

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

In re:

City of Nezperce, Idaho

NPDES Permit No. ID0020397

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PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the City of Nezperce, Idaho petitions for review of the conditions contained in National Pollutant Discharge Elimination System (“NPDES”) Permit No. ID0020397 (the “2019 Permit”), which was issued on June 25, 2019 by the U.S. Environmental Protection Agency (“EPA”) Region 10 to the City of Nezperce Wastewater Treatment Plant. The 2019 Permit is attached as Exhibit A. It authorizes Nezperce to discharge treated wastewater from Outfall 001 of the wastewater treatment plant to Long Hollow Creek, subject to the effluent limitations and other terms and conditions contained in the 2019 Permit, which is effective August 1, 2019 and expires July 31, 2024. The 2019 Permit includes effluent limitations for total ammonia (as nitrogen) of 0.5 mg/L and 0.4 lbs/day as a monthly average and 1.1 mg/L and 0.8 lbs/day as a daily maximum.¹ Nezperce had not been subject to ammonia limitations before issuance of the 2019 Permit.

Nezperce contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law by EPA Region 10. Specifically, Nezperce challenges EPA’s failure to provide a schedule of compliance to allow Nezperce time to achieve new water quality-based effluent limitations for ammonia. In addition, EPA failed to properly respond to comments submitted by Nezperce requesting a schedule of compliance for ammonia and setting forth the reasons such a schedule is needed.

Nezperce requests that the 2019 Permit be remanded to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations. In the alternative, Nezperce requests that the 2019 Permit be remanded for EPA to fully consider and respond to the Nezperce comments requesting a schedule of compliance for ammonia.

¹ 2019 Permit (Exhibit A), Part I.B, Table 1. Effluent Limitations and Monitoring Requirements, p. 4 of 27.

FACTUAL AND STATUTORY BACKGROUND

A. Factual background.

Nezperce owns and operates a wastewater treatment plant located in Nezperce, Idaho, providing secondary treatment for municipal sewage, with a residential population of approximately 475. There are no major industries discharging to the treatment plant. On February 5, 2004, EPA Region 10 issued a final NPDES permit authorizing Nezperce to discharge from its treatment plant Outfall 001 to Long Hollow Creek.² This receiving water is located within the boundaries of the Nez Perce Reservation. The 2004 Permit did not include effluent limitations for ammonia, but required weekly monitoring of total ammonia (as nitrogen).³ The 2004 Permit is now expired, but has been administratively extended and remains effective until August 1, 2019, the effective date of the 2019 Permit.

On November 28, 2017, Nezperce entered into a Compliance Order on Consent with EPA Region 10 to address ongoing violations of long-term total suspended solids (“TSS”) and 5-day biological oxygen demand (“BOD₅”) effluent limitations contained in the 2004 Permit.⁴ The 2017 Compliance Order requires that Nezperce complete a Phase I study of infiltration and inflow reduction projects and secondary treatment performance by May 31, 2020, and implement the recommendations of that study by December 31, 2021. If additional improvements are necessary, Nezperce must conduct Phase II planning and complete needed facility upgrades by December 31, 2028.⁵

² City of Nezperce NPDES Permit No. ID0020397 (EPA Region 10, Feb. 5, 2004) (the “2004 Permit”), attached as Exhibit B.

³ 2004 Permit (Exhibit B) at Part I.A.1, Table 1: Effluent Limitations and Monitoring Requirements, p. 5 of 22.

⁴ Compliance Order on Consent, *In the Matter of: City of Nezperce Wastewater Treatment Plant, Nezperce, Idaho*, Docket No. CWA-10-2018-0003 (EPA Region 10, Nov. 28, 2017) (the “2017 Compliance Order”), attached as Exhibit C.

⁵ 2017 Compliance Order (Exhibit C) at pp. 4-5.

On January 31, 2018, EPA provided public notice of its intent to reissue the 2004 Permit, including proposed permit language and a supporting fact sheet.⁶ The 2018 Fact Sheet indicated that EPA had found no reasonable potential to exceed applicable water quality criteria for ammonia, so did not propose to include effluent limitations for ammonia.⁷ On March 1, 2018, Nezperce timely submitted comments on both the 2018 Draft Permit and the 2018 Fact Sheet.⁸

On March 15, 2019, EPA provided public notice of its intent to substantially revise the 2018 Draft Permit, including revised permit language and a supporting statement of basis.⁹ The 2019 Revised Draft Permit included proposed effluent limitations for ammonia, due to correction of errors in EPA's previous evaluation of the reasonable potential to exceed applicable water quality criteria for ammonia.¹⁰ On April 11, 2019, Nezperce timely submitted comments on the 2019 Revised Draft Permit, including a request for a schedule of compliance consistent with the activities required by the 2017 Compliance Order, which Nezperce believed would be necessary to achieve compliance with the proposed new water quality-based effluent limitations for ammonia.¹¹ On June 25, 2019, EPA issued the final 2019 Permit, including its response to comments received on both the 2018 Draft Permit and the 2019 Revised Draft Permit.¹² EPA did not substantively respond to the Nezperce request for a schedule of compliance for ammonia,

⁶ City of Nezperce Proposed Draft NPDES Permit No. ID0020397 (EPA Region 10, Jan. 31, 2018) (the "2018 Draft Permit"), attached as Exhibit D; Fact Sheet to City of Nezperce Proposed Draft NPDES Permit No. ID0020397 (EPA Region 10, Jan. 31, 2018) (the "2018 Fact Sheet"), attached as Exhibit E.

⁷ 2018 Fact Sheet (Exhibit E) at p. 14.

⁸ *Comments to draft NPDES Permit for the City of Nezperce Wastewater Treatment Facility (Permit No. ID 0020397)* (Nezperce, Mar. 1, 2018) (the "Nezperce 2018 Comments"), attached as Exhibit F.

⁹ City of Nezperce Revised Draft NPDES Permit No. ID0020397 (EPA Region 10, Mar. 15, 2019) (the "2019 Revised Draft Permit"), attached as Exhibit G; Statement of Basis to City of Nezperce Revised Draft NPDES Permit No. ID0020397 (EPA Region 10, Mar. 15, 2019) (the "2019 Statement of Basis"), attached as Exhibit H.

¹⁰ 2019 Statement of Basis (Exhibit H) at p. 5.

¹¹ *Comments to draft NPDES Permit for the City of Nezperce Wastewater Treatment Facility (Permit No. ID 0020397)* (Nezperce, Apr. 11, 2019) (the "Nezperce 2019 Comments"), attached as Exhibit I.

¹² Response to Comments (EPA Region 10, Jun. 25, 2019), attached as Exhibit J.

instead suggesting that Nezperce seek an amendment to the 2017 Compliance Order, if necessary.¹³

B. Statutory and regulatory background.

The federal Clean Water Act (“CWA”) authorizes EPA to issue NPDES permits for the discharge of pollutants to jurisdictional waters. CWA section 402, 33 U.S.C. § 1342. It also requires the development of effluent limitations in NPDES permits necessary to meet water quality standards. CWA section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Federal regulations require that the conditions contained in NPDES permits comply with the applicable water quality standards of all affected States. 40 C.F.R. § 122.4(d).

