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Name:	Sender's Direct Dial:	Sender's Direct Email:
FROM: Teresa A. Hill	(208) 387-4264	tahill@stoel.com

Client: Hecla Mining Company	Matter: Lucky Friday
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Date: February 5, 2004

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**COMMENTS:**

Attached is Hecla Mining Company's Objection to Motion for Leave to File Surreply.

You will receive the original and the appropriate copies by UPS overnight delivery tomorrow, February 6, 2004. (I believe this is the package that the UPS driver tried to deliver today, and will redeliver tomorrow.)

Thank you,

Sheryl Gillogly, Legal Assistant to Teresa A. Hill



## II. STANDARD FOR FILING SURREPLY

The rules governing a Petition for Review of an NPDES permit do not provide for the filing of a reply or surreply. According to the EAB Practice Manual, a reply may be allowed upon "motion explaining why a reply brief is necessary." See EAB Practice Manual at pt. III, (D)(5). Leave to file a rebuttal brief is not allowed where the issues before the EAB have been "adequately briefed and that further briefing [would] not materially assist the Board in its understanding of the issues." See *In re Sumas Energy 2 Generation Facility*, PSD Appeals Nos. 02-10 & 02-11 (EAB, March 25, 2003).

## III. DISCUSSION

EPA's Motion for Leave to File a Surreply fails to establish that additional briefing is necessary. EPA argues that Hecla's Reply "references a number of new cases and additional documents which the Region believes deserve closer scrutiny." See Motion for Leave to File Surreply at 3. Hecla's reference of one new document and cases in Reply to EPA's arguments does not establish that additional briefing is necessary. The parties have been allowed to present their arguments, supporting documents and cases to the EAB. The issues have been adequately briefed and both sides of the arguments presented. Granting EPA additional rebuttal simply provides EPA further opportunity to refine their previously presented arguments. The EPA's filing of a surreply will not materially assist the Board in understanding the issues already adequately briefed by the parties; therefore, a surreply is not necessary and should be denied.

In its Motion, EPA provides two examples of why a surreply is necessary: (1) "Hecla references a 2002 guidance document for the first time;" and (2) "[t]he Reply also cites federal judicial and EAB decisions in support of new arguments that the Region bears the burden of proof to prove the existence of a hydrologic connection and that Idaho's certification letter is

ambiguous and therefore warrants review.” *Id.* These arguments do not support the necessity for a surreply because contrary to EPA’s assertion, no new issues were raised in Hecla’s Reply.

EPA argues additional briefing is necessary to respond to Hecla’s reference of the National Recommended Water Quality Criteria: 2002. *Id.* EPA is correct that this document is raised for the first time in Hecla’s Reply. However, the document does not raise any new issues and only provides further support for Hecla’s previous arguments, raised in the Petition for Review, that the mercury limits and monitoring are unsupported particularly in light of the evidence and studies in the South Fork Coeur d’Alene Basin that demonstrate mercury is not a concern in the basin, nor in Hecla’s effluent. *See, e.g.* Petition for Review 7-13; Reply 2-5. EPA responded at length to Hecla’s arguments that the mercury limits and monitoring were unsupported. *See* Response to Petition for Review at 9-16. This issue has been fully briefed; therefore, no further rebuttal is necessary.<sup>1</sup>

EPA further argues a surreply is necessary because Hecla raised “new cases” and “new arguments” that the Region bears the burden of proof to prove the existence of a hydrological connection. Motion for Leave to File Surreply at 3. No further briefing is warranted on this issue. EPA’s Response brief cites to *Idaho Rural Council v. Bosma* and *Washington Wilderness Coalition v. Hecla Mining Co.* in support of their argument that Clean Water Act (CWA) jurisdiction extends to ground water that has a hydrologic connection to surface water. Response to Petition for Review at 18-19. Hecla’s Reply provides analysis of the same two cases. Reply Brief in Support of Petition for Review at 7-9 (arguing that these cases support proposition that

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<sup>1</sup> Hecla does not believe a rebuttal is warranted to address this document. However, if the EAB finds a surreply is necessary on this issue, the proposed Surreply should be rejected and the EPA should be directed to file a surreply limited solely to EPA’s arguments regarding 2002 EPA guidance.

general allegation of hydrologic connection is insufficient to establish CWA jurisdiction). Both EPA and Hecla have presented arguments and analysis regarding the same issue and cases; therefore, no further briefing is necessary.

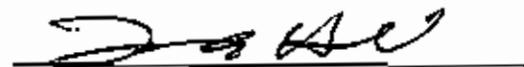
Finally, EPA seeks further rebuttal regarding "new arguments" that "Idaho's certification letter is ambiguous and therefore warrants review." Motion for Leave to File Surreply at 3. This argument by Hecla is not "new" but is a direct response to EPA's argument that the EAB does not have the authority to review the interim limits in the permit because they are "entirely 'attributable to state certification.'" Response to Petition for Review at 337-39. This argument was raised by EPA, and subsequently responded to by Hecla. Reply Brief in Support of Petition for Review at 15-18. Both parties have presented their arguments and cases regarding whether the state certification can be reviewed by the Board. Since the issue has been adequately briefed, no additional arguments are necessary to assist the EAB. Granting EPA further rebuttal would only allow EPA to further refine their previous arguments.

#### IV. CONCLUSION

Based on the foregoing, Hecla respectfully requests the EAB deny EPA's Motion for Leave to File Surreply. The issues raised in EPA's Motion for Leave to File Surreply have been adequately briefed; therefore, further rebuttal is not necessary and will not materially assist the EAB in resolving the issues presented by the Petition for Review.

Dated this 4<sup>th</sup> day of February, 2004.

Respectfully submitted,



Teresa A. Hill  
Steel Rives LLP  
Attorneys for Hecla Mining Company

CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of February, 2004, I served a copy of the Hecla Mining Company's Objection to Motion for Leave to File Surreply by facsimile and regular mail on:

David Allnut  
Assistant Regional Counsel  
Environmental Protection Agency  
Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

Facsimile 206-553-0163

Kelly Huynh  
Acting Manager  
NPDES Permits Unit  
Environmental Protection Agency  
Region 10  
1200 Sixth Avenue  
Seattle, Washington 98101

Facsimile 206-553-0165

  
Teresa A. Hill