BEFORE THE ENVIRONMENTAL APPEAL 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

RESPONSE OF DESERET GENERATION AND TRANSMISSION CO-OPERATIVE TO PETITIONER'S MOTION FOR RECONSIDERATION

Pursuant to 40 C.F.R. § 124.19(f)(3) and the Environmental Appeals Board's (the "Board") September 26, 2024 Scheduling Order on Motion for Reconsideration, Deseret Generation and Transmission Co-Operative ("Deseret") hereby submit this Response to Ute Indian Tribe of the Uintah and Ouray Reservation's (the "Tribe" or "Petitioner") Motion for Reconsideration ("Motion") of the Board's Order Denying Review ("Order"). For the reasons discussed below, the Board should deny the Motion.

INTRODUCTION

On September 10, 2024, the Board denied review of Petitioner's challenge to EPA Region 8's (the "Region") renewal of the Clean Air Act ("CAA") Title V permit (the "Permit") issued to Deseret for the Bonanza Power Plant. Petitioner now seeks reconsideration of the Board's Order, but the Motion fails to identify any factual or legal error in the Board's decision that warrants reconsideration. Petitioner's primary argument is that the Board failed to consider the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024),

which was decided prior to the Board's decision in this case.[1] Mot. at 5-10. *Loper* does not apply to the Board's administrative review of permit appeals. Moreover, *Loper* did not change the substantive requirements, procedures, or policies applicable to Title V permitting decisions. In short, *Loper* is not relevant to this case. Petitioner's reliance on *Loper* is merely a vehicle to reiterate arguments that the Board has already rejected. Because Motion fails to articulate any clearly erroneous factual or legal conclusions in the Board's decision, the Board should deny reconsideration.

STANDARD OF 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 Missouri Permit*, NPDES Appeal No. 17-04, at 2 (EAB Nov. 2, 2017) (Order Denying Motion for Reconsideration Or Clarification); *see also In re Bear Lake Props., LLC*, UIC Appeal No. 11-03, at 2-3 (EAB July 26, 2012) (Order Denying Motion for Partial Reconsideration); *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 through 10-05, at 2 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration)). A party should not regard reconsideration "as an opportunity to reargue the case in a more convincing fashion[.]" *In re Town of Newmarket*, NPDES Appeal No. 12-05, at 1-2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) (Order on Motion for Reconsideration)); *In re*

[1] *Loper* was decided on June 28, 2024. The EAB issued its Order Denying Review in this case on September 10, 2024.

Chempace Corp., FIFRA Appeal Nos. 99-2 & 99-3, at 3 (EAB July 25, 2000) (Order Denying Motion for Reconsideration) (same). Nor can a motion for reconsideration "serve as the occasion to tender new legal theories for the first time," *In re Bear Lake Props.*, UIC Appeal No. 11-03, at 3. To the contrary, "[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 Russell City Energy Ctr*., PSD Appeal Nos. 10-1 to 10-05, at 2-3; *see also In re Env't Disposal Sys., Inc.*, UIC Appeal No. 07-03, at 5 (EAB Aug. 25, 2008) (Order Denying Motion for Reconsideration) (denying reconsideration because motion reiterated arguments previously considered and rejected by the Board and did not identify any error warranting reconsideration); *In re D.C. Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, at 4-5 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration) (explaining that while the permittee clearly disagreed with the Board's conclusion, the permittee had not articulated any clear error in the Board's legal or factual conclusions, but was simply rearguing assertions previously considered and rejected by the Board).

DISCUSSION

I. The Supreme Court's Decision In *Loper Bright Enterprises v. Raimando* Does Not Warrant Reconsideration Of The Board's Decision.

Petitioner argues that *Loper* reflects a "change in the applicable law" during the pendency of the petition that should have been considered or referenced by the Board in its decision. Mot. at 6. Petitioner further contends that the Board, by not addressing *Loper*, erred by "clearly erroneously misstating the law, impermissibly deferring to EPA's decisions, and failing to provide an independent review of EPA's cursory conclusions against the Tribe." *Id*. While *Loper* may be an important decision broadly speaking, that does not make it significant or

relevant here. The Board should deny reconsideration because Petitioner fails to demonstrate how *Loper* renders any of the Board's factual or legal conclusions erroneous so as to justify a different outcome.

