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ENVIR. APPEALS BOARD

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November 19, 2003

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VIA OVERNIGHT DELIVERY

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

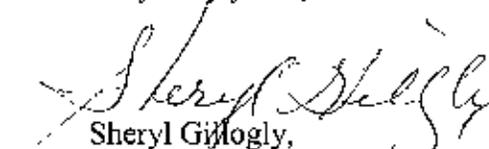
**Re: In the Matter of Hecla Mining Company - Lucky Friday Mine
NPDES Permit No. ID-000017-S**

Dear Clerk:

Enclosed is the original and six copies of Hecla Mining Company's Response to EPA's Motion to Strike Exhibit K to Hecla's Petition. Please file the original with the Environmental Appeals Board. Please conform one copy and return it to this office in the envelope enclosed.

Thank you for your assistance in this matter.

Very truly yours,


Sheryl Gillogly,
Assistant to Teresa A. Hill

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Attorneys for Hecla Mining Company

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

IN THE MATTER OF) HECLA MINING COMPANY –) LUCKY FRIDAY MINE) NPDES Permit No. ID-000017-5)	Appeal Number - NPDES 03-10 HECLA MINING COMPANY'S RESPONSE TO EPA'S MOTION TO STRIKE EXHIBIT K TO HECLA'S PETITION
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Hecla Mining Company, Lucky Friday Unit ("Hecla") and respectfully submits this response to the Environmental Protection Agency's ("EPA") Motion to Strike Exhibit K to Hecla's Petition, contained in EPA's Response to Hecla Mining Company's Petition for Review.

I. INTRODUCTION

A. Procedural Background

On September 10, 2003 Hecla filed a Petition for Review and supporting memorandum seeking review of conditions contained in National Pollutant Discharge Elimination System ("NPDES") Permit No. ID-000017-5 (the "Lucky Friday Permit"). EPA's Response to the Petition for Review was due on October 31, 2003 and was received by Hecla's counsel via email on November 6, 2003 and by certified mail on November 7, 2003. EPA's Response contains, as

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part IV, a “Motion to Strike Exhibit K to Hecla’s Petition” (“Motion to Strike”). Hecla files this response solely to address EPA’s Motion to Strike contained within its Response to Hecla’s Petition for Review.

II. DISCUSSION

A. The Dexter Affidavit Should be Considered by the Board in Support of Hecla’s Petition for Review.

Exhibit K, the Affidavit of Mike Dexter (“Dexter Affidavit”), is properly submitted in support of Hecla’s Petition for Review because it contains information that is either part of the administrative record, or was not “reasonably ascertainable” during the public comment period on the draft permit. As provided in 40 C.F.R. § 124.13, “[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.” Accordingly, issues and arguments raised during the comment period generally form the basis for an appeal to the Board. The intent of this rule is to “ensure that the Region has the opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency’s longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process.” *In Re: New England Plating*, NPDES Appeal No. 00-7, slip op. at 10 (E.A.B. March 29, 2001)(citations omitted). However, as the rule states, to the extent that issues or arguments were not “reasonably ascertainable” during the comment period, these arguments may also be raised on appeal. 40 C.F.R. 124.13; *In Re: New England Plating*, NPDES Appeal No. 00-7 at 14-16; *In Re: MCN Oil & Gas Co.*, UIC Appeal No. 02-03, slip op. at 12 (EAB, Sept. 4, 2002). Finally, in limited circumstances, the Board will consider issues not specifically raised during the public comment period, but that are “very closely related to challenges raised

during the public comment period, and the Region had the opportunity to address the concerns in its response to comments.” *In Re: New England Plating*, NPDES Permit No. 00-7 at 10 (citations omitted)(stating that “This doctrine helps guard against a hypertechnical approach to issue preservation while simultaneously furthering the important principle that the Region . . . first have opportunity to consider the issue.”).

EPA argues that the Dexter Affidavit is not part of the administrative record and should not be considered in ruling on Hecla’s Petition for Review. Response at 8-9. In support of this argument, EPA simply states that the information provided in the Dexter Affidavit “was ascertainable at the time Hecla commented on previous drafts of the Permit; therefore, to the extent this information was not submitted in Hecla’s previous comments, the information should not be considered as the EAB evaluates the Region’s permitting decision.” *Id.* at 8. Although EPA recognizes that the affidavit is appropriate to the extent it contains information in Hecla’s previous comments, EPA nevertheless seeks that EAB strike the entire Dexter Affidavit, including arguments clearly raised during the public comment period. *Id.* at 9. In addition, EPA provides no argument in support of its summary conclusion that the remainder of the information submitted in the Dexter Affidavit was reasonably ascertainable during the public comment period. *Id.* Because the Dexter Affidavit is comprised of information that is in the record, or was not reasonably ascertainable during the public comment period, the Affidavit is proper and should be considered in support of Hecla’s Petition for Review.

