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

IN THE MATTER OF HECLA MINING COMPANY – LUCKY FRIDAY MINE NPDES Permit No. ID-000017-5	Appeal Number - NPDES 03-10 HECLA MINING COMPANY'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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Hecla Mining Company, Lucky Friday Unit ("Hecla"), by and through its counsel of record, hereby submits this Reply Brief in support of Hecla's Petition for Review.

I. INTRODUCTION

Hecla's Petition for Review demonstrates that certain conditions contained in National Pollutant Discharge Elimination System ("NPDES") Permit No. ID-000017-5 (the "Lucky Friday Permit") are based on clearly erroneous findings of fact and conclusions of law, or involve an exercise of discretion or important public policy consideration that warrants review by the Environmental Appeals Board ("EAB"). Therefore, review and remand of these conditions in the Lucky Friday Permit is warranted.

II. PROCEDURAL BACKGROUND

On September 10, 2003 Hecla filed a Petition for Review and supporting memorandum seeking review of conditions contained in the Lucky Friday Permit. EPA's Response to the Petition for Review was due on October 31, 2003 and was received by Hecla's counsel on November 7, 2003. On November 17, 2003 Hecla filed a Motion for Leave to File Reply Brief. Hecla submits this Reply Brief pursuant to the Environmental Appeals Board's January 13, 2004 order granting leave to file a reply.

III. DISCUSSION

A. Mercury Limits and Monitoring

Hecla's Petition for Review specifically demonstrates why the Region's response to Hecla's objections regarding the mercury limits and monitoring requirements are clearly erroneous, an abuse of discretion, or otherwise warrant review. *See* Petition for Review at 7-13. Although the Board assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature, the Board "look[s] to determine whether the record demonstrates

that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record." *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10 (EAB, July 27, 2001). Deference is not given to the Region's decision, if the Board is not satisfied "that the Region gave due consideration to comments received" or if the Region did not adopt "an approach in the final permit decision that is rational and supportable." *Id.* Hecla's Petition for Review specifically demonstrates that the Region's prior response to Hecla's objections is clearly erroneous and should not be provided deference because (1) the Region failed to give due consideration to Hecla's comments, specifically failing to address the numerous studies establishing that mercury was not a concern and failed to articulate why water quality based effluent limit for mercury and associated low level mercury monitoring is justified in spite of these studies; and (2) the Region's use of technology-based effluent limits in its reasonable potential to exceed calculation is not rational in light of all the information in the record. *See* Petition for Review at 7-13. Review of the mercury limits and monitoring conditions is therefore warranted.

(1) The Use of Technology-Based Limits is Clearly Erroneous.

The Region's use of technology-based limits, rather than actual effluent monitoring data, is not rational in light of extensive data in the record to support that the Lucky Friday Unit is discharging below detection levels and in light of EPA's guidance regarding computation of the maximum projected effluent concentration. EPA's Response to Hecla's Petition for Review erroneously states that Hecla is not challenging the methodology the Region employed in developing the Permit's effluent limits for mercury. *See* Response at 12. This is precisely what Hecla is challenging. Hecla specifically challenges the Region's failure to follow its own technical guidance, which recommends use of maximum projected effluent concentration based

on *available effluent data* calculated to a statistically projected worst-case value. *See* Petition for Review at 9. EPA does not dispute this guidance and provides no rationale for ignoring the guidance and using technology-based effluent limits, rather than actual effluent monitoring data, in determining the reasonable potential to exceed ("RPE") in setting Hecla's effluent limitations for mercury. *See* Response at 12-13. In addition, EPA does not dispute that mercury discharge from the Lucky Friday Mine has been non-detect. *Id.* Instead, EPA simply sites to a 1982 Development Document indicating that the processes used at Lucky Friday have the "potential to generate wastewater polluted with many toxics."[1] *See* Response at 13. This does not justify the Region's failure to follow its own guidance requiring use of available effluent data, and does not warrant the Region's use of technology-based effluent limits that assumed effluent concentrations up to two orders of magnitude higher than actual effluent monitoring data for mercury. Much of the NPDES permit program is premised on the collection of accurate effluent data to determine permit compliance and the necessity for future permit conditions. The Region's rejection of actual data and its initial reliance on default technology based effluent limits is contrary to EPA Guidance and implicates important issues concerning how data is collected and used in NPDES permit decisions. Accordingly, the Region's use of technology-based effluent limitations instead of actual reliable data to determine RPE for mercury is clearly erroneous and involves an important public policy consideration. Hecla therefore requests review and remand of this condition.