Although Nezperce discharges to Long Hollow Creek, which is located within the Nez Perce Reservation, EPA Region 10 remains the permitting authority. EPA has indicated that because the Nez Perce Tribe has not applied for the status of Treatment as a State and has not adopted its own water quality standards, the 2019 Permit is based on application of Idaho water quality standards.¹⁴ Federal regulations governing EPA Region 10 as the permitting authority, as well as Idaho water quality standards, authorize the inclusion of schedules of compliance within NPDES permits. *See* 40 C.F.R. § 122.47 and Idaho Administrative Procedures Act (“IDAPA”) 58.01.02 (400.03) (June 30, 2019).

THRESHOLD PROCEDURAL REQUIREMENTS

Nezperce satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Nezperce has standing to petition for review of the permit decision because it is the permittee, and participated in the public comment period on the permit. *See* 40 C.F.R.

¹³ Response to Comments (Exhibit J) at p. 9.

¹⁴ 2018 Fact Sheet (Exhibit E) at p. 7.

§ 124.19(a). Nezperce submitted timely comments on both the 2018 Draft Permit and the 2019 Revised Draft Permit.¹⁵

2. The issues raised by Nezperce in its petition were raised during the public comment period and therefore were preserved for review. Nezperce requested a schedule of compliance to allow time for it to achieve the new water quality-based effluent limitations for ammonia, including the reasons why such a schedule was necessary, in its comments on the 2019 Revised Draft Permit.¹⁶

ARGUMENT

Nezperce contends that EPA Region 10 erroneously failed to provide a schedule of compliance to allow Nezperce time to achieve new water quality-based effluent limitations for ammonia. In addition, EPA failed to properly respond to comments submitted by Nezperce requesting a schedule of compliance for ammonia.

- I. EPA Region 10 erroneously failed to provide a schedule of compliance for ammonia.**
 - A. Both federal and Idaho laws authorize the inclusion of schedules of compliance within NPDES permits.**

EPA Region 10 was authorized by federal regulations to grant the Nezperce request for a schedule of compliance for ammonia: “The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.” 40 C.F.R. § 122.47(a).

In addition, applicable state water quality standards specifically allow compliance schedules:

Compliance Schedules for Water Quality-Based Effluent Limitations. Discharge permits for point sources may incorporate compliance schedules which allow a discharger to phase in, over time, compliance with water quality-based effluent limitations

¹⁵ See Nezperce 2018 Comments (Exhibit F) and Nezperce 2019 Comments (Exhibit I).

¹⁶ Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

when new limitations are in the permit for the first time. IDAPA 58.01.02 (400.03).

B. Nezperce satisfied all conditions necessary to qualify for a schedule of compliance for ammonia.

Under Idaho regulations, quoted above, compliance schedules are available where, as here, the permit includes a new water quality-based effluent limitation. The 2004 Permit did not include limitations for ammonia, and EPA proposed such limitations for the first time in the 2019 Revised Draft Permit.¹⁷ As a result, Nezperce satisfied state law requirements necessary to receive a schedule of compliance for ammonia.

Under federal regulations, a compliance schedule may be appropriate if the discharger cannot immediately comply with a water quality-based effluent limitation (“WQBEL”) upon the effective date of the permit, based on a number of factors:

Factors relevant to whether a compliance schedule in a specific permit is “appropriate” under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.¹⁸

EPA guidance, provided in its NPDES Permit Writers’ Manual, outlines similar considerations:

Permit writers should consider the principles outlined in this [Hanlon] memo when assessing whether a compliance schedule for achieving a WQBEL is consistent with the CWA and its

¹⁷ 2019 Statement of Basis (Exhibit H) at p. 5.

¹⁸ *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits* (EPA Memo, J. Hanlon to A. Strauss, May 10, 2007) at pp. 2-3.

implementing regulations and when documenting the basis for a compliance schedule in a permit. Considerations outlined in the memo include the following:

- Demonstrate that the permittee cannot immediately comply with the new effluent limitation on the effective date of the permit.
- Include an enforceable *final* limitation and a date for achievement in the permit.
- Justify and document the *appropriateness* of the compliance schedule; factors relevant to a determination that a compliance schedule is appropriate include how much time the discharger had to meet the WQBEL under prior permit(s), whether there is any need for modifications to treatment facilities, operations, or other measures and, if so, how long it would take to implement such modifications.
- Justify and demonstrate that compliance with the final WQBEL is required *as soon as possible*; factors relevant to a determination that a compliance is required as soon as possible include the steps needed to modify or install treatment facilities, operations, or other measures and the time those steps would take.
- Include an enforceable sequence of events leading to compliance with interim milestones for schedules longer than one year.¹⁹

Nezperce provided all the information necessary for EPA to determine that a compliance schedule for ammonia was appropriate for the 2019 Permit, including Nezperce's current inability to meet the proposed limitations, the measures necessary to achieve compliance, and the time needed to implement those measures, among other things:

The City is aggressively completing a Facilities Plan to address compliance issues identified in the 2018 Compliance Order on Consent to address effluent discharge limits of the 2004 permit predominately associated with BOD and TSS that the City cannot reliably achieve. Within the Compliance Order, the EPA agreed that an extended timeframe for compliance is justified and ordered

¹⁹ NPDES Permit Writers' Manual (EPA, Sep. 2010) at p. 9-9 (emphasis in original).

full compliance with the 2004 permit limits be achieved over a 10 year period terminating December 31, 2028.

The potential nutrient and proposed effluent ammonia limits require a significant “change-of-course” in the way the City treats and disposes of wastewater.

Given the existing lagoon treatment process, the City is unable to meet an effluent ammonia limit of <0.5 mg/l by the time the proposed permit is expected to become effective. Therefore, the City requests that an extended compliance schedule be incorporated into the permit.

Further, during the Phase I planning process identified in the existing Compliance Order, the City would continue to collect effluent ammonia, temperature, and pH data more consistent with current operations (as EPA acknowledged within the Statement of Basis) for continued use by EPA for performance analysis. In conjunction, the City will collect stream flow rate information in addition to the surface water monitoring required under Table 2 of the permit. This will allow the EPA to work with the City and better quantify creek flows, establishing timeframes for seasonal discharge to optimize the City’s ability to comply with ammonia, phosphorus, and temperature limits. The data collection period would begin upon issuance of the permit and terminate no later than May 31, 2024 in conjunction with the Compliance Order assessment period. The new data would be utilized to develop dynamic ammonia limits including consideration of a seasonal permit to discharge under more moderate flow conditions. A compliance date beginning July 2029 would be implemented for the final limits.

In summary, the City proposes the following timeline of Extended Compliance Activities to facilitate development of dynamic ammonia limits in parallel with compliance efforts the City is striving to achieve under the existing Compliance Order on Consent.

