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ENVIR. APPEALS BOARD

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

In the Matter of:	Appeal No. NPDES 06-05
HECLA MINING COMPANY, LUCKY FRIDAY MINE NPDES Permit No. ID-000017-5	**RESPONSE TO HECLA MINING COMPANY'S PETITION FOR REVIEW**

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BPJ	best professional judgment
BPT	best practicable control technology
BAT	best available technology economically achievable
CWA	Clean Water Act
DEQ	Idaho Department of Environmental Quality
EAB	Environmental Appeals Board
ELG	Effluent Limitations Guideline
EPA	U.S. Environmental Protection Agency
FDF	fundamentally different factors
NPDES	National Pollutant Discharge Elimination System
RTC	Response to Comments
SFCdA	South Fork Coeur d'Alene
SSC	site specific criteria
TMDL	Total Maximum Daily Load
WET	whole effluent toxicity

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(206) 553-1037

I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19 and the January 27, 2006 letter from the Environmental Appeals Board ("EAB" or "Board"), Region 10 of the U.S. Environmental Protection Agency ("Region") respectfully submits this response to the Petition for Review ("2006 Petition") of NPDES Permit No. ID-000017-5 filed by the Hecla Mining Company ("Hecla" or "Petitioner"). The 2006 Petition challenges a number of conditions found in the final modification of the NPDES permit authorizing discharges from Hecla's Lucky Friday facility. The Region issued this final NPDES permit modification on December 28, 2005 at the conclusion of remand proceedings ordered by the EAB in October 2004. For the reasons set forth below, the EAB should deny the 2006 Petition, as well as the related Petition for Review ("2003 Petition") that Hecla filed in September 2003 (NPDES Appeal No. 03-10), a portion of which remains pending before the Board after earlier briefing resulting in a partial remand.[1]

II. FACTUAL AND PROCEDURAL BACKGROUND

The factual background relevant to Hecla's NPDES permit is described at some length in the brief ("2003 Response Brief") filed by the Region in response to Hecla's 2003 Petition. 2003 Response Brief at 1-4.[2] In short, the NPDES permit challenged in this action regulates the

[1] In the 2003 Petition, Hecla raised nine issues (thus challenging the associated permit conditions). The Board has previously issued orders granting withdrawal of two of these nine issues: #5 (Lack of Compliance Schedules for Various Monitoring Requirements) and #6 (Method Detection Limit for Zinc). *See* 2004 Order Granting Second Partial Withdrawal (November 3, 2004); 2003 Order Granting Partial Withdrawal (October 13, 2003). In its January 25, 2006 Status Report, Hecla reported that it was no longer seeking EAB review of four additional issues from the 2003 Petition: #1 (Effluent Limitations and Monitoring Requirements for Mercury), #2 (Seepage Study and Hydrological Analysis), #3 (Variance Request), and #7 (Interim Effluent Limitations for Lead, Cadmium, and Zinc). 2006 Status Report (January 25, 2006). The Board has not yet adjudicated the remaining three issues from the 2003 Petition.

[2] Because of the close connection between this matter (NPDES Appeal No. 06-05) and Hecla's still pending appeal of the 2003 Permit (NPDES Appeal No. 03-10), this response brief cites to papers filed in the earlier action without attaching copies or identifying them as exhibits. For clarity, papers filed in the earlier action are

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discharge into the South Fork Coeur d'Alene ("SFCdA") River of process wastewater generated by Hecla's Lucky Friday mine and mill complex near Mullan, Idaho.

In previous submittals to the Board, the Region recounted the Lucky Friday NPDES permit's "lengthy and complex" procedural history leading up to the issuance of the most recent permit modification. *See* 2003 Response Brief at 4-5; 2004 Brief on Effect of Modified Section 401 Certification at 2-4. In short, Hecla is operating the Lucky Friday facility today subject to the same "best professional judgment" ("BPJ") effluent limitations for metals that were imposed in its first NPDES permit in 1973. 2001 Fact Sheet, Ex. 3, at p. 7.[3] This status quo has persisted despite intervening events including the promulgation of nationally-applicable effluent limitation guidelines for the ore mining and dressing industrial point source category, the promulgation and approval of various water quality standards for the SFCdA River, the issuance of total daily maximum loads ("TMDLs") with waste load allocations applicable to the Lucky Friday facility, and the placement of the Bunker Hill Mining and Metallurgical Complex (including the SFCdA River) on the National Priorities List under the Comprehensive Emergency Response, Compensation, and Liability Act .