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[1] In addition, it is disingenuous for EPA to now argue that "Hecla has identified mercury as one of the pollutants present in the Lucky Friday facility's effluent." *See* Response at 13 (citing December 1976 Permit Application, Ex. 8). As the Region is well aware, Hecla filed a new application for NPDES permit in 1990. Mercury was not identified as a potential pollutant. The Region is also well aware that no reliable effluent data supports that mercury is a pollutant of concern.

Hecla recognizes that presently the chronic aquatic criteria for mercury is less than the detection levels used by Hecla. Therefore, arguably there could be an exceedence of the chronic criteria that could go undetected. However, EPA has recommended new criteria for mercury and criterion for methylmercury. *See* EPA National Recommended Water Quality Criteria: 2002. The proposed criteria is above method detection levels employed by Hecla; therefore, Hecla can demonstrate based on its data that Hecla does not exceed the EPA 2002 recommended criteria for methylmercury to protect aquatic species. While Idaho Water Quality Standards currently do not incorporate the new recommended criteria for mercury, it is clear that the real concern expressed by EPA's proposed change is accumulation of methylmercury in fish tissue. *Id.* (providing that 0.3 mg/kg in fish tissue supports the need for WQBELs, low level monitoring and TMDL). The Region could therefore reasonably set water quality based effluent limits (WQBELs) *if* there were evidence of such accumulation. However, fish tissue data in the South Fork Coeur d' Alene basin (basin) establishes that no such problem exists in the basin, and therefore, the mercury limits imposed by the Permit are not reasonable.

(2) Low Level Mercury Monitoring is Unsupported.

The error created by the Region's use of technology-based effluent limits to establish the water quality based–effluent limit for mercury is further compounded by including low level mercury monitoring in the permit. The Response to Comments completely fails to address Hecla's significant comments regarding the numerous studies in the basin that demonstrate that mercury levels are non-detect, and not a concern in fish tissue, nor does it articulate why low level mercury monitoring is justified in spite of this evidence.

EPA does not dispute that the Response to Comments fails to address this issue. *See* Response at 14-15. Instead, EPA simply sites its general information gathering authority under §

308 of the CWA as justification for imposing the mercury monitoring conditions in the permit. *Id.* (citing 33 U.S.C. § 1318(a)(4)(A). The Region's reliance on § 308 as the basis for low level mercury monitoring is simply post hoc rationalization by its counsel. The only basis cited in the record for low level mercury monitoring was that water quality based effluent limits for mercury were necessary. As noted above, there is no basis in the record for this position. Thus, EAB should not consider this argument.

Even if the EAB considers EPA's argument that monitoring is justified under § 308, this argument fails because the monitoring is unreasonable. Although the CWA confers upon EPA broad information gathering authority, this authority is not limitless and the information requested and demands imposed must be "reasonable." *See United States v. Hartz Construction Co.*, 2000 WL 1220919 at * 3 (N.D.Ill. 2000)(stating that Section 308 requests must be "reasonable"); *Natural Resources Defense Council v. E.P.A.*, 822 F.2d 104 (U.S.App.D.C. 1987)(stating that Section 402(a)(2) grants broad information disclosure requirements as long as the disclosure demands imposed are reasonable). Low-level mercury monitoring is not reasonable where numerous studies in the basin demonstrate that mercury levels in both surface water and in fish tissue have not been shown to be a problem in the basin. It is unreasonable to require expensive monitoring when actual effluent data and instream studies do not justify data collection. Finally, low level monitoring is unreasonable because the state § 401 certification called for reducing costs of unnecessary monitoring, a directive that the Region ignored. *See* June 17, 2003 letter re: § 401 certification, **Exhibit H.**

Furthermore, EPA's general authority to require monitoring does not cure the Region's failure to address significant comments on the draft permit and failure to adequately articulate its reasons for including low level mercury monitoring. *See* 40 CFR § 124.17 (a)(2) (requiring

permitting agencies to "briefly describe and respond to all significant comments on the draft permit."); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remanding RCRA permit because permitting authority's rationale for certain permit limits was not clear and therefore did not reflect considered judgment required by regulations); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997) (remand due to lack of clarity in permitting authority's explanation). Because the Region failed to articulate with reasonable clarity the reasons for requiring low level mercury monitoring in spite of crucial facts and evidence demonstrating that mercury is not a concern in the South Fork Coeur d'Alene River ("SFCDA River") nor Hecla's effluent, the Permit should be remanded.

