ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

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

EPA REGION 8'S RESPONSE TO THE UTE TRIBE'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

The Environmental Appeals Board (the "Board") should deny the Tribe's Motion for Reconsideration because the Tribe identifies no material error of law or fact in the Board's September decision or a change in the applicable law. The Tribe argues that the Board should have addressed *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024), but *Loper* does not govern the Board and, even if it did, does not support the Tribe's arguments. The Tribe did not raise any question of statutory interpretation in its prior filings in this case. The Tribe ignores that *Loper* applies only to matters of statutory authority before federal courts, and misapplies *Loper* to argue that it requires the Board to reconsider its deference to the Region's interpretation of 40 C.F.R. § 71.6(a) and factual findings. The Tribe also argues that the Board committed clear error by determining that the Region lacked statutory authority to add extra conditions to the Clean Air Act title V permit at issue, that Resource Conservation and Recovery Act ("RCRA") matters were outside the scope of the permit, that the Region met its obligations under EPA's

environmental justice policies. The Tribe also argues that the Board misapprehends the federal trust responsibility. The Tribe provides no basis to justify these claims.

At bottom, the Tribe's Motion does not identify any error in the Board's decision but simply re-argues the Tribe's previous positions and presents new arguments. For these reasons, explained further below, the Board should deny the Motion.

II. BACKGROUND

On January 3, 2024, the Ute Indian Tribe of the Uintah & Ouray Reservation in Utah filed a petition with the Environmental Appeals Board to review EPA Region 8's decision to renew a title V permit for the operation of a 500 MW coal fired power plant at Deseret's Bonanza facility. The Tribe argued, in brief, that EPA Region 8 failed its environmental justice and federal trust duties to the Tribe by: 1) failing to engage in meaningful dialog with the Tribe; 2) ignoring cumulative impacts of coal combustion residues; 3) ignoring disproportionate effects of power plant emissions on tribal members; 4) disregarding tribal cultural values; and, 5) misinterpreting scientific studies.

On September 10, 2024, the Board issued its Order Denying Review. In its Order, the Board noted that the Tribe's Petition for Review did not argue that the renewed title V permit was inconsistent with title V of the Clean Air Act ("CAA"), nor did the Tribe demonstrate that the permit renewal was clearly erroneous, an abuse of discretion, or otherwise warranted review. Instead, the Tribe focused its arguments on alleged violations of Executive Orders and EPA policy on environmental justice, federal trust, and tribal consultation practices. The Board held that the Tribe did not demonstrate that review was warranted on any of the grounds presented. Order Denying Review at 3.

The Tribe now requests that the Board reconsider its Order Denying Review.

III. STANDARD FOR RECONSIDERATION

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*, NPDES Appeal no. 15-08, at 1 (EAB Jun. 16, 2016) (Order Denying Reconsideration). A motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion," *In re Knauf Fiber Glass, GmbH*, PSD appeal Nos. 98-3 to -20, at 2-3 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration), and "a motion for reconsideration [should not] serve as the occasion to tender new legal theories for the first time." *In re Town of Newmarket Wastewater Plant*, NPDES Appeal No. 12-05, at 2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (internal citations omitted). While a change in applicable law may provide a basis for reconsideration, *In the Matter of Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992), the Board does not err by failing to consider issues not raised. *In re City and County of San Francisco*, NPDES Permit Appeal No. 20-01, at 4 (EAB June 18, 2020). General allegations of error, disagreement with the Board's conclusions, and reiteration of arguments are insufficient bases to support granting reconsideration. *San Francisco*, NPDES Appeal No. 20-01, at 4*; City of Taunton*, NPDES Appeal No. 15-08, at 4.

IV. ARGUMENT

The Board should reject the Tribe's motion for reconsideration because the Tribe has failed to demonstrate that the Board made a demonstrable error that merits reconsideration. The Tribe has not identified a mistake on a material point of law or fact in the Board's decision and instead seeks, in some instances, to reargue issues previously presented and present new arguments for the first time. For these reasons, and as explained in greater detail below, the Board should deny reconsideration.