On August 12, 2003, after a lengthy period of public review, comment, and response, the Region reissued NPDES Permit No. ID-000017-5 to Hecla. Hecla petitioned the Board for

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identified by the year in which they were filed (e.g., "2003 Response Brief").

[3] This response brief uses the following conventions when citing to the administrative record for the Permit. Each cited document is identified first by a short descriptor (*e.g.*, "2005 Permit" or "2001 Fact Sheet"), followed by the exhibit number it has been assigned for the purposes of this brief ("Ex. __"), and then the page(s) or section(s) specifically referenced. Documents that were cited and attached to briefs submitted by the Region in response to Hecla's 2003 Petition (NPDES Appeal No. 03-10) are identified by the same exhibit number they were assigned in that matter. Materials cited for the first time in the more recent appeal are identified with exhibit numbers beginning with the number 23, so as not to duplicate exhibit numbers from the earlier appeal.

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review of this 2003 permitting decision raising nine issues contesting various conditions of the permit. The issues raised by Hecla's 2003 Petition were fully briefed when, in July 2004, the State of Idaho issued a modified Clean Water Act Section 401 Certification ("2004 Certification") for the permit, which precipitated another round of motions and briefing. In October 2004, the Board remanded five of the nine issues raised in Hecla's 2003 Petition and directed the Region "to incorporate any changes it determines are appropriate" in light of the 2004 Certification. *See* 2004 Remand Order and Order Requiring Status Report (October 13, 2004).

On June 21, 2005, the Region provided public notice of a draft modified permit ("2005 Draft Permit") and fact sheet ("2005 Fact Sheet") for the Lucky Friday facility that it had prepared in response to the EAB's remand order. 2005 Draft Permit, Ex. 23; 2005 Fact Sheet, Ex. 24. By letter dated July 21, 2005, Hecla submitted comments on this draft modified permit, challenging the draft permit's proposed pH limit, interim limits, and effective date. 2005 Comment Letter, Ex. 25.

On December 28, 2005, the Region issued a final modified permit ("2005 Permit") and sent this permit along with a Response to Comments document ("2005 RTC") to Hecla and other interested parties.[4] 2005 Permit, Ex. 26; 2005 RTC, Ex. 27. On January 26, 2006, Hecla filed a Petition for Review and supporting Memorandum with the EAB challenging the Region's issuance of the 2005 Permit.

[4] The 2005 RTC also responded to comments on the 2005 Draft Permit that had been submitted by the Center for Justice on behalf of Idaho Rivers United and the Sierra Club.

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III. SCOPE AND STANDARD OF REVIEW

There is no appeal as of right from a Region's permitting decision. *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB, May 29, 1992). For the EAB to grant review of an NPDES permit, the petition must demonstrate that the condition in question is based on "a finding of fact or conclusion of law which is clearly erroneous," or "an exercise of discretion or an important policy consideration which the [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a). *See, e.g., In re Hecla Mining Co., Grouse Creek Unit*, NPDES Appeal No. 02-02, slip op. at 13 (EAB, July 11, 2002); *In re City of Moscow, Idaho*, 10 E.A.D. 135, 140-41 (EAB 2001); *In re City of Jacksonville, District II Wastewater Treatment Plant*, 4 E.A.D. 150, 152 (EAB 1992). As stated in the preamble to 40 C.F.R. § 124.19, "this power of review should only be sparingly exercised," and "most permit conditions should be finally determined [by the permitting authority] . . . ." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). *See, e.g., In re Teck Cominco Alaska, Inc.*, NPDES Appeal No. 03-09, slip op. at 21 (EAB, June 15, 2004); *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 (EAB 1999); *In re Maui Elec. Co.*, 8 E.A.D. 1, 7 (EAB 1998).

