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

In re Deseret Generation and Transmission Co-operative Bonanza Power Plant Permit No. V-UO-000004-2019.00	)	CAA Appeal No. 24-01

ORDER DENYING MOTION FOR RECONSIDERATION

On September 10, 2024, the Environmental Appeals Board issued an Order Denying Review of U.S. Environmental Protection Agency Region 8's renewal of a Clean Air Act Title V permit. Following the Board's Order Denying Review, Petitioner, the Ute Indian Tribe of the Uintah and Ouray Reservation, filed a timely Motion for Reconsideration. *See* 40 C.F.R. § 124.19(m). The Tribe bases its Motion on, among other things, an argument that the Board "[f]ailed to [p]roperly [a]pply" the U.S. Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), to the Order Denying Review. Motion for Reconsideration at 5 (Sept. 20, 2024). *Loper* is not relevant to the Board's decision as there were no questions of statutory interpretation raised in the petition, and Loper does not apply to the Board's administrative review of permit appeals. The Tribe's other arguments merely repeat arguments that the Board previously considered and rejected, introduce new arguments that cannot be raised at this time, or otherwise mischaracterize aspects of the Order Denying Review. The Board denies the Tribe's Motion because it fails to identify any demonstrable error based on *Loper*, or otherwise, in the Order Denying Review.

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. § 124.19(m). "The Board reserves reconsideration for cases in which the Board has made a demonstrable error, such as a mistake on a material point of law or fact." *In re City of Taunton Dep't. of Pub. Works*, NPDES Appeal No. 15-08, at 1 (EAB June 16, 2016) (Order Denying Reconsideration). A motion for reconsideration is not an opportunity to raise new legal theories for the first time or to "reargue the case in a more convincing fashion." *In re Gen. Elec. Co.*, RCRA Appeal No. 16-01, at 2 (EAB Mar. 7, 2018) (Order Denying Motion for Partial Reconsideration); *City of Taunton*, NPDES Appeal No. 15-08, at 1.

In the Motion for Reconsideration, the Tribe first makes a broad assertion that the Board erred in failing to apply *Loper* to the Region's technical determinations and interpretation of the law. Motion at 6, 8. But *Loper* is not relevant to the Board's decision. In *Loper*, the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), which established a framework for federal court review of an agency's statutory interpretation and required courts to defer to an agency's permissible construction of an ambiguous statute. *Loper*, 144 S. Ct. at 2254, 2273. The *Loper* decision holds that federal courts "must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Id.* at 2273. In so holding, the Supreme Court provided that "[c]areful attention to the judgment of the Executive Branch may help inform that inquiry. And when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it." *Id.*

As an initial matter, we note that the Tribe did not preserve or raise a statutory interpretation challenge in its petition. Rather, the petition alleged that the Region acted contrary to executive orders on environmental justice, agency policies, and the federal government's trust responsibility to tribes. Ute Indian Tribe of the Uintah and Ouray Reservation, Petitioner's Brief at 5 (Jan. 3, 2024) ("Pet."). The Tribe did not argue that the Region violated any of the provisions of the Clean Air Act ("CAA"). *See In re Deseret Generation and Transmission Coop. Bonanza Power Plant*, CAA Appeal No. 24-01, slip op. at 13 (EAB Sept. 10, 2024), 19 E.A.D. ___. Simply put, *Loper* does not apply, as there was no statutory interpretation issue raised by the Tribe's petition.

The Tribe also fails to recognize that *Loper* would not apply to the Board's administrative review of the Region's permitting decision in any event. Board precedent establishes that the principle of "*Chevron* Deference" does not apply to adjudications by administrative tribunals like the Board. *Chevron* established the level of deference that the *judicial* branch should give to the *executive* branch for its statutory interpretations. *In re Lazarus, Inc.*, 7 E.A.D. 318, 350 n.54 (EAB 1997) ("The doctrine of administrative deference as applied by the courts is based on the Constitutional principle of separation of powers.") (citing *Chevron*, 467 U.S. at 866). The Board has explained that the deference federal courts (previously) afforded to an agency's statutory interpretations under *Chevron* is not applicable to the Board's review of decisions of individual components of EPA. *See id.* at 351 n.55 ("Parties in cases before the Board may not ordinarily raise the doctrine of administrative deference as grounds for requiring the Board to defer to an interpretation of statutory or regulatory requirements advanced by any individual component of the EPA * * * because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction."); *In re McLaughlin Gormley King Co.*, 6 E.A.D. 339, 350 (EAB 1996)

(stating the Board was under no obligation to defer to an *agency* interpretation of a statute); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 509 n.30 (EAB 1994) ("Because the Board serves as the final decisionmaker for the Agency, the concepts of *Chevron* and *Skidmore* deference do not apply to [Board] deliberations."). Since *Chevron* did not apply to the Board's review of decisions by other components of the agency, *Loper* does not change the law applicable or relevant to the Board's Order Denying Review.