Timeframe	Existing Compliance Order Activities	Extended Compliance Activities
July, 2019		Anticipated effective date of NPDES permit
July, 2019 – May, 2020	Facilities Plan Analysis	Additional Data Collection for development of dynamic ammonia limit
June, 2020 – December, 2021	Phase I Design & Construction	<ul style="list-style-type: none"> • Effluent Discharge Data (Ammonia, temperature, pH)
January, 2022 – May, 2024	Phase I Assessment Period	<ul style="list-style-type: none"> • Streamflow Data (Flow, Ammonia, temperature, pH)
June, 2024 – May, 2026	Phase II Planning	Development of dynamic ammonia limit based on data collection period and seasonal discharge
June, 2026 – December, 2028	Phase II Design & Construction for full compliance	

Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

Despite the clear request by Nezperce for a schedule of compliance for ammonia to be included in the permit, with appropriate support, EPA failed to consider any of the factors prescribed by federal regulations or EPA guidance to determine whether a compliance schedule was appropriate and, if so, what its terms should be.²⁰

C. EPA has provided a schedule of compliance for ammonia for another discharger under similar circumstances.

EPA is clearly aware of the availability of schedules of compliance in Idaho NPDES permits for new water quality-based effluent limitations. In fact, EPA has previously granted a schedule of compliance for ammonia to another discharger within the Nez Perce Reservation. The City of Culdesac received new seasonal ammonia limitations in its most recent NPDES

²⁰ See Response to Comments (Exhibit J) at p. 9.

permit.²¹ Unlike the Nezperce 2019 Permit at issue here, however, the Culdesac Permit also included a schedule of compliance that allowed Culdesac time to achieve the new ammonia limitations.²² EPA explained its rationale as follows:

Compliance schedules are authorized by federal NPDES regulations at 400 [sic] CFR 122.47 and Idaho WQS at IDAPA 58.01.02.400.03. Compliance schedules allow a discharger to phase in, over time, compliance with water quality-based effluent limitations when limitations are in the permit for the first time. Additionally, the federal regulations at 40 CFR 122.47 require that the compliance schedules require compliance with effluent limitations as soon as possible and that, when the compliance schedule is longer than 1 year, the schedule shall set forth interim requirements and the dates for their achievement. The time between the interim dates shall generally not exceed 1 year, and when the time necessary to complete any interim requirement is more than one year, the schedule shall require reports on progress toward completion of these interim requirements. In order to grant a compliance schedule the permitting authority must make a reasonable finding that the discharger cannot immediately comply with the water quality-based effluent limit upon the effective date of the permit and that a compliance schedule is appropriate (see 40 CFR 122.47(a)). The EPA has found that a compliance schedule is appropriate for total ammonia.

A reasonable potential calculation showed that the Culdesac discharge would have the reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia. Therefore, the draft permit contains water quality-based effluent limits for ammonia.

A review of the data shows that the permittee will not be able to meet the limits upon the effective date of the permit. Therefore, a compliance schedule is appropriate. See Appendices D and E for the reasonable potential and effluent limit calculations for ammonia.

The permit requires the facility to meet final effluent limits in four years and eleven months. The time is required to obtain funding,

²¹ City of Culdesac NPDES Permit No. ID0024490 (EPA Region 10, Aug. 18, 2016) (the "Culdesac Permit"), attached as Exhibit K, at Part I.B. Table 1. Effluent Limitations and Monitoring Requirements, pp. 5-6 of 30.

²² Culdesac Permit (Exhibit K) at Part I.D. Total Ammonia Schedule of Compliance, pp. 9-10 of 30.

allow proper evaluation of alternatives in the facilities planning process. Pursuant to 40 CFR 122.47(a)(3), a permit with a compliance schedule must have interim requirements and dates for achievement. EPA has included interim requirements, dates for their achievement and reports of progress.²³

For Nezperce, EPA also conducted a reasonable potential calculation, which showed that the Nezperce discharge would have the reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia:

In developing the draft permit, EPA incorrectly applied the reported ammonia effluent concentrations to be in units of ug/L. Instead, the data were in mg/L. This means the effluent levels of ammonia were much higher in comparison to the criteria. The updated reasonable potential calculation using the correct units shows that the discharge has reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia. Therefore, the revised draft permit contains water quality-based effluent limits for ammonia. Appendix A shows the reasonable potential analysis and effluent limitation calculations.²⁴

Based on the referenced ammonia data, EPA should have similarly concluded that a schedule of compliance for ammonia was appropriate for Nezperce.

D. EPA violated federal and state law, and its own guidance, by failing to grant Nezperce a schedule of compliance for ammonia.

This Board grants review of a permitting decision when the Petitioner has shown that it is based on clearly erroneous findings of fact or conclusions of law, or when the decision involves an exercise of discretion or an important policy matter that warrants EAB review. 40 C.F.R. § 124.19(a)(4). When evaluating a challenged permit decision for clear error, the Board considers the administrative record, and determines whether the record as a whole demonstrates that the “permit issuer ‘duly considered the issues raised in the comments’ and ultimately

²³ Fact Sheet to City of Culdesac NPDES Permit No. ID0024490 (EPA Region 10, Aug. 18, 2016), attached as Exhibit K, at pp. 15-16.

²⁴ 2019 Statement of Basis (Exhibit H) at p. 5 and Appendix A.

adopted an approach that ‘is rational in light of all information in the record.’” *In re Town of Concord Dept. of Public Works*, 16 E.A.D. 514, 517 (EAB 2014); *see also In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002).

In reviewing an exercise of discretion by the permit issuer, the Board will uphold the permit issuer’s decision if it is cogently explained and supported in the record. *In re Town of Concord*, 16 E.A.D. at 517. In this case, however, EPA has no reasonable basis for its failure to grant Nezperce a schedule of compliance for ammonia. The agency was provided clear information that Nezperce could not immediately comply with the new ammonia limitations, such that a schedule of compliance was appropriate. Indeed, the agency conducted its own calculations demonstrating that Nezperce could not meet the new limits. Despite the fact that another discharger on the Nez Perce Reservation had been granted a schedule of compliance for the same parameter under similar circumstances, EPA gave no indication in its 2019 Statement of Basis or Response to Comments that it actually considered the Nezperce request and supporting data and information. EPA violated federal and state regulations allowing schedules of compliance, particularly for new water quality-based effluent limitations, and disregarded its own guidance concerning the factors to consider in determining whether to grant a schedule of compliance.

In the face of evidence that a community could not meet a new effluent limitation, this Board has previously remanded similar NPDES permitting decisions:

Since the issue of whether the City is entitled to a compliance schedule directly affects the permit’s terms, factual issues having to do with the City’s ability to comply immediately are clearly material (*i.e.*, could affect the outcome of the proceeding). Thus we are remanding this issue to the Regional Administrator. On remand, the Regional Administrator is directed to reconsider the

issue of whether the City is entitled to a compliance schedule. . .
.”).²⁵

Nezperce has demonstrated that it is entitled to a compliance schedule under federal and state law, and therefore requests that this Board remand the 2019 Permit to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations.

