Case No. 11-70776

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF KIVALINA IRA COUNCIL, et al.
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

and

TECK ALASKA, INCORPORATED et al.,
Intervenors

On Petition for Review of an Order of the
United States Environmental Appeals Board

BRIEF FOR RESPONDENTS

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STATEMENT OF JURISDICTION

Pursuant to Section 402 of the Clean Water Act, 33 U.S.C. § 1342, the United States Environmental Protection Agency ("EPA" or the "Agency") has jurisdiction to issue National Pollutant Discharge Elimination System ("NPDES") permits authorizing the discharge of pollutants into the waters of the United States. On January 8, 2010, EPA Region 10 reissued a five-year NPDES permit ("Final Permit") to Teck Alaska, Incorporated ("Teck").

On February 16, 2010, pursuant to 40 C.F.R. § 124.19(a), Petitioners and five individuals petitioned the EPA's Environmental Appeals Board (the "Board") for review of the Final Permit. Based on the Board's Order denying the administrative petition, EPA's Regional Administrator for Region 10 issued a final permit decision on December 8, 2010, pursuant to 40 C.F.R. § 124.19(f)(1). This final permit decision constitutes final agency action for purposes of judicial review. 40 C.F.R. §§ 124.19(c) & (f). On March 18, 2011, Petitioners timely filed the instant Petition for Review. The Court therefore has jurisdiction to entertain the petition.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in Petitioners' addendum. Additional relevant statutes and regulations are attached to this brief.

ISSUE PRESENTED FOR REVIEW

Whether EPA's Environmental Appeals Board reasonably denied Petitioners' administrative petition for review, when Petitioners had failed to demonstrate with specificity, as expressly required by 40 C.F.R. § 124.19(a), why EPA's responses to their earlier comments to the Agency were clearly erroneous or otherwise warranted review by the Board.

STATEMENT OF THE CASE

This Petition for Review stems from a Clean Water Act discharge permit issued in January 2010 by EPA for the Red Dog Mine, a large zinc mine near Kotzebue, Alaska. The permit authorizes the effluent from the mine to be discharged into Red Dog Creek, which eventually flows into the Wulik River, from which the Native Village of Kivalina obtains fish and drinking water.

After commenting on the draft permit before the Agency, Petitioners filed an administrative petition for review with EPA's Environmental Appeals Board[1] that, among other things, challenged the permit's monitoring provisions. According to the Board's rules, Petitioners in their administrative petition were not allowed to simply repackage or restate the points that they had submitted to EPA as part of

[1] The Board exercises the authority of the EPA Administrator with regard to final internal review of permitting decisions, among other things. 40 C.F.R. § 1.25(e)(2). *See Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 44 n.3 (2d Cir. 1993) (Board "exercise[s] the Administrator's review authority"). The composition and functions of the Board are described in 40 C.F.R. § 1.25(e). *See also* 57 Fed. Reg. 5320 (Feb. 13, 1992) (creation of the Board).

their comments on the draft permit. Rather, under the applicable regulations and case law, Petitioners were obligated to directly address EPA's responses to comments and explain why those responses were clearly erroneous or insufficient, or why they otherwise warranted review by the Board. Thus, in the appellate-like setting of the Board, petitioners are not permitted to rely on their previous submissions to the Agency; they must make a clear showing as to why the agency has clearly erred.

In their administrative petition, Petitioners submitted a mere two-and-a-half pages to the Board that addressed the monitoring issues of concern. In contravention of the Board's rules, their presentation was so general that the Board was forced to "generously" interpret Petitioners' brief to understand the arguments they were making. Petitioners' vague, bare-bones submission did not engage EPA's responses to comments or attempt to explain why the Agency's responses were wrong. Rather, Petitioners merely repeated the points they had made in their comments on the draft permit.

On November 18, 2010, the Board denied Petitioners' administrative petition for failing to comply with 40 C.F.R. § 124.19(a), the regulation governing the process for appealing NPDES permits. As to each of the three arguments advanced by Petitioners concerning the permit's monitoring provisions, the Board correctly concluded that Petitioners had not complied with Section 124.19(a) by

not addressing EPA's responses to comments and not explaining why those responses were clearly erroneous, insufficient, or otherwise deserving of review.

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Water Act

Congress enacted the Clean Water Act ("CWA" or "Act") "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." *See* CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the CWA makes it unlawful for any person to discharge any pollutant into the waters of the United States from any point source, except as authorized by specified permitting sections of the Act. *See* CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). Section 402 establishes one of the CWA's principal permitting programs, the NPDES. Under Section 402, EPA may "issue a permit for the discharge of any pollutant, or combination of pollutants" so long as the requirements of the CWA and its implementing regulations are met. *Id.* NPDES permits generally contain discharge limitations and establish related monitoring and reporting requirements. *See* CWA § 402(a)(1), (2), 33 U.S.C. § 1342(a)(1), (2).

NPDES permits are issued by EPA or by a state agency subject to EPA review in those jurisdictions in which EPA has authorized a state agency to administer the NPDES program. *See* CWA § 402(a)-(d), 33 U.S.C. § 1342(a)-(d). On October 31, 2008, the State of Alaska obtained approval to administer the

NPDES program through the Alaska Department of Environmental Conservation ("ADEC"), with authority over specific program components to be transferred over a three-year period. Authority to administer the NPDES program for the mining sector transferred to the State on October 31, 2010, after the EPA permit action at issue here. In addition, under the transfer agreement between EPA and ADEC, for cases in which an appeal was pending on the date the program sector transferred, EPA retains permitting jurisdiction until that appeal is resolved administratively or judicially. Petitioners' permit appeal was pending before the Board on October 31, 2010. As such, EPA will retain jurisdiction over the Red Dog Mine NPDES permit until this matter is resolved.