In any appeal, the petitioner bears the burden of demonstrating that review of the Region's decision is warranted. *See* 40 C.F.R. § 124.19(a); *see also Hecla Mining Co., Grouse Creek Unit*, slip op. at 13; *City of Moscow,* 10 E.A.D. at 141; *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). Among other things, the petitioner must demonstrate to the EAB "that any issues being raised were raised during the public comment period to the extent required by these regulations . . . ." 40 C.F.R. § 124.19(a). Participation during the comment period must have conformed to the requirements of NPDES permitting regulations, which require that all reasonably ascertainable issues and all reasonably available arguments supporting

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a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13; *see also In re Diamond Wanapa I, L.P.*, PSD Appeal No. 05-06, slip op. at 3-4 (EAB, February 9, 2006); *Hecla Mining Co., Grouse Creek Unit*, slip op. at 14; *City of Moscow*, 10 E.A.D. at 141; *In re New England Plating*, 9 E.A.D. 726, 731 (EAB 2001). As the EAB has noted, the intent of this provision "is to ensure that the permitting authority has the first opportunity to address any objections to the permit, and that the permit process will have some finality." *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *see also In re Steel Dynamics*, 9 E.A.D. 165, 229-30 (EAB 2000); *In re Encogen*, 8 E.A.D. 244, 249-50 (EAB 1999). The EAB "has often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period." *Diamond Wanapa I*, slip op. at 4 (citing cases); *In re Caribe General Electric Products, Inc.*, 8 E.A.D. 696, 698, n.1 (EAB 2000).

Further, petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate with specificity why the permitting authority's response to those objections is clearly erroneous or otherwise merits review. *See In re City of Marlborough,* NPDES Permit Appeal No. 04-13, slip op. at 8 (EAB, August 11, 2005); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 508 (EAB 2002); *In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17 & 01-19, -23, 17 (EAB, April 25, 2002).

The EAB "assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature." *Hecla Mining Co., Grouse Creek Unit*, slip op. at 14-15 (citing *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 15 (EAB, Feb. 20, 2002) (hereinafter *"D.C. MS4"*)); *City of Moscow,* 10 E.A.D. at 142; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE*

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Hub Partners, L.P., 7 E.A.D. 561, 567 (EAB 1998), *rev. denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999)). When presented with technical issues in a petition, the EAB determines whether the record demonstrates that "the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record." *Hecla Mining Co., Grouse Creek Unit,* slip op. at 15. If the EAB determines that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, the EAB typically gives deference to the Region's position. *Id.*; *City of Moscow*, 10 E.A.D. at 142.

As discussed below, Hecla has not carried its burden to demonstrate that either the Region's 2003 permitting decision or the 2005 decision on remand were based on a clear error of law or fact or raised important policy considerations meriting review. Therefore, Hecla's request for review should be denied.

IV. ARGUMENT

Three aspects of the Lucky Friday NPDES permit remain under appeal by Hecla. In its January 25, 2006 Status Report, Hecla stated that it was seeking further review of the Region's decision to express effluent limitations for cadmium, lead, zinc, copper, and silver in the 2005 Permit in terms of "total recoverable" metals.[5] 2006 Status Report at 4. In addition, Hecla's 2006 Petition challenges two other aspects of the 2005 Permit: the upper pH limit contained in

[5] This issue corresponds to Issue #4 from the 2003 Petition.

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Part I.A.3. of the Permit[6] and the whole effluent toxicity ("WET") testing requirements found in Part I.B.[7] This response brief addresses each of these three challenges in turn.

A. Total Recoverable Effluent Limitations for Metals

The 2003 Permit's effluent limitations included concentration- and mass-based restrictions on the amounts of "total recoverable" cadmium, lead, zinc, copper, and silver. *See* 2003 Permit, Ex. 1, at I.A.1, Tables 1-4; I.A.4, Table 5. The modified 2005 Permit continues to express the limitations for these metals in "total recoverable" terms. *See* 2005 Permit, Ex. 26, at I.A.1, Tables 1-4; I.A.4, Table 5. As the Region described in the fact sheets accompanying the 2001 and 2003 draft permits, these metals effluent limitations are expressed in this fashion to reflect the requirement in 40 C.F.R. § 122.45(c) that "[a]ll permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of 'total recoverable metal'" unless one of three exceptions enumerated in the regulation applies. *See* 2001 Fact Sheet, Ex. 3, at p. B-16; 2003 Fact Sheet, Ex. 4, at p. A-9. In its 2003 Petition, Hecla contended that the 2003 Permit's limitations for metals should be expressed in terms of "dissolved" metals because the Idaho water quality criteria upon which the metals limitations are based are expressed in terms of "dissolved" metals and that Hecla therefore qualified for the first of these three exceptions (i.e., that an "applicable effluent standard or limitation" specified the limitation for metals in dissolved form). Petitioner's 2003 Memorandum at 21.