B. Seepage Study

Hecla's Petition for Review specifically demonstrates that the inclusion of the seepage study was clearly erroneous; therefore, review of this permit condition is warranted. EPA's Response to the Petition for Review asserts that the seepage study is legally justified because CWA jurisdiction applies to "discharges of pollutants from a point source via groundwater that has a 'direct hydrologic connection' to surface waters." *See* Response at 18. EPA's Response once again demonstrates the erroneous and illogical basis for the seepage study.[2] EPA contends the seepage study is legally justified because of the "direct hydrologic connection" between the groundwater and surface water. *Id.* However, no such connection has been established. *See* Response to Comments, **Exhibit J**, § III, Comment 75 (stating that it is "reasonable to assume"

[2] EPA states that the seepage from the tailings pond is "uncontrolled." *See* Response at 20. This assertion is incorrect. The tailings impoundments meet construction and design criteria mandated under the exclusive jurisdiction of the Idaho Department of Water Resources. The approved design is based upon a permeability of the tailings; therefore, seepage is expected, but is not "uncontrolled." *See* Response to Comments, **Exhibit J**, § III, Comment 75. Furthermore, contrary to EPA's assertion, Hecla has not admitted that the tailings ponds are designed to seep contaminated wastewater into the South Fork Coeur d'Alene River.

there is a hydrologic connection). Even courts finding that CWA may extend federal jurisdiction over groundwater that is connected to surface waters that are themselves waters of the United States recognize that the burden in proving this connection "is not light" and it must be demonstrated that "pollutants from the point source affect surface waters of the United States." *Idaho Rural Council v. Bosma*, 143 F.Supp. 2d 1169 (D.Idaho 2001). "It is not sufficient to allege groundwater pollution, and then to assert a general hydrological connection between all waters. Rather, pollutants must be traced from their source to surface waters, in order to come within the purview of the CWA." *Id.* (citations omitted). *See also, Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F.Supp. 983 (E.D. Wash. 1994)(recognizing that Plaintiffs must "demonstrate that pollutants from the point source affect surface waters of the United States" in order to establish jurisdiction under the CWA).[3] Here, no connection between the tailings ponds and SFCDA has been demonstrated and the very purpose of the seepage study is to establish the hydrologic connection. *Id.* Accordingly, there is no legal justification for the study since EPA is relying on the study itself to establish the hydrologic connection.

Furthermore, the Region acknowledges that the seepage study may be inconclusive to establish such a connection. *See* Response to Comments, **Exhibit J**, § III, Comment 75. EPA nevertheless contends the study is warranted, relying again on its broad authority to request information under the CWA. *See* Response at 19 (citing 33 U.S.C. §§ 1318(a)(4)(A),

[3] Based on *Washington Wilderness Coalition*, EPA concludes that there "can be little doubt that any seepage from the Lucky Friday facilities tailings ponds that reached the SFCdA River would be subject to NPDES regulation." *See* Response at 19. However, in *Washington Wilderness Coalition* the court merely allowed plaintiffs to survive a motion to dismiss based on their allegation of a hydrological connection between seepage into groundwater and the surface waters. 870 F.Supp. at 991. Similar to *Bosma*, the court recognized that in proving their claims a general hydrological connection is insufficient, and the pollutants "must be traced from their source to surface waters in order to come within the purview of the CWA." *Id.* at 990.

1342(a)(2)). Again, EPA's reliance on § 308 to justify the seepage study is a post hoc rationalization by its counsel and should not be considered. Even if considered, as noted above, EPA's power under § 308 is limited based on its reasonableness. *See United States v. Hartz Construction Co.*, 2000 WL 1220919 at * 3 (N.D.Ill. 2000); *Natural Resources Defense Council v. E.P.A.*, 822 F.2d 104 (U.S.App.D.C. 1987). The seepage study, which EPA admits may not establish the hydrologic connection necessary for EPA to have the power to conduct the study in the first place, is not reasonable.

