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

In the Matter of:	)	
	)	
GENERAL ELECTRIC COMPANY	)	
	)	RCRA Appeal No. 16-01
Modification of RCRA Corrective Action Permit No. MAD002084093	)	
	)	

GENERAL ELECTRIC COMPANY'S OPPOSITION
TO EPA'S MOTION FOR PARTIAL RECONSIDERATION

The Board should deny the EPA Region's motion for partial reconsideration for four reasons: (1) because the motion inappropriately relies on an argument that the Region could and should have made during the appeal; (2) because the motion fails to demonstrate that the Board made any error, much less a manifest error, in the part of the decision that the Region attacks; (3) because the Region cannot, by purporting to reinterpret an ambiguous term in the Modified Permit, bypass the remand, revision, and review provisions of the governing Consent Decree; and (4) because the Region has not shown that a remand will cause any harm or prejudice, much less a manifest injustice, to it or to any party.

1. The Motion for Partial Reconsideration Relies on an Argument That the Region Could Have Made During the Appeal.

"A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion." *In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (EAB 1992). Specifically, "[t]he motion for reconsideration is not intended as a forum for . . . raising new arguments that could have been made before." *In re The Barden Corp.*, 2002 EPA ALJ LEXIS 64 at *11, quoting 64 Fed. Reg. 40138, 40168 (July 23, 1999) (preamble discussion of 1999 amendments to Consolidated Rules).

The Region violates the latter principle. The Region argues that certain provisions of the Modified Permit and the Consent Decree negate the conclusion underlying the challenged element of the remand order. Specifically, the Region challenges the Board's conclusion that the so-called "Additional Work Requirements" are ambiguous because, in contrast to the Biota and Downstream Transport Performance Standards, the Additional Work Requirements do not explicitly require any additional response actions to be determined "in accordance with the Consent Decree," and thus do not clearly bring Paragraph 39.a of the Consent Decree into play. Motion for Partial Reconsideration ("Region's Motion") at 3-5. *See also* Order Remanding in Part and Denying Review in Part ("EAB Order") at 87.

This is a new argument. The Region does not claim otherwise. Nevertheless, it insists that it can make *this* new argument in a motion for reconsideration because it could not have made the argument before, i.e., because the "particular rationale used as the basis to remand the Additional Work Requirements was advanced by the Board for the first time in its decision, *sua sponte*, necessitating this reconsideration motion…." Region's Motion at 5.

The record belies this claim. GE clearly challenged the Additional Work Requirements as in conflict with the Consent Decree; and in doing so, it incorporated its arguments about the Biota and Downstream Transport Performance Standards, which specifically addressed Paragraph 39 of the Consent Decree and challenged the applicability of that provision. Petition of the General Electric Company at 48, 45-46.

In response, the Region argued that Paragraph 39 applied to the Biota and Downstream Transport Performance Standards because the "Performance Standards provide for the modification of the Rest of River SOW '*in accordance with the CD*,' which obviously includes Paragraph 39.a." Region 1's Response to General Electric Company's Petition at 47 (emphasis in

original). The EAB accepted this argument and denied review of the Biota and Downstream Performance Standards for that very reason. EAB Order at 84.[1/]

Because the Additional Work Requirements lacked the same language, the Region did not make the same argument in support of those provisions. But the omission was as obvious as the text of the Modified Permit, and nothing prevented the Region from arguing then – as it does now – that language appearing elsewhere in the Modified Permit and the Consent Decree subjected the Additional Work Requirements to Paragraph 39.a. But the Region did not do so. Instead, it defended the Additional Work Requirements with two other substantively distinct arguments that the Board considered and rejected. *See* Region 1's Response to General Electric Company's Petition at 49-54; EAB Order at 88. Thus, the Board had before it no basis for upholding the Additional Work Requirements once it had rejected the only two reasons actually offered by the Region.