B. The Part 124 Regulations

The implementing regulations for EPA's NPDES permit program are found in 40 C.F.R. Parts 122, 124, 125, 129, 133, 136 and 40 C.F.R. Subchapter N and Subchapter O. Of particular relevance here is Part 124, which contains procedures for EPA processing of NPDES permit applications and appeals.

Among other things, the Part 124 regulations provide that when EPA prepares a draft NPDES permit, it must be based on the administrative record, publicly noticed and made available for public comment. 40 C.F.R. §§ 124.6(e), 124.10. During the public comment period, any interested person may submit written comments on the draft permit. 40 C.F.R. §§ 124.11. In particular, the regulations

require that "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate . . . must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period . . . ." 40 C.F.R. § 124.13.

Following the close of the public comment period and after consideration of all comments received, the Regional Administrator issues a permit and provides notice of the decision and appeal procedures to the applicant and any person who submitted written comments. 40 C.F.R. §§ 124.11, 124.15. The permit is also accompanied by the Agency's "response to comments," which must:

> (1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and
>
> (2) Briefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing.

40 C.F.R. § 124.17(a).

Within 30 days after issuance of a final permit, "any person who filed comments on that draft permit or participated in the public hearing may petition the [Environmental Appeals] Board to review any condition of the permit decision." 40 C.F.R. § 124.19(a). Importantly, such a petition to the Board:

> . . . shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to

> the extent required by these regulations and when appropriate, a showing that the condition in question is based on:
>
> (1) A finding of fact or conclusion of law which is clearly erroneous, or
>
> (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

Id.

Within a reasonable time following the filing of the administrative petition for review, the Board must issue an order granting or denying the petition. 40 C.F.R. § 124.19(c).

In addition, when an administrative petition for review of a NPDES permit is filed, EPA's regulations provide that, contested permit conditions are stayed and are not be subject to judicial review pending final agency action. 40 C.F.R. § 124.16(a)(1).

Following Board review, the Regional Administrator must issue a final permit decision. 40 C.F.R. § 124.19(f)(1). For purposes of judicial review, final agency action occurs when a final permit decision is issued by the Regional Administrator and agency review processes under 40 C.F.R. § 124.19 are exhausted. *Id.*

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Red Dog Mine and Permitting History

Teck operates the Red Dog Mine pursuant to a contract with NANA Regional Corporation.[2] Respondents' Supplemental Excerpts of Record ("SER") 59. The mine is located in a sparsely populated area of northwestern Alaska in the DeLong Mountains, approximately 46 miles inland from the Chukchi Sea. SER 59. The nearest villages are Kivalina (approximately 50 miles to the southwest, population approximately 406), Noatak (approximately 30 miles to the south, population approximately 512), and Kotzebue (approximately 80 miles to the south, population approximately 3,126). The vast majority of the local population consists of native Inupiaq people.

Red Dog is an open pit mine that extracts lead and zinc from a surface ore body. The mine facility also includes a mill that processes the ore into concentrate. SER 6-7. To store wastewater and tailings (the finely ground waste rock separated during processing), Teck created a tailings impoundment by constructing a dam near the mouth of the South Fork Red Dog Creek. SER 60. The mine's wastewater becomes highly contaminated with metals through contact with the areas disturbed by mining, through use in the milling process, and through contact with the tailings in the impoundment. Prior to discharge, this wastewater is treated

[2] NANA Regional Corporation owns the underlying land and mineral rights.

to remove metals (primarily zinc, lead, iron and cadmium) using lime precipitation and sodium sulfide precipitation. SER 9, 61. This process introduces into the wastewater calcium and sulfate ions, which are constituents of total dissolved solids ("TDS"). SER 36, 62.

The mine is located within the headwaters of the Red Dog Creek system, which includes the South Fork, Middle Fork, North Fork, and Main Stem of Red Dog Creek. SER 6, 21-22. The tailings impoundment is located in the South Fork of Red Dog Creek. SER 60. The Middle Fork historically flowed directly across the surface deposit that is being mined, and as a result had very high metals concentrations in its natural condition. ER 2:256; SER 33. The mine discharges its treated wastewater to the Middle Fork Red Dog Creek downstream of the mine pit. Discharge occurs when the surface waters are not frozen, typically mid-May through mid-October. ER 2:257.

Approximately 1½ miles downstream of the outfall, the Middle Fork and North Fork converge and become the Main Stem. The Main Stem of Red Dog Creek is a tributary of Ikalukrok Creek, which ultimately enters the Wulik River. ER 2:258. The Wulik River is a sizeable river that flows into the Chukchi Sea near the Native Village of Kivalina. ER 2:258.

Because of natural ore bodies present in the vicinity of the mine, including the one presently being mined, some water bodies in the vicinity had very high

metals concentrations in their natural condition, prior to mining or any other human activity. As a result, not all of the area water bodies supported aquatic life, and the designated uses of the waters differ among various stream segments near the Mine. SER 8. Six species of fish have been observed in the Red Dog and Ikalukrok Creek systems. ER 2:260 (Table 3.10-2.) None has been historically observed in the Middle Fork, due to high natural metals levels resulting from the surface ore deposit through which it flowed. ER 2:256. Spawning occurs downstream of the mine's outfall at certain times and locations. ER 2:259-62.

