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ENVIR. APPEALS BOARD

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

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IN THE MATTER OF )	Appeal Number - NPDES 06-5
HECLA MINING COMPANY – )	HECLA MINING COMPANY’S [PROPOSED]
LUCKY FRIDAY MINE )	REPLY BRIEF IN SUPPORT OF PETITION
NPDES Permit No. ID-000017-5 )	FOR REVIEW
_____ )	

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.

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## II. PROCEDURAL BACKGROUND

On January 25, 2006, Hecla filed a Petition for Review and supporting memorandum seeking review of conditions contained in the 2005 Lucky Friday Permit. EPA's Response to the Petition for Review was due on March 13, 2006 and was received by Hecla's counsel on March 15, 2006. Hecla has sought leave to file a Reply Brief. *See* Motion for Leave to File Reply Brief, filed concurrently herewith. Hecla submits this proposed Reply Brief in support of its Petition for Review to be filed upon order of the EAB granting leave to file a reply.

## III. DISCUSSION

### A. Upper pH Limit

Hecla has demonstrated that the Region erred by failing to incorporate elements of the State of Idaho's July 15, 2004 section 401 Certification. Specifically, the Region failed to incorporate the mixing zone for pH and declined to change the upper pH limit based on 40 C.F.R. § 440.131(d). The Region's failure to adjust the pH is not rational in light of the information in the record. The Region's Response ignores and unreasonably dismisses information in the record that supports the upper pH adjustment and involves inappropriate comparisons. The Region's failure to adjust the upper pH based on the information in the record is not rational or supportable. Therefore, the EAB should review and modify and/or remand this erroneous permit condition.

In its Response, the Region asserts that to obtain an adjustment of the upper pH limit under 40 CFR § 440.131 Hecla must submit sufficient information to demonstrate that (1) compliance with "relevant metals limitations" in the permit requires the implementation of "neutralization and sedimentation technology"; (2) implementation of this technology results in an inability to comply with the upper pH limit of 9.0 s.u.; and (3) the relaxed pH limit will not

result in a degradation of water quality. *See* Response at 13. Hecla has provided such information.

The Region argues that Hecla has submitted no site-specific information demonstrating that compliance with the permit will require implementation of neutralization and sedimentation technology or that it intends to implement such technology. *Id.* The Region's Response addresses, and dismisses, the Centra Report as being the only "site-specific" information provided by Hecla. *Id.* This Response does not accurately describe Hecla's arguments and the documents in the record. The Region's Response, like its response to comments, continues to ignore the totality of the information in the record. Hecla's Petition specifically points to Hecla's recent statements in the record, past comments, the Centra Report, EPA consultant documents and the ELG Development Document. *See* Petition for Review at 13-19 (citing 2005 Comments, Attachment B at 2). These documents and Hecla's statements in the record demonstrate that lime addition combined with sedimentation is the most economically viable treatment option to achieve the water quality based effluent limits in the permit. *Id.* The comments and documents also demonstrate that this process could result in a discharge of pH in excess of 9.0 s.u. *Id.* Finally, the 2004 State 401 Certification provides that water quality will not be degraded and there will not be toxic conditions to biota because of pH discharges of 10.0 s.u. *See* 2004 State 401 Certification, Attachment C; 2005 Comments, Attachment B at 2-3. Therefore, Hecla has provided the information necessary to establish an adjustment of the upper pH limit based on the regulation, and under the Region's articulation of the three criteria required under the regulation.

Nevertheless, instead of accepting the information in the record, the Region asserts that Hecla must provide an additional "commitment" that it will implement neutralization technology to meet the metals limits in the permit. *See* 2005 Response to Comments, Attachment G at 6;

Response at 15. The Region asserts that this is not a “new standard” for granting the adjustment and that its delay in relaxation of the upper pH is an appropriate exercise of its discretion.

Response at 15 (arguing the EAB should decline to review this “essentially technical” challenge). The EAB does not simply defer to the Region’s judgment, but must consider whether the Region’s refusal to adjust the pH limit is “supportable” and “rational in light of all of the information in the record.” *See In re Tallmadge Generating Station*, PSD Appeal No. 02-12, slip op. at 11 (EAB, May 21, 2003). The Region’s requirement of an additional “commitment” by Hecla is not required by the regulation, is a previously unarticulated standard and is not supportable. In addition, the Region’s decision to delay adjustment of the upper pH limit is not reasonable where: the State Certification allows an adjustment of the upper pH limit; Hecla has submitted sufficient information to support the adjustment; the Region has acknowledged that a pH adjustment is necessary in “many cases” including Hecla’s circumstances; and the Region could resolve this issue now with a simple amendment to the permit condition, which clarifies that an upper pH limit is allowed only if neutralization and sedimentation technology is applied.

**B. Response to Comments Inadequate**

The Region did not adequately address Hecla’s comments on the draft permit. The Region contends that it provided a “point-by-point rebuttal” of the permits and studies and Hecla’s comments on the pH issue. Response at 11. The Region did not provide this detailed rebuttal and failed to respond to significant comments in the record, as required under the rules. *See* 40 CFR § 124.17(a)(2). The Region must “articulate with reasonable clarity the reasons for [its] conclusions and the significance of crucial facts in reaching those conclusions.” *See In re Tallmadge*, PSD Appeal No. 02-12 slip op. at 17. As described in detail in the Petition for Review, the Region failed to articulate its reasoning on key issues including: Hecla’s comments

seeking clarification of the Region's reasoning that they cannot provide a mixing zone for the upper range of the pH because it is technology-based; Hecla's comments regarding the intent of the Clean Water Act and the need to incorporate the state certification; Hecla's comments on the ELG Development Document. *See* Petition for Review at 12-17. The Region erred by failing to respond to these significant comments.

#### 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 7<sup>th</sup> day of April, 2006.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on this 7<sup>th</sup> day of April, 2006, I served a copy of the HECLA MINING COMPANY'S [PROPOSED] REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW via facsimile and regular mail on:

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