II. EPA failed to properly respond to Nezperce comments requesting a schedule of compliance for ammonia.

A. EPA was required to duly consider and meaningfully respond to the Nezperce request for a schedule of compliance for ammonia.

Federal permitting rules require that permit issuers must “[b]riefly describe and respond to all significant comments on [a] draft permit.” 40 C.F.R. § 124.17(a)(2). The Board has held that it is incumbent on the permit issuers to “duly consider” issues raised in comments, and to respond in a “meaningful fashion.” *In re West Bay Expl. Co.*, 17 E.A.D. 204, 222 (EAB 2016) (quoting *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002) and *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004)). Although comment responses may be succinct, they must be “clear and thorough enough to adequately encompass the issues raised by the commenter.” *Id.* Comment responses must be sufficient to enable the Board to determine that the issuer has adopted an approach that is “rational in light of all information in the record.” *In re Muskegon Development Co.*, 17 E.A.D. 740, 742 (EAB 2019).

Even when the permit issuer offers a rationale for ignoring certain comments, the Board may remand a permit approval if the Board cannot determine that the issuer has “duly considered” all significant issues. For example, in the *In re Muskegon Development Co.* appeal, the Board remanded a permit in part because the issuer failed to address several comments

²⁵ *In re City of Ames, Iowa*, 6 E.A.D. 498, 504 (EAB 1996).

directly, or to provide any cross-reference or other indication that the issues raised by the omitted comments had been addressed elsewhere in its response. 17 E.A.D. at 751. The Board found that it was “stymied in its ability to determine whether the Region considered and responded to comments . . . and otherwise exercised its considered judgment in issuing the Permit” because of the inadequate information and reasoning in the issuer’s response, and remanded the permit. *Id.* at 749.

The Board also has remanded permits because the issuer failed to respond to comments regarding questionable factual findings. In *In re Washington Aqueduct*, the Board remanded an NPDES permit for reconsideration solely because the permit issuer ignored comments questioning the validity of the data it used to analyze the potential for certain pollutants to exceed water quality standards. 11 E.A.D. at 586, 589-90. Similarly, the Board remanded a decision for failure to address comments regarding the implications of underground geological formations for injection wells in *In re West Bay*, 17 E.A.D. 204, 221 (EAB 2016). The Board held that it was “particularly important” for the permit issuer to address technical issues, and avoid asking the Board to serve as the “first-line decisionmaker.” *Id.* at 222. The decision emphasized that the Region, not the Board, has applicable technical expertise:

The Board’s role is not to make initial scientific findings, but to review the Region’s decisions to determine if the Region has based its conclusions on clearly erroneous conclusions of fact or law. *Id.* at 222-23.

B. EPA failed to duly consider and meaningfully address Nezperce Comment 14 requesting a schedule of compliance for ammonia.

The selection from the Nezperce 2019 Comment letter presented as Comment 14 in the Response to Comments included at least three substantial issues, none of which EPA addressed in its response. First, Nezperce explained that compliance with the ammonia limit set forth in the permit is impossible with the existing treatment process; second, Nezperce requested an

extended compliance schedule be incorporated into the permit, and proposed a schedule in a detailed timeline of “Extended Compliance Activities,” presented as a table with specific dates and milestones; and third, Nezperce proposed specific measures to “allow the EPA to work with the City and better quantify creek flows, establishing timeframes for seasonal discharge to optimize the City's ability to comply with ammonia, phosphorus, and temperature limits.”²⁶ Significantly, Nezperce expressly stated that a compliance schedule was needed “to facilitate development and implementation of dynamic ammonia limits **in parallel with** compliance efforts . . . under the existing Compliance Order on Consent,” emphasizing that addressing the issues raised in the comment were specific to the permit conditions themselves, rather than any issues with the Compliance Order.²⁷

EPA failed to address—or even acknowledge—the issues raised in Nezperce Comment

14. EPA provided only the following terse response:

The City should contact the Enforcement & Compliance Assurance Division to discuss the potential for an amendment to their existing compliance order, if necessary.²⁸

This response is clearly inadequate, even under the most generous reading of the requirements of 40 C.F.R. § 124.17(a)(2). EPA did not address the issue of ammonia limitations; it did not even acknowledge that Nezperce had proposed a compliance schedule, let alone address the question of its feasibility; and it completely ignored the measures Nezperce proposed

²⁶ Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

²⁷ Nezperce 2019 Comments (Exhibit I) at p. 2 (emphasis added).

²⁸ Response to Comments (Exhibit J) at p. 9.

to ensure optimal compliance.²⁹ As discussed above, despite the clear request by Nezperce that a schedule of compliance for ammonia be included in the permit, with appropriate support, EPA here failed to consider any of the factors prescribed by federal regulations or EPA guidance to determine whether a compliance schedule was appropriate and, if so, what its terms should be. Just as in *In re Muskegon Development Co.*, EPA here failed to provide any indication that it had “duly considered” the issues raised sufficient to demonstrate that it had “considered and responded to [all] comments.” 17 E.A.D. at 749.

By ignoring the three substantial technical issues raised in Nezperce Comment 14, EPA is inappropriately asking the Board to “serve as a first-line decisionmaker” with regard to technical questions, just as in *In re West Bay*. See 17 E.A.D. at 222-23. For this reason alone, the decision to approve this permit should be remanded with instructions to duly consider and meaningfully address all significant comments.

CONCLUSION

For the foregoing reasons, Nezperce respectfully requests that this Board grant the following relief:

1. Remand the 2019 Permit to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations;

²⁹ EPA addressed a separate Nezperce request for a schedule of compliance in Comment Response 6. Response to Comments (Exhibit J) at p. 5. Nezperce commented on the 2018 Draft Permit (which did not include ammonia limitations) by suggesting interim limits and a schedule of compliance consistent with the 2017 Compliance Order. Nezperce 2018 Comments (Exhibit F) at p. 3. EPA responded by stating, “Since the effluent limitations proposed in the draft permit and contained in the final permit are the same as those in the previous permit, there is no basis to include interim effluent limits in the permit. In addition, since the permit limits have not changed, there is no basis to include a compliance schedule in the permit.” Response to Comments (Exhibit J) at p. 5. Because neither the Nezperce comment nor the EPA response referred to the 2019 Revised Draft Permit (which included ammonia limitations), EPA cannot rely on Comment Response 6 to justify its failure to include a schedule of compliance for ammonia. Further, the limits in the 2019 Permit have changed in comparison to the 2004 Permit. Therefore, there is a clear basis to include a compliance schedule for ammonia in the 2019 Permit.

2. Alternatively, remand the Permit for EPA Region 10 to duly consider and meaningfully respond to the Nezperce comments concerning its request for a schedule of compliance; and

3. Any such other relief as may be appropriate under the circumstances.

In addition, Nezperce requests the opportunity to present an oral argument in this proceeding.