As set forth in the administrative petition for review, one of the primary NPDES issues at Red Dog Mine since at least 2003 has been effluent limitations for TDS. TDS consists of inorganic salts and small amounts of organic matter dissolved in water. The principal constituents of TDS are carbonates, chlorides, sulfates, potassium, magnesium, calcium, and sodium. SER 47. Most of these ions are found in natural waters, typically at lower concentrations in fresh water and higher concentrations in marine waters, when compared to the concentrations in Main Stem Red Dog Creek below the mine's outfall.

As discussed above, the process of removing metals contamination from the mine's wastewater involves the addition of calcium and sulfate ions, which are two of the constituents of TDS. SER 63. The concentrations and quantities of TDS discharged by the mine do not cause TDS levels that exceed human health criteria

in any of the receiving waters that are used as human drinking water sources. SER 57-58, 63.

Red Dog Mine commenced operations in 1988. In compliance with the National Environmental Policy Act and 40 C.F.R. § 122.29, EPA issued an environmental impact statement in 1984, followed by the original NPDES permit in 1985. The permit was administratively extended upon expiration and was reissued in 1998.

In March 2007, EPA reissued the NPDES permit for the Red Dog Mine. After one Petitioner filed an administrative petition for review that raised NEPA compliance and other issues, EPA withdrew the 2007 permit. SER 1.

In October 2009, EPA completed a Supplemental Environmental Impact Statement that supports the permit and evaluates Teck's plan to develop the adjacent Aqqaluk ore deposit. On January 8, 2010, EPA issued both its Record of Decision and the Final Permit. SER 65-100 (entire version of Final Permit); 101-114 (entire Record of Decision; appendices omitted).

B. Petitioners' Administrative Appeal of the Final Permit

On February 15, 2010, Petitioners filed an administrative petition for review before the Board challenging multiple conditions in the Final Permit. The issues raised included alleged improper reliance on the State's Section 401 Certification, several topics concerning "backsliding" and antidegradation, alleged deficiencies

in the permit's monitoring conditions, and the permit's discharge location. ER 1:60-61. In particular, the petition focused on the State of Alaska's lack of antidegradation implementation procedures and associated implications for EPA's permitting decision. Petitioners submitted a 44-page Memorandum of Law along with their petition. ER 1:74.

While the administrative proceeding was pending, on March 8, 2010, EPA issued a notice identifying the contested permit conditions that were stayed by the petition for review, pursuant to 40 C.F.R. § 124.16. The stayed limits were those for lead (monthly average), selenium (daily maximum), zinc, weak acid dissociable ("WAD") cyanide, and TDS. EPA further noted that the limits from the 1998 NPDES permit would be in effect for those parameters. In addition, on March 17, 2010, EPA withdrew the contested effluent limitations pursuant to 40 C.F.R. § 124.19(d) and confirmed that the remainder of the Final Permit would be fully effective and enforceable on March 31, 2010.[3]

EPA filed motions to dismiss those portions of the administrative petition related to the withdrawn effluent limitations, that is, the entire administrative petition except for the challenge to the Final Permit's monitoring conditions. On

[3] Petitioners characterize this withdrawal as EPA's recognition of "impending defeat." Br. 4. To the contrary, because the State of Alaska had committed to developing antidegradation implementation procedures, EPA's withdrawal gave the Agency an opportunity to address Petitioners' antidegradation concerns prior to briefing on appeal. *See* SER 115.

April 30, 2010, the Board granted EPA's motions to dismiss. ER 1:23-36. The Board concluded that it would take under advisement and consider the remaining argument in Section II.C.3 of the administrative petition, involving Petitioners' challenge to the Final Permit's monitoring conditions.

C. The Board's Decision

On November 18, 2010, the Board rendered its decision, beginning its analysis by reviewing the regulations and other legal authorities applicable to whether Petitioners had adequately set forth a monitoring issue warranting Board review as required by 40 C.F.R. § 124.19(a). The Board, after noting that "the petitioner bears the burden of meeting certain threshold requirements including setting forth the basis for review," articulated the pertinent language of the regulation and summarized the relevant administrative and judicial case law. ER 1:14-16.

The Board noted that Petitioners' argument relating to the monitoring provisions was "only slightly more than two pages." ER 1:16. The Board quoted the one sentence that the Board interpreted as Petitioners' summary of the Region's response to comments, which the Board believed was also intended to summarize the issues Petitioners intended to challenge. ER 1:16 (quoting ER 2:70). The Board read "generously" from this summary and "assumed" that Petitioners

> intend to argue that Region 10 abused its discretion and committed clear error by: 1) failing to include monitoring requirements for compounds not governed by effluent limitations; 2) failing to include adequate bioassessment monitoring requirements in the 2010 NPDES permit; and 3) failing to require third-party monitoring.

ER 1:16-17.

First, as to the failure to include monitoring requirements for compounds not governed by effluent limitations, the Board began by observing that Petitioners had misstated EPA's position on the issue. ER 1:17. The Board next reviewed EPA's responses to comments on this issue, concluding that "[e]ach of the responses provide the Region's rationale for various effluent and ambient monitoring required or omitted, and Petitioners do not address this rationale at all, let alone sufficiently to explain why the Region's responses are irrelevant, erroneous, insufficient or otherwise constitute an abuse of discretion." ER 1:18 (citing *In re Chukchansi Gold Resort & Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05, 2009 WL 152741, Slip op.[4] at 22 (EAB Jan. 14, 2009)).

