

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

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| _____ |) | |
| In re: |) | |
| |) | RCRA-HQ-2003-0001 |
| Pyramid Chemical Company |) | |
| |) | |
| _____ |) | |

ORDER DENYING MOTION FOR RECONSIDERATION

I. BACKGROUND

On October 22, 2004, the Respondent in this matter, Pyramid Chemical Company ("Pyramid"), filed a motion for reconsideration of the Environmental Appeals Board's September 16, 2004 Default Order and Final Decision ("Default Order") in the above-captioned matter. See Pyramid Chemical Company's Motion for Reconsideration (Oct. 22, 2004) ("Motion"); Pyramid Chemical Company's Memorandum in Support of its Motion for Reconsideration (Oct. 22, 2004) ("Memorandum in Support").¹ Pyramid's Motion and Memorandum in Support raise two issues: (1) whether the Board had the statutory authority under the Resource Conservation and Recovery Act ("RCRA") to require that Pyramid comply with provisions of a Compliance Order requiring Pyramid to reimburse the Netherlands Environmental Ministry for costs associated with

¹ The Board received the Motion and Memorandum in Support by facsimile on October 22, 2004. The Board then received each document by mail on October 25, 2004.

disposal of materials Pyramid sent to the Netherlands (Motion at 1; Memorandum in Support at 2-4); and (2) whether the matter should be stayed pending the outcome of proceedings before the United States District Court for the Eastern District of Pennsylvania (Motion at 1; Memorandum in Support at 4-5. U.S. EPA's Office of Enforcement and Compliance Assurance has filed a response opposing the Motion and Memorandum in Support.

For the reasons set forth below, Pyramid's motion for reconsideration is denied.

II. DISCUSSION

Under 40 C.F.R. § 22.32, motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. As this Board has said on numerous occasions, 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 John A. Capozzi*, RCRA(3008) Appeal No. 02-01, slip op. at 3 (EAB, Oct. 16, 2003) (Order Denying Motion for Reconsideration); *In re Michigan CAFO Gen. Permit*, NPDES Appeal No. 02-11, slip op. at 3 (EAB, July 8, 2003) (Order Denying Motion for Reconsideration); *In re Hawaii Elec. Light Co.*, PSD

Appeal Nos. 97-15 through 97-22, slip op. at 6 (EAB, Mar. 3, 1999) (Order Denying Motion for reconsideration). 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. *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, slip op. at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration). In addition, a motion for reconsideration cannot be employed as a vehicle to introduce new evidence that could have been adduced earlier; nor can such a motion serve as the occasion to tender a new legal theory for the first time. *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 01-24 through 01-29, slip op. at 5-6 (EAB, Jan. 29, 2002) (Order Denying Motion for Reconsideration) (citing *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985)).

As stated above, Pyramid raises two issues in support of its motion for reconsideration. First, Pyramid questions the Board's statutory authority under RCRA to require that Pyramid comply with provisions of a Compliance Order requiring Pyramid to reimburse the Netherlands for costs associated with disposal of materials Pyramid sent to the Netherlands. However, because this constitutes a new legal theory raised for the first time in Pyramid's Motion to Reconsider, we decline to consider it at this

late date. As the Board stated in its September 16, 2004 Default Order and Final Decision:

The issue of Complainant's authority to issue a RCRA Section 3008(a) compliance order with reimbursement provisions is not squarely presented to the Board; although Respondent seeks to avoid imposition of the compliance order sought by Complainant, Respondent does not challenge Complainant's authority to issue a compliance order providing for reimbursement.

Pyramid Chemical, slip op. at 39 n.40.² Pyramid's Motion for reconsideration has not challenged this conclusion. Under these circumstances, Pyramids argument in this regard is rejected as a basis for reconsideration.

Second, Pyramid argues that this matter should be stayed pending the outcome of proceedings before the United States District Court for the Eastern District of Pennsylvania. Pyramid's argument in this regard, however, is identical to an argument raised and rejected by the Board in the September 16,

² The Board further stated:

Under the limited context in which the Board is evaluating Complainant's Compliance Order, the reimbursement provisions do not appear to be outside the scope of Complainant's authority. See *In re A.Y. McDonald Indus.*, 2 E.A.D. 402, 428 (CJO 1987) ("[RCRA] confers *broad discretion* on the Administrator (and derivatively to his delegates) to fashion appropriate compliance orders for RCRA violations. See 42 U.S.C. § 6928(a).") (emphasis added); accord *In re Arrcom, Inc.*, 2 E.A.D. 203, 210-214 (CJO 1986).

Default Order at 39-40 n.40. Pyramid has not pointed to any factual or legal errors in this conclusion.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Pyramid Chemical Company, RCRA-HQ-2003-0001, were sent to the following persons in the manner indicated:

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Dated: Nov. 10, 2004

_____/s/_____
Annette Duncan
Secretary