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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	)	
NPDES Permit No. ID-000017-5	)	**RESPONSE TO HECLA MINING COMPANY'S PETITION FOR REVIEW**
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TABLE OF ABBREVIATIONS

BPT	best practicable control technology
BAT	best available technology economically achievable
CWA	Clean Water Act
EAB	Environmental Appeals Board
ELG	Effluent Limitations Guideline
EPA	U.S. Environmental Protection Agency
IDEQ	Idaho Department of Environmental Quality
MDL	method detection limit
mgd	million gallons per day
μg/L	micrograms per liter
NPDES	National Pollutant Discharge Elimination System
RTC	Response to Comments
SFCdA	South Fork Coeur d'Alene
SSC	site specific criterion
TMDL	Total Maximum Daily Load
TSD	"Technical Support Document for Water Quality-Based Toxics Control"
WET	whole effluent toxicity
WLA	waste load allocation
WQBEL	water quality-based effluent limit

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the September 16, 2003 letter from the Clerk of the Environmental Appeals Board ("EAB" or "Board"), Region 10 of the U.S. Environmental Protection Agency ("Region") respectfully submits this response to the Petition for Review ("Petition") of NPDES Permit No. ID-000017-5 filed by the Hecla Mining Company ("Hecla" or "Petitioner"). For the reasons set forth below, the EAB should deny the Petition.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Facility Background

The Hecla Mining Company owns and operates the Lucky Friday silver, lead, and zinc mine and mill complex in Shoshone County, Idaho, just north of the South Fork Coeur d'Alene ("SFCdA") River and approximately one mile east of Mullan, Idaho. 2001 Fact Sheet, Ex. 3, at p. 6.[1] Ore has been mined from the Lucky Friday deposit since 1942, and the Lucky Friday mill has been in operation since 1959, with periods of temporary closure. *Id.* Ore from the Lucky Friday deposit is mined underground and conveyed to the mill. *Id.* Mill operations include crushing, grinding, and flotation to produce a silver-lead concentrate and a zinc concentrate. *Id.* The concentrates are transported off-site for refining. *Id.* Hecla uses hydrocyclones to separate the residuals (or "tailings") from the mill into coarse and fine materials. *Id.* Hecla uses the

[1] This response brief uses the following conventions when citing to the administrative record for the Permit. Each cited document is identified first by a short descriptor (*e.g.*, "Permit" or "2001 Fact Sheet"), followed by the exhibit number it has been assigned for the purposes of this brief ("Ex. __"), and then the page(s) or section(s) specifically referenced

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coarse tailings to backfill the mine, while the fine tailings are piped in a slurry from the mill to a tailings pond. *Id.*

As a mine and mill complex that produces and processes silver, lead, and zinc ores, the Lucky Friday facility is subject to the effluent limitation guidelines ("ELGs") found in Subpart J of 40 C.F.R. Part 440 . *Id.* at p. B-1. In particular, the mine drainage from Lucky Friday's mine is subject to the best practicable control technology ("BPT") limitations found in 40 C.F.R. § 440.102(a) and the best available technology economically achievable ("BAT") limitations found in 40 C.F.R. § 440.103(a), while the discharge from Lucky Friday's mill is subject to the BPT and BAT limitations found in 40 C.F.R. § 440.102(b) and 40 C.F.R. § 440.103(b), respectively.[2] *Id.*

Wastewater generated at the Lucky Friday Mine includes mine drainage, cooling water, sanitary wastewater, tailings slurry from the facility's mill, and groundwater and storm water that have become contaminated with mining wastes. 2001 Fact Sheet, Ex. 3, at p. 6. This wastewater is collected in three large, unlined ponds immediately adjacent to the SFCdA River before being discharged through one of three outfalls. *Id; see also id.* at Appendix A (map from Hecla's permit application showing locations of tailings ponds relative to the SFCdA River). Outfall 001 continuously discharges into the SFCdA River the overflow from Tailings Pond No. 1, which contains a mixture of groundwater, cooling water, sanitary wastewater, and mine drainage. *Id.* at

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[2] The BPT and BAT limitations in these subsections are technology-based treatment requirements under Section 301(b) of the Clean Water Act and therefore "represent the minimum level of control that must be imposed" in an NPDES permit. 40 C.F R. § 125.3. As discussed below, water quality considerations required the Region to impose limitations for a number of parameters (copper, zinc, lead, mercury, and cadmium) more stringent than those contained in the Part 440 ELG because the Region determined that these pollutants are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above water quality standards. *See* 40 C.F.R. § 122.44(d)(1).

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p. 6. Between 1995 and 2000, flows from Outfall 001 ranged from 0.43 to 2.88 million gallons per day ("mgd"). *Id.* Outfall 002 discharges overflow from Tailings Pond No. 2 into the SFCdA River approximately 0.8 miles east (upstream) of Outfall 001. *Id.* Although Hecla contends that Outfall 002 has not experienced a discharge for years, Hecla nevertheless applied for authorization to discharge from Outfall 002 on an emergency basis when the flow from Outfall 001 or Outfall 003 needs diversion *Id.* Outfall 003 discharges overflow from Tailings Pond No. 3, which contains tailings slurry and storm water, into the SFCdA River approximately 1.3 miles east (upstream) of Outfall 002. *Id.* Between 1995 and 2000, flows from Outfall 003 ranged from 0.23 to 2.28 mgd. *Id.* at 7.

B. Receiving Water Background

Outfalls 001, 002, and 003 discharge to the SFCdA River between Daisy Gulch and Canyon Creek. *Id.* at 7. The SFCdA River watershed is the center of the Coeur d'Alene Mining District. Sediment TMDL, Ex. 5, at p. xii. The State of Idaho and EPA have designated beneficial uses for this portion of the SFCdA River. 2001 Fact Sheet, Ex. 3, at p. 7.[3] Specifically, this portion of the river is designated for protection of secondary contact recreation and cold water biota. *Id.* Idaho's water quality standards specify water quality criteria that are deemed necessary to support these use classifications. *Id.* These criteria are both numeric and narrative and are found at Idaho Code Ch. 58.01.02. *Id.*

[3] Designated uses are one component of a state's water quality standards. EPA's regulations define "water quality standards" as provisions of state or federal law that "consist of a *designated use or uses* for the waters of the United States and *water quality criteria* for such waters based upon such uses." 40 C.F.R. § 130.2(d) (emphasis added).

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The water quality criteria for metals include hardness-based equations for cadmium, copper, lead, nickel, silver, and zinc. *See* 2003 Fact Sheet, Ex. 4, at p. A-4. The acute criterion for mercury is 2.1 micrograms per liter ("μg/L") and the chronic criterion is 0.012 μg/L[4]. *Id.* Idaho's water quality standards also contain a narrative toxicity criterion that states that "surface waters shall be free from toxic substances in concentrations that impair designated beneficial uses." 2001 Fact Sheet, Ex. 3, at p. B-6.

The SFCdA River below Canyon Creek and the Lucky Friday outfalls does not meet Idaho's water quality criteria for cadmium, lead, or zinc. *Id.* at p. 7. The SFCdA River also does not meet the state's water quality criteria for sediment. Sediment TMDL, Ex. 5, at p. xi. Impairment of the cold water biota use due to both metals and sediment has been demonstrated in the low diversity of macroinvertebrates and low trout abundance. *Id.* at p. xii. The native fish species of the SFCdA River (including cutthroat trout, whitefish, and bull trout) appear stable in the headwaters of the South Fork but fish abundance has greatly declined due to the historic levels of metals and sediment impacts. *Id.* at p. 8.

C. Procedural History

Hecla's Petition aptly characterizes the procedural history of the Lucky Friday NPDES permit as "lengthy and complex." The facility first obtained NPDES permit coverage in 1973. 2001 Fact Sheet, Ex. 3, at p. 7. On September 30, 1977, EPA reissued the NPDES permit for the Lucky Friday facility which Hecla appealed. This permit expired on December 31, 1980. *Id.* Since expiration of the 1977 permit, EPA has promulgated effluent limitation guidelines for the

[4]The aquatic life criteria for toxics (metals) are based on Idaho Code § 58.01.022.10. This section cites the National Toxics Rule ("NTR"), 40 CFR 131 36(b)(1), and the NTR subparts.

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mining industry, *see* 40 C.F.R. Part 440, Subpart J (December 3, 1982), and EPA has promulgated and/or approved various water quality standards for the SFCdA River. On March 28, 2001, EPA issued a draft NPDES permit for the Lucky Friday facility, together with an accompanying fact sheet (the "2001 Fact Sheet"). *See generally* 2001 Fact Sheet, Ex. 3. A number of the effluent limitations for metals in the 2001 draft permit were based on wasteload allocations ("WLAs") specified in a metals TMDL for the Coeur d'Alene River Basin, which Idaho and EPA had issued in August 2000. *See* Response to Comments ("RTC"), Ex. 2, at p. 4. On September 6, 2001, an Idaho state trial court invalidated the Coeur d'Alene Basin metals TMDL. *Id.* In 2002, EPA received for review and approval two submissions from the Idaho Department of Environmental Quality ("IDEQ") relevant to the Permit's effluent limitations: (1) site-specific criteria ("SSC") relaxing the water quality criteria for cadmium, lead, and zinc applicable to the Lucky Friday facility; and (2) a sediment TMDL for the SFCdA River containing WLAs for the facility. *Id.* In light of these developments, EPA public noticed a revised draft NPDES permit and supporting fact sheet (the "2003 Fact Sheet") in January 2003. *See generally* 2003 Fact Sheet, Ex. 4. On February 28, 2003, EPA approved the cadmium, lead, and zinc SSC. RTC, Ex. 2, at 5. On August 12, 2003 EPA responded to the comments received on both draft permits and issued a final NPDES permit. *See generally* Permit, Ex. 1; RTC, Ex. 2.[5] On September 10, 2003, Hecla timely appealed the Permit to the EAB.

[5] Ultimately, the Idaho State Supreme Court upheld the trial court's determination that the metals TMDL was invalid, *Asarco Inc., et al. v. Idaho*, 69 P.2d 139 (Idaho 2003), and EPA did not approve the sediment TMDL until August 21, 2003, nine days after the final Permit was issued. As a result, none of the Permit's final effluent limitations are based on TMDL WLAs.

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III. SCOPE AND STANDARD OF REVIEW

There is no appeal as of right from a Region's permitting decision. *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB, May 29, 1992). For the EAB to grant review of an NPDES permit, the petition must demonstrate that the condition in question is based on "a finding of fact or conclusion of law which is clearly erroneous," or "an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a). *See, e.g., In re Hecla Mining Co., Grouse Creek Unit*, NPDES Appeal No. 02-02, slip op. at 13 (EAB, July 11, 2002); *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 8-9 (EAB, July 27, 2001); *In re City of Jacksonville, District II Wastewater Treatment Plant*, 4 E.A.D. 150, 152 (EAB 1992). As stated in the preamble to 40 C.F.R. § 124.19, "this power of review should only be sparingly exercised," and "most permit conditions should be finally determined [by the permitting authority] . . . ." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). *See In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Elec. Co.*, 8 E.A.D. 1, 7 (EAB 1998).

