

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

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In re: )  
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Hecla Mining Company )  
Grouse Creek Unit )  
 ) NPDES Appeal No. 02-02  
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NPDES Permit No. ID-002646-8 )  
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**ORDER DENYING PETITION FOR REVIEW**

**I. INTRODUCTION**

In a protective<sup>1</sup> petition for review filed on January 15, 2002, the Hecla Mining Company ("Hecla") seeks review of the National Pollutant Discharge Elimination System ("NPDES") permit decision made by the United States Environmental Protection Agency (U.S. EPA) Region X ("Region X")<sup>2</sup> on December 13, 2001.

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<sup>1</sup> Hecla's January 15, 2002 petition for review contained only a preliminary identification of issues it wished to preserve for appeal, rather than substantive arguments, because Hecla was seeking solely to preserve its right to appeal under 40 C.F.R. § 124.19(a). See Petition for Review of National Pollutant Discharge Elimination System Permit at 2-4 (Jan. 15, 2002). Specifically, although the Permit was issued on December 13, 2001, Hecla did not receive a copy until January 10, 2002 - five days before the deadline for appealing the Permit would pass. *Id.* Consequently, Hecla had insufficient time to prepare a substantive petition for review. *Id.*

<sup>2</sup> Region X issues NPDES permits in Idaho because the State of Idaho has not received authorization to implement its own NPDES permit (continued...)

The decision approved the reissuance of NPDES permit<sup>3</sup> No. ID-00264-8 (the "Permit") to Hecla. See Permit.

In addition to the protective petition for review, Hecla filed a motion for an extension of time to file a petition for review or, in the alternative, an amended petition for review. On January 17, 2002, the Board granted Hecla's motion for an extension of time, and directed Hecla to file a petition for review no later than February 11, 2002. See Order Granting Motion to File Extension of Time (Jan. 17, 2002). Accordingly, on February 11, 2002, Hecla filed an Amended Petition for Review. See Amended Petition for Review of National Pollutant Discharge Elimination System Permit (Feb. 11, 2002) ("Petition").

Hecla objects to the establishment of a dilution ratio<sup>4</sup> of 8:1 as an effluent limitation on the basis that the limitation is

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<sup>2</sup>(...continued)  
program.

<sup>3</sup> Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must obtain a permit in order for the discharge to be lawful. 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

<sup>4</sup> The dilution ratio, which is used to calculate concentration-based effluent limits, refers to the ratio of the daily flow of Jordan Creek to Hecla's daily maximum effluent flow. The dilution ratio can also be stated as the Jordan Creek flow rate divided by Hecla's effluent discharge flow rate. Thus, based on the 8:1 dilution ratio set forth in the Permit, Hecla's daily maximum effluent flow must not exceed 12.5% of the Jordan Creek flow.

predicated on erroneous findings of fact and conclusions of law. See Petition at 2, 5-13. Hecla argues that the effluent limitation should be expressed as a maximum effluent flow rate, or a revised dilution ratio. Specifically, Hecla asserts that (1) based on recent drought conditions and corresponding low stream flows in Jordan Creek, Hecla is unable to discharge volumes of wastewater at expected levels and comply with the 8:1 dilution ratio permit limitation, except for three to four months a year; and (2) the dilution ratio is unnecessary because Hecla is capable of maintaining compliance with the applicable water quality standards ("WQS") during low flow conditions. See *id.*

Further, Hecla contends that, in the absence of removing the dilution ratio as a permit condition, Region X should have extended the compliance schedule for the dilution ratio.

For the reasons stated below, we conclude that a denial of the Petition is in order. Our decision is based on Hecla's failure to demonstrate that the dilution ratio is based on clearly erroneous findings of fact or conclusions of law, or involve an exercise of discretion or an important policy consideration that warrants review.