The record shows, in other words, that the Region had ample opportunity during the appeal process to raise the argument on which it now bases its motion for reconsideration. Thus, the Board did not act *sua sponte*, as the Region accuses it of doing. Region's Motion at 5. The Region, moreover, is not asking for a correction of the Board's error, but for a chance to supplement its appellate arguments in order to rectify its own omission. A "party's failure to present its strongest case in the first instance," however, "does not entitle it to a second chance in the form of a motion to reconsider." *In re Environmental Disposal Systems, Inc.*, 2007 EPA App. LEXIS 52 at *7 (EAB July 27, 2007)

[1/] GE disagrees with the Board's decision on this issue and reserves its right to challenge that decision in future proceedings under the Consent Decree.

2. The Motion for Reconsideration Fails to Demonstrate That the Board Committed a Manifest Error.

"Motions for reconsideration serve a limited function: to correct manifest errors of law or to present newly discovered evidence." *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15 at 3 (EAB Apr. 9, 2001), quoting *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985). The Region does not cite any new evidence. It claims, rather, that the Board "clearly erred" when it concluded that the Additional Work Requirements were ambiguous. Region's Motion at 2. Such error, however, "is not demonstrated by the disappointment of the losing party." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000). Manifest error consists, rather, of "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law." *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir. 2004).

There was no manifest error here. The Board remanded the Additional Work Requirements for clarification because it concluded that they are ambiguous. EAB Order at 87, 89. It based that conclusion on a comparison of the Additional Work Requirements to the Biota and Downstream Transport Performance Standards. GE had challenged both sets of permit requirements on the ground that they exposed GE to the risk that it would someday be required to perform additional response actions that were (1) not specified in the Modified Permit, (2) not limited to the kinds of "modifications" of already-specified response actions authorized by Paragraph 39.a of the Consent Decree, and (3) not subject to the narrow conditions for applying the covenant "reopener" provisions of the Consent Decree.

The Board concluded that the Biota and Downstream Transport Performance Standards adequately protected GE from that risk because those provisions explicitly said that any additional work required under them must be "determine[d] … in accordance with" the Consent

Decree, including the restrictions of Paragraph 39.a. EAB Order at 84. The Additional Work Requirements, however, expressed no such requirement, and therefore were "ambiguous on this point." *Id.* at 87. The Board remanded the Additional Work Requirements with instructions to resolve the apparent conflict with the Consent Decree, and to clarify whether those provisions "limit the Region's choice of response actions to only those actions that are consistent with the scope of the response action defined in the Permit …." *Id.* at 89.

The motion for reconsideration could succeed, therefore, only if the Region were to show that the Board's finding of ambiguity was clearly or manifestly erroneous, i.e., that the error was "plain and indisputable," and that the finding displayed a "complete disregard of the controlling law." Here the Region does not even mention the most relevant aspect of controlling law here: the legal definition of ambiguity. A contractual instrument – like the Consent Decree and Modified Permit – is considered ambiguous where "the phraseology can support reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken." *Fashion House, Inc. v. K Mart Corp.*, 892 F.2d 1076, 1083 (1st Cir. 1989).

The Region does not contend that the Additional Work Requirements are unambiguous because of what those provisions themselves say, but because an entirely different part of the Modified Permit explains, in a section entitled "Introduction," that the special conditions enumerated in the Permit collectively describe the measures "that Permittee shall perform pursuant to the CD," and say that "all Permittee activities shall be conducted pursuant to this Permit and the CD under the oversight and approval of EPA." Region's Motion at 3, quoting Modified Permit, Special Condition II.A.[2/] EPA also cites a few items in the Consent Decree,

[2/] In its Motion for Reconsideration, the Region abridged these clauses and failed to point out that they were located in an introductory section. GE has restored the elisions for clarity.

which supposedly "highlight[] the need for acting in accordance with the Decree." *Id.* at 4. Each of the cited paragraphs says that GE will "perform" or "implement" the selected Rest of River Remedial Action, as upheld by the Board and the First Circuit, "pursuant to CERCLA and this Consent Decree." Consent Decree, ¶¶ 22.p, 22.w., 22.z. The Region's position, then, appears to be that the Additional Work Requirements are manifestly unambiguous because it can find scattered provisions of the Modified Permit and Consent Decree which can be read to indicate that *anything* GE does to perform the Rest of River Remedy will, *ipso facto*, be done "pursuant to the Consent Decree."