Finally, EPA's argument that the seepage need only be "estimated" does not respond to Hecla's concern that the results of such a study would not quantify any alleged unmonitored discharges to the SFCDA. Inclusion of the seepage study as a condition in the permit is not rational and is legally and technically unsupportable.

C. Variance Request

EPA's Response infers that Hecla, not the Region, created the delay that prohibited a ruling on the variance request prior to the Permit being finalized. This is incorrect. Hecla's variance request has been pending since 2001. The Region did not even respond to Hecla's variance request until nearly two years after it was filed. The EPA's continued characterization of Hecla's variance request as "new" is also disingenuous. The bases for Hecla's variance request are identical to the 2001 variance request and the economic burdens of compliance are the same. EPA points out that they received the additional information necessary to review the variance request in July 2003, "just one month prior to permit issuance." *See* Response at 21. However, EPA did not request the information until June 9, 2003; therefore, Hecla's response was timely. If EPA was unable to act on the request, which had been pending for over two years, because it was still reviewing the information it requested in June 2003, it should have delayed

issuance of the final permit. As noted below, the variance rule clearly anticipated that the Region would act on timely variance requests *prior* to final permit issuance. The Region's delay in acting on Hecla's variance request is not attributable to Hecla.

(1) Hecla Specifically Challenges Permit Conditions Resulting From Failure to Act on Variance Request.

Hecla is challenging EPA's failure, over the course of thirty months, to act on its variance request, however, concomitant to this failure is the inclusion of specific permit conditions, including the effluent limitations for cadmium, lead, zinc and mercury, which were included in the permit prior to acting on the request for variance. EPA argues that the Board does not have jurisdiction over Hecla's arguments regarding the variance request. *See* Response at 22. In making this argument, EPA mischaracterizes Hecla's arguments regarding EPA's failure to act on the variance request by stating that Hecla is *not* contesting the permit conditions regarding the effluent limitations for cadmium, lead, zinc and mercury. *Id.* Hecla is specifically challenging the permit conditions related to cadmium, lead, zinc and mercury. For example, Hecla's Petition for Review states that "EPA's inclusion of the effluent limitations for cadmium, zinc and lead without acting on the variance request is unlawful." *See* Petition for Review at 17. The Petition for Review also argues that the Region's failure to act on variance resulted in improper, overly-stringent and unattainable effluent limitations for cadmium, lead, zinc and mercury being incorporated into the permit. *See* Petition for Review at 16-20. Because Hecla is challenging the permit conditions contained in the permit, which are the result of EPA's failure to act on the variance, these issues are properly before the Board.

(2) Issuance of the Final NPDES Permit Prior to Acting on the Variance Request Was Unreasonable and an Abuse of Discretion.

EPA's issuance of the Permit prior to acting on Hecla's variance request is unreasonable. EPA argues that the authority cited by Hecla regarding its requirement to act expeditiously are inapplicable to variances from the Idaho water quality standards. *See* Response at 25-27. However, the Petition for Review demonstrates that variances from Idaho's water quality standards were clearly designed to be acted upon expeditiously. *See* 62 Fed. Reg. 23004, 23015 (April 28, 1997)(stating that "the Administrator is delegating to the Regional Administrator the authority to propose and grant these variances. This delegation should expedite the processing of variance requests, as they will typically arise in the context of NPDES proceedings being handled by EPA Region X."). The variance provision, specific to Idaho, was designed to provide relief to the permitee from certain unattainable requirements *before* the permit is issued. *Id.* (stating that "The practical effect of such a variance is to allow a permit to be written using less stringent criteria, while encouraging ultimate attainment of the underlying standard."). The Region's failure to act on Hecla's timely requested variance prior to final permitting is simply a failure to follow its own rules, review of this failure is clearly within the Board's jurisdiction.

The variance procedures under 40 C.F.R. § 124.63(a) demonstrate a similar intent by providing that the NPDES permit reflect the "conditions needed to implement the variance." EPA argues that these rules support EPA's finalization of the permit without acting on the variance request because § 124.63(a) provides that "if acting on the 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.'"

See Response at 26 (citing 40 CFR § 124.63(a).[4] This is inconsistent with EPA's later position that it did not act on the variance because it did not have all the information required, but that upon receipt of the additional information requested in June 2003, and received in July 2003, the EPA should be able to act upon the variance request "within a few months." *See* Response (citing **Exhibit M** at 2).[5] According to EPA's own assertions, there would be no "significant delay" of the permit, and there was no need to separate the variance request from the permit.

