1 BEFORE THE ENVIRONMENTAL APPEALS BOARD

2 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

3 WASHINGTON, DC

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5 IN THE MATTER OF: :

6 HECLA MINING COMPANY,   : NPDES Appeal Nos.

7 LUCKY FRIDAY MINE   : 03-10 and 06-05

8 NPDES Permit No. Id-000017-5 :

9 - - - - - - - - - - - - - - - -x

10   EPA East Builging

11   1201 Constitution Ave., NW

12   Room 1152

13   Washington, DC

14   Thursday, July 13, 2006

15   10:00 a.m.

16   Meeting of the Environmental Appeals Board,

17 was held on Thursday, July 13, 2006, at 1201

18 Constitution Ave., NW, Rm. 1152, commencing at 10:00

19 a.m.

20 JUDGES: SCOTT C. FULTON

21   EDWARD E. REICH

22   KATHIE A. STEIN

PROCEEDINGS

1

2   JUDGE FULTON: Good morning.

3   The argument this morning will proceed in

4 accordance with the Board's order dated May 25th,

5 2006.   As specified in that order, each side will

6 have 30 minutes for argument.   Hecla Mining Company

7 is the appellant here and may reserve five minutes

8 for rebuttal.

9   We look forward very much to hearing the

10 parties' perspectives on the issues presented in the

11 case.   And while we will no doubt benefit from your

12 prepared remarks, you understand the primary value of

13 oral argument is to help us understand the issues

14 that are presented.   We will likely have questions

15 and very much appreciate your responsiveness to the

16 questions that we have.

17   Please assume that we have read the briefs

18 and the various papers that have been submitted to

19 the Board.   In keeping with that we'll make the best

20 use of our time.   And if you could focus your

21 energies on those points that you think are

22 particularly important to take away from this

1   morning's oral argument.

2   Let's begin by asking counsel to identify

3   themselves for the record, starting with counsel for

4   Hecla Mining Company.

5   MR. BEATON: Your Honor, my name is Kevin

6   Beaton, here on behalf of Hecla Mining Company.

7   JUDGE FULTON: Mr. Beaton, will anyone

8   else be joining you in presenting the argument?

9   MR. BEATON: No, your Honor.

10   JUDGE FULTON: Thank you very much.

11   And for EPA Region 10.

12   MR. ALLNUTT: Your Honor, my name is David

13   Allnutt, Assistant Regional Counsel in EPA Region 10

14   in Seattle.

15   With me at the counsel's table is Steve

16   Sweeney from the Office of General Counsel.

17   JUDGE FULTON: Will Mr. Sweeney

18   participate in the argument?

19   MR. ALLNUTT: I don't anticipate that he

20   will.

21   JUDGE FULTON: Thank you very much.

22   Mr. Beaton, you may proceed.

1   If you could start by letting us know

2 whether you intend to reserve time for rebuttal.

3   MR. BEATON: Thank you.

4   May it please the Board, my name is Kevin

5 Beaton, here on behalf of Hecla Mining Company.

6   For the record, I do intend to reserve

7 five minutes for rebuttal.

8   If I may just give a little background, I

9 think it's important to some of the issues. I

10 understand the Board has read the briefs and has

11 thoroughly reviewed all the material. But the Lucky

12 Friday Mine is an underground lead, silver and zinc

13 mine up in north Idaho. It's one of the last

14 remaining underground mines, such a mine in the

15 United States. It's kind of a lengthy unique history

16 as to the mine itself and to the environment that it

17 discharges into.

18   The Lucky Friday Mine has been subject to

19 NPDES permits since the 1970s and has been

20 discharging pollutants into the South Fork of the

21 Coeur d'Alene River for some 30 years. In that

22 stretch of the river from all accounts it's Hecla's

1   position that the aquatic environment is fully

2   protected. Downriver, about eight miles downriver

3   from the Lucky Friday discharge begins the Superfund

4   site, and about eight miles down, as I indicated, the

5   water quality of the river changes dramatically and

6   is significantly above aquatic goals.

7   From all accounts it appears like it may

8   be decades, if not hundreds of years, before that

9   portion of the river will ever achieve the right

10   quality criteria.

11   The EPA has been involved in the Superfund

12   aspect of the lower portion of the river for some 25

13   years. There's been hundreds of studies, hundreds of

14   remediation plans put in place. So it is one of the

15   more studied rivers in the United States, I would

16   submit.

17   During the course of the Hecla permit

18   process from the 1970s up until now a variety of

19   things happened, one of which was the Superfund. The

20   second initiative was when EPA came out with the

21   national toxics rule in the mid-'90s, Hecla became

22   concerned with the Lucky Friday Mine that the

1   criteria that were going to be established for it

2   were going to immediately cause the river in the area

3   that the mine discharges to be out of compliance. So

4   they entered into an agreement with the EPA and the

5   State of Idaho to establish some specific criteria in

6   recognition that the aquatic community was fully

7   protected, and at levels of management of the whole

8   river. That went on for some ten or twelve years.

9   During the process also the EPA came in

10   and redesignated the other portion of the river for

11   aquatic life use, and that had previously not been

12   so. In that process EPA recognized that there would

13   be substantial -- potentially substantial costs

14   associated with that designation because now point

15   sources would be required to comply with more

16   stringent metals limits even though the river wasn't

17   close to being in compliance with those limits.

18   During this whole process there was a

19   recognition from the agencies that this river system

20   was not going to be in compliance for a long time,

21   point sources were a very minimal component of the

22   problem, and that some economic consideration should

1 be given to the point sources when EPA takes permit

2 action.

3   I would submit to this Board that the EPA,

4 the Region did not take those issues into

5 consideration on the three remaining issues that are

6 before the Board. On the first issue, Hecla

7 requested an adjustment to the pH ceiling in the

8 permit of 9.0. The reason for that was that Hecla is

9 now required to comply with water quality criteria,

10 the site specific criteria that the EPA ended up

11 approving in 2003. And the most economically

12 feasible and achievable type treatment to meet those

13 dissolved metal limits is through some sort of

14 sedimentation and neutralization process.

