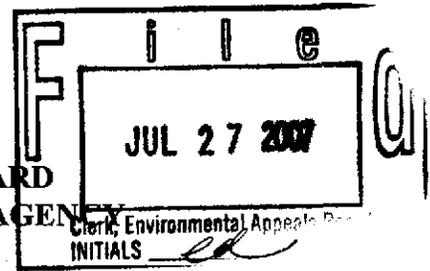


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Environmental Disposal)
Systems, Inc.)
)
UIC Permit Nos. M1-163-1W-C007 and)
M1-163-1M-2008)
)

UIC Appeal No. 07-01

ORDER DENYING MOTIONS FOR LEAVE AND FOR RECONSIDERATION

I. BACKGROUND

Environmental Geo-Technologies, LLC ("EGT") filed with the Environmental Appeals Board ("Board") a Motion for Leave to File Reply Brief ("Motion for Leave") and Motion for Reconsideration of Environmental Appeals Board Order ("Motion for Reconsideration") on July 16, 2007, and July 24, 2007, respectively, in the above-captioned matter. This case is an informal appeal under 40 C.F.R. § 124.5(b) concerning the U.S. Environmental Protection Agency ("EPA") Region 5's ("Region") alleged denial of EGT's February 28, 2007 request to transfer from Environmental Disposal Systems, Inc., ("EDS") to EGT two Safe Water Drinking Act underground injection control ("UIC") permits to operate Class I commercial hazardous waste injection wells in Romulus, Michigan. After considering EGT's motions, and in light of the Board's July 11, 2007 order declining to review the informal appeal, the Board denies the Motion for Leave and the Motion for Reconsideration.

Although 40 C.F.R. § 124.5(b) does not itself provide for briefing by the parties, in this case, the Clerk of the Board requested the Region file a response to EGT's informal appeal. After reviewing EGT's petition and the Region's response, the Board denied review and issued an order to clarify for the parties the basis for its decision. The July 11, 2007 order serves as the Board's final decision in this matter and thus, renders moot EGT's subsequently filed Motion for Leave.

EGT also moves under 40 C.F.R. § 124.19(g) for reconsideration of the Board's July 11, 2007 order declining review of the Region's alleged denial of the permit transfer request. EGT's primary argument for reconsideration is that the Board did not have the opportunity to review the full record,¹ the documents of which EGT purportedly identifies in an exhibit to the Motion for Leave, before issuing the order. Consequently, EGT asserts, the Board's order is both factually and legally erroneous. EGT further raises all the arguments it made in the Motion for Leave as well as points previously argued in its petition. Several of EGT's issues were not raised in the petition, nor did EGT provide any basis for why they could not have been raised earlier. For example, EGT argues for the first time in the Motion for Leave and Motion for Reconsideration

¹ EPA did not provide a certified administrative record "[b]ecause there is no appealable final U.S. EPA decision regarding the requested permit transfer." EPA Response to Petition for Review at 8. We further observe that, when EPA is the permitting authority, the compilation of administrative records is required for draft permits and final permit decisions. 40 C.F.R. §§ 124.9, 124.18. According to the regulations, "[a] denial of a request for modification, revocation and reissuance or termination, as discussed in § 124.5, is not a 'draft permit.'" *Id.* § 124.2. Under § 124.15, a final permit decision is "a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." EPA has not made a final permit decision with respect to the transfer request; therefore, an administrative record under § 124.18 does not exist, either.

that EPA has acted in bad faith.

II. ANALYSIS

Section 124.19 pertains to appeals of final permit decisions issued under § 124.15, including final decisions “to issue, deny, modify, revoke and reissue, or terminate a permit.” 40 C.F.R. § 124.15(a). Subsection (g) allows a party to move for reconsideration of the Board’s final order. *Id.* § 124.19(g). Since promulgating the regulation consolidating EPA’s permit programs procedures in 1980, the Agency has sought to:

distinguish a denial of a request for modification, revocation and reissuance, or termination [of a permit] under § 124.5 from a tentative decision to deny a permit application under § 125.6. The former is not subject to the same procedures as a denial of an application for a permit. * * * [Denials of requests for modification, revocation and reissuance, or termination] are subject only to an informal appeal under § 124.5(b). In adopting this position, EPA rejected comments urging that modification denials be appealable through the same agency procedures as permit issuance or denial.

Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,408 (May 19, 1980);² *see also id.* at 33,405 (“Denials of requests for modification, revocation and reissuance, or termination cannot be formally appealed to the Administrator under § 124.19 but only informally under

² The tentative decision to deny a permit application is the first step towards a final decision under § 124.15, which is formally appealable under § 124.19.

§ 124.5(b)”).³ In fact, EPA’s proposed rule for Part 124 did not contemplate *any* appeal mechanism for denials of requests made under § 124.5 for modification, revocation and reissuance, or termination of a permit. *See* Consolidated Permit Regulations, 44 Fed. Reg. 34,244, 34,327 (proposed June 14, 1979). EPA furthered this intent to distinguish between the types of Board review available when the Agency added subsection (g) to § 124.19, providing for the filing of motions to reconsider final orders. *Changes in Regulations to Reflect the Role of the Environmental Appeals Board in Agency Adjudications*, 57 Fed. Reg. 5320, 5335 (Feb. 13, 1992). EPA has not promulgated a similar provision in or relating to § 124.5(b). Given the separate development and regulatory histories of §§ 124.5(b) and 124.19, the Board declines to read into § 124.5(b) a mechanism by which parties have a right to seek reconsideration of a denial to review an informal appeal. EGT’s characterization of the phrase “final order” in § 124.19(g)⁴ to include Board decisions made pursuant to § 124.5(b) contravenes a clear Agency intent to make reconsideration available as of right only to final orders arising from formal appeals.

Moreover, EGT’s Motion for Reconsideration urges the Board to review either matters previously considered by the Board or new issues EGT raised for the first time in the Motion for

³ Upon creation of the Board, EPA transferred the responsibilities of reviewing formal and informal appeals under §§ 124.19 and 124.5(b), respectively, to the Board. *Changes in Regulations to Reflect the Role of the Environmental Appeals Board in Agency Adjudications*, 57 Fed. Reg. 5335 (Feb. 13, 1992); *Changes in Regulations to Reflect the Role of the Environmental Appeals Board in Agency Adjudications; Amendment*, 57 Fed. Reg. 60,128, 60,129 (Dec. 18, 1992).

⁴ “Final order” is not defined in Part 124.

Leave, which sought the filing of a reply. We have previously stated that "new issues raised at the reply stage of the [] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). Even if the Board were to entertain reconsideration, reconsideration is not "an opportunity to reargue the case in a more convincing fashion." *In re Haw. Elec. Light Co.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB Mar. 3, 1999) (Order Denying Motion for Reconsideration); see also *In re Ariz. Mun. Storm Water NPDES Permits for City of Tucson, Pima County, City of Phoenix, City of Mesa and City of Tempe*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1989) (Order Denying Motion for Reconsideration) ("A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider").

Rather,

Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion.* * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc., 762 F.2d 557, 562 (7th Cir. 1985).

III. CONCLUSION

Because the Board previously declined to review EGT's petition, EGT's Motion for Leave is moot and therefore, denied. Furthermore, 40 C.F.R. Part 124 does not provide for the

reconsideration of a Board order declining review of an informal appeal made under § 124.5(b).⁵

Accordingly, EGT's Motion for Reconsideration is also denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: _____

July 27, 2007

By: _____

Kathie A. Stein

Kathie A. Stein

Environmental Appeals Judge

⁵ In any event, EGT's Motion for Reconsideration does not appear to be well-founded.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order in the matter of *Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-01, were sent to the following persons in the manner indicated:

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Annette Duncan
Secretary