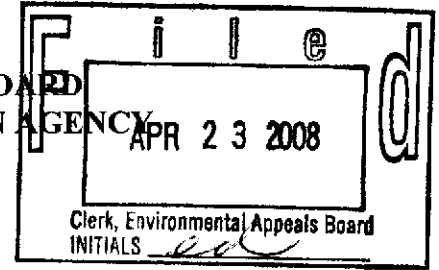


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
District of Columbia Water and)
Sewer Authority) NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12
)
Permit No. DC0021199)
_____)

ORDER DENYING MOTION FOR RECONSIDERATION

I. BACKGROUND

On April 5, 2007, U.S. EPA Region 3 (the "Region") issued a National Pollutant Discharge Elimination System ("NPDES") permit to the District of Columbia Water and Sewer Authority ("WASA"), for the operation of its Blue Plains Wastewater Treatment Plant ("Final Permit"). Four petitions filed with the Board under 40 C.F.R. § 124.19(a) sought review of the Final Permit. On March 19, 2008, the Environmental Appeals Board ("Board") issued an Order Denying Review In Part and Remanding In Part. *See In re Dist. of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12 (EAB Mar. 19, 2008), 13 E.A.D. ____ (hereinafter "*WASA Decision*"). Among other things, the Board rejected WASA's challenge to the Final Permit's total nitrogen effluent limit as well as WASA's assertion that the Region failed to respond to certain comments concerning the nitrogen limit. *See id.* at 43-47.

On April 1, 2008, WASA filed a motion for reconsideration of the *WASA Decision*. *See* District of Columbia Water and Sewer Authority's Motion for Reconsideration (April 1, 2008) ("Motion"). The Motion states that reconsideration is warranted on two issues. First, WASA argues that the Board erred in rejecting WASA's challenge to the Region's decision to include a

total nitrogen effluent limitation of 4,689,000 pounds per year. *See id.* at 2. Second, WASA argues that the Board erred in rejecting WASA's assertion that the Region's response to comments failed to address WASA's concerns relating to alleged deficiencies and unfairness in the process for determining the nitrogen limitation. The Region, as well as the two other petitioners in this matter, the Chesapeake Bay Foundation and, filing together, the Friends of the Earth and the Sierra Club, have filed responses to WASA's Motion. *See* Region III Response to District of Columbia Water and Sewer Authority's Motion for Reconsideration (Apr. 14, 2008); Chesapeake Bay Foundation's Response to WASA's Motion for Reconsideration (Apr. 14, 2008); Friends of the Earth and Sierra Club's Opposition to the District of Columbia Water and Sewer Authority's Motion for Reconsideration (Apr. 15, 2008).

II. DISCUSSION

Motions for reconsideration are authorized by 40 C.F.R. part 124, which provides that the motion must be filed within ten (10) days after service of the final order and "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a clearly erroneous mistake of law or fact. *See In re Core Energy, LLC*, UIC Appeal No. 07-02, at 2 (EAB Jan. 15, 2008) (Order Denying Motion for Reconsideration); *Michigan CAFO General Permit*, NPDES Appeal No. 02-11, at 3 (EAB July 8, 2003) (Order Denying Motion for Reconsideration); *In re Steel Dynamics, Inc.*, PSD Appeal No. 01-03, at 2 (EAB May 7, 2000) (Order Denying COW's Motion for Reconsideration and Stay of Decision).

The filing of a motion for reconsideration “should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.” *In re Haw. Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB Mar. 3, 1999) (citing *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998) (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. *See In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, at 3 (EAB April 10, 2000) (Order Denying Motions for Reconsideration) (citing *Publishers Res., Inc. v. Walker-Davis Publ’ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) (“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 proceeding]. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.”)). For the reasons stated below, we conclude that WASA has failed to demonstrate that reconsideration of the Board’s Decision is warranted.

As stated above, WASA’s Motion raises two issues on which it seeks reconsideration. First, WASA argues that the Board’s *WASA Decision* erroneously rejected WASA’s arguments regarding the process used to develop the permit’s nitrogen effluent limitation.¹ *See* Motion at 2. As the Board explained, however, the allocation process by which the Chesapeake Bay Area

¹ This process was fully explained in the Board’s March 19, 2008 Order Denying Review In Part and Remanding in Part and will not be repeated here. *See WASA Decision*, at 34-37.

States established load allocations for various pollutants by state, is not a condition of the Final Permit itself and is, therefore, outside the scope of the Board's jurisdiction. *See WASA Decision*, at 44-45. While WASA clearly disagrees with this conclusion, *see* Motion at 2-4, WASA has not articulated any clear error in the Board's legal or factual conclusions. Rather, WASA is simply rearguing assertions previously considered and rejected by the Board as a basis for review. WASA has therefore failed to demonstrate that reconsideration is warranted on this issue. Further, to the extent that WASA's Motion is arguing that the comment period on the draft permit did not provide a sufficient opportunity to comment on the nitrogen limit, the Motion fails to convince us that reconsideration is warranted. A review of the record makes clear that WASA was given a full and fair opportunity to challenge the nitrogen limit and that the Region fully considered WASA's objections.²

Second, in its petition for review, WASA argued that the Region failed to respond to its comments regarding unfairness related to the development of the Permit's nitrogen limitation.³ Upon review of the Region's Response to Comments Document,⁴ the Board rejected WASA's argument in this regard. In particular, the Board stated that "[t]he Region dedicated ten pages of

² We note that, in discussing the 2006 draft permit, the Region concluded that any exceedance of the 4.689 million pounds per year mass load limitation would have a reasonable potential to exceed state water quality standards. *See WASA Decision*, at 38-39. As the Board stated in the *WASA Decision*, "[d]uring the comment period for the December 2006 Draft Permit, WASA again objected to the nitrogen limit, raising arguments similar to the ones it now raises before the Board * * *. The Region acknowledged these comments, yet determined that, despite WASA's comments, the 4,689,000 pounds-per-year total nitrogen limit was appropriate, and thus the Region included it in the final permit." *Id.*

³ *See WASA Decision*, at 47.

⁴ The Response to Comments Document is cited in the *WASA Decision* as: Reg. 07 Ex. 4 (Apr. 5, 2007 Response to Comments). *See WASA Decision*, at 47 n.59.

its Response to Comments to WASA's comments" and addressed WASA's fairness concerns on pages 20-21 of its Response to Comments Document. *See WASA Decision*, at 47. While WASA may disagree with this conclusion, it has once again failed to demonstrate that reconsideration is warranted. An examination of the Region's response to comments document indicates that the Region did indeed adequately address WASA's concern on this issue and nothing in the Motion demonstrates that this conclusion was erroneous.

III. CONCLUSION

For the above-stated reasons, WASA's motion to reconsider the Board's March 19, 2008 Order Denying Review in Part and Remanding in Part is hereby **DENIED**.

So ordered.⁵

Dated:

April 23, 2008

ENVIRONMENTAL APPEALS BOARD

By: _____

Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

⁵ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Motion for Reconsideration in the matter of District of Columbia Water and Sewer Authority, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, were sent to the following persons in the manner indicated:

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Dated: 4/23/2008


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