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

In re:	)	
Pepperell Associates	)	CWA Appeal Nos. 99-1 & 99-2
Docket No. CWA 2-I-97-1088	)	

ORDER DENYING MOTION FOR RECONSIDERATION

In a Motion for Reconsideration ("Motion") filed May 23, 2000, Petitioner Pepperell Associates ("Pepperell") requests reconsideration of the Environmental Appeals Board's May 10, 2000 Final Decision ("Final Decision") in the above-captioned proceeding. Pepperell contends that reconsideration is warranted because the Board erred by: (1) finding that it was reasonably foreseeable that oil could migrate from the boiler room floor to the sewer conduit below the company's oil handling facility (the "Facility"); (2) finding that the "reasonably be expected to discharge" and "storage capacity" thresholds determining Spill Prevention Control and Countermeasure Plan ("SPCC") jurisdiction should be treated independently; (3) determining that the company's installation of a new above-ground storage tank materially affected the Facility's likelihood of discharging oil into a navigable water; (4) determining that a discharge of oil from the

Facility was reasonably foreseeable despite the fact that oil traveled through a sewer conduit and combined sewer and stormwater overflow ("CSO") before reaching a navigable water; and (5) unfairly and unconstitutionally using as a basis for enhanced penalties under Count I a time period during which the company lacked reasonable notice of its SPCC obligations. Upon review of the Motion and the Region's response brief filed June 6, 2000, we deny Pepperell's motion, for the reasons provided below.

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 an attempt to reargue in more convincing fashion points that we previously rejected in our Final Decision. These arguments will not be considered. In addition, Pepperell raises one new issue that is waived because the company could have raised it previously. For these reasons, Pepperell has failed to demonstrate that reconsideration of the Final Decision is warranted.

Reasonable Expectation of Oil Migrating from the Facility's Boiler Room to the Sewer Conduit

In its Motion, Pepperell disputes our finding that a floor drain provided a direct connection between the boiler room floor and the sewer conduit below, thus making the migration of spilled oil to the sewer conduit reasonably foreseeable. Motion at 2 n.2. In raising this argument, Pepperell asserts that there was no "evidence to support a finding of a direct drain connection," Motion at 2, because we misconstrued the testimony of Pepperell owner Robert Gladu regarding this matter.

Pepperell is mistaken in its argument because the record supports a finding that the boiler room drain provided a direct pathway from the boiler room floor to the sewer conduit below. In his testimony, Robert Gladu, when asked by his counsel whether there was a direct connection between the boiler room and sewer conduit, answered that the boiler room drain provided such a connection. Hearing Transcript at 753. What Pepperell appears to misconstrue as a lack of evidentiary support for such a connection is our statement that the record left uncertain whether or not Mr. Gladu actually knew of this direct connection at the time of the oil spill. Final Decision at 18. In any case, we determined that Mr. Gladu's

knowledge was not dispositive, because facility owners "should be charged with knowledge of the functioning of common, visible structures such as the boiler room floor drain." Final Decision at 18 n.10.

Because Pepperell is incorrect in its arguments on this point, we deny reconsideration on this issue.

Independence or Interdependence of "Reasonably Be Expected to Discharge" and "Storage Capacity" Thresholds

In its Motion, as in its earlier Petition for Review, Pepperell argues that the Board erred when it held that the "reasonably be expected to discharge" and "storage capacity" thresholds established in 40 C.F.R. § 112.1 for determining SPCC jurisdiction should be viewed independently. Motion at 3. Maintaining that these jurisdictional criteria should instead be interdependent, Pepperell argues that when it completed the disconnection of two underground storage tanks on October 31, 1996, it concomitantly rendered the individual tanks not reasonably likely to discharge oil *and* reduced the Facility's total storage capacity by the storage capacity of the two tanks. *Id.* The upshot of the tanks' disconnection, claims the company, was a reduction in Facility storage capacity to below the jurisdictional threshold, thus

precluding the company's SPCC liability as of October 31, 1996. Pepperell contends that our alleged error resulted in finding a longer period of violation than warranted under Count I of the amended complaint. *Id.*

In our Final Decision, we stated that Pepperell's above interpretation of the two jurisdictional criteria was "incompatible with a straightforward reading of the SPCC regulations," Final Decision at 21, which clearly supported separate treatment of the two thresholds. Citing the regulatory text, we emphasized that the "regulations are premised on the storage capacity of facilities as a whole rather than on individual units within facilities" and that "facilities that have large storage capacity and a potential for harmful discharge must have SPCC plans * * * irrespective of the discharge potential of individual storage units within the facility." *Id.* at 21-22. Under this interpretation, we concluded that the Pepperell's disconnection of two underground storage tanks did not terminate SPCC jurisdiction over the Facility.

In opposing our determination in its motion for reconsideration, Pepperell repeats earlier arguments that we previously rejected in our Final Decision. Because Pepperell is seeking to reargue its case in more convincing fashion,

without otherwise indicating in the Motion how we committed a clear error of fact or law, the company is not entitled to reconsideration on this point. *Southern Timber Products,* 3 E.A.D. at 889.

