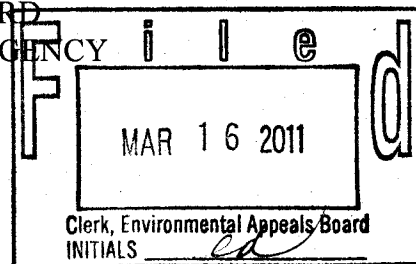


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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In re: )  
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Smith Farm Enterprises, LLC )  
)

Docket No. CWA-03-2001-0022 )  
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CWA Appeal No. 08-02

**ORDER DENYING MOTION FOR RECONSIDERATION  
OF ORDER DENYING MOTION FOR LEAVE TO SUPPLEMENT BRIEFING**

On October 7, 2010, Smith Farm Enterprises, LLC (“Smith Farm”) filed with the Environmental Appeals Board (“the Board”) a Motion for Reconsideration of the Board’s September 28, 2010 Order Denying [Smith Farm’s] Motion for Leave to Supplement Briefing. As stated in the Board’s Order, Smith Farm sought to file its supplemental brief on July 12, 2010, eight days prior to oral argument and more than a year after filing the initial brief in this appeal. The Region opposed the motion. The Board concluded the motion was filed significantly out of time, without explanation for the delay, and denied the motion as untimely. Smith Farm now seeks to provide explanation for the delay and asserts that reconsideration is warranted because the Board “erroneously concluded that the issue of fair notice had not been raised in the case prior to July 9, 2010.” U.S. EPA Region 3 (the “Region”) opposes the Motion for Reconsideration. For the reasons articulated below, the Board denies the Motion to Reconsider its September 28, 2010 order.

Motions for reconsideration are authorized under 40 C.F.R. § 22.32, which provides that such motions “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 has made a demonstrable error, such as a mistake of law or fact. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration); *see also in re Pepperell Assocs.*, CWA Appeal Nos. 99-1 & 99-2 (EAB June 28, 2000) (Order Denying Reconsideration) (denying reconsideration in a CWA penalty case based on respondent’s failure to identify a demonstrable error of fact or law). Board precedent establishes that the reconsideration process should not be regarded as “an opportunity to reargue the case in a more convincing fashion.” *Knauf*, at 2-3 (quoting *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992). *See also, e.g., In re Pyramid Chemical Co.*, RCRA-HQ-2003-0001 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration) (denying reconsideration of an argument raised and rejected by the Board in the Board’s prior order); *see also In re Environmental Disposal Systems, Inc.*, UIC Appeal No. 07-03 (EAB Aug. 25, 2008) (Order Denying Motion for Reconsideration) (concluding that the motion for reconsideration simply reiterated arguments previously considered and rejected by the Board and did not identify any error warranting reconsideration); *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration) (explaining that while the permittee clearly disagreed with the Board’s conclusion, the permittee had not articulated any clear error in the Board’s legal or

factual conclusions, but was simply rearguing assertions previously considered and rejected by the Board).

Federal courts employ a similar standard. *See, e.g., 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] motion. \* \* \* Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.”) (citation omitted); *Ahmed v. Ashcroft*, 388 F.3d 247 (7th Cir. 2004) (noting that the rule governing motions for reconsideration, applies generally, and that “[t]o be within a mile of being granted, a motion for reconsideration has to give the tribunal to which it is address a reason for changing its mind,” such as “a change of law” or “perhaps an argument or aspect of the case [that] was overlooked”); *see also Arcega v. Mukasey*, 302 Fed. Appx. 182 (4th Cir. 2008) (quoting *Ahmed v. Ashcroft* and upholding the Board of Immigration Appeal’s denial of a motion for reconsideration because the petitioner failed to show how the Board erred as a matter of law or fact in reaching its decision).

As stated above, the Board denied Smith Farm’s Motion for Leave to Supplement Briefing as untimely because Smith Farm filed its supplemental brief on the eve of oral argument, more than fifteen months after filing its initial brief in this post-remand appeal, and after acknowledging that it intended to file the brief for at least eight months prior to filing, with

no explanation as to why the filing was delayed. Smith Farm seeks to explain in its Motion for Reconsideration that the late filing was due to the personal circumstances of one of its more-recently retained counsel. While the Board regrets that personal circumstances required counsel to step away from her case responsibilities, these circumstances do not justify the failure of Smith Farm to raise the issue in its principle brief, or the failure to file its supplemental brief long before fifteen months had passed with the assistance of any of the other counsel representing Smith Farm. Nothing in Smith Farm's Motion for Reconsideration leads the Board to conclude that the Board erred in determining that Smith Farm's eleventh-hour Motion for Leave to Supplement Briefing with an entirely new issue for appeal was anything but *significantly* out of time. *See* Order Denying Supplemental Briefing at 2 ("It is axiomatic that an appellant's principal brief should contain all issues presented for review. *See* 40 C.F.R. § 22.30(a) (providing that an appeal brief "shall contain \* \* \* a statement of the issues presented for review \* \* \* [and] argument on the issues presented")) (some citations omitted). The requirement to identify issues presented for review and argument on those issues in the appeal brief at the outset of an appeal is not just a procedural nicety that may be disregarded at the whim of a party; it is instrumental to an orderly and efficient administrative enforcement process. *See In re Tri-County Builders Supply*, CWA Appeal No. 03-04 at 7 (EAB, May 24, 2004) (Order Dismissing Appeal); *see also id. In re Tri-County Builders Supply*, CWA Appeal No. 03-04 at 3 (EAB July 27, 2004) (Order Denying Motion for Reconsideration). Smith Farm's time for raising a fair notice defense had and has, quite simply, passed.