A. The Recent Decision in Loper Bright Enterprises v. Raimondo Does Not Offer a Basis for Granting Reconsideration.

The Tribe argues that the recent decision by the Supreme Court in *Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244 (2024), represents a change in the applicable law, and consequently the Board erred by failing to incorporate the *Loper* decision into its Order. Additionally, the Tribe argues 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 for Reconsideration at 5, and that, "[t]he EAB made no reference to any consideration of *Loper* in its September decision and made no effort to independently evaluate EPA's technical determination and interpretation of the law." *Id.* at 6.

In *Loper*, the Supreme Court overruled the deference framework established in *Chevron v. NRDC*, 467 U.S. 837 (1987), which required federal courts to defer to agency interpretations of statutory authority where the statute is ambiguous and the agency's interpretation is reasonable. The Court held that instead, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires." *Loper* at 2273.

As a threshold matter, the Tribe is attempting to raise a new legal theory for the first time, which is inappropriate in a request for reconsideration. *In re Town of Newmarket Wastewater Plant,* at 2. The Tribe did not raise any question of statutory interpretation in its Petition for Review or Reply Brief and cannot do so now. Consequently, the Board should deny the Tribe's Motion for Reconsideration.

Next, while *Loper* does change how federal courts address statutory questions of agency authority, it is not a change in the applicable law that might provide a basis for reconsideration. *In the Matter of Cypress Aviation,* at 392. Moreover, the fact that the Board does not address *Loper* in its Order does not demonstrate clear error. *In re City and County of San Francisco*, at 4. Contrary to the Tribe's assertion, the Supreme Court's decision in *Loper* does not govern decision making by administrative tribunals like the Board. The Court was clear that in overruling its prior decision in *Chevron*, it was establishing a new governing standard for federal courts to apply in cases involving statutory questions of agency authority. The Court explained that in such cases, "[c]ourts must exercise their independent judgement in deciding whether an agency has acted within its statutory authority, as the APA requires," and that "under the APA, [courts] may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper* at 2273. The Board is not a federal court established under Article III of the United States Constitution, but instead an administrative appellate tribunal within the EPA created pursuant to the Administrative Procedure Act. *See* 5 U.S.C. § 704. Thus, *Loper* does not apply to this matter, because the Board is conducting an administrative review of a title V permit renewal. *Loper* would govern a court reviewing the Board's interpretation of statutory language, but it does not govern the Board. *See In re McLaughlin Gormley King Co.,* 6 E.A.D. 339, 350 (EAB 1996) (stating that the Board is under no obligation to defer to the Agency's statutory

interpretation under the *Chevron* standard) (citing *In re Mobil Oil Corp.*, 5 E.A.D. 490, 509 (EAB 1994); *Cf. In re Lazarus, Inc.*, 7 E.A.D. 318, 350 n.55 (EAB 1997) ("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. This rule applies because the Board serves as the final decisionmaker for EPA in cases within the Board's jurisdiction.").

Finally, the Tribe asserts that *Loper* requires the Board to review *de novo* the scientific conclusions the Region made in renewing the title V permit for the Deseret Bonanza facility, arguing that the case "requires that a reviewing court hear the scientific evidence and decide on its own whether EPA's interpretation of the law or science is correct." Motion for Reconsideration at 5. This is incorrect. In *Loper*, the Court contrasted the requirement in the Administrative Procedure Act that reviewing courts must "decide all relevant questions of law" with the deference the APA requires that courts accord to agency policymaking and factfinding. *Loper* at 2261. The Court relied on this distinction, in part, to establish a new governing standard for federal courts when deciding challenges involving questions of law regarding a federal agency's exercise of statutory authority. In light of the distinction, however, the Court did not alter the deference due to agency policymaking and factfinding under 5 U.S.C. § 706. Thus, even if *Loper* governed the Board's administrative decision making, which it does not, the decision would not alter the Board's deferential approach, under the APA and 40 C.F.R. § 124.19, to reviewing actions based on the Region's technical expertise and experience.

Because the Tribe is raising a question of statutory interpretation for the first time in its Motion for Reconsideration, because the holding in *Loper* applies to federal courts and not to the Board, and because *Loper* does not alter the approach that *any* reviewing body should take

regarding factual and technical determinations made by federal agencies, the Board did not commit clear error when it did not refer to *Loper* in denying the Petition for Review.