15   JUDGE FULTON: May I ask you this

16 question: This issue, the pH issue, I gather, and

17 this question of whether the metals limit should be a

18 dissolved metals limit or a total recoverable metals

19 limit I gather are interconnected issues. Is that

20 correct?

21   If you weren't required to control

22 according to a total recoverable metals limit you

1   might not be under such pressures on the pH front.

2   Is it appropriate to look at these things as

3   connected in that way?

4   MR. BEATON: Your Honor, I think there is

5   probably some connection with respect to that. But I

6   think from all accounts, since it is clear no matter

7   how you measure it that for lead, zinc and cadmium

8   that the facility is going to need to comply with

9   basically in-stream criteria. Whether that's

10   measured as dissolved or whether it's measured as

11   total recoverable metals, there is going to be some

12   treatment required. The most feasible treatment is

13   neutralization and sedimentation.

14   So I think they are related in some

15   fashion. But I think at the end of the day no matter

16   how the limits are set treatment will be required,

17   and it will be the type of treatment that Hecla

18   maintains a variance from the technology-based

19   limits, specifically in Part 440 of the Federal

20   Regulations.

21   JUDGE REICH: If I remember, I think the

22   Region's response to your brief in the most current

1   appeal indicated as to the pH limit it really becomes

2   an issue I think as of September 2008 because you

3   would not have a problem with the interim limits; you

4   would only have a problem with the final limits.

5   Is that the right time frame in which this

6   issue presents a real role problem?

7   MR. BEATON: Your Honor, yes, I believe --

8   not to be argumentative about it -- but I think the

9   real role problem is now. That is simply because,

10   one, the Region claimed -- although Hecla maintains

11   it's not a standard under Part 440 -- that Hecla

12   needs to make some sort of commitment that it was

13   going to implement that type of treatment. There is

14   no -- not only are the regulations silent about that

15   issue, there is no process by which Hecla is supposed

16   to make such a commitment.

17   What we might be facing is that Hecla

18   implements this treatment regime in 2008. It works,

19   but then it's too late to modify the permit. This is

20   not just a theoretical issue. This permit has been

21   on administrative extension for 30 years. If we

22   don't get this fixed now I would submit that Hecla

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1   will be faced with the technology based effluent

2   limitation well beyond 2008.

3   JUDGE REICH: It seems to me that when I

4   read your briefs, on the one hand you keep coming

5   back to statements that approaching the problem with

6   neutralization and sedimentation is the most

7   economically viable treatment. You try to suggest

8   that that's a likely scenario. And yet you

9   deliberately don't want to make a commitment to say

10   yes, in fact that's what we're going to do.

11   So to the extent that the regulatory

12   provision we're talking about is based on a premise

13   of using neutralization and sedimentation technology,

14   what you're really asking the Region to do is you are

15   asking a hypothetical that may or may not ever come

16   to pass.

17   Why isn't it reasonable for the Region to

18   say, 'We don't want to deal with all these

19   hypothetical contingencies if we know in fact that

20   that situation is going to present itself, and we'll

21   use the data and work it through the requirements of

22   the 440.131 and we'll see where that takes us.

1   MR. BEATON: Thank you, your Honor.

2   I do believe it's unreasonable simply

3 because the Region is on record, not only when they

4 denied Hecla's variance request but in the response

5 to the comments themselves, one, treatment is

6 required, is going to be required, and, two, that

7 neutralization and sedimentation appears to be the

8 only viable treatment. There's others that are more

9 expensive options.

10   JUDGE REICH: Yet you're not willing to

11 say you're going to do it. It seems like the only

12 viable treatment, yet you seem -- every time the

13 Region says, 'If they only said this we could move

14 this thing forward,' you come back to language that

15 suggests it's maybe the most economically viable but

16 short of saying, 'and in fact that's what we intend

17 to do.' And I don't understand the resistance.

18   MR. BEATON: Your Honor, I believe that

19 Hecla is on record in the comment period saying that

20 that is the treatment that will be employed. Yet

21 there needs to be more work done on the water

22 recycling component of it before that is employed.

1   I do understand the issue, your Honor.

2   Hecla's rather modest request here is that it has to

3   happen, but just simply a qualified condition in the

4   permit that if Hecla chose to implement sedimentation

5   and neutralization that an adjustment of pH, which is

6   appropriate -- the State has already determined that

7   a pH above 9.0 will be protective of water quality in

8   the area.

9   JUDGE REICH: Let me ask one last question

10   on that point.

11   In your brief supporting your petition you

12   deal with the fact that the Region could have

13   addressed the conditional permit. And you suggested

14   sample language. Part of it says an upper pH limit

15   of 10.0 if you allow the neutralization and

16   sedimentation technology is applied to the effluent.

17   If I look back under 440.131(b), what it

18   says to me is not only is the a requirement to use

19   that, but there is in fact a requirement that the

20   agency conclude that it's an inability to comply with

21   the pH range of 6 to 9 using that technology.

22   I assume you're not suggesting that the

1 agency has to determine not only that you're going to

2 use that technology but that that would in fact

3 preclude meeting a limit of 9?

4   MR. BEATON: I hope I restate it

5 correctly, your Honor.

6   I think Hecla's position is that if

7 sedimentation and neutralization is utilized that the

8 pH of the wastewater treated has got to be higher

9 than 9.

10   JUDGE REICH: And you've already submitted

11 enough site-specific data that there's reason to draw

12 that conclusion?

13   MR. BEATON: Yes, that is our position.

14   There's obvious ways to readjust the pH

15 after the treatment, which doesn't make any sense to

16 Hecla Mining. Basically we could have drums of acid

17 in the south fork in the Coeur d'Alene River and

18 treat the higher pH wastewater with acid before it's

19 discharged. That's not impossible to do. It just

20 doesn't seem to make any sense. And I've submitted

21 that the regulation never attempted to address the

22 issue of compliance with dissolved water quality

1   criteria with the Part 440.131 issue.

2   JUDGE FULTON: Mr. Beaton, your position

3   then is that Hecla is committed to a neutralization

4   regime?

5   MR. BEATON: That's correct.

6   JUDGE FULTON: And that's reflected in the

7   record to the point where it could eventually be

8   represented in the permit?

9   MR. BEATON: I believe so. I think

10   typically the Region does not dictate specific types

11   of treatment in the permit.

