BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF ENVIRONMENTAL CONSERVATION

In the Matter of: NATIVE VILLAGE OF POINT HOPE IRA COUNCIL, NORTHERN ALASKA ENVIRONMENTAL CENTER, and ALASKA COMMUNITY ACTION ON TOXICS, Requestors, v. ALASKA DEPARTMENT OF ENVIRONMENTAL CONSERVATION, WATER DIVISION and TECK ALASKA, INC., Respondents, and NANA REGIONAL CORPORATION, INC., Intervenor.	)	OAH No. 13-1013-DEC

DECISION

I. Introduction

The Department of Environmental Conservation (DEC) issued Alaska Pollutant Discharge Elimination System Permit No. AK 0038652 (APDES Permit) to Teck Alaska, Inc. (Teck) for its Red Dog Mine operation. The Native Village of Point Hope IRA Council, the Northern Alaska Environmental Center, and the Alaska Community Action On Toxics (collectively referred to as Point Hope) jointly requested a hearing challenging the issuance of the APDES Permit. NANA Regional Corporation, Inc. (NANA) was granted intervention in the case.

The parties cross-moved for summary adjudication. Oral argument was held on the parties' motions on June 4, 2014.

After a review of the record and the parties' arguments, this case does not present a factual issue, only a narrow legal issue. That legal issue is whether or not DEC's issuance of the

APDES Permit was invalid because DEC did not respond to and consider Point Hope's comment regarding alternative technologies.

DEC is only required to respond to "significant" comments. Because Point Hope's comment was not "significant," DEC was not required to respond to it. Summary adjudication is therefore granted in favor of DEC and the co-aligned parties, Teck Alaska, Inc. and NANA Regional Corporation, Inc.

II. Procedural History

DEC issued the APDES Permit on February 13, 2013. Point Hope requested a hearing on March 18, 2013.[1] In its hearing request, Point Hope requested either a remand of the permit to the APDES program staff or a hearing upon the record.[2] On June 12, 2013, the Commissioner of Environmental Conservation granted Point Hope's request and referred four issues to the Office of Administrative Hearings for hearing on written briefs and the existing record.[3] NANA filed an unopposed request to intervene, which was granted.

Point Hope moved for summary adjudication. Teck and NANA jointly opposed Point Hope's motion for summary adjudication and cross-moved for summary adjudication. DEC separately opposed Point Hope's motion for summary adjudication and cross-moved for summary adjudication.

Point Hope withdrew three of the four issues upon which it had requested a hearing, which left one remaining issue for resolution.[4] That issue, as referred by the Commissioner, was:

> Issues under III.D of the request: In making any finding under 18 AAC 70.015(a)(2)(D) that DEC was required to make to grant the mixing zones for [Total Dissolved Solids] and cyanide included in the 2013 APDES permit, did DEC fail to appropriately consider methods of pollution prevention, control, and treatment proposed for consideration by requesters, including inhibiting acid rock drainage by oxygen displacement in the waste rock piles, and gas-phase modification? In making any finding under 18 AAC 70.240(a)(3) that DEC was required to make to grant the mixing zones for [Total Dissolved Solids] and

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[1] ADEC 16189 – 16202.

[2] ADEC 16202.

[3] *See* Commissioner's Order Granting Partial Stay On Request For Adjudicatory Hearing Relating To A Single Legal Issue And Granting A Hearing On Written Briefs And The Existing Record For All Remaining Legal Issues.

[4] Requestors' Notice Of Withdrawal Of Request For A Hearing On Two Issues Referred From The Commissioner; Requestors' Reply In Support Of Motion For Summary Adjudication (2 AAC 64.250), dated November 20, 2013; Requestors' Notice Of Withdrawal Of Request For A Hearing On One Issue Referred From The Commissioner, dated June 3, 2014.

> cyanide included in the 2013 APDES permit, did DEC fail to appropriately consider methods to remove, reduce, and disperse pollutants proposed for consideration by requesters, including inhibiting acid rock drainage by oxygen displacement in the waste rock piles, and gas-phase modification? [5]

At oral argument, Point Hope clarified that its comment was specifically regarding Total Dissolved Solids (TDS) and not cyanide.

III. Facts

NANA is the owner of the land and mineral resources where the Red Dog Mine is located. It leases the land and the underlying mineral resources to Teck, which operates Red Dog. Red Dog seasonally discharges treated wastewater during its operation. The wastewater discharge was authorized by a National Pollutant Discharge Elimination System Permit (NDPES Permit) issued by the Environmental Protection Agency (EPA) in 1995, 1998, and 2010.[6]

The EPA issued draft permit terms in 2011. Appendix A to that draft permit was a Best Professional Judgment analysis that compared the current wastewater treatment method (a multiple step process using sodium sulfide, lime, and filtering prior to discharge) with the following alternative technologies for reducing Total Dissolved Solids (TDS): membrane processes (reverse osmosis, nanofiltration, electrodialysis), ion exchange, biological treatment, barium hydroxide, and a wastewater pipe. In that discussion, the EPA concluded that the alternative methods were not the best available and the current water treatment process should be retained.[7]