In any appeal, the petitioner bears the burden of demonstrating that review of the Region's decision is warranted. *See* 40 C.F.R. § 124.19(a); *see also Hecla Mining Co., Grouse Creek Unit*, slip op. at 13; *City of Moscow*, slip op. at 9; *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). The petitioner must demonstrate to the EAB, *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). Participation during the comment period must have conformed to the requirements of NPDES permitting regulations, which require that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's

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position be raised by the close of the public comment period. 40 C.F.R. § 124.13; *see also, Hecla Mining Co., Grouse Creek Unit*, slip op. at 14; *City of Moscow*, slip op. at 9; *In re New England Plating*, 9 E.A.D. 726, 731 (EAB 2001). As the EAB has noted, the intent of this provision "is to ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Steel Dynamics*, 9 E.A.D. 165, 229-30 (EAB 2000); *In re Encogen*, 8 E.A.D. 244, 249-50 (EAB 1999). The Board has consistently stricken arguments submitted to the EAB that were not provided to the Agency during the public comment period. *See, e.g., In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696, 698, n.1 (EAB 2000).

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); *In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17 & 01-19, -23, 17 (EAB, Apr. 25, 2002); *City of Moscow*, slip op. at 9-10; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998).

The EAB "assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature." *Hecla Mining Co., Grouse Creek Unit*, slip op. at 14-15 (citing *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 15 (EAB, Feb. 20, 2002) (hereinafter *"D.C. MS4"*)); *City of Moscow*, slip op. at 9; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub*

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Partners, L.P., 7 E.A.D. 561, 567 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999)). When presented with technical issues in a petition, the EAB determines 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." *Hecla Mining Co., Grouse Creek Unit*, slip op. at 15. If the EAB determines that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the EAB typically gives deference to the Region's position. *Id.*; *City of Moscow*, slip op. at 11.

As discussed below, Hecla has not carried its burden to demonstrate that the Region's permit decision is based on a clear error of law or fact or raises important policy considerations meriting review. Therefore, Hecla's request for review should be denied.

IV. MOTION TO STRIKE EXHIBIT K TO HECLA'S PETITION

As a preliminary matter, the Region moves to strike an exhibit submitted by Hecla in support of the Petition. Exhibit K to Hecla's Petition consists of an affidavit signed by Hecla employee Mike Dexter after issuance of the Permit and submitted to EPA for the first time as part of the Petition. As such, the Dexter Affidavit is not a part of the administrative record of the regional decision that the EAB is reviewing in this matter. *See* 40 C.F.R. § 124.18(c) ("The record shall be complete on the date the final permit is issued"). The information contained in this 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. *See* 40 C.F.R. 124.13 ("[A]ll persons, including applicants, who believe any condition of a draft

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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"); *In re Hecla Mining Co., Grouse Creek Unit*, slip op. at 17 (declining to consider an affidavit submitted by Hecla in a petition challenging an NPDES permit). The EAB has consistently stricken arguments and documents submitted to the EAB that were not provided to the Region during the public comment period. *See In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696, 698, n.1 (EAB 2000) (striking brief raising new arguments that should have been raised in the public comment period); *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 705 n.16 (1995) (striking documents appended to brief that were not part of the administrative record). For all these reasons, the Region respectfully requests that the EAB strike the Dexter Affidavit (Exhibit K to the Petition) and not consider it in ruling on Hecla's petition in this matter.[6]

V. ARGUMENT

Hecla's Petition challenges nine aspects of the Permit on a variety of grounds. This response brief addresses each of Hecla's nine challenges in turn.

A. Effluent Limitations and Monitoring Requirements for Mercury

The Permit establishes concentration- and mass-based effluent limitations for mercury for each of the Lucky Friday facility's three outfalls that vary based on the upstream flow of the SFCdA River. *See* Permit, Ex. 1, at I.A.1, Tables 1-4. The Permit's mercury limitations were

[6] The Region has not moved to strike the similar Tridle Affidavit that accompanies the Petition as Exhibit N because this affidavit appears to address only those issues related to Hecla's challenge to the method detection limit for zinc. As described below in Part F of this brief, the Region has been told that Hecla intends to withdraw its challenge to this condition of the Permit, and Exhibit N is therefore no longer relevant to the EAB's consideration of the Petition.

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derived from Idaho's water quality criteria for mercury in accordance with a process laid out in detail in appendices to the 2001 and 2003 Fact Sheets as well as in an appendix to the response to comments document accompanying the Permit. 2001 Fact Sheet, Ex. 3, at Appendix B; 2003 Fact Sheet, Ex. 4, at Appendix A; RTC, Ex. 2, at Appendix D. In accordance with Idaho's Clean Water Act ("CWA") Section 401 certification, the Permit contains a compliance schedule for these mercury limits which does not require Hecla to meet the limits until September 13, 2008. Permit, Ex. 1, at I.A.4. To determine compliance with the Permit's effluent limits for mercury, the Permit requires Hecla to collect grab samples of effluent from each discharging outfall twice per month and to monitor these samples for mercury. *See id.* The Permit does not specify a particular sample analysis method, but does require that Hecla use monitoring methods approved by EPA under 40 C.F.R. Part 136 that can achieve a method detection limit ("MDL") less than the corresponding effluent limitation. *Id.* at I.A.6; *id.* at III.C. As of the date of the Permit was issued, Method 1631 Rev. B was the only EPA-approved monitoring method for mercury that had an MDL sufficiently low to determine compliance with state water quality standards and with the Permit's mercury effluent limitations. *See* RTC, Ex. 2, at pp. 44-45; 64 Fed. Reg. 30,417 (June 8, 1999) (approving Method 1631, Rev. B to "measure[] mercury at the low levels associated with ambient water quality criteria").

1. The Petition's Challenge to the Permit's Mercury Limits and Monitoring Requirements Merely Restates Objections Made During the 2001 and 2003 Comment Periods and Does Not Demonstrate With Specificity Why the Response to Those Objections Merits Review

As noted above in Part III (Scope and Standard of Review), for an issue to be subject to EAB review, it must be more than a mere restatement of an issue raised during the comment

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period. Instead the Petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996).

The Petition's challenge to the Permit's mercury requirements essentially restates comments Hecla submitted in 2001 and 2003 on draft versions of the Permit. *See* Memorandum in Support of Hecla Mining Company's Petition for Review ("Petitioner's Memorandum") at 7-13. The RTC contains detailed responses to Hecla's earlier objections to the Permit's mercury provisions. RTC, Ex. 2, at pp. 44-45, 102-103. These responses demonstrate that the Region carefully considered Hecla's objections to the draft permits' mercury provisions and even revised the final Permit in response to these comments to reduce mercury monitoring frequency and extend the due date for reporting the results in Hecla's discharge monitoring reports ("DMRs"). *Id.* The responses demonstrate that the Region was well aware of the sampling data indicating that the concentration of mercury in Hecla's discharge was consistently less than 0.2 μg/L, but still concluded that this fact was insufficient to conclude that Hecla's discharge had no reasonable potential to exceed the applicable state water quality criterion for mercury (0.012 μg/L), which is more than an order of magnitude below the detection limit Hecla's monitoring had employed. Because the Petition does not identify with specificity why the Region's response merits review, the EAB should decline to review Hecla's challenge to the Permit's mercury provisions.

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2. The Permit's Effluent Limitations for Mercury Are Not Clearly Erroneous

Even if the EAB decides to consider Hecla's challenge to the Permit's mercury provisions, it should uphold the Permit's mercury effluent limitations as being appropriate and in fact mandated by Section 301(b)(1)(C) of the CWA.

As described above in Part II.A. (Facility Background) the Lucky Friday facility is subject to the ELGs found in Subpart J of 40 C.F.R. Part 440, including the prohibition on discharging mercury at concentrations greater than 2.0 μg/L. However, Section 301(b)(1)(C) of the CWA requires that NPDES permits also include, in addition to these technology-based limits, "any more stringent limitation, including those necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). The regulations implementing Section 301(b)(1)(C) of the CWA require that NPDES permits include limits for all pollutants or parameters which "are *or may be* discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard. . . ." 40 C.F.R. § 122.44(d)(1)(i) (emphasis added).[7]

Hecla does not appear to challenge the methodology that the Region employed in developing the Permit's effluent limits for mercury, but instead challenges the Region's authority to impose any water quality-based effluent limits ("WQBELs") at all for this pollutant. *See* Petitioner's Memorandum at 9-10. Contrary to Hecla's assertions, the administrative record in this matter provides ample support for the Region's conclusion that mercury is present in the Lucky Friday facility's effluent and that this mercury poses a reasonable potential to exceed the

[7] The U.S. EPA NPDES Permit Writers' Manual states that "if, after technology-based limits are applied, the permit writer projects that a point source discharger may exceed an applicable criterion, a water quality based effluent limit must be imposed." Permit Writer's Manual, Ex. 6, at p. 99. The Manual goes on to provide that the permit writer "also must consider whether technology-based limits are sufficient to maintain State water quality standards." *Id.* at p. 101.

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applicable water quality criteria for mercury. As evidenced by EPA's 1982 "Development Document for Effluent Limitation Guidelines and Standards for the Ore Mining and Dressing Point Source Category" ("Development Document"), mercury is a naturally occurring metal commonly found in the type of ore processed at the Lucky Friday facility. Development Document, Ex. 7, at p. 155 ("Toxic metals are naturally associated with metal ores and all of the 13 toxic metals [including mercury] were found in wastewater from this category"); *id.* at 157 (noting that the "froth flotation" process employed at the Lucky Friday mine has "the potential to generate wastewater polluted with many toxics" and that "all of the toxic metals were detected in raw mill water").[8] Given the Development Document's findings, it should come as no surprise that the resulting effluent limitation guidelines applicable to the Lucky Friday facility contain BPT and BAT effluent limitations for mercury. *See* 40 C.F.R. §§ 440.102, 440.103. Furthermore, Hecla has identified mercury as one of the pollutants present in the Lucky Friday facility's effluent. *See, e.g.,* Dec. 1976 Permit Application, Ex. 8, at pp. II-5, II-7 (identifying mercury as present in the effluent from both Outfall 001 and 002 (now 003) and assigning 0.001 milligrams/L (or 1.0 μg/L) as the "Maximum Value Observed or Expected During Discharge Activity" and 0.0001 milligrams/L (or 0.1 μg/L) as the "Minimum Value Observed or Expected During Discharge Activity").