Respectfully submitted,

/s/ Fredric P. Andes

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LIST OF EXHIBITS

<u>Exhibit Description</u>	<u>Exhibit Number</u>
2019 Permit – NPDES ID0020397	A
2004 Permit – NPDES ID0020397	B
2017 Compliance Order	C
2018 Draft Permit – NPDES ID0020397	D
2018 Fact Sheet	E
Nezperce 2018 Comments	F
2019 Revised Draft Permit – NPDES ID0020397	G
2019 Statement of Basis	H
Nezperce 2019 Comments	I
Response to Comments	J
Culdesac Permit – NPDES ID0024490	K
Culdesac Fact Sheet	L

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Petition for Review, including all relevant portions, contains fewer than 14,000 words.

/s/ Fredric P. Andes

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2019, a true and correct copy of the foregoing Petition for Review and all Exhibits was sent to the following persons, in the manner specified:

By EAB eFiling System and overnight delivery to:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
Washington, D.C. 20004

By email and overnight delivery to:

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Water Division
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Region 10
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By First Class U.S. Mail to:

Nez Perce Tribe
Attn: Ken Clark
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P.O. Box 365
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/s/ Fredric P. Andes

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Attorneys for Hecla Limited Lucky Friday Mine

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

_____)
IN THE MATTER OF)
)
HECLA LIMITED LUCKY FRIDAY)
MINE, LUCKY FRIDAY UNIT)
)
NPDES Permit No. ID0000175)
)
_____)

PETITION FOR REVIEW

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IDEQ Implementation Guidance for the Idaho Copper Criteria for Aquatic Life (Nov. 2017)9

I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Hecla Limited Lucky Friday Mine (“Hecla”) petitions for review of the conditions of final National Pollutant Discharge Elimination System (“NPDES”) Permit No. ID0000175 (the “Lucky Friday Permit” or “Permit”) issued by the United States Environmental Protection Agency (“EPA”), Region X (the “Region”) on June 21, 2019. Hecla received the Lucky Friday Permit on June 21, 2019. The Lucky Friday Permit was issued pursuant to EPA’s authority under the federal Clean Water Act (the “CWA”).¹ See 33 U.S.C. §§ 1311 and 1342. A copy of the Lucky Friday Permit is attached hereto as Exhibit A. The Lucky Friday Permit authorizes Hecla to discharge from the Lucky Friday Unit located near Mullan, Idaho (“Lucky Friday Unit”) at the locations and in accordance with the conditions set forth in the Permit. Hecla contends that certain pertinent conditions are based on clearly erroneous findings of fact and conclusions of law. Specifically, Hecla challenges the following Permit conditions:

- (1) I.B (1), as to the effluent limitations and monitoring requirements pertaining to WET, copper, cadmium, lead, mercury, and zinc
- (2) I.B (1), as to the effluent limitations pertaining to Outfall 001
- (3) I.B (9)
- (4) I.C.3, WET chronic Toxicity Triggers and receiving water concentrations
- (5) I.D.6, as to the Surface Water Monitoring Requirements pertaining to copper
- (4) II.A.

II. FACTUAL BACKGROUND

The Lucky Friday Unit is a deep, hard rock underground mine located immediately east of Mullan, Idaho in Shoshone County. Ore has been mined from the Lucky Friday since 1942. The mill began operation in 1959. Currently, operations consist of two underground accesses, support facilities, a surface mill, a lined tailings impoundment, and two water treatment facilities: Water Treatment Plant 2 (“WTP 2”) and Water Treatment Plant 3 (“WTP 3”).

At the site, several components of the Lucky Friday Unit generate wastewater, which can be combined and routed for discharge, after treatment, through three outfalls to the South Fork Coeur d’Alene River (“SFCDAR”): Outfalls 001, 002, and 003. Approximately six miles downriver from the outfalls, both Canyon Creek and Ninemile Creek flow into the SFCDAR.

A NPDES Permit was first issued to Hecla for the Lucky Friday Unit in 1973. In 1976, Hecla timely applied to the Region for reissuance of its Permit. This timely application ensured that the 1973 Permit remained in effect after its expiration date of June 30, 1977. On September 28, 1990 a draft Permit for the Lucky Friday Unit was issued for public notice, but was never finalized. Hecla submitted applications to discharge from Outfalls 001, 002, and 003 and additional information related to the applications over the intervening years.

On August 12, 2003, the currently active Permit was issued to Hecla (i.e., the reissued Permit becomes effective August 1, 2019). The Permit was subsequently modified in February 1, 2006 and August 1, 2008. The Permit expired on September 14, 2008 but, pursuant to 40

(...continued)

¹ Because the State of Idaho had yet to receive authorization to implement its own NPDES permit program at the time of the Lucky Friday Permit issuance, EPA issued permits in Idaho, in lieu of the federal program.

C.F.R. § 122.6, the Permit has been administratively extended and remains in effect. Hecla has submitted numerous updates to the application since 2008 and as recently as March 29, 2018. During the current Permit term, Hecla installed additional water treatment facilities (WTP 2 and WTP 3), which substantially reduced metals concentrations and metal loading. Additional water treatment was necessary due to the phaseout of the 2003 Permit interim effluent limitations, with final Permit effluent limitations taking effect in September 2008. Instream chemical monitoring and biological monitoring taken from both upstream and downstream of the outfalls pursuant to the existing Permit demonstrates that water quality criteria are being met, aquatic life is being protected, and beneficial uses are supported.

The Region issued a draft permit (“Draft Permit”) and supporting Fact Sheet, Exhibit B, for public notice on February 25, 2019. Hecla timely submitted written comments on the Draft Permit on March 26, 2019, attached hereto as Exhibit C. The State of Idaho issued its draft 401 Certification of the Lucky Friday Permit (“Draft 401 Certification”) for public notice on February 25, 2019, attached hereto as Exhibit D. Hecla timely submitted written comments on the Draft 401 Certification on March 26, 2019, attached hereto as Exhibit E.

On June 3, 2019, the State of Idaho issued its final 401 Certification of the Lucky Friday Permit, attached hereto as Exhibit F. Hecla intends to timely appeal certain conditions in the state 401 Certification.

The Region issued its “Response to Comments,” attached hereto as Exhibit G, and issued the Lucky Friday Permit, Exhibit A, on June 21, 2019.

III. THRESHOLD PROCEDURAL REQUIREMENTS

Hecla satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. As the holder of the Permit, Hecla is an interested party entitled to file an appeal under 40 C.F.R. § 124.19(a)(2). In addition, Hecla has standing to petition for review because it submitted written comments on the Draft Permit. *See* Hecla's Comments March 26, 2019, Exhibit C.

2. The issues raised by Hecla in its petition were raised during the public comment period and therefore were preserved for review.

