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

In re:	
Town of Ashland Wastewater Treatment Facility	NPDES Appeal No. 00-15
NPDES Permit No. NH0100005	

ORDER DENYING MOTION FOR RECONSIDERATION

By motion dated March 9, 2001, the Town of Ashland ("Town") requests reconsideration of the Order Denying Petition for Review ("Order") entered by the Environmental Appeals Board ("EAB" or "Board") in the above-captioned matter. Motion for Reconsideration of Final Order Denying Petition for Review ("Motion"). The Town contends that reconsideration is warranted because: (1) the EAB based its decision in part upon the Town's failure, in its petition for review ("Petition"), to respond to the U.S. EPA, Region I ("Region") response to comments ("RTC") attached to the final permit, without explaining how the Town could more specifically address such comments; and (2) the EAB "significantly mischaracterize[d]" the Town's arguments with regard to the Region's calculation of low-flow conditions in the Squam River and whether the Region should have taken into account facts particular to the Town's facility when determining whether

the Town had a reasonable potential to violate water quality standards. For reasons set forth below, the Town's Motion is denied.

Motions for reconsideration are authorized by 40 C.F.R. § 124.19(g), 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 is shown to have made a demonstrable error, such as a mistake of law or fact. *See In re Pepperell Assoc.*, CWA Appeal Nos. 99-1 & 99-2, at 2 (EAB, June 28, 2000) (Order Denying Motion for Reconsideration), *appeal docketed sub nom Pepperell Assoc. v. EPA*, No. 1708 (1st Cir. June 9, 2000); *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72 at 2 (EAB, Feb. 10, 2000). The reconsideration process "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 Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) (citation omitted). 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. *Knauf,* at

3; *see also 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.") (citation omitted).

Upon review of the Town's arguments, we conclude that the Town, in its Motion, is attempting to advance facts and arguments that, to have been preserved, should have been set forth in its Petition. Additionally, we find that the Motion largely consists of an attempt to reargue in more convincing fashion points that the Board already addressed in its final decision not to review the Town's permit. For these reasons, the Town has failed to demonstrate that reconsideration of the Order is warranted.

Failure to Respond Substantively to the Region's RTC

The Town argues that while the Board found that the Town's Petition failed to provide substantive responses to the Region's RTC to be material, the Board "fails to explain how the Town could more specifically address" the RTC. Motion at 2. The Town argues that, taken together, 40 C.F.R. §§ 124.19(a), 124.13, and

124.17 “limited the Town from substantively addressing the Region’s RTC in its petition” and therefore “cannot be used as a basis for the EAB’s conclusion that the Town failed to establish clear error or abuse of discretion by the Region * * *.” Motion at 3-4. The essence of the Town’s argument appears to be that because arguments on appeal are limited to those arguments raised during the comment period, and because the Region’s RTC, which raised new issues and facts, was necessarily developed after the comment period ended, the Town was effectively hamstrung in its ability to make arguments in its Petition related to the new issues and facts set forth in the RTC. Close inspection of the applicable regulations reveals, however, that the Town was not nearly so limited.

Section 124.13 requires all persons believing any draft permit condition to be “inappropriate” to “raise *all reasonably ascertainable* issues and submit all reasonably available arguments supporting their position” as well as any supporting materials to the permit issuer before the close of the public comment period. 40 C.F.R. § 124.13 (emphasis added). By its express terms, section 124.13 does not require commentors to raise issues during the public comment period that are beyond commentors' reasonable ascertainment.

The provision in the regulations setting the threshold for review of final permit decisions by the Board, section 124.19(a), contains a complementary idea. That provision requires that a petition for review of a final permit contain:

> a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period * * * to the extent required by these regulations.

