

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

In re:)
)
)
Chempace Corporation) FIFRA Appeal Nos. 99-2 & 99-3
)
Docket No. 5-IFRA-96-017)
)

ORDER DENYING MOTION FOR RECONSIDERATION

I. BACKGROUND

On June 2, 2000, Chempace Corporation ("Chempace") filed a motion for reconsideration of the Environmental Appeals Board's ("EAB" or "Board") May 18, 2000 Final Decision in the above-captioned matter. See Respondent's Motion to Reconsider Final Decision and Motion to Stay Effective Date of Final Decision ("Chempace Motion"). Chempace seeks reconsideration on two grounds:

- 1) The EAB's decision places an unsupportable burden on [Chempace] to show that [Chempace] was not capable of paying any penalty, including the 4% of average annual gross income guideline; and

2) Viewed in its totality, [Chempace]'s evidence clearly shows that [Chempace] does not have an ability to pay anything but a minimum penalty.

Id. at 2, 5. Chempace urges the Board to reconsider its Final Decision and stay the effective date of that order, pending consideration of its motion. *Id.* at 1.

On June 16, 2000, Complainant, U.S. Environmental Protection Agency Region V (the "Region"), filed a response to Chempace's Motion. See Complainant's Brief Opposing Respondent's Motion for Reconsideration and Stay of Final Decision. The Region argues that Chempace is improperly rearguing its case through its motion for reconsideration. *Id.* at 3-4. In the alternative, the Region asserts that Chempace's arguments on reconsideration are meritless. *Id.* at 4-8.

On June 30, 2000, this Board ordered that the effective date of its Final Decision be stayed pending the Board's consideration of the motion on reconsideration. See Order Granting Stay (EAB, June 30, 2000). For the reasons stated below, the motion to reconsider is denied and this Board's June 30, 2000 stay is lifted.

II. DISCUSSION

Under the Consolidated Rules of Practice, as amended, 64 Fed. Reg. 40138, 40176 (July 23, 1999) (codified at 40 C.F.R. part 22), motions for reconsideration shall be filed within ten (10) days after service of the final order and "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32.

Chempace's June 2, 2000 motion was timely filed.

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 Roger Antkiewicz and Pest Elim. Prod. of America, Inc.*, FIFRA Appeal Nos. 97-11 & 97-12 (EAB, March 26, 1999) (Order On Motion for Reconsideration); *In re Gary Development Co.*, RCRA (3008) Appeal No. 96-2, at 2 (EAB, Sept. 18, 1996) (Order Denying Motion for Reconsideration); *In re Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992) (Order Denying 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 Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992). 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) (Order Denying Motions for Reconsideration) citing *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. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted); accord *In re Arizona Municipal Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2-3 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration); *In re Gary Development Co.*, RCRA (3008) Appeal No. 96-2, at 2 (EAB Sept. 18, 1996) (Order Denying Motion for Reconsideration).

Upon review of the motion for reconsideration and the Region's response, we conclude that Chempace has failed to

demonstrate that reconsideration of the Board's Final Order is warranted because Chempace has not articulated any clear error in the Board's legal or factual conclusions. First, Chempace argues that the Board's Final Order improperly places a burden on it to demonstrate that it cannot pay any penalty, or to "determine what it can pay." Chempace Motion at 5. Chempace argues that placing such a burden on a respondent has no basis in "the statute, case law, or * * * fundamental fairness." *Id.* We find that Chempace is simply rearguing an issue considered in the case in chief, and in any event disagree with this claim of legal error. The Board's Final Order specifically considered Chempace's argument that the Presiding Officer erroneously "impos[ed a] burden on it to 'put forth evidence on an amount of civil penalty it could pay.'" *In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, slip op. at 28 (EAB, May 18, 2000), 9 E.A.D. ___. The Board made clear that Chempace "misread[] both the record and [our precedent in] *New Waterbury*." *Id.* We concluded that the record reflected that the \$200,000 penalty proposed by the Region was determined by the Presiding Officer to be inappropriate, and that the Presiding Officer then properly exercised his authority under the rules to "consider the record, the statutory penalty

criteria, and the applicable penalty policy, see 40 C.F.R. § 22.27(b), to determine an appropriate penalty." Slip op. at 28. This conclusion does not reflect a decision without basis in law, let alone fundamental fairness.

Chempace further asserts that its evidence demonstrates that it was unable to pay "anything but a minimum penalty amount." Chempace Motion at 5. In so doing, Chempace merely reargues its view of the facts which the Board has already considered and rejected. This does not provide a basis for reconsideration.

III. CONCLUSION

For the above-stated reasons, Chempace's motion to reconsider the Board's May 18, 2000 Final Order is denied and the Board's June 30, 2000 stay is lifted. Chempace shall pay the full amount of the civil penalty, \$92,193, within thirty (30) days of receipt of this order, unless otherwise agreed to by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer,

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Chempace Corporation, FIFRA Appeal Nos. 99-2 & 99-3, were sent to the following persons in the manner indicated:

By First Class Mail: Kris P. Vezner (C-14J)
 Assistant Regional Counsel
 U.S. EPA, Region V
 77 W. Jackson Boulevard
 Chicago, IL 60604-3590

David S. Hoffmann, Esq.
McMahon, DeGulis,
 Hoffmann & Blumenthal
The Caxton Building, Suite 650
812 Huron Road
Cleveland, OH 44115-1126

Dated: 7/25/00

_____/s/_____
Annette Duncan
Secretary