12   But it is clear, from not only EPA's

13   studies but Hecla's as well, that is really the only

14   feasible treatment option there is. So I think -- I

15   believe that the commitment has been made, with the

16   qualifier that things might change. And because of

17   this total recoverable metal issue we might have to

18   treat even more than neutralization and

19   sedimentation.

20   What I would suggest is that there's

21   nothing in the record to suggest that if we didn't

22   implement neutralization and sedimentation that the

1   discharge would ever be above 9.0. There's no

2   suggestion that there's some kind of ulterior

3   treatment thing going on here where Hecla wouldn't

4   really neutralize where the pH would be above 9.

5   That's why Hecla takes issue with this process.

6   The only reason why the pH would be above

7   9 is if it committed neutralization and

8   sedimentation. There's no other reason why it would

9   be above 9.

10   JUDGE FULTON: I was trying to figure out

11   whether you felt as though you needed to keep your

12   options open on the neutralization and sedimentation

13   front until the issue of the dissolved versus total

14   recoverable metals was resolved.

15   MR. BEATON: That may be a fair

16   characterization, your Honor.

17   There's a two-step treatment process

18   envisioned in the program. The Region takes the

19   position they're not sure if the treatment is even

20   required, which we take exception to. We can't

21   believe they have taken that position since there is

22   interim limits set in the permits. The data we

1   submitted to them indicates over the last five years,

2   we would have had 200-some violations with what the

3   final permit is going to be.

4   So I think it's clear that it's a two-step

5   process. There's the water recycling and then

6   there's an evaluation of sedimentation and

7   neutralization against the permit models. We believe

8   that there may be some additional step required that

9   would be a combination of sedimentation and

10   neutralization, and perhaps something else. And I

11   don't believe that would preclude the Region from

12   including the kind of condition that I would suggest

13   in the permit.

14   If I might move on to the next issue, and

15   that is whether the Region erred in requiring full

16   effluent toxicity monitoring, it's a relatively

17   straightforward issue.

18   Hecla recognizes the Region and the EPA's

19   broad information-gathering authority under the Clean

20   Water Act. Nevertheless the Idaho Water Quality

21   Standards from which the Region proposed full

22   effluent toxicity is basically used to determine

1   whether the effluent is affecting water quality. The

2   standards upon which the permits are set and the

3   conditions are established, and which the Region

4   approved, sets up an alternative approach. You can

5   assess narrow compliance with narrow toxic standards

6   or synergistic effects of toxics by either doing in-

7   stream biomonitoring or undertaking long-term

8   toxicity data.

9   The State of Idaho required in-stream

10   biomonitoring. We believe that is all that is

11   required under state law and under the EPA

12   regulations. Certainly, again, we believe this is

13   just piling on additional requirements.

14   We question the value of undertaking the

15   whole effluent toxicity data, one, because the

16   quality of the effluent is going to obviously change;

17   there's going to be less metal discharged over the

18   course of the permit. Two, we've already done it.

19   There's been low effluent toxicity tests taken over

20   the course of the permit over the last 25-30 years.

21   The Region concluded those were inconclusive. That's

22   not surprising. Then we'll get to the end of the

1   permit and they'll say that monitoring is

2   inconclusive.

3   We believe that the best way to determine

4   whether we're complying with the toxicity

5   prohibitions and combinations in the Clean Water Act

6   is actually the in-stream measuring what the effect

7   is on the aquatic environment.

8   JUDGE FULTON: What's your understanding

9   of the principal differences between whole effluent

10   toxicity testing and bioassessment monitoring? What

11   are the primary differences in the data that these

12   approaches generate?

13   MR. BEATON: I think from a very

14   superficial standpoint, obviously people have greater

15   technical expertise than I on this particular issue.

16   But I think that what the Act is intended to

17   accomplish is to protect the critters in the creek.

18   The best way to determine that is to go out and test

19   what's happening in the creek upstream of the

20   discharge and downstream of the discharge, and within

21   the mixed zone.

22   The whole effluent toxicity test is more

1   of a laboratory theoretical test. If you have an

2   effect on these two particular species -- again, my

3   Latin is not very good; I don't recall the two

4   species that are required to be tested. It used to

5   be algae too, but that was taken out by the

6   Department in the permit -- that there is some impact

7   to those species and you've got to go study some more

8   and figure out what's going on.

9   JUDGE FULTON: These are certain indicator

10   species?

11   MR. BEATON: That would be the EPA

12   standpoint.

13   Hecla believes that the best indicator of

14   the impact on the environment is actually measuring

15   the species in the environment we're trying to

16   protect.

17   JUDGE FULTON: Which is what bioassessment

18   monitoring is?

19   MR. BEATON: That's correct. Some 10 or

20   12 years of the development of site-specific studies

21   and site-specific criteria would affirm that

22   principle that the national levels that are

1   established in some part through laboratory tests

2   simply don't apply to the South Fork of the Coeur

3   d'Alene River.

4   JUDGE STEIN: Why did the EPA prefer the

5   wet testing to fishing in the creek? I understand

6   EPA had questions about that.

7   MR. BEATON: I think I might just say we

8   have another idea of what they believe is the wisdom

9   of doing so.   I would imagine they would

10   say something like that it gives a more statistically

11   verifiable indicator for them, for their program to

12   say 'we've got 20 discharges and this is the trend we

13   see in these kinds of bugs and these'   -- and

14   whatever the fish that's involved, I suppose. I've

15   never seen that, but I suppose that would be a

16   benefit to the Region.

17   JUDGE STEIN: Is it a conundrum for there

18   to be both bioassay testing and wet testing at the

19   same time?

20   MR. BEATON: I've seen such conditions in

21   some permits. Others, for example, you know, in the

22   City of Mullin, which is about six miles down the

1   river, doesn't have wet testing or biomonitoring and

2   testing. It has a variance from the water quality

3   criteria.

4   But I think it, stated just very crassly,

5   is that the Region imposes these requirements on

6   larger facilities that can afford them.

7   JUDGE FULTON: Do you agree that the

8   regulatory framework that EPA operates under requires

9   something to be permanent with respect to level of

10   toxicity? There needs to be a determination made

11   whether it's necessary or not, right?

