

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

_____)
In re:)
)
Arizona Municipal Storm)
Water NPDES Permits for City)
of Tucson, Pima County, City)
of Phoenix, City of Mesa,) NPDES Appeal No. 97-3
and City of Tempe)
)
Permit Nos. AZS000001,)
AZS000002, AZS000003,)
AZS000004, and AZS000005)
_____)

ORDER DENYING MOTION FOR RECONSIDERATION

On June 3, 1998, the Defenders of Wildlife and the Sierra Club ("petitioners") filed a request for reconsideration of the Environmental Appeals Board's May 21, 1998 Order Denying Review in the above-captioned matter. Motion to Reconsider Order Denying Review ("Motion to Reconsider"). Petitioners contend that reconsideration is warranted because the Board erred by: 1) concluding that a Regional permitting authority may hold informational meetings with a permittee during the comment period; 2) concluding that the permits will ensure compliance with State water quality standards absent numeric effluent limitations and whole effluent toxicity limits; and 3) failing to require that the permit be revised to include whole effluent

toxicity testing. For the reasons stated below the motion for reconsideration is denied.

Under 40 C.F.R. § 124.91(i), motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. See *In re Gary Development Co*, RCRA (3008) Appeal No. 96-2, at 2 (EAB, Sept. 18, 1996) (Order Denying Motion for reconsideration); *In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 2 (EAB, Dec. 17, 1993) (Order Denying Reconsideration and Stay Pending Reconsideration or Appeal). 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 Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992). 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 *Publishers Resource, Inc. v. Walker-Davis Publications, 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] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." (citation omitted). Upon review of the motion for reconsideration and the Region's response, we conclude that the motion largely consists of arguments or information raised by petitioners to the Board for the first time. These arguments will not be considered. As to issues raised in the original petition for review, petitioners have failed to demonstrate that reconsideration of the Order Denying Review is warranted.

First, with regard to petitioners' assertion that Region IX improperly met with the permittees during the public comment period, petitioners reiterate their assertion that such a meeting was improper. Petitioners also raise new arguments, not raised in their petition. In particular, petitioners assert that the applicable regulations require that any meetings with a permittee be transcribed or recorded and made available to the public and that the failure to do so constitutes a violation of due process. Motion to Reconsider at 1-2. Petitioners further state that the notes of the meeting between the permittees and Region IX were "uninformative and largely incomprehensible." *Id.* at 2. However, because these arguments were not raised in the petition for review, they are not appropriate for consideration here. See *In re Gary Development, supra*, at 3-4 (a petitioner is precluded

from raising new arguments or presenting new evidence in a motion for reconsideration).

As the Board stated in the Order Denying Review, nothing in the regulations governing the issuance of an NPDES permit prohibits the Regional permitting authority from meeting with a permittee during the public comment period. Further, notes from the meeting (including an agenda) were included in the administrative record and any changes made to the permit after the close of the comment period were fully explained in the Region's response to comments.¹ Finally, as the Board stated, the applicable regulatory prohibition on *ex parte* communications applies only after the granting of an evidentiary hearing. 40 C.F.R. § 124.78(d). As no hearing was granted in this case, the prohibition is inapplicable.

On the issue of whether the permits assure compliance with State water quality standards, petitioners fail to convince us that our rejection of petitioners' assertion that the permit must be revised to include numeric effluent limitations is erroneous. As stated in the Order Denying Review, the Agency has determined that where, as it expressly found here, numeric effluent limitations prove infeasible, permits may include best management

¹We note that although the notes are not entirely clear, they do not, contrary to petitioners' suggestion, indicate that any substantive agreement or decision was reached "behind closed doors." Rather, as far as we can determine from the record, the notes appear to support the Region's assertion that the meeting was informational in nature.

practices. The motion for reconsideration with regard to this issue consists largely of new arguments not raised in the original petition. In particular, petitioners argue that storm water discharges governed by the permits violate Arizona's water quality standards for heavy metals and toxicity. Motion to Reconsider at 4. In support of this assertion, petitioners state:

According to EPA, storm water discharges in Phoenix on occasion violate state water quality standards for heavy metals such as copper, lead and zinc. Phoenix discharges also show "frequent exceedences" of water quality standards for fecal coliform. Violations of standards for DDE are shown in storm water discharge data from Mesa.

