IN RE HECLA MINING COMPANY, LUCKY FRIDAY MINE

NPDES Appeal Nos. 03-10 & 06-05

ORDER DENYING REVIEW

Decided October 31, 2006

Syllabus

On January 26, 2006, Hecla Mining Company, Lucky Friday Unit ("Hecla"), filed a timely petition for review of the decision of U.S. EPA Region 10 ("Region") to issue a final Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit, dated December 28, 2005 (the "2005 Permit"), to Hecla. The 2005 Permit would authorize Hecla to discharge treated wastewater from Hecla's Lucky Friday Mine and Mill, located in Shoshone County, Idaho, into the South Fork Coeur d'Alene River. Hecla alleges that certain conditions of the 2005 Permit are clearly erroneous or otherwise warrant Environmental Appeals Board ("Board") review. In particular, Hecla seeks Board review on the following three issues: (1) the 2005 Permit's use of total recoverable metals rather than dissolved metals to express effluent limits; (2) the 2005 Permit's upper limit for pH; and (3) the 2005 Permit's inclusion of a requirement for both bioassessment monitoring and whole effluent toxicity ("WET") testing. The Board held oral argument on this matter on July 13, 2006.

Held: Hecla's petition for review is denied. The Board finds that Hecla has not shown any clear error, abuse of discretion, or important policy matter warranting Board review of the permit. In particular:

(1) The 2005 Permit expresses the effluent limits for metals as "total recoverable metals." According to Hecla, the permit limits should have been expressed as "dissolved" metals. Hecla argues that, under 40 C.F.R. § 122.45, the Region has the "discretion" to express the effluent limits as dissolved metals, rather than as total recoverable metals, and that the Region's failure to do so was "unwarranted" under the circumstances of this case where both the site-specific criteria and in-stream standards under Idaho's water quality standards are expressed as dissolved metals. Section 122.45(c)(1) provides that "All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of 'total recoverable metal' * * * unless: (1) An applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form." Hecla argues that because Idaho's applicable water quality standards are expressed in "dissolved" form, the exception under paragraph (1) is applicable and the Region had discretion to state the permit limits as "dissolved" metals. The Board rejects this argument.

The regulatory exception quoted above applies only where an "*effluent standard or limitation* has been promulgated under the CWA." A water quality standard, however, is not the equivalent of an effluent limitation or standard. Rather, site-specific effluent limitations, such as the metals limitation at issue here, are a means of achieving a state's water quality standards. Thus, the discretion afforded by § 122.45(c)(1) does not apply. Accordingly, the Board concludes that Hecla has failed to establish that the permit condition at issue was clearly erroneous or otherwise warrants review.

(2) Hecla seeks an increase in the 2005 Permit's upper limit for pH from 9.0 standard units ("s.u.") to 10 s.u. Hecla points out that, under certain circumstances, the regulations provide a basis for increasing the upper pH limitation beyond 9.0 s.u. In particular, under 40 C.F.R. § 440.131(d), "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." Upon consideration of the record, the Board cannot conclude that the Region clearly erred in declining to relax the pH limit. In particular, the Board finds that Hecla has not committed itself to using neutralization and sedimentation technology as its compliance vehicle. Further, the Board concludes that Hecla has failed to establish that the utilization of neutralization and sedimentation technology would necessarily "result[] in an inability to comply with the pH range of 6 to 9." Under these circumstances, Hecla has not demonstrated that the Region's determination to include an upper pH limitation of 9.0 was clearly erroneous or otherwise warrants Board review.

(3) Hecla objects to the inclusion of a permit condition requiring WET testing. In particular, Hecla argues that the 2005 Permit's WET testing requirement is duplicative of the permit's bioassessment monitoring requirement and is not "legally or factually justified." Because Hecla's arguments on this issue merely restate comments made during the comment period without indicating why the Region's response to those comments was clearly erroneous or otherwise warrants review, review is denied. While this alone is a sufficient basis for denying review, the Board notes further that it generally accords deference to the permitting authority on technical judgments of this kind and Hecla has not demonstrated any error in the Region's determination.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

I. *INTRODUCTION*

On January 26, 2006, Hecla Mining Company, Lucky Friday Unit ("Hecla"), filed a timely petition for review ("2006 Petition")[1] and "Memorandum in Support of Hecla Mining Company's Petition for Review of National Pollutant Discharge Elimination System Permit" ("2006 Brief"). The 2006 Petition chal-

[1] The 2006 Petition is designated as NPDES Appeal No. 06-05.

lenges the terms of a National Pollutant Discharge Elimination System ("NPDES") permit,[2] dated December 28, 2005 (the "2005 Permit"), issued by U.S. Environmental Protection Agency Region 10 ("Region") to Hecla under the Clean Water Act ("CWA").[3] The 2005 Permit would authorize Hecla to discharge treated wastewater from Hecla's Lucky Friday Mine and Mill into the South Fork Coeur d'Alene ("SFCDA") River. Hecla alleges that certain conditions of the 2005 Permit are clearly erroneous or otherwise warrant Board review. *See* 2006 Brief at 1. In particular, Hecla seeks Board review on the following three issues: (1) the 2005 Permit's use of total recoverable metals to express effluent limits rather than dissolved metals;[4] (2) the 2005 Permit's upper limit for pH; and (3) the 2005 Permit's inclusion of a requirement for both bioassessment monitoring and Whole Effluent Toxicity ("WET") testing. The Region filed a response to Hecla's 2006 Brief on March 14, 2006 ("Region's 2006 Response"). Hecla filed a reply to the Region's 2006 Response on April 10, 2006 ("Hecla's 2006 Reply"). For the reasons stated below, review is denied.