As an initial matter, the Motion should be denied because it does not identify any erroneous factual or legal conclusion in the Board's decision based on *Loper*, let alone explain why such error should yield a different outcome. *See* 40 C.F.R. § 124.19(m) ("Motions for reconsideration must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors."). At most, the Motion demonstrates disagreement with Board's decision, "but does not identify any clear errors of law or fact that would warrant reconsideration here." *In re Peabody W. Coal Co.*, CAA Appeal No. 11-01, at 2 (EAB Apr. 17, 2012) (Order Denying Motion for Reconsideration).

Petitioner contends that *Loper* "significantly changed" the law, but fails to articulate what applicable law or regulation *Loper* changed so as to justify reconsideration. Mot. at 6. The Motion states that the Board "erroneously misstat[ed] the law," but fails to point to any purported misstatement of law in the Board's decision. *Id*. It also asserts that the Board "impermissibly deferr[ed] to EPA's decisions," yet does not explain how the Region's determinations were not supported by the administrative record or contrary to law. *Id*; *see In re Town of Newmarket*, NPDES Appeal No. 12-05, at 2 (denying reconsideration where petitioner failed "to demonstrate that the Region made a clear error of law or fact or abused its discretion" in the permitting decision). Finally, the Motion argues that the Board "fail[ed] to provide an independent review of EPA's cursory conclusions," but fails to identify any such conclusions or demonstrate how they were erroneous. Mot. at 6. The Board cannot reconsider allegedly erroneous conclusions if the Motion does not explain where or how the Board supposedly erred.

In addition to the Motion's lack of specificity and clarity, reconsideration should be denied because Petitioner relies on a fundamental misinterpretation of *Loper* and mischaracterization of the Board's decision. First, *Loper* does not apply to the Board's review of permitting decisions. In *Loper*, the Supreme Court overruled the "*Chevron* doctrine,"[2] which was a two-step framework for *courts* to use during *judicial review* of agency interpretations of statutes they administer. *Loper*, 144 S.Ct. at 2254. At step one, courts considered whether the statute's plain terms "directly addres[s] the precise question at issue." *Chevron*, 467 U.S. at 843. If not and the court determined that "the statute is silent or ambiguous with respect to the specific issue," courts moved to the second step where they would defer to the agency's interpretation of the statute, as long as it "is based on a permissible construction of the statute." *Id*. at 843-44. Following *Loper*, *courts* must now "exercise their independent judgment in deciding whether an agency has acted within its statutory authority" rather than "defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper*, 144 S.Ct. at 2273.

While *Loper* provides a new framework for *judicial review* of final agency actions under the Administrative Procedure Act ("APA"), it has no application to the Board's review of the Region's Title V permitting decision here. The Board is not an Article III court and does not judicially review agency decisions under the Administrative Procedure Act. Nor does the Board review permitting decisions *de novo*. Rather, the Board's review of permit appeals is governed by 40 C.F.R. § 124.19 and is limited to examining "the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised 'considered judgment' in

[2] The "*Chevron* doctrine" emerged from the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), overruled by *Loper*, 144 S. Ct. 2244 (2024).

issuing the permit." Order at 12 (quoting *In re MPLX*, 18 E.A.D. 228, 230 (EAB 2020)). Any suggestion that the Board relied on *Chevron* deference or that *Loper* somehow applies to the Board's decision is wrong.

II. Petitioner Fails To Show Clear Error In The Boards Conclusion That The Permit Contains All Applicable Requirements Under The CAA.

The Motion next asserts that the Board erroneously deferred to the Region's interpretation of 40 C.F.R. § 71.6(a) "that it can only include in Title V permits conditions that were previously in the Permit and expressly enumerated in regulations and cannot look at additional requirements to ensure protection of human health and the environment." Mot. at 6. The Board should deny reconsideration on this issue, because the Motion merely repeats the same flawed arguments previously considered –and rejected— by the Board and fails to identify any clear error in the Board's decision.

