

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
324 East 11th Street
Kansas City, Missouri 64106

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In the Matter of:)
HECLA MINING COMPANY,)
Permittee)
Docket No. X-WP-77-22

Marvin E. Jones
Administrative Law Judge

ORDER Granting EPA Motion to Dismiss

COMES NOW Permittee, Hecla Mining Company, by and through its attorneys, and moves for an Order setting the above-entitled matter for an evidentiary hearing concerning legal and factual issues in the record, including the issues of Permittee's request for variance at the Star Morning Mine for Discharge Points 001 and 002; and further moves for an Order requiring the Environmental Protection Agency (EPA) to rescind its current permit-issuing proceedings which were instigated by the Agency on May 9, 1983, with the formal issuance of a draft water discharge permit, on the grounds that EPA is attempting to circumvent these adjudicatory proceedings prior to a hearing, and without good cause, after the agency, in 1977, granted Hecla's request for said hearing.

The above mentioned hearing process has been in progress since October 7, 1977, when Permittee requested and was granted an adjudicatory hearing on a water discharge that involved Hecla's Lucky Friday and Star Morning Mines. The latter mine has two discharge points known as 001 and 002. Permittee, on January 2, 1979, requested a variance (for Star Morning) from new effluent limitation guidelines promulgated July 11, 1978, on the grounds that the facility was fundamentally different from the operations used by EPA to develop said guidelines.

The October 31, 1977, Permit (ID-000016-7, Star Morning facility), covers two outfalls. Permittee seeks a variance from mill guidelines for Outfall 001 for cyanide and copper, and an adjustment of pH; for Outfall 002, a variance from mine guidelines for zinc limitation is requested, claiming that it is using BPCTCA at Outfall 001 and it is still not possible to meet said July 11, 1978, guidelines. With respect to Outfall 002, it is claimed that no logical relationship exists between the cost and the benefits of further reducing the concentration of zinc beyond that achieved by a reasonable effort exerted to date.

Region X, EPA, first sought dismissal of both proceedings on May 29, 1979, which Motion was taken under advisement on June 4, 1979, with the Order that "after modification is completed, EPA shall renew its said Motion . . . "

On August 7, 1980, EPA modified the Star Morning Permit, generally directed to effluent limitations there provided^{1/}, but also changing the "termination date" to June 30, 1981^{2/} (pursuant to 40 CFR 122.64[a]) and "upset provision" (utilizing language in Section 122.60[h]).

In a later Motion to Dismiss, filed August 28, 1980, EPA stated that "following a decision on Hecla's variance request (Hecla) could then request an adjudicatory hearing if . . . still aggrieved", citing GC Decision No. 34, in re Public Service Company of Indiana (November 2, 1975), and 40 CFR 124.64(b), 45 FR 33289, 33497, November 19, 1980.

At a prehearing conference held in Spokane, Washington, on March 15, 1979, Hecla pointed out that the effluent limitations in the final permit were based on Interim Guidelines (for Ore Mining and Dressing Point Source Category) effective at time of permit issuance, and requested a stay of proceedings until Final Effluent Guidelines were issued, in the belief that the outstanding issues would there be resolved.

Hecla joined in the action before the USCA, 10th Circuit, in 1978 and 1979 (Kennecott Copper vs. EPA, 612 F2d, 1232, l.c. 1238-1244 [1979]), and after its petition for reconsideration on December 12, 1978, in which it requested withdrawal of copper and cyanide effluent limitations, the cyanide limitations were withdrawn but the copper limitations were not. The argument made for its challenge to effluent limitations (in Kennecott) are essentially those made in Hecla's subject variance request. The Court upheld the effluent limitations, here in issue, with the suggestion that, if data and experience demonstrate the facilities are fundamentally different, a variance may be applied for, as was done by Hecla, as aforementioned. The record in Kennecott demonstrated an adequate consideration of treatment costs (by EPA) for the lead and zinc category (l.c. 1241[13]) and said effluent limitations were upheld.

I have considered the provisions of 40 CFR 124.86 and find that the regulations alluded to and relied upon by EPA should be here applied for the reason that such is required to carry out the purpose of the Clean Water Act, and I further find that Hecla will not be unduly prejudiced thereby. The permits here under consideration have been in effect for a period in excess of that contemplated during the course of this proceeding (see Footnote ^{2/}, *supra*). During this period, approaching six years, the subject Permit provisions have been stayed. Though both of

^{1/} Of the limitations addressed in the variance request, dated January 2, 1979, only the copper limitation on the 001 discharge and the zinc limitation on the 002 discharge were left in issue.

^{2/} The permits issued September 30, 1977, originally provided an expiration date of December 31, 1980; in its Request for an Adjudicatory Hearing, Hecla urged that the termination dates in the permits "should be October 31, 1982". The Fact Sheet provided a termination date, for both Permits, on June 30, 1982.


the parties herein have been slow in keeping the instant record fully advised, it is apparent that the parties have conferred and have been advised respecting the progress of events bearing on this case^{3/}. It is now clear on the record that Star Morning was closed, and permanently so. It is further clear that economic conditions indicate the feasibility of its being reopened. For this reason, it would appear appropriate that the permits provide for two sets of parameters, one each for a "shutdown" and "operating" mode (page 6, Hecla Motion, supra; page 2, Hecla letter, dated May 6, 1983). Further, EPA announced, on July 1, 1982, its tentative decision, before said closing, to approve the FDF variance for discharge 002 (Star Morning) and to reissue a permit therefor with higher zinc limits. EPA then requested information need for its determination on the variance requested for Discharge 001.

Though the variance for Star Tunnel (001) was withdrawn, and the variance for 002 has now been denied, EPA has stated its intention that its decision on the variance requests will be incorporated in the new permit (John Y. Hohn letter, February 7, 1983, addressed to the Administrative Law Judge).

In the premises, I find that the Motion of Hecla should be and it is hereby denied and the MOTION TO DISMISS of EPA should be and it is hereby granted and withdrawal by the Regional Administrator of the subject permit, issued originally in 1977, is hereby approved, with the provision that said withdrawal of Permit ID-000016-7 and the formal issuance of said new permit, under current permit-issuing proceedings, shall coincide in point of time so that Permittee shall experience no gap between the withdrawal of said original permit and issuance of the new permit.

It is so ORDERED.

DATED: June 13, 1983



Marvin E. Jones
Administrative Law Judge

^{3/} A chronological listing of various actions herein, including the aforementioned, appear in a Status Report written by John Underwood and forwarded to John Hamill, Attorney, on January 13, 1983, and furnished to interested parties as an attachment to a letter to the Administrative Law Judge on February 7, 1983; a listing also appears in Attachment 2 to EPA Motion, dated May 26, 1983.

CERTIFICATE OF SERVICE

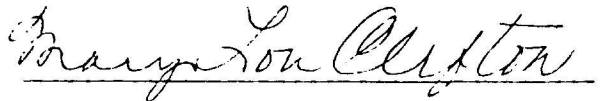
I hereby certify that the Original of the foregoing Order was forwarded, via Certified Mail, Return Receipt Requested, to the Regional Hearing Clerk, U.S. EPA, Region X, 1200 Sixth Avenue, Seattle, Washington 98101, and that True and Correct Copies were forwarded, also via Certified Mail, Return Receipt Requested, on this 13th day of June, 1983, to:

William F. Boyd, Esquire
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Attorneys at Law
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Kellogg, Idaho 83837

and

John Y. Hohn, Esquire
Assistant Regional Counsel
Office of Regional Counsel (M/S 613)
U.S. Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, Washington 98010

DATED: June 13, 1983



Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