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

In re Atlantic Shores Offshore Wind, LLC Permit No. OCS-EPA-R2 NJ 02	)	OCS Appeal No. 24-01

ORDER DENYING MOTION FOR RECONSIDERATION

On March 14, 2025, the Environmental Appeals Board issued an Order Granting Motion for Voluntary Remand of an Outer Continental Shelf ("OCS") Clean Air Act permit ("Permit") issued by EPA Region 2 to Atlantic Shores Offshore Wind Project 1, LLC ("Atlantic Shores") and dismissing OCS Appeal No. 24-01. Atlantic Shores filed a Motion for Reconsideration, which petitioner Save Long Beach Island, Inc. and the Region oppose. Mot. for Recons. ("Motion") at 1 (Mar. 24, 2025); Pet'r Save Long Beach Island's Br. in Opp'n to Atlantic Shores Offshore Wind LLC's Mot. for Recons. (Mar. 31, 2025); EPA Region 2's Resp. to Atlantic Shores Offshore Wind, LLC's Mot. for Recons. (Apr. 3, 2025). The Board granted Atlantic Shores' unopposed motion to set a schedule for a consolidated reply and the reply was filed on April 10, 2025. Atlantic Shores Offshore Wind, LLC's Consol. Reply in Supp. of Mot. for Recons. (Apr.10, 2025). The Board denies the Motion for Reconsideration because it fails to identify any demonstrable error in the Order Granting Motion for Voluntary Remand.

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) (quoting *In re Town of Newmarket Wastewater Treatment Plant*, NPDES Appeal No. 12-05, at 2 (EAB Jan. 7, 2014)); *In re Deseret Generation and Transmission Coop. Bonanza Power Plant*, CAA Appeal No. 24-01, at 2 (EAB Nov. 8, 2024) (Order Denying Motion for Reconsideration); *see also In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 through 10-05, at 2-3 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay).

Here, the Region's motion for voluntary remand is consistent with Agency regulation and Board precedent. The Board fully considered Atlantic Shores' opposition to the Region's request for a voluntary remand of the permit, its motion for reconsideration, and its consolidated reply, and we have found no merit in the arguments advanced by Atlantic Shores. Following well-established precedent, the Board exercised its broad discretion and granted the Region's request for a voluntary remand so that it could reconsider some element of its permit decision. *Id.* at 3-6; *see, e.g., In re Desert Rock Energy Co., LLC,* 14 E.A.D. 484, 493 (EAB 2009). The regulations governing Agency permitting are grounded in a system that ensures that "most permit conditions should be finally determined at the Regional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). And, as stated in the order granting remand, the Board "cannot predict what the Region may, or may not, do on remand nor is it appropriate for the Board to provide a legal opinion on the merits of these theoretical outcomes."

Remand Order at 6 (quoting *Desert Rock*, 14 E.A.D. at 507). Among other things, to do so would be the height of inefficiency. In the instant motion, Atlantic Shores simply reiterates its arguments that misconstrue applicable law, regulations, and Board precedents and posits at least one new argument. This is not sufficient to warrant reconsideration. And contrary to Atlantic Shores' attempt to flip the burden, it is not incumbent upon the opposing parties or the Board to establish that the Board *should not* reconsider the decision. *See* Consol. Reply in Supp. of Mot. for Recons. at 5-7.

In its motion, Atlantic Shores fails to demonstrate any matter erroneously decided in the Board's Order in exercising its discretion and following the well-established precedent that guided the Board's decision. For the reasons explained in the order granting remand, the Board has long allowed permit issuers to withdraw permits and file motions for remands or for stays of the proceedings. *See* Remand Order at 3; *Desert Rock*, 14 E.A.D. at 493 & n.14; *In re Indeck-Elwood, L.L.C.*, PSD Appeal No. 03-04, at 5-6 (May 20, 2004) (Order Denying Respondent's Motion for Voluntary Partial Remand and Petitioners' Cross Motion for Complete Remand, and Staying the Board's Decision on the Petition for Review). This was true even before the current regulations in 40 C.F.R. § 124.19 were promulgated and before the regulations addressed withdrawal of permits. *See* Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals Pending Before the Environmental Appeals Board, 78 Fed. Reg. 5281, 5282 (Jan. 25, 2013) ("Specifically, before today, § 124.19 authorized the Regional Administrator to unilaterally withdraw a permit and prepare a new draft permit at any time prior to the Board's grant of review under what was § 124.19(c)."); Amendments to Streamline the NPDES Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,281 (Dec. 11, 1996)