The variance procedures were designed to provide relief from unattainable requirements in the permit; therefore, EPA's inclusion of the effluent limitations without acting on the variance request was unreasonable and an abuse of discretion.

(3) The Region Failed to Adequately Respond to Comments Regarding Costs.

The Region's Response to Comments, while addressing the variance request generally, failed to respond to Hecla's main concern and significant comments regarding the cost associated with compliance with the permit absent a ruling on the variance. *See* **Exhibit J**, § IV, Comment 14. EPA contends that the response was sufficient because the Region is not required to respond to each comment. *See* Response at 29. However, as EPA recognizes in its brief "[t]he response to comments document must demonstrate that *all significant comments* were considered." *Id.* (citing *In re NE Hub Partners, L.P.*, 7 E.A.D 561 (EAB 1998)(emphasis added). *See also, In re Steel Dynamics, Inc.*, 9 E.A.D. 165, n.31 (EAB 2000)(stating that Region must briefly describe and respond to all significant comments). The majority of Hecla's comments regarding the variance request expressed its concerns about the costs associated with

[4] EPA contends that § 124.63(a) is inapplicable, but even if applied by analogy, would support its position. *See* Response at 26.

[5] Although EPA indicated in its August 22, 2003 letter that they could act on the variance within a few months of receiving the information requested therein, and the information was provided on September 15, 2003, EPA has not yet acted on the variance.

compliance absent a ruling on the variance. *See* **Exhibit J**, § IV, Comment 14. The Region responded to these comments by providing the background of the variance request, explained that the variance had been renewed, and that EPA is reviewing the request. *See* Response at 30. *See also*, **Exhibit J**, § IV. The Region's response does not in any way respond to Hecla's concerns over the costs associated with compliance absent a ruling on the variance and does not demonstrate that Hecla's significant comments regarding costs were considered at all. Therefore, the EPA's response to comments regarding the variance request is insufficient.

(4) The District Court Case Does Not Eliminate the Need for Review by the EAB.

EPA contends that Hecla's request to review the Region's failure to act on the variance request is moot, and should not be reviewed by the EAB, because Hecla has asserted an unreasonable delay claim in federal district court. *See Idaho Conservation League and the Lands Council v. Iani*, Respondent's Ex. 14. In the federal district court case, Hecla intervened and cross-claimed to reserve its rights *before* EPA took final action on the NPDES permit and the related to site-specific criteria and the pending request for variance. *See Id.* However, the United States has not filed an answer to Hecla's cross-claims. *See* Joint Motion to Stay Proceedings and Proposed Order, Exhibit Q. The issue before the EAB is simply whether the Region should have considered and acted on the timely variance request prior to setting effluent limits in the Permit, as clearly required by their rules. On the other hand, the Administrative Procedures Act unreasonable delay claim involves separate issues and will not resolve the issue of the appropriate effluent limits in the NPDES permit. The effluent limits are an issue exclusively within EAB jurisdiction. Thus, it is appropriate for the EAB to consider Hecla's challenge regarding the Region's failure to act on the variance.

D. Total Recoverable Effluent Limitations for Metals

The Region's response to Hecla's objections to the "total recoverable" metal limits is inadequate and warrants review. The Region argues the exception found in 40 CFR § 122.45(c), providing that where an "applicable effluent standard or limit has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form" the permit limits do not have to be based on "total recoverable metals," is inapplicable. *See* Response at 32-34. The Region's response to comments does not provide the requisite explanation or authority for its reading of the exception; therefore, review of this condition is warranted. *See In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997)(remand due to lack of clarity in permitting authorities explanation). In its Response brief, the EPA for the first time provided an analysis of why it believes the exception is inapplicable. *See* Response at 32-33. EPA argues that courts have "consistently held that a state water quality standard does not constitute an 'effluent standard or limitation.'" *Id.* at 33. However, EPA relies solely on cases interpreting the CWA's citizen suit provisions. *Id.* These cases have distinguished between water quality standards and effluent limitations in the context of citizen enforcement, only allowing citizen enforcement of water quality standards actually contained in an NPDES permit. *See Oregon Nat. Res. Council v. U.S. Forest Service*, 834 F.2d 842 (9th Cir. 1987)(suit to enforce water quality standards allegedly breached by nonpoint sources not regulated by NPDES permits). Furthermore, courts have found a "state water quality standard can constitute an effluent standard or limitation under section 505" if it has been incorporated into an NPDES permit. *See Northwest Environmental Defense Center v. U.S. Army Corps of Engineers*, 118 F.Supp.2d 1115 (D.Or.2000)(citing *McClellan Ecological Seepage v. Weinberger*, 707 F.Supp.1182, 1200 (E.D.Cal.1988)(overruled on other grounds). These cases do not support