Second, the Board addressed Petitioners' argument that EPA has broad discretion under Clean Water Act Section 308(a)(A) to require the permittee to

[4] Because the electronic databases do not contain page numbers of the decisions with slip opinions, copies of the slip opinions are attached to this brief for the convenience of the Court.

retain a consultant for independent monitoring. After quoting EPA's response to comments on this issue, the Board concluded:

> Petitioners have not attempted to address the Region's response to comment in any meaningful way. Although Petitioners note that the Region has 'broad discretion' with respect to the monitoring provisions it imposes . . . Petitioners make no attempt to explain how the Region's adherence to the CWA's self-monitoring provisions, and its reliance on certification requirements and periodic EPA and State inspections to conclude that self-monitoring is appropriate in this case (even after taking into account a history of non-compliance) constituted an abuse of that discretion."

ER 1:19 (citing *Chukchansi*, 2009 WL 152741, Slip op. at 22).

Third, with respect to Petitioners' argument that EPA's bioassessment monitoring requirements have been transferred out of the permit or have been made unenforceable, the Court once again quoted at length EPA's response to comments on the topic. The Board then found that "Petitioners provide no explanation why the Region's response to comments regarding the bioassessment monitoring in the Final Permit is irrelevant, erroneous, insufficient or constituted an abuse of discretion." ER 1:20 (citing *Chukchansi*, 2009 WL 152741, Slip op. at 22).

Based on these conclusions, the Board determined that Petitioners had failed to meet their burden under 40 C.F.R. § 124.19(a) to adequately articulate why EPA's response to comments was clearly erroneous or otherwise warranted review. ER 1:20-21 (citing *Chukchansi*, 2009 WL 152741; *In re City of Pittsfield*, NPDES

Appeal No. 08-19, 2009 WL 582577, Slip op. at 7 (EAB Mar. 4, 2009)). The Board thus found no need to consider whether Petitioners failed to identify the permit conditions at issue in the first instance. ER 1:21 n.8.

On December 8, 2010, based on the Board's Order Denying Review and pursuant to 40 C.F.R. § 124.19(f)(1)(i), EPA issued a final permit decision. On March 18, 2011, Petitioners filed the instant Petition for Review concerning the Board's Order Denying Review of November 18, 2010.[5]

STANDARD OF REVIEW

A final agency decision may be overturned only if the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). *Adams v. EPA*, 38 F.3d 43, 49 (1st Cir. 1994); *see also Michigan Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 707 (6th Cir. 2003) (review of the Board's action is narrowly circumscribed). This is a highly deferential standard that presumes the validity of agency action and upholds that action if it satisfies minimum standards of rationality. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 412, 415 (1971); *Pan Am. Grain Mfg. Co. v. EPA*, 95 F.3d 101, 103-04 (1st Cir. 1996). In reviewing an agency's interpretation of its own regulations, the courts give "controlling weight" to the agency's interpretation "unless it is plainly erroneous or inconsistent with the regulation."

[5] On April 25, 2011, EPA reissued the withdrawn permit limits for public comment.

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (internal quotations and citations omitted); *see also Martex Farms, S.E. v. EPA*, 559 F.3d 29, 32 (1st Cir. 2009) (high deference to EPA's interpretation of own regulations); *Penobscot Air Serv., Ltd. v. FAA*, 164 F.3d 713, 721 (1st Cir. 1999) (agency regulations that effectuate statute are entitled to *Chevron* deference); *Adams v. EPA*, 38 F.3d at 49 ("deference increases when the agency interprets its own regulations").

This Court's standard of review is also informed by the standard of review applied by the Board. EPA's regulations and the Board's precedent place the burden on a petitioner to demonstrate that review of a permit is warranted to correct "clearly erroneous" findings of fact or conclusions of law, or to resolve an important matter of policy or exercise of discretion. *See* 40 C.F.R. § 124.19(a)(1); *In re Am. Soda, LLP*, 9 E.A.D. 280, 286 (EAB 2000). Thus, the specific standard of review in this case is whether the Board acted arbitrarily or capriciously in determining that Petitioners failed to meet their burden of showing clear error by EPA in issuing the permit.

SUMMARY OF THE ARGUMENT

Under the applicable regulations, Petitioners were required to submit an administrative petition for review demonstrating to the Environmental Appeals Board that EPA's responses to comments the Agency had received were either clearly erroneous or otherwise warranted review. 40 C.F.R. § 124.19(a). Under

those regulations, the administrative petition could not simply refer to or rely on the original comments previously submitted to the Agency, just as on appeal to a federal appellate court a party may not simply resubmit its district court briefs and ask the court to rule. Rather, Petitioners were obligated to submit to the Board specific information and provide reasons explaining why EPA had clearly acted improperly or unlawfully as to the monitoring provisions in the NPDES permit for the Red Dog Mine, and why EPA's specific responses to comments on monitoring issues were insufficient.

Instead of complying with these established procedural rules, Petitioners presented a bare-bones, two-page submission on several monitoring issues that was dedicated principally to making generalized arguments about their position and simply referencing previously submitted comments. As the Board recognized, these two pages contained only vague statements about three issues related to the permit's monitoring provisions. Notably, Petitioners merely provided four citations to EPA's responses, but never addressed EPA's responses in any detail; neither did they explain in any way their bases for contending that those responses were clearly erroneous, improper, irrelevant or insufficient, or that they otherwise warranted review. Accordingly, the Board properly denied their petition for failure to comply with clearly articulated regulations that required significantly more.

