

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

IN THE MATTER OF:
TECK ALASKA, INCORPORATED

NPDES Permit AK-003865-3

NPDES Appeal No. 10-04

**PETITIONER NATIVE VILLAGE OF KIVALINA IRA COUNCIL'S
OPPOSITION TO REGION 10'S MOTION TO DISMISS
SECTION II.C.4 OF PETITION FOR REVIEW**

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I. INTRODUCTION.

In section II.C.4 of this Petition for Review, the Native Village of Kivalina IRA Council (“Kivalina”) challenges EPA’s failure to consider and require an alternative location for the discharge of the Red Dog Mine’s water pollution. Because EPA has authority to proscribe case-by-case effluent limits to protect Kivalina’s drinking water and subsistence fishery, the Wulik River, EPA’s failure to do so violates section 402 of the Clean Water Act.

Region 10 argues that its withdrawal of the Total Dissolved Solids (“TDS”) effluent limitation from NPDES Permit No. AK-003865-2 issued January 8, 2010 (hereafter “2010 Permit”) moots section II.C.4. While the Withdrawal Letter¹ operates to apply the TDS limit in NPDES Permit No. AK-003865-2 issued July 27, 1998 (hereafter “1998 Permit”) to Teck Alaska, Inc, EPA has failed to demonstrate that its action moots section II.C.4 of the Petition. Moreover, EPA’s conduct is capable of repetition yet evades review, this Board may decide the issues presented in section II.C.4 under this exception to the mootness doctrine. Accordingly, the Board should deny Region 10’s Motion to Dismiss Section II.C.4 of Petition for Review (“Motion”).²

II. THIS OPPOSITION IS TIMELY

EPA Region 10 originally filed this Motion on April 1, 2010 but failed to serve the Petitioners with a complete copy of the Motion. *See* Letter from Kimberly Owens to Eurika

¹ Letter from Michael Bussell to Eurika Durr, dated March 17, 2010, attached as Exh. 1 (hereafter “Withdrawal Letter”).

² Petitioners Enoch Adams, Jr., Leroy Adams, Andrew Koenig, Jerry Norton, and Joseph Swan, Sr. (“Kivalina Residents”) take no position on the Motion. On March 23, 2010, Kivalina Residents partially withdrew from this Petition and only maintain their Petition on the issues related to limits set for Total Dissolved Solids discharge into Red Dog Creek from when grayling begin spawning in Main Stem Red Dog Creek until the conclusion of that spawning as determined by the Alaska Department of Fish and Game. Petitioners Native Village of Pt. Hope IRA Council, Alaska Community Action on Toxics, and the Northern Alaska Environmental Center did not join section II.C.4 of the Petition and therefore take no position on the Motion.

Durr, dated April 6, 2010. EPA served a complete copy of the Motion on Petitioners by U.S. Mail on April 6, 2010. Kivalina's response to the Motion is due fifteen days after service by mail of the motion. *See* EAB Practice Manual at 38-39. Because Region 10 served the Motion by mail, Kivalina receives an additional three days to respond. *See* 40 C.F.R. § 124.20(d). Accordingly, Kivalina has until April 24, 2010 to respond. Because April 24, 2010 is a Saturday, Kivalina's response is due on April 26, 2010. *See* 40 C.F.R. § 124.20(c).

III. BACKGROUND.

In an effort to conserve the parties' and the Board's time and resources, Kivalina incorporates by reference the Background section and exhibits (pages 2-5) in Petitioners' Opposition to Region 10's Motion to Dismiss Petition for Review in Part and Petitioners' Cross Motion to Stay the Entire Permit, filed April 5, 2010 (hereafter "Opposition to First EPA Motion to Dismiss") by reference.