(proposed rule) ("In practice, EPA has withdrawn and reissued permits under all statutes prior to decisions of the EAB as well as prior to ALJ decisions.").

Section 124.19(j) only addresses the Region's authority to unilaterally withdraw a permit, not the Board's authority to grant a voluntary remand. *See* 40 C.F.R. § 124.19(j); *see also Desert Rock*, 14 E.A.D. at 492; *In re West Bay Expl. Co.*, UIC Appeal Nos. 13-01 & -02, at 2 (EAB May 29, 2013) (Order Denying Reconsideration). The promulgation of regulations allowing for unilateral withdrawal of a permit in certain circumstances did not alter the Board's wide discretion to grant a motion for voluntary remand and it does not limit the Region's ability to request a voluntary remand at any time. 78 Fed. Reg. at 5282 ("Nothing in this regulation prevents the Region from seeking to withdraw the permit by motion at any time."). The time provisions on the Region's actions were intended to avoid a unilateral withdrawal after the Board "devoted significant resources to the substantive consideration of an appeal." *Id*. Thus, the addition of the unilateral withdrawal authority to the part 124 regulations and the timing provision provided the Board with a mechanism to efficiently manage the Board's docket, without limiting the Board's discretion to grant a voluntary remand at any time. *See Desert Rock*, 14 E.A.D. at 493; *In re West Bay Exploration Co.*, UIC Appeal Nos. 13-01 & -02, at 2 (EAB May 29, 2013) (Order Denying Reconsideration); 78 Fed. Reg. at 5282 ("Nothing in this regulation prevents the Region from seeking to withdraw the permit by motion at any time."). Atlantic Shores misconstrues section 124.19(j) to somehow limit the Board's discretion to grant a request for withdrawal and ignores precedent that makes it clear the Board may, and has, granted requests for voluntary remands at *any time*.

And despite Atlantic Shores' renewed attempts to very narrowly construe when the Board may grant a permit issuer's motion for voluntary remand, the Board's discretion is broad and

does not require a permit issuer to specify particular permit provisions that it intends to reconsider. This is not new, and Board precedent incorporates this point. In fact, Atlantic Shores repeatedly ignores language from prior cases that provide that the Board will generally grant a request when the region advises the Board that it intends to reconsider "some element of the permit decision." *Desert Rock*, 14 E.A.D. at 493 & n.14 (citing *Indeck-Elwood, L.L.C.* at 5-6). The Region is not required to identify a specific element of its permit decision. Atlantic Shores appears to add words and requirements to suit its own purposes. The Region's expressed intent to reevaluate the Project and its environmental impacts as part of a review called for under the Presidential Memorandum is reasonable, and granting a remand under these circumstances is within the Board's discretion.[1] The Region explained the reason for its request and the Board explained why it was granting the request, including not engaging in the issuance of an advisory opinion and long standing Agency policy that most permit conditions should be finally determined at the Region level. Atlantic Shores appears to disagree with this decision because of the *potential* results.

Moreover, allowing permit issuers within the executive branch to reconsider pending decisions at the request of an Administrator or during Administration transitions is reasonable and consistent with past precedent. For example, in 2009, during the proceedings in the *Desert Rock* PSD permit appeal, EPA Region 9 sought a remand because "'the Administrator's office ha[d] requested that Region 9 reconsider its permitting decision,'" and the Board granted Region

[1] The Region's reading of the Presidential Memorandum as applicable to this permit in the absence of final agency action is reasonable. In any event, the request for a voluntary remand to reevaluate an element of the permit decision is reasonable and consistent with past practice even in the absence of a Presidential Memorandum.