II. *BACKGROUND*

A. *Factual Background*

Hecla owns the Lucky Friday Mine and Mill located in Shoshone County, Idaho, near Mullan, north of the SFCDA River. *See* Fact Sheet for Permit Remand and Modification Proceedings (for public comment period from June 21, 2005 to July 21, 2005) at 6 (hereinafter "2005 Fact Sheet"). Ore has been mined from the Lucky Friday deposit since 1942, and the Lucky Friday Mill has been in operation since 1959, with periods of temporary closure. *Id.* The ore is mined underground and conveyed to the mill where it is processed to create a silver and lead concen-

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[2] Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant from a point source into waters of the United States, except if the discharge is made in compliance with, among other things, an NPDES permit issued under CWA § 402, 33 U.S.C. § 1342. The NPDES program is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

[3] States that have received authorization from the Agency under CWA § 402(b) administer the NPDES permit program within their boundaries in lieu of the federal government. 33 U.S.C. § 1342(b), (c). As of today's date, Idaho has not received such authorization. Thus, EPA (in particular, Region 10) continues to issue NPDES permits within the State pursuant to CWA § 402(a), 33 U.S.C. § 1342(a).

[4] As discussed later in this decision, on September 11, 2003, Hecla filed a petition for review of a permit issued in 2003. Hecla's objection to conditions relating to the permit's expression of effluent limitations for metals in terms of total recoverable metals was originally raised in that 2003 Petition. Although, as discussed below, the 2003 permit was remanded on several issues, this particular issue was neither remanded nor resolved, and the 2006 Petition reestablishes Hecla's previously raised concern on this point.

trate and a zinc concentrate. *Id.* The concentrates are transported off-site for refining and the tailings (wastes from the mill) are separated via hydrocyclones to produce a coarse material and a fine material. *Id.* The coarse tailings are used to backfill the mine, and the fine tailings are piped in a slurry to a tailings pond. Wastewater is discharged from the facility via three outfalls[5] into the SFCDA River between Daisy Gulch and Canyon Creek. Fact Sheet (for public comment period from March 28, 2001 to May 14, 2001) at 6-7 ("2001 Fact Sheet"). It is the discharges or potential discharges from these outfalls that are regulated under the NPDES permit.

B. *Statutory and Regulatory Background*

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). To this end, the Act prohibits the discharge of pollutants into waters of the United States from a point source[6] unless such discharge proceeds in compliance with a CWA permit. CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA Administrator to issue permits for the discharge of pollutants, provided that certain statutory requirements are satisfied. CWA § 402(a), 33 U.S.C. § 1342(a). The permitting program at issue in the present case is the NPDES program, set forth in CWA § 402, 33 U.S.C. § 1342, and EPA's implementing regulations at 40 C.F.R. part 122. Under section 402 of the CWA, permitted discharges must, among other things, comply with sections 301 and 306 of the CWA. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1).

The CWA provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131. Technology-based limitations, generally developed on an industry-by-industry basis, reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. CWA § 301(b), 33 U.S.C. § 1311(b). Technology-based effluent treatment requirements "represent the minimum level of control that must be imposed in a permit." 40 C.F.R. § 125.3(a). Water quality-based effluent limits, on the other hand, are designed to ensure that state water quality standards are met when

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[5] Each of these outfalls receives overflow from one of three tailings ponds at the facility. Fact Sheet (for public comment period from March 28, 2001 to May 14, 2001) at 6.

[6] A "point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

technology-based limitations are not sufficient for this purpose.[7] In particular, section 301 requires achievement of "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulations * * * ." CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *see also* 40 C.F.R. § 122.4(d) (prohibiting issuance of a permit "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States"); 40 C.F.R. § 122.44(d)(1) (providing that a permit must contain effluent limits as necessary to protect state water quality standards).

The CWA requires that states develop water quality standards for all water bodies within a state. CWA § 303, 33 U.S.C. § 1313. These standards have three components: (1) one or more "designated uses" for each water body or water body segment in the state; (2) water quality "criteria," consisting of numerical concentration levels and/or narrative statements specifying the amounts of various pollutants that may be present in each water body without impairing the designated uses of that water body; and (3) an antidegradation provision, focused on protecting existing uses by generally prohibiting degradation of water quality below that necessary to maintain existing uses. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.12.

Idaho's state water quality standards, as pertinent to this case, have designated beneficial uses for that portion of the SFCDA River receiving Hecla's discharges. Specifically, this portion of the River is classified for protection of secondary contact recreation (such as fishing) and cold water biota (i.e., those aquatic species that require lower temperatures to survive) . *See* 2001 Fact Sheet at 7 & app. B at 5 (citing Idaho Admin. Code § 58.01.02.110.09 and 62 Fed. Reg. 41,162 (July 31, 1997)). The applicable criteria are set forth in tables B-4 and B-5 in appendix B to the 2001 Fact Sheet.

C. *Procedural Background*

The procedural path that has led to the presentation of the issues now before us has been complex. An NPDES permit for the Lucky Friday Mine and Mill was first issued in 1973. 2001 Fact Sheet at 7. According to the Region, this permit was reissued by EPA on September 30, 1977, and, although the permit expired on December 31, 1980, Hecla is currently operating under the terms of the 1977 per-

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[7] States are primarily responsible for establishing the water quality standards applicable to water bodies within their borders. The CWA requires that states adopt water quality standards designed to protect the public health or welfare, enhance water quality, and advance the purposes of the CWA. CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2). These standards are then subject to review by the EPA. CWA § 303(c)(1), (c)(2)(A), 33 U.S.C. § 1313(c)(1), (c)(2)(A). The EPA must examine water quality standards to determine conformance with the CWA and whether the standards support the state's designated uses for the water body. *See id.*; 40 C.F.R. § 131.5.

mit.[8] *See* Region's Response to Hecla Mining Company's Petition for Review (Oct. 31, 2003); *see also* 2006 Brief at 2 n.4.