The Region fully responded to Hecla's challenge to the 2003 Permit's use of "total recoverable" metals limits in its October 30, 2003 Response Brief and in its January 30, 2004

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[6] This issue corresponds to Issue #8 from the 2003 Petition.

[7] This issue corresponds to Issue #9 from the 2003 Petition.

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Surreply, explaining that the water quality criteria upon which the challenged limitations were based are not "effluent standards or limitations" as that term is defined in 33 U.S.C. § 1365(f) and that none of the three exceptions to 40 C.F.R. § 122.45(c) apply. 2003 Response Brief at 31-35; 2004 Surreply at 5-6. Both the draft and final versions of the 2005 Permit continued to express the limitations for cadmium, lead, zinc, copper, and silver in terms of "total recoverable" metals. Hecla did not raise, either in its comments on the draft 2005 Permit or in its January 25, 2006 Status Report, any additional arguments in support of its contention that the permit's metals limits should be expressed in "dissolved" terms.[8] As a result, the Region does not repeat the arguments made in prior submissions to the Board. For the reasons set forth in its 2003 Response Brief and 2004 Surreply, the Region respectfully requests that the EAB deny review of this issue and uphold the 2005 Permit's "total recoverable" effluent limitations for cadmium, lead, zinc, copper, and silver.

B. Upper pH Limit

Like the 2003 Permit before it, the 2005 Permit contains a condition limiting the pH of the effluent from all three outfalls to "not [] less than 6.5 standard units (s.u.) nor greater than 9.0 s.u." 2005 Permit, Ex. 26, at I.A.3. As the Region has described in fact sheets supporting the various permit drafts, the upper end of this range is dictated by the technology-based effluent limitation guideline applicable to the facility. *See, e.g.,* 2001 Fact Sheet, Ex. 3, at p. B-19; 2005 Fact Sheet, Ex. 24, at 18 ("The NPDES regulations require that permits include technology-based

[8] In fact, Hecla's Status Report correctly states that "[t]he arguments regarding this condition have not changed based on subsequent events." 2006 Status Report at 4.

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limits based on the applicable effluent limitation guidelines (40 CFR 122.44(a)(1))").[9] The Region ultimately imposed the same upper pH limit in the 2005 Permit that Hecla's NPDES permits have required since 1973. 2005 Fact Sheet, Ex. 24, at 18.

In comments submitted to the Region in 2001 and again in 2003, Hecla objected to the draft permits' upper pH limits, citing less stringent water quality considerations, less stringent ELGs applicable to other industrial sectors, and Hecla's belief that it was entitled to a "fundamentally different factors" ("FDF") variance. The Region responded to these objections when it issued the final 2003 Permit. *See* 2003 RTC, Ex. 2, at 32-33, 97-98. Hecla's 2003 Petition reiterated its prior objections to the upper pH limit and added one additional argument not included in previous comments on the draft permits: that 40 C.F.R. § 440.131(d) obligated the Region to provide an alternative upper pH limit of greater than 9.0 s.u. Petitioner's 2003 Memorandum at 26-27. The Region's 2003 Response Brief contains a detailed rebuttal of Hecla's claims that it was entitled to an alternative upper pH limit. *See* 2003 Response Brief at 39-44.

In July 2004, the State of Idaho transmitted a modified CWA Section 401 certification letter ("2004 Certification") to the Region, which included, among other things, a mixing zone of

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[9] As a mine and mill complex that produces and processes silver, lead, and zinc ores, the Lucky Friday facility is subject to the effluent limitations guidelines ("ELGs") found in Subpart J of 40 C.F.R. Part 440 . 2001 Fact Sheet, Ex. 3, at p. B-1. In particular, the mine drainage from Lucky Friday's mine is subject to the best practicable control technology ("BPT") limitations found in 40 C.F.R. § 440.102(a) and the best available technology economically achievable ("BAT") limitations found in 40 C.F.R. § 440.103(a), while the discharge from Lucky Friday's mill is subject to the BPT and BAT limitations found in 40 C.F.R. § 440.102(b) and 40 C.F.R. § 440.103(b), respectively. *Id.* These technology-based effluent limits specify an upper pH limit of 9.0 s.u. 40 C.F.R. § 440.102(a)-(b). The BPT and BAT limitations in these subsections are technology-based treatment requirements under Section 301(b) of the Clean Water Act and therefore "represent the minimum level of control that must be imposed" in an NPDES permit. 40 C.F.R. § 125.3, esp. subsection (c)(1). Hecla does not contest the applicability of these ELGs to the discharge at issue.