ARGUMENT

Petitioners argue that the Board abused its discretion and acted arbitrarily and capriciously in denying review of the NPDES permit's monitoring provisions. Petitioners argue that they complied with 40 C.F.R. § 124.19(a) by identifying the monitoring conditions at issue and why EPA's responses to comments warranted review. For the reasons set forth below, Petitioners' argument lacks merit. The petition for review should be denied.[6]

I. A PETITION FOR ADMINISTRATIVE REVIEW OF A NPDES PERMIT MUST SHOW WHY EPA'S RESPONSES TO COMMENTS WERE INSUFFICIENT AND MAY NOT RELY ON THE ORIGINAL COMMENTS TO THE AGENCY

The regulations governing the administrative appeals process before EPA's Environmental Appeals Board are clear: a petition for administrative review of an EPA permitting decision must *demonstrate* to the Board the error of the Agency's decision or explain why the permitting decision otherwise warrants the Board's review. 40 C.F.R. § 124.19(a). Mere restatement of arguments or comments made to the Agency before issuance of the permit are insufficient. Here, the Board concluded that Petitioners' administrative submission did not comply with the regulation because "Petitioners have not identified any Permit condition warranting

[6] Petitioners allege that they have standing. Br. 23-32. Respondents do not dispute the standing of Petitioner Native Village of Kivalina IRA Council. Accordingly, the Court need not inquire as to the standing of the other Petitioners.

review." ER 1:21. That conclusion was neither arbitrary nor capricious and must be upheld.

Petitions for administrative review of NPDES permits are governed by the Part 124 regulations summarized above, Board decisions interpreting those regulations, and federal court decisions. The pertinent language of the regulation is:

> The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:
>
> (1) A finding of fact or conclusion of law which is clearly erroneous, or
>
> (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a); *see also Citizens for Clean Air v. EPA*, 959 F.2d 839, 845 (9th Cir. 1992).

Petitioners correctly note that the Board has interpreted this requirement as mandating two things: (1) clear identification of the conditions in the permit that petitioners challenge, and (2) argument demonstrating that those conditions warrant the Board's review. Br.[7] at 33 (citing ER 1:15.) This Court has observed that, under this regulation, the burden shifts to petitioners to establish the

[7] Citations to "Br." refer to Petitioners' Opening Brief, filed June 4, 2011. Docket # 20.

requirements necessary to obtain administrative review. *See, e.g., Citizens for Clean Air*, 959 F.2d at 845.

The Board has interpreted Section 124.19(a) to mean that "it is not enough to simply rely on previous statements of [a petitioner's] objections, such as comments on a draft permit; a petitioner must demonstrate why the [r]egion's response to those objections (the region's basis for its decision) is clearly erroneous or otherwise warrants review." ER 1:15 (citing *In re: Chukchansi*, 2009 WL 152741, Slip op. at 9; *In re City of Pittsfield*, 2009 WL 582577.) Indeed, in its Order Denying Review of the petition at issue, the Board cited a number of cases in which it previously denied review of petitions that failed to address the permitting authority's responses to comments. ER 1:15-16 (citing *In re Cherry Berry B1-25 SWD*, UIC Appeal No. 09-02, 2010 WL 3258139 (EAB Aug. 13, 2010)); *Chukchansi*, 2009 WL 152741, Slip op. at 9; *City of Pittsfield*, 2009 WL 582577, Slip op. at 7; *see also In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001); *In re Newmont Nev. Energy Inv.*, LLC, 12 E.A.D. 429, 472 (EAB 2005).

Decisions of federal appellate courts have consistently affirmed the Board's interpretation of 40 C.F.R. § 124.19(a). *See City of Pittsfield v. EPA*, 614 F.3d 7 (1st Cir. 2010) (affirming the Board's denial of the petitioner's administrative petition for review based on Section 124.19(a)); *LeBlanc v. EPA*, 310 Fed. Appx.

770 (6th Cir. 2009) (affirming the Board's denial of the petitioners' petition for review for failure to meet their burden under 40 C.F.R. § 124.19); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705 (6th Cir. 2003) (affirming the Board's denial of the petitioner's administrative petition for failure to meet its burden under Section 124.19(a)).

Federal appellate courts have further upheld the Board's consistent interpretation of its regulations such that "a petitioner may not simply restate its original comments in order to be granted review without demonstrating why the Region's response was clearly erroneous or otherwise warranted review." *LeBlanc*, 310 Fed. Appx. at 775 (citing *Newmont Nev. Energy Inv.*, 12 E.A.D. at 472); *see also City of Pittsfield*, 614 F.3d at 13 (finding that petitioner's administrative submission was deficient because, among other things, it did not "engage the EPA's initial response to its draft comments"); *Mich. Dep't of Envtl. Quality*, 318 F.3d at 708 (noting the Board's rule that "a petitioner may not simply restate or refer to its original comments in order to be granted review."). Rather, an administrative petition to the Board must contain a "showing" that the permit condition in question is based on: (1) a clearly erroneous finding of fact or legal conclusion or (2) an exercise of discretion or an important policy consideration that the Board should review in its discretion. This "showing" requires an affirmative

demonstration of "why the Region's detailed responses to [a petitioner's] comments were clearly erroneous." *Id*.