The Region issued for public comment an updated draft NPDES permit on March 28, 2001, along with the 2001 Fact Sheet explaining the background of its proposed permitting decision and rationale for the permit conditions for the Lucky Friday Mine and Mill. The public was given until August 3, 2001,[9] to submit comments. Hecla, among others, submitted comments during the 2001 public comment period. Subsequently, on January 6, 2003, the Region revised certain conditions of the draft permit and provided the public with a second opportunity to submit comments. *See* 2003 Response to Comments at 4. Hecla submitted comments during the 2003 public comment period.

The Region issued a permit on August 12, 2003, along with a response to the comments that had been submitted during the 2001 and 2003 public comment periods. Thereafter, on September 11, 2003, Hecla filed a Petition for Review with the Board (designated as NPDES Appeal No. 03-10), and a "Memorandum in Support of Hecla Mining Company's Petition for Review of [NPDES] Permit" ("2003 Brief"). Hecla's 2003 Brief raised nine issues on which it sought Board review.[10] 2003 Brief at 2-3. Subsequently, Hecla withdrew its request for review

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[8] Under 40 C.F.R. § 122.6, an expiring federal permit may continue in effect after its expiration date in circumstances where, as here, an application for permit renewal is timely filed by the permittee and is pending Agency review. 40 C.F.R. § 122.6.

[9] The original 45-day comment period was extended twice at Hecla's request. *See* Region's Response to Comments at 4 (Aug. 12, 2003) ("2003 Response to Comments").

[10] The following briefly summarizes those nine issues: (1) Mercury Effluent Limits and Monitoring – Hecla argued that the permit's mercury effluent limits and monitoring requirements were both procedurally and substantively flawed. 2003 Brief at 7-13; (2) Seepage Study and Hydrological Analysis Requirement – Hecla argued that the Region does not have legal authority to impose this requirement and that the errors inherent in such a requirement would likely render the results meaningless. *Id.* at 13-16; (3) Hecla's Variance Request – Hecla claimed that it submitted a request for a variance from lead and zinc water quality criteria and that this request should have been considered prior to issuance of the permit. *Id.* at 16-20; (4) Dissolved vs. Total Recoverable Metals – Hecla argued that the permit limits should have been expressed as "dissolved metals" rather than "total recoverable metals". *Id.* at 20-22; (5) Compliance Schedule for Certain Monitoring Conditions – Hecla argued that it should have been granted time, in the form of a compliance schedule or implementation period, before being required to comply with the permit's flow-proportioned composite sampling, continuous effluent flow monitoring and in-stream flow monitoring. *Id.* at 22-23; (6) Zinc Method Detection Limit – Hecla argued that the method detection limit for zinc was excessively stringent. *Id.* at 23-24; (7) Interim Limits Not Based on Past Performance – Hecla argued that the interim effluent limitations for cadmium, lead, mercury, and zinc set forth in Table 5 of the permit were erroneous because they allegedly were not based on Hecla's past performance. *Id.* at 24-26; (8) Upper Limit for pH – Hecla argued that the upper limit for pH should have been set at 10.0 s.u. rather than 9.0 s.u. *Id.* at 26-27; and (9) Bioassessment Monitoring and Whole Effluent Toxicity Sampling – Hecla argued that there is no authority under state standards to require whole effluent toxicity sampling in addition to in-stream bioassessment monitoring, as specified in the permit. *Id.* at 27-29.

of two of the nine issues.[11]

On July 15, 2004, the State of Idaho issued a revised certification of the 2003 Permit pursuant to section 401(a) of the CWA, 33 U.S.C. § 1341(a).[12] *See* Letter from Toni Hardesty, Director, Idaho Department of Environmental Quality, to Robert R. Robichaud, U.S. EPA Region 10 (July 15, 2004) ("2004 Certification"). By order dated October 13, 2004, the Board remanded five of the remaining seven issues based on the Board's determination that they were potentially affected by the 2004 Certification. *See* Remand Order and Order Requiring Status Report (Oct. 13, 2004) ("Remand Order"). On June 21, 2005, the Region issued a draft permit modification to the 2003 Permit. *See* 2005 Fact Sheet at 8. Hecla submitted timely comments on the draft modified permit. On December 27, 2005, the Region issued a response to comments document[13] along with the 2005 Permit.

Thereafter, Hecla filed its 2006 Petition. On the same date, Hecla submitted a status report detailing the current status of the nine issues raised in the 2003 Brief. *See* Hecla Mining Company's Status Report (Jan. 26, 2006) ("Status Report"). At bottom, of the nine original issues, Hecla continues to seek Board review on only three: (1) the permit's use of total recoverable metals to express effluent limits rather than dissolved metals; (2) the permit's upper limit for pH; and (3) the permit's inclusion of a requirement for both bioassessment monitoring and WET testing. The Board held oral argument on this matter on July 13, 2006.[14]

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[11] Specifically, Hecla withdrew issues number five (the 2003 Permit's compliance schedule for certain monitoring conditions) and six (the 2003 Permit's method detection limit for zinc). *See* Order Granting Partial Withdrawal of Petition for Review (Nov. 13, 2003); Order Granting Second Partial Withdrawal of Petition for Review (Nov. 3, 2004).

[12] Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the appropriate state agency stating that the permit will comply with all applicable federal effluent limitations and state water quality standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulatory provisions pertaining to state certification provide that EPA may not issue a permit until a certification is granted or waived by the state in which the discharge originates. 40 C.F.R. § 124.53(a). The regulations provide further that "[w]hen certification is required * * * no final permit shall be issued * * * [u]nless the final permit incorporates the requirements specified in the certification." *Id.* § 124.55(a)(2).

[13] *See* Response to Comments on Permit Modification (Dec. 27, 2005) ("2005 Response to Comments").

[14] The oral argument transcript will be cited as "Oral Arg. Tr." along with the applicable page number.