The draft permit included DEC's draft certification under the Clean Water Act (401 Certification).[8] That draft certification addressed the regulatory requirements that "the methods of pollution prevent, control, and treatment found by the department to be the most effective and reasonable will be applied to all wastes and other substances to be discharged"[9] and that "the effluent will be treated to remove, reduce, and disperse pollutants using methods found by the department to be the most effective and technologically and economically feasible, consistent with the highest statutory and regulatory treatment requirements."[10] With regard to both of these

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[5] Commissioner's Order Granting Partial Stay On Request For Adjudicatory Hearing Relating To A Single Legal Issue And Granting A Hearing On Written Briefs And The Existing Record For All Remaining Legal Issues, p. 6 (footnotes omitted).

[6] ADEC 13900, 14106, 16118.

[7] ADEC 16853 – 16859.

[8] ADEC 16153, 16168.

[9] 18 AAC 70.015(a)(2)(D).

[10] 18 AAC 70.240(a)(3).

requirements, the draft certification concluded (1) that the level of weak acid dissociable (WAD) cyanide was below the level that was treatable with available technology, and (2) that other "[w]ater treatment methods (distillation, membrane filtration, etc.)" were not practical or economical, and that the current water treatment methods should be retained.[11]

During the public comment process, Point Hope commented on the effluent standards for TDS and cyanide, stating generally, "Commenters disagree with the proposed effluent limitations for TDS and cyanide . . . DEC failed to ensure that the proposed effluent limitations are based on the most effective pollution prevention, control and treatment methods . . . ."[12] Point Hope made a number of more specific comments. However, the pertinent comment for this case was:

> *i. The proposed effluent limitations are not based on the most effective pollution prevention, control, and treatment methods.*
>
> Under the antidegradation policy, DEC must ensure that the proposed effluent limitations are based on the most effective methods of pollution prevention, control, and treatment. Technologies exist that would ensure, or come substantially closer to, compliance with the 1998 Permit's effluent limitations for TDS. In the SEIS for the 2010 Permit, EPA concluded that three different approaches would achieve the 1998 Permit effluent limitations: reverse osmosis with pretreatment for gypsum removal, a system with barium hydroxide, and a reverse osmosis system with aluminum hydroxide. While these technologies have been deemed infeasible by Teck or EPA, Commenters have found that there are other, newer technologies that have not been evaluated for feasibility. The technologies would result in significant source reduction for TDS and heavy metals from the waste rock areas, the largest contributors of these pollutants. The technologies are (1) inhibiting acid rock drainage by oxygen displacement in the waste rock piles, and (2) gas-phase modification. Because feasible control technologies exist to achieve, or come substantially closer to, the existing effluent limitations, DEC cannot certify the less stringent limitations proposed here.[13]

Point Hope's comment did not explain the referenced technologies or how they would be applied, nor did it include or cite any supporting scientific studies or other reference materials. The record does not contain any other information regarding these technologies.[14]

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11 ADEC 16934 – 16936, 16948 – 16949.

12 ADEC 16206.

13 ADEC 16211 (footnotes omitted).

14 Point Hope was asked at oral argument whether there was other information pertaining to these technologies contained in the record. The response was: "Your second question is there anything in the record regarding the two technologies besides Point Hope's comment. And no, there is not." June 4, 2014 Oral Argument at 7:00 – 7:04.

EPA transferred responsibility for the permit to DEC.[15] EPA and DEC summarized Point Hope's comments as follows:

> One commenter maintains that the draft CWA § 401 Certification is legally deficient and EPA cannot rely upon it to issue the draft permit with the proposed limitations because it is confusing and misleading, factually inaccurate, the State lacks legally adopted implementation procedures for the antidegradation policy so cannot make a legal antidegradation analysis, the proposed effluent limitations are not based on the most effective pollution prevention, control and treatment methods, the proposed TDS limitations do not fully protect existing uses, the mixing zone for TDS, ammonia and cyanide violate Alaska's mixing zone regulations, and by employing two exceptions to the generally applicable water quality standards, DEC endangers designated and existing uses of Red Dog Creek.[16]

EPA did not respond to Point Hope's Comment. DEC's response was:

> The legality of DEC's interim methods for conducting an antidegradation analysis was challenged in Alaska's Superior Court, case no. 3AN-11-07159CI. On September 4, 2012, the court found the interim methods legal and denied the challenge. The antidegradation analysis addressed concerns expressed by the commenter regarding effective treatment, protection of uses, mixing zones, limitations, and water quality standards.[17]

IV. Discussion

Summary adjudication in an administrative proceeding is the equivalent of summary judgment in a court proceeding.[18] It is a means of resolving disputes without a hearing when the central underlying facts are not in contention, but only the legal implications of those facts. Under these circumstances, the evidentiary hearing is not required.[19] The parties have not identified any factual disputes; a review of the pleadings and pertinent portions of the record does not reveal any factual issues; and the Commissioner referred this case to OAH for a hearing based upon the record, as Point Hope had requested. This case is therefore appropriate for summary adjudication.

