, and TDS. On March 18, 2010, Region 10 filed a motion to dismiss Sections II.C.1 and II.C.2 of the petition for review as moot, arguing that the five withdrawn effluent limitations form the basis of claims in those sections. The Board has not yet acted on that motion. The Region was informed yesterday that petitioners intend to file an opposition to the motion for partial dismissal on April 5.² The Center on Race Poverty and the Environment has indicated that it will also oppose the instant motion.³

¹ Teck filed a motion for expedited review on February 23, 2010. NANA Regional Corporation also filed a combined motion for leave to intervene and motion for expedited review on February 23, 2010. By order dated March 2, 2010, the Board granted Teck and NANA leave to respond, declined to rule on the motions for expedited review, and set a deadline of April 5 for their responses.

² Personal communication, March 31, 2010, between Kimberly Owens, Region 10, and Carl Johnson, Trustees for Alaska.

³ Personal Communication, April 1, 2010, between Kimberly Owens, Region 10, and Brent Newell, Center on Race, Poverty and the Environment.

Region 10's March 18 motion for partial dismissal also included an acknowledgement that "arguments raised in Sections II.C.3 and II.C.4 of the petition are unaffected by the withdrawal" and stated that the Region would submit its response to claims raised in these sections on April 5.⁴ As discussed in detail below, upon further review of Petitioners' claims in Section II.C.4, Region 10 has since determined that this conclusion relating to Section II.C.4 was premature. Petitioners' claims in Section II.C.4 relate directly to the withdrawn limitation for TDS.

III. ARGUMENT

Numerous Board cases have held that dismissal of a petition for review is appropriate when contested conditions have been withdrawn. *See In re: CH2MHill Plateau Remediation Co.*, NPDES Appeal No. 09-08, Order Dismissing Petition as Moot at 2-3 (EAB, Nov. 4, 2009) (granting motion to dismiss petition as moot after Region withdrew contested condition); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal No. 08-01, Order Dismissing Petition for Review at 2 (EAB, Feb. 28, 2008) (same); *In re Cavenham Forest Indus.*, 5 E.A.D. 722, 728 & n.10 (EAB 1995) (declining to reinstate appeal where each contested permit condition had been remanded; no contested conditions from original petition remained for Board to review); *In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994) (holding appeal was mooted by Region's withdrawal of permit under predecessor to 40 C.F.R. § 124.19(d) despite petitioner's objection to new draft permit proposed as replacement).

The Board has similarly dismissed portions of petitions for review where the effluent limitations at issue were withdrawn. *In re: City of Keene Wastewater Treatment Facility*,

⁴ Region 10's Motion to Dismiss Petition for Review in Part at 1, n.1, NPDES Appeal No. 10-04, March 18, 2010.

NPDES Appeal No. 07-18, Order Noticing Partial Withdrawal of Permit and Dismissing Portion of Petition for Review as Moot at 2 (EAB, Dec. 5, 2007). In addition, the Board has made clear that under 40 C.F.R. § 124.19(d), the Region need not articulate a rationale in support of withdrawal. *In re: San Jacinto River Authority*, NPDES Appeal No. 07-19, Order Dismissing Petition for Review at 3 (EAB, March 28, 2008).

As set forth in the March 17 notification, Region 10 has withdrawn the effluent limitation for TDS. In accordance with 40 C.F.R. § 124.19(d), the Region intends to prepare a new draft permit addressing the TDS limit and the other four withdrawn effluent limitations. Although styled as a broad abuse of discretion claim, a closer examination of Section II.C.4 reveals that petitioners raise a direct challenge to the method by which the TDS limit was developed. Because the TDS limit has been withdrawn, this challenge should be dismissed as moot.

Petitioners argue in Section II.C.4 that the NPDES permit should have required Teck to construct a pipeline to discharge wastewater directly to the Chukchi Sea rather than discharging through Outfall 001 to Red Dog Creek.⁵ In support of this claim, petitioners argue that the agency has broad authority under section 402(a)(1)(B) of the Clean Water Act to mandate an alternative discharge location – in this case a 52-mile wastewater discharge pipeline.⁶ The heart of petitioners’ argument is that because no effluent limitation guidelines exist for TDS, the Region is authorized to conduct a “best professional judgment” analysis to determine the best available technology economically achievable (“BAT”). In particular, petitioners argue:

The determination of BAT *for Total Dissolved Solids*, then, relies on effluent limitation guidelines promulgated by regulation. Where no effluent limitations guidelines exist, *as is the case for mining and TDS*, then EPA has the authority to impose conditions on a

⁵ Petition for Review at 43.

⁶ *Id.* 40-41.

case-by-case basis under its broad authority in section 402(a)(1)(B), called “best professional judgment.”⁷

Petitioners further cite EPA’s regulations at 40 C.F.R. § 125.3, which set forth specific criteria for developing technology-based treatment requirements in permits.⁸ Notably, petitioners refer only to the exercise of these authorities in the context of TDS.

Petitioners essentially argue that the Region could have conducted a best professional judgment analysis to reach a different result for TDS – *i.e.*, one that they allege would have resulted in a discharge pipeline – rather than the effluent limitation Region 10 included in the 2010 NDPES permit. Because the TDS limit has been withdrawn, petitioners’ arguments related to TDS, including the discharge pipeline, are moot. As noted above, in accordance with 40 C.F.R. § 124.19(d), the Region intends to prepare a new draft permit addressing the TDS limit and the other four withdrawn effluent limitations. Petitioners’ claims in Section II.C.4 will be further evaluated and addressed in that process.

Although there are no timing requirements for submitting motions to dismiss, Region 10 recognizes that this motion is filed towards the end of its 45-day response period and just a few days before responsive briefs are due. The Region also acknowledges that its March 18 motion for partial dismissal did not identify this issue. The Region notes, however, that petitioners’ arguments on technology-based effluent limitations raise complex technical and legal issues that the Region has been diligently analyzing in coordination with the Office of General Counsel. In addition, petitioners have not yet filed an opposition to the Region’s March 18 motion for partial dismissal, although they intend to do so on April 5. The Region would not oppose an extension

⁷ *Id.* at 41 (emphasis added).

⁸ *Id.* at 41, n.211.

of time to allow petitioners to respond to both motions to dismiss at once.

Accordingly, the Region respectfully submits that no party will be prejudiced by this filing and that, given the nature of the claims in Section II.C.4, the Board should consider this motion to dismiss.

IV. RELIEF REQUESTED

The permit limit for TDS, which is directly at issue in Section II.C.4 of the petition for review, has been withdrawn pursuant to 40 C.F.R. § 124.19(d) and will not take effect. Region 10 therefore requests that the Board dismiss this section of the petition for review and any associated claims for relief as moot. If the Board denies the Region's motion to dismiss these claims, the Region requests that it be granted at least 15 days from the date of the Board's denial to address Section II.C.4.

Dated this 1st day of April, 2010

Respectfully submitted,

/S/

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Region 10's MOTION TO DISMISS SECTION II.C.4 OF THE PETITION FOR REVIEW 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 1st day of April 2010.

/S/

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