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"25% for pH above 9.0 s.u." 2004 Certification, Ex. 29, at p. 2. In its October 2004 remand order, the Board remanded the 2003 Permit's upper pH limit and directed the Region "to incorporate any changes it determines are appropriate" in light of the 2004 Certification. The draft modified permit issued by the Region in response to the remand order did not propose any change to the upper pH limit. In the Fact Sheet accompanying this draft permit, the Region described its basis for retaining the technology-based upper pH limit despite Idaho's water quality-based decision to authorize a pH mixing zone. *See* 2005 Fact Sheet, Ex. 24 at 18. During the public comment period on the draft modified 2005 Permit, Hecla submitted additional information and arguments in support of its contention that it was entitled to a relaxed upper pH limit of 10.0 s.u. *See* 2005 Comment Letter, Ex. 25, at 1-4. In its December 2005 RTC, the Region responded to Hecla's comments regarding the permit's upper pH limit, explaining, among other things, that Hecla had not submitted sufficient information about its planned treatment upgrades to justify a relaxed pH limit under 40 C.F.R. § 440.131(d)(1). 2005 RTC, Ex. 27, at 4-8. The Region therefore issued the final modified 2005 Permit with the same upper pH limit that had appeared in all previous versions of the permit. 2005 Permit, Ex. 26, at I.A.3.

In its 2006 Petition, Hecla again contends that it is entitled to an alternative upper pH limit. While Hecla is no longer arguing that it is entitled to an FDF variance,[10] it contends that information submitted to the Region during the remand proceedings demonstrates that it is entitled to a relaxed upper pH limit pursuant to 40 C.F.R. § 440.131(d)(1). For the following

[10] *See* Petitioner's 2006 Memorandum at 8, fn.12 ("Hecla believes it is futile to further pursue an economic based FDF variance request to EPA").

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reasons, Hecla has not satisfied its burden to demonstrate that the modified 2005 Permit's upper pH limit is clearly erroneous or involves an exercise of discretion which warrants EAB review.

1. The Region's Response to Hecla's Comments Regarding the Upper pH Limit Were Neither Inadequate Nor Erroneous

Hecla devotes five pages of the brief in support of its 2006 Petition to an argument that the Region "failed to respond to and adequately address Hecla's comments based on the erroneous conclusion that the comments were untimely." Petitioner's 2006 Memorandum at 7-12. Contrary to Hecla's assertion, the RTC accompanying the 2005 Permit includes a detailed response to Hecla's comments on the pH condition, including a point-by-point rebuttal of the various permits and studies which Hecla's comments contended support its request for a less stringent upper pH limit. *See* 2005 RTC, Ex. 27 at 6-8. There is nothing in the record to indicate that the Region summarily dismissed or disregarded Hecla's comments on this topic for reasons of untimeliness.

The regulations governing response to comments in a permit proceeding require that the Region "[b]riefly describe and respond to all significant comments." 40 C.F.R. § 124.17(a)(2). The EAB has noted that this regulation does not require a Region to respond to each comment in an individualized manner, to respond with the same length or level of detail as the comment, or to make a permit change corresponding to any particular comment. *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 583 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). The Region's response to Hecla's comments on the upper pH limit demonstrates that the Region, rather than "failing to respond" to Hecla's comments, carefully

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considered the information submitted by Hecla and articulated the basis for its decision to impose a limit of 9.0 s.u.

2. The Region Was Not Clearly Erroneous In Concluding that Hecla Has Not Submitted Sufficient Information to Support Adjusting the Upper pH Limit Pursuant to 40 C.F.R. § 440.131(d)(1)

The bulk of Hecla's 2006 Petition is devoted to its contention that the Region adopted an arbitrary "new standard for granting an adjustment of upper pH" and then applied this new standard irrationally in failing to relax the upper pH limit in the final permit. *See* Petitioner's 2006 Memorandum at 7, 12-19. Because the Region properly interpreted the applicable ELG in establishing the permit's upper pH limit and in declining to adjust the limit as requested by Hecla, the Board should deny review on this issue and uphold this limit.