**II. BACKGROUND****A. Factual Background**

Hecla owns and operates the Grouse Creek Unit, a gold mine and mill located in Custer County, Idaho. Fact Sheet at 7. The facility operated from December 1994 until April 1997, and is currently undergoing closure. *Id.* The Grouse Creek Unit covers approximately 590 acres on both private lands and federal lands. *Id.* The mine facilities are located in the Grouse Creek, Pinyon Creek, Washout Creek, and Jordan Creek drainages. *Id.* Grouse Creek, Pinyon Creek, and Washout Creek are tributaries to Jordan Creek, which flows into the Yankee Fork of the Salmon River approximately four miles from the mine site. *Id.*

Hecla discharges mine and mill wastewater, including storm water runoff from mined areas, storm water runoff from the inactive Sunbeam mine adit (access tunnel),<sup>5</sup> seepage and storm

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<sup>5</sup> The Grouse Creek unit includes two deposits of gold-bearing ore: the Sunbeam deposit and the Grouse Creek deposit.

water runoff from the waste rock<sup>6</sup> storage area, and seepage from the tailings impoundment,<sup>7</sup> as reflected in the table below.

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<sup>6</sup> Waste rock, which is rock that is removed from the mine in order to gain access to the ore, was deposited in an area adjacent to the Sunbeam pit in the upper Pinyon Creek drainage area. Fact Sheet at 7. The waste rock is currently undergoing reclamation. *Id.*

<sup>7</sup> Tailings (the residuals from cyanide leachings to recover gold) were disposed of in a lined tailings impoundment, which covers approximately 197 acres. *Id.* The impoundment serves to separate the water and solids portions of the tailings via settling. *Id.* The tailings impoundment was originally designed as a "zero discharge" facility; however, since the facility is undergoing closure, water is no longer drawn from the tailings impoundment and the accumulated water must be discharged in order to maintain the stability of the impoundment and to dewater the pond for reclamation. *Id.*

Grouse Creek Unit

| <b>Discharge Sources</b>                                      | <b>Discharge</b>               | <b>Route</b>   | <b>Exit</b>                   |
|---|--------------------------------|--|-------------------------------|
| mined areas and mine drainage from inactive Sunbeam mine adit | storm water runoff             | collected in sediment ponds, treated and discharged.   | Outfall 002 into Jordan Creek |
| waste rock storage area                                       | seepage and storm water runoff | routed through west ditch, which flows to the treatment plant prior to discharge.                  | Outfall 002 into Jordan Creek |
| tailings impoundment  | seepage                        | collected in underdrains that flow into Ponds 4 and 6; the seepage is then treated and discharged. | Outfall 002 into Jordan Creek |

See Fact Sheet at 7-8.

The Permit authorizes and limits the discharge of the following pollutants: cadmium, copper, lead, mercury, silver, zinc, and cyanide.<sup>8</sup> See Permit at 4, Table 1.

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<sup>8</sup> In the Spring of 1999, cyanide was detected in Jordan Creek at levels exceeding Idaho aquatic life water quality criteria. The major source of the cyanide was leakage from the tailings impoundment. Region X, the State of Idaho, the U.S. Forest Service, and Hecla are negotiating a Consent Order under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") to address this problem. The CERCLA Consent Order will require Hecla to dewater the tailings impoundment to eliminate leakage and facilitate reclamation. This particular discharge from the tailings impoundment is authorized under CERCLA and is not part of the draft NPDES Permit. See *id.* at 8.

**B. Procedural Background**

Region X first issued an NPDES permit for the Grouse Creek Unit on October 5, 1992, which became effective on November 5, 1992, and expired on November 5, 1997. Hecla submitted a timely application for renewal of the permit on September 17, 1997, and accordingly, the 1992 permit has been administratively extended and remains fully effective and enforceable until reissuance. See 40 C.F.R. § 122.6(a) (Continuation of expiring permits).

Region X issued a draft NPDES permit for the Grouse Creek Unit on November 24, 1999, and sought public comment. See Draft NPDES Permit No. ID-002646-8 (the "Draft Permit"). The public comment period ran from November 24, 1999, through February 9, 2000. The Draft Permit authorized discharges from Outfall 002 into Jordan Creek of runoff and seepage from a wastewater rock dump, mine drainage from the inactive mine adit, storm water, and seepage from the tailings impoundment underdrains. In addition, the Draft permit included mass and concentration-based effluent limits. On August 8, 2000, Region X sent a letter to the State of Idaho Department of Environmental Quality ("DEQ") requesting certification under Section 401 of the Clean Water Act ("CWA") of the proposed final permit. The State certified the Permit on October 3, 2000.