Like to the petition for review, the Motion "does not argue that the permit is inconsistent with Title V of the CAA, the requirements of [40 C.F.R.] part 71, or that it fails to require Deseret to take any additional or different actions required by the CAA or part 71." Order at 13. Nor does the Motion "identify any applicable requirement that the current permit renewal fails to incorporate[.]" *Id*. at 29 (citing 40 C.F.R. § 71.2). Instead, Petitioner argues that the Board erred by not imposing additional or different (unspecified) requirements in the permit, because "the regulations *allow*, if not *require*, EPA to incorporate new information and information omitted from the original permit." Mot. at 8 (emphasis in original). However, Petitioner merely

rehashes the same failed arguments from the petition and should not be considered.[3] *See In re Town of Newmarket*, NPDES Appeal No. 12-05, at 1-2 (denying reconsideration where petitioner reiterated the same arguments that it made in its petition and replies).

Petitioner's repackaged arguments from the petition are no more convincing in the instant Motion and should be rejected again. First, the Motion cites no legal authority to support its assertion that the Board is allowed or even required to include permit conditions beyond those necessary to satisfy with the "applicable requirements" set forth in 42 U.S.C. § 7661c(a) and 40 C.F.R. § 71.2. *See* Mot. at 8. The Motion also does not identify what additional or different conditions the Board was allegedly required to, but failed to, impose in the permit.

Second, at no point does the Motion explain what "new information" or "scientific evidence" it contends the Board should have, but did not, consider. Petitioner simply repeats its critique of the Region's "reliance on the 2013 Utah Study"[4] in its environmental justice analysis. Mot. at 7; *see* Order at 24-26 ("We next address the Tribe's challenge to the Region's reliance on the 2013 Ozone Study in its environmental justice analysis.") (citing Pet. at 18)). Like the petition, the Motion fails "to explain or provide any support" that reliance on the "2013 Utah Study" was clear error. *See* Order at 25 ("[Petitioner] merely states that it 'does not agree' with

[3] *See e.g.*, Pet. at 5 ("EPA has approved the Title V Permit renewal without taking the necessary steps to ensure that the environmental and human health concerns of the Ute Indian Tribe are addressed in the Permit conditions."); Pet'rs' Reply at 4 ("the Tribe has suggested ways to address Environmental Justice outside of imposing substantive emission requirements, such as using penalties that should have been assessed against Deseret for operating for years without a permit to improve environmental conditions to those affected, all of which EPA has summarily rejected.").

[4] Petitioner appears to be referring to the *Final Report: 2013 Uinta Basin Winter Ozone Study* prepared by Environ International Corporation that was cited in the Region's Response to Comments and discussed in the Board's decision. *See* Order at 22-26. This study is referenced as the "2013 Ozone Study" in the Order. *Id*.

the Region's conclusion, describes the study as being based on 'historic data,' and asserts that '[d]ue to our rapidly changing climate, one cannot assume that historic climate properties will remain stable and unchanging.'") (quoting Pet. at 18). But "a mere difference of opinion or different theory is not sufficient to prove the [Board] clearly erred." Order at 25 (citing *In re Panoche Energy Ctr., LLC*, 18 E.A.D. 818, 821 (EAB 2023) ("Clear error or abuse of discretion in a permit issuer's technical determination cannot be 'established simply because petitioners document a difference of opinion or an alternate theory.'") (citation omitted)); *see also In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005) ("[O]n issues that are fundamentally technical in nature, the Board assigns a particularly heavy burden to the petitioner.") The Board concluded "the Region duly considered this issue and provided a reasoned explanation for its decision," Order at 26, and the Motion fails to demonstrate any clear error in this conclusion.