9's request. *Desert Rock*, 14 E.A.D. at 488 (quoting EPA Region 9's Motion for Voluntary Remand 1 (Apr. 27, 2009)). And in *In re GSP Merrimack LLC*, the Region sought a continuation of the oral argument date and abeyance of sixty days so that EPA leadership under a new Administration, "could 'be briefed on the cases and the underlying action to determine the Agency's position going forward in this matter.'" 18 E.A.D. 524, 526 (EAB 2021) (quoting EPA Region 1 Motion for Continuance of the Date for Oral Argument and Abeyance 1 (Feb 3, 2021)); *see also In re GSP Merrimack LLC*, NPDES Appeal Nos. 20-05, 20-06, at 2-3 (Feb. 9, 2021) (Order Granting Motion for Continuance of Oral Argument Date and Abeyance) (granting opposed motion for abeyance after Executive Order requiring review of prior Administration's actions to allow time to brief incoming Agency leadership and allowing the Region to request a voluntary remand, among other options); *In re Limetree Bay Terminals, L.L.C.*, CAA Appeal Nos. 20-02, 20-03, at 2-3 (Feb. 12, 2021) (Order Granting Motion for Extension of Time to File Response) (granting extension to allow time to brief incoming leadership after Executive Order requiring review of prior Administration's actions).

It is also important to note that while neither the Board nor Atlantic Shores can presume to know what Region 2 will determine, Region 2 may or may not change its position on some element of the permitting decision following its review on remand. And "[a]n agency may change its existing position on an issue 'as long as [it] provide[s] a reasoned explanation for the change.'" *Housatonic River Initiative v. U.S. EPA*, 75 F.4th 248, 270 (1st Cir. 2023) (quoting *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016)). Here, the Region seeks to

reevaluate a permitting decision that is not yet final.[2] We emphasize that neither the Board nor Atlantic Shores can predict the result of the Region's reevaluation or determine in advance whether any change in the decision would be supported by the administrative record for the final permit decision. *See id.*; *see also In re GMC Delco Remy*, 7 E.A.D. 136, 167 n.61 (EAB 1997) (noting that courts "refuse to assume in advance that federal agencies will not follow legal

[2] In a footnote, Atlantic Shores acknowledges that the applicable regulations state that final agency action does not occur until the "EAB appeal is complete" and after the administrative review proceedings are exhausted. Motion at 10 n.10. Atlantic Shores argues, however, that "this raises the very real question * * * as to whether EAB's regulations are legal in the context of air construction permits, where they mandate use of an administrative review procedure that all but ensures Section 165(c) of the CAA is violated." *Id*. Not so. Nothing in the regulations governing EAB appeals precludes the Agency from granting or denying a permit application, including review by the EAB, with a final permit decision within the statutory timeframe. Atlantic Shores' allegation that the timeframe was exceeded for the permit at issue in this matter does not render the EAB regulations invalid, and, as discussed further below, based on the current record before the Board, it is unclear when the statutory timeframe began to run and the issue is not properly raised in this forum. *See* page 9 below.

Furthermore, Atlantic Shores' assertion that the Region issued a "final permit" on September 30, 2024, simply restates an erroneous argument Atlantic Shores made in opposition to the Motion for Voluntary Remand and rejected by the Board, which is not a basis for reconsideration. *Id*. at 10 & n.11; *see also Deseret*, CAA Appeal No. 24-01, at 2. Apparently, Atlantic Shores revisits this mistaken position to reargue that the Presidential Memorandum does not apply to the permit in this case and its argument that EPA has run afoul of the one-year timeframe in the CAA. As explained previously, the Region did not need to rely on the Presidential Memorandum for its remand request and any challenge to whether the Agency has exceeded the CAA timeframe lies elsewhere. Atlantic Shores also had other legal tools at its disposal if it had concerns about section 165(c).

requirements"). Accordingly, remand is both reasonable and in the interest of administrative efficiency.[3]