The sole remaining issue, as referred by the Commissioner, boils down to the question of whether DEC was required to respond to Point Hope's comment which identified two technologies that it claimed would result in significant source reduction for TDS and heavy

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[15] ADEC 13896 –13899.

[16] ADEC 16739 – 16740.

[17] ADEC 16740.

[18] *See, e.g., Schikora v. State, Dept. of Revenue*, 7 P.3d 938, 940-41, 946 (Alaska 2000).

[19] *See Smith v. State of Alaska,* 790 P.2d 1352, 1353 (Alaska 1990); 2 Pierce, *Administrative Law Treatise* § 9.5 at 813 (5th ed. 2010).

metals from the waste rock areas. The technologies were described simply as "(1) inhibiting acid rock drainage by oxygen displacement in the waste rock piles, and (2) gas-phase modification." DEC is only required to respond to "significant" comments. Alaska regulation 18 AAC 83.120(o) provides:

> When the department issues a final permit, the department will issue a response to comments, which must be available to the public. The response must . . . (2) briefly describe and respond to all **significant** comments on the draft permit raised during the public comment period, or during any hearing.[20]

The federal counterpart to the Alaska regulation similarly requires the EPA to "respond to all significant comments."[21]

Federal case law is of assistance in interpreting and applying the Alaska regulation regarding "significant" comments, inasmuch as the Alaska regulation mirrors the federal language.[22] The federal cases recognize agency discretion to determine whether a comment is a "significant" one which requires a response:

> [C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . .; it must show why the mistake was of possible significance in the results.[23]

In order for a comment to be significant, the party "must present their concerns with sufficient precision and specificity to apprise the permitting authority of the significant issues."[24] "Generalized or vaguely enunciated concerns warrant no formal, particularized response and are not preserved for review on appeal."[25]

In *Citizens for Clean Air v. EPA,* a Clean Air Act case involving an application for an incinerator air permit, a commenter objected that "recycling" was not considered the best available control technology. As part of its comments, the commenter pointed out how recycling would reduce the pollution produced by the incinerator and supplied three studies on recycling.

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20 (emphasis added).

21 40 C.F.R. § 124.17(a)(2).

22 *Cf. Miller v. Safeway, Inc.*, 102 P.3d 282, 290 (Alaska 2004).

23 *Citizens for Clean Air v. EPA*, 959 F.2d 839, 845 (9th Cir. 1992) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC*, 535 U.S. 519, 553 (1978)).

24 *In re Pio Pico Energy Center*, 16 EAD ___ (Envir. App. Bd. 2013), slip op. at 36 (citations omitted). This decision is available online at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Case~Name/A73AC96F4C0E14CE85257BBB006800F2/$File/Pio%20Pico...36.pdf

25 *Id.* at 37.

In that case, the court nonetheless found the recycling comments were not significant, because the commenter did not submit any “hard evidence” showing the effectiveness of recycling in combination with the other technologies in use at the incinerator.[26] In *Northside Sanitary Landfill v. Thomas,* a case involving a hazardous waste site, the commenter provided 420 pages of geological studies, water quality evaluations, and correspondence regarding the site. The court found that information did not constitute a significant comment because the commenter did not specify why those documents were relevant to the rulemaking process.[27]

The present case contains less detail in the comment than either *Citizens for Clean Air* or *Northside Sanitary Landfill*. Point Hope did not explain how either of the technologies (oxygen displacement in the waste rock piles, or gas-phase modification) worked, and submitted no information regarding their effectiveness or application; nor was there other information in the record regarding these technologies. Given the dearth of information provided by Point Hope, its comment was not a significant one which required a response.

Point Hope, in its opening brief, argued that “DEC failed to respond or otherwise address” its comment.[28] In its reply brief, it argued that because DEC filed a response that was more than the one word “noted”, DEC was tacitly acknowledging that Point Hope’s comment was a significant one, which required a substantive response.[29] Point Hope’s logic is not persuasive. DEC’s response was non-responsive to the specific technology issue, merely stating that these issues had been raised in the Superior Court, where Point Hope had not prevailed. In other words, DEC was not providing a substantive response, nor did it deem one necessary. The limited response it provided was therefore not an acknowledgement that Point Hope’s comment was a significant one requiring a response.

V. Conclusion

DEC was only required to respond to significant comments. Because Point Hope’s comment was not a significant one, DEC’s failure to respond to it does not render the issuance of the APDES Permit invalid. Point Hope’s Motion for Summary Adjudication is DENIED, and Summary Adjudication is granted in favor of DEC, Teck, and NANA.

DATED this 19th day of June, 2014.

Signed

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[26] 959 F.2d 839, 847 – 48.

[27] 849 F.2d 1516, 1518 – 19 (D.C. Cir. 1988).

[28] Point Hope Motion for Summary Adjudication, p. 7.

[29] Point Hope Reply in Support of Motion for Summary Adjudication, p. 6.

Lawrence A. Pederson
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]