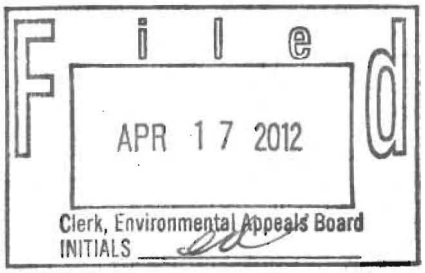
BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	
Peabody Western Coal Co.,	)	CAA Appeal No. 11-01
Permit No. NN-OP-08-010	)	

ORDER DENYING MOTION FOR RECONSIDERATION

By motion dated March 26, 2012, Peabody Western Coal Co. ("Peabody") seeks reconsideration of the Environmental Appeals Board ("Board") Order Denying Petition for Review issued in the above-captioned matter on March 13, 2012.[1] For the reasons explained below, the Board will deny this motion.

Motions for reconsideration are authorized by 40 C.F.R. § 71.11(*l*)(6), which provides that the motion "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

[1] Peabody informs the Board that both the Navajo Nation Environmental Protection Agency ("NNEPA"), which issued the Clean Air Act Title V federal operating permit renewal that is the subject of this matter, and Region 9 of the U.S. Environmental Protection Agency, which participated as *amicus curiae*, object to reconsideration of the Order. Motion for Reconsideration of Order Denying Review ("Motion") at 3.

Reconsideration). Board precedent establishes that the reconsideration process should not be regarded as "an opportunity to reargue the case in a more convincing fashion."[2] *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 Envtl. Disposal Sys., 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 D.C. Water and Sewer Auth.*, 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 permitee clearly disagreed with the Board's conclusion, the permitee 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).

Peabody's Motion for Reconsideration of Order Denying Review ("Motion") repeats and specifically references numerous arguments that already have been made at length in its Petition and its briefs filed in this matter. *See, e.g.*, Motion at 6 (stating that "Peabody's prior filings in this proceeding did make the requisite demonstration to justify the Board's review"), and 10 (summarizing previously filed documents). The Motion generally disagrees with the Board's legal conclusions, but does not identify any clear errors of law or fact that would warrant reconsideration here.

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[2] 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 by 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 addressed 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 Appeals' denial of a motion for reconsideration because the petitioner failed to show how the tribunal erred as a matter of law or fact in reaching its decision).

Peabody's Motion claims that "the Board's incorrect conclusion of law is based in large part on the Board's misapprehension of two key facts." *Id.* at 6. Peabody identifies those two key facts as:

> (1) "the Board failed to recognize that the regulations which NNEPA [the Navajo Nation Environmental Protection Agency] has established in order to administer federal authority as a delegate agency, and which NNEPA applied to this permit, comprise not only the part 71 federal regulations but also specific non-duplicative and additional tribal permitting procedures within NNOPR [the Navajo Nation Operating Permit Regulations]," *id.*; and
>
> (2) "the Board wrongly found NNEPA's challenged action to be analogous to the longstanding, 'common practice' of state agencies 'acting with delegated federal [PSD] permitting authority often includ[ing] conditions based on state law in federal permits,'" *id.* at 7 (quoting Order Denying Petition for Review at 12).

These arguments do not identify any errors of fact made by the Board, but simply disagree with the Board's legal conclusions, on the same grounds that Peabody previously articulated in its briefs in this matter. The Board's Order accurately reflects the fact that NNEPA established its own permitting procedures in the NNOPR to parallel the applicable federal regulations at 40 CFR part 71. The Board concluded that Peabody had failed to demonstrate that it was a clear error of law for NNEPA to include citations to those regulations, as well as the applicable provisions of part 71, in the permit.

In its Motion Peabody also "respectfully begs to differ" with the Board's observation that Peabody did not claim that the NNOPR citations in the permit required Peabody to take any additional or different actions than are required by part 71. *Id.* at 4 (citing Order Denying Petition for Review at 8). Yet, Peabody offers nothing more to buttress this argument than a repetition of the vague and conclusory statement in its Petition that "NNEPA does not appreciate

Peabody's increased legal liability that attaches with permit conditions that are now based on NNOPR requirements." Petition at 29. Peabody, once more, fails to identify any specific provision of the NNOPR that imposes alleged "increased legal liability" beyond the requirements of part 71.

The Board concludes that Peabody has failed to demonstrate that reconsideration of the Order Denying Petition for Review is warranted, and the Motion to Reconsider is **DENIED**.

So ordered.[3]

Dated: April 17, 2012

ENVIRONMENTAL APPEALS BOARD

By: _____
Catherine R. McCabe
Environmental Appeals Judge

[3] The three-member panel deciding this matter consists of Environmental Appeals Judges Catherine R. McCabe, 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 foregoing **Order Denying Motion for Reconsideration** in *Peabody Western Coal Co.*, CAA Appeal No. 11-01, were sent to the following persons in the manner indicated:

By First Class, Certified U.S. Mail, Return Receipt Requested:

Jill E. Grant
Nordhaus Law Firm, LLP
1401 K Street, NW, Suite 801
Washington, D.C. 20005

Peter S. Glaser
Troutman Sanders LLP
401 9th Street, NW, Suite 1000
Washington, DC 20004

Anthony Aguirre
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

John R. Cline
John R. Cline, PLLC
8261 Ellerson Green Close
Mechanicsville, VA 23116

By EPA Pouch Mail:

Ivan Lieben
U.S. Environmental Protection Agency, Region 9
Office of Regional Counsel
75 Hawthorne St. (ORC-2)
San Francisco, CA 94105

Date: APR 17 2012

Annette Duncan
Secretary