In its Motion, Atlantic Shores also asserts that the Board made a demonstrable error in concluding that the one-year deadline in CAA section 165(c), 42 U.S.C. § 7475(c), does not apply to remand. Motion at 3. What the Board concluded was that any challenge to the Agency's compliance with CAA section 165(c) is outside the scope of Board review and lies in federal court. Remand Order at 8.[4] Atlantic Shores misconstrues the Board's conclusion and now argues that the EAB erred in failing to acknowledge that the statutory "deadline had already

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[3] The federal court decisions cited by Atlantic Shores are inapposite. In *Am. Waterways Operators v. Wheeler*, the court noted that granting a request for remand of final agency action to reopen the agency's decision-making process would "potentially disrupt[] a years-long initiative by the State of Washington." 427 F. Supp. 3d 95, 99 (D.D.C. 2019). This is not the case here, where the final agency action has not yet occurred. *See* 40 C.F.R. § 124.19(*l*)(2) (defining what constitutes a final permit decision). And, in *Miss. River Transmission Corp. v. FERC*, the court noted in a footnote that the agency filed a motion to remand "two business days before oral argument" and "did not obtain, did not even request, leave to file the motion," violating local procedural rules meant to conserve the resources of the court and other parties. 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992). The court concluded: "For that reason alone, we deny [the motion to remand]." *Id.* Here, the Region followed the applicable regulations and Board precedent.

[4] Adjudicating a claim regarding the Region's failure to act as set forth in CAA section 165(c) is beyond the scope of Board review. *Desert Rock*, 14 E.A.D. at 501-02. Any potential remedy for an alleged violation of section 165(c) lies with the federal district courts. *See* CAA § 304(a)(2), 42 U.S.C. § 7604(a)(2) (granting district courts of the United States the jurisdiction to compel nondiscretionary agency action unreasonably delayed). Atlantic Shores' assertion that *Desert Rock* is "no longer good law" after *Avenal Power Ctr., LLC v. U.S. EPA*, is incorrect. *See* Motion at 7 n.6. *Avenal* held that the Board's review was included in the one-year timeframe set forth in section 165(c). 787 F. Supp. 2d 1, 4 (D.D.C. 2011). It did not address the Board's ability to remand a permit or the Board's conclusion that adjudication of a section 165(c) claim lies elsewhere.

passed as applied to the Final Permit, and that remand would further exacerbate this delay." Motion at 8. According to the arguments now raised in the Motion, Atlantic Shores avers that EPA was already in violation of section 165(c) when the Region issued its permit decision on September 30, 2024, before the petition in this appeal was even filed. *Id*. at 8-10. Yet Atlantic Shores discussed neither this statutory limit nor the alleged violation in its response to the petition. *See* Response of Atlantic Shores Offshore Wind, LLC and Atlantic Shores Offshore Wind Project 1, LLC to Petition for Review (Nov. 5, 2024) ("Atlantic Shores Resp. Br."). As we previously noted, the June 28, 2024, revised permit application was the only application included in the administrative record before the Board[5] and attached to Atlantic Shores' response brief in this matter. Remand Order at 1-2 n.2; *see also* Atlantic Shores Offshore Wind, *Outer Continental Shelf Air Permit Application* (Sept. 1, 2022; revised June 2024) (A.R. 2.1.1). Given Atlantic Shores' current argument, it is notable that Atlantic Shores did not raise any argument related to the one-year statutory timeframe in its filed response to the petition for review.