Faced with these facts, the Region imposed final effluent limitations for mercury (ranging in concentration from 0.014 μg/L to 0.39 μg/L, depending on river flows and outfall) that ensure compliance with Idaho's chronic water quality criterion. Hecla suggests that the Region should

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[8] In fact, the Lucky Friday facility was one of the mines specifically evaluated in the Development Document. *See* RTC, Ex. 2, at 59 (quoting Hecla's 2001 comments: "Hecla, Sunshine, Bunker Hill, and ASARCO facilities were all evaluated as part of the studies supporting the development document.")

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have simply imposed a final, technology-based daily maximum mercury effluent limit of 2.0 μg/L or, alternatively, a limit of 0.2 μg/L. Had it done so, however, the Region clearly would have been authorizing Hecla to discharge levels of mercury in excess of the applicable water quality criteria, and the Permit would not have included "any more stringent limitation . . . necessary to meet water quality standards." 33 U.S.C. § 1311(b)(1)(C). Given the information indicating that mercury is likely to be present in the Lucky Friday facility's effluent, the Region's decision to determine Hecla's reasonable potential to exceed the mercury criterion with reference to the ELG's limits was not clearly erroneous and should be upheld by the EAB.[9]

3. The Permit's Monitoring Requirements for Mercury Are Not Clearly Erroneous

If the EAB decides to consider Hecla's challenge to the Permit's mercury provisions, it should also uphold the Permit's mercury monitoring requirements as being appropriate and authorized by the CWA's information-gathering authorities. Section 308 of the CWA grants EPA broad authority to require owners and operators of point sources to sample effluent, to install, maintain, and use monitoring equipment and methods, and to "provide any such other information as [EPA] may reasonably require." 33 U.S.C. § 1318(a)(4)(A); *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 671-72 (EAB 2001) (holding that the CWA confers broad authority on the Region to impose monitoring requirements in NPDES permits and that there is nothing in the Act or its implementing regulations that would limit

[9] Another approach that the Region could have taken that would have been consistent with the requirements of Section 301(b)(1)(C) would have been to accept at face value Hecla's claims that "there is no evidence that mercury is being discharged," Petitioner's Memorandum at 10, and prohibit *all* discharges of mercury from the Lucky Friday facility. The Petition does not advance this approach, presumably because of the consequences to Hecla should subsequent monitoring reveal any mercury (even at levels below the water quality criteria) in the Lucky Friday discharge.

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monitoring requirements to just those that might be necessary to assess compliance with effluent limits established by the permit); *In re City of Port St. Joe*, 7 E.A.D. 275, 306 (EAB 1997) (holding that Section 308(a) confers broad authority on the Region to impose monitoring requirements). In addition, Section 402(a)(2) of the CWA authorizes the Administrator to prescribe permit conditions for data and information collection, reporting, and such other requirements as he deems appropriate to carry out the objectives of the Act. 33 U.S.C. § 1342(a)(2). EPA's regulations are likewise very broad in scope, requiring NPDES permits to include "*any* requirements . . . necessary to . . . [a]chieve water quality standards." 40 C.F.R. § 122.44(d) (emphasis added).

Hecla can cite to no authority that would prohibit the Region from requiring Hecla to monitor its effluent for mercury using a method that is adequate to determine whether such effluent is exceeding state water quality criteria for mercury. To the contrary, given the indications that mercury is present in the Lucky Friday effluent and the lack of data to support a conclusion that the mercury is being discharged at concentrations below state water quality criteria, the Permit's mercury monitoring provisions would be reasonable, even in the absence of WQBELs for mercury. *See Town of Ashland Water Treatment Facility,* 9 E.A.D. at 672, n.14 ("Since CWA § 308(a) empowers the Agency to require, outside a permit proceeding, monitoring that is independent of and supplemental to the terms and conditions of the applicable permit, then, by extension, that same statutory predicate is surely broad enough to support the provision of comparable monitoring requirements in the permit itself").[10] The EAB should uphold the

[10] The Petition also claims that mercury is not a water quality concern worthy of monitoring at low detection levels because previous Superfund studies in the Coeur d'Alene basin identified only cadmium, lead, and zinc as the primary metals of concern. Petitioner's Memorandum at 11. The studies conducted by the Superfund

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Permit's monitoring requirements for mercury as a reasonable exercise of the Region's authority to impose monitoring requirements necessary to determine compliance with the Permit's final effluent limitations and to ensure that the Lucky Friday discharge is not exceeding applicable water quality criteria.

B. Seepage Study and Hydrological Analysis

As noted above in Part II.A. (Facility Background), Hecla collects the wastewater generated at the Lucky Friday facility in three large, unlined tailings ponds immediately adjacent to the SFCdA River. In order "to determine if there are discharges of pollutants from the tailings ponds into the SFCDA River," the 2001 draft permit proposed requiring Hecla to quantify seepage from the ponds by performing a water balance analysis. 2001 Fact Sheet, Ex. 3, at p. 16. In response to comments stating that the seepage study alone would not be sufficient to determine whether the seepage was entering the SFCdA River,[11] the Region revised the final Permit to require Hecla to "conduct a seepage study and hydrological analysis to determine if there are unmonitored discharges of pollutants from the Lucky Friday facility tailings pond no. 1 and tailings pond no. 3 into the SFCdA River."[12] Permit, Ex. 1, at I.C. The Permit requires Hecla to report the results of this study to EPA and IDEQ within three years of the Permit's effective date. *Id.*

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program and in support of the development of a Total Maximum Daily Load ("TMDL") do not provide justification to remand the Permit's mercury monitoring requirements These studies were intended to determine a cleanup plan and to develop a TMDL for cadmium, lead, and zinc. The lack of extensive studies on other parameters does not mean they do not cause water quality problems or that Hecla should not be required to determine whether its discharges cause or contribute to violations of state water quality standards.

[11] *See* RTC, Ex. 2, at p. 58.

[12] The Permit also requires the study to analyze seepage from Tailings Pond No. 2 under certain circumstances and provides some specificity on how the seepage study is to be conducted.

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In commenting on the 2001 draft permit's seepage study requirements, Hecla admitted that seepage was expected from the tailings ponds and, in fact, that "the tailings impoundments are designed to seep." RTC, Ex. 2, at pp. 59, 60. Hecla nevertheless contested the seepage study in its 2001 comments and again in comments submitted on the revised draft permit in 2003, claiming that a study of seepage from the ponds was neither technically nor legally justified. *Id.* at pp. 60-61, 110-111. In its response to these comments, the Region described the legal and technical basis for the seepage and hydrologic study requirements. *Id.* at pp. 60, 111.

1. The Petition's Challenge to the Permit's Seepage and Hydrological Study Requirements Merely Restates Objections Made During the 2001 and 2003 Comment Periods and Does Not Demonstrate With Specificity Why the Response to Those Objections Merits Review

The Petition reiterates the comments that Hecla previously submitted to the Region on the Permit's seepage study requirements and paraphrases portions of the Region's response to these comments, but makes little effort to demonstrate why this response was inadequate or merits review. The Petition's claim that the Region has provided "no response" to Hecla's concern that the study "would not in any way quantify" the discharges via seepage to the SFCdA River, *see* Petitioner's Memorandum at 15, is patently untrue. The final permit requires Hecla to conduct a hydrological analysis in conjunction with the seepage study designed specifically "to determine if seepage from the ponds enters the SFCdA River and to estimate the amount of seepage." Permit, Ex. 1, at I.C.2. To provide Hecla "with the flexibility to conduct the analysis using the most cost-effective methods applicable to the site," the Permit does not specify precisely how this analysis should be performed, but rather leaves that to Hecla's discretion. *See* RTC, Ex. 2, at p. 58. In its response to Hecla's written comments, the Region acknowledged that determining the

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quantity of seepage and the percent of seepage that entered surface waters would be difficult, but stated that these quantities can and should be at least estimated to determine the impact on the SFCdA River. *Id.* at 61. Because the Petition merely restates objections previously made by Hecla and considered by the Region, the EAB should deny review of this permit condition.

2. The Region Has a Sound Legal Basis for Imposing the Permit's Seepage and Hydrological Study Requirements and Its Decision to Do So Is Not Clearly Erroneous

EPA has repeatedly stated that it interprets the CWA to apply to discharges of pollutants from a point source via groundwater that has a "direct hydrologic connection" to surface waters.[13] The majority of courts that have considered this issue have similarly concluded that CWA jurisdiction extends to surface waters discharges that occur via hydrologic connection.[14] The

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[13] *See, e.g.*, 66 Fed. Reg. 2960, 3015-18 (Jan. 12, 2001) ("restating," in the context of proposing revisions to NPDES regulations governing concentrated animal feeding operations ("CAFOs"), "that the Agency interprets the Clean Water Act to apply to discharges of pollutants from a point source via groundwater that has a direct hydrologic connection to surface water" and providing a lengthy legal analysis), 62 Fed. Reg. 20,177, 20,178 (April 12, 1997) (responding to comments on proposed NPDES CAFO general permit for Idaho: "The only situation in which groundwater is affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater"); 60 Fed. Reg. 44,489, 44,493 (Aug. 28, 1995) (issuing proposed draft CAFO permit); 56 Fed. Reg. 64,876, 64,892 (Dec. 12, 1991) (promulgating regulations authorizing development of water quality standards by Indian Tribes); 55 Fed Reg. 47,990, 47,997 (Nov. 16, 1990) (preamble to final NPDES permit application regulations for storm water discharges).