12   MR. BEATON: I would submit the rules say

13   -- they've got to say -- they've got to set whole

14   effluent toxicity limits unless they make a finding

15   that permit conditions are protective of water

16   quality, which they did.

17   I think the whole effluent toxicity

18   information gathering process is just that. It's for

19   them to confirm their original findings and that

20   water quality standards will be protected. That's

21   the methodology they employed. And I understand that

22   it's in a lot of permits. But there's an alternative

1   method, and it was employed here.

2   JUDGE FULTON: So your view is that the

3   necessary determination has effectively already been

4   made via the Region's conclusion that the permit will

5   be protective of water quality standards. It's not a

6   separate determination associated with the level of

7   toxicity.

8   MR. BEATON: I'm not aware of a separate

9   qualifier condition in which the Region has to say

10   whether the whole effluent toxicity monitoring is

11   required or not. I don't think the regulatory

12   framework speaks to that issue or speaks to the

13   limits. It doesn't speak to a finding as to whether

14   wet testing is necessary or not.

15   JUDGE FULTON: But there needs to be a

16   finding that low-level toxicity limits have been

17   implicit in the issuance of the final permit and the

18   conclusion that that permit does have final water

19   quality standards is this decision as well. You

20   don't need something extra.

21   MR. BEATON: That would be my contention,

22   your Honor, in addition to the State suggesting

1   biomonitoring.

2   I only have a minute or so left on the

3   whole recoverable metals issue, but I think this is a

4   relatively technical issue. There's a legal argument

5   to suggest that since the criteria for site specific

6   and water quality standards can be resolved, EPA went

7   through litigation on that on national toxics at

8   great length. The initiative recognizes that

9   dissolved is really what you're trying to get at.

10   I would submit under 125, Part 125 --

11   sorry, Part 122.45 -- that the condition under which

12   those recoverable metals should not be sent isn't

13   plain. The Region disagrees with us there.

14   JUDGE REICH: That was part of the

15   argument, right?

16   MR. BEATON: No, it's not.

17   JUDGE REICH: I mean in the sense that if

18   we wind up agreeing with the Region, contrary to your

19   position on 122.45(c)(1), it is not applicable here,

20   there is no other basis on which the Region would

21   have discretion to grant relief in your case?

22   MR. BEATON: No, your Honor. I believe

1   just the contrary.   I believe the Region does have

2   discretion to grant it here.

3   JUDGE REICH: Even if 122.45(c)(1) were

4   not satisfied?

5   MR. BEATON: That is correct.

6   JUDGE REICH: You think it has a basis.

7   MR. BEATON: Yes, your Honor.

8   JUDGE REICH: And the basis is what?

9   MR. BEATON: The basis factually is that

10   Hecla has been discharging at dissolved levels for 30

11   years, and there's still no demonstrable impact to

12   the receiving water.   What they're trying

13   to get at is a resolubilization of total metals. And

14   you don't pick up when you're measuring dissolved.

15   There is nothing in the record to suggest that that

16   could possibly even happen, particularly when we're

17   talking about a situation in which the discharge is

18   actually happening.   In any stream on the quality

19   criteria at the end of the pipe, there's nothing in

20   the record to suggest that you're going to get some

21   sort of resolubilization.

22   We believe there's enough information.

1   Hecla submitted chemical data indicating that the ore

2   bodies that are associated with this mining and

3   building operation are very insoluble, particularly

4   lead and zinc.

5   JUDGE REICH: Let me make sure I

6   understand. This is something that I picked up from

7   the briefs. And excuse me for reducing it to kind of

8   a level of simplicity I can deal with.

9   But in terms of the legal framework,

10   basically we have 122.45(c) that says it should be a

11   total recoverable metal unless you meet one of the

12   exceptions. Are you saying that not only do you meet

13   one of the exceptions but that even if you didn't

14   that 122.45(c) wouldn't be a prohibition in this

15   case?

16   MR. BEATON: Yes.

17   JUDGE REICH: And you stated that in the

18   briefs?

19   MR. BEATON: Yes.

20   JUDGE REICH: Okay.

21   MR. BEATON: If I may, I'd like to reserve

22   whatever time I have left.

1   JUDGE REICH: One further clarifying

2   question on a different issue.

3   In the pH discussion you talk about, as

4   one of the factors on which you think the Region has

5   at least a discretion by not going above 9.0, the

6   fact that in what we call the revised certification -

7   - I recognize you take some exception to

8   characterizing it that way -- there is now a missing

9   element of 25 percent above 9.0.

10   You are not suggesting, are you, though,

11   that the Region has the ability to go above 9.0 if

12   440.131 and (d)(1) is not satisfied? I mean you'd

13   still have to go back to the regulatory standard and

14   meet that regulatory standard irrespective of what

15   the State did with that certification?

16   MR. BEATON: Hecla does not take that

17   position.

18   The certification would rule on the issue

19   absent a variance under the variance process under

20   Part 440.

21   JUDGE REICH: Thank you.

22   JUDGE FULTON: Thank you.

1   Because of our questions we went over your

2 five minutes for rebuttal.

3   Mr. Allnutt.

4   MR. ALLNUTT: Good morning.

5   May it please the Board, my name is David

6 Allnutt, Assistant Regional Counsel for EPA Region 10

7 in Seattle.

8   Your Honor, since 1973 Hecla has operated

9 the Lucky Friday Mine subject to the NPDES permit

10 limits for metals that predate the national effluent

11 limitations guidelines for ore mining, and that

12 predate state water quality standards that protected

13 aquatic life. The permits on appeal today represent

14 the first complete update to Hecla's permits in more

15 than 30 years.

16   In August 2003, after years of public

17 review and comment, including the publication of two

18 draft permits, accompanying fact sheets, public

19 hearings, and extensive consultation with the State,

20 the Region issued an NPDES permit that was the

21 subject of the first technical appeal under

22 consideration today.

1   When portions of this permit were remanded

2   in 2004, the Region engaged in another process of

3   public review and State consultation which culminated

4   in the issuance of a modified Lucky Friday permit in

5   December of last year. This second 2005 modified

6   permit is the subject of our second appeal for

7   consideration.