Further, the Tribe mistakenly seeks to apply *Loper* to the Agency's technical determinations. The Tribe states that "*Loper* requires that a reviewing court hear the scientific evidence and decide on its own whether EPA's interpretation of the law and science is correct." Motion at 5. The Tribe then argues that *Loper* requires the Board to provide an independent review of the Region's technical conclusions. *Id.* at 6. As stated above, and contrary to the Tribes' assertion, *Loper* concerns court deference to an agency's legal interpretation of statutes, not an agency's factual findings regarding scientific or technical evidence. *See Loper*, 144 S. Ct. at 2273 (holding courts "may not defer to an agency *interpretation of the law* simply because a statute is ambiguous.") (emphasis added). *Loper* did not change the deference courts accord to agency technical decisions. Indeed, the D.C. Circuit has continued to defer to "EPA's evaluation of scientific data within its area of expertise" after *Loper*. *See Huntsman Petrochemical LLC v. EPA*, 114 F.4th 727, 735 (D.C. Cir. 2024). *Loper* provides no basis for reconsideration of the Board's decision with respect to the Region's technical determinations.

As to the Tribe's second argument in its Motion for Reconsideration that the Board adopted the Region's "[r]estrictive [v]iew of [p]ermit [c]onditions" and this contradicts federal regulations, we reiterate that *Loper* does not apply to the Board's review of permit appeals, nor to agency interpretations of its own regulations. Motion at 6. Moreover, the Tribe's petition

failed to allege that the permit is inconsistent with the requirements of part 71. *See Deseret*, slip op. at 13, 19 E.A.D. at ___. The Tribe cannot make new arguments in a motion for reconsideration. *Gen. Elec. Co.*, RCRA Appeal No. 16-01, at 2. And the Tribe's new argument in the Motion for Reconsideration fails to identify any applicable requirement that the current permit fails to include. Motion at 6-8.

In fact, the Board analyzed the Tribe's arguments advocating for additional Title V permit conditions in the context of the Tribe's environmental justice claims, which is the context in which the Tribe sought additional permit conditions. *Deseret*, slip op. at 29, 19 E.A.D. at ___. As stated in the Order Denying Review, Title V permits "must include emissions limitations and standards, a schedule of compliance, monitoring requirements, and other conditions 'necessary to assure compliance with applicable requirements of this chapter.'" *Id.* at 3-4; *see also id.* at 13, 17. The Board conducted an extensive analysis of the permit conditions requested by the Tribe and the Title V regulations and concluded that the applicable law did not give the agency discretion to include the Tribe's requested conditions, such as the requested tree planting and establishment of a future trust fund, in a Title V permit. *Id.*, slip op. at 29-30. In the Motion, the Tribe argues for additional and unspecified requirements and offers no legal support. Motion at 8 ("The Tribe asserts that the regulations *allow*, if not *require*, EPA to incorporate new information and information omitted from the original Permit but critical to ensure protection of human health and the environment."). The Tribe's Motion merely repackages arguments made in the Tribe's petition that were not based on CAA Title V or the implementing regulations, but on environmental justice executive orders and policies. This is not a basis for reconsideration.

In the Tribe's discussion of permit conditions, it reiterates its disagreement with the Board's conclusion that the Region's reliance on the 2013 Ozone Study did not warrant review.

Motion at 7; *Deseret*, slip op. at 23-24, 19 E.A.D. at ___ (citing Environ Int'l Corp., *Final Report: 2013 Uinta Basin Winter Ozone Study* (Mar. 2014) (A.R. 54)).[1] The Tribe's argument that the Board's "reliance on the 2013 Utah Study is egregiously erroneous," is also based on a misreading of *Loper* and the Board's decision. Motion at 7. As noted above, *Loper* does not alter the Board's longstanding precedent that a petitioner has a particularly heavy burden to demonstrate error in a permit issuer's technical determination. *See Deseret*, slip op. at 25, 19 E.A.D. at ___ (citing *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *In re Chemical Waste Management*, 6 E.A.D. 66, 80 (EAB 1995)). Here, the Board reviewed the Region's environmental justice analysis including its scientific conclusions and found them to be supported by evidence in the record and explained in the response to comments. *Id.*, slip op. at 21-26. As the Board noted in the Order Denying Review, "The Tribe has offered no evidence to support its theory that the temperature inversion has changed. In the absence of any contradictory evidence in the record, the Board concludes the Region duly considered this issue and provided a reasoned explanation for its decision." *Id.*, slip op. at 26.[2] The petition failed to meaningfully address the Region's explanation for its decision to rely on the 2013 Ozone Study.