[14] *See, e.g., Quivira Mining Co. v. United States EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985) (affirming EPA's decision that an NPDES permit was required for discharges of pollutants into surface arroyos which, during storms, channeled rainwater both directly to navigable-in-fact streams and into underground aquifers that connected with such streams), *cert. denied*, 474 U.S. 1055 (1986); *U.S. Steel Corp. v. Train*, 556 F.2d 882, 852 (7th Cir. 1977); *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169, 1180 (D Id. 2001) (holding that "the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States"); *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1319-20 (S.D. Iowa 1997) ("Because the CWA's goal is to protect the quality of surface waters, the NPDES permit system regulates any pollutants that enter such waters either directly or through groundwater."); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983, 98-90 (E.D. Wash. 1994), *dismissed on other grounds per unpublished decision* (E.D. Wash. May 7, 1997); *Friends of the Coast Fork v. County of Lane, Oregon*, Civ. No. 95–6105–TC (D. Or January 31, 1997) (holding that hydrologically-connected groundwaters are covered by the CWA); *McClellan Ecological Seepage Situation v. Weinberger*, 763 F. Supp. 431, 438 (E.D. Cal. 1989) (allowing plaintiff to attempt to prove at trial that pollutants discharged to groundwater are subsequently discharged to surface water), *vacated on other grounds*, 47 F.3d 325 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 51 (1995); *Friends of Santa Fe Co. v. LAC Minerals, Inc.*, 892 F. Supp. 1333, 1357-58 (D.N.M. 1995) (holding that CWA regulates discharges to hydrologically connected

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court's decision in *Washington Wilderness Coalition v. Hecla Mining Co.* is particularly relevant to Hecla's claims in the Petition in this matter. The plaintiffs in that case alleged that three tailings ponds associated with a Hecla mine in Republic, Washington seeped and leached contaminated wastewater into nearby surface waters. *Washington Wilderness Coalition*, 870 F. Supp. at 985. Hecla moved to dismiss plaintiffs' CWA claims, arguing that (1) the tailings ponds were not "point sources" subject to CWA jurisdiction, and (2) that the seepage through groundwater to surface waters did not constitute a discharge to "navigable waters." *Id.* at 988-89. The court rejected both arguments, holding first that "[d]ischarges from a pond or refuse pile can easily be traced to their source. Thus, even though runoff may be caused by rainfall or snow melt percolating through a pond or refuse pile, the discharge is from a point source because the pond or pile acts to collect or channel contaminated water." *Id.* at 988. With respect to Hecla's contention that there was no CWA jurisdiction over discharges via seepage, the court held that, although the CWA does not regulate discharges to isolated groundwater, "any pollutant which enters [surface] waters, either directly or through groundwater, is subject to regulation by NPDES permit." *Id.* at 990. There can be little doubt that any seepage from the Lucky Friday facility's tailings ponds that reached the SFCdA River would be subject to NPDES regulation.

As noted above, Sections 308 and 402(a)(2) of the CWA confer broad authority on EPA to prescribe permit conditions for data and information collection and to require owners and operators of point sources to "provide any such other information as [EPA] may reasonably require." 33 U.S.C. §§ 1318(a)(4)(A), 1342(a)(2). Hecla's Petition offers no authority or

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groundwater); *Sierra Club v. Colorado Refining Co.*, 838 F. Supp. 1428, 1434 (D. Colo. 1993) (holding that allegations that pollutants infiltrated creek via groundwater and seeps in creek bank stated a CWA cause of action).

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argument to support a conclusion that the Region has been unreasonable in requiring Hecla to conduct a seepage and hydrologic study to determine whether seepage from its tailings ponds is resulting in an NPDES-regulated discharge. The single case cited by Hecla (*American Iron & Steel Institute v. EPA*, 115 F.3d 979 (D.C. Cir. 1997)) has no applicability to the facts of this matter since the Region has made no attempt to assert jurisdiction over or impose limitations on "internal waste streams" at the Lucky Friday facility. Rather, the Region has required merely that Hecla analyze the uncontrolled seepage from Hecla's tailings ponds. Any of this seepage that flows into the SFCdA River would constitute a point source discharge of pollutants to navigable waters, and requiring Hecla to verify the existence and estimate the impacts of such a discharge is plainly within EPA's broad CWA information-gathering authorities.

3. The Region Has a Sound Technical Basis for Imposing the Permit's Seepage and Hydrological Study Requirements and Its Decision to Do So Is Not Clearly Erroneous

As noted above, Hecla admits that its unlined tailings ponds, which are immediately adjacent to the SFCdA River, are designed to seep contaminated wastewater. RTC, Ex. 2, at p. 60; *see also* 2001 Fact Sheet, Ex. 3, at Appendix A (map); Letter from Booth to Smith (August 2, 1999), Ex. 9, at Attachment 4 (maps of tailings ponds with arrows to SFCdA River). The Region has committed no clear error by requiring Hecla to quantify this seepage through a water balance analysis and then determine whether and how much of this seepage discharges to the SFCdA River through a hydrological study. As acknowledged by Hecla in its comments on the 2001 draft permit, similar studies have been performed on tailings ponds at other mine sites in the Coeur d'Alene basin, *see* RTC, Ex. 2, at p. 60, and neither the Petition nor Hecla's comments offer any technical basis for concluding that such an analysis is impractical, impossible, or

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unnecessary at the Lucky Friday facility. Furthermore, by requiring only that the amount of seepage to the SFCdA River be "estimated" and by allowing Hecla to design the hydrologic study using the most cost-effective methods applicable to this site, *see id.* at p. 58, the Permit is narrowly tailored to ensure that relevant information is obtained without undue expense to Hecla.

The Region committed no clear error in imposing seepage and hydrological study requirements through the Permit, and the EAB should deny review of Part B of the Petition.

C. Variance Request

On February 21, 2001, Hecla submitted a request to EPA for a variance from the lead and zinc water quality standards that were used to establish effluent limits in the 2001 draft permit. *See* Letter from Beaton to Findley and Allred (Feb. 21, 2001), Ex. 10. However, Hecla had indicated that the variance was only needed until IDEQ adopted site-specific criteria for cadmium, lead, and zinc in the SFCdA River. *See* RTC, Ex. 2, at pp. 15-16. In February 2003, EPA approved the SSC, but then received a letter from Hecla in April 2003 indicating that, despite approval of the SSC, it intended to keep its February 2001 variance request "active." *See* Letter from Dexter to Office of Water Director (April 11, 2003). Ex. 11, at pp. 5-6. On June 9, 2003, EPA responded to Hecla, stating that if Hecla still sought a variance, it should renew its request because the previous request for a variance was based on lead and zinc water quality criteria that were no longer in effect. *See* Letter from Smith to Dexter (June 9, 2003), Ex. 12, at p. 1. In a July 11, 2003, letter, just one month prior to permit issuance on August 12, 2003, Hecla formally provided additional information in response to EPA's June 9, 2003, letter. *See* Letter from Dexter to Smith (July 11, 2003), Ex. 13. In response to public comments on the draft

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permits, the Region noted that it was reviewing the variance request and that if EPA approved the variance, then the permit will be modified to incorporate the variance. *See* RTC, Ex. 2, at 18.

The Petition makes four arguments related to its variance request: (1) EPA should have acted on the variance request before issuing the permit; (2) EPA should not have issued the Permit before acting on the variance; (3) the limits for cadmium, lead, zinc, and mercury in the Permit impose unreasonable financial burdens on the company; and (4) EPA failed to adequately respond to public comments related to the variance request.

The EAB should reject all these arguments. As an initial matter, the EAB should find that Hecla's claims related to the variance request are not properly before the Board, because they are not related to "any condition of the permit decision" as required by 40 C.F.R. § 124.19. Alternatively, even if the issue related to the variance request were properly before the Board, the EAB should find that the Region properly issued the Permit with effluent limits for cadmium, lead, zinc, and mercury and that the Region was not required to act on the variance request prior to permit issuance. Finally, the EAB should conclude that the Region adequately responded to public comments related to the variance request.

1. The Region's Decision Not to Act on HECLA's Variance Request Prior to Permit Issuance is Not Properly Before the EAB

The EAB should reject Hecla's arguments related to the variance request because the Board's jurisdiction only extends to "contested permit conditions." *See* 40 C.F.R. § 124.19(a). Rather than challenge any specific permit condition, Hecla instead challenges the agency's failure to act on the variance request prior to issuing the NPDES permit. Such a challenge is inappropriate in this forum.

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In *City of Moscow*, the EAB rejected the petitioner's challenge to permit conditions that were derived from an EPA-approved Total Maximum Daily Load ("TMDL"), noting that petitioner was essentially attempting to challenge EPA's approval of the TMDL in the context of an individual NPDES permit appeal. *See In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 35 (EAB, July 27, 2001). The EAB noted that,

> the rules governing permit appeals before the Board do not in the ordinary course contemplate review of Agency decisions of this kind. Section 124.19 of 40 C.F.R., which addresses Board review of permit decisions, authorizes the Board to review "contested permit conditions." 40 C.F.R. § 124.19(a). As we have held in a number of different contexts, this does not ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora.

Id. at 37; *see also In re City of Irving, Tex. Mun. Separate Storm Sewer Sys.*, NPDES Appeal No. 00-18, slip op. at 19-20 (EAB, July 16, 2001) (noting "we have repeatedly recognized that the regulations authorizing appeals to the EAB contemplate review of conditions of *permits*, not review of the statutes and regulations which are predicates for such conditions") (emphasis in original); *In re City of Hollywood, Fla.*, 5 E.A.D. 157, 175-76 (EAB 1994) (noting the EAB does not have jurisdiction to consider a challenge to EPA's approval of state's water quality standards in context of NPDES permit appeal). The EAB noted that the petitioner's challenge should have been brought as a challenge to EPA's approval of the TMDL under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.* *See In re City of Moscow*, slip op. at 35.

In this case, Hecla's challenge is even more far removed from a "contested permit condition" than was the case in *City of Moscow*. In *City of Moscow*, petitioner directly challenged a final agency decision (*i.e.*, the approval of the TMDL), and a specific permit condition (*i.e.*, initial algal growing period incorporated from the TMDL into the permit). *See id.*

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In this case, however, there is not even a final agency decision to review because EPA has not yet acted on the variance request. In addition, in the section in Hecla's memorandum related to the variance request, Hecla does not mention any specific permit conditions related to cadmium, lead, zinc, or mercury which it is challenging. Rather, Hecla argues that EPA should be required to act on the variance request before issuing the permit. *See* Petitioner's Memorandum at 16-20.

Hecla should pursue its argument that the agency failed to act on the variance request as required by law under the APA in federal district court.[15] The APA provides the opportunity for an aggrieved party to have a federal court "compel agency action unlawfully withheld or unreasonably delayed" and to set aside "agency actions, findings, and conclusions found to be– (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(1); 706(2)(A). Not only is Hecla aware of the opportunity to pursue such a claim under the APA, it has in fact done so.

On November 27, 2002, Hecla filed a cross complaint in federal district court for the Western District of Washington claiming, *inter alia,* that EPA has unreasonably delayed and failed to act in issuing a final decision on Hecla's request for a variance filed on February 21, 2001, in violation of the APA. *See* Proposed Answer and Cross-Claim of Intervenor Cross-Claimant Hecla Mining Company, Ex. 14, at p. 11. As of the filing of this response brief, this action is pending. In light of the fact that Hecla's challenge to the variance request is not a

[15] This memorandum does not address the merits of such a claim under the APA. The purpose of this memorandum is only to explain why the proper forum for such a claim is in federal district court, and not before the EAB.

