

F I L E D

Feb 17, 2021

Clerk, Environmental Appeals Board

INITIALS *EW*

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

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In re:)	
)	
Ocean Era, Inc. – Velella Epsilon Facility)	NPDES Appeal No. 20-08
)	
NPDES Permit No. FL0A00001)	
_____)	

ORDER REQUIRING STATUS REPORT

On October 30, 2020, Friends of Animals (“FOA”) petitioned the Environmental Appeals Board (“Board”) to review a Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permit decision by U.S. Environmental Protection Agency Region 4 (“Region”).¹ Pursuant to CWA §§ 402 and 403, the Region issued a NPDES permit to Ocean Era, Inc. (“Ocean Era”) to operate a pilot-scale offshore marine aquaculture facility, referred to as the Valella Epsilon Project (“Facility”), in federal waters of the Gulf of Mexico, approximately 45 miles off the coast of Sarasota, Florida. 33 U.S.C. §§ 1342, 1343. *See* Petition for Review by Friends of Animals (Oct. 30, 2020) (“FOA Petition”). FOA contends that issuance of the permit violates the CWA, 33 U.S.C. §§ 1251-1387, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, and the National Environmental Policy Act, 42 U.S.C. §§ 4231-4370h.

¹ A consortium of groups, including Center for Food Safety, Friends of the Earth, Recirculating Farms, Tampa Bay Waterkeeper, Suncoast Waterkeeper, Healthy Gulf, Sierra Club Florida, the Center for Biological Diversity, and Food & Water Watch, have also filed a petition for review in this matter (NPDES Appeal No. 20-09).

FOA requests that the Board hear oral argument on this matter. FOA Petition at 39. The Region has filed a response to the Petition and FOA has filed a reply to that response. EPA Region 4's Response to Petition for Review (Dec. 18, 2020) ("Region's Response"); Friends of Animals' Reply Brief in Support of Petition for Review (February 1, 2021). In its response, the Region states that it opposes FOA's request for oral argument. Region's Response at 38. The permittee, Ocean Era, has not participated in these proceedings.

For the following reasons, the Board has determined that a status report from the Region would materially assist in the Board's deliberations, including whether to set this matter for oral argument. First, FOA states that the proposed aquaculture facility would be the first of its kind to operate and discharge in federal waters of the eastern Gulf of Mexico. *See* FOA Petition at 1 ("The Permit would authorize the first ever aquaculture project in the Gulf of Mexico"). The arguments raised in the Petition appear to present issues of national significance concerning the application of the CWA, NEPA, and the ESA to offshore aquaculture facilities. The arguments also appear to include some issues of first impression for the Board. Second, President Biden recently issued an executive order directing federal agencies to "immediately review" certain actions taken "during the last 4 years" and to "consider suspending, revising, or rescinding" those actions. *See* Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 25, 2021).

And under longstanding EPA procedures, the Agency's regional and Headquarters offices must coordinate with respect to their views on issues raised in permit appeals so that the positions presented to the Board consistently represent those of the Agency as a whole, which properly takes into account the views of a new Administration. *See* Memorandum from Ray Ludwiszewski, Acting Gen. Counsel, Office of General Counsel, and Herbert H. Tate, Jr., Ass't

Adm'r, Office of Enforcement, U.S. EPA, to Reg'l Counsels, Assoc. Gen. Counsels, and Enforcement Counsels (Jan. 26, 1993) (attaching procedures for coordination of matters before the Environmental Appeals Board); *see also In re Evoqua Water Techs. LLC*, RCRA Appeal No. 18-01 (Order for Further Briefing on Evoqua's Motion for Stay of Permit Provisions Pending Board Review) (Dec. 14, 2018) (directing Region to confer with EPA's Office of General Counsel to ensure that Region's responses reflect Agency's views).

Thus, preparation and filing of a status report, reflecting consultation with the Office of General Counsel and the Office of Water (including incoming Agency officials as appropriate) will provide the Agency with an opportunity to review this first-of-its-kind permit in light of the above-referenced Executive Order and ensure that the Region's positions in this proceeding reflect the Agency's coordinated views. *See In re Granite Shore Power Merrimack LLC*, NPDES Appeal Nos. 20-05 and 20-06 (Order Granting Region 1's Motion for Continuance of Oral Argument Date and Abeyance) (Feb. 9, 2021) (granting Region 1's request for continuance of the date of oral argument and 60-day abeyance to allow for consultation with EPA leadership in new Administration in light of Executive Order 13,990); *see also In re Limetree Bay Terminals, L.L.C.*, CAA Appeal Nos. 20-02 and 20-03 (Order Granting Motion for Extension of Time to File Response) (Feb. 12, 2021).

Accordingly, the Region shall file a status report no later than **March 31, 2021**, informing the Board whether the Board should proceed with deliberations in this matter, including whether to set this matter for oral argument.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: Feb 17, 2021

By: 
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Requiring Status Report* in the matter of Ocean Era, Inc. – Velella Epsilon Facility, NPDES Appeal No. 20-08, were sent by email to the following persons:

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Dated: Feb 17, 2021



Eurika Durr
Clerk of the Board