IV. ARGUMENT.

EPA fails to demonstrate that the withdrawal TDS effluent limitations from the 2010 Permit moots section II.C.4 of this Petition for two reasons. First, EPA's elimination of a *de jure* relaxation of the Total Dissolved Solids ("TDS") effluent limitation in the 2010 Permit does not demonstrate that EPA's unlawful conduct allowing relaxation of these effluent limitations will not recur. Over the last twelve years, EPA has allowed Teck to routinely violate the 1998 Permit without requiring Teck to abate the Red Dog Mine's pollution. Teck also claims that it cannot operate and comply with the TDS limit in the 1998 Permit. Absent an affirmative demonstration that the mine will not be allowed to operate in violation of the TDS effluent limit in the 1998 Permit, EPA's historic *de facto* relaxation of effluent limits demonstrates that EPA's illegal conduct – failure to consider and require an alternative discharge location as Best

Available Technology Economically Achievable pursuant to section 402 of the Act – will likely recur. Accordingly, the Board should deny the Motion.

Moreover, assuming that section II.C.4 is moot, which Kivalina does not concede, then the capable of repetition yet evading review exception to the mootness doctrine applies.

A. The Mootness Standard.

The Board must apply a stringent standard to determine whether EPA’s Withdrawal Letter moots section II.C.4. *See Friends of the Earth v. Laidlaw*, 528 U.S. 167, 189 (2000). “A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *United States v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968). To establish mootness, EPA must show that the Board cannot order *any* effective relief. *See San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1159 (9th Cir. 2002) (“*BayKeeper*”), *citing City of Erie v. Pap’s A. M.*, 529 U.S. 277, 287 (2000). Such a showing must satisfy a “heavy burden of persuasion.” *BayKeeper*, 309 F.3d at 1159, *citing Concentrated Phosphate Export Assn.*, 393 U.S. at 203.

The Supreme Court established the “capable of repetition, yet evading review” exception to the general principle of mootness in *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). The capable of repetition yet evading review exception applies where “(1) the duration of the challenged action is too short to allow full litigation before it ceases, and (2) there is a reasonable expectation that the plaintiffs will be subjected to it again.” *Alaska Center*, 189 F.3d at 854-855, *quoting Greenpeace Action v. Franklin*, 14 F.3d 1324, 1329 (9th Cir. 1992) (“*Greepeace*”); *Biodiversity Legal Foundation v. Badgley*, 309 F.3d 1166, 1173 (9th Cir. 2002).

Evading review – the duration element – means that the “underlying action is almost certain to run its course before either this Board can give the case full consideration.” *Miller v.*

California Pacific Medical Center, 19 F.3d 449, 453-454 (9th Cir. 1994) (“*Miller*”); *Alaska Center*, 189 F.3d at 855.

The repetition element requires some indication that the challenged conduct will be repeated. *Greenpeace*, 14 F.3d at 1329. A party needs only to show “that it is reasonable to expect that the [EPA] will engage in conduct that will once again give rise to the allegedly moot dispute.” *Miller*, 19 F.3d at 454. The analysis is not whether the same exact rulemaking would recur, but whether EPA would engage in similar rulemakings. *Alaska Center*, 189 F.3d at 856-857 (issue is *not* whether Forest Service will issue another permit to the same permit holder, but whether the Forest Service will issue other similar permits in the Chugach National Forest that violate NEPA in the same manner).

B. The Petition for Review is not Moot because EPA Fails to Demonstrate that Teck will Comply with the 1998 Permit.

EPA’s withdrawal of the TDS permit limit from the 2010 Permit does not moot this Petition because EPA cannot demonstrate that Teck will comply with the 1998 Permit. EPA’s Motion to Dismiss rests on the assumption that its withdrawal of the 2010 Permit’s TDS limit combined with the imposition of the 1998 Permit’s TDS limit moots section II.C.4. Motion at 5.

However, EPA ignores the past twelve years of history and its role in that saga. EPA assumes that Teck will comply with the 1998 Permit’s TDS limit and implies that it will require Teck to comply.³ EPA’s history with Teck demonstrates EPA’s pattern and practice of allowing Teck to exceed the 1998 Permit’s limits.⁴ While EPA has withdrawn the *de jure* relaxation of TDS effluent limitations from the 2010 Permit, EPA has failed to demonstrate that it will prohibit a *de facto* relaxation of those limits. EPA cannot dispute that the agency – through

³ See Withdrawal Letter.