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challenge to any specific permit condition, and has been brought under the APA in federal court, the EAB should deny review of Hecla's challenge to the variance request in this forum.[16]

2. EPA Did Not Act Contrary to Law in Issuing HECLA's NPDES Permit Prior to Acting on HECLA's Variance Request

Hecla's second argument is that EPA acted in violation of law by issuing the Permit prior to acting on the variance request. *See* Petitioner's Memorandum at 18. However, Hecla does not cite to any legal authority demonstrating that EPA is required to delay issuance of an NPDES permit until a variance request is acted upon.

On April 28, 1997, EPA proposed water quality standards that would be applicable to the waters of the United States in the State of Idaho. 62 Fed. Reg. 23,004 (April 28, 1997). EPA proposed to authorize the Region X Regional Administrator to grant water quality standard variances where a permittee submits data indicating that an EPA-designated use is not attainable for the reasons specified in 40 C.F.R. § 131.10(g). *See id.* at 23,015. The proposed rule was finalized three months later. 62 Fed. Reg. 41,162 (July 31, 1997). The rule contains minimal procedural requirements related to processing variance requests. *See* 40 C.F.R. § 131.33(d)(4).

It is under this rule, specific to variances from the Idaho water quality standards, under which Hecla applied for a variance. *See* Letter from Beaton to Findley and Allred (Feb. 21, 2001), Ex. 10. However, the primary authority to which Hecla refers in making its arguments relating to the processing of variance request is 40 C.F.R. § 124.63(a). *See* Petitioner's

[16] In addition, it should be noted that if EPA were to grant Hecla's variance request, but for some reason made the decision not to modify Hecla's NPDES permit, Hecla would be in a position to appeal the denial of a permit modification request under 40 C.F.R. § 124.19 to the EAB. Furthermore, if Hecla sought review of the EAB's final decision on the permit modification denial, Hecla could appeal that decision to the Ninth Circuit Court of Appeals under section 509(b)(1) of the CWA, 33 U.S.C. § 509(b)(1).

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Memorandum at 18. Hecla argues that, pursuant to 40 C.F.R. §124.63(a), if EPA is unable to act on a variance request because it is still reviewing information, it must delay issuance of the final permit. *See id.* But, the variance provisions in Part 124 are not applicable in this case. The procedures in 40 C.F.R. § 124.63(a)(1) relate to variances requested based on the presence of fundamentally different factors or on Section 301(g) of the CWA. The procedures in 40 C.F.R. § 124.63(a)(2) relate to variances requested under Section 301(c) or 302(b)(2) of the CWA. The variance request in this case, which Hecla correctly identified in its original February 21, 2001 request as being authorized under 40 C.F.R. 131.33(d), see Petitioner's Ex. B at 1, falls under neither of those provisions.

Furthermore, to the extent the EAB may choose to draw analogies from the variance procedures in 40 C.F.R. § 124.63(a) and apply them to those procedures in 40 C.F.R. § 131.33(d)(4), the language in § 124.63(a) supports EPA's position, not Hecla's. 40 C.F.R. § 124.63(a) states that if acting on a variance request "would significantly delay the processing of the permit . . . the processing of the variance request may be separated from the permit . . . and the processing of the permit shall proceed without delay." 40 C.F.R. § 124.63(a)(1)(i).[17] Thus,

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[17] The idea that the public should not bear the burden of additional pollution while an agency considers a pending variance request has been directly addressed by the federal district court for the Northern District of Illinois. In a case involving enforcement of NPDES permit conditions which were in effect while the permittee had a pending variance request before the state agency authorized to implement the NPDES program, the court noted:

> Under the Clean Water Act, the pendency of a variance petition does not suspend the limitations of the permit. See *N.R.D.C. v. Outboard Marine Corp.*, 692 F. Supp. 801, 811 (N.D. Ill. 1988). The Supreme Court has stated this principle in a related context:
>
> > [A] polluter is subject to existing requirements until such a time as he obtains a variance, and variances are not available under the [Clean Air Act] until they have been approved by both the State and the [United States Environmental Protection] Agency. . . . [The polluter's attempt to obtain a variance] is carried out on the polluter's time, not the public's, for during [variance proceedings] the original regulations remain in effect, and the polluter's failure to comply may subject him to

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even if the EAB were to look to the variance procedures in 40 C.F.R. § 124.63(a) as guidance with respect to how to interpret 40 C.F.R. § 133.31(d)(4), there is nothing in these procedures which suggest EPA must withhold issuance of an NPDES permit until it has acted upon a variance request, and in fact, the regulation states just the opposite.

In this case, waiting to process the variance request prior to permit issuance would have meant further delay in issuing a permit, already long overdue for reissuance. The NPDES permit under which Hecla was discharging pollutants to waters of the United States was issued in 1977 and expired in 1980. Hecla's 2001 variance request was based on standards which were no longer in existence. Furthermore, EPA did not have all the information required to make a determination on the variance. *See* Letter from Smith to Dexter (June 9, 2003), Ex. 12; Letter from Dexter to Smith (July 11, 2003), Ex. 13. Hecla continued to provide new and essential information with respect to its updated variance request long after the draft NPDES permit had been put out for public comment. *See, e.g., id.*; Petitioner's Ex. M.[18] Therefore, it was reasonable to proceed with issuing the final permit while continuing to process the variance request. The EAB should find that EPA did not act contrary to law in issuing the NPDES permit prior to acting on the variance request.

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a variety of enforcement procedures.

United States v. Citizens Utilities Company, 1993 U.S. Dist. LEXIS 10340 (N.D. Ill. July 27, 1993) (citing *Train v. N.R.D.C.* 421 U.S 60, 92 (1975).

[18] Note that Exhibit M, which was prepared after issuance of the final Permit, is not part of the administrative record for the Permit.

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3. The Permit's Effluent Limitations for Cadmium, Lead, Zinc, and Mercury are Reasonable and Not Clearly Erroneous

In the variance section of its Memorandum, Petitioner fails to explain how failure to act on Hecla's variance request prior to issuance of the Permit has resulted in improper effluent limitations for cadmium, lead, zinc, or mercury. Instead, Hecla argues that meeting such limits will be prohibitively expensive for the company. *See* Petitioner's Memorandum at 16. Hecla claims that it faces costs of up to $7 million at the end of the permit's compliance schedule. *See id.* However, Hecla fails to point out that it is not required to design, build, and implement a water treatment system to comply with, *inter alia*, limits for cadmium, lead, zinc, and mercury until September 13, 2008, five years hence. *See* Permit, Ex. 1, at I.A.4.d. Though not part of the administrative record in this case, Hecla's own projected compliance costs show that it will not be required to make capital expenditures of $5.5 million (towards the $7 million water treatment system) until 2007. *See* Petitioner's Ex. K ("Additional Compliance Costs" shown in chart attached to exhibit).[19] Thus, Hecla faces far fewer expenses in the short term than implied in its Petition.

Furthermore, EPA has indicated in writing that, upon receipt of the additional information related to its variance request, EPA should be able to act on the variance request "within a few months." *See* Petitioner's Ex. M at 2. As part of its analysis, EPA is considering the significant and widespread economic and social impacts of imposing pollution controls necessary to meet the cadmium, lead, zinc, and mercury standards in the permit. *See* Letter from Smith to Dexter (June 9, 2003), Ex. 12, at 2. Thus, Hecla should know the results of EPA's determination with

[19] The Region has moved to strike this Exhibit, which was prepared after issuance of the final Permit and is not part of the administrative record for the Permit. *See* Part IV of this response brief, *supra*.

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respect to the variance long before it is actually required to make any substantial capital expenditures towards a water treatment system. *See* Petitioner's Ex. K ("Additional Compliance Costs" shown in chart attached to exhibit). In its response to public comments, EPA has indicated that, should EPA grant the variance request, it will modify the permit to reflect the final determination related to the request. *See* RTC, Ex. 2, at p. 18. Therefore, in the meantime, the EAB should find that EPA is properly acting within the regulatory context on Hecla's variance request and that the current limits for cadmium, lead, zinc, and mercury in the permit are appropriate.

4. The Region's Response to Public Comments Related to the Variance Request was Sufficient and Does Not Warrant Remand of the Permit

Hecla argues that EPA's response to comments related to Hecla's variance request were insufficient. *See* Petitioner's Memorandum at 20. Under the permitting regulations, permit issuers are obligated to "[b]riefly 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)(2). As the EAB has stated, "[t]his regulation does not require a [permit issuer] to respond to each comment in an individualized manner," nor does it require the permit issuer's response "to be of the same length or level of detail as the comment." *In re NE Hub Partners, L.P.* 7 E.A.D. 561, 583 (EAB 1998) *rev. denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). Instead, "[t]he response to comments document must demonstrate that all significant comments were considered, even if the [permit issuer] ultimately disagrees with the substance of the comment." *Id.*

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In its comments on the draft NPDES permit, Hecla indicated its intent to keep its February 2001 variance request "active," and expressed some concerns about the way in which EPA was considering its request. *See* Letter from Dexter to Office of Water Director (April 11, 2003), Ex. 11, at pp. 5-6. Hecla characterizes EPA's response to its comments as "insufficient" and as simply stating that EPA was in the process of reviewing the variance request. *See* Petitioner's Memorandum at 20.

In the RTC, the Region thoroughly responded to all comments related to the variance request and explained the reasons why the Region was proceeding with permit issuance prior to acting on the request. Contrary to Hecla's assertion, the Region went far beyond simply indicating it was in the process of reviewing the request. In particular, the Region explained the background associated with Hecla's original variance request in February 2001, which only related to lead and zinc. *See* RTC, Ex. 2, at pp. 15-16. The Region explained that, despite the fact that Hecla had previously indicated to EPA that a variance was only needed until the SSC were approved, Hecla modified its variance request in July 2003 to include a variance from the water quality standards that are the basis for the cadmium, lead, zinc, and mercury limits in the permit. *See id.* The Region also indicated that if it approved the variance request, then the permit would be modified to incorporate any changes to the limits. *See id.* As the record shows, the Region responded in detail to public comments related to its variance request, and the EAB should find that the Region's response to comments regarding the variance request was sufficient.

In sum, EPA requests that the EAB find that Hecla's claims related to the variance request are not properly before the Board, because they are not related to any permit condition

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and should be rejected outright. However, even if the EAB determines that Hecla's claims related to the variance request are properly before the Board, the Region requests that the Board conclude that the Region properly issued the Permit with effluent limitations for cadmium, lead, zinc, and mercury. The EAB should also find that it is proper for the Region to act on the variance request in a timely manner after receiving all information necessary to make such a determination. Finally, the Region requests that the EAB find that the Region adequately responded to public comments related to the variance request.