EPA's narrow reading of the exception allowing the effluent limitations in Hecla's permit to be expressed in dissolved form. The Region failed to provide justification for its failure to exercise its discretion to express effluent limits in dissolved form; therefore, this condition warrants review and remand by the Board.

E. Compliance Schedules for Monitoring Requirements

EPA supports its failure to provide for a compliance or implementation schedule for flow-proportioned composite sampling, continuous effluent monitoring, and instream flow monitoring by again pointing to its broad information-gathering authorities under the CWA. *See* Response at 36. Again, these requirements must be reasonable. *See United States v. Hartz Construction Co.,* 2000 WL 1220919 at * 3 (N.D.Ill. 2000); *Natural Resources Defense Council v. E.P.A.*, 822 F.2d 104 (U.S.App.D.C. 1987). Failure to provide a compliance schedule is unreasonable in light of IDEQ's directive that it "supports any steps that can be taken to make the [sic] all of the permits monitoring requirements less expensive." *See* June 17, 2003 letter re: § 401 certification, **Exhibit H**. Furthermore, Hecla specifically requested a compliance schedule to address monitoring because of the time necessary to install, implement and debug the new monitoring equipment. *See* 2003 Comments, **Exhibit B**, at 9. The physical impossibility of installing and debugging this equipment prior to the September 14, 2003 effective date of the permit, and unreasonableness of failing to allow for a compliance schedule, is further demonstrated by the fact that despite diligent work by Hecla, Hecla is still working to debug the monitoring equipment. Failure to provide a compliance schedule is therefore unreasonable.

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

The interim limits should be reviewed because they are not solely attributable to the state certification within the meaning of 40 CFR § 124.55(e). The interim effluent limits for lead,

cadmium and zinc were authorized by the Idaho Department of Environmental Quality ("IDEQ") in its Section 401 certification letter. This does not, however, create an absolute shield from review of these limits by the EAB. EPA correctly cites the NPDES regulations providing 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." *See* Response at 38 (citing 40 CFR § 124.55(e)). Permit conditions are "attributable to State certification" where "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, Massachusetts*, 5 E.A.D. 93 (EAB 1994)(citation omitted). However, where the 401 certification is ambiguous, and leaves open the possibility that the requirements can be made less stringent and still comply with State water quality standards, the conditions are not considered "attributable to State certification" and are therefore reviewable under Part 124 procedures. *See In the Matter of Boise Cascade Corporation*, 4 E.A.D. 474, n.7 (EAB 1993).

For example, in *Boise Cascade Corporation*, Boise Cascade sought review of permit requirements relating to dissolved oxygen that were in the draft permit sent to the State of Louisiana for Section 401 certification. *Id.* The State indicated in its certification letters that it was "reasonable to expect that the discharge will comply" with the State water quality standards. *Id.* However, even with this language, the EAB found that "the letters leave open the possibility that the requirements can be made less stringent and still comply with Louisiana's water quality standard." *Id.* "Because of this ambiguity in the certification letters," the EAB found that the "dissolved oxygen requirements cannot be said to be 'attributable to State certification.'" *Id.* (*citing* 44 Fed.Reg. 32,880 (June 7, 1979) (a State certification letter stating merely that a

particular permit condition will not violate a State water quality standard is ambiguous in that it still leaves open the possibility that the condition could be made less stringent and still comply with the water quality standard). *See also, In re General Electric Company, Hooksett, New Hampshire*, 4 E.A.D. 468 (EAB 1993)(stating that permit condition not "attributable to State certification" clearly communicates idea that "nothing less than what was written in the permit would satisfy State law.").