III. *DISCUSSION*

A. *Standard of Review*

The Board will generally not grant review of petitions filed under 40 C.F.R. § 124.19(a) unless it appears from the petition that the permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *see also In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004); *In Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002); *In re City of Irving, Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 122 (EAB 2001). The Board's analysis of NPDES permits is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 472 (EAB 2004). In addition, EPA policy favors final adjudication of most permits at the regional level. 45 Fed. Reg. at 33,412; *Carlota Copper*, 11 E.A.D. at 708; *Teck Cominco*, 11 E.A.D. at 472. The petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2).

Moreover, in order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to have first raised "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. § 124.13, .19; *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002). Assuming the issues have been preserved, the petitioner must then explain with sufficient specificity why a permit issuer's previous responses to those objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. 40 C.F.R. § 124.19(a); *Carlota Copper*, 11 E.A.D. at 708.

We now turn to a discussion of the specific issues raised by Hecla in this matter.

B. *Issues on Appeal*

1. *Dissolved vs. Total Recoverable Metals*

The 2005 Permit expresses the effluent limits for metals as "total recoverable metal." 2005 Permit pt. I.A.1, tbls. 1-4 & pt. I.A.4.e, tbl. 5. According to Hecla, the permit limits should have been expressed as "dissolved" metals. 2003 Brief at 20-22. Briefly, the distinction between measuring metals using a "total recoverable" versus a "dissolved" method is as follows. The dissolved metals method uses filtration to remove solids, including metal particulates, and thus measures only dissolved metals. Regulating total metals, on the other hand, is a more conservative approach in that it is based on the assumption that all solid

metals have the potential to dissolve and thereby adversely affect the environment. *See* 49 Fed. Reg. 37,998, 38,028 (Sept. 26, 1984). At bottom, a dissolved metals-based limit will be less stringent than the same limit based on total recoverable metals; hence, Hecla's interest.

Hecla argues that the Region has the "discretion" to express the effluent limits as dissolved, rather than as total recoverable, metals. 2003 Brief at 20-21 (citing 40 C.F.R. § 122.45). Hecla argues that the Region's decision not to use its discretion to express effluent limits as dissolved metals was "unwarranted" under the circumstances of this case where both the site-specific criteria and in-stream standards under Idaho's water quality standards are expressed as dissolved metals. *Id*. at 21. Further, Hecla argues that the Region's response to the comments Hecla submitted on this issue did "not provide the requisite explanation or authority for" the Region's decision. *Id.*

Central to Hecla's argument is its contention that the Region has discretion under 40 C.F.R. § 122.45(c)(1) to express permit limits in a form other than total recoverable metals where "an applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form." 2003 Brief at 21 (citing 40 C.F.R. § 122.45(c)(1)). This regulation provides as follows:

> All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as defined in 40 C.F.R. part 136 unless:
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> > (1) An applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form[.]

40 C.F.R. § 122.45(c)(1). Hecla argues that because Idaho's applicable water standards are expressed in "dissolved" form, the exception under paragraph (1) of the regulation is applicable and the Region had discretion to state the permit limits as "dissolved" metals.[15] 2003 Brief at 21.

In response, the Region states that although the Idaho water quality standards governing the permit's metals limitations are expressed in terms of "dissolved" metals, these are not "effluent standards or limitations" as defined in the

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[15] At oral argument, Hecla suggested that even if the exceptions in 40 C.F.R. § 122.45(c)(1) do not apply in the present context, the Region would still have the discretion to express the permit's metals limitations in terms of dissolved metals. Oral Arg. Tr. at 25. However, because this issue was not previously raised, and thus was not properly presented or briefed, we decline to consider it.

CWA. Thus, the Region argues, the regulatory exception to the expression of a permit's effluent limitations for metals in terms of "total recoverable metals" does not apply in this case. Therefore, in the Region's view, it was constrained to establish a total recoverable metals limit. Upon consideration, we conclude that the Region did not clearly err on this point.

We note that the Agency has expressed a strong policy preference for measurement of metals in water using the total recoverable metals orientation. In particular, at the time 40 C.F.R. § 122.45(c) was promulgated the Agency stated, in part:

> EPA's intent in promulgating this regulation is to endorse the total recoverable method as the best predictor of effluent impact on water quality. Using the total recoverable method to set water quality-based effluent limitations is independent of the method used to develop water quality standards for the receiving water.

49 Fed. Reg. 37,998, 38,029 (Sept. 26, 1984). The Agency explained further that "[t]he general standard to be applied is total recoverable metal, since metals may change form in receiving waters or elsewhere in the environment." *Id.* The Agency also stated that "[b]y choosing a total recoverable metals standard, the use of dissolved metals limits is being *strongly discouraged*, especially for toxic metals. Except where otherwise provided in guidelines, or where required in highly unusual cases to implement the Clean Water Act, metals limits in permits should be stated as total recoverable metals." *Id.* (emphasis added).

Against this backdrop, even if Hecla is correct that Idaho's water quality standards are expressed in terms of dissolved metals,[16] Hecla has failed to establish that the inclusion of the permit limitation at issue was clearly erroneous or otherwise warrants review. The regulatory exception quoted above applies only where an "*effluent standard or limitation* has been promulgated under the CWA." 40 C.F.R. § 122.45(c)(1) (emphasis added). A water quality standard, however, is not the equivalent of an effluent limitation or standard. An "effluent limitation" is defined as:

> [A]ny restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical,

[16] In its response to the 2003 Brief, the Region states that "Hecla is correct that the Idaho water quality criteria governing the permit's metals limitations are expressed in terms of 'dissolved' metals." Region's 2003 Response at 32. Although the Region's 2003 Response does not provide any citation in support of this conclusion, the Region is presumably referring to section 58.01.02-210 of the Idaho Administrative Code, a provision referenced in the Region's response to comments document.

> physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

CWA § 502(11), 33 U.S.C. § 1362(11). Water quality standards, on the other hand, which states must develop for all water bodies and submit to EPA for approval (CWA § 303, 33 U.S.C. § 1313), are essentially a predicate for establishment of site-specific effluent limitations. Office of Water, U.S. EPA, *NPDES Permit Writer's Manual* § 6.1, at 88 (1996). In other words, specific effluent limitations, such as the metals limitations at issue here, are not the same as water quality standards, but rather are a means of achieving water quality standards. *See Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993) (water quality standards are used as the basis for establishing specific effluent limitations in NPDES permits)*; Am. Paper Inst., Inc. v. EPA*, 890 F.2d 869, 876 (7th Cir. 1989) ("Effluent limitations describe the measures needed to implement the criteria defined in the water quality standards."); *Trustees for Alaska v. EPA*, 749 F.2d 549, 557 (9th Cir. 1984) ("Effluent limitations are a means of achieving water quality standards.").[17]

We find it telling that the Agency has issued guidance designed, at least in part, to assist permit writers in developing a total recoverable permit limit from a dissolved criterion. *See* Office of Water, U.S. EPA, EPA 823-B-96-007, *The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit from a Dissolved Criterion*, at 5(June 1996) ("Metals Translator") ("The purpose of this technical guidance document is to present additional details regarding development and application of the metals translator to go from a dissolved metal criterion to a total recoverable permit limit."). As the Metals Translator explains, "[i]f a facility has a water quality based permit limit for a metal, and the state is adopting standards based on dissolved metals, then a translator is needed to produce a permit limit expressed as total recoverable metal." *Id*. at 2. The Metals Translator recognizes that, under 40 C.F.R. § 122.45(c), permit limits must, in most instances, be expressed as total recoverable metals and provides the following example of why a limitation expressed as dissolved metal might not be sufficient:

> [M]etals in the effluent of an electroplating facility that adds lime and uses clarifiers will be a combination of solids not removed by the clarifiers and residual dissolved metals. When the effluent from the clarifiers, usually with a high pH level, mixes with receiving water with a signifi-

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[17] We note that courts construing the phrase "effluent standards or limitation" in the context of citizen suits have reached the same conclusion. *See, e.g., Or. Natural Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 850 (9th Cir. 1987).

> cantly lower pH level, these solids instantly dissolve. Measuring dissolved metals in the effluent, in this case, would underestimate the impact on the receiving water.

Id. at 1 n.3. Further, as the Region states in its 2003 Fact Sheet:

> For the metals of concern the aquatic life water quality criteria are expressed as dissolved. However, the NPDES regulations require that metals limits be based on total recoverable metals (40 CFR 122.45(c)). This is because changes in water chemistry as the effluent and receiving water mix could cause some of the particulate metal in the effluent to dissolve. To account for the difference between total effluent concentrations and dissolved criteria, "translators" are used in the reasonable potential (and permit limit derivation) equations.

2003 Fact Sheet at A-9.

In short, the fact that the Agency has recognized the need to convert a state's dissolved metals criteria into permit-specific limitations based on total recoverable metals, and has developed guidance specifically designed to assist permit writers in making this conversion, further dispels Hecla's suggestion that the presence of dissolved metals water criteria compels dissolved metals-based permit limits.

Under these circumstances, Hecla has failed to convince us that the permit condition at issue was clearly erroneous or otherwise warrants Board review.[18]

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[18] We also reject Hecla's assertion that the Region "failed to provide [an] explanation and justification for refusal to exercise its discretion to express effluent limits in dissolved rather than total metals; therefore, this condition should be remanded." In responding to Hecla's comments on this issue, the Region made clear that the above-referenced exception to the requirement in 40 C.F.R. § 122.45(c) that effluent limitations be expressed in terms of total recoverable metals did not apply in this case because Idaho's water quality criteria are not an "effluent standard or limitation." *See* 2003 Response to Comments at 30. While Hecla disagrees with the Region's conclusion in this regard, we conclude that the Region provided an adequate response.

Further, as stated above, Hecla argues that if the exception to the requirement that effluent limitations be expressed in terms of total recoverable metals applies in this case, then the Region has *discretion* to express those limits in terms of dissolved metals. 2003 Brief at 20-21. However, even assuming that the exception applies, nothing in the 2003 Brief or in the record before us indicates why the Region's use of total recoverable metals would constitute an abuse of the Region's discretion, especially in light of the Agency's clearly expressed policy preference for stating metals limits in permits as total recoverable metals. Thus, we would deny review even if the exception were applicable in this case.

2. *Upper pH Limit*

The 2005 Permit contains a condition stating that the pH of the facility's effluent "must not be less than 6.5 standard units ("s.u.") nor greater than 9.0 s.u." 2005 Permit Condition I.A.3. This provision remained unchanged from the 2003 Permit. Hecla had sought (and continues to seek) an increase in the upper limit for pH from 9.0 s.u. to 10 s.u. As stated above, the Board remanded the 2003 Permit's upper pH limit to the Region "to incorporate any changes it determines are appropriate" in light of the State's 2004 modified certification. Remand Order at 11. In July of 2005, Hecla submitted comments on the draft 2005 Permit in which it renewed its objection to the pH limitation. *See* E-mail from Mike Dexter, General Manager, Lucky Friday Mine, to Patty McGrath, U.S. EPA Region 10 (July 21, 2005) ("2005 Comments"). The final 2005 Permit maintained the upper pH limitation of 9.0 s.u., and, in its 2006 Brief, Hecla continues to assert its objection to this provision.