D. Total Recoverable Effluent Limitations for Metals

The Permit's effluent limitations impose concentration- and mass-based restrictions on the amounts of "total recoverable" cadmium, lead, zinc, copper, and silver. *See* Permit, Ex. 1, at I.A.1, Tables 1-4. As the Region described in the fact sheets accompanying the 2001 and 2003 draft permits, these effluent limitations are expressed in this fashion to reflect the requirement in 40 C.F.R. § 122.45(c) that "[a]ll permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of 'total recoverable metal'" unless one of three exceptions enumerated in the regulation applies. *See* 2001 Fact Sheet, Ex. 3, at p. B-16; 2003 Fact Sheet, Ex. 4, at p. A-9. Hecla objected to the Region's proposal of total recoverable metals limitations in comments mirrored in part by Section D of the Petition. *See* RTC, Ex. 2, at pp. 29-30.

In its Petition, Hecla contends that the Permit's limitations for metals should be expressed in terms of "dissolved" metals because the Idaho water quality criteria upon which the metals limitations are based are expressed in terms of "dissolved" metals. Petitioner's Memorandum at 21. Hecla contends that these water quality criteria constitute "applicable effluent standard[s] or limitation[s] . . . promulgated under the CWA," thus qualifying for the exception to the "total

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recoverable" metals rule that is found in 40 C.F.R. § 122.45(c)(1). *Id.* at 22. The EAB should decline to review this aspect of Hecla's Petition because the water quality criteria upon which the metals limitation are based are not "effluent standards or limitations" and because the Region adequately responded to Hecla's objections on this point.

1. The Permit's Use of "Total Recoverable" Effluent Limitations for Metals is Not Clearly Erroneous Because the Region Correctly Concluded that the Applicable Idaho Water Quality Criteria Are Not "Effluent Standard[s] or Limitation[s]" Promulgated Under the CWA

While Hecla is correct that the Idaho water quality criteria governing the Permit's metals limitations are expressed in terms of "dissolved" metals, it is incorrect in asserting that these criteria constitute "effluent standard[s] or limitation[s]." The CWA defines "effluent standard or limitation under this chapter" (for the purposes of the Act's citizen suit provisions) to mean:

> (1) . . . an unlawful act under subsection (a) of section 301 of this Act; (2) an effluent limitation or other limitation under section 301 or 302 of this Act; (3) standard of performance under section 306 of this Act; (4) prohibition, effluent standard or pretreatment standards under section 307 of this Act; (5) certification under section 401 of this Act; (6) a permit or condition thereof issued under section 402 of this Act, which is in effect under this Act (including a requirement applicable by reason of section 313 of this Act); or (7) a regulation under section 405(d) of this Act.

33 U.S.C. § 1365(f). State water quality standards, which are promulgated by states and approved by EPA pursuant to Section 303 of the CWA, do not appear on this list. Courts considering this definition have consistently held that a state water quality standard does not constitute an "effluent standard or limitation" under this definition. *See Oregon Natural Resources Council v. U.S. Forest Service,* 834 F.2d 842, 850 (9th Cir. 1987) (holding that the phrase "effluent standard or limitation" does not include state water quality standards: "effluent limitations may be derived from state water quality standards and may be enforced when

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included in a discharger's permit. We agree with defendants that it is not the water quality standards themselves that are enforceable. . . ."); *Sparacino v. Anadromous, Inc.*, 1990 U.S. Dist. LEXIS 20893, *3 (D. Or., November 8, 1990) ("It is important to distinguish between an 'effluent standard or limitation' which is the subject of a citizen's suit and a 'water quality standard.' A water quality standard is used to measure the level of pollution in a body of water, i.e. the effect of pollution. An 'effluent standard or limitation' evaluates the level of pollutants in a discharge prior to its introduction into a body of water" (omitting citations)).

EPA's permitting guidance provides further support for the Region's conclusion that 40 C.F.R. § 122.45(c) requires permit effluent limitations for metals to be expressed as "total recoverable," even where the underlying water quality criterion is expressed in "dissolved" terms. In a 1996 document entitled, "The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From a Dissolved Criterion" ("Translator Guidance"), EPA's Office of Water set forth detailed technical guidance to assist permit writers in translating "dissolved" metals criteria into "total recoverable" permit limits. Translator Guidance, Ex. 15. The Translator Guidance reiterates EPA's recommendation that *water quality standards* be established with reference to dissolved metals "because dissolved metal more closely approximates the bioavailable fraction of metal in the water column than does total recoverable metal." *Id.* at 1 (quoting a 1993 memorandum entitled "Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria"). The guidance confirms, however, that in most instances *permit limits* based on such dissolved metal criteria

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"must be expressed as total recoverable metal." *Id.* (citing 40 C.F.R. § 122.45(c)).[20] In fact the sole reason that the Translator Guidance is even necessary is because 40 C.F.R. § 122.45(c), properly interpreted, makes no exception for permit limits based on water quality standards expressed in "dissolved" form.

Because the state water quality standards from which the Permit's effluent limitations are derived do not constitute "applicable effluent standard[s] or limitation[s] . . . promulgated under the CWA," the Permit's metals limitations are properly expressed in terms of "total recoverable" metals, and the EAB should therefore uphold these limits.

2. The Region's Response to Public Comments Related to the Imposition of "Total Recoverable" Metals Limits was Sufficient and Does Not Warrant Remand of the Permit

Petitioner's Memorandum contends that the Region's response to Hecla's objections to the "total recoverable" metals limits was inadequate and warrants a remand. Petitioner's Memorandum at 21. Hecla's basis for this claim is the Region's statement, in response to Hecla's 2001 objections to the Permit's "total recoverable" metals limits, that Idaho water quality criteria are "not an 'effluent standard or limitation' developed under 301(b)(1)(B)." *See id.* Although this statement is unquestionably true, Hecla appears to contend that the response is nevertheless inadequate because the Region neglected to mention that a water quality criterion also is not an "effluent standard or limitation" under 301(a), 302, 307, a 401 certification, a 402 permit condition, a 405(d) regulation, or any of the other provisions referenced in the definition

[20] The Translator Guidance provides a rationale for imposing permit limits that are expressed differently than the underlying standard by describing a hypothetical electroplating facility: "When the effluent from the clarifiers, usually with a high pH level, mixes with receiving water with a significantly lower pH level, these solids [not removed by the clarifier] instantly dissolve. Measuring dissolved metals in the effluent, in this case, would underestimate the impact on the receiving water." *Id.* at 1, n.3.

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of that phrase in Section 505 of the CWA. The Region's failure to list in the RTC every type of "effluent standard or limitation" which is *not* an Idaho water quality criterion does not render the response unclear or suggest that the Permit should be remanded.

As noted previously, the NPDES permitting regulations require only that the permitting authority "[b]riefly 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)(2). The Region's response to Hecla's request for "dissolved" metals limits, though perhaps not as expansive as Hecla would have wished, clearly identifies the regulatory provision that requires the imposition of "total recoverable" limits and briefly describes why the exception to this rule relied upon by Hecla does not apply. This is all that is required in an RTC, and the EAB should not remand the Permit for further elaboration.

E. Lack of Compliance Schedules for Various Monitoring Requirements

The Permit requires Hecla to conduct flow-proportioned 24-hour composite sampling to monitor for a number of the Permit's authorized parameters, to continuously monitor outfall flow, and to daily monitor the flow of the SFCdA River directly upstream of each outfall. Permit, Ex. 1, at I.A.1, Tables 1-4; *id.* at I.D.1; *see also id.* at VI.20 (defining "24-hour composite"). These monitoring requirements are necessary to determine compliance with a number of the Permit's effluent limitations, including: (1) the flow-tiered WQBELs for copper, mercury, and silver[21]; (2) all of the Permit's mass-based effluent limitations (including interim

[21] *See* Permit, Ex. 1, at I.A.1, Tables 1-4.

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limits)[22]; and (3) the interim maximum daily limitation for mercury (which only applies during specified SFCdA River "flow tiers").[23] The data generated by these monitoring requirements will also assist the Region in conducting future reasonable potential evaluations and establishing effluent limitations. *See* 2001 Fact Sheet, Ex. 3, at p. 13.

The Petition challenges the lack of a compliance schedule for these monitoring requirements, contending that the requirements are "unreasonable" and "physically impossible" for Hecla to meet prior to the Permit's September 14, 2003 effective date. Petitioner's Memorandum at 23. The only support that the Petition offers for its claims of unreasonableness and impossibility comes from a single paragraph in the Dexter Affidavit attached to the Petition as Exhibit K,[24] and Petitioner's Memorandum includes no indication of the schedule under which Hecla believes it could meet the monitoring requirements.

As described above in response to other aspects of Hecla's petition, EPA's information-gathering authorities under the CWA are broad and constrained only by a requirement that the request for information be reasonable. *See* 33 U.S.C. §§ 1318(a)(4)(A), 1342(a)(2). Furthermore, EPA's permitting regulations require that NPDES permit include monitoring conditions sufficient to assure and determine compliance with the permit's effluent limitations. 40 C.F.R. § 122.44(i). Hecla has failed to satisfy its burden to demonstrate that the Permit's

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[22] *See* Permit, Ex. 1, at I.A.1, Tables 1-4 and I.A.4.e, Table 5. Determining the pounds per day being discharged from each outfall requires one to multiply the concentration (in milligrams/L) by a conversion factor of 8.34 by the effluent flow (in mgd). 2001 Fact Sheet, Ex. 3, at p. B-18.

[23] *See* Permit, Ex 1, at I.A.4.e, Table 5, n.2.

[24] The Region has moved to strike this exhibit, which was prepared after issuance of the final Permit and is not part of the administrative record for the Permit. *See* Part IV of this response brief, *supra*.

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monitoring conditions are not required by Section 122.44(i) or to show that these conditions are otherwise unreasonable or contrary to law. For all of these reasons, the EAB should decline to entertain the Petition's challenge to the Permit's requirements for flow-proportioned composite sampling, continuous outfall flow monitoring, and instream flow monitoring.

F. Method Detection Limit for Zinc

Based on representations made by counsel for Hecla, the Region understands that Hecla will withdraw its challenge to the Permit's method detection limit for zinc during the week of November 3, 2003. This response brief therefore does not respond to the arguments and authorities cited in Part F of Petitioner's Memorandum. The Region respectfully requests that, should the Region's understanding prove to be incorrect, the EAB allow the Region to file a response to Part F of Petitioner's Memorandum no later than November 14, 2003.

