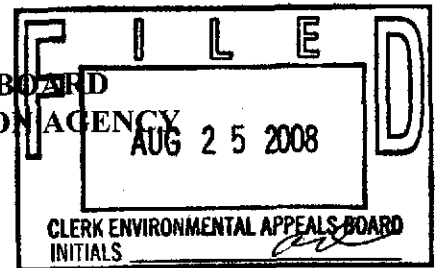


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC



_____)
In re:)

Environmental Disposal Systems, Inc.)

UIC Appeal No. 07-03

UIC Permit Nos. MI-163-1W-C007 and)
MI-163-1W-C008)
_____)

**ORDER DENYING MOTION FOR RECONSIDERATION
AND GRANTING STAY**

In October 2007, U.S. Environmental Protection Agency (“EPA” or “Agency”), Region 5 (“Region”), terminated two Underground Injection Control (“UIC”) permits, numbers MI-163-1W-C007 and MI-163-1W-C008 (“Permits”), issued to Environmental Disposal Systems, Inc. (“EDS”). The Permits, issued under the Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300h–300h-8, and regulations implementing the UIC program at 40 C.F.R. parts 124, 144-148, authorized EDS to operate two existing Class I hazardous waste injection wells at a facility in Romulus, Michigan, (“Facility”) through September 6, 2015. A.R. 1, 2, *available at* EPA Exs. N (UIC Permit MI-163-1W-C007), O (UIC Permit MI-163-1W-C008). On November 21, 2007, the Police and Fire Retirement System of the City of Detroit, RDD Investment Corporation, and RDD Operations, LLC,¹ (collectively, “PFRS/RDD”) timely filed a petition requesting that the Environmental Appeals Board (“EAB” or “Board”) review the termination

¹ RDD Investment Corporation, and RDD Operations, LLC , together referred to as “RDD” herein, are wholly owned subsidiaries of the Police and Fire Retirement System of the City of Detroit, an investor in the EDS wells.

decision (“Petition”). Thereafter, the Region filed a response to the Petition, PFRS/RDD filed a reply to the Region’s response, and on July 18, 2008, the Board issued its Order Denying Review. *In re Env'tl. Disposal Sys., Inc.*, UIC Appeal No. 07-03, slip op. (EAB July 18, 2008), 13 E.A.D. ____ (“*EDS Decision*”).

On July 31, 2008, PFRS/RDD filed a motion seeking reconsideration of the *EDS Decision*. See Motion for Reconsideration and Motion for Stay of Order Denying Petition for Review and Stay of Termination of UIC Permits Pending Appeal (July 30, 2008) (“Motion”). PFRS/RDD also requested a stay of the *EDS Decision*. *Id.* The Region filed its response to the Motion on August 18, 2008. Response to the Petitioners’ Motion for Reconsideration and Motion for Stay (Aug. 18, 2008) (“Response”). PFRS/RDD subsequently filed a Notice of Concurrence with the EPA’s Response to Petitioner’s Motion for Stay (“Notice of Concurrence”).

The Motion states that reconsideration is warranted on three issues. First, PFRS/RDD argue that the Board erred in finding that the Region “was not required to consider RDD’s compliance actions in reaching the decision to terminate, despite the fact that under the law, RDD as the ‘owner’ of the Facility, can discharge the duties of the permittee or operator.” Motion at 3. Second, PFRS/RDD argue that the Board erred in finding that the Region did not abuse its discretion when it “omi[tted] the ‘primary’ reason for termination from the Fact Sheet and Notice of Intent to Terminate” when deciding to terminate the Permits. *Id.* at 7. Finally,

PFRS/RDD argue that the Board “erred in accepting the [Region’s] explanation for its choice to terminate the Permits without considering a transfer request, as evidence in the administrative record contradicts the [Region’s] explanation, and the [Region] has not acted consistently when faced with similar situations.” *Id.* at 9. The Region contends that PFRS/RDD relies on arguments previously addressed in the *EDS Decision*. Response at 2.

II. DISCUSSION

A. Motion for Reconsideration

Motions for reconsideration are authorized under 40 C.F.R. part 124, which provide that such motions must be filed within ten days² 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

² The Part 124 rules provide:

Whenever a party * * * has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days shall be added to the prescribed time.