II. PETITIONERS DID NOT ADDRESS EPA'S RESPONSES TO COMMENTS IN THEIR ADMINISTRATIVE PETITION FOR REVIEW AND THUS DID NOT COMPLY WITH THE REQUIREMENTS OF 40 C.F.R. § 124.19(a)

Petitioners here do not dispute the legal principles articulated by the Board or federal courts that have interpreted 40 C.F.R. § 124.19(a). Rather, Petitioners argue that the Board "ignored" their compliance with the regulation and that the cases in which federal courts of appeal have affirmed Board denials based on the same regulation are factually distinguishable. Br. 32-33, 40-42. These arguments are without merit.

A. Reduced Monitoring and Reporting

Petitioners argue that the Board acted arbitrarily and capriciously, and abused its discretion, by not considering the historical monitoring required in earlier permits issued to Teck or Teck's intentional efforts to dilute the effluent from the Red Dog Mine at Outfall 001 with fresh water from Bons Creek. Br. 38.

This argument is baseless. As discussed above, it was not the Board's responsibility to consider the generalized argument asserted in the single paragraph of the administrative petition dedicated to this argument. Rather, Petitioners had the burden to "engage the EPA's initial response to its draft comments" and to

affirmatively demonstrate to the Board "why the Region's detailed responses to its comments were clearly erroneous." *Mich. Dep't of Envtl. Quality*, 318 F.3d at 708.

In their administrative petition, Petitioners dedicated only one paragraph to the issue of reduced monitoring and monitoring for compounds not governed by permit limits. The paragraph argues only that EPA has the *authority* to require monitoring of the mine's effluent and ambient conditions under Clean Water Act Section 308(a)(A), and asserts that the Agency abused its discretion by not requiring such monitoring. ER 2:70-71. Significantly, this paragraph does not grapple with – indeed, it does not even mention – EPA's response to comments in which the Agency set forth a detailed rationale for its decision to eliminate certain monitoring requirements – including the fact that the permit's limits on Whole Effluent Toxicity ("WET") would "account for the toxic effect of parameters that may not [otherwise] have been limited," or that influent monitoring "is irrelevant to determining permit compliance and effects on the receiving waters," or that there already exists a long-term record of background conditions throughout the watershed. ER 2:251. In short, Petitioners failed to "engage" EPA's detailed responses or to make any showing as to why those responses are clearly erroneous. Rather, they simply alleged that EPA has the authority to require monitoring for pollutants not specifically limited in the permit. However, the fact that EPA may have the authority to require certain monitoring does not even begin to address the

issue of whether EPA abused its discretion in declining to exercise this authority, for the reasons that EPA articulated in its response to comments. The Board thus reasonably concluded that Petitioners had not properly addressed EPA's rationale for the effluent and ambient monitoring required or omitted in the Final Permit.[8] ER 1:18.

B. Removal of Biomonitoring Provisions

Petitioners next argue that the Board "completely ignored" their argument regarding EPA's authority to enforce water quality standards, EPA's concession that biomonitoring in a state permit was not federally enforceable, and Teck's history of violations and manipulation of monitoring data. Br. 39.

Petitioners' argument on this issue should be rejected. In their comments to the Agency, Petitioners proposed that EPA keep all biomonitoring, rather than "dramatically scaling back the bioassessment monitoring." SER 64. In its responses, EPA explained that these bioassessment monitoring requirements were initially required by the State in the 1998 Section 401 Certification, but are not required by the current Section 401 Certification. ER 2:247. Thus, EPA concluded that it was "appropriate to follow the State's recommendations since the

[8] On this issue, Petitioners' argument was rejected by the Board partly because it was not accurate. Petitioners had erroneously alleged that EPA stated in its comments that "the only monitoring necessary is that which ensures compliance with the Permit's effluent limitations." ER 1:17 (quoting ER 2:70). EPA simply never took this position. Petitioners' argument, therefore, was based on an incorrect premise.

State initially included bioassessment requirements in the CWA § 401 Certification of the 1998 Permit and has had the primary responsibility for reviewing the bioassessment data collected to date." ER 2:250. The Region further pointed out that several bioassessment monitoring requirements were indeed retained in the 2010 NPDES permit and remain enforceable under the Clean Water Act. ER 2:250. These requirements "are intended to assure that the conditions of the Final Permit are protective of aquatic life in the receiving water." ER 2:250.

In their administrative petition on this issue, Petitioners included a single, two-sentence paragraph concerning the removal of biomonitoring provisions. That paragraph failed to adequately address EPA's responses to comments or demonstrate to the Board why the Agency's decision not to require biomonitoring as a permit condition was clearly erroneous.

Petitioners' mere reference to EPA's response to comments did not challenge the Agency's rationale, nor did Petitioners explain why EPA's response was clearly erroneous. Rather, Petitioners cited EPA's response to comments solely to support its argument that "the biomonitoring is not actually being reduced, just made unenforceable under the CWA by transferring the bulk of biomonitoring requirements to the state solid waste permit." ER 2:71. In other words, Petitioners cited EPA's response to comments to explain the provisions of the Final Permit, but Petitioners never challenged the substance of EPA's response

or its stated reasoning, other than to argue that various statutory provisions gave the Agency the authority to ensure that the mine complies with CWA Section 303 water quality standards. ER 2:71. Again, as discussed above, the fact that EPA may have the authority to require biomonitoring does not address the issue whether EPA abused its discretion in declining to exercise this authority for the reasons detailed in its response to comments.