8   Throughout this process the Region's goals

9   have been straightforward: To place the Lucky Friday

10 mine under a permit that is consistent with

11 technology-based effluent guidelines effective

12 nationally, and that is protective of Idaho's water

13 quality standards. Today only three issues stand

14 between this goal and reality.

15   The first question is how the limits

16 should be expressed in the final permit, that is the

17 limits for metals. Hecla claims they should be

18 expressed as dissolved metals, and the Region claims

19 that the NPDES regulations and EPA guidance

20 interpreting those regulations compels it to express

21 the metals limitations in total recoverable terms.

22   The second question is whether Hecla has

1 submitted sufficient information to the Region to

2 entitle it to an exception to the rule that NPDES

3 permits for mines must impose an upper pH limit of 9.

4 The Region has stated repeatedly that Hecla must

5 submit site-specific information about the treatment

6 technology it intends to employ before it can take

7 advantage of this exception. Hecla has failed to do

8 so.

9   Finally, the third question is whether the

10 Region can require Hecla to conduct full effluent

11 toxicity or wet mining without first proving that the

12 Lucky Friday mine is discharging effluent in toxic

13 amounts. The Region contends that such monitoring is

14 a reasonable and appropriate exercise of its broad

15 information-gathering authority under the Clean Water

16 Act.

17   I would like now to discuss each of these

18 three issues in turn, starting with the total

19 recoverable metals limit.

20   JUDGE FULTON: Maybe we can find our way

21 through a couple of things that concern us about this

22 issue.

1   Hearing the argument that Mr. Beaton just

2   offered, it sounds as though there are basically two

3   arguments being made. One is that this exception is

4   applicable because of the water quality criteria

5   issue and the use of effluent limitations. Somehow

6   there's a way to end that exception on behalf of the

7   dissolved metals standards and total recoverable

8   metals.

9   But the other argument appears to be sort

10   of in a way an absurd results argument: that given

11   the site specific characteristics at play here, and

12   setting aside for the moment whether we would rather

13   define a hook for such an exception under the legal

14   framework. But the proposition is that if you look

15   at site specific considerations it makes no sense to

16   frame a limitation around total recoverable metals as

17   opposed to dissolved metals.

18   My question for you is on the second

19   point. First of all, do you agree with the

20   characterization regarding the site specific

21   characteristics at work here? Secondly, if you did

22   agree -- or whether or not you agree, doesn't the

1   Agency have any latitude under the regulatory

2   framework to take that into account in settling for

3   something other than total recoverable metal limits?

4   JUDGE REICH: And a third question to ask

5   is: Do you in fact think that is an argument has

6   been made in the briefs that have been filed on

7   appeal?

8   MR. ALLNUTT: The third one first. The

9   answer to that is no.

10   The first one was whether the Region

11   agrees that there's something unique about Hecla's

12   situation, and it's the site specific nature of the

13   limits that would lend itself to excepting from the

14   general rule. I would answer that question no. I

15   think the limits in the permit are very similar to

16   water quality based effluent limits in any mining

17   permit or other permit for that matter. And under

18   the general rule expressed in 122.45(c), that

19   requires all permit conditions, all permit effluent

20   basis standards or prohibitions for metals to be

21   expressed in terms of total recoverable metals, that

22   applies to Hecla just as it applies to anyone else.

1   I think that Hecla's challenge to that

2 general rule in this case is belied by EPA's

3 longstanding policy of recommending the State water

4 quality criteria for metals be expressed in dissolved

5 terms while also providing translators that ensure

6 the effluent limits in permits comply with 122.45(c)

7 or words expressed in totally comparable terms. This

8 is a longstanding practice of EPA.

9   Some background on the guidance

10 surrounding this may be useful.

11   As I mentioned, EPA has along recognized

12 dissolved fraction of a metal better represents the

13 biologically harmful portion of the metal than does

14 the total recoverable fraction. This is because the

15 primary mechanism for toxicity envisions uptake

16 through the gills, and this process can only occur if

17 the metals are dissolved in water.

18   In 1993 in recognition of this fact EPA

19 issued guidance recommending that State water quality

20 criteria for aquatic life be expressed in terms of

21 dissolved metals to best capture the amount of metal

22 that should not be exceeded in receiving waters.

1   This guidance has been widely applied across the

2   country. So as a result you have many states that

3   have water quality criteria that are expressed in

4   dissolved terms.

5   However EPA has also recognized that

6   achieving these dissolved metals criteria in the

7   receiving water requires limiting the total

8   recoverable metals entering the water. This is

9   because the chemical differences between effluent

10   discharges and receiving water quality often result

11   in an increase in the portion of the metals that are

12   dissolved in the receiving water.

13   JUDGE FULTON: Where do you have site

14   specific information that enables you to make that

15   determination? You know what the water chemistry is

16   of the receiving water and you can conclude that

17   there isn't going to be a differential impact as

18   between the dissolved standard and the whole

19   recoverable metal standards.

20   MR. ALLNUTT: First of all, I would submit

21   that finding has not been made. It's not in the

22   record supporting the permit in this case.

1   Secondly, it's not an exception under

2   122.45(c).

3   JUDGE FULTON: If it's not an exception,

4   is it appropriate for us to look at that kind of

5   question as essentially a challenge to the Agency

6   regulation and establish that requirement and

7   exceptions thereto which can't be undertaken at this

8   time and in this forum?

9   MR. ALLNUTT: That would be my view, yes.

10   Let me give you an example of where this

11   guidance comes into play.

12   If you have a very basic or alkaline

13   effluent then the pH is high and it mixes with the

14   more acidic receiving water. In other words, with a

15   lower pH the metal can instantly dissolve. Limiting

16   only dissolved metals would not be effective in

17   achieving compliance with water quality standards.

18   It's the simple scientific truth that has led EPA to

19   require that metals permit limits be expressed in

20   total aquatic terms.

21   In 1996 EPA issued guidance to facilitate

22   transmitting the dissolved metals water quality

1   criteria for total recoverable limits. This metals

2   translated guidance is found in Exhibit 15 to the

3   Region's briefs. And it actually cites 122.45(c) for

4   the proposition that permit limits must in most

5   instances be expressed in total recoverable terms.

