

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 PETITION FOR REVIEW IN PART**

**I. INTRODUCTION**

Region 10 of the United States Environmental Protection Agency files this motion for partial dismissal 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. By notification filed yesterday with the Board, Region 10 has withdrawn the permit conditions at issue in Sections II.C.1 and II.C.2 of the petition for review. Accordingly, these sections and any associated claims for relief should be dismissed as moot.<sup>1</sup>

**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 Environmental Appeals Board. By letter dated February 18, 2010,

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<sup>1</sup> Region 10 acknowledges that arguments raised in Sections II.C.3 and II.C.4 of the petition are unaffected by the withdrawal and will submit its response to claims raised in these sections on April 5.

the Board notified Region 10 that this petition had been filed and set a response date of April 5, 2010.<sup>2</sup>

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By notice filed yesterday with the Board, Region 10 has withdrawn the following effluent limitations from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d): lead (monthly average), selenium (daily maximum),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 total dissolved solids (TDS). See Exhibit 1.

### 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

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<sup>2</sup> 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.

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*, 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).

In this case, Region 10 has withdrawn the five effluent limitations that form the basis of claims in Sections II.C.1 and II.C.2 of the petition for review. In accordance with 40 C.F.R. § 124.19(d), the Region intends to prepare a new draft permit addressing the portions withdrawn yesterday. As explained in more detail below, Sections II.C.1 and II.C.2 of the petition for review should therefore be dismissed as moot.

Although set forth separately, petitioners' arguments in Sections II.C.1 and II.C.2 are each directly linked to the withdrawn effluent limitations. Petitioners first argue in Section II.C.1 that EPA may not rely on the State of Alaska's antidegradation analysis because the State lacks antidegradation implementation procedures for conducting that analysis.<sup>3</sup> Although couched in broad terms, a careful reading reveals that petitioners' real challenge is to the

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<sup>3</sup> Petition for Review at 15.

antidegradation analysis, which appears as a separate appendix to the 401 Certification, as opposed to the entire 401 Certification. Indeed, much of the argument focuses on specific requirements for an antidegradation policy and implementation procedures.<sup>4</sup>

Based on these requirements, petitioners argue that the lack of implementation procedures makes “a legally adequate *antidegradation analysis* impossible.”<sup>5</sup> The conclusion to this section similarly states, “It is an abuse of discretion for the EPA to rely on the State’s *antidegradation analysis* when it is EPA’s duty to ensure that backsliding does not occur when reissuing an NPDES permit.”<sup>6</sup> Petitioners further cite comments submitted by the Native Villages of Point Hope and Kivalina, arguing that because the State cannot legally perform an antidegradation analysis, “the certification to *allow for backsliding* of the effluent limitations . . . is illegal.”<sup>7</sup> Backsliding, in turn, is only relevant to permit limits that are less stringent than in the prior permit and that have been challenged here. Thus, petitioners’ argument that implementation procedures are necessary is tied directly to the five withdrawn effluent limits.

Section II.C.2 in turn challenges five specific effluent limits – lead (monthly average), selenium (daily maximum), zinc, weak acid dissociable cyanide and TDS – that were subject to the State’s antidegradation analysis and that petitioners argue constitute illegal backsliding or are otherwise not justified. In particular, petitioners argue that:

- The “apparent backsliding” of cyanide limits is not justified
- EPA is precluded from relying on exceptions to the prohibition against

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<sup>4</sup> *Id.* at 16-18.

<sup>5</sup> *Id.* at 19 (emphasis added).

<sup>6</sup> *Id.* at 20. “Backsliding” refers to the Clean Water Act’s prohibition on effluent limitations in reissued permits that are less stringent than comparable limitations in the previous permit, unless certain exceptions are met. 33 U.S.C. § 1342(o)(1).

<sup>7</sup> *Id.* at 15 (emphasis added).

backsliding with regard to less stringent zinc limits

- EPA's backsliding exception for lead and selenium is "legally invalid"
- There is no legal justification for relaxed TDS limits in the permit<sup>8</sup>

As discussed above, by notification filed yesterday with the Board, Region 10 has withdrawn these five effluent limitations from the January 2010 NPDES permit, pursuant to 40 C.F.R. § 124.19(d). As stated in Region 10's notification of withdrawal, the 1998 permit limits for each of these parameters will remain in effect until further agency action. Sections II.C.1 and II.C.2 of the petition for review are therefore moot.

#### **IV. RELIEF REQUESTED**

The permit limits at issue in Sections II.C.1 and II.C.2 of the petition for review have been withdrawn pursuant to 40 C.F.R. § 124.19(d) and will not take effect. Region 10 therefore requests that the Board dismiss these sections 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

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<sup>8</sup> *See id.* at 26, 27, 30, 37.

Region requests that it be granted at least 15 days from the date of the Board's denial to respond to Sections II.C.1 and II.C.2 of the petition for review.

Dated this 18<sup>th</sup> day of March, 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 PETITION FOR REVIEW IN PART 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 18<sup>th</sup> day of March 2010.

/S/

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Carol Kennedy  
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