⁴ See *Adams v. Teck Cominco Alaska, Inc.*, 2008 Summary Judgment Order, attached as Exhibit 2 at 3-4.

Compliance Orders by Consent, among others – relaxed TDS limits in the 1998 Permit even before issuing the 2010 Permit. EPA cannot now rely on the 1998 Permit as the justification that EPA’s wrongful conduct will not recur, especially when Teck asserts that it cannot comply with the TDS limits in the 1998 Permit.⁵

EPA’s reliance on a host of this Board’s prior decisions is misplaced, Motion at 3-4, as those decisions are inapposite. None of those decisions address the issue presented here: whether withdrawal of permit limits from a new NPDES permit moots a petition when the point source cannot comply with its prior permit and EPA has failed to demonstrate elimination of *de facto* permit relaxation. Accordingly, EPA has failed to meet its heavy burden here to demonstrate that the Withdrawal Letter moot section II.C.4.

Since EPA fails to demonstrate that section II.C.4 is moot, the Board should deny the Motion.

C. THE EPA ACTION CHALLENGED HERE IS CAPABLE OF REPETITION YET EVADES REVIEW.

Assuming that the Board rules that EPA’s action to withdraw the TDS effluent limit from the 2010 Permit moots section II.C.4 of the Petition, which it should not, then the Board should nevertheless adjudicate the issue raised in section II.C.4 because EPA’s action is capable of repetition yet evades review.

1. EPA Action to Relax the TDS Limit in the 1998 Permit Evades Review.

While EPA has allowed Teck Alaska to discharge TDS in excess of the 1998 Permit for years,⁶ the history of EPA’s permitting of the Red Dog Mine demonstrates EPA action that evades review. The 1998 Permit limited TDS discharges to “176 milligrams per liter (“mg/l”)

⁵ Teck Alaska Incorporated’s Request for Leave to Respond at 3.

⁶ See Opposition to First EPA Motion to Dismiss at 2-5.

(monthly average limit) and 196 mg/l (maximum daily limit).” *In re Teck Cominco*, 11 E.A.D. 457, 459 (EAB 2004) (“*Teck I*”). EPA proposed to modify the 1998 Permit in 2003 to allow the mine to discharge more TDS than allowed in the 1998 Permit, but the new conditions were appealed to EPA and the changed conditions did not go into effect. *Id.* at 459-460.⁷ Teck timely reapplied for the NPDES permit and the 1998 Permit was administratively extended.⁸ EPA reissued the NPDES permit in March 2007, again attempting to relax the TDS limitation, but this time creating mixing zones so that dilution was the solution to the TDS pollution.⁹ The reissued permit was again appealed and EPA withdrew the permit on September 27, 2007, citing the need to conduct additional National Environmental Policy Act (“NEPA”) analysis. *In re Teck Cominco*, 2007 WL 3138038 (EAB, Oct. 10, 2007) (“*Teck II*”).¹⁰ In each of the 2003 and 2007 proposed permits, EPA attempted to relax the TDS effluent limit in the 1998 Permit. EPA has *twice* withdrawn relaxed TDS limits when challenged – the 2007 Permit and the 2010 Permit – and continues to allow Teck Alaska to discharge TDS at amounts greater than the 1998 Permit.

Since the *Teck I* remanded the TDS issue to EPA in 2004, EPA continues to withdraw challenged TDS limits and to allow Teck to discharge TDS in amounts greater than the 1998 Permit. Teck admits that it cannot operate in compliance with the TDS limit in the 1998 Permit.¹¹ The issue of EPA’s compliance with the Clean Water Act when it purportedly regulates TDS discharges evades review.

⁷ See also EPA Fact Sheet, dated Dec. 5, 2008 (“Fact Sheet”), at 6, attached as Exhibit 3.