Third, *Loper* provides no support for reconsideration based on Petitioner's argument that the Board erred by allegedly deferring to the Region's technical determinations on the "scientific evidence" in the permitting record. Again, *Loper* addressed the framework for *judicial review* agencies' interpretation of statutes, not administrative review of agency decisions. *Loper*, 144 S.Ct. at 2254. But Petitioner's reliance on *Loper* leads it even farther astray. Petitioner appears to be confused about the standard of review that applies in this proceeding. *See* Mot. at 8 ("*Loper* requires that the reviewing court independently hear the scientific evidence and make its own decision on how that impacts the law."). Nowhere does *Loper* suggest that courts, let alone the Board, would review *de novo* the Region's interpretation of scientific or technical evidence. Board review of permit appeals is not a vehicle for Petitioner to get a do-over because it is dissatisfied with the Region's permitting decision. The Board has previously denied reconsideration where, like here, a petitioner has argued that the Board failed to adequately

scrutinize or independently review the Region's technical determinations. *In re Town of Newmarket*, NPDES Appeal No. 12-05, at 3 (denying reconsideration where petitioner alleged the Board "applied an improper standard of review by presuming that the Region's responses to comments were correct and failing to seek verification and support for those responses in the administrative record"). "The Board will not find clear error based merely on a difference of opinion or alternative theory regarding the permit issuer's technical decisions." *In re Evoqua Water Techs. LLC*, 17 E.A.D. 795, 799-800 (EAB 2019). "When reviewing a permit issuer's exercise of discretion, the Board applies an abuse of discretion standard. The Board will uphold a permit issuer's reasonable exercise of discretion if the decision is 'cogently explained and supported in the record.'" *Id*. at 800 (citations omitted). It is not the Board's burden to refute Petitioners' contrary conclusions. *In re Town of Newmarket*, NPDES Appeal No. 12-05, at 3. Rather, "Petitioner has the burden of proof on this appeal, and is required to demonstrate that the Region," and the Board in a motion for reconsideration, committed clear error. *Id*. The Motion demonstrates no clear error in the Board's conclusion that the Region fully considered and explained its rationale for its technical determinations. Order at 26.

Lastly, the Motion repeats Petitioner's disagreement with the Region's "position that groundwater contamination that was the subject of the multiple RCRA inspection violations was not associated with Permit conditions." Mot. at 8. For the first time, Petitioner now contends that "air emissions" from burning coal at the Bonanza Plant "were the direct cause of the surface and groundwater contamination." *Compare, id*. at 8-9, *with* Pet. at 24 (asserting "the monitoring and disposal of CCR. . . could lead to adverse environmental impacts on groundwater"). This argument is untimely and should not be considered at all. *See In re West Bay Exploration Co.*, UIC Appeal No. 14-66, at 2 (EAB Oct. 21, 2004) (Order Denying Reconsideration) (explaining

that a motion for reconsideration is "not an opportunity to reargue the original petition, either by raising arguments or facts that could have been presented earlier."). Even if this argument were properly before the Board, it should be rejected. Other than vague and conclusory statements expressing disagreement with the Region's determinations regarding the Permit's lack of impact on groundwater, Petitioner cites no evidence in the administrative record or otherwise to support its assertion. *See In re Town of Newmarket*, NPDES Appeal No. 12-05, at 2 ("disagreement with the Board's conclusions. . . is insufficient to meet the Board's standard for reconsideration"). The Motion identifies no clear error in the Board's determination that the Region "gave due consideration to the Tribe's concerns about groundwater impacts of the permit renewal." Order at 27.

III. Petitioner Fails To Show Clear Error In The Board's Determination That The Region Appropriately Evaluated the Environmental Justice Implications of the Permitting Action.

Petitioner next argues that the Board should reconsider its decision because "[the Board's] concurrence with EPA's position that its Environmental Justice Policy is satisfied solely by listening to Petitioner's concerns, without taking action to address those concerns, is clearly erroneous." Mot. at 9. Petitioner already made these arguments to the Board, and they were rejected. In its petition, it asserted "that the Region failed to 'reasonably consider' the environmental justice issues it raised, and that the Region's action is irreconcilable with its obligation to address various environmental justice concerns[.]" Pet. at 13, 20. Petitioner also challenged the Region's environmental justice analysis, arguing that the Region, in contravention its environmental justice policies, failed to acknowledge Tribal cultural values, including "a profound, spiritual respect for elders (who have become ill likely attributable to local air

pollution)" and "reverence for the natural environment." *Id*. at 18. The Board rejected these arguments, concluding that the Region "did consider the Tribe's cultural values," "gave due consideration to the Tribe's concerns" about environmental impacts from the permit renewal, and "considered the Tribe's concerns about the permit's effect on wildlife and vegetation." Order at 27. The Board also rejected Petitioner's unsupported position –repeated in the Motion (Mot. at 9)— that Deseret should be required to privately fund or perform mitigation activities. Order at 29. The Motion fails to identify any clear error in these determinations, and the Board should deny reconsideration.