The information presented in the Dexter Affidavit is primarily a summary of issues and arguments that were specifically raised during the public comment period and are part of the administrative record. For example, paragraph 7 states that Lucky Friday Mine cannot immediately comply with the flow proportioned composite sampling of the effluent, continuous

effluent flow monitoring and instream flow monitoring. Exh. K at 7. During the comment period, Hecla specifically requested a compliance schedule in the permit to address monitoring because the monitoring conditions “may require researching, purchasing, installing, implementing/de-bugging newly installed monitoring equipment.” See Exhibit B to Hecla’s Petition for Review, April 11, 2003 letter from Mike Dexter (“2003 Comments”) at 9. The Dexter Affidavit simply confirms that the Lucky Friday Unit would have to “run electricity to the site, order equipment and install and de-bug equipment” prior to compliance with the monitoring requirements, which could not be accomplished prior to the effective date of the permit. Exh. K at 7. This issue was specifically raised during the comment period, therefore, the Dexter Affidavit, summarizing this previously raised argument, is properly before the Board.

Paragraphs 5, 6, 8, 9 and 10 of the Dexter Affidavit address concerns regarding compliance costs related to the conditions contained in the permit and the economic impacts of EPA’s failure to act on Hecla’s variance request. Again, these arguments were specifically raised during the public comment period and the Region has had ample opportunity to respond to these concerns. In particular, paragraphs 5, 6 and 8 of the Dexter Affidavit discuss estimated compliance costs. Hecla specifically raised the issue of compliance costs in its comments on the draft permit and commented that unwarranted expenses in the draft permit would negatively affect the economic viability of the Lucky Friday Unit. See 2003 Comments, Exh. B. at 4, 6. Exhibit A to the Dexter Affidavit, summarizing the additional NPDES compliance costs associated with the final permit, is an extension of these previously raised arguments. Furthermore, an actual estimation of the compliance costs for the permit was not reasonably ascertainable until the permit was issued. Because the compliance cost issues were specifically raised during the comment period, providing ample opportunity for the Region to respond, and

the only additional information provided in the Dexter Affidavit was not reasonably ascertainable during the public comment period, the information contained in paragraphs 5,6 and 8 is properly before the Board.

Paragraphs 9 and 10 address the economic impact of the Region's failure to act on the variance request. Hecla specifically raised these issues during the public comment period. For example, Hecla's comments asserted that consideration of the economic impacts in ruling on the variance request was proper under the Clean Water Act. *See* 2003 Comments, Exh. B at 6. In addition, Hecla's commented that the "increased costs due to a permit, which includes costly and unnecessary conditions given the case-specific factors, could effectively cause the cessation of operations at the Lucky Friday Unit unless reasonable relief from excessive requirements, as allowed in the permitting and regulatory process, is granted." *Id.* The Region has had ample opportunity to address these arguments.

Finally, paragraph 11 provides arguments and information regarding the interim limits in the Permit. As noted in the Memorandum in Support of Hecla's Petition for Review, the interim limits represent a change from the draft to final permit; therefore, the issues and arguments regarding these limits were not "reasonably ascertainable" at the time of the comment period. Hecla should therefore be allowed to provide additional arguments regarding these new conditions, including the information contained in the Dexter Affidavit.

The information conveyed in the Dexter Affidavit is either information submitted in Hecla's previous comments, or was not reasonably ascertainable at the time Hecla commented on the draft permit; therefore, the Dexter Affidavit is properly before the Board and should be considered in support of Hecla's Petition for Review.

B. Hecla's Response is Timely.

Hecla's Response to EPA's Motion to Strike is timely. The rules under 40 C.F.R. Part 124, and EAB Practice Manual, have no specific provisions regarding the timing for a response to a motion. Hecla received EPA's Response, containing the Motion to Strike, on November 7, 2003. Hecla is filing this Response to the Motion to Strike within two weeks of receipt of the Motion, therefore, Hecla's Response to the Motion to Strike is timely.¹

III. CONCLUSION

For the foregoing reasons, Hecla respectfully requests the EAB to deny EPA's Motion to Strike Exhibit K to Hecla's Petition.

Dated this 19th day of November, 2003.

Respectfully submitted,



Kevin J. Beaton
STOEL RIVES LLP
Attorneys for Hecla Mining Company

¹ For example, for appeals under the Consolidated Rules of Practice, the timing for filing a response to a motion is "15 days after service of the motion." See EAB Practice Manual at part II, I., 1.

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 2003, I served a copy of the HECLA MINING COMPANY'S RESPONSE TO EPA'S MOTION TO STRIKE EXHIBIT K TO HECLA'S PETITION via facsimile and regular mail on:

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