40 C.F.R. § 124.19(a). The opening clause of the text of section 124.19(a) quoted above makes it clear that all of the reasons supporting review must be set forth in a petition for review. The clause that follows does not limit this obligation, but rather enumerates one particular matter -- a demonstration that the issues raised in a petition were likewise raised during the public comment period -- that must be among the matters addressed in the statement of reasons. Importantly for purposes of this case, this latter obligation obtains only to the extent "required by these regulations." As already stated, the regulations do not require commentors to address during the public comment period matters beyond their reasonable ascertainment at that time. 40 C.F.R. § 124.13.

The import of these provisions for this case seems clear to us. First, the Town had an obligation to include in its Petition all of the reasons supporting review. Second, notwithstanding

the Town's arguments to the contrary, there is nothing in the regulations that constrains a petitioner's ability to raise issues that were not reasonably ascertainable during the comment period.[1] *See In re Rockgen Energy Ctr.*, PSD Appeal No. 99-1, slip op. at 7 (EAB, Aug. 25, 1999), 8 E.A.D. at __. If the Town believed that the RTC relied on mistaken facts or raised issues not reasonably ascertainable during the public comment period which warrant remand for purposes of allowing for additional public comment, it not only had the opportunity, but the *duty*, to present its argument in this regard in its Petition. Because the Town is now making arguments that it could - and should - have raised in its Petition, we deny reconsideration of the issue. *See In re Rohm & Haas* Co., RCRA Appeal No. 98-2, slip op. at 22 n.23 (EAB, Oct. 5, 2000); In *re Pepperell Assoc.*, CWA Appeal Nos. 99-1 & 99-2, slip op. at 10-11 (EAB June 28, 2000), *appeal docketed sub nom Pepperell Assoc. v. EPA*, No. 1708 (1st Cir. June 9, 2000); *see also Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 3 (1st Cir. 1998).

[1]This reading is very much consistent with the allowance in 40 C.F.R. § 124.19(a) that even persons who have not participated in the public comment process may petition with respect to "changes made from the draft to the final permit." *Id.*

Whether the Board Mischaracterized the Town's Arguments

The Town argues that the questions involving the Region's determination of the Town's reasonable potential to violate water quality standards and the Region's calculation of the low-flow rate of the Squam River do not devolve to a single issue as suggested by the Board in its Order. Motion at 4. However, the Town's Motion itself again demonstrates that the two issues are essentially centered around whether the Region should have used a low-flow value of 60 cfs. In the Motion, the Town argues that: (1) if the Region had based its decision on the facts the Town viewed to be controlling, it would have used a low-flow calculation of 60 cfs as the basis for evaluating the Town's potential to violate water quality standards; and (2) had the Region used a 60 cfs low-flow value, the Town's effluent had no reasonable potential of violating water quality standards. Motion 4-6. We fail to see how the Board erred in treating both of the Town's arguments as essentially contesting the Region's decision to use a low-flow value of 26 cfs instead of the 60 cfs value the Town asserted to be appropriate, since, in order to conclude that the Region erred as to the Town's second argument, we would necessarily have to agree with the Town that the Region

had erred in its low-flow calculation.[2]

Moreover, we concluded in our Order that the Region had indeed considered the facts the Town pointed out, but came to a different conclusion as to their meaning -- a conclusion that, in our view, the Town had failed successfully to refute. Order at 13-14. While the Town's Motion again restates the Town's disagreement with the Region's decision, it fails to demonstrate why our earlier conclusion that the Region's decision was not clearly erroneous or an abuse of discretion was mistaken in fact of law.

For the foregoing reasons, we conclude that the Town has failed to demonstrate a clearly erroneous factual or legal conclusion by the Board and thus deny reconsideration of its Petition.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: /s/
Scott C. Fulton
Environmental Appeals Judge

Dated: April 9, 2001

[2]The Town has not argued in any way that there is no reasonable potential for its discharge to violate water quality standards based on a low-flow value of 26 cfs.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Town of Ashland Wastewater Treatment Facility, NPDES Appeal No. 00-15, were sent to the following persons via U.S. mail, postage prepaid:

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/s/
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