G. Interim Effluent Limitations for Lead, Cadmium, and Zinc

As mentioned in previous sections of this response brief, the Permit contains compliance schedules for certain of the WQBELs for cadmium, lead, mercury, and zinc. *See* Permit, Ex. 1, at I.A.4 (establishing a September 13, 2008 deadline to comply with the lead, mercury, and zinc WQBELs for all three outfalls, and to comply with the cadmium WQBELs for Outfall 001, and Outfall 002 when it is discharging the Outfall 001 waste stream). These compliance schedules were authorized by a certification of the Permit issued by the State of Idaho on June 17, 2003 pursuant to Section 401 of the CWA, 33 U.S.C. § 1341. While Idaho's certification letter provided Hecla additional time to come into compliance with these WQBELs, it also specified

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interim limits to apply "[d]uring the period that the compliance schedule is in effect." Certification Letter, Ex. 16, at pp. 2-3. According to the certification letter, the interim limits for cadmium, lead, and zinc were "based on the recent discharge levels reported in [Hecla's Lucky Friday discharge monitoring reports]." *Id.* at 2. The Permit contains a table incorporating without change the interim limits from the state's certification letter. Permit, Ex. 1, at I.A.4.e.

The Petition challenges the Permit's interim limits for cadmium, lead, and zinc,[25] claiming that these limits are not based on actual past performance and that, as a result, Hecla will have difficulty achieving compliance with them. Petitioner's Memorandum at 25-26. The EAB should reject this portion of the Petition because the interim limits are attributable to Idaho's certification letter and therefore not reviewable in this forum.

The NPDES regulations provide that "[r]eview on appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the [Part 124] procedures." 40 C.F.R. § 124.55(e); *see Roosevelt Campobello Int'l. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). Thus, EPA is without authority to "'look behind' a State certification issued pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, for the purpose of relaxing a requirement of that certification." *In re General Electric Company, Hooksett, N.H.*, 4 E.A.D. 468, 470 (EAB 1993); *In re Lone Star Steel Co.*, 3 E.A.D. 713, 715 (CJO 1991). It is well settled that conditions are attributable to state certification when "the State indicates (in writing) that these conditions are necessary in order to comply with State law and cannot be made less stringent and still comply with State law." *In re City of Fitchburg, Mass. (East and 8 Waste Plants)*, 5 E.A.D. 93, 98 (EAB 1994); *General*

[25] Petitioner's Memorandum does not reference or appear to challenge the interim limits for mercury.

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Electric Company, Hooksett, N.H., 4 E.A.D. at 471; *In re Puerto Rico Public Buildings Authority S.U. Mameyes Ward School*, NPDES Appeal No. 00-20, slip op. at 7-8 (EAB, October 19, 2000).

Even a cursory examination of Idaho's June 17, 2003 certification letter reveals that the Permit's interim effluent limitations are entirely "attributable to State Certification" within the meaning of 40 C.F.R. § 124.55(e) and therefore not subject to EAB review. The certification letter states that it "will serve as certification by the State of Idaho pursuant to the provision of Section 401 of the [CWA]" and that if "the Lucky Friday Mine and Mill complies with the terms and conditions imposed by this permit and the conditions set forth in this § 401 Certification, there is reasonable assurance the discharge will comply" with Idaho's water quality standards. Certification Letter, Ex. 16, at p. 1. The letter goes on to require that, for the duration of the compliance schedule for cadmium, lead, zinc, and mercury provided by the letter, "interim limits shall apply to the outfalls" and it goes on to identify interim limits identical to those subsequently included in the final Permit. *Id.* at pp. 2-3.[26] Because neither the EAB nor the Region have authority to look behind Idaho's claim that these interim limits are necessary to assure compliance with state water quality standards, the EAB should decline to review the Petition's challenge to these limits.

H. Upper pH Limit

The Permit contains a condition limiting the pH of the effluent from all three outfalls to "not [] less than 6.5 standard units (s.u.) nor greater than 9.0 s.u." Permit, Ex. 1, at I.A.3. As

[26] Hecla appears to contend that the interim limits are not somehow attributable to certification because an EPA employee ran at least some of the calculations upon which they were based. Petitioner's Memorandum at 25. Hecla cites no authority for this remarkable proposition, nor does it explain why an otherwise valid certification issued by the appropriate state official should be rendered subject to EAB review simply because it relied, in whole or in part, on calculations performed by EPA.

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described in the 2001 Fact Sheet, the lower end of this range is dictated by the applicable state water quality standard, while the upper end is dictated by the technology-based effluent limitation guideline applicable to the facility. 2001 Fact Sheet, Ex. 3, at p. B-19.[27] Hecla objected to the upper pH limits in comments submitted to the Region in 2001 and again in 2003, and the Region responded to these objections when it issued the final permit. *See* RTC, Ex. 2, at pp. 32-33, 97-98. The Petition reiterates these objections to the upper pH limit and adds one additional argument not included in previous comments on the draft permits: that 40 C.F.R. § 440.131(d) obligated the Region to provide an alternative upper pH limit of greater than 9.0 s.u. Petitioner's Memorandum at 26-27.

1. The EAB Should Not Review that Portion of the Petition's Challenge to the Permit's Upper pH Limit Which Merely Restates Objections Made During the 2001 and 2003 Comment Periods and Does Not Demonstrate With Specificity Why the Response to Those Objections Merits Review

All but the final four sentences of Part H of Petitioner's Memorandum simply repeat objections to the upper pH limit that Hecla previously submitted to the Region in 2001 and in 2003. Petitioner's Memorandum at 26-27. The RTC accompanying the Permit includes detailed responses to these objections. *See* RTC, Ex. 2, at pp. 32-33, 97-98. Because, as described above with reference to other aspects of the Petition, Hecla has made no effort to demonstrate with

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[27] As the 2001 Fact Sheet describes,

> The State water quality standard for pH is 6.5 - 9.5 standard units for the protection of aquatic life [citing Idaho's aquatic life – cold water biota pH criterion found at Idaho Code § 58.01 02.250.01.a]. The technology-based effluent limits specify a pH of 6.0 - 9.0 [citing 40 C.F.R. § 440.102]. The draft permit incorporates the more stringent water quality-based minimum of 6.5 and the technology-based maximum of 9.0 standard units.

2001 Fact Sheet, Ex. 3, at B-19.

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specificity why these responses are inadequate, the EAB should decline to review the challenge to the Permit's upper pH limit.

2. The EAB Should Not Review the Petition's Arguments Premised on 40 C.F.R. § 440.131 Because These Issues Were Not Raised During Either of the Permit's Two Public Comment Periods

The final four sentences of Part H of Petitioner's Memorandum contend that "the Region failed to comply with their own regulations at 40 C.F.R. § 440.131(d)" by declining to authorize Hecla to discharge effluent with a pH of greater than 9.0 s.u. This argument appears for the first time in Petitioner's Memorandum, and was never raised by Hecla or any other commenter during either of the Permit's two public comment periods.

Section 440.131(d) of EPA's regulations authorize the permitting authority to establish permit limitations for pH that "slightly exceed 9.0" for a facility within the ore mining and dressing point source category where "the application of neutralization and sedimentation technology to comply with the relevant metals limitations results in an inability to comply with the pH range of 6 to 9." 40 C.F.R. § 440.131(d). Hecla has provided EPA with no information to support a conclusion that compliance with a pH limit of 9.0 s.u. would render it unable to comply with the technology-based effluent limits for metals contained in 40 C.F.R. Part 440, Subpart J. Nor has Hecla provided any information to support a conclusion that such an inability (if there is one) is attributable to the "application of neutralization and sedimentation neutralization and sedimentation technology technology."[28] To the contrary, Hecla did not even

[28] Attached to Hecla's Petition is a copy of an NPDES permit that EPA issued in 1991 to Sunshine Precious Metals, Inc. in which Hecla claims "EPA authorized a higher pH pursuant to" 40 C.F.R. § 440.131(d) *See* Petitioner's Memorandum at 27; Petitioner's Ex. P. Hecla offers no support for its contention that the Sunshine permit's pH limit was developed pursuant to this regulatory section, nor does Hecla attempt to equate the neutralization and sedimentation technologies employed at the Sunshine mine in 1991 with those currently employed

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request that the Region analyze whether the Lucky Friday facility was eligible for a pH adjustment pursuant to 40 C.F.R. § 440.131(d) until after the Permit was issued in final form.

Because Hecla never asked the Region for a pH adjustment pursuant to this section and did not raise this reasonably ascertainable argument prior to the close of the second public comment period on the Permit, the EAB should decline to entertain it at this late date. *See* 40 C.F.R. § 124.13; *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Steel Dynamics*, 9 E.A.D. 165, 229-30 (EAB 2000); *In re Encogen*, 8 E.A.D. 244, 249-50 (EAB 1999).

3. The Region Has a Sound Legal Basis for Imposing the Permit's Upper pH Limit and Its Decision to Do So Is Not Clearly Erroneous

Even if the EAB decides to consider Hecla's arguments on this issue, it should conclude that the Region's decision to impose an upper pH limit of 9.0 s.u. is mandated by Section 301(b) of the CWA and its implementing regulations and therefore is not clearly erroneous.

EPA's regulations require that each NPDES permit include, at a minimum, conditions meeting technology-based effluent limits, including those based on ELGs promulgated under Section 301 of the CWA. 40 C.F.R. § 122.44(a)(1). As described above, the Permit's upper pH limit is a technology-based limit that was determined with reference to the BPT limits of the ELG applicable to the Lucky Friday facility. As such, it "represent[s] the minimum level of control that must be imposed" in an NPDES permit. 40 C.F.R. § 125.3.

The Petition contends that the Region should have allowed an exception to the technology-based limit of 9.0 s.u. pursuant to "fundamentally different factors" ("FDF") variance criteria found at 40 C.F.R. Part 125, Subpart D. This provision of EPA's regulations allows the

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at Lucky Friday. It is therefore unclear what, if any, relevance the Sunshine permit has to Hecla's claims that it is entitled to an alternative upper pH limit.

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imposition of alternative technology-based effluent limitations because "factors related to the discharger's facilities, equipment, processes or other factors related to the discharger are fundamentally different from the factors considered by EPA in development of the [otherwise applicable ELG]." 40 C.F.R. § 125.30(a). The regulations establish detailed criteria and standards to be used making such a determination and specify that:

> The burden is on the person requesting the variance to explain that: (1) Factor(s) listed in § 125.31(b) regarding the discharger's facility are fundamentally different from the factors EPA considered in establishing the national limits. The requester should refer to all relevant material and information, such as the published guideline regulations development document, all associated technical and economic data collected for use in developing each national limit, all records of legal proceedings, and all written and printed documentation including records of communication, etc., relevant to the regulations which are kept on public file by the EPA; (2) The alternative limitations requested are justified by the fundamental difference alleged in paragraph (b)(1) of this section; and (3) The appropriate requirements of § 125.31 have been met

40 C.F.R. §§ 125.31, 125.32.

Hecla made no reference to its belief that it was entitled to an FDF variance until it commented on the 2003 draft permit. In doing so, Hecla apparently attempted to satisfy the burden imposed by 40 C.F.R. § 121.32 with a seven-sentence comment which is reproduced below in its entirety:

> In accordance with 40 CFR 125, subpart D, an exception to the pH limit should be authorized by EPA because it will not affect water quality and, as noted below, will result in a net improvement to water quality. *Id.* The precipitation of dissolved metals requires a pH above 9.0 s.u. With an upper permit limit of 9.0 s.u., and optimum precipitation of dissolved metals above this level, it would be necessary to add acid to reduce the pH prior to discharge. The handling of acids, both in transportation and within the operation, is not warranted when pH is rapidly dissipated instream after mixing. In fact, this effluent limitations technology-based limit, for those subcategories with dissolved metals in untreated effluent, is often above 9.0 s.u. with certain categories having pH upper limits at 10.0 s.u. (e.g. 40 CFR Part 461 for battery manufacturing has distinct subparts for

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> lead, cadmium, and zinc with an upper pH limit of 10.0 s.u. – these categories would be treating to remove dissolved lead, zinc, and cadmium also). An upper pH of 10.0 s.u. is justified to meet water quality-based limits where metal precipitation is involved and will result in improved water quality conditions. Accordingly, EPA should authorize a pH limit of 10. s.u.

