

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

In the Matter of:)	
)	
Windfall Oil & Gas Inc.)	
)	
)	
UIC Permit No. PAS2D020BCLE)	Permit Appeals UIC 14-187 and 188
)	(consolidated with UIC 14-73)
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)	

**REGION III'S RESPONSE OPPOSING
MARIANNE ATKINSON'S AND RICHARD ATKINSON'S
MOTIONS FOR RECONSIDERATION**

The United States Environmental Protection Agency Region III (Region) hereby responds to the motions for reconsideration by petitioners Marianne Atkinson and Richard Atkinson, received by the Region on June 23, 2015.¹ These petitioners are asking the Environmental Appeals Board (Board) to reconsider its June 12, 2015, Order denying their petitions. In particular, Mrs. Atkinson argues that the Board should reconsider its decision on the use of corrosion inhibitors, and Mr. Atkinson argues that Board should reconsider its decision on the argument on over-pressurization of the annulus between the long-string and the surface

1. It is unclear to the Region whether these motions for reconsideration were properly filed with the Board. The certificates of service attached to the motions indicated that the motions were emailed to Board, although email is not listed as one of the filing methods in the regulations at 40 C.F.R § 124.19(i)(2). It is also unclear that the motions were served on all the parties in this appeal in accordance with the regulations, which require service by mail or commercial delivery service. *Id.* at § 124.19(i)(3). As the Region is amenable to service by email in this case, the Region acknowledges its receipt of the motions. Because the regulations require the Region to file a response within 15 days of the date of service (as opposed to the date of filing), *see* 40 C.F.R § 124.19(f)(3), the Region hereby responds to the motions for reconsideration, but by doing so the Region does not concede that the motions were properly filed with the Board.

casings. Because the petitioners have not shown that the Board's decision was based on clearly erroneous factual or legal conclusions, the Board should deny the motions for reconsideration.

STANDARD OF REVIEW

Under 40 C.F.R. § 124.19(g), motions for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." *See also In re Bear Lake Properties, LLC*, UIC Appeal No. 11-03, at 2 (EAB July 26, 2012) (Order Denying Motion for Partial Reconsideration). 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 Hawaii Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97 -22, at 6 (EAB March 3, 1999) (citing *In re Arizona Municipal Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998)).

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 In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, at 3 (EAB April 10, 2000) (citing *Publishers Res. Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("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 proceeding]. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time."). A motion for reconsideration is not "an opportunity to reargue the original petitions, either by raising arguments or facts that could have been presented earlier or attempting to frame prior arguments in a more convincing fashion. *In re West Bay Exploration Co.*, UIC Appeal No. 14-66, at 2 (EAB Oct. 21, 2014) (Order Denying Reconsideration).

DISCUSSION

Mrs. Atkinson's motion for reconsideration does not articulate any clear factual or legal error in the Board's decision.

In its July 12 Order, the Board rejected petitions raising concerns about the injection of additives such as corrosion inhibitors. The Region had explained, in its response to comment summary, that the proper operation and maintenance of an injection well may require the use of such additives in order to preventing corrosion in the injection well. In its decision, the Board found that the petitioners did not adequately confront the Region's response or demonstrate how the Region abused its discretion. *In re Windfall Oil & Gas, Inc.*, 16 E.A.D. ____, slip op. at 54-55 (EAB July 12, 2015).

Although Mrs. Atkinson is concerned that the permittee may use different additives without any control from the permit, the use of such additives is permitted only as necessary for the proper operation and maintenance of the well. The permittee is required to keep maintenance records and to provide such records, as well any other information necessary to determine compliance, to the Region upon request.

Mrs. Atkinson does not articulate in her motion why the conclusion by the Board is factually or legally erroneous. While Mrs. Atkinson may disagree with the Board's conclusion, in her motion for reconsideration she is simply reiterating the arguments she made in her petition. This is insufficient to meet the Board's standard for reconsideration. *See, e.g., In re Town of Newmarket Wastewater Treatment Plant*, NPDES Appeal No. 12-5, at 2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration); *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-2 *et al.*, at 4 (EAB April 23, 2008) (Order Denying Motion for Reconsideration). Accordingly, Mrs. Atkinson's motion for reconsideration should be denied.

Mr. Atkinson's motion for reconsideration should be denied because it does not articulate any factual or legal error and improperly raises new issues and introduces new materials.

In his motion for reconsideration, Mr. Atkinson repeats the argument he made in his motion for leave to file a reply, which is that the Board should review his argument concerning over-pressuring of the annulus between the long-string casing and the surface casing, despite the fact that this argument was not raised during the public comment period. In addition, Mr. Atkinson introduces yet another new argument and new materials. In his motion for reconsideration, Mr. Atkinson argues for the first time that the permit should require that drilling mud of a specified weight be placed in the well. His motion also includes new documents not in the record pertaining to a different well. Neither Mr. Atkinson's previously rejected argument, his new argument, nor his new documents meet the standard of review for a motion for reconsideration.

In its Order denying review, the Board rejected Mr. Atkinson's argument about over-pressuring of the annulus because the issue was not raised during the comment period. *In re Windfall Oil & Gas, Inc.*, 16 E.A.D. ____, slip op. at 55 n.42. There is no clear factual or legal error in this determination. Mr. Atkinson argues that despite the fact that the argument was not raised during the comment period, the Board should review the argument as an exercise of discretion. The Board already did review Mr. Atkinson's argument but did not find it persuasive; instead, the Board found that the permit contains casing and cementing requirements designed to prevent movement of fluids into the underground sources of drinking water. *See id.* Mr. Atkinson has failed to articulate any factual or legal error in the Board's ruling and thus has failed to meet the standard of review.

Mr. Atkinson's new arguments regarding drilling mud were not only not raised during the comment period; neither did he raise them in his petition for review. A motion for

reconsideration is not an opportunity to raised new arguments. *See, e.g., In re Bear Lake Properties, LLC*, UIC Appeal No. 11-03 (EAB July 26, 2012) (Order Denying Motion for Partial Reconsideration). Thus, the Board should refuse to consider this new argument.

In support of this new argument, Mr. Atkinson introduces new documents pertaining to a different injection well. Mr. Atkinson does not explain how these documents pertain to the Windfall well. Furthermore, because these documents were not presented prior to the permit issuance, they are not part of the administrative record. The Board's case law, including the prior decision in this case, firmly states that new documents submitted after permit issuance should not be considered by the Board. *See In re Windfall Oil & Gas*, 16 E.A.D. ___, slip at 35 n.24 (declining to consider documents not submitted prior to permit issuance and pertaining to other wells). *See also In re Dominion Energy Brayton, LLC*, 12 E.A.D. 490, 518 (EAB 2006) (“[D]ocuments submitted subsequent to permit issuance cannot be considered part of the administrative record.”); *In re City of Caldwell*, NPDES Appeal No. 09-11 (EAB Feb. 1, 2011)(Order Denying Review) at 16. As such, Mr. Atkinson has failed to meet the standard of review for a motion for reconsideration.

CONCLUSION

These petitioners have not met the standard of review for a motion for reconsideration because they have not shown that the Board's decision denying their petitions for review was clearly erroneous factually or legally. Their motions merely reiterate arguments already made and rejected by the Board or raise new arguments and documentation not presented before. The Board should deny their motions for reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered a copy of the foregoing Region III's Response Opposing Marianne Atkinson's and Richard Atkinson's Motions for Reconsideration on the date specified below, by U.S. mail to:

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I also certify that I filed the original electronically with the Environmental Appeals Board.



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