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ENVIR. APPEALS BOARD

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

In the Matter of:	)	
	)	
	)	Appeal No. NPDES 03-10
HECLA MINING COMPANY,	)	
LUCKY FRIDAY MINE	)	<b>MOTION FOR LEAVE TO</b>
NPDES Permit No. ID-000017-5	)	<b>FILE SURREPLY</b>
	)	
	)	
	)	
	)	

**I. INTRODUCTION**

By this motion, Region 10 of the U.S. Environmental Protection Agency ("Region") respectfully requests that the Environmental Appeals Board ("EAB" or "Board") grant it leave to file a Surreply responding to the Reply Brief in Support of Petition for Review ("Reply") submitted by the Hecla Mining Company ("Hecla" or "Petitioner") on January 20, 2004. The Region requested, but was denied, permission by Hecla to request such leave through an unopposed motion. A copy of the Surreply which the Region is requesting leave to file is attached hereto as Exhibit A.

**II. PROCEDURAL BACKGROUND**

On September 10, 2003 Hecla filed a Petition for Review and supporting materials seeking EAB review of NPDES Permit No. JD-000017-5 (the "Permit"). On October 31, 2003,

the Region filed a Response to Hecla Mining Company's Petition For Review together with various supporting materials. On January 13, 2004, the Board granted an unopposed motion by Hecla for leave to file a reply brief, and, on January 20, 2004, counsel for the Region received a faxed copy of Hecla's Reply. The Region today seeks leave to file a surreply that responds to a number of new arguments and authorities cited in the Reply.

### III. STANDARD FOR GRANTING LEAVE TO FILE SURREPLY

Although the rules governing NPDES permit appeals do not specifically provide for the filing of replies or surreplies, the EAB Practice Manual allows petitioners to seek leave to file a reply brief upon "motion explaining why a reply brief is necessary." EAB Practice Manual at 36. Motions for leave to file a reply brief "should be filed as soon as possible upon receipt of the permitting authority's response, since the timeliness of the motion may be a factor in the Board's consideration of whether to grant it." *Id.* A review of the Board's decisions indicates that the Board has similarly granted permission for permitting authorities and intervenors to file surreplies and rebuttal briefs unless it appears that the issues before it had "been adequately briefed and that further briefing [would] not materially assist the Board in its understanding of the issues." *See, e.g., In re Sumas Energy 2 Generation Facility*, PSD Appeal Nos. 2-10 & 2-11, at 7 (EAB, March 25, 2003); *In re Mille Lacs Wastewater Treatment Facility*, NPDES Appeal No. 01-16, at 7 (EAB, September 3, 2002).

### IV. DISCUSSION

The Region believes that the Surreply attached hereto would materially assist the Board in its understanding of the new issues presented in Hecla's Reply. In large part, Hecla's Reply simply restates arguments made previously in comments submitted on the 2001 and 2003 draft

permits or in Hecla's Petition, and the attached Surreply refrains from restating the responses to these arguments that previously appeared in the Region's response to comments document and in the response brief filed with the Board. However, the Reply also references a number of new cases and additional documents which the Region believes deserve closer scrutiny. For example, the Hecla references a 2002 EPA guidance document for the first time in the Reply to support its contentions that the Permit's water quality-based effluent limitations and monitoring requirements for mercury are clearly erroneous and an abuse of discretion. The Reply also cites federal judicial and EAB decisions in support of new arguments that the Region bears the burden of proof to prove the existence of a hydrologic connection and that Idaho's certification letter is ambiguous and therefore warrants review. The Surreply — if leave to file is granted — would assist the Board in understanding the Region's rationales for contending that these new arguments and authorities do not warrant remanding the Permit.

This motion is being filed only ten days after counsel for the Region received a copy of the Reply, and review of the attached eight-page Surreply should not significantly prolong the Board's review of Hecla's Petition.<sup>1</sup>

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<sup>1</sup> On January 27, 2004, counsel for the Region sought telephonic approval from Hecla to file this motion unopposed, but such permission was denied.

## V. CONCLUSION

For all of the foregoing reasons, EPA Region 10 respectfully requests that the EAB grant the Region leave to file the Surreply attached hereto as Exhibit A.

Dated this 30<sup>th</sup> day of January, 2004.

Respectfully submitted,



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