Hecla submitted comments in which it requested that effluent limits be based on the ratio of flow in Jordan Creek to the effluent flow, i.e., a dilution ratio, rather than on the maximum effluent flow. See Letter from Kevin Beaton, Stoel Rives LLP, Counsel for Hecla, to Randy Smith, Director, U.S. EPA Office of Water (Feb. 8, 2000). Hecla requested a minimum dilution ratio of 14:1 from November to February, and a minimum dilution ratio of 8:1 for the periods March to April, May to June, and July to October. *Id.* at 3. In addition, after the close of the comment period, Hecla sent a letter to Region X requesting that the permit limit be recalculated using the 8:1 dilution ratio year-round. See Letter from Eileen Steilman, Environmental Manager, Hecla, to Patty McGrath, U.S. EPA Region X (Mar. 8, 2000). Consistent with Hecla's request, Region X used the 8:1 dilution ratio to recalculate the concentration-based effluent limits.<sup>9</sup> Further, Region X added the 8:1 dilution ratio as a separate permit limitation, essentially as an alternative to a maximum flow limit.

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<sup>9</sup> Region X's use of the dilution ratio changed the limits as follows: (1) Region X recalculated the concentration-based water quality-based effluent limits ("WQBELs") based on the 8:1 dilution ratio requested by Hecla, see Response to Comments at 15, C-7, which resulted in concentration-based limits in the final Permit that were less stringent than those contained in the Draft Permit; (2) Region X removed the mass limits (lbs/day) for individual pollutants and substituted the dilution ratio as a requirement of the Permit. See *id.* at 15, 20-21.



However, in a reversal of its position, Hecla sent a letter to Region X almost eighteen months after the close of the comment period, in which the company requested the removal of the dilution ratio as a permit limitation. See Letter from Paul Glader, Environmental Manager, Hecla, to Patty McGrath, NPDES Permits Unit, U.S. EPA 3 (Sept. 25, 2001). Hecla based its request on effluent flow data from January 2000 through July 2001, as well as receiving water flow data and calculated dilution ratios from this period, which showed that the dilution ratios were less than 8:1 for some months during this period. *Id.*<sup>10</sup>

In its Response to Comments document dated December 11, 2001, Region X explained that since the Permit's water quality-based effluent limits ("WQBELs")<sup>11</sup> - in this instance, the

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<sup>10</sup> According to Hecla, the Grouse Creek area had recently experienced several years of low flow drought condition, and these unexpected low flow conditions occurred after the close of the comment period. As such, they were not, according to Hecla, reasonably ascertainable prior to the close of the comment period. See Letter from Paul Glader, Environmental Manager, Hecla, to Patty McGrath, NPDES Permits Unit, U.S. EPA 3 (Sept. 25, 2001).

<sup>11</sup> WQBELs involve a site-specific evaluation of the discharge and its effect on the receiving water. See U.S. EPA, Office of Water, *U.S. EPA NPDES Permit Writer's Manual* at 88 (Dec. 1996). A WQBEL is designed to protect the quality of the receiving water by ensuring that state water quality standards are met. *Id.* Accordingly, WQBELs are based on: (1) use classification of the water body (e.g., public water supply, recreation, agricultural); (2) numeric and/or narrative water quality criteria, that is, the water quality criteria deemed necessary to support the designated use of the water body; and (3) the

(continued...)

Permit's concentration-based limits - are based on an assumed dilution ratio, it is critical that the dilution ratio be maintained; otherwise it could not be assured that the discharge would be protective of water quality standards in the receiving water at the edge of the authorized mixing zone.<sup>12</sup> See Response to Comments at 20-21. Region X also explained that in the absence of a dilution ratio limit, effluent discharged at a high enough flow (i.e., a flow greater than that represented by the flow in Jordan Creek divided by the dilution ratio) could be in compliance with the concentration-based WQBELS, while exceeding

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<sup>11</sup>(...continued)

state's anti-degradation policy which is required to be consistent with EPA's anti-degradation regulations at 40 C.F.R. § 131.12. *Id.* at 89. In the permit at issue, the concentration-based limits are WQBELS. Moreover, because the integrity of the concentration-based limits depends on maintenance of the dilution ratio upon which they are predicated, the dilution ratio is itself also properly included as a Permit requirement.

