

RECEIVED
U.S. E.P.A.

2004 JAN 30 . PM 2: 50

ENVIR. APPEALS BOARD

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

In the Matter of:)	
)	
)	Appeal No. NPDES 03-10
HECLA MINING COMPANY,)	
LUCKY FRIDAY MINE)	
NPDES Permit No. ID-000017-5)	REGION 10's SURREPLY
)	
)	
)	
)	

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. DISCUSSION	1
A. Effluent Limitations and Monitoring Requirements for Mercury	1
B. Seepage Study and Hydrological Analysis	3
C. Variance Request	4
D. Total Recoverable Effluent Limitations for Metals	5
E. Lack of Compliance Schedules for Various Monitoring Requirements	6
F. Method Detection Limit for Zinc	6
G. Interim Effluent Limitations for Lead, Cadmium, and Zinc	6
H. Upper pH Limit	8
I. Whole Effluent Toxicity Testing Requirements	8
III. CONCLUSION	8

TABLE OF AUTHORITIES

Environmental Appeals Board Decisions

<i>In re Boise Cascade Corporation</i> , 4 E.A.D. 474 (EAB 1993)	6, 7
<i>In re General Electric Company, Hooksett, N.H.</i> , 4 E.A.D. 468 (EAB 1993)	6, 7
<i>In re Knauf Fiber Glass, GMBH</i> , 8 E.A.D. 121 (EAB 1999)	1

Judicial Decisions

<i>Idaho Rural Council v. Bosma</i> , 143 F. Supp. 2d 1169 (D. Id. 2001)	3
<i>Washington Wilderness Coalition v. Hecla Mining Co.</i> , 870 F. Supp. 983 (E.D. Wash. 1994) ..	3

Statutes

33 U.S.C. § 1318	3
33 U.S.C. § 1342(a)	3

Regulations

40 C.F.R. § 122.45(c)	5
40 C.F.R. § 122.45(c)(1)	5
IDAPA § 58.01.02.070.01	2
IDAPA § 58.01.02.210.01(a)	2

Other

National Recommended Water Quality Criteria: 2002 (EPA-822-R-02-047)	2, 3
--	------

I. INTRODUCTION

Region 10 of the U.S. Environmental Protection Agency ("Region") respectfully submits this surreply which responds to the Reply Brief in Support of Petition for Review ("Reply") submitted by the Hecla Mining Company ("Hecla" or "Petitioner") on January 20, 2004. For the reasons set forth below, the additional arguments and authorities cited by Hecla in its Reply should not prevent the Environmental Appeals Board ("EAB" or "Board") from denying Hecla's Petition and upholding NPDES Permit No. ID-000017-5 (the "Permit") in its entirety.

II. DISCUSSION

For the most part, Hecla's Reply simply restates arguments made previously in comments submitted on the 2001 and 2003 draft permits or in Hecla's Petition, and the Region will refrain from restating the responses to these arguments that previously appeared in the Region's response to comments document and in the response brief filed with the Board. However, the Reply also references a number of new cases and additional documents which the Region believes deserve closer scrutiny. For ease of reference, this brief is organized into sections that correspond with the sections found in the memorandum in support of Hecla's Petition.

A. Effluent Limitations and Monitoring Requirements for Mercury

For the first time in its Reply, Hecla cites a 2002 EPA guidance document in support of its contention that the Permit's limitations and monitoring requirements for mercury are clearly erroneous and an abuse of discretion.¹ This document, which is not found in the administrative record for the Permit and which Hecla has not sought to add as an exhibit in this matter, was

¹ As a preliminary matter, the Board should disregard the Reply's reference to this 2002 guidance document because Hecla has raised it for the first time well after the deadline for filing an appeal to the Permit. *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("[n]ew issues raised for the first time at the reply stage of these proceedings are equivalent to latefiled appeals and must be demed on the basis of timeliness").

published “to provide guidance for states and tribes authorized to establish water quality standards under the CWA to protect human health and aquatic life.” National Recommended Water Quality Criteria: 2002 (EPA-822-R-02-047), at p. 1.² As the document itself recognizes, the guidance

does not substitute for the CWA or EPA’s regulations; nor is it a regulation itself. Thus, it cannot impose legally binding requirements on the EPA, states, authorized tribes or the regulated community, and might not apply to a particular situation based upon the circumstances. State and tribal decision-makers retain the discretion to adopt approaches on a case-by-case basis that differ from this guidance when appropriate.

Id. As described in the Region’s response brief, Idaho has promulgated and EPA has approved a water quality criterion for mercury of 0.012 µg/L in waters (like the South Fork Coeur d’Alene River) that are designated for aquatic life use. *See* Response at pp. 4, 11.³ To date, Idaho has neither proposed nor promulgated, and EPA has not approved for Idaho, water quality criteria for mercury or methylmercury that attempt to implement the 2002 EPA guidance. The fact that EPA has published guidance recommending the establishment of different criteria for mercury and/or methylmercury has no bearing on the question of whether Hecla’s Lucky Friday facility has a reasonable potential to exceed the water quality standards actually in effect in Idaho.