40 C.F.R. § 124.20(d).

(EAB July 8, 2003) (Order Denying Motion for Reconsideration); *In re Steel Dynamics, Inc.*, PSD Appeal No. 01-03, at 2 (EAB May 7, 2001) (Order Denying COW's Motion for Reconsideration and Stay of Decision).

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) (Order Denying Motion for Reconsideration) (citing *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998)). Failure to present the strongest case in the first instance does not entitle a party to a second chance in the form of a motion to reconsider. *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). While reconsideration of a decision may be warranted to present newly discovered evidence, a party is not entitled to reconsideration so that it may introduce new evidence that could have been adduced during the pendency of the original decision. *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). For the following reasons, we conclude that PFRS/RDD have failed to demonstrate that reconsideration of the *EDS Decision* is warranted.

As stated above, the Motion raises three issues on which PFRS/RDD seek reconsideration. First, PFRS/RDD argue that the *EDS Decision* erroneously failed to consider

the regulations that require the owner or operator of a UIC injection well to maintain records of the well's operation and other records concerning financial assurances and to implement required well testing. Motion at 4. These arguments echo those PFRS/RDD made in their Petition. *Compare id. with* Petition at 38-40. We addressed these arguments and explained that the Region relied on a regulatory cause for UIC permit termination that is based on the actions or non-actions of the permittee, in this case EDS, and upon finding that cause existed to terminate the Permits, the Region exercised its discretion to do so. *EDS Decision*, slip op. at 7, 13 E.A.D. at ____.

While PFRS/RDD clearly disagree with the Region's actions upon finding that EDS violated conditions of the Permits, PFRS/RDD have not articulated any clear error with the Board's legal conclusion that the Region is authorized to terminate the Permits upon finding that the permittee has violated permit conditions and that it is appropriate for the Region to focus on EDS's actions or non-actions. In the *EDS Decision*, the Board made no determination as to whether RDD, as the owner, did or did not discharge the operator's obligations, but PFRS/RDD failed to provide any legal support for their assertion that RDD's alleged discharge of these obligations must be considered in a permit termination proceeding.

PFRS/RDD also argue that the Board erroneously concluded that the Region could rely on "abandonment," which PFRS/RDD allege was not discussed in the Fact Sheet and appeared as a post-hoc rationalization in the Response to Comments as a primary reason to terminate the

Permits. Motion at 7. We addressed this argument in the *EDS Decision* and stated that the Region found that the permit holder, EDS, “abandoned its interest in the Permits.” Slip op. at 17, 13 E.A.D. at _____. In support, we cited the Fact Sheet, an inspection report, and the Region’s Response to Comments document. *Id.* The Fact Sheet also states that “EDS abandoned all interest in, and operations at, the wells.” Fact Sheet at 1. Thus, the Region did include “abandonment” in the Fact Sheet, and PFRS/RDD fail to demonstrate otherwise.

Moreover, the *EDS Decision* is clear that abandonment was not a regulatory cause for terminating the Permits, but rather an influential factor as to why the Region pursued termination as a *response* to finding cause – in this case EDS’s noncompliance with permit conditions – to terminate. *EDS Decision*, slip op. at 35 n.23, 13 E.A.D. at _____ (“[A]bandonment influenced the Region’s decision to pursue a termination *action*, rather than (or in addition to) a penalty *action*.”). As we discussed in the *EDS Decision* and above, the Region may, as it has done, terminate a permit upon finding regulatory cause to do so. PFRS/RDD’s argument in favor of reconsideration is a reiteration of assertions previously considered and rejected by the Board as a basis for review. Accordingly, reconsideration is not warranted on these grounds.

Finally, PFRS/RDD argue that the Board erred when it concluded that the Region’s decision to process the request from RDD to transfer the Permits to Environmental Geo-Technologies (“EGT”) only after completing the termination proceeding was a reasonable exercise of agency discretion. Motion at 9. PFRS/RDD assert that the Region’s explanation

articulated before the Board contradicts a February 15, 2007 recommendation the director of the Region's Water Division made to the Regional Administrator. *Id.* (citing Memorandum from Jo Lynn Traub, Director, Water Division, U.S. EPA Region 5 to Mary Gade, Administrator, U.S. EPA Region 5 (February 15, 2007), available at A.R. 37 ("Traub Memorandum")).