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[1] This argument was also proffered in the context of the Tribe's environmental justice arguments in the petition for review. Pet. at 18.

[2] The Tribe's argument, raised for the first time in the Motion for Reconsideration, that "groundwater contamination was caused almost exclusively by air emissions from the stack," similarly lacks citation to or support in the record, and it comes too late for consideration. Motion at 8 (emphasis omitted); *see Gen. Elec. Co.*, RCRA Appeal No. 16-01, at 2.

See id., slip op. at 25. In its Motion, the Tribe has not identified any demonstrable error in the Board's evaluation of the Region's factual or technical determinations.

The Tribe's third argument regarding environmental justice merely reiterates arguments previously raised and rejected by the Board. The Tribe again asserts that the permitting decision is inconsistent with EPA's environmental justice policy. Motion at 9. The Board fully considered all of the Tribe's filings on appeal, the administrative record, and the applicable law. This included a thorough review of the Region's environmental justice analysis and the Tribes' arguments, and the Board concluded that "the Region appropriately evaluated the environmental justice implications of the permitting action and explained how it exercised the limited discretion it had under Title V." *Deseret*, slip op. at 14-30, 19 E.A.D. at ___. The Tribe has not established a demonstrable error in the Board's decision regarding environmental justice.

In the Tribe's fourth and final argument in the Motion, it incorrectly asserts that the Board "summarily rejected" the Tribe's argument regarding the trust responsibility, and, in particular, erred in relying on the U.S. District Court ruling in *Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States Dep't of Interior*, No. 2:21-CV-00573-JNP-DAO, 2023 WL 6276594 (D. Utah Sept. 26, 2023). *See* Motion at 10. While the Board cited the *Ute* decision, it did so after analyzing applicable Supreme Court and Circuit Court precedent. *Deseret*, slip op. at 31, 19 E.A.D. at ___. As the Board explained, "unless Congress has created a conventional trust relationship with a tribe as to a particular trust asset, th[e] Court will not 'apply common-law trust principles' to infer duties not found in the text of a treaty, statute, or regulation." *Id.* (quoting *Arizona v. Navajo Nation*, 599 U.S. 555, 566 (2023)); *see also U.S. v. Jicarilla Apache Nation*, 564 U.S. 162, 174 (2011); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998). The Board explained that the Tribe had not identified any basis for a

conventional trust relationship with respect to air resources, and cited the *Ute* decision, which addressed water resources, as analogous. *Deseret*, slip op. at 31, 19 E.A.D. at __. The Board also recognized a general trust responsibility and determined that the Region fulfilled that responsibility by complying with the CAA and its implementing regulations. *Id.*, slip op. at 31-32. The Board concluded that the Tribe had not demonstrated clear error, an abuse of discretion or that review was otherwise warranted with respect to the Agency's trust responsibility. *Id.*, slip op. at 32. The Board's consideration of the Tribe's trust responsibility arguments neither "summarily rejected" the Tribe's argument nor was erroneous.[3]

While the Tribe expresses disagreement with the Board's conclusions, it fails to demonstrate that the Board made any demonstrable error on a material point of law or fact or otherwise. The Board therefore denies the Motion for Reconsideration.

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[3] The cases the Tribe cites are inapposite. *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859 (10th Cir. 1994), *aff'd en banc*, 47 F.3d 1032 (10th Cir. 1995), *Cheyenne-Arapaho Tribes v. U.S.*, 966 F.2d 583, 588-90 (10th Cir. 1992), and *Kenai Oil and Gas, Inc. v. U.S. Dep't of Interior*, 671 F.2d 383, 386-87 (10th Cir. 1982) involved appeals from decisions of Department of the Interior related to oil and gas resources on tribal land for which the agency is a trustee acting in a fiduciary capacity. *Mandan, Hidatsa & Arikara Nation v. U.S. Dep't of Interior*, 95 F.4th 573, 583 (8th Cir. 2024) involved a decision by the Bureau of Land Management concerning land held in trust for the benefit of tribes. Here, the EPA is not a trustee of tribal land or resources but a regulatory agency subject to a general trust responsibility, which it fulfilled by complying with applicable laws and regulations. *See Morongo Band of Mission Indians*, 161 F.3d at 574.

So ordered.[4]

ENVIRONMENTAL APPEALS BOARD

Dated: November 8, 2024

By: _____
Mary Kay Lynch
Environmental Appeals Judge

[4] The three-member panel deciding this matter is composed of Environmental Appeals Judges Mary Kay Lynch, Wendy L. Blake, and Ammie Roseman-Orr.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Motion for Reconsideration* in the matter of Deseret Generation and Transmission Co-operative Bonanza Power Plant, CAA Appeal No. 24-01, were sent to the following persons in the manner indicated:

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