See RTC, Ex. 2, at 97-98. This comment does not come anywhere close to satisfying Hecla's burden to demonstrate its entitlement to an FDF variance. As noted above, the Lucky Friday Mine was one of the facilities *actually evaluated* as part of the studies supporting the "Development Document for the Ore Mining and Dressing ELG." *See* RTC, Ex. 2, at 59. To claim now – with no supporting data or documentation – that Lucky Friday's facilities, equipment, and processes are "fundamentally different from the factors considered by EPA in development" of the ore mining and dressing ELG borders on the absurd.

There is no support for Hecla's contentions that the Region was clearly erroneous in concluding that the Lucky Friday facility was subject to a technology-based upper pH limit of 9.0 s.u. and that there was insufficient information to conclude that it was entitled to an FDF variance. The EAB should uphold this limit of the Permit.

I. Whole Effluent Toxicity Testing Requirements

The Permit requires Hecla to conduct whole effluent toxicity ("WET") testing[29] and, under certain circumstances, to conduct a toxicity reduction evaluation ("TRE") or toxicity

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[29] "Whole effluent toxicity" is defined as the aggregate toxic effect of an effluent measured directly by an aquatic toxicity test. WET tests are standardized laboratory tests that measure the total toxic effect of an effluent by exposing organisms to the effluent and noting the effects. There are two different durations of toxicity tests: acute and chronic. Acute toxicity tests measure the test organisms' survival over a 96-hour test exposure period. Chronic toxicity tests measure reductions in survival, growth, and reproduction over a 7-day exposure. *See* 2001 Fact Sheet, Ex. 3, at 14; Permit Writer's Manual, Ex. 6, at pp. 94-96.

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identification evaluation ("TIE"), and the Permit specifies methods, toxicity triggers, quality assurance, and reporting requirements for these tests and evaluations. Permit Ex. 1, at I.B. As described in the 2001 Fact Sheet, the Region included WET testing requirements in the permit in consideration of the limited existing WET testing data on the Lucky Friday effluents, which the Region concluded were not adequate to determine the need for WET-based effluent limits. 2001 Fact Sheet, Ex. 3, at 14-15 (summarizing historical WET testing results).

The Petition challenges the Region's WET testing requirements, contending that they are not "legally or factually justified." Petitioner's Memorandum at 27. In short, the Petition argues that WET testing may only be required if EPA has previously determined that there is a "significant likelihood of toxic effects" from the permitted facility's effluent, and that the Region made no such determination prior to issuing the Permit. *Id.* at 29. The EAB should reject Hecla's challenge to the WET testing requirements because: (1) the Petition merely restates objections that Hecla made during the comment periods that were considered and adequately addressed by the Region; and (2) Hecla misconstrues the circumstances under which WET testing may or must be required.

1. The Petition's Challenge to the Permit's WET Testing Requirements Merely Restates Objections Made During the 2001 and 2003 Comment Periods and Does Not Demonstrate With Specificity Why the Response to Those Objections Merits Review

As noted above in Part III (Scope and Standard of Review), for an issue to be subject to EAB review, it must be more than a mere restatement of an issue raised during the comment period. Instead the Petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." *In re Envotech, L.P.*, 6 E.A.D. 260, 268

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(EAB 1996); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 670 (EAB 2001) (upholding the region's WET limit in light of the petitioner's "failure to do more than reiterate its previous comments without addressing the issues raised in the Region's RTC").

The Region's RTC in this matter provided lengthy and detailed responses to the objections Hecla and others raised to the 2001 and 2003 draft permits' WET testing requirements. *See* RTC, Ex. 2, at pp. 48-55, 104-110. Petitioner's Memorandum reiterates a number of the objections Hecla raised in 2001 and in 2003 and broadly asserts that the Region's responses were incorrect, but makes no attempt to identify with specificity why these responses merit review by the EAB. *See* Petitioner's Memorandum at 27-29. Because Hecla has failed to satisfy its burden in this regard, the EAB should decline to review Hecla's challenge to the Permit's WET testing requirements.

2. The Region Has a Sound Legal Basis for Imposing the Permit's WET Testing Requirements and Its Decision to Do So Is Not Clearly Erroneous

If the EAB decides to consider this aspect of Hecla's Petition, it should nevertheless uphold the Permit's WET testing requirements as a reasonable exercise of EPA's information-gathering authorities necessary to determine the Lucky Friday facility's ability to meet state water quality standards.

Idaho's water quality standards include a narrative criterion stating that "surface waters shall be free from toxic substances in concentrations that impair designated beneficial uses." Idaho Code § 58.01.02.200.02. The NPDES regulations require the permitting authority to impose effluent *limits* for WET whenever it determines that a discharge "causes, has a reasonable potential to cause, or contribute to an in-stream excursion above a narrative criterion within an

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applicable State water quality standard" unless the permitting authority affirmatively demonstrates that the permit's chemical-specific effluent limits "are sufficient to attain and maintain applicable numeric and narrative State water quality standards." 40 C.F.R. § 122.44(d)(1)(v). EPA's 1991 "Technical Support Document for Water Quality-Based Toxics Control" ("TSD") states that, to make the demonstration required by Section 122.44(d)(v), "additional effluent information will be needed" and recommends that the discharger conduct a TIE to identify causative agents in the effluent. TSD, Ex. 17, at p. 62.

For the reasons described in the 2001 and 2003 Fact Sheets and in the RTC, existing effluent data are inadequate to make the demonstration required by 40 C.F.R. § 122.44(d)(1)(v) that the Permit's chemical-specific limits are sufficient to attain and maintain compliance with Idaho's narrative toxics criterion.[30] Nevertheless, Hecla never submitted a TIE to support its objections to the Permit's WET provisions. As a result, the Permit appropriately requires WET testing which the Region believes will enable it to determine the WET-based effluent limits (if any) in future NPDES permits for the Lucky Friday facility. This approach is entirely consistent with EPA's broad information-gathering authorities under Sections 308(a) and 402 of the CWA.

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[30] Hecla cites "the tens of millions of dollars of studies on the [Coeur d'Alene] basin [which] have clearly identified lead, zinc, and cadmium as the limiting pollutants and EPA's recent approval of site-specific criteria for these constituents" as somehow being sufficient to enable the Region to demonstrate that existing controls on Lucky Friday's effluent are sufficient to protect water quality. Petitioner's Memorandum at 28. Hecla's permit application identifies numerous metals and other toxic pollutants in Lucky Friday's effluent in addition to lead, cadmium, and zinc. *See generally,* Dec. 17, 1982 Permit Application, Ex. 18, (listing metals present in effluent); Letter from Booth to Smith (Aug. 2, 1999), Ex. 9, (updating application to list reagents used at Lucky Friday mill). The Petition cites no data from the "tens of millions of dollars of studies" or the record supporting EPA's approval of the site-specific criteria which would support a conclusion that none of these toxic pollutants occur in the Lucky Friday facility's effluent at levels that could impair the designated beneficial uses of the SFCdA River. To the contrary, the record contains information indicating that the toxic pollutants identified in Hecla's permit applications have a significant likelihood of impairing the river's beneficial uses. For example, the record reveals that, as recently as August 2002, the Lucky Friday facility discharged sodium isopropyl xanthate (one of its identified reagents) into the SFCdA River at a concentration and quantity sufficient to kill fish. *See* Hazmat Incident Comments Addendum (Aug. 6, 2002), Ex. 19.

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Hecla relies on EPA's "Policy for the Development of Water Quality-Based Permit Limitations for Toxic Pollutants" to contend that the Region was without authority to impose WET testing requirements. Hecla's reliance on this policy for this contention is misplaced. The portion of this policy quoted in the Petition merely describes one situation (i.e., where there is a "significant likelihood of toxic effects to biota") under which the permitting authority "may impose permit *limits* on effluent toxicity." 49 Fed. Reg. 9,016, 9,017 (March 9, 1984) (emphasis added). This policy does not, as Hecla paraphrases it, "particularly state[] that there should be a determination of a significant likelihood of toxic effects prior to requiring WET testing"— in fact, the sentence Hecla quotes refers only to permit *limits* on effluent toxicity and does not reference toxicity *testing* at all.[31]

Hecla has cited no authority indicating that the Region's decision to require additional WET testing is inappropriate or unwarranted. The Permit's WET testing requirements are not clearly erroneous and are entirely reasonable given the requirements of 40 C.F.R. § 122.44(d)(1)(v) and the CWA's broad information-gathering authorities. The EAB should reject Hecla's challenge to the WET testing conditions of the Permit.

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[31] The policy's next sentence, which Petitioner's Memorandum alludes to but does not quote, does address toxicity testing, stating:

> Where toxic effects are present but there is a significant likelihood that compliance with technology-based requirements will sufficiently mitigate the effects, EPA and the States may require chemical and toxicity testing after installation of treatment and may reopen the permit to incorporate additional limitations if needed to meet water quality standards.

Id. Hecla does not explain how this sentence would prohibit EPA from requiring testing prior to installing additional treatment, nor has Hecla provided any information regarding when such treatment upgrades would occur at the Lucky Friday facility.

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CERTIFICATE OF SERVICE

I certify that the foregoing "Response to Petition for Review," together with the reference attachments and the "Certified Index of Administrative Record, NPDES Permit No. ID-000017-5," were sent to the following persons, in the manner specified, on the date below:

Original and five copies, via FedEx, to:

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

One copy, by certified mail, return receipt requested, to:

Kevin J. Beaton
Teresa A. Hill
STOEL RIVES LLP
101 S. Capitol Blvd. Suite 1900
Boise, Idaho 83702-5958

Dated: 10/30/03

Valerie Badon
U.S. EPA