⁸ Fact Sheet at 6.

⁹ *Id.*; see also Draft NPDES Permit AK-003865-2 (“2007 Permit”) at 7-11, attached as Exh. 4.

¹⁰ See also Fact Sheet at 6.

¹¹ See Teck Alaska Incorporated’s Request for Leave to Respond at 3.

2. EPA Action to Relax the TDS Limit in the 1998 Permit is Capable of Repetition.

EPA's refusal to exercise its authority under section 402(a)(1)(B) of the Clean Water Act, 33 U.S.C. § 1342(a)(1)(B), to regulate TDS by requiring an alternative discharge location is capable of repetition in this case and elsewhere. EPA seeks to dismiss section II.C.4 of Kivalina's Petition to preclude the Board from considering the issue of the scope of EPA's authority and the abuse of that authority.

TDS is considered a nonconventional (and nontoxic) pollutant under the CWA. *See* 40 C.F.R. §§ 401.15 and 401.16 (listing, respectively, the pollutants considered either toxic or conventional); *American Petroleum Inst. v. EPA*, 787 F.2d 965, 969-70 & n.5 (5th Cir. 1986) (explaining that pollutants not classified as conventional or toxic are generally referred to as "nonconventional/nontoxic" pollutants). For nonconventional/nontoxic pollutants, sections 301(b)(1)(C) and 301(b)(2)(A) of the Act, 33 U.S.C. §§ 1311(b)(1)(C) & 1311(b)(2)(A), govern the appropriate effluent limitations. *See In re Dominion Energy Brayton Point, L.L.C.*, 2006 EPA App. LEXIS 9, *24 (Feb. 1, 2006). Section 301(b)(1)(C) requires application of water quality standards for TDS discharges and section 301(b)(2)(A) requires best available technology economically achievable, otherwise known as BAT. *Id.* In any given case, the more stringent standard applies. *Id.* at *24.

The determination of BAT for Total Dissolved Solids, then, relies on effluent limitation guidelines promulgated by regulation. *Id.* at *25, *citing* 40 C.F.R. § 125.3(c); *Tex. Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 927-28 (5th Cir. 1998). Where no effluent limitations guidelines exist, as is the case for mining and TDS, then EPA has authority to impose conditions on a case-by-case basis under its broad authority in section 402(a)(1)(B), called "best professional judgment." *See* 40 C.F.R. § 125.3(c)(2) (where no applicable or promulgated effluent limitation

guidelines exist, technology-based analysis to be done on case-by-case basis); 40 C.F.R. §§ 125.3(a)(2)(i)(B), (v)(B) (effluent limits established case-by-case are based best professional judgment); *see also NRDC v. EPA*, 863 F.2d 1420, 1424-25 (9th Cir. 1988).

The issue presented in section II.C. 4 will come before the Board once again when EPA regroupes and proposes a *fourth* draft NPDES Permit to relax TDS limits at the Red Dog Mine. “[T]he Region intends to prepare a new draft permit addressing the TDS limit[.]” Motion at 5. EPA also acknowledges that the EPA Office of General Counsel is involved because Kivalina’s arguments “raise complex technical and legal issues,” inferring that the issues raised have national implications. *Id.*

Accordingly, the issues presented in section II.C.4 are capable of repetition and evade review and thus allows the Board to consider that section of the Petition. The Board should deny the Motion.

IV. CONCLUSION

For the reasons set forth above, the Board should deny Region 10’s Motion to Dismiss Petition for Review in Part and grant Petitioners’ Motion to Stay Permit.

Respectfully submitted this 23rd day of April, 2010.

CENTER ON RACE, POVERTY & THE
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **PETITIONER NATIVE VILLAGE OF KIVALINA IRA COUNCIL'S OPPOSITION TO REGION 10'S MOTION TO DISMISS SECTION II.C.4 OF 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 23rd day of April 2010.

/s/ Brent Newell
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