6   JUDGE REICH: Can I ask -- I've been

7   holding off on this specific point and it's really

8   more out of curiosity than anything else.

9   When I read your response to the position

10   -- I think that's where it was -- you cited to me an

11   argument based upon -- this really has come down, as

12   Mr. Beaton indicated, to what in fact is an

13   applicable effluent standard, although there is

14   secondary ordering as well. For clarification, what

15   that term meant, you cited 1365 of 33 USC, which is

16   the definition in the citizens review provision. I

17   think they responded and said this is a different

18   animal and they made an attempt to distinguish. You,

19   however, were responding to it. Yet I believe

20   there's kind of a general definition for effluent

21   limitation in 1362.

22   Is there any particular reason why you

1   didn't focus on the definition in 1362 as the one we

2   should be looking at as opposed to suggesting we

3   should be looking at the definition in 1365?

4   MR. ALLNUTT: As to both of those I would

5   suggest that those are just sources of interpretation

6   of the term. They're not necessarily binding on how

7   the term is defined in the regulations.

8   JUDGE REICH: The entire chapter on one of

9   the definitions is -- I'm surprised that you cited

10   the narrower one which isn't actually directly on

11   point and not a broader one.

12   MR. ALLNUTT: The narrow one is the exact

13   phrase that's used in the regulation. It's a

14   standard limitation which has a slightly different

15   definition than effluent limitation.

16   I would submit, though, that both of those

17   support the Region's position that what we're talking

18   about here is much different than water quality

19   criteria, if you focus on the definition of effluent

20   standard limitation in Section 505.

21   JUDGE REICH: So your argument is

22   basically because 1365 has the term 'standard' or

1   'limitation' rather than 'effluent limitation,'

2   that's fine.

3   MR. ALLNUTT: That's right. I think both

4   of those are informed by a plain reading of the

5   phrase, 'effluent standard limitation,' which appears

6   in the regulations. I think a plain reading of that

7   term makes clear that a water quality criterion is

8   not an effluent standard limitation.

9   Water quality criteria are elements of

10   State water quality standards that represent a level

11   of receiving water quality necessary to maintain a

12   particular use. But they do not standing alone

13   impose limitations or restrictions on the discharge

14   of effluent from a point source.

15   JUDGE FULTON: I think we understand your

16   argument on this point. We're talking a little bit

17   about the pH issue.

18   But we'd be interested in your response to

19   Mr. Beaton's suggestion that everything that the

20   Region needed in order to write into the permit

21   something about neutralization was present, and the

22   failure to have sort of nailed down this issue in the

1   permit leaves them subject to a potentially time-

2   intensive and unpredictable permit modification

3   process.

4   MR. ALLNUTT: I would disagree with the

5   characterization that everything we needed to find

6   that that exception applied is in the record.   If it

7   is in the record I'm curious about where it is.

8   There are a number of places in the record

9   that the Region cites to in its brief where Hecla

10   sent letters to the Region where it says it doesn't

11   know what treatable technology it is required to use.

12   In fact, the most recent State certification in 2004

13   that was agreed to with Hecla similarly says

14   throughout that it's unclear what treatment

15   technology, if any, would be required to meet this

16   metals test.

17   There is simply nowhere in the record

18   where Hecla says, 'Here is the treatment technology

19   we intend to use and here are some treatment studies,

20   treatability studies that show the effluent

21   characteristics.'

22   I would just add that the Region needed to

1   determine the exception.

2   JUDGE FULTON: Hecla makes the point in

3   its brief that the Region could have developed a

4   contingency clause essentially around this issue.

5   I'm not sure that their formulation is exactly the

6   right one because it doesn't contend with the need to

7   find that the 9.0 pH limit would be unachievable in

8   conjunction with the neutralization regime.

9   But my question is it seems like it would

10   have been relatively light there in the matter of

11   writing the permits to construct a contingency

12   provision that would allow this issue to play out

13   within the context of this permit rather than

14   requiring it to proceed through a permit modification

15   process.

16   MR. ALLNUTT: I have a couple of responses

17   to that.

18   First, as you all have pointed out, the

19   formulation is much more complicated than Hecla would

20   suggest. And you are probably correct: There are

21   some formulations that could be made to recognize

22   that. But it would be complex. And that open is in

1   no way foreclosed by telling Hecla to gather the

2   requisite information and submit it to the Region.

3   We will consider a modification. There's

4   plenty of time to do that between now and 2008, when

5   these final metal limits come into effect.

6   JUDGE FULTON: Just remind us what the

7   typical flow path for a permit modification of this

8   kind is.

9   MR. ALLNUTT: I don't know if the Region

10 has entertained a modification of this particular

11 kind. But in general, you submit a permit

12 modification request -- in this case in response to

13 the 2004 State certification -- in the form of a

14 letter and the data associated with it. And the

15 Region will process that request for modification

16 under the Part 124 regulations, just as we process a

17 permit application that comes in.

18 JUDGE FULTON: What is the time horizon

19 for a modification?

20 MR. ALLNUTT: It depends on the

21 complication. Here there's obviously a lot of data

22 already in the record, additional treatability

1   information and the designation of a particular

2   technology, presumably one that's time consuming for

3   the Region to look at. I know there would be a huge

4   controversy surrounding it. There are a lot of

5   factors that go into how long something takes.

6   But the fact that the State has already

7   certified a mixing zone would simplify the process.

8   I don't expect that that would be a particularly long

9   process.

10   JUDGE FULTON: Is this the kind of process

11   that could be comfortably run within a year's time?

12   MR. ALLNUTT: I would expect so.

13   JUDGE STEIN: I take it the regulations

14   don't specify a time within which you would act on a

15   request for permit modification?

16   MR. ALLNUTT: I don't believe there's a

17   particular deadline on which the Regions need to act.

18   I believe there is a provision for someone who

19   submitted an application or a request for

20   modification to petition the board to review that.

21   If it's denied, whether you can claim unreasonable

22   delay either in a board proceeding or through another

1   proceeding.

2   JUDGE STEIN: But there's no provision for

3   any streamlined permit modification proceeding?

4   MR. ALLNUTT: There are minor modification

5   proceedings.

6   JUDGE STEIN: But this would not be one of

7   them?