Similar to the *Boise Cascade Corporation* § 401 certification, the Lucky Friday § 401 certification letter from IDEQ "leaves open the possibility" that the interim effluent limitations can be made less stringent and still comply with Idaho's water quality standards. Although EPA argues that even a "cursory examination" of the § 401 certification letter shows it is "attributable to State certification," the letter merely states that if Lucky Friday "complies with the terms and conditions imposed by this permit . . . there is reasonable assurance the discharge will comply" with State water quality standards. *See* **Exhibit H**. However, specific to the interim limits, the § 401 certification letter further states these limits are "based on the recent discharge levels reported in the DMRs." *Id.* In addition, the letter states that the interim limits "have been set at levels the permitee has shown they can achieve." *Id.* Finally, the letter states that "DEQ supports any steps that can be taken to make the [sic] all of the permits monitoring requirements less expensive." *Id.* These statements do not communicate the idea that "nothing less than what was written in the permit would satisfy State law" and instead indicate the State's intent to set interim limits based on past performance and based on what Hecla can achieve. However, as discussed in the Petition for Review, the interim limits do not achieve this result. *See* Petition for Review at 24-25. Furthermore, as noted in the Petition for Review, the Region calculated and was integrally involved in the development of the interim limits. *Id. See also* **Exhibit O**.

Because the § 401 Certification is ambiguous, does not set interim limits based on past performance – although it purports to – and leaves open the possibility of less stringent conditions, the interim limits are not "attributable to State certification" and may be reviewed by the EAB.

G. Upper pH Limit

Hecla has specifically demonstrated that an exception to the upper pH limit under 40 CFR § 125, subpart D, is justified. In addition, 40 CFR § 440.131(d) authorizes a pH of above 9.0. Hecla specifically requested EPA to authorize a pH limit of 10 s.u. in its comments on the draft permit. *See* 2003 Comments, **Exhibit B** at 11, 2001 Comments, **Exhibit C** at 16. The pH condition is properly before the Board and Hecla seeks remand of this permit condition for inclusion of an alternative pH upper limit.

H. Whole Effluent Toxicity Testing

EPA has failed to provide a legal or factual basis for whole effluent toxicity ("WET") testing and bioassessment monitoring in the permit.[6] Hecla's Petition for Review clearly demonstrates why the Region's response to its objections regarding WET testing is clearly erroneous and warrants review. In particular, Hecla points to the circular logic employed by EPA in its response to comments wherein EPA justifies WET testing by arguing it is necessary to determine if there is "a significant likelihood of toxic effects," which EPA argues in turn would provide the basis for requiring WET testing. *See* Petition for Review at 29. Therefore,

[6] In response to Hecla's argument that tens of millions of dollars in studies of the basin demonstrate that controls on Lucky Friday's effluent are sufficient to protect water quality, EPA argues that "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* Response at 47, fn 30. This is incorrect. IDEQ, the lead agency investigating this incident, did not believe that the release was sufficient to kill fish, and has never indicated that Hecla's release killed fish.

Hecla has not simply reiterated its prior objections, but has specifically demonstrated why the Region's response to comments is unreasonable and warrants review.

EPA once again relies on its information-gathering authority under the CWA to justify WET testing. *See* Response at 46. As noted above, EPA's authority under the Act is limited to requests that are reasonable. It is unreasonable for EPA to require both WET testing and bioassessment monitoring. In addition, the Region, despite policy to the contrary, fails to make a determination of a significant likelihood of toxic effect *prior* to WET testing and instead admits that it is using the WET testing to make such a determination. *See* Petition for Review at 29. Finally, the health of the receiving water at current levels of discharge does not support WET testing. The requirement is therefore unreasonable.

V. CONCLUSION

For the reasons stated herein, and in Hecla's Petition for Review, the EAB should grant review of the Lucky Friday Permit and set aside, modify, and/or remand the unlawful conditions in the permit.

Dated this 30th day of January, 2004.

Respectfully submitted,

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

LIST OF EXHIBITS

Exhibit Q Joint Motion to Stay Proceedings and Proposed Order, *Idaho Conservation League and the Lands Council v. Iani* (No. C02-2295Z).