As Hecla points out, under certain circumstances, the regulations provide a basis for increasing the upper pH limitation beyond 9.0 s.u. In particular, under 40 C.F.R. § 440.131(d):

> 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). Hecla sought an increase in the upper pH limitation under this provision. *See* 2005 Comments at 2. Although the Region agreed that "in many cases pH adjustment is required to precipitate metals and that for certain wastewaters pH adjustment above 9.0 s.u. is required," 2005 Response to Comments at 7, the Region declined Hecla's request to increase the pH limitation in this case, concluding that Hecla had failed to submit sufficient information justifying a relaxation of the pH limitation. *Id* at 6. The Region stated that although Hecla operated tailings ponds allowing for sedimentation before discharge, "Hecla has not supplied EPA with any commitment that they will implement neutralization technology in order to meet the metals limits in the permit. Nor has Hecla supplied information related to the expected pH in the discharge following neutralization and sedimentation treatment to meet the metals limits in the final permit." *Id*. The Region stated further that "[i]f Hecla submits information that provides a commitment to implement a neutralization process to meet the metals limits and demonstrates that the process will result in a pH above 9.0 s.u. upon discharge, then EPA may consider modifying the NPDES permit to incorporate a

limit higher than 9.0." *Id.* at 7.[19]

In its 2006 Brief, Hecla argues that by conditioning approval of a relaxed pH limitation on Hecla's commitment to implement a neutralization and sedimentation process, the Region "arbitrarily created a new standard for allowing adjustments under 40 C.F.R. § 440.131." 2006 Brief at 14. Hecla states that the Region's previously unarticulated standard creates unnecessary delay and that the Region should have included a condition allowing a pH limit of 10 s.u. "when neutralization and sedimentation technology is applied to the effluent." *Id.* at 14-15. The Region states that it did not adopt a "new standard" but appropriately exercised its discretion to decline to increase the upper pH limit until Hecla informs the Region of the technology it intends to implement to meet the permit's metals limits and submits the information necessary to justify such a relaxation of the pH limit under 40 C.F.R. § 440.131. Region's 2006 Response at 15. The Region argues that the Board should defer to the Region on this technical issue.

Upon consideration of the record before us, we cannot conclude that the Region clearly erred in declining to relax the pH limit. As stated above, the upper pH limit may be increased "[w]here the application of neutralization and sedimentation technology to comply with relevant metal limitations results in an inability

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[19] Hecla had also requested an upward adjustment of the pH limitation based on a provision in Idaho's 2004 revised certification allowing for a mixing zone of 25% for pH above 9.0. 2006 Brief at 12. In rejecting this request, the Region stated that the permit's upper pH limitation of 9.0 is a technology-based limit and thus cannot be relaxed on the basis of the State's 2004 Certification. *See* 2005 Response to Comments at 6; 2005 Fact Sheet at 18. As the Region states in its 2006 Response:

> As a mine and a mill complex that produces and processes silver, lead, and zinc ores, the Lucky Friday facility is subject to the effluent limitation guidelines ("ELGs") found in Subpart J of 40 C.F.R. Part 440. 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.

Region's 2006 Response at 9 n.9. Hecla has not contested the Region's conclusion that the applicable technology-based limitation for pH ordinarily requires an upper limitation of 9.0 s.u. Further, Hecla does not appear to contest the Region's assertion that a state certification cannot in itself provide an exception to a technology-based limitation.

to comply with the pH range of 6 to 9." 40 C.F.R. § 440.131(d). While this section does not specify the information that a permittee must provide in order to justify an increase in the pH limitation, it seems clear from the above-quoted language that the permittee must, at a minimum, demonstrate that it intends to utilize neutralization and sedimentation technology and that the use of this technology will result in an inability to comply with the pH range of 6 to 9. 40 C.F.R. § 440.131. Hecla has shown neither at this juncture.

First, although there are references in the record to neutralization as a likely adjunct to sedimentation, Hecla has simply not committed itself to using neutralization and sedimentation technology as its compliance vehicle. In particular, Hecla has submitted documentation showing, at most, that this technology may be its "most economically viable treatment option," 2006 Brief at 14, but, for reasons unknown to this Board,[20] Hecla has consistently stopped short of providing the Region with assurances that the facility will in fact utilize neutralization and sedimentation technology. Although, in response to a question at oral argument as to whether Hecla was indeed committed to this technology, Hecla's counsel responded in the affirmative, *see* Oral Arg. Tr. at 14, counsel made other statements that were more equivocal.[21] Hecla has not cited to any specific portion of the record where such a commitment was made, nor have we found such a commitment in the record.[22]

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[20] As suggested at oral argument, Hecla's reluctance to make a commitment regarding the use of neutralization and sedimentation technology may be due, at least in part, to Hecla's desire to keep its options open on this front pending resolution of Hecla's objection to the permit's inclusion of a metals limitation based on total recoverable metals rather than dissolved metals . *See* Oral Arg. Tr. at 15. Perhaps now that the metals issue has been resolved in the Region's favor, Hecla will no longer be hesitant to provide the Region with the necessary information and commitment.

[21] In particular, following counsel's affirmative response, he was asked whether Hecla's commitment to utilize neutralization and sedimentation technology was reflected in the record "to the point where it could eventually be represented in the permit." Oral Arg. Tr. at 14. He responded: "*I believe so*. I think typically the Region does not dictate specific types of treatment in the permit. But it is clear, from not only EPA's studies but Hecla's as well, that [it] is really the only feasible treatment option there is. *So I think – I believe that the commitment has been made, with the qualifier that things might change*." *Id*. (emphasis added). Thus, it appears to this Board that, even when taking representations made at oral argument into account, Hecla has stopped short of making an unequivocal commitment to the use of neutralization and sedimentation technology.

[22] We note further that, as the Region states in its 2006 Response, "[t]he 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 [it] intends to use to achieve compliance with these final limits, it has not informed the Region of this decision." Region's 2006 Response at 13-14. Thus, it is not clear from the record before us when or if utilization of neutralization and sedimentation technology will be necessary in this case in order to meet the permit's metals limitations.