This is insufficient to warrant reconsideration for three reasons. First, the Permit conditions and Consent Decree provisions relied on by the Region only deepen the ambiguity when they are compared to the provisions of the Biota and Downstream Transport Performance Standards cited by the Board in its decision. The former provisions say only that GE will *perform*, *conduct,* or *implement* the Rest of River Remedial Action pursuant to the Consent Decree, and thus do not clearly bind the Region to follow the Consent Decree in its *determination* of specific future response actions. The Biota and Downstream Transport Performance Standards, on the other hand, provide a measure of clarity in this regard by specifying that the Region "will *determine* any additional actions necessary . . . in accordance with" the Consent Decree. EAB Order at 83, citing Modified Permit, §§ II.B.1.a(1), II.B.1.b(1)(a).

Second, the Region's argument begs the question. If the general provisions cited by the Region unambiguously subordinate the Additional Work Requirements to the restrictions of Paragraph 39.a, then they also subordinate the Biota and Downstream Transport Performance

Standards. Why, then, include specific language to that effect in the Performance Standards, while omitting it from the Additional Work Requirements?

The Region suggests that the omission reflected "the permit writer's desire to avoid duplication through an economy of expression," Region's Motion at 4, but it supplies no evidence for that assertion of subjective intent. Even if the Region could substantiate it, moreover, the contention would be irrelevant here because, "[t]o answer the ambiguity question, the court must first examine the language of the contract itself, independent of extrinsic evidence concerning . . . the intention of the parties." *Farmers Insurance Exchange v. RNK, Inc.*, 632 F.3d 777, 783 (1st Cir. 2011). And even if the "permit writer's" alleged intent could be considered, the Region's argument does nothing to answer the salient question: If the drafter's overriding desire was "economy of expression," then why add an expressively uneconomical belt to the suspenders supporting the Performance Standards, while leaving the Additional Work Requirements to hang by a single, ambiguous thread?

Finally, if some prefatory language in an introductory section of the Modified Permit, and a handful of sporadic references in the Consent Decree, were enough to resolve the ambiguity in the Additional Work Requirements, then the cited provisions would also be sufficient to clarify any ambiguity arising anywhere in the Modified Permit. Indeed, they would excuse any facial inconsistency, no matter how *unambiguous*, between the terms of the Permit and the requirements of the Consent Decree: The Region could always argue, much as it does here, that since GE is only required to perform "pursuant to the Consent Decree," any conflicts between what the Permit demands and what the Consent Decree allows by way of performance can be deferred to the "implementation" stage, where GE will have access to the separate dispute resolution processes outlined in Section XXIV of the Consent Decree, "including appeal to the

U.S. District Court." Region's Motion at 6. As the Region reads the Consent Decree, therefore, the Board and the First Circuit would have no role to play in the process of determining whether the Modified Permit complies with or violates the Consent Decree, and the provisions of the Decree that explicitly assign them such a role would effectively be nullified.

3. The Region's Reinterpretation Is Not a Permissible Substitute for a Remand and Revision of the Modified Permit's Ambiguous Terms.