Furthermore, there is no merit to Hecla’s claim that it “can demonstrate based on its data that Hecla does not exceed the EPA 2002 recommended criteria for methylmercury to protect

² This document is available on EPA’s web site at <http://www.epa.gov/waterscience/pc/revcom.pdf>

³ The applicable aquatic life criteria for toxics (metals) are found in Section 58.01.02.210.01(a) of Idaho’s administrative code. IDAPA § 58.01.02.210.01(a). This section incorporates by reference Columns B1, B2, and D2 of EPA’s National Toxics Rule (“NTR”), 40 C.F.R. § 131.36(b)(1). For mercury, these columns of the NTR establish criteria of 2.1 µg/L (acute freshwater aquatic life); 0.012 µg/L (chronic freshwater aquatic life); and 0.15 µg/L (human health for fish consumption). The most stringent of these three criteria (0.012 µg/L) is the applicable standard for mercury. *See* IDAPA § 58.01.02.070.01 (“In the application of the use designation, the most stringent criterion of multiple criteria applies.”).

aquatic species.” See Reply at p. 5. As described in more detail in the document itself, the 2002 guidance recommends a methylmercury criterion of 0.3 mg/kg “expressed as a fish and shellfish tissue value rather than as a water column value.” National Recommended Water Quality Criteria: 2002, at pp. 5, 12. The guidance recognizes that relating this tissue value to traditional water column criteria “will pose implementation problems,” and the guidance provides no assistance in determining whether a discharge (like Hecla’s) containing a concentration of mercury of up to 0.2 µg/L would be likely to result in an exceedence in fish tissue of the recommended methylmercury criterion of 0.3 mg/kg. Hecla’s attempt to compare apples and oranges bears no fruit here.

Finally, Hecla provides absolutely no support for its claim that “numerous studies in the basin demonstrate that mercury levels in both surface water and in fish tissue have not been shown to be a problem.” See Reply at p. 6.

B. Seepage Study and Hydrological Analysis

The Reply cites two federal district court decisions for the proposition that EPA bears the burden of establishing a hydrologic connection and that this burden of proof “is not light.” Reply at p. 8 (citing *Idaho Rural Council v. Bosma*, 143 F. Supp. 2d 1169 (D. Id. 2001); *Washington Wilderness Coalition v. Hecla Mining Co.*, 870 F. Supp. 983 (E.D. Wash. 1994)). Both of these decisions discuss the burden of proof borne by a plaintiff in an enforcement action — a matter that has no bearing on the question of whether the seepage and hydrological analyses required by the Permit are authorized by Sections 308 and 402(a)(2) of the CWA, 33 U.S.C. §§ 1318 and 1342(a). Hecla appears to assert that EPA can only “legally justify” a monitoring requirement where it has first discharged its burden to prove a CWA violation. If this were true, EPA would

virtually never be able to impose monitoring requirements or exercise its information-gathering authorities -- the very purpose of these authorities is to determine whether compliance is being achieved.

The Reply states that "Hecla has not admitted that the tailings ponds are designed to seep contaminated wastewater into the South Fork Coeur d'Alene River." Reply at p. 7, n.2.

Nevertheless, Hecla has admitted that "the tailings impoundments are designed to seep," that the ponds are filled with contaminated wastewater, and that the ponds sit immediately adjacent to the South Fork Coeur d'Alene River. *See, e.g.*, RTC, Ex. 2, at pp. 59, 60; Letter from Booth to Smith (August 2, 1999), Ex. 9, at Attachment 4. Given these undisputed facts, the Region has ample legal and technical justification for the seepage and hydrological studies required by the Permit.

C. Variance Request

In its Reply, Hecla repeats its previous arguments related to the variance request, including: (1) that Hecla did challenge specific Permit conditions resulting from failure to act on the variance request; (2) that EPA's issuance of the final Permit prior to acting on the variance request was an abuse of discretion; and (3) that EPA failed to adequately respond to public comments related to the variance request. With respect to these arguments, no further reply from the Region is called for because Hecla has not raised any new issues related to the variance request which were not previously addressed in the Region's response brief. *See Response* at pp. 21-31. The Region believes the arguments in its response brief related to the variance request adequately support its position and is content to rely on those positions without further elaboration.

Hecla also replies to the Region's argument that Hecla's "unreasonable delay" claim under the Administrative Procedure Act eliminates the need for review of the variance issue by the EAB. Without explanation, Hecla makes the argument that the federal proceeding involves "separate issues" from Hecla's argument before the Board, related to whether EPA acted appropriately in issuing the permit prior to acting on the variance request. See Reply at p. 13. The Region fails to see how the issue of whether EPA acted appropriately or not in issuing the Permit prior to acting on the variance request differs, whether resolved in federal court or before the EAB. Finally, the Region notes that the motion to stay the federal case was a joint motion. See Reply at p. 13; Petitioner's Exhibit Q. Hecla should not be able to "forum shop" an issue currently before, and more appropriately resolved in, federal court, to the Board through its voluntary action.