Petitioners' contention that the Board ignored their argument concerning EPA's authority is not dispositive because Petitioners had the burden to show that the Agency's rationale, as set forth in the response to comments, was insufficient or clearly erroneous. Petitioners clearly did not make that showing with respect to the argument on biomonitoring provisions. Given these facts, the Board properly concluded that "Petitioners provide no explanation why the Region's response to comments regarding the bioassessment monitoring in the Final Permit is irrelevant, erroneous, insufficient or constituted an abuse of discretion." ER 1:20.

C. Third-Party Monitoring

Petitioners' next argument to the Board was, since Section 308(a)(4)(A) of the Clean Water Act *authorize* EPA to require monitoring, EPA necessarily erred by failing to require Teck to pay for a third-party monitor. They contend (erroneously) that the Board failed to acknowledge this argument. Br. 39-40. The record, however, shows that the Board *did* acknowledge Petitioners' argument, but

properly rejected it because Petitioners did not even attempt to demonstrate to the Board that EPA's failure to exercise its discretionary authority to require such monitoring in this case was clearly erroneous.

As discussed above, the regulation and relevant case law are clear that the burden is on the Petitioners to identify in an administrative petition a relevant permit condition and to show in that petition why EPA's response to comments on that issue is insufficient or clearly erroneous. Again, Petitioners merely pointed out that the Agency did not exercise its Section 308(a)(A) discretion to require a permittee to perform such monitoring. ER 2:71.

The Board reasonably concluded that Petitioners had failed, and in fact had not even attempted, to address EPA's response to comments in any meaningful way. ER 1:18-19. Indeed, Petitioners' argument on this point (both before the Board and before this Court) merely states the obvious: that EPA has authority to ensure, by monitoring or otherwise, that the mine complies with water quality standards under Clean Water Act Section 303. ER 2:71 (citing 33 U.S.C. §§ 1318(a)(A), 1341(a)(1)). As support for this proposition, Petitioners relied on a statement made by EPA in its response to comments, but did not address that response in the context of the specific comment raised. ER 1:17 (footnote 191).

Thus Petitioners never explained how EPA's response to the specific comment raised was deficient. Nor did Petitioners explain how EPA's decision not

to require such monitoring was clearly erroneous in the context of the permit. These failures are fatal to their petition.

The Board also correctly concluded that Petitioners made no attempt to rebut EPA's position that reliance on the Clean Water Act's self-monitoring provisions, as well as the certification requirements and periodic EPA and State inspections, would be appropriate in this case to ensure compliance with water quality standards, even after taking into account Teck's history of noncompliance.[9] Petitioners simply did not present any rebuttal to EPA's response to comments sufficient to satisfy their burden as required by 40 C.F.R. § 124.19(a) and the relevant case law.

D. Relevant Cases Support the Board's Decision

Petitioners argue that *Michigan Department of Environmental Quality v. EPA*, 318 F.3d 705 (6th Cir. 2003), and *City of Pittsfield v. EPA*, 614 F.3d 7 (1st Cir. 2010), "starkly contrast[]" with the instant petition. Br. 40-42. Petitioners are incorrect. To the contrary, those two cases, as well as other federal appellate and Board precedent, support the Board's decision in this case.

[9] Respondents do not dispute that Teck has had a history of noncompliance. However, that issue is not relevant to the question before the Court, which is whether the Board correctly concluded that Petitioners did not adequately explain in their administrative petition why EPA's responses to comments were clearly erroneous or otherwise insufficient.

In *Michigan Department of Environmental Quality*, the petitioner submitted to the Board a four-and-a-half-page administrative petition for review, in which that petitioner argued that EPA's actions in issuing a NPDES permit were unauthorized. 318 F.3d at 708. The petitioner referred the Board to two appendices that contained EPA's final discharge permit, the petitioner's comments on EPA's draft permit along with the original attachments to the comments, and EPA's detailed responses to the comments. *Id.* The Board denied the petition, holding that a petitioner may not simply restate or refer to its original comments. *Id.*

On appeal, the Sixth Circuit held that the Board did not abuse its discretion in denying the administrative petition under Section 124.19(a) and prior Board precedent. *Id.* The court noted that, "[i]nstead of explaining to the Board why the Region's detailed responses to its comments were clearly erroneous, Michigan simply repackaged its comments and the EPA's response as unmediated appendices to its petition to the Board. This does not satisfy the burden of showing entitlement to review." *Id.*

Petitioners in the instant case did even less than Michigan to comply with Section 124.19(a). Petitioners here submitted only two pages of argument to the Board concerning the three monitoring issues that they raised, and the Board found it necessary to read the petition "generously" even to discern an understandable

argument based on a one-sentence summary. In contrast, the *Michigan Department of Environmental Quality* petitioners had presented more than twice the amount of argument (four-and-a-half pages) and apparently had no problem making clear the points that they intended to raise. Petitioners in the instant case made scant reference to EPA's responses to comments in their arguments concerning the monitoring provisions, merely citing the Agency's responses in four footnotes. Notably, Petitioners failed to address in any way EPA's detailed responses on each monitoring issue that Petitioners raised in comments. Because the Sixth Circuit in similar circumstances upheld the Board's dismissal of a four-and-a-half-page argument that sought to "repackage" the petitioner's original comments, it follows that this Court should also uphold the Board's dismissal of a two-page argument that barely mentioned, much less demonstrated the error of, EPA's responses to comments.