IV. STANDARD OF REVIEW

Under 40 C.F.R. § 124.19(a)(4), the Environmental Review Board ("EAB" or the "Board") should grant review of a permitting decision when it is based on clearly erroneous findings of fact or conclusions of law or involves an exercise of discretion or an important policy matter that warrants EAB review. *See In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 239 (E.A.B. 2005). The Board's "power of review (under 40 C.F.R. § 124.19) should only be sparingly exercised and most permit conditions should be finally determined at the Regional level." *Id.* (citing 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). 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 [that petitioner's] position' during the public comment period on the draft permit." *In re Westborough & Westborough Treatment Plan Bd.*, 10 E.A.D. 297, 304 (E.A.B. 2002) (quoting 40 C.F.R. § 124.13). The burden of demonstrating

that review is warranted rests with the petitioner, “who must state any objections to the permit and explain why the permit issuer’s previous response to the objection is clearly erroneous, an abuse of discretion, or otherwise warrants review.” 40 C.F.R. § 124.19(a); *see In re City of Marlborough*, 12 E.A.D. at 240.

V. ARGUMENT

A. The Region Arbitrarily Set BLM-Based Copper Effluent Standards.²

The Region failed to rely on any biotic ligand model (“BLM”) based data for the receiving water, the SFC DAR, in setting the copper effluent limits in the Permit. The Region instead relied on data that lacked the necessary site-specific and temporal data set, identified as required methods of setting BLM-based effluent limits in the Idaho Department of Environmental Quality (“IDEQ”) guidelines. Exhibit A, Lucky Friday Permit, p. 4; Exhibit G, Region’s Response to Comments, pp. 6-7. *But see* Exhibit H, IDEQ Implementation Guidance for the Idaho Copper Criteria for Aquatic Life (Nov. 2017) (“IDEQ BLM Guidance”) §§ 5.3,

² The Region took the unusual step of proposing BLM-based copper limits in the Draft Permit based on a state water quality standard that had not been approved by EPA, contrary to 40 C.F.R. § 131.21 (Alaska Rule), *see* 40 C.F.R. § 131.21(c), although EPA subsequently approved the state copper standards (in record time) after the public comment period and before final issuance of the Permit. This placed Hecla at a disadvantage to develop comments based on a standard that may have not come into effect by the time the final Permit was issued. This fact provides an independent reason to remand the copper limits to the Region for reconsideration. The Region improperly sought comments on a state standard and associated permit limits that were not yet effective under the CWA. Accordingly, Hecla reserves the right to provide additional information and raise additional issues during this appeal that were not submitted during the public comment period regarding the legitimacy of EPA’s estimated BLM derived criteria. This is necessary because the BLM-derived criteria did not apply during the public comment period and Hecla focused its comments on rules and law that were in effect when the Draft Permit was subject to public comment. Also, for the same reason, Hecla intends to present additional information regarding the legitimacy of the estimated BLM-derived criteria during its challenge to Idaho’s 401 Certification.

5.3.2, 5.4. The Region's decision to rely on overly conservative estimates for the BLM-based effluent limits without considering any data in the SFCDAR, including biological data which demonstrated that aquatic life uses were fully supported, was arbitrary.

The Region developed the conservative copper criteria using data extracted from IDEQ's³ *Statewide Monitoring for Inputs to the Copper Biotic Ligand Model* (Aug. 2017) ("IDEQ Statewide Monitoring Inputs"), hereto attached as Exhibit I. See Exhibit G, Region's Response to Comments, pp. 6-7. The Region, however, erred in its application of the IDEQ BLM Guidance. In the IDEQ BLM Guidance, BLM specifically cautions against using assessment unit ("AU") level data for effluent limit development:

While it is appropriate to sample at locations representative of an AU for [integrated report] and [total maximum daily load] purposes, this is generally not acceptable for determining applicable criteria for effluent limit development. For effluent limit development, it is instead necessary to characterize site specific conditions within the effluents receiving water.

Exhibit H, IDEQ BLM Guidance § 5.3.2.

IDEQ BLM Guidance is corroborated by EPA's own guidance. In its Technical Support Document for Water Quality-Based Standards, EPA instructs permitting authorities to require permittees to collect site-specific monitoring data. See "Technical Support Document for Water Quality-Based Toxics Control," EPA (Mar. 1991), p. 52 (emphasis in original) ("EPA recommends monitoring data be generated on effluent toxicity prior to permit limit development for the following reasons: (1) the presence or absence of effluent toxicity can be more clearly established or refuted and (2) where toxicity is shown, effluent variability can be more clearly

³ Biological data collected by Hecla as required in the existing NPDES Permit demonstrated that aquatic life beneficial uses in the SFCDAR directly below Hecla's outfalls
(continued...)

defined.”). Rather than rely on estimates at the outset, EPA recommends including a permit reopener to impose appropriate site-specific effluent limits once site-specific monitoring data has been collected noting that “the more information the authority can acquire to support the limit, the better a position the authority will be in to defend the limit if necessary.” *Id.* at 51.

The conservative effluent limitations calculated by the Region are based on the data inputs that are not representative of site-specific conditions in the SFCDAR. Rather than following IDEQ and EPA guidance, the Region arbitrarily applied parameters from a limited sample data set that contained only one sample per location and represents less than 5% of an appropriate two-year data set, when state guidance stipulates that 24 sample series are needed to set an appropriate baseline. These sample data were collected over only two months in September and October 2016, in an attempt to define a baseline for various BLM parameters for several Idaho ecoregions. Despite being appropriate for some purposes, these data ignore the temporal variability and site specificity required of a data set to implement the BLM for effluent limits.

The IDEQ BLM Guidance further states that spatial coverage is essential to setting appropriate BLM-based effluent limits and recommends that “[m]onitoring locations should represent the conditions for the receiving water as affected by the specific discharge being considered . . . [and] it may be necessary or advisable to collect samples upstream of points of discharge to capture baseline conditions.” Exhibit H, IDEQ BLM Guidance § 5.3.2.

(... continued)

were fully supported. The Region arbitrarily did not consider this information in estimating a BLM-derived criteria for the SFCDAR.

The Region's "conservative criteria" data set also ignores IDEQ BLM Guidance recommendation with respect to temporal variability in setting appropriate BLM parameters. IDEQ guidance suggests 24 consecutive months of instantaneous water quality criteria is appropriate to characterize seasonable variability at any single location. *See id.* § 5.4.1

To further illustrate that the data relied upon by the Region was arbitrary and not representative of conditions in the SFC DAR, the Region included two samples from Canyon Creek, a third-order stream. *See* Exhibit I, IDEQ Statewide Monitoring Inputs, p. 37; *cf. id.* at p. 40. Canyon Creek is significantly different from the upper reaches of the SFC DAR, and has very different water quality, including lower concentrations of dissolved organic carbon (DOC), cations, and anions. *See* Exhibit I, IDEQ Statewide Monitoring Inputs, pp. 14, 30.

Notwithstanding the variability of limits caused by the data set's failure to account for spatial differences, the Permit also ignores two data set locations—ID0021296D and ID0021296U—in the SFC DAR. These samples are the most representative spatial samples and are 1.7 to 2 times the Permit-proposed 10th percentile criterion continuous concentrations (CCC) (1.0 and 1.2 µg/L respectively). *See* Exhibit I, IDEQ Statewide Monitoring Inputs, p. 53.