<sup>12</sup> A mixing zone is an area where an effluent discharge undergoes initial dilution and is extended to cover the secondary mixing in the ambient water body; a mixing zone may also be defined as an allocated impact zone where acute and chronic water quality criteria can be exceeded as long as acutely toxic conditions are prevented. See *Gov't of the District of Columbia Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 00-09, slip op. at 21 (EAB, Feb. 20, 2002), 10 E.A.D. \_\_\_; *Technical Support Document for Water Quality-based Toxics Control*, Office of Water Enforcement and Permits, Office of Water Regulations and Standards at XX (Mar. 1991) ("Technical Support Document"); see also Water Quality Standards Regulation, 63 Fed. Reg. 36,788 (proposed July 7, 1988) (codified at 40 C.F.R. pt. 131) (defining mixing zones based on the premise that surface water quality criteria can be exceeded under limited circumstances without causing unacceptable toxicity or, more broadly, impairment of the beneficial uses).

the WQS at the outer circumference or "edge" of the mixing zone<sup>13</sup> due to acute mass loading of pollutants. See *id.* at 20-21.

Notably, Region X acknowledged that the receiving water, Jordan Creek, had a lower flow than previously assessed, but disagreed that removing the dilution ratio as a permit condition was necessary. Instead, Region X explained that in recognition of the varied flow of effluent from Outfall 002, and the varied seasonal flow of Jordan Creek, it included two tiers of concentration-based limits in the Permit tied to the seasonal flow rates of Jordan Creek: one for flows — 30 cubic feet per second ("cfs") (which corresponds to Jordan Creek flows during approximately May and June); and another for flows § 30 cfs (which corresponds to flows over the rest of the year). See *id.* at 15.

Additionally, Region X stated that if the engineering evaluation/cost analysis ("EECA"), undertaken as part of the CERCLA cleanup at the site, and/or other future monitoring data

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<sup>13</sup> Where a mixing zone is allowed, water quality standards must not be exceeded at the edge of that mixing zone. See Technical Support Document at 70; see also *Marathon Oil Co. v. EPA*, 830 F.2d 1346, 1349 (5th Cir. 1987) ("By definition, the effluent itself [within the mixing zone] does not meet water quality standards \* \* \*. It necessarily follows, then, that the edge or outer circumference of the mixing zone is defined as the boundary at which water quality standards are first met.").

indicates that a different dilution ratio is warranted, Hecla could submit a request for Region X to modify the Permit. See *id.* at 15-16; see also Permit at 31-32 (Reopener Clause). Accordingly, when Region X issued the final Permit on December 13, 2001, the Permit contained concentration-based effluent limits for the pollutants identified in the Draft Permit as well as a dilution ratio limit.

In accordance with the procedure provided by amendments to the NPDES regulations,<sup>14</sup> Hecla filed a timely appeal with this Board. For the reasons stated below, Hecla's petition is denied.

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<sup>14</sup> Prior to the amendments to streamline the NPDES regulations, see Amendments to Streamline the NPDES Program Regulations: Round II, 65 Fed. Reg. 30,866 (May 15, 2000), the rules governing petitions for review of an NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead, a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 9 n.20 (EAB, July 27, 2001), 10 E.A.D. \_\_\_. The outcome of the request for an evidentiary hearing or the outcome of an evidentiary hearing if so granted, was then appealable to the Board. However, under those rules there was no review as a matter of right from the Regional Administrator's decision or the denial of an evidentiary hearing. See *In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). Petitions for review of NPDES permits are now regulated by 40 C.F.R. § 124.19, as amended by 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). Although the regulations governing NPDES appeals changed in the sense that the evidentiary hearing provisions were eliminated, the standard of review has not changed. *City of Moscow*, slip op. at 9 n.20, 10 E.A.D. \_\_\_ (citing *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 n.11 (EAB, Feb. 26, 2001), 9 E.A.D. \_\_\_).

