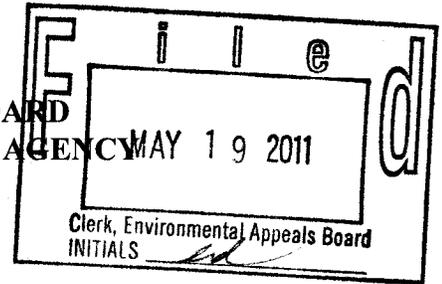


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
Henry R. Stevenson, Jr. &)
Parkwood Land Co.)
)
Docket No. CWA-06-2010-2708)
)

CWA Appeal No. 11-02

ORDER DENYING MOTION FOR RECONSIDERATION

I. INTRODUCTION

On April 19, 2011, the Environmental Appeals Board (“Board”) issued an Order Dismissing Appeal for Lack of Jurisdiction (“Order”) in response to an appeal filed on February 6, 2011, by Mr. Henry R. Stevenson, Jr., individually and as owner of the Parkwood Land Company (collectively “PLC”). The Board’s Order rejected PLC’s request for “review of a decision of Administrative Law Judge Miguel I. Flores,” because the “decision” PLC referenced was in fact an Administrative Order issued by Mr. Flores in his capacity as the Director of the Water Quality Protection Division for Region 6 (“Region”) of the U.S. Environmental Protection Agency (“EPA”). Order at 1 & n.1 (noting that Mr. Flores is not an Administrative Law Judge); *see also* Complainant’s Memorandum in Opposition to Respondent’s Motion for Reconsideration at 1-2 (May 10, 2011) (same) (“Region’s Opposition”). Thus, the Board lacked jurisdiction under the Consolidated Rules of Practice, 40 C.F.R. part 22. *See* Order at 4.

On April 29, 2011, PLC timely filed a motion for reconsideration of the Board’s decision to dismiss for lack of jurisdiction. Motion for Reconsideration (Apr. 29, 2011) (“Motion”). The Motion states that reconsideration is warranted because the Administrative Order, which includes a section entitled “Findings of Fact and Conclusions of Law,” indicates that Mr. Flores “not only

acted as 'Regional Judicial Officer' but also as 'Presiding Officer' in the dispute. Therefore, the original Administrative Order is an 'initial decision' by a 'Regional Judicial Officer,' and confers jurisdiction upon the Board." Motion at 5.

II. STANDARD FOR REVIEW OF MOTIONS FOR RECONSIDERATION

Under the Consolidated Rules of Practice, a motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. Reconsideration is generally reserved for cases in which the Board has made a demonstrable error, such as a mistake of law or fact. *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02, at 3 (EAB Mar. 16, 2011) (Order Granting Partial Reconsideration); *see also In re Shell Gulf of Mexico, Inc. & In re Shell Offshore, Inc.*, OCS Appeal Nos. 10-01 through 10-04, at 8 (Feb. 10, 2011) (Order on Motions for Reconsideration and/or Clarification); *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 3 (EAB Feb. 4, 1999) (Order on Motions 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 Haw. Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 6 (Mar. 3, 1999) (Order Denying Motion for Reconsideration); *see also Knauf*, at 3 (citing *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) and stating that "[t]he reconsideration process 'should not be regarded as an opportunity to reargue the case in a more convincing fashion.'"). Federal courts employ a similar standard. *See Publishers Res., Inc. v. Walker-Davis Publ'ns, 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 pendency of the [original

proceeding]. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.”).

III. *DISCUSSION*

PLC has failed to demonstrate that the Board made a manifest error of law or fact. Instead, PLC sets forth in its reconsideration motion the new legal theory that Mr. Flores, despite his position as the director of the program office that issued the Administrative Order, has nonetheless acted as the Regional Judicial Officer and the Presiding Officer in this matter. This legal theory is unsustainable.

PLC asserts that Mr. Flores acted under a delegation of authority from the Regional Administrator pursuant to 40 C.F.R. § 22.4(b), yet PLC provides no support for this statement in its Motion. Section 22.4(b) states that a Regional Judicial Officer has the authority to act as a Presiding Officer, but there is nothing in the record that suggests the Regional Administrator delegated this authority to Mr. Flores. PLC’s arguments characterizing Mr. Flores’s participation in this matter as that of a Presiding Officer and a Regional Judicial Officer are wholly unsupported by the record, and thus PLC has not met the requisite standard for reconsideration set forth in 40 C.F.R § 22.32.¹

¹ Mr. Flores’s issuance of the Administrative Order shows that he was manifestly not acting in the capacity of a Regional Judicial Officer since, under 40 C.F.R. § 22.4(b), a Regional Judicial Officer “shall not have performed prosecutorial or investigative functions in connection with any case in which he serves as a Regional Judicial Officer,” and issuance of an Administrative Order is clearly a prosecutorial function.

IV. CONCLUSION

For the forgoing reasons, PLC's motion to reconsider the Board's April 19, 2011, Order Dismissing Appeal for Lack of Jurisdiction is hereby denied.

So ordered.²

ENVIRONMENTAL APPEALS BOARD

Dated: May 19, 2011

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

² The three-member panel deciding this matter is composed of Charles J. Sheehan, Edward E. Reich, and Kathie A. Stein. 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Dismissing Appeal for Lack of Jurisdiction in the matter of Henry J. Stevenson, Jr. & Parkwood Land Co., CWA Appeal No. 11-02, were sent to the following persons in the manner indicated:

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Dated: **MAY 19 2011**


Annette Duncan
Secretary