As described in prior submittals to the Board, the ELG applicable to the Lucky Friday facility allows permitting authorities to establish upper pH effluent limitations that "slightly exceed 9.0" under certain specified circumstances. *See* 2003 Response Brief at 41-42. This provision reads in its entirety as follows:

> *pH adjustment.* (1) Where the application of neutralization and sedimentation technology to comply with relevant metal limitations results in an inability to comply with the pH range of 6 to 9, the permit issuer *may allow* the pH level in the final effluent to slightly exceed 9.0 so that the copper, lead, zinc, mercury, and cadmium limitations will be achieved.

40 C.F.R. § 440.131(d)(1) (emphasis added). There is little regulatory history surrounding the proposal and final promulgation of this rule in 1982 other than a response to a comment published with the proposed rule:

> A pH above 9.0 may be necessary to achieve desired treatment levels for certain toxic metals at selected facilities. Subpart M of these regulations (General Provisions) allows a small excursion from an effluent value of pH from 6 to 9 to

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> meet other limitations. In these cases, the pH of the final effluent may be under or over the range stipulated if evidence is submitted to the permitting authority demonstrating that this provision will not result in degradation of water quality in the receiving stream or toxic conditions for its biota.

47 Fed. Reg. 25682, 25701 (June 14, 1982); *see also* 47 Fed. Reg. 54598-54621 (December 3, 1982). Taken together, this provision and its regulatory history suggest that an NPDES permitting authority has the discretion to impose a "slightly" relaxed upper pH limit where the permittee submits information sufficient 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 degradation of water quality in the receiving stream or toxic conditions for its biota."

For the following reasons, the Region has correctly concluded that Hecla has not yet submitted sufficient information to enable the Region to exercise its discretion to adjust the upper pH limit.

First, Hecla has submitted no site-specific information demonstrating that compliance with the effluent limitations for metals in the 2005 Permit will require the implementation of neutralization and sedimentation treatment technology or that it intends to employ such a technology. The 2005 Permit's interim effluent limitations for cadmium, lead, mercury, and zinc are based on actual past performance, and compliance with these limits should not require the installation of any additional treatment. The more stringent final effluent limits for these metals do not apply until September 2008, and, if Hecla has selected the technology that intends to use

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to achieve compliance with these final effluent limits, it has not informed the Region of this decision. To the contrary, Hecla has repeatedly asserted that it does not know what treatment technology, if any, it will use to achieve compliance with the permit's final metals limits. *See, e.g.,* Letter from Dexter to Smith (July 11, 2003), Ex. 13, at 2 (agreeing that "it is impossible to know or predict with any certainty, what type of water treatment may be required until a water-recycling system is implemented"). In support of its contention that it has submitted sufficient information on this point, Hecla cites a single site-specific document: the August 2001 "Centra Conceptual Design Report" ("Centra Report").[11] According to Hecla's Petition, the Centra Report stands for the proposition that "the most economically viable treatment option is for lime addition combined with sedimentation." *See* Petitioner's 2006 Memorandum at 14. There is, however, nothing in the record indicating that Hecla intends to implement this technology, or that the use of this technology would be required to meet "relevant metals limits." The Centra Report analyzed technologies designed to assure compliance with the 2001 Draft Permit's TMDL-based effluent limits for metals. *See* Letter from Dexter to Smith and Allred (June 9, 2003), Ex. 28, at 2 ("Centra Consulting prepared a cost analysis to assure 100% compliance with TMDL-based permit limits"). In contrast, as a result of the subsequent invalidation of the metals TMDL, the 2005 Permit's metals limits are less stringent than those analyzed by Centra and are derived from the site-specific criteria ("SSC") approved by EPA in 2003 and from "Quality Criteria for Water 1986" (so-called "Gold Book" values).[12] Hecla has simply not submitted any information to the

[11] The Centra Report was submitted to the Region in 2003 during its consideration of Hecla's request for a water quality standards variance. Hecla has claimed that the Centra Report is confidential business information, and it was not resubmitted to EPA during remand proceedings or as an exhibit to Hecla's 2006 Petition.

[12] In addition, the 2005 Permit's limits for copper and mercury have been further relaxed (as compared to the 2001 draft permit limits) to reflect the mixing zones authorized by Idaho's CWA Section 401 Certifications.