**III. DISCUSSION****A. Standard of Review**

In appeals under 40 C.F.R. part 124, the Board will not grant review unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review. See 40 C.F.R. § 124.19(a) (2001); see also *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 14 (EAB, Feb. 20, 2002), 10 E.A.D. \_\_\_ (hereinafter "D.C. MS4"); *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 8-9 (EAB, July 27, 2001), 10 E.A.D. \_\_\_. The burden of demonstrating that review of the Regional Administrator's decision is warranted rests with the petitioner. See 40 C.F.R. § 124.19(a); see also *D.C. MS4*, slip op. at 4, 10 E.A.D. \_\_\_; *City of Moscow*, slip op. at 9, 10 E.A.D. \_\_\_; *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997).

Persons seeking review must demonstrate to the Board, *inter alia*, "that any issues being raised were raised during the public comment period to the extent required by these regulations \* \* \* ." 40 C.F.R. § 124.19(a) (2001).

Participation during the comment period must conform to the requirements of section 124.13, which requires that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2001); see also, *D.C. MS4*, slip op. at 15, 10 E.A.D. \_\_\_; *City of Moscow*, slip op. at 9, 10 E.A.D. \_\_\_; *In re New England Plating*, NPDES Appeal No. 00-7, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. \_\_\_\_.

Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate with specificity why the permitting authority's response to those objections is clearly erroneous or otherwise merits review. See *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 16-17 (EAB, May 21, 2002), 10 E.A.D. \_\_\_; *In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17 & 01-19, -23, 17 (EAB, Apr. 25, 2002), *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 9-10 (EAB, July 27, 2001), 10 E.A.D. \_\_\_; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998).

The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially

technical in nature. *D.C. MS4*, slip op. at 15, 10 E.A.D. \_\_\_; *City of Moscow*, slip op. at 9, 10 E.A.D. \_\_\_; *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 26, 2001), 9 E.A.D. \_\_\_; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), review denied sub nom. *Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). When the Board is presented with technical issues we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *City of Moscow*, slip op. at 10-11, 10 E.A.D. \_\_\_; *NE Hub*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically give deference to the Region's position. *City of Moscow*, slip op. at 11, 10 E.A.D. \_\_\_; *NE Hub*, 7 E.A.D. at 568.

Hecla's arguments are considered below in light of this framework.

**B. *The Dilution Ratio***

Hecla seeks review of the requirement in the final Permit to

maintain a dilution ratio because, "based on recent drought conditions and corresponding low stream flows in Jordan Creek, Hecla is unable to discharge volumes of wastewater at expected levels and comply with the 8:1 dilution ratio permit limitation, except for three (3) to four (4) months a year." See Petition at 6. In addition, Hecla argues that because it is currently meeting WQS at dilution ratios lower than 8:1, a dilution ratio as a permit condition is not necessary to meet WQS. See *id.* In other words, Hecla believes that the Permit's concentration-based limits are all that is needed to comply with CWA requirements.

**1. *The Berberick Affidavit***

In support of its argument that Region X committed clear error in including the dilution ratio as a permit condition, Hecla offers the Affidavit of David Berberick, Site Manager of the Grouse Creek Unit ("Berberick Affidavit"). According to Hecla, the Berberick Affidavit demonstrates that, among other things, due to the company's installation of a wastewater treatment plant ("WWTP") at the Grouse Creek Unit, concentrations of pollutants in the discharge from Outfall 002 improved, thereby obviating the need for a dilution ratio as a permit condition. See Petition at 4. The Region objects to our consideration of the Berberick Affidavit on grounds that it is not part of the



administrative record of the Permit. See Region X's Brief in Opposition to Hecla Mining Co.'s Amended Petition for Review of NPDES Permit No. ID-002646-8 (Apr. 9, 2002) ("Region X's Response Brief") at 18.