D. Total Recoverable Effluent Limitations for Metals

In response to the Region's contention that a state water quality standard does not constitute an "effluent standard or limitation" within the meaning of 40 C.F.R. § 122.45(c)(1), Hecla's Reply points out that courts have found that a state standard can constitute an "effluent standard or limitation" if the standard has been incorporated into an NPDES permit. See Reply at p. 14. The fact that a water quality-based permit limit may qualify as an "effluent standard or limitation" has no bearing on the proper resolution of Hecla's appeal. The "dissolved" metals water quality criteria at issue here have not been incorporated into an NPDES permit, and there is therefore nothing in the cases cited by Hecla to suggest error in the Region's conclusion that 40 C.F.R. § 122.45(c) requires permit effluent limitations for metals to be expressed as "total

recoverable,” even where the underlying water quality criterion is expressed in “dissolved” terms.

E. Lack of Compliance Schedules for Various Monitoring Requirements

The Reply states that the fact that Hecla is still working to debug its monitoring equipment “further demonstrate[s]” the “unreasonableness of failing to allow for a compliance schedule.” See Reply at p. 15. Hecla cites no support for the rather amazing proposition that a permittee’s failure to comply with a permit’s deadline renders the deadline “unreasonable” and therefore invalid.

F. Method Detection Limit for Zinc

By order dated November 13, 2003, the Board granted Hecla’s request to withdraw its challenge to the Permit’s method detection limit for zinc, and this issue is therefore no longer before the Board.

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

The Reply cites two EAB decisions for the proposition that Idaho’s CWA Section 401 certification letter “leaves open the possibility” that “the interim effluent limitations can be made less stringent and still comply with Idaho’s [WQS].” Reply at pp. 16-17 (citing *In re Boise Cascade Corporation*, 4 E.A.D. 474 (EAB 1993); *In re General Electric Company, Hooksett, N.H.*, 4 E.A.D. 468 (EAB 1993)). Therefore, Hecla asserts, the EAB may review the interim effluent limitations incorporated into the Permit from this certification letter.

The *Boise Cascade* decision is distinguishable from the facts at issue here. The challenged permit conditions at issue in the *Boise Cascade* case were final effluent limitations for dissolved oxygen (“DO”) that Region VI included in the draft permit sent to Louisiana for

certification. *Boise Cascade*, 4 E.A.D. at 483, n.7. While Louisiana indicated that it was “reasonable to expect” that the draft permit’s DO limitation would result in compliance with state water quality standards, Louisiana did not itself propose a different DO limit, nor did it indicate whether a less stringent DO limit would also comply. *Id.* As a result of this ambiguity, the EAB held that the DO limit was not “attributable to State certification” within the meaning of 40 C.F.R. § 124.55(e). *Id.* In contrast, in the present case, it was Idaho’s certification letter, and not the Region’s draft permit, that supplied the challenged limits, and Idaho specifically conditioned its certification on Hecla’s compliance with “the conditions set forth in this §401 Certification.” Certification Letter, Ex. 16, at p. 1. This is a far cry from the ambiguity identified by the Board in its *Boise Cascade* decision.

Furthermore, the second case cited by Hecla actually supports the Region’s position in this matter. In the *General Electric* case, Region I revised a draft permit to include various changes insisted upon by New Hampshire, and the state subsequently certified the revised draft permit. *General Electric Company, Hooksett, N.H.*, 4 E.A.D. at 471. The EAB held that, while New Hampshire’s certification letter “did not explicitly say that the permit conditions [were] necessary or that they [could not] be made less stringent,” the words employed in the letter “were intended to communicate those exact ideas.” *Id.* The words employed in Idaho’s certification letter clearly convey the idea that the conditions it is recommending are the minimum necessary to comply with Idaho’s WQS, and the Board should therefore conclude that the interim limits are “attributable to State certification” and not subject to EAB review.

H. Upper pH Limit

The Region believes that the Reply's arguments with respect to the Permit's upper pH limit are adequately addressed in the Region's Response brief.

I. Whole Effluent Toxicity Testing Requirements

The Region believes that the Reply's arguments with respect to the Permit's whole effluent toxicity testing requirements are adequately addressed in the Region's Response brief.

III. CONCLUSION

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

Dated this 30th day of January, 2004.

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: alinutt.david@epa.gov

Of Counsel:

Susmita Dubey, Attorney Advisor
Water Law Office
Office of General Counsel
(202) 564-5577

CERTIFICATE OF SERVICE

I certify that the foregoing "Motion for Leave to File Surreply" and the "Region 10 Surreply" attached thereto were sent to the following persons, in the manner specified, on the date below:

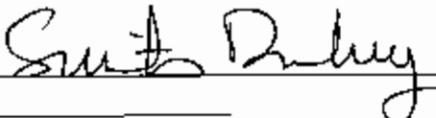
Original and five copies, hand delivered, to:

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 facsimile and first class U.S. mail, to:

Kevin J. Beaton
Teresa A. Hill
STOEL RIVES LLP
101 S. Capitol Blvd. Suite 1900
Boise, Idaho 83702-5958
Fax: (208) 389-9040

Dated: 1-30-04



U.S. EPA