Atlantic Shores seems to interpret section 165(c) to mean that "Region 2 may not seek, and EAB may not grant, a voluntary remand that violates or exacerbates the violation of the statutory deadline." Motion at 4. This is a mistaken interpretation of section 165(c). Based on the current record before the Board, it is unclear when the statutory timeframe began to run. *See* also Remand Order at 1-2 n.2. If Atlantic Shores believed that the one-year deadline had already passed as of the date of the filed petition for review, it could have filed a motion to expedite review with the Board. The Board has previously issued orders in prevention of significant

[5] The record indicates that the application in the record includes additional information and updates, and it is not clear if this application superseded some earlier application.

deterioration ("PSD") cases in response to a permittee's motion to expedite that cited an ongoing violation of the statutory timeframe in section 165(c). *See, e.g.*, *In re La Paloma Energy Ctr., LLC*, PSD Appeal No. 13-10, at 1-2 (EAB Jan. 15, 2014) (Order Scheduling Status Conference/Expedited Oral Argument); *In re Tucson Elec. Power*, PSD Appeal No. 18-02, at 3 (EAB Oct. 18, 2018) (order directing parties to correct record issues to assist the Board's expedited review). We also note that, in this case, either the one-year timeframe of section 165(c) expired even before the appeal was filed or, based on the application in the record, the issue of the one-year timeframe has not yet arisen. In either case, a challenge to a Region's failure to act within the section 165(c) timeframe is beyond the scope of Board review. Therefore, Atlantic Shores fails to establish demonstrable error in the Board's decision not to interpret section 165(c) as limiting the Board's authority to remand the permit.[6]

Finally, Atlantic Shores argues that reconsideration should be granted because the Motion for Voluntary Remand was "motivated at least in part by political pressure." Motion at 17. Atlantic Shores misapplies federal court precedent to the facts of this case. Federal courts have recognized that agency action "may be arbitrary and capricious if political pressure influenced

[6] Atlantic Shores appears to argue that section 165(c) requires the Board to issue a decision denying review of the permit. *See* Motion at 3-10. Putting aside other parties' administrative appeal rights for the moment, in so arguing, Atlantic Shores presumes the outcome of a Board decision on the merits in this matter will be a denial. We note, however, if the Board were to issue a decision on the merits remanding the permit, it is likely that further delay in the permitting decision would result. In fact, by granting the Region's Motion for Voluntary Remand and noting that the Board is not requiring an appeal on the final permitting decision following remand, the Board is acting to expedite the matter. *See* Order Granting Motion for Voluntary Remand at 9.

the decision in a manner not dictated by the relevant statutes and regulations." *Connecticut v. U.S. Dept. of Interior*, 363 F. Supp. 3d 45, 63 (D.D.C. 2019).

The federal court decisions cited in the Motion are inapposite. The political pressure asserted in those cases came from outside the executive branch or communications between outside parties and a decisionmaker. *See Aera Energy LLC v. Salazar*, 642 F.3d 212, 215-16 (D.C. Cir. 2011) (concerning political pressure from state officials and members of Congress); *Press Broad. Co v. Fed. Commc'n Comm'n*, 59 F.3d 1365, 1368 (D.C. Cir. 1995) (concerning *ex parte* communications between agency decision-maker and outside parties); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1236 (D.C. Cir. 1971) (concerning political pressure from member of the House of Representatives); *Connecticut*, 363 F. Supp. 3d at 64 (concerning political pressure exerted in private meetings between executive branch officials and members of Congress). Here, the Region requested a voluntary remand to reconsider an element of its permitting decision—to review among other things the environmental impacts of the permit—and to coordinate within the executive branch on the review. Remand Order at 2-3. As discussed above, allowing permit issuers within the executive branch to reconsider pending decisions during Administration transitions is reasonable and consistent with past precedent.

Moreover, there is nothing to indicate that applicable requirements prescribed by statute or regulation will not be followed. In fact, as the Board noted in its Order granting voluntary remand, the Region seeks to reevaluate element(s) of the permitting decision within the scope of its statutory authority. Remand Order at 5. Any challenge to the Region's final permit decision is premature given that the Region's reevaluation has not yet occurred, and the Region proposes to consider factors within its discretion and grounded in applicable law.

While Atlantic Shores 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.

So ordered.

Dated: April 15, 2025

Per Curiam
Environmental Appeals Board[7]

[7] The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Ammie Roseman-Orr.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Motion for Reconsideration* in the matter of Atlantic Shores Offshore Wind, LLC, OCS Appeal No. 24-01, were sent to the following persons in the manner indicated:

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Dated: Apr 15, 2025

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