The Berberick Affidavit was submitted for the first time after the Permit was issued, as part of Hecla's Petition, and, as such, is not a part of the administrative record of the regional decision that the Board reviews. See 40 C.F.R. § 124.18 ("The record shall be complete on the date the final permit is issued."). Moreover, we are not convinced that the information conveyed by the Berberick Affidavit was not ascertainable at a point in time that would have permitted Hecla to submit it to the Region for its consideration.<sup>15</sup> See 40 C.F.R. § 124.13. For all these reasons, we decline to consider the Berberick Affidavit.<sup>16</sup>

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<sup>15</sup> Since the WWTP was installed in 1997 and upgraded in January 1999, we do not understand - and Hecla does not explain - why it did not raise this issue during the comment period, which ran from November 24, 1999, through February 9, 2000. Likewise, Hecla does not explain why this issue was not raised at the time the company submitted its post-comment period letter of September 25, 2001, in which it requested the removal of the dilution ratio.

<sup>16</sup> We note further that the issue of variable flow in the Jordan Creek has been present throughout the permit process. Accordingly, the information conveyed in the Berberick Affidavit is largely redundant with information that can be found elsewhere in the administrative record, and would, therefore, not add materially to this proceeding.

2. *Technical Infeasibility & Unexpected Low Flow Conditions in the Grouse Creek Area*

In further support of the removal of the dilution ratio, Hecla maintains that recent drought conditions and corresponding low stream flows in Jordan Creek renders Hecla unable to discharge volumes of wastewater at expected levels and comply with the 8:1 dilution ratio permit limitation. Petition at 6. This argument is, however, insufficient to refute Region X's determination regarding the need for WQBELs under 40 C.F.R. § 122.44(d)(1).<sup>17</sup>

Reduced to its simplest form, Hecla's argument appears to be that the permit condition in question is clearly erroneous because Hecla will experience difficulty complying with it. See Petition at 6-9. Significantly, elsewhere Hecla appears to refute its own claim of impracticability. See also Letter from Paul Glader, Environmental Manager, Hecla, to Patty McGrath, NPDES Permits Unit, U.S. EPA, at Fig. 3 (Sept. 25, 2001)

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<sup>17</sup> Although Hecla did not raise this issue until almost eighteen months after the close of the comment period, Region X nonetheless considered it in rendering its permit decision in view of Hecla's assertion that the low flow conditions experienced in the Grouse Creek area occurred *after* the close of the comment period and, as such, were not reasonably ascertainable prior to the close of the comment period. See Letter from Paul Glader, Environmental Manager, Hecla, to Patty McGrath, NPDES Permits Unit, U.S. EPA 3 (Sept. 25, 2001); Petition at 7; see also Response to Comments at 15-16. As we discuss *infra*, we do not find Region X's consideration and disposition of this argument to have been clearly erroneous.

(conceding that Hecla could meet the dilution ratio if it reconfigures flow in its wastewater management operation by pumping the tailings impoundment underdrain waters (Ponds 4 and 6 waters) to the tailings impoundment (Pond 1)); see also Petition at 8 ("Hecla has determined, though, that it could meet the 8:1 dilution ratio given Jordan Creek's low stream flows and the configuration of the mine's wastewater collection system.

\* \* \* Additional information submitted on September 25, 2001, suggested certain modifications that would allow Hecla to meet the 8:1 dilution ratio.").

In any case, it is settled law that technological considerations are not a factor in setting water quality-based effluent limits. See, e.g., *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 18 (EAB, Mar. 29, 2001) 9 E.A.D. \_\_\_ ("In requiring compliance with applicable water standards, the CWA simply does not make any exceptions for cost or technological feasibility.") (quoting *In re Mass. Corr. Inst. Bridgewater*, NPDES Appeal No. 00-9 at 10 (EAB, Oct. 16, 2000)); *In re City of Fayetteville*, 2 E.A.D. 594, 600-601 (CJO 1988); *In re Pub. Serv. Co. of Ind., Inc.*, 1 E.A.D. 590, 610 (Adm'r, 1979) ("[T]he states are free to force technology \* \* \* " and "[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations \* \* \*.") (quoting *U.S. Steel*

*Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977)); see also *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 24 (EAB, Feb. 13, 2001) ("[T]he legal standard is that technological considerations are not a factor in setting water quality-based effluent limits"); *Bridgewater*, NPDES Appeal No. 00-9 at 9 (EAB, Oct. 16, 2000) ("Not only was it not error for the Region to set the permittee's copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law").