Second, Hecla has failed to establish that the utilization of neutralization and sedimentation technology would "result[] in an inability to comply with the pH range of 6 to 9." 40 C.F.R. § 440.131. Hecla states only that it has submitted documentation demonstrating that the use of neutralization and sedimentation technology *could* result in pH discharges exceeding 9.0 s.u. *See* Hecla's 2006 Reply at 3. Under such circumstances, we cannot conclude that the Region clearly erred in declining to relax the pH limit at this juncture.

While, as Hecla has pointed out, the Region might well have included a contingency provision of some sort in the permit pertaining to this issue so that a subsequent adjustment of the pH level could be addressed under the permit rather than as a permit modification, the Region was not obliged by law to include such a provision, and we do not regard the Region's choice to require that any such change be effectuated as a permit modification as clearly erroneous or an abuse of discretion. As we have noted, the Region has stated that if Hecla provides a commitment to implement a neutralization process to meet the metals limits and demonstrates that the process will result in a pH above 9.0 s.u. upon discharge, the Region might consider modifying the permit accordingly. Should Hecla provide such assurances as well as the appropriate demonstration, we would expect that the Region would act expeditiously in initiating and completing permit modification proceedings.

Under these circumstances, Hecla has failed to convince us that the Region's determination to include an upper pH limitation of 9.0 was clearly erroneous or otherwise warrants Board review.

3. *Whole Effluent Toxicity Testing*

In its 2003 Brief, Hecla objected to the inclusion of a permit condition requiring WET testing (permit cond. I.B.).[23] In particular, Hecla argued that the permit's WET testing requirement was duplicative of the permit's bioassessment monitoring requirement (permit cond. I.D.3.) and was not "legally or factually justified." 2003 Brief at 27. Hecla asserted that Idaho's water quality standards do not allow for both WET testing and bioassessment monitoring and the Region abused its discretion in requiring both. *Id*. at 27-28. According to Hecla, WET testing may only be required if EPA has previously determined that there is a

[23] WET is defined under EPA regulations as "the aggregate toxic effect of an effluent measured directly by an aquatic toxicity test." 40 C.F.R. § 122.2. WET is one element in EPA's recommended integrated approach to controlling toxic discharges into waters of the United States. *See* U.S. EPA Office of Water, NPDES Permit Writer's Manual at 94 (1996). The WET approach protects the quality of the receiving water body from the aggregate toxic effects of a mixture of pollutants in the effluent. *Id*. The WET approach is implemented by measuring the degree of response of aquatic test organisms that have been exposed to toxic pollutants over short and long periods of time. These two types of WET tests are known respectively as acute and chronic toxicity testing. *See id.* at 95-96.

"significant likelihood of toxic effects" from the permitted facility. *Id*. at 29. In its 2003 Response, the Region argued that Hecla had misconstrued the circumstances under which WET testing may be required and that the Region had a sound legal basis for including the WET testing requirement. Region's 2003 Response at 45. The Region also asserted that Hecla's arguments merely restated arguments made during the comment period that were adequately addressed by the Region. *Id*.

Under the permitting regulations:

> [W]hen the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity. Limits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit, using the procedures in paragraph (d)(1)(ii) of this section, that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards.

40 C.F.R. § 122.44(d)(1)(v). The Region states that it lacked the information necessary to demonstrate that chemical-specific limits would be sufficient to meet water quality standards and the permit therefore included WET testing requirements to ensure that toxics in the effluent are controlled and to determine the need for future WET limits. 2003 Response at 47; 2001 Fact Sheet at 15. The Region states that this approach "is consistent with EPA's broad information-gathering authorities under Sections 308(a) and 402 of the CWA." 2003 Response at 47.

In responding to comments on this issue, the Region stated:

> Toxicity tests on the effluent are used to determine if the effluent is toxic to aquatic life. This is important to know regardless of whether or not the receiving water is impaired. In fact, the toxicity tests may provide information as to why a receiving water is impaired and therefore provide information on how the impairment may be remedied. The NPDES regulations require that permits contain effluent limits to control pollutants that are or may be discharged at levels having the reasonable potential to cause or contribute to an excursion above any State water quality standard including any state narrative criteria for water quality (40 CFR 122.44(d)(1)(I)). As discussed in the 2001 Fact Sheet and also in response to the comment be-

> low, the State of Idaho has a narrative water quality criteria that surface waters of the State shall be free from toxic substances in concentrations that impair designated beneficial uses. Idaho's narrative toxic criteria is implemented through WET testing, and where needed, WET limits. The NPDES regulations require that EPA determine whether or not the discharge causes or contributes to excursion of the States narrative toxic criteria (40 CFR 122.44(d)(1)(I) and (v)). Sufficient WET testing was not available for the Lucky Friday discharges to make this determination, therefore WET testing is required in the permit. The WET testing required in the permit is consistent with the WET testing required for other major mining and industrial facilities permitted in Idaho.

2003 Response to Comments at 48-49. In response to Hecla's assertion that Idaho regulations allow for the use of WET testing or in-stream benthic assessments, but not both, the Region stated:

> The comment cites [Idaho Administrative Code] 58.01.02.210.04 as allowing for the use of WET **or** in-stream benthic assessments, but not both. This part of the Idaho water quality standards refers to the development of toxic substance criteria. The regulations use the term "or," but do not specifically prohibit that both bioassessment and toxicity tests could be used to develop criteria. Regardless, the WET testing and bioassessment monitoring in this permit is not being used to develop toxic substance criteria so these regulations are not applicable. In their 401 certification, the state required bioassessment monitoring and authorized a 25% mixing zone for calculating toxicity triggers for WET testing.