* * * * *

According to EPA's own submissions to this Board, test results of storm water discharges in Maricopa County (which encompasses Phoenix, Tempe, and Mesa) showed that 50% of the first flush samples were toxic to test organisms * * * and 25% of the composite samples.

Id. at 4 (citations omitted). Petitioners further state that "EPA's assertion that it lacks adequate information to set numeric or WET limits is specious." *Id.* at 6. However, as these arguments were not raised in the original petition, they will not be considered here. See *In re Gary Development, supra*.

Finally, petitioners assert that the Board erred in failing to require that the permits be revised to include a whole effluent toxicity testing requirement. Review was denied because petitioners failed to state why the Region's response to comments on this same issue was erroneous or deficient in any respect.

The Motion to Reconsideration does not dispute the Board's rationale for denying review on this issue. That is, petitioners do not contend that the original petition did anything more than restate petitioners' comments on the draft permit without explaining why the Region's response to comments was erroneous.²

Accordingly, for the above-stated reasons, Petitioners' motion for reconsideration of the Board's May 21, 1998 Order Denying Review is denied.³

²Petitioners have also raised additional arguments not raised in the original petition. In particular, petitioners state that EPA has "conced[ed] that its national draft policy recommends that toxicity monitoring be required for storm water[,]" and that such testing "is an 'important' aspect of the Agency's toxics control program." Motion to Reconsider at 7. Petitioners also argue that EPA's Interim Permitting Approach recommends that storm water permits include WET testing requirements. *Id.* at 8. In its response to the Motion to Reconsider, the Region disputes the inferences petitioners draw from the cited documents. EPA Region IX's Response to Motion for Reconsideration at 9-10 (arguing that the documents cited by petitioners are not relevant and would not require WET testing in these permits). As previously stated, a motion for reconsideration should not be regarded as an opportunity to raise additional arguments or to reargue the case in a more convincing fashion. Because petitioners' arguments in this regard were not raised in the original petition for review, we do not consider them here.

³In its Order Denying Review, the Board dismissed three issues raised in the original petition because these issues were not ripe for review. We reached this conclusion because the Region had withdrawn the portions of the permits of concern to petitioners and has issued modified permits. As the Board stated, Petitioners will now have the opportunity to seek administrative review of the reissued provisions. Petitioners request that the Board reconsider its dismissal on one of these issues (whether the storm water management programs incorporated into the permits fail to quantify the pollution reductions estimated to occur as a result of the pollution control measures
(continued...)

So ordered.

Dated: 8/17/98

ENVIRONMENTAL APPEALS BOARD

By: /s/
 Kathie A. Stein
Environmental Appeals Judge

³(...continued)
required by the permits). According to petitioners:

In the modifications, EPA has included a requirement that each permittee submit a quantification of the pollution reductions estimated to occur as a result of the storm water programs in the permits. However, EPA has not provided for any action in response to such estimates.

Motion to Reconsider at 9-10. Petitioners have expressed concern that "the Agency will claim that petitioners cannot argue for denial or further amendment of the permits as part of an appeal of the modifications, but rather had to do so in this proceeding." *Id.* at 10. As the Board stated in its Order Denying Review, however, petitioners will be able to seek administrative review of the reissued permit provisions. This includes an evidentiary hearing request as well as an appeal to the Environmental Appeals Board. In fact, petitioners have filed a petition for review from the modified permit and that petition is currently pending before the Board. Petitioners' concerns are therefore unwarranted.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Arizona Municipal Storm Water NPDES Permits for the City of Tucson, Pima County, City of Phoenix, City of Mesa, and City of Tempe, Arizona, NPDES Appeal No. 97-3, were sent to the following persons in the manner indicated:

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Dated: 8/17/98

/s/
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Secretary