Since Region X determined that the dilution ratio is necessary to ensure that Hecla's discharge does not violate the WQS in Jordan Creek at the edge of the authorized mixing zone - a proposition not squarely addressed by Hecla<sup>18</sup> - Region X complied with CWA § 1311(b)(1)(C) and 40 C.F.R. §122.44(d)(1)(iii) by setting Hecla's effluent limits without regard to Hecla's

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<sup>18</sup> As stated previously, Region X explained its reasons for retaining the 8:1 dilution ratio as a requirement of the Permit. See Response to Comments at 20-21. However, Sun provides no discussion whatsoever as to why Region X's response to its objections regarding the dilution ratio is erroneous or otherwise warrants review. It is not sufficient for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review. See *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 16-17 (EAB, May 21, 2002), 10 E.A.D. \_\_\_; *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 9-10 (EAB, July 27, 2001), 10 E.A.D. \_\_\_; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66,71 (EAB 1998). Sun's failure to demonstrate why Region X's response is erroneous is, thus, fatal to its claim.

technological capacity. Hecla has not meaningfully challenged the analytical or technical underpinnings of Region X's determination. Thus, Hecla's request for the reinstatement of maximum effluent flow-based limit, rather than a dilution ratio-based effluent limit, is without force. Accordingly, we deny review of this issue on this basis. See *In re Ariz. Mun. Storm Water NPDES Permits*, 7 E.A.D. 646, 659 n.21 (EAB 1998), *aff'd sub nom. Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), *amended on denial of reh'g by* 197 F.3d 1035 (9th Cir. 1999) ("As petitioners have not \* \* \* provided any legal or other support, petitioners' request lacks the specificity necessary for a grant of review."); *In re Commonwealth Chesapeake Corp.* 6 E.A.D. 764, 772 (EAB 1997) (petition for review must provide sufficient information or specificity from which the Board could conclude that a permit determination was erroneous).

**3. *Alleged Inadequacy of Region X's Response to Hecla's Comments Submitted After the Close of the Comment Period***

Lastly, Hecla argues that Region X failed to adequately "consider and respond to information on low stream flows in Jordan Creek." See Petition at 6. Here, apart from the issue of technical feasibility discussed above, Hecla argues that Region X's consideration of low stream flow was insufficient in view of the importance of flow assumptions in establishing the Permit's

limits. We disagree.

According to Region X, it initially chose the dilution ratio to calculate the concentration-based WQBELs because Hecla specifically requested a dilution ratio rather than a maximum effluent flow value. See Region X's Response Brief at 11. Region X ultimately agreed with Hecla that because much of the flow in Outfall 002 is dependent on precipitation and varies in proportion to the flow in Jordan Creek, the use of a single maximum flow value was not representative of the actual flow, and, therefore, a dilution ratio should be used to establish the concentration-based WQBELs in the Permit. See Response to Comments at 15. Given that the concentration-based WQBELs are predicated on an assumed dilution ratio, Region X further determined that the dilution-ratio should itself be stated as a condition in the Permit as a means of assuring that the WQS are met at the edge of the mixing zone.<sup>19</sup>

Later, when Hecla changed its position and requested the removal of the dilution ratio, Region X reiterated the necessity

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<sup>19</sup> Specifically, the dilution ratio operates to assure that the flow of effluent discharged from Outfall 002 is no greater than a specified percentage (12.5%) of the flow in the receiving water (Jordan Creek). See Region X's Response Brief. Controlling effluent flow (volume per unit time), via the dilution ratio, in combination with limiting concentration (mass per volume), via the WQBELs, serves to control pollutant loading (mass per unit time). See Response to Comments at 20.

of the ratio. Specifically, Region X explained that in the absence of a dilution ratio limit, effluent discharged at a high enough flow could be in compliance with the WQBELS, while exceeding the WQS at the edge of the mixing zone due to acute mass loading of pollutants. See *id.* at 20-21.<sup>20</sup>

Region X also explained that because it recognized that the flow of the Outfall 002 effluent and Jordan Creek varied over the course of the year, it included two tiers of concentration-based limits in the Permit: one for flows — 30 cfs (which corresponds to Jordan Creek flows during approximately May and June), and another for flows \$ 30 cfs (which corresponds to flows over the rest of the year). See *id.* at 15.