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Region identifying with particularity the treatment technology it intends to employ to meet the final metals limits in the 2005 Permit.

Second, Hecla has not submitted treatability studies or other information demonstrating that implementation of the technology it intends to use will result in an inability to comply with the upper pH limit of 9.0 s.u. Hecla has stated that the implementation of a lime addition/sedimentation process "could result in the discharge of pH up to 10.0 s.u.," and the Region has agreed that an adjustment to the upper pH limit is sometimes appropriate. 2005 RTC Ex. 27 at 7.[13] Hecla has identified nothing in the record, however, that demonstrates that this (or any other) treatment technology, when implemented at the Lucky Friday facility, would result in the discharge of pH above 9.0 s.u. and, if so, how much of an adjustment is appropriate.

The Region did not, as Hecla asserts, adopt a "new standard" for granting the pH adjustment authorized by 40 C.F.R. § 440.131. Rather the Region appropriately exercised its discretion to decline to relax the upper pH limit until such time as Hecla selects the treatment technology it intends to implement to meet the 2005 Permit's final metal limits and submits the information necessary to conclude that the standard established by 40 C.F.R. § 440.131 is met. The Board should decline to review this "essentially technical" challenge to the 2005 Permit's upper pH limit.

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[13] The 2005 RTC also identifies examples where pH adjustment is used to treat metals, yet the final effluent does not exceed an upper pH of 9.0 s.u. See 2005 RTC, Ex. 27, at 7.

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C. Whole Effluent Toxicity Testing Requirements

The 2003 Permit required Hecla to conduct whole effluent toxicity ("WET") testing[14] and, under certain circumstances, to conduct a toxicity reduction evaluation ("TRE") or toxicity identification evaluation ("TIE"), and the 2003 Permit specified methods, toxicity triggers, quality assurance, and reporting requirements for these tests and evaluations.[15] 2003 Permit, Ex. 1, at I.B. By its terms, the 2003 Permit required Hecla to begin WET testing on the first February, May, August, or November following the permit's effective date and to continue this testing on a quarterly basis. *See* 2003 Permit, Ex. 1, at I.B.1.a.

In its 2003 Petition, Hecla contested the 2003 Permit's WET testing requirements, and these conditions have been stayed ever since. Hecla's 2003 Petition contended that the 2003 Permit's WET testing requirements were not "legally or factually justified." Petitioner's 2003 Memorandum at 27. In short, the 2003 Petition argued that the WET testing requirements were duplicative of certain "bioassessment monitoring" requirements that the State of Idaho had required through its original CWA Section 401 Certification and that WET testing may only be required if EPA has previously determined that there is a "significant likelihood of toxic effects" from the permitted facility's effluent. *Id.* at 29.

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[14] "Whole effluent toxicity" is defined as the aggregate toxic effect of an effluent measured directly by an aquatic toxicity test. 40 C.F.R. § 122.2 (definitions). WET tests are standardized laboratory tests that measure the total toxic effect of an effluent by exposing organisms to the effluent and noting the effects. There are two different types of toxicity measured with the tests: acute toxicity measured over a short term and chronic toxicity measured over a longer term. *See* 2001 Fact Sheet, Ex. 3, at 14; Permit Writer's Manual, Ex. 6, at pp. 94-96.

[15] The permit provisions require only monitoring and, if necessary, remedial response to determine the cause of measured toxicity. The permit does not include an "effluent limit" susceptible to violation in a traditional sense. As such, these provisions implement CWA section 308 and 402(a)(2), rather than section 301(b).

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In the July 15, 2004 letter transmitting the modified 2004 Certification, Idaho Department of Environmental Quality ("DEQ") Director Toni Hardesty stated the following, in a section entitled "Other Comments":

> As a general comment, DEQ supports any steps that can be taken to make the [sic] all of the permit monitoring requirements less expensive. Consistent with this general comment, DEQ supports the position that the whole effluent toxicity testing should only be required starting in 2007 once Hecla completes its implementation, testing and analysis of the water recycling program.