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of January, 2004, I served a copy of the HECLA MINING COMPANY'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW via facsimile and regular mail on:

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Kevin J. Beaton

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IDAHO CONSERVATION LEAGUE and THE LANDS COUNCIL, Plaintiffs, v. JOHN IANI, et al., Defendants.	No. C02-2295Z **JOINT MOTION TO STAY PROCEEDINGS AND PROPOSED ORDER**

Cross Claimant Hecla Mining Company ("Hecla") and Defendants United States Environmental Protection Agency, John Iani, Regional Administrator of the United States Environmental Protection Agency, Region 10, and Michael O. Leavitt, Administrator of the United States Environmental Protection Agency, (collectively, "EPA"), jointly move this Court to stay until further Order of the Court all proceedings in this litigation, including EPA's answer or other responsive pleading to Hecla's cross-claims currently due January 16, 2004. As good cause therefore, Hecla and EPA (collectively the "Parties") state as follows:

1. On August 19, 2003, Plaintiffs filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P.

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41(a)(1)(i), thereby dismissing their claims in this lawsuit. Accordingly, the only claims left in this case are cross-claims asserted by Hecla against EPA. Those cross-claims generally allege that EPA has failed to take timely action on Hecla's request for a variance from the State of Idaho's applicable water quality standards for certain metals.[1/]

2. This Court previously extended EPA's deadline for filing an answer or other responsive pleading to Hecla's cross-claims to January 16, 2004, to allow Hecla to continue its consideration of whether and how to proceed with its claims in light of the Plaintiffs' voluntary dismissal.

3. The Parties anticipate that, within the next several months, EPA will issue a proposed decision on Hecla's variance request. A public comment period will follow. Thereafter, in accordance with its statutory and regulatory authority and discretion, EPA anticipates that it will reach a final decision. Once EPA issues a final decision, the Parties will able to clarify whether there are any issues that remain to be litigated.

4. Under these circumstances, the interests of the Court and the Parties are best served by staying all proceedings in this litigation. This approach will promote judicial economy by ensuring that neither the Court nor the Parties will expend resources unnecessarily. It is well settled that, as part of the district court's inherent power to control its docket, a court "has the power to stay proceedings pending before it." Pet Milk Co. v. Ritter, 323 F.2d 586, 588 (10th Cir. 1963) (citing Landis v. North American Co., 299 U.S. 248, 255 (1936). The district court may exercise this discretion to enter a stay where the stay provides "economy of time and effort for itself, for counsel, and for litigants." Landis, 299 U.S. at 254.

5. If the stay is granted, the Parties will file a joint report regarding the status of the administrative

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1/ On February 28, 2003, EPA took final action on Idaho's submission of specific water quality criteria for the South Fork Coeur d'Alene river. See Cross Complaint ¶¶ 14-16, 23-26 (November 27, 2002).

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process with the Court on July 16, 2004, and will periodically file any necessary additional joint status reports with the Court thereafter.

6. If the stay is granted, either EPA or Hecla may seek to end the stay by providing the other party fourteen days advance written notice, and by thereafter filing an appropriate pleading concerning ending the stay with the Court.

WHEREFORE, the Parties respectfully request that the Court enter a stay, until further Order of the Court, of all proceedings in this litigation, including EPA's answer or other responsive pleading to Hecla's cross-claims currently due January 16, 2004. A Proposed Order is attached hereto.

Respectfully submitted,

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CONTINUED ON NEXT PAGE

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The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IDAHO CONSERVATION LEAGUE and THE LANDS COUNCIL, Plaintiffs, v. JOHN IANI, et al., Defendants.	No. C02-2295Z **ORDER GRANTING JOINT MOTION TO STAY PROCEEDINGS**

Upon consideration of the Parties' Joint Motion to Stay Proceedings ("Joint Motion") filed January 15, 2004,

IT IS ORDERED that the Joint Motion is GRANTED. Proceedings in this case shall be stayed until further Order of this Court, and the Parties shall file a joint report regarding the status of the administrative process with the Court on July 16, 2004, and shall thereafter keep the Court apprised of the status of the case by making periodic joint status reports to the Court.

DONE AND ORDERED, THIS _____ DAY OF _____, 2004.

_____
United States District Judge

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IDAHO CONSERVATION LEAGUE and THE LANDS COUNCIL, Plaintiffs, v. JOHN IANI, et al., Defendants.	No. C02-2295Z CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2004, a true and correct copy of the Joint Motion to Stay Proceedings and the Proposed Order was served by first-class mail on the following:

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