8   MR. ALLNUTT: This would not be one of

9   them.

10   JUDGE STEIN: But assuming there are two

11   things that need to be demonstrated, you simply have

12   the treatment technology that the company would

13   intend to employ?

14   MR. ALLNUTT: That's correct. There are

15   some treatability studies that demonstrate that a pH

16   above 9 is necessary to meet those metal limits.

17   JUDGE STEIN: Why couldn't we take account

18   of the contention here that they intend to treat to

19   satisfy that?

20   MR. ALLNUTT: If it does, we still need to

21   know if that's going to cause an exceedance of the pH

22   limits, and, if so, how much of an exceedance. You

1   wouldn't want to get above 11 if you're only required

2   to get up to 9.

3   JUDGE FULTON: Could we talk a little bit

4   about the wet testing requirement. I guess I'll ask

5   you the same question I asked Mr. Beaton.

6   Can you explain your understanding of the

7   difference in terms of information generated between

8   wet testing and bioassessment monitoring?

9   MR. ALLNUTT: Like Mr. Beaton, I'm not a

10 scientist and I won't be able to discuss this fully.

11 But my understanding is that the type of

12 biomonitoring requirement the State has required

13 through its authorities measures the effect in the

14 receiving water. So the wet testing that is required

15 under the federal regs is more predictive and it is

16 more protective for things like variability and other

17 factors that may affect aquatic life in the stream in

18 the future.

19   I guess I would also point out the regs

20 require wet testing unless a certain finding is made.

21 And this is in 122.44(d).2 and (d).5. This

22 requirement is clear, and for the reasons set forth

1   in the fact sheets and the Region's brief, there is

2   simply not enough information in the record to make

3   that finding.

4   JUDGE FULTON: Could that finding be

5   predicated on a product of bioassessment monitoring?

6   MR. ALLNUTT: I don't believe so,

7   although, again, I'm way out of my league here. The

8   permit writers need to look at the results to the

9   bioassessment monitoring to determine if there's

10   enough there to make a finding. I don't know if it's

11   possible, but it's conceivable.

12   JUDGE FULTON: I know that the guidance

13   for dealing with the whole effluent toxicity in the

14   absence of sufficient information to allow for a

15   determination can certainly be appropriate and

16   prudent for the program writer to require wet testing

17   under the permit to develop the body of information

18   necessary to make the determination. I'm not sure

19   that the guidance goes so far as to suggest that's

20   the only way to develop the body of information

21   needed for determination.

22   So what I'm wondering is: if you only

1   have bioassessment monitoring would that still give

2   you the information needed to make the regulatory

3   determination that must be made?

4   It's a way of looking at this redundancy

5   argument that Hecla has offered that is potentially

6   squareable.

7   MR. ALLNUTT: I agree that it's a way.

8   But let us keep in mind there's a lot of other stuff

9   in the record here that talks about the toxicity

10   effect specifically.

11   Another, as Mr. Beaton has pointed out,

12   Hecla has done some wet mines in the past. However

13   this information was reviewed by the Region and found

14   to be contradictory and limited. And the reasons for

15   this were set forth in the fact sheet. There's other

16   information in the record that indicates that there

17   is some reason for concern about the toxicity and the

18   electrolyte discharge.

19   Looking at development documents which are

20   also part of the record, development documents

21   supporting the effluent guidelines, Hecla was one of

22   the facilities reviewed in preparation for that

1   development document. It says toxic metals are

2   naturally associated with metal ores and all of the

3   13 toxic metals were found in wastewater from this

4   category. The development document also notes the

5   flotation process employed by the Lucky Friday mine

6   has the potential to generate wastewater fluid in

7   many toxics, and all the toxic metals were detected

8   in the water.

9   In addition, Hecla has submitted

10   information with a list of reagents they use in these

11   processes. None of these reagents are limited. And

12   there are specific monitoring requirements for those

13   reagents.

14   As recently as 2002 one of the reagents

15   was concentrated enough to result in fish being

16   killed in the South Fork of the Coeur d'Alene.

17   JUDGE FULTON: The wet testing requirement

18   in the permit continues throughout the life of the

19   permit, correct?

20   MR. ALLNUTT: Correct.

21   JUDGE FULTON: Is there a reason that

22   there was a provision in the permit for a juncture

1 which was information generated through that testing

2 and where that information would be considered in

3 making the necessary regulatory determination? I

4 assume that the reason this issue is before us is

5 that there must be an incremental cost associated

6 with wet testing that's a concern to the company.

7   What really needs to happen here is

8 development of information to enable the regulatory

9 determination to be made. But the way the permit is

10 set up the obligation to do the wet testing continues

11 throughout the life of the permit.

12   Is there a reason that there wasn't a

13 decision point built into the permit?

14   MR. ALLNUTT: If there was, I'm not aware

15 of that decisionmaking process. But I will point out

16 that as a practical matter -- and this goes to

17 Hecla's more recent challenge to wet monitoring that

18 they wanted to start in 2007, citing a comment the

19 State made that as a practical matter we're already

20 in the middle of 2006. There's only one more quarter

21 of wet mining required.

22   Are those conditions likely to be stayed

1 until 2007? There are only going to be a few

2 quarters of wet mining to be done within the life of

3 this permit. And I suppose if those few quarters of

4 wet mining information demonstrate with enough

5 specificity for the Region to make a determination

6 the next Lucky Friday permit will not include wet

7 mining monitoring.

8 JUDGE FULTON: Can we look at this issue

9 the same way as the pH question? If in Hecla's view

10 a body of information is generated either through the

11 wet testing or through the combination of wet testing

12 and bioassessment monitoring to enable the Agency to

13 make the determination that a whole effluent toxicity

14 limit is not needed here, that they can present that

15 to the Agency and may request a permit modification

16 to eliminate the wet testing requirement?

17 MR. ALLNUTT: I think that's appropriate,

18 or six months before September of 2008. They ought

19 to be submitting a reissuance request that could be

20 included in that as well.

21 JUDGE FULTON: I'm not sure I understand

22 that.

1   MR. ALLNUTT: They have to reapply for a

2   permit six months before September of 2008 when it

3   expires.

4   JUDGE FULTON: I see. This permit expires

5   in 2008.