Not only was the Region's decision arbitrary, the inclusion of overly conservative estimates for the BLM-based effluent limits in the Permit exposes Hecla to significant challenges in establishing site-specific effluent limitations after adequate data are collected. Based on the Permit's current BLM-based effluent limitations, Hecla will be required to overcome anti-backsliding and anti-degradation limitations, even as site-specific data are collected. In its Response to Comments, however, the Region failed to address how anti-backsliding requirements may apply to any attempt by Hecla to seek modification of the Permit once

adequate data are collected. *See* Exhibit G, Region’s Response to Comments, p. 7; *see also* Exhibit G, IDEQ’s Response to Comments p. 36. The Region’s approach of setting effluent limits first (absent any site-specific data) and placing the burden on Hecla to undo the limits based on actual data arbitrarily places Hecla at risk and raises important policy considerations warranting review.

B. The Region Erred by Adopting IDEQ’s Conflated Effluent Limits for Outfalls 001 and 002.

The Lucky Friday Unit’s prior Permit prescribed separate effluent limits at Lucky Friday Unit Outfalls 001, 002, and 003 that both EPA and IDEQ previously authorized as compliant with the Clean Water Act. Each limit was based on and carefully tailored to the specific receiving water conditions at each outfall. Permit Part I.B removes the outfall-specific limits for Outfall 001. *See* Exhibit A, Lucky Friday NPDES Permit, Part I.B, Effluent Limitations and Monitoring, Table 2, pp. 4-5. Hecla objects to the Region’s failure to provide effluent limits tailored to site-specific conditions at Outfall 001 as existed in the prior Permit.⁴

⁴ The Permit’s Outfall 001 effluent limits derive from IDEQ’s erroneous conclusion in the 401 Certification. The Outfall 001 effluent limits are not attributable to State certification and therefore can be contested at the federal level. A permit condition that is “attributable to State certification” may not be contested at the federal level. *See* 40 C.F.R. § 124.55(e) (“Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.”). On the other hand, if a State certification leaves open the possibility that the permit condition could be made less stringent and still comply with the State water quality standard, the permit condition is not “attributable to State certification” and is subject to further challenge within the agency pursuant to the procedures in 40 C.F.R. part 124. *See In re Boise Cascade Corp.*, 4 E.A.D. 474, 483 n.7 (E.A.B. 1993).

Here, IDEQ does not contend that the effluent limits for Outfall 001 must be the same as the Outfall 002 limits to comply with state water quality standards. Rather, IDEQ simply concludes the identical limits are appropriate “[g]iven that effluent from Water Treatment Plant 2
(continued...)

Table 2 of the Permit presents effluent limits calculated based on river flow and hardness conditions at or just above Outfall 002. The outfall-specific data clearly demonstrate that the receiving water conditions are different at each outfall. Relevant here, the receiving water data demonstrate that low flow statistics are higher at Outfall 001. *See* Exhibit G, Region Response to Comments, p. 3 (presenting Table 1 from Exhibit C, Hecla’s Comments to the Draft NPDES Permit, p. 1). Further, it is undisputed that the receiving water at Outfall 001 also has higher hardness than that of Outfall 002. However, rather than calculate corresponding limits for those conditions just above Outfall 001, the Permit simply imposes the Outfall 002 limits to both Outfalls 001 and 002, effectively conflating what should be two distinct, site-specific effluent limits into one. *See* Exhibit A, Lucky Friday Permit, at Part I.B; Exhibit G, Region’s Response to Comments, p. 4.

That conflation is contrary to established EPA guidance. EPA’s Technical Support Document for Water Quality-Based Standards is clear that the primary operative consideration in establishing effluent limits to implement water quality criteria is “receiving water concentration,” or “RWC.” *See* “Technical Support Document for Water Quality-Based Toxics Control, p. 48 (“A fundamental principle in the development of water quality based controls is that the RWC must be less than the criteria that comprise or characterize the water quality standards.”).

Moreover, effluent characterization should be based on “toxicity testing *in accordance with site-*

(...continued)

directs water of the same quality and quantity to either Outfall 001 or Outfall 002.” Exhibit G, IDEQ’s Response to Comments, p. 38. Because IDEQ certification does not posit that a permit requirement cannot be made less stringent and still comply with the State water quality standard, the requirement is not “attributable to State certification” and can be challenged at the federal level.

specific considerations,” to determine whether “an effluent will cause toxic effects *in the receiving water.*” *Id.* at 53 (emphasis added).

According to the Region, the “simplified” effluent limits in the Permit are appropriate due to “[w]ater treatment plant improvements.” Exhibit B, NPDES Fact Sheet, p. 77. The separate limits, the Region explained, “are no longer necessary due to the consistent effluent quality from Water Treatment Plant 2,” because “[t]he extra dilution offered by diverting Outfall 002 effluent to Outfall 001 is no longer necessary.” *Id.* Thus, “Outfall 002 can still be diverted to Outfall 001 but now only one set of effluent limits apply.” *Id.*

Thus, ignoring its own directive, the Region neglected to set appropriate, site-specific effluent limits, based on little more than what appears to be the administrative convenience of one overarching, and overbroad, standard. Therefore, the Region’s failure to independently adopt effluent limits for Outfall 001 in Permit Part I.B is clearly erroneous.

C. The Region Erroneously Rescinded Applicable and Authorized Flow-Tiered Limits in the Prior Permit.

In accordance with Idaho regulations, Lucky Friday Unit’s prior Permit provided flow-tiered effluent limits for copper, silver, mercury, and WET, with silver being removed from the renewed Permit due to lack of reasonable potential to exceed instream criteria. The omission of pre-existing flow-tiered limits from the Permit is erroneous because it is inconsistent with authorizing regulations and unsupported by any regulatory and factual change.⁵

⁵ The removal of flow-tiered limits for mercury and WET in the Permit is not attributable to State certification and therefore is subject to federal review. IDEQ’s 401 Certification does not conclude that these flow-tiered limits must be removed in order to comply with state water quality standards. Rather, IDEQ concluded flow-tiered limits were not necessary because
(continued...)

IDAPA 58.01.02.400.05 prescribes tiered effluent limitations for NPDES Permits authorizing discharges to waters exhibiting unidirectional flow, including the SFCDAR. As IDEQ explains in its water quality implementation guidance, alternative streamflow estimates like tiered effluent limits are to be employed “in cases where it is clear that [there exist] differing sets of circumstances . . . (e.g., different effluent flows, receiving water flows, or hydrologic or climatic conditions).” Exhibit J, IDEQ Idaho Pollutant Discharge Elimination System Effluent Development Guidance (Dec. 2017), p. 83. Tiered limits are particularly appropriate where there is “significant variability both in the receiving water body and effluent flow,” *id.* at 84, e.g., those due to changing “production rates” or “special processes . . . that operate during certain times,” *id.* at 37-38.