Furthermore, Region X, although acknowledging that the recently discovered low flows in Jordan Creek reflected drought conditions somewhat more severe than that which existed when it calculated the dilution ratio of 8:1, declined to remove the dilution ratio as a permit limitation, but notified Hecla that it could request a modification of the Permit if such conditions persist and the CERCLA EECA<sup>21</sup> and/or other future monitoring data indicated that a dilution ratio that is different from the

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<sup>20</sup> See *supra* notes 12-13.

<sup>21</sup> See *supra* note 8.

current 8:1 dilution ratio is warranted. See Response to Comments at 15-16, 20-21; see also Permit at 31-32 (Reopener Clause providing that the Permit could be modified based on, among other things, results of the CERCLA EECA).<sup>22</sup>

As can be seen, contrary to Hecla's assertion, the record appears to demonstrate that Region X duly considered the issues raised in Hecla's comments, and adopted an approach that is rational in light of all the information in the record. See *City of Moscow*, slip op. at 10-11, 10 E.A.D. \_\_\_; *NE Hub*, 7 E.A.D. at 568. Hecla has not explained why the two tiers of concentration-based limits in the Permit and/or a dilution ratio other than 8:1 is not sufficient to cure the anticipated problem of low flow conditions, and has failed to explain why Region X's response to this point is clearly erroneous. As noted earlier, Hecla bears the burden of establishing grounds for review. See 40 C.F.R. § 124.19(a)(1)-(2). Because we are satisfied that Region X gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we

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<sup>22</sup> We note that Region X attests that if Hecla had requested that the Region revise the dilution ratio, rather than requested that the Region remove it altogether, Region X would have considered data submitted by Hecla to determine whether a different dilution ratio could ensure that Hecla's discharge is protective of the WQS at the edge of the authorized mixing zone for the duration of the Permit. See Region X's Response Brief at 15 n.12, 15-16. To date, Hecla has not requested a different dilution ratio.



will give deference to Region X's position. *City of Moscow*, slip op. at 11, 10 E.A.D. \_\_\_; *NE Hub*, 7 E.A.D. at 568. Accordingly, we deny review of this issue.

**C. *Extension of the Compliance Schedule***

For the first time on appeal, Hecla raises the issue of a longer compliance schedule to comply with its dilution ratio requirement. See Petition at 12 ("At the very least, the Region should have \* \* \* considered extending the compliance schedule for the dilution ratio.").

As already stated, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board, except to the extent that issues or arguments were not reasonably ascertainable at that time. See 40 C.F.R. § 124.13 (2001); *In re New England Plating*, NPDES Appeal No. 00-7, slip op. at 8 (EAB, Mar. 29, 2001), 9 E.A.D. \_\_\_. Because Hecla did not earlier raise the issue of an extension of the compliance schedule, and does not now argue that the issue was not ascertainable, we will not consider the merits of this argument.

**IV. CONCLUSION**

For all the foregoing reasons, Hecla's petition for review is hereby denied.

So ordered.<sup>23</sup>

ENVIRONMENTAL APPEALS BOARD

Dated: 07/11/02

By: \_\_\_\_\_ /s/  
Scott C. Fulton  
Environmental Appeals Judge

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<sup>23</sup> The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein. See 40 C.F.R. § 1.25(e) (1) (2001).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing Order Denying Review in the matter of Hecla Mining Co., NPDES Appeal No. 02-02 were sent to the following persons in the manner indicated:

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\_\_\_\_\_/s/  
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