6   MR. ALLNUTT: Yes. It was issued in

7   August 2005, or 2003, effective September 2003 and by

8   its terms will expire in 2008.

9   JUDGE FULTON: So we really are chasing a

10   resolution here.

11   MR. ALLNUTT: I would like to have one

12   before it expires.

13   JUDGE STEIN: I don't fully understand

14   that. The permit was issued by the Region, but are

15   portions of this permit in effect?

16   MR. ALLNUTT: Portions of it are. Those

17   that were uncontested and severable from the

18   challenged portions. Over time, as our stipulation

19   was filed last week, it demonstrates the number of

20   issues has decreased. Some more portions of the

21   permit have gone into effect. But all the portions

22   of the permit related to these issues are stayed, and

1 will remain stayed until the Department comes to a

2 decision.

3   JUDGE STEIN: Right.

4   But correct me if I'm wrong. Merely

5 filing a request or an application for a new permit,

6 doesn't that simply operate under the terms of the

7 old permit until the new permit is received?

8   MR. ALLNUTT: If there's a timely

9 application the permit is eventually extended.

10   JUDGE STEIN: It still could be a number

11 of years before we could be to not this permit, but

12 the next one.

13   MR. ALLNUTT: It could be. But there's

14 other avenues that we can pursue to force Agency

15 action on an application.

16   JUDGE FULTON: Any information on record

17 or in the public domain related to the cost of wet

18 testing?

19   MR. ALLNUTT: I'm sure there is. I can't

20 give you a specific citation right now. In fact,

21 Hecla's comments talked about the cost.

22   If there are no further questions, we have

1   covered the three matters sufficiently. I appreciate

2   the time. And I ask, for all the reasons that I've

3   set forth today, to dismiss Hecla's remaining

4   challenges and uphold the 2005 permit in its

5   entirety.

6   JUDGE FULTON: Mr. Beaton.

7   MR. BEATON: Thank you.

8   I appreciate the Region's comments. On

9   behalf of Hecla Mining Company we really appreciate

10   the Board's careful consideration of these important

11   issues.

12   It's clear from the Board's questions that

13   this has been closely evaluated. If I just might

14   raise a couple of points.

15   First of all, on the applicability or not

16   of 122.45(c) on total recoverable metals, I would

17   submit that either it applies or it doesn't. If it's

18   an effluent limit that's established then the

19   following paragraph -- and it's a water quality based

20   effluent limit in the interim paragraph -- then it

21   has to be an effluent limit in the next paragraph.

22   It uses the same identical language in the

1   regulations. So either 122.45(c) and its exceptions

2   applies to water quality or it doesn't apply at all.

3   I don't know of any other reading of that

4   rule. It used the same language in both sections.

5   On the issue of the concern that motivates

6   the Region -- not the Region, EPA -- to set total

7   recoverable metals, it was the only example that I'm

8   aware of that has been offered in the record. It

9   came from the early 1980s regarding an electroplating

10   operation. And the idea that some of the metals that

11   you would not measure if you were measuring dissolved

12   resolublized total metals in the water body, I am

13   unaware of any other finding for the last 25 years

14   from EPA or the Region that would suggest that this

15   would actually happen.

16   It has simply been a mantra that keeps

17   getting repeated over the last 25 years. This is

18   pre-water quality toxics rules. This is pre-water

19   quality limitations focused on the acts. So I would

20   submit that this rule applies or an exception

21   applies. It simply didn't cover water quality

22   effluents to begin with.

1   On the issue of wet testing being more

2   predictive and more protective, we disagree with

3   that. I think the idea is what you're trying to

4   protect is the water body, and the best way to

5   determine what you're trying to protect is to measure

6   it, not some sort of hypothetical species in a

7   laboratory vial and make some sort of qualified

8   determination from that.

9   I think the question about how long will

10   this go on and can Hecla fix this, I will say that

11   this Region, and I believe EPA nationally, takes the

12   position that once a permit is on administrative

13   extension the Agency is incapable of modifying that

14   permit.

15   That is their position under the

16   Administrative Procedures Act. I'm not hearing

17   argument on that one way or another that we'll

18   represent that position in the region on other permit

19   action.

20   And I will say it's been my experience

21   that I have never heard a Region say, 'Well, you

22   don't have to have wet testing any more; you've shown

1 that there's no hope for the toxicities when you're

2 done with them.' Once it starts it goes on and on.

3 And even if we were to make some sort of a

4 demonstration I'm very skeptical that it would ever

5 be taken out of the permit.

6   Hecla takes exception to the suggestion

7 that there was a fish kill caused by a reagent spill

8 from the Lucky Friday mine. We handled that in the

9 brief, and we just suggested that did not occur. And

10 that was just a justification for calling for

11 toxicity monitoring.

12   One final point on the pH issue. What is

13 somewhat galling to Hecla is that the Region came out

14 just two or three months ago with a draft permit.

15 And I believe this Board is considering some issues

16 of the Red Dog mine in Alaska. And it was just a

17 rubber stamp adjustment of the pH simply because the

18 State of Alaska thought it was okay.

19   On the final issue, while we don't know if

20 Hecla is going to discharge up to 11 or 12 pH, the

21 State establishes a maximum limit of 10.0. That is

22 what we demonstrated to the State was necessary for

1   treatment and to protect the aquatic species in the

2   stream. It's not a mystery that the upper ceiling --

3   that Hecla is choosing to seek the pH adjustment.

4   Again, I thank the Board for all its time

5   and consideration in this matter. I'll be happy to

6   answer any questions.

7   JUDGE FULTON: How about the incremental

8   cost question on wet testing?

9   MR. BEATON: I asked Mr. Dave Holland, who

10   is here, who is the company representative from Hecla

11   Mining. I apologize: We don't have it dollar-

12   evaluated. It is, as you suggest incremental.

13   Thank you very much.

14   JUDGE FULTON: Thank you.

15   We want to extend our thanks to the

16   parties for their contributions today. We will no

17   doubt find them helpful in arriving at a decision in

18   the case. We wish you a good day and a pleasant stay

19   in Washington, D.C.

20   (Whereupon, at 11:05 a.m., the oral

21   argument in the above-entitled matter was adjourned.)

22

A

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