Although the Traub Memorandum is included in the administrative record for the termination decision, PFRS/RDD failed to bring the memorandum to the Board's attention in the Petition. As noted previously, a party may not use a motion for reconsideration as a vehicle for introducing evidence that could have been introduced during the pendency of the original appeal. Since the Traub Memorandum was easily ascertainable during the original proceeding before the Board, it does not constitute newly discovered evidence and cannot be invoked to obtain reconsideration of the *EDS Decision*. See *Publishers Res.*, 762 F.2d at 561.³

PFRS/RDD also assert that the Board's acceptance of the Region's explanation contravenes our holding in *In re Waste Technologies Industries*, 5 E.A.D. 646 (EAB 1995), and condones inconsistent, if not conflicting, Agency behavior in the face of two similar fact patterns. We note that the Petition cited *Waste Technologies* in support of the argument that the Region should have elected to process the transfer request prior to the termination. Petition at 53 (citing 5 E.A.D. at 665). This argument in the Motion is an attempt to bolster an argument that the

³ For these reasons, we make no determination as to whether the memorandum supports PFRS/RDD's position that it contradicts statements the Region has made before the Board.

Board has already considered and rejected as a basis for review. Accordingly on these grounds, reconsideration is not appropriate.

B. *Motion for Stay of the EDS Decision*

PFRS/RDD also seek a stay of the *EDS Decision* pending appeal to the U.S. Court of Appeals for the Sixth Circuit. Motion at 2. The Region, without conceding that PFRS/RDD “have any likelihood of success on the merits of their appeal,” states that the Region “does not oppose either staying the effective date of the [*EDS Decision*] or suspending this proceeding for a six month period.” Response at 3. The Region explains that EGT, the intended transferee of the Permits, applied for permits to operate the wells at the Facility. *Id.* The Region has determined the application to be “administratively complete.” *Id.* The Region anticipates issuing a draft decision on EGT’s application within six months of the date the Region filed its Response, and states that “in the interim[,] the status quo has been and will be maintained.” *Id.* at 3-4; *see also* Motion at 17 (“A stay will merely continue the status quo, which has been in place since November 2006 * * *”). PFRS/RDD concurs with EPA’s proposed six-month stay of the effective date of the *EDS Decision*. Notice of Concurrence at 2.

For good cause shown, the Board grants PFRS/RDD’s request to stay the effective date of the *EDS Decision* until February 18, 2009.⁴ On or before February 18, 2009, the parties shall

⁴ For purposes of judicial review, a final agency action occurs only after “the
(continued...)

submit a report regarding the status of the draft decision and shall include a discussion of whether it is appropriate to continue the stay. Either party may submit, prior to that date, a motion to vacate the stay.

III. CONCLUSION

For the foregoing reasons, PFRS/RDD's motion to reconsider the Board's July 18, 2008 Order Denying Review is hereby **DENIED**. The Board further **GRANTS** a stay of the effective date of the July 18, 2008 Order Denying Review until February 18, 2009.

So ordered.⁵

ENVIRONMENTAL APPEALS BOARD

Dated: August 25, 2008

By: 

Edward E. Reich
Environmental Appeals Judge

⁴(...continued)

Environmental Appeals Board issues notice to the parties that review has been denied[.]” 40 C.F.R. § 124.19(f)(1)(i). The Board's *EDS Decision* shall not constitute such notice while the effective date of the decision remains stayed.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration and Granting Stay in *Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03, were sent to the following persons in the matter indicated:

**By Certified U.S. Mail,
Return Receipt Requested:**

Joseph E. Turner
Ronald A. King
Kristin B. Bellar
Clark Hill PLC
212 East Grant River Avenue
Lansing, MI 48906
Facsimile: (517) 318-3099

By EPA Pouch Mail:

Thomas J. Kreuger
Associate Regional Counsel
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604
Facsimile: (312) 886-0747

By EPA Interoffice Mail:

Mindy G. Nigoff
Office of General Counsel
U.S. EPA - MC 2355A
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Date: AUG 25 2008


Annette Duncan
Secretary