Id. at 109. The Region further stated:

> EPA believes that independent consideration of chemical-specific, WET, and bioassessment be applied to water quality-based situations. That is because each assessment method has unique as well as overlapping attributes and sensitivities. Some advantages of WET testing include: the toxicity of effluent is measured directly for the species tests; the aggregate toxicity of all constituents in a complex effluent is measured, and toxics effect can be limited by limiting one parameter, i.e., WET; and ecological impacts can be predicted before they occur. The bioassess-

> ment approach is limited in that the methods detect problems after they have occurred or the impacts may not yet have occurred. So, even though there is existing bioassessment data for the South Fork, which was valuable in determining the [site-specific criteria], this does not negate the need for WET testing of the Lucky Friday discharges.

Id. at 53. Finally, in its 2001 Fact Sheet the Region stated:

> Because the limited amount of existing historical WET testing on the Lucky Friday effluents is not adequate to determine the need for WET effluent limits, WET testing has been incorporated into the draft permit. The draft permit requires Hecla to conduct chronic WET testing quarterly on effluent from each outfall. * * * Results of these tests will be used to ensure that toxics in the effluent are controlled and to determine the need for future WET limits. In addition, the permit establishes toxicity trigger levels for each outfall (see Appendix B, Section IV.B), that, if exceeded, trigger additional WET testing and, potentially, investigations to reduce toxicity.

2001 Fact Sheet at 15.

This issue was one of the five issues remanded for further proceedings in light of Idaho's revised 401 certification. After proceedings on remand, the permit's WET testing provisions remained unchanged from the 2003 Permit.[24] In the petition currently before the Board, Hecla has renewed its objection to the WET testing requirement and incorporated the arguments raised in its 2003 Brief.[25]

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[24] As the Region states in its 2005 Fact Sheet, some of the permit's bioassessment monitoring requirements were revised based on the State's revised 2004 Certification. *See* 2005 Fact Sheet at 15, 18. In particular, "the revised 401 certification states that bioassessment monitoring be conducted 'using a sample design that will allow DEQ to make a determination as to the impact of the discharges to the beneficial use' and that 'Hecla shall coordinate the sample design with the Coeur d'Alene Office of DEQ.' The Region has included these revised bioassessment monitoring requirements in Part I.D.3 of the revised draft permit." 2005 Fact Sheet at 15 (quoting 2004 Certification at 3-4).

[25] Hecla also raises one additional argument – "the Region's failure to incorporate the State of Idaho's suggestion that WET testing not be required until 2007, after Hecla completes its implementation, testing and analysis of the water recycling program." 2006 Brief at 19 (citing 2004 State 401 Certification). Because this argument was not raised in Hecla's comments on the draft 2005 permit, however, it was not preserved for review by this Board.

Upon consideration, we conclude that the Region adequately responded to Hecla's concerns on this issue during the comment period. *See* 2003 Response to Comments at 48-55, 104-10; 2001 Fact Sheet at 14-15. Hecla's arguments before this Board merely restate objections raised during the comment period without sufficiently articulating why the Region's responses to those objections were clearly erroneous or otherwise warrant review. For example, as previously stated, the Region rejected Hecla's interpretation of Idaho's water quality standards as prohibiting a permit writer from including both bioassessment monitoring as well as WET testing requirements, pointing out that the language cited by Hecla is inapposite here. Hecla has provided no convincing rebuttal to the Region's conclusion on this front, nor does our review of the record and the relevant legal provisions indicate that the Region's conclusion was erroneous. Similarly, Hecla has failed to convincingly rebut the Region's determination that WET testing was appropriate in this case. Rather, Hecla merely repeats its assertion that such a requirement is unnecessary. As noted, this alone is a basis for denying review.[26] Moreover, while Hecla continues to question the value of including both bioassessment monitoring and WET testing, the Board generally defers to the permitting authority on technical judgments such as these.[27] Nothing in Hecla's submissions or in the record before us convinces us that the Region's determination was clearly erroneous or otherwise warrants review, particularly in view of the deference that we accord technical judgments by the permit issuer.

Accordingly, review is denied on this issue. We note, however, that in response to a question at oral argument, the Region agreed that the body of information generated through either WET testing or a combination of bioassessment monitoring and WET testing could enable the Agency to make a determination that WET testing was no longer needed, and that, under such circumstances, the Region would entertain a request from Hecla for either a permit modification removing the WET testing provision or for the omission of the WET testing re-

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[26] As the Board has previously stated, where the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely on previous statements of its objections, such as comments on the draft permit. Rather, a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review. *See In re Carlota Copper Co.*, 11 E.A.D. 692, 708 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). We find nothing in the Region's responses on this issue or in the record before us that would warrant Board intervention.

[27] As we have explained on many occasions, the Board assigns a particularly heavy burden to a petitioner seeking review of a permit based on issues that are fundamentally scientific or technical in nature. *E.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *In re Dominion Energy Brayton Point, L.L.C.*, 12 E.A.D. 490, 510 (EAB 2006); *In re Gov't of D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. 323, 348 (EAB 2002); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 201 (EAB 2000). This is grounded on the Agency policy that favors final adjudication of most permits at the regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *D.C. Mun. Separate Sewer Sys.*, 10 E.A.D. at 348; *In re City of Moscow*, 10 E.A.D. 135, 141-42 (EAB 2001).

quirement from any renewed permit. Oral Arg. Tr. at 48-49. In the event of such request by Hecla, we would expect that the Region would expeditiously assess whether the necessary regulatory determination could be made (i.e., that the permit's "chemical-specific limits * * * are sufficient to attain and maintain applicable numeric and narrative State water quality standards," 40 C.F.R. § 122.44(d)(1)(v)), and, if so, take the necessary steps to relieve Hecla of the permit's WET testing requirements.

IV. *CONCLUSION*

For the foregoing reasons, we deny Hecla's Petition for Review.

So ordered.