Despite that regulatory authority, the tiered-flow effluent limits are noticeably absent from Part I.B of the Permit. Initially, the Region attempted to justify the departure by stating that tiered-flow limits were

appropriate for permitting facilities that do not have more than basic treatment facilities (e.g. simple settling) and depend on increased dilution to achieve compliance with WQS. With the installation of wastewater treatment plants at both outfalls, it is expected that these treatment plants will be tuned to treat to the most stringent effluent limitations and, as such, tiered limitations are no longer necessary.

(...continued)

Hecla’s “ability to treat its effluent has improved dramatically.” Exhibit G, IDEQ’s Response to Comments, p. 30.

IDEQ concluded that flow-tiered limits for copper were not appropriate since the SFCDAR does not have any assimilative capacity for additional copper. IDEQ’s method for reaching this conclusion is flawed. As discussed in Section V.A, no site-specific SFCDAR copper data have been collected and, therefore, IDEQ cannot validly make a determination that the assimilative capacity for copper is exceeded in the SFCDAR for purpose of establishing Permit limits.

Exhibit B, NPDES Fact Sheet, p. 13.

Hecla challenged that premise in its response to the Draft Permit, establishing that the tiered limits were included in the prior Permit based not on the simplicity of wastewater treatment but on IDAPA 58.01.02.400.05 and the variable site-specific conditions. Indeed, in Attachment A of the 2002 Fact Sheet for the prior Lucky Friday Permit, EPA acknowledged that flow in the SFC DAR varies with precipitation and snow melt and flow-tiered limits were calculated accordingly. *See* Exhibit K, Fact Sheet for Lucky Friday NPDES Permit No. ID0000175 (Dec. 2002), p. A-23. SFC DAR flow characteristics and variability due to precipitation and snow melt are not significantly different since 2002. Nor has the authorizing regulation allowing flow-tiered limits changed. Thus, the Region's proffered reason provided no justification for the change in the Permit treatment.

Implementation of flow-tiered effluent limits in the Permit would ensure compliance with water quality standards while providing the Lucky Friday Unit operational flexibility and control over discharges based on actual instream flow conditions, particularly in spring run-off and periods of excessive precipitation. Importantly, there has occurred no change in either rule or fact that justifies the departure from the flow-tiered limits. IDAPA 58.01.02.400.05 remains in effect. Consistent with that rule, tiered effluent limitations should be employed in NPDES Permits authorizing discharges to unidirectional waters, including the SFC DAR. Further, the significant fluctuations in the current variable and seasonal river flow and the infrequent occurrence of actual critical low flows (i.e., 7Q10 and 1Q10), coupled with changing production

rates,⁶ support the continued implementation of the same tiered approach deemed appropriate by both EPA and IDEQ in 2002.

Flow-tiered limits should not be based on current treatment technology. The Region has exceeded the scope of its authority by omitting the carefully crafted tiered limits, thereby erroneously imposing de facto *technology*-based effluent limits at the Lucky Friday Unit based on current treatment technology. That the Lucky Friday Unit operates its treatment plants to achieve optimal treatment, and effluent quality is in compliance with effluent limits is not reason enough to rescind the valuable tool of tiered limits. Treatment plants do not operate in such a manner that they can be “tuned” to increase treatment efficiency. Lucky Friday Unit’s effluent quality has improved since installation of WTPs 2 and 3, not because a treatment system was “tuned.” Treatment systems are designed for specific capacity and to meet certain design criteria and have limitations on what can be achieved. This is precisely why applicable regulations and policy allow for options like flow-tiered effluent limits—to implement and facilitate compliance with water quality standards. This is witnessed by the fact that quarterly instream monitoring since 2012, at three locations in the SFCDAR, shows attainment of applicable water quality criteria.

Thus, the Region’s erroneous rescission of the flow-tiered limits in Permit Part I.B, which is inconsistent with authorizing regulations and unsupported by any regulatory and factual change, should be reviewed and modified or remanded.

⁶ Hecla’s operations for the past few years have been limited due to labor disputes. Once those disputes are resolved, Hecla anticipates additional production at the mine and thus the need for additional flexibility under the Permit (while still complying with water quality standards).

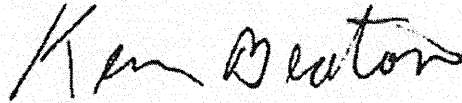
VI. CONCLUSION

For the reasons stated herein, the EAB should grant review of Hecla's petition for review of the Lucky Friday Permit and set aside, modify, and/or remand the unlawful conditions established by the Region in the Permit.

Dated this 22nd day of July, 2019.

Respectfully submitted,

STOEL RIVES LLP

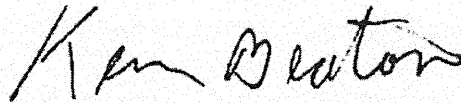


Kevin J. Beaton

Attorneys for Hecla Limited Lucky Friday Mine

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I hereby certify that the foregoing Petition for Review contains 4,166 words, including footnotes, and therefore, complies with the word limits set forth in 40 C.F.R. § 124.19(d)(3).



Kevin J. Beaton
STOEL RIVES LLP
Attorneys for Hecla Limited Lucky Friday Mine

LIST OF EXHIBITS

- Exhibit A** NPDES Permit No. ID0000175 (issued June 21, 2019)
- Exhibit B** Excerpts from Fact Sheet for Lucky Friday NPDES Permit No. ID0000175 (Feb. 25, 2019)
- Exhibit C** Hecla Comments to Draft Lucky Friday NPDES Permit (Mar. 26, 2019)
- Exhibit D** Draft 401 Certification of the Lucky Friday NPDES Permit (Feb. 25, 2019)
- Exhibit E** Hecla Comments to Draft 401 Certification of the Lucky Friday NPDES Permit (Mar. 26, 2019)
- Exhibit F** Final 401 Certification of the Lucky Friday NPDES Permit (June 3, 2019)
- Exhibit G** EPA and IDEQ Responses to Comments (June 2019)
- Exhibit H** IDEQ Implementation Guidance for the Idaho Copper Criteria for Aquatic Life (Nov. 2017)
- Exhibit I** IDEQ Statewide Monitoring for Inputs to the Copper Biotic Ligand Model (Aug. 2017)
- Exhibit J** Excerpts from IDEQ Idaho Pollutant Discharge Elimination System Effluent Development Guidance (Dec. 2017)
- Exhibit K** Excerpts from Fact Sheet for Lucky Friday NPDES Permit No. ID0000175 (Dec. 2002)

CERTIFICATE OF SERVICE

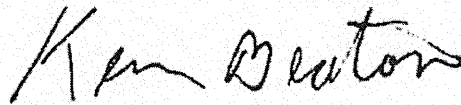
I hereby certify that on this 22nd day of July 2019, that a true and correct copy of the foregoing Petition for Review was served as follows:

By EAB eFiling System and overnight delivery to:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3332
Washington, DC 20004

By email and overnight delivery to:

Daniel D. Opalski, Director
Water Division
United States Environmental Protection Agency
Region X
1200 Sixth Avenue
Seattle, WA 98101
Email: opalski.dan@epa.gov



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