2004 Certification, Ex. 29, at p. 4. In the Fact Sheet supporting the draft modified 2005 Permit, the Region acknowledged that it had received this comment from DEQ, but stated that it did not intend to further delay WET testing pending completion of Hecla's water recycling program, stating that the Region believed "that it is important to monitor toxicity regardless of whether Hecla is recycling [its] wastewater." 2005 Fact Sheet, Ex. 24, at 18-19. The Region therefore proposed a draft modified permit that was unchanged from the 2003 Permit in all respects related to WET testing. *See* 2005 Draft Permit, Ex. 23, at I.B.

Neither Hecla nor any other interested party submitted comments regarding the Region's decision not to modify the schedule for WET testing. *See generally* Hecla's 2005 Comments, Ex. 25. As a consequence, the final modified 2005 Permit contains WET testing requirements identical to those found in the draft modified 2005 Permit and in the 2003 Permit. *See* 2005 Permit, Ex. 26, at I.B.

In its 2006 Petition, Hecla renews its challenge to the 2005 Permit's WET testing requirements. In its memorandum, Hecla "incorporates its previous arguments regarding the WET testing condition" and states that the "only additional argument raised by the modified permit is the Region's failure to incorporate the 2007 deadline for implementing WET testing."

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Petitioner's 2006 Memorandum at 20. The EAB should reject Hecla's renewed challenge to the WET testing requirements for the following reasons.

1. As Described in the Region's 2003 Response Brief, the Region Has a Sound Legal Basis for Imposing the Permit's WET Testing Requirements and Its Decision to Do So Is Not Clearly Erroneous

The Region fully responded to Hecla's previous arguments regarding the 2003 Permit's WET testing requirements in its October 2003 Response Brief. 2003 Response Brief at 44-48. The Region will not repeat the arguments made in prior submissions to the Board, but refers the Board to these prior submissions and respectfully requests that the EAB deny review of this issue and uphold the substance of the 2005 Permit's WET testing requirements.

2. By Failing to Submit Comments on the Draft Modified 2005 Permit's WET Testing Requirements, Hecla Has Not Preserved For Review Its Argument that the Region Erred in Declining to Delay the WET Testing Requirements Until 2007

As described above, in its comments on the draft modified 2005 Permit, Hecla failed to raise any objection to the deadline for commencing WET testing and in fact did not reference the draft permit's WET testing requirements at all. Nor did any other interested party comment on the WET testing requirements during the public comment period on the draft modified 2005 Permit. The only suggestion to the Region that the WET testing requirements be delayed came in the July 14, 2004 letter from DEQ transmitting the modified Section 401 Certification. The Region made clear that it was rejecting this suggestion at the time it proposed the draft modified 2005 Permit. *See* 2005 Fact Sheet, Ex. 24, at 18-19.

As noted above, the petitioner must demonstrate to the EAB "that any issues being raised were raised during the public comment period to the extent required by these regulations . . . ."

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Seattle, Washington 98101
(206) 553-1037

40 C.F.R. § 124.19(a). Participation during the comment period must have conformed to the requirements of NPDES permitting regulations, which require that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13. The Board has held that these regulations "dictate that Petitioners must demonstrate that someone prompted focused consideration of the issue by raising it *during* the public comment period; it is not sufficient for the issue to have been raised *before or after* the public comment period." *In re Carlota Copper Co.*, NPDES Appeal Nos. 00-23 & 02-06, slip op. at 48 (EAB, September 30, 2004). Because Hecla's argument regarding "the Region's failure to incorporate the 2007 deadline for implementing WET testing" was not raised by any party during the public comment period on the draft modified 2005 Permit, this issue was not preserved for review and should not be considered by the Board.

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1200 Sixth Avenue
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(206) 553-1037

V. CONCLUSION

For all of the foregoing reasons, EPA Region 10 respectfully requests that the EAB issue a final decision denying review of the 2003 and 2005 Petitions and upholding NPDES Permit No. ID-000017-5 in its entirety.

Dated this 13th day of March, 2006.

Respectfully submitted,

R. DAVID ALLNUTT
Assistant Regional Counsel
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, Washington 98101
Tel: (206) 553-2581
Fax: (206) 553-0163
Email: allnutt.david@epa.gov

Of Counsel:

Steve Sweeney
Attorney Advisor
Water Law Office
Office of General Counsel
(202) 564-5491

CERTIFICATE OF SERVICE

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

Original and five copies, via FedEx, to:

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

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

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

Dated: 3/13/06

Melissa L Whitaker

Melissa Whitaker
U.S. EPA