Similarly, in *City of Pittsfield*, the petitioner sought administrative review of a NPDES permit based only on a one-page letter to the Board and a copy of the comments the petitioner had submitted to the Agency during the public comment period on the draft permit. 614 F.3d at 8, 10. The Board denied the petition on the ground that petitioner did not specify which permit conditions it was challenging before the Board and did not explain why the challenged limits were "unachievable," let alone "clearly erroneous." *Id.* at 13.

The First Circuit upheld the Board's denial, based on its review of the applicable case law interpreting 40 C.F.R. § 124.19(a). 614 F.3d at 11-12. In addressing the petitioner's interpretation of the regulation, the court noted that the Board, like federal appellate courts, should not be required to "'ferret out and articulate the record evidence considered material to each legal theory advanced on appeal.'" *Id.* at 12 (quoting *Conto v. Concord Hosp., Inc.*, 265 F.3d 79, 81 (1st Cir. 2001)). With that principle in mind, the court observed that the petitioner "made no effort in its petition to the Board to engage the EPA's initial response to its draft comments." *Id.* at 13. The First Circuit went on to describe how the petitioner failed to address EPA's position as to all of the issues that petitioner intended to raise. *Id.* (noting that "the city did not explain why it disagreed with either the EPA's calculations of those limits or the data on which the EPA relied in reaching them"). Thus the Court upheld the Board's denial of the administrative petition for review.

As in *City of Pittsfield*, Petitioners in this case "made no effort in [their] petition to the Board to engage the EPA's initial response to [their] draft comments." *Id.* While the *City of Pittsfield* petitioner merely attached its comments to a one-page letter to the Board, Petitioners effectively did no more here – their administrative petition contained just two pages of discussion of the permit's monitoring provisions and included only four footnoted citations to EPA's

responses to comments. As in *City of Pittsfield*, the Petitioners in the instant case made no effort to address EPA's comments or to explain why those responses were clearly erroneous. The two pages of argument here contain little more than conclusory statements and rehashed arguments from Petitioners' own comments on the draft permit. Petitioners' administrative submission concerning the monitoring requirements in this case is thus analogous to the petitioner's submission in *City of Pittsfield*.

Petitioners also fail to account for the numerous other cases interpreting 40 C.F.R. § 124.19(a), each of which amply justifies the Board's decision to deny review where petitioners failed to address EPA's responses to comments or explain why those responses were insufficient or clearly erroneous. *See, e.g.*, *LeBlanc v. EPA*, 310 Fed. Appx. at 775 (denying petition for review of the Board's conclusion that the petitioner did not satisfy Section 124.9(a) where the petitioners "merely restated their grievances regarding subsurface and mineral property rights without offering any reasons why the Region's responses were clearly erroneous or otherwise warranted review"); *In re Cherry Berry B1-25 SWD*, 2010 WL 3258139 (denying petition in part because it consisted of the comments previously submitted on the draft permit; the petitioner failed to demonstrate why the permit issuer's response to those objections was clearly erroneous or otherwise warranted review); *In re City of Pittsfield*, NPDES Appeal No. 08-19, 2009 WL 582577, Slip

op. at 7 (EAB Mar. 4, 2009) (noting that "a long and consistent line of Board authority has required that petitioners do more than cite, attach, incorporate, or reiterate comments previously submitted on the draft permit . . . [t]hey must instead *explain why* the Region's response to those comments is clearly erroneous or otherwise warrants review") (emphasis in original); *Chukchansi*, 2009 WL 152741, Slip op. at 25 (denying review as to one argument under Section 124.19(a) on the ground that the petitioner "provides no further argument and no legal or factual basis for this alternative request"); *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 733 (EAB 2006) (noting that, under 40 C.F.R. 124.19(a), "to obtain review of a permit decision, petitioners must include specific information in support of their allegations to demonstrate why the permit issuer's response to the petitioner's comments below (i.e., the permit issuer's basis for its permit decision) is clearly erroneous, an abuse of permitting discretion, or otherwise warrants review").

Each of these authorities supports the proposition that 40 C.F.R. § 124.19(a) requires a petitioner to include in its petition a demonstration of why EPA's response to comments was clearly erroneous or otherwise deserving of review. Petitioners' two-page submission on the topic of the Red Dog Mine permit's monitoring provisions did not include any such discussion of EPA's response to comments. Rather, the two pages made a mere four references to EPA's responses

to comments without any explanation of why the responses were insufficient. In light of the Agency's regulations as well as the federal and Board jurisprudence interpreting those regulations, this Court should conclude that the Board did not act arbitrarily or capriciously or abuse its discretion in denying Petitioners' petition for administrative review, due to Petitioners' failure to comply with the requirements of Section 124.19(a).

CONCLUSION

For the foregoing reasons, the Court should deny the Petition for Review.

Respectfully submitted,

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Dated: July 14, 2011

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

I certify that, pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points, and contains 7,892 words, exclusive of those parts of the brief exempted by Rule 32(a)(7)(B)(iii). I have relied on Microsoft Word's calculation feature.

Date: July 14, 2011 */s/ Paul Cirino*

STATEMENT OF RELATED CASES

The Respondents are not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

On July 14, 2011, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

I certify that counsel for all parties in this case are registered with the Ninth Circuit CM/ECF system and that service will be accomplished by the CM/ECF system.

Date: July 14, 2011 */s/ Paul Cirino*