Rather than asserting Board error in its determination of untimeliness, Smith Farm focuses in its Motion for Reconsideration on the Board's alternative conclusion that the issue of fair notice was not raised in the case prior to July 8, 2010. See Smith Farm's Motion for Reconsideration at 1; see also *Order Denying Reconsideration for Leave to Supplement Briefing* at 3. In support of its assertion that "fair notice" was in fact previously raised, Smith Farm provides citations identical to those provided in Smith Farm's Reply in Support of Motion for Leave to File Supplemental Brief, CWA Appeal No. 08-02, Docket No. 51 at 2 (Jul. 23, 2010), the substance of which the Board fully considered and rejected prior to denying supplemental briefing. In particular, Smith Farm does not cite to its appeal brief in the matter currently before the Board, but rather cites to the appeal brief that Smith Farm filed in its first appeal to the Board, prior to the remand, as well as to two of the Region's filings from prior to remand.<sup>1</sup>

Ignoring for a moment the fact that Smith Farm points to nothing raised in the current appeal, the citations from the previous appeal are equally non-persuasive. As the Board explained previously, the issue of "fair notice" was never raised in any of the proceedings prior to the remand. *Order Denying Motion for Leave to Supplement Briefing* at 3. Every citation Smith Farm provides refers to factual elements that *allegedly* are dispositive of a fair notice claim, had

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<sup>1</sup> Specifically, Smith Farm cites: (1) "Respondent's Appeal Brief" which the Board concludes based on the pages cited refers to Respondent's Appeal Brief in EAB Appeal No. CWA-05-05, Docket No. 2 (filed Jun. 3, 2005); (2) "Complainant's Post-Hearing Reply Brief" Docket No. CWA-03-2001-0022 (Feb. 17, 2004); and (3) Complainant's Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act," which the Board concludes was also filed in EAB CWA Appeal No. 05-05, Docket No. 8 (filed July 1, 2005). See Smith Farm's Motion for Reconsideration at 2.

one been properly raised.<sup>2</sup> As explained in the Board's Order denying supplemental briefing, however:

the fact that certain elements of the fair notice doctrine may be present in the factual record or that "facts [allegedly] dispositive of the issue \* \* \* have been raised" (Reply in Supp. of Motion for Leave to File Suppl. Br. at 1-2,3), cannot and do not substitute for timely and sufficiently raising the issue or making the relevant arguments below. *See, e.g., In Re C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 598 (EAB 1994) (explaining that Part 22 limits appeals to adverse rulings and orders of the presiding officer and that because the issue was not raised, the presiding officer could not rule on the issue and, thus, the issue cannot be appealed); *See also In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989) (explaining that objections to initial decisions must be sufficient enough to inform the agency of one's position).

*Order Denying Supplemental Briefing* at 3. The Board stands by its conclusion that, even if Smith Farm had timely raised the issue of fair notice in this appeal, and it did not, the issue was not properly raised below. *See Order Denying Supplemental Briefing* at \_\_\_ (citing 40 C.F.R. Section 22.30(c) as limiting the "parties' rights of appeal \* \* \* to those issues raised during the course of the proceeding and by the initial decision."). 40 C.F.R. § 22.30(c).

Finally, although Smith Farm attempts in one sentence to reargue the relevance of the affidavit from John Paul Woodley, Jr., the Board is not persuaded that it made any factual or legal error in this regard. For all of the reasons provided in the Board's Order denying Supplemental briefing, Mr. Woodley's opinion in this matter is irrelevant.

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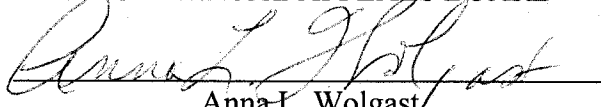
<sup>2</sup> The Board draws no conclusions with respect to the viability of a fair notice claim had one been properly raised.

The Board concludes that Smith Farm has not identified any clearly erroneous factual or legal conclusions in the Board's prior Order Denying Supplemental Briefing. As such, the Board denies Smith Farm's Motion for Reconsideration.

So Ordered.

Dated: March 16, 2011

ENVIRONMENTAL APPEALS BOARD<sup>3</sup>



Anna L. Wolgast  
Environmental Appeals Judge

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<sup>3</sup> The three-member panel deciding this matter includes Environmental Appeals Judges Anna L. Wolgast, Kathie A. Stein, and Charles J. Sheehan. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration of Order Denying Motion for Leave to Supplement Briefing in the matter of Smith Farm Enterprises, LLC, CWA Appeal No. 08-02, were sent to the following persons in the manner indicated.

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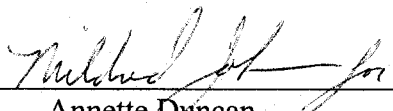
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Annette Duncan