In Section 3 of its motion, the Region suggests that a remand is unnecessary because it "agrees with the interpretation that the Additional Work Requirements are to be determined in accordance with the CD, including the requirement that the Additional Work Requirements be consistent with the scope of the response action." Region's Motion at 6. This reinterpretation of the Modified Permit, the Region says, "is binding," and thus "[t]here is no controversy meriting remand." *Id.*[3/]

This argument is inconsistent with the Consent Decree. In fact, if the Region could clarify ambiguities or erase inconsistencies by simply announcing its reinterpretation of the Permit, rather than by actually revising the document to solve the problems, then additional provisions of the Consent Decree would be nullified. First, the "binding interpretation" approach would annul

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[3/] The "binding interpretation" cases cited at page 6 of the Region's Motion – *In re Austin Powder Co.*, 6 E.A.D. 713, 717 (EAB 1997) and *In re Amoco Oil Co.*, 4 E.A.D. 954, 959-960 (EAB 1993) – are inapposite. First, in both cases the Board accepted the Region's interpretation of a RCRA permit on direct appeal. Neither case involved a motion for reconsideration of a decision in which the Board rejected the Region's initial interpretation and remanded the permit for clarification. Thus, neither case involved a Region's *reinterpretation* of a facially ambiguous permit provision in a motion for reconsideration. Second, the RCRA permits at issue in *Austin Powder* and *Amoco* did not modify permits that had been incorporated into a consent decree. Consent decrees are contracts, as are permits that are part of such consent decrees. As the Board recognized, the Region's interpretation of such contractual provisions is not entitled to deference. EAB Order at 51 ("[T]he Board conducts its own independent review of the terms of the Consent Decree and does so without deferring to the Region or any other party"). Moreover, as discussed below in the text, the Region's position here is inconsistent with the Consent Decree.

Paragraphs 22.t and 22.v(i) of the Decree. These provisions say that, if the Board (or the First Circuit) finds fault with all or part of the Modified Permit, the appropriate remedy is to vacate or remand the Region's permit modification decision, and the appropriate response – assuming that the Region wants to fix the deficiencies, rather than simply excise the defective provisions – is to revise the remanded Permit. Consent Decree, ¶¶ 22.t and 22.v.(i). In addition, by bypassing the remand and revision provisions of the Consent Decree, the Region's approach would negate the Consent Decree provisions that authorize the Board and the First Circuit to review any revisions made by the Region. Consent Decree, ¶¶ 22.u(i), 22.v(i) and (ii).

The Region's approach would also negate the practical benefits inherent in the remand, revision, and review provisions of the Consent Decree. That process ensures that the Region will not develop a reinterpretation on the fly – as it has done here, where its putatively binding interpretation is stated in a single sentence of a motion drafted on a ten-day deadline. Instead, it allows the Region an opportunity to give reasoned consideration to the best way to clarify an ambiguity or resolve an inconsistency. By following the Consent Decree process, moreover, the Region can allow GE and others to weigh in, and thus subject the Region's proposed revisions to critical scrutiny by interested and knowledgeable parties before the revised Modified Permit is finalized and submitted to review by this Board and the First Circuit.

4. The Region Is Not Entitled to a Remand on Grounds of Manifest Injustice.

Finally, the Region gets it backwards when it argues that there is "no harm to Petitioner, by granting the requested relief." Region's Motion at 6. The Region cites no authority for its implicit assertion that a motion for reconsideration is warranted in the absence of prejudice to the opposing party. The case law indicates, rather, that insofar as harm or prejudice enter into the determination of a motion for reconsideration, the movant must show that it will suffer "manifest

injustice" if relief is not granted. *In re Southern Timber Products, Inc.*, 3 E.A.D. at 889. The Region has made no such showing here. It suggests that a remand would "needlessly consume time and administrative resources," Region's Motion at 6, but it offers no explanation or evidence to support that claim. Moreover, since the Board has remanded other parts of the Modified Permit for revision, and since the Region has not moved for reconsideration of those aspects of the Board's order, following the prescribed process will not cause any delay.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2018, I served one copy of the foregoing General Electric Company's Opposition to EPA's Motion for Reconsideration on each of the following:

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