Reasonable Likelihood of Oil Discharging Into Navigable Waterway Given the Fact that Oil Migrated to a Navigable Water Via a Sewer Conduit and CSO

Pepperell challenges in two respects our determination that a discharge of oil from the Facility into a navigable waterway was reasonably foreseeable. First, contending that the Facility's locational and geographical features did not make a discharge of oil foreseeable, the company states that it was "the facility's connection to a municipal sewer line -- not its geographical and locational aspects -– which allowed the discharge to occur." Motion at 5. In this regard, the company states that employing the Board's standard of reasonable foreseeability, "any facility in the United States that is connected to a municipal sewer line is required to have an SPCC Plan if the facility has more than 42,000 gallons worth of storage capacity and the municipal sewer line has a CSO." *Id.* Second, the company contends that the operation of a CSO on the morning of the spill, allowing oil in the sewer

conduit to enter a navigable waterway, was not reasonably foreseeable. In support of this argument, Pepperell points to the company owners' lack of environmental expertise and the routine discharge of raw sewage through a CSO not being "something that an average business owner would know or even suspect." *Id* at 6.

In our Final Decision, we addressed and rejected these same arguments. We explained that the fact that oil entered a navigable water through a sewer conduit was a highly relevant "geographic and locational" factor in determining the Facility's reasonable expectation of discharge because the sewer conduit facilitated drainage to a navigable waterway. *Id.* at 19. We also explained that the City of Lewiston had a long-standing practice of discharging raw sewage into navigable water through CSOs because of the City's lack of sewer lines, and that a reasonably alert oil facility owner in Lewiston should have been aware of this fact and the consequent need to take preventive measures. *Id.* at 19-20.[1]

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[1]In its motion, Pepperell claims that there is no evidence that the company owners actually knew about the existence of a CSO prior to the oil spill. *See* Motion at 5 n.4. Although our Final Decision was predicated on the view that the company *should have known* about the existence of a CSO, thus making Pepperell's claim irrelevant, we note that the record appears to cast doubt upon the company's claim. The record indicates that upon failing to trace the path of spilled oil within the

Because Pepperell merely repeats earlier arguments on the Facility's foreseeability of discharge that we have previously rejected and does not otherwise demonstrate in its Motion how we committed a manifest error of fact or law, we deny reconsideration of this issue. *In re Southern Timber Products, Inc.*, 3 E.A.D. at 889.

Impact of Installation of Above-Ground Storage Tank on Likelihood of Facility to Discharge Oil

In its Motion, Pepperell disputes our finding that the company's installation of a new, state-of-the-art, above-ground oil storage tank materially affected the Facility's potential to discharge oil into a navigable water, thus requiring the Facility to submit an amended SPCC Plan. Motion at 6-7. Pepperell contends that we erred by "using generalizations" about the new tank's potential to discharge instead of making a "case-specific" finding that the new tank posed a greater danger of discharge than the old tank. In

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Facility, the company's owners both went down to Gully Brook to see if oil was discharging into that water body. Hearing Transcript at 732-36 (Sawyer Testimony); Hearing Transcript at 802-03 (Gladu Testimony). The owners' decision to check Gully Brook for oil suggests their knowledge of the CSO, since Gully Brook was the water body that received, via the CSO, overflow from the sewer conduit. Stipulation No. 14.

this respect, the company notes that "there is no credible" evidence that the new tank posed a greater danger given its "state-of-the art," "professionally engineered" features. *Id.*

In our Final Decision, we addressed and rejected essentially identical arguments by Pepperell. There, we decided that regardless of the tank's alleged protective features, the inherently greater environmental risks posed by above-ground tanks in comparison with underground tanks –- clearly reflected in the regulatory language –- supported treating the installation of Pepperell's new above ground tank as a material change affecting the Facility's potential to discharge. Final Decision at 34.

Because the company is merely rearguing its case, and does not otherwise explain in the Motion how our reasoning contained a manifest error of fact or law, we deny reconsideration of this issue. *Southern Timber Products,* 3 E.A.D. at 889.

Alleged Unconstitutionality and Unfairness in Finding Pepperell Liable for Full Period Under Count I

In its Motion, Pepperell states that Agency violated the Constitution and fundamental notions of fairness by imposing on it liability and a penalty for a portion of Count I while

failing to provide the company with reasonable notice on how to comply with SPCC regulations. Motion at 3. Specifically, the company argues that any penalty imposed for the time period October 31, 1996 to July 14, 1997 -- during which time the company allegedly sought to comply with the SPCC regulations but without the benefit of reasonable notice of its compliance obligations --is unconstitutional and unfair. *Id.* In support of this argument, Pepperell notes that the Agency had not developed any regulations giving the company notice on how it could take underground storage tanks "out of service" and thus achieve compliance.[2] Furthermore, the company relates that the company had requested the Agency's help in meeting its SPCC obligations, but that the "Agency never responded to the Respondent's good faith – albeit unsophisticated -- attempt to come into compliance." *Id.*

Pepperell's argument on lack of constitutionally required notice is a new one. Because the company had the opportunity to raise the argument below, it is waived. Therefore, we deny reconsideration of this issue. *See Publishers Resource,* 762 F.2d at 561.

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[2]There was, of course, an alternative path to compliance that Pepperell's argument ignores –- submission of an SPCC Plan for its underground tanks.

For the foregoing reasons, Pepperell's Motion is denied.[3]

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 6/28/00

/s/
Scott C. Fulton
Environmental Appeals Judge

[3]Pepperell requests a stay of the "effective date of the [Final Decision] while its [M]otion is under consideration." Motion at 7. We interpret the company's request to mean that the Board should hold the Final Decision in abeyance pending disposition of the Motion. Since we are denying reconsideration of the Final Decision, Pepperell's request is moot.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Pepperell Associates, CWA Appeal No. 99-21 & 99-2, were sent to the following persons in the manner indicated:

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/s/
Annette Duncan
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