IV. Petitioner Fails To Show Clear Error In The Board's Conclusion That the Region Fulfilled Its General Trust Responsibility to Petitioner.

Lastly, the Motion seeks reconsideration, because the Board "rejected the Tribe's invocation of the [tribal] trust responsibility, relying on a U.S. District Court's 2023 ruling in an unrelated case, *Ute Indian Tribe v. Dep't of Interior*." Mot. at 10-11. It is unclear from the Motion what aspect of the Board's decision it objects to. General dissatisfaction with the Board's decision is not enough to warrant reconsideration. Petitioner's Motion must "identify any clear errors of law or fact that would warrant reconsideration here." *In re Peabody*, CAA Appeal No. 11-01, at 2. Here, the Motion expresses Petitioner's disagreement with the Board's determination regarding the trust responsibility, but fails to articulate how the Board's decision "disregard[ed]" the trust responsibility or how that constitutes clear error. Mot. at 11.

Additionally, the Motion mischaracterizes the Board's decision. In its petition, Petitioner made general allegations that the Region failed to fulfill its trust responsibility to preserve tribal assets and that "[c]lean air must be considered a fundamental tribal asset[.]" Pet. at 14. The Board correctly observed that Petitioner did "not point to any legal authority that creates a

conventional trust relationship with regard to air." Order at 31. The Board then cited *Ute Indian Tribe*, which concluded that no such conventional trust relationship exists. *Ute Indian Tribe*, No. 2:21-CV-00573-JNP-DAO, 2023 WL 6276594, at *1 (D. Utah Sept. 26, 2023). But that was not the end of the Board's analysis.

The Board went on to recognize that the United States "maintains a general trust relationship with Indian Tribes." *Id*. (quoting *Arizona v. Navajo Nation*, 599 U.S. 555, 565 (2023). The Board further noted that, "in the absence of a conventional trust relationship, an agency fulfills its general trust responsibility by complying with the statutes and regulations it is entrusted to implement." *Id*. (citing *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998) ("[A]lthough the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."); *Nance v. EPA*, 645 F.2d 701, 711 (9th Cir. 1981) ("[A]dequate procedures were provided by the Clean Air Act and the EPA regulations to fulfill [the United States' trust] responsibility [to tribes]."). Relying on Supreme Court and Ninth Circuit precedent, the Board concluded that "[t]he Region fulfilled its general trust responsibility by complying with the requirements of the CAA and 40 C.F.R. part 71 . . . and provid[ing] additional opportunities to comment based on the Tribe's request." *Id*. at 32. Contrary to the Motion, the Board's determination that the Region complied with its general trust obligations when issuing the Permit was not solely based on *Ute Indian Tribe*. The Board provided ample support and thoroughly explained its rationale. The Motion, on the other hand, cites no legal authority to demonstrate that the Board's conclusion is clearly erroneous.

CONCLUSION

In filing this Motion, Petitioner is attempting to reargue its case by citing irrelevant case law and repackaging arguments that have been considered and rejected by the Board. Petitioner has not met the standard for establishing a basis for reconsideration. Therefore, the Motion should be denied.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

Pursuant to 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that Deseret's Response to Petitioner's Motion for Reconsideration does not exceed 7000 words.

Respectfully submitted,

Date: October 7, 2024

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CERTIFICATE OF SERVICE

I certify that the foregoing **Response to Motion for Reconsideration** was filed electronically with the Environmental Appeals Board's E-Filing system and served by email on the following persons on October 7, 2024:

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