B. The Board Correctly Decided the Region Could Not Add Permit Conditions Beyond Those Required to Assure Compliance with the Applicable Requirements of the CAA

In its Petition, the Tribe claimed, among other things, that Region 8 failed to consider historic inequities related to the operation of the Deseret Bonanza facility in its environmental justice analysis, Petition for Review, at 18-21, that the Region should have imposed a lifetime coal consumption limit, *Id.* at 30, and that the Region should have addressed coal combustion residual (CCR) requirements and RCRA inspections in its title V permit renewal process. *Id.* at 23-24. The Region argued that its authority under CAA § 504(a), 42 U.S.C. § 7661c(a), and EPA's implementing regulation at 40 C.F.R. § 71.6(a), was limited to including permit conditions necessary to assure compliance with the applicable requirements of the CAA, and that the Tribe's requested permit terms were not based on such applicable requirements. *See, e.g.,* Response to Petition for Review at 19. The Board agreed and denied the claims. Order Denying Review at 28-30, 37. The Tribe now argues that the Board, in making this decision, deferred to the Region's construction of the language in 40 C.F.R. § 71.6(a), and that the decision itself "is clearly erroneous, and contrary to the EPA's duty to protect human health and the environment." Motion for Reconsideration at 7. In support of this, the Tribe advances three arguments, all of which lack merit.

First, the Tribe argues that the Board "rotely defer[s] to EPA's interpretation of allegedly ambiguous statutes and regulations," and that the Agency's understanding of Clean Air Act title V and EPA's implementing regulations is incorrect. Motion for Reconsideration at 6-7. Pointing to 40 C.F.R. § 71.6, the Tribe asserts that the language does not explicitly prohibit EPA from

adding permit conditions other than the applicable requirements of the Clean Air Act when issuing title V permits, including new conditions beyond those of the original permit. *Id.* As an initial matter, the Tribe does not identified with any specificity where in its Order the Board has identified any ambiguity in the Clean Air Act and its implementing regulations, or where the Board deferred to the Region's interpretation of that ambiguity. The Tribe's subsequent arguments are nearly identical to those the Tribe made in its Reply Brief, at 4-6, and are not appropriately raised in a Petition for Reconsideration. *In re Knauf Fiber Glass, GmbH*, at 2-3. Further, the Tribe fails to explain why it is clear error for the Board to rely on the plain language of CAA § 504(a), 42 U.S.C. § 7661c(a), and 40 C.F.R. § 71.6, which require that title V permits incorporate enforceable emission limitations and standards, schedules of compliance, reporting requirements and other conditions "necessary to assure compliance with applicable requirements." Finally, the Tribe has not identified any statutory or regulatory language that would authorize the Region to add permit conditions beyond only those required under the CAA and EPA regulations. As a result, the Tribe has not identified any basis for its assertion of clear error.

Second, the Tribe argues that *Loper* requires the Board to "independently hear the scientific evidence and make its own decision on how that evidence impacts the law." Motion for Reconsideration at 8. The Tribe notes that "EAB's reliance on the 2013 Utah Study is egregiously erroneous" and cites several alleged reasons for the assertion. *Id.* at 8. The Tribe's critique of the 2013 Utah Study closely follows the claims it raised in both its Petition for Review, at 18-22, and its Reply Brief, at 2-3, which were rejected in the Board's Order, at 24-26. Moreover, as explained above, the *Loper* decision does not alter the Board's (or any court's) approach to reviewing technical determinations, and the Board properly deferred to the Region's

technical review of and reliance on the conclusions of the 2013 Study to inform its permitting decision.

Third, the Tribe asserts that the "EAB adopted, without further inquiry, EPA's position that groundwater contamination from the CCR that was the subject of multiple RCRA inspections resulting in violations was not associated with Permit conditions." Motion for Reconsideration at 8. The Tribe also asserts that Deseret Bonanza's "air emissions were the direct cause of the surface and groundwater contamination" at the Deseret Bonanza facility and argues that the groundwater contamination is "clearly integral to the Permit and its purpose of protecting human health and the environment." *Id.* at 7-9. In short, the Tribe appears to be arguing that groundwater contamination is not outside the scope of the title V permit process and should, in fact, be addressed via the title V permit. This assertion merely reargues issues that the Tribe raised in the original Petition, at 12 & 24, and in the Reply Brief, at 12, and which the Board rejected in its Order, at 37-38. Additionally, and as explained above, the Tribe fails to identify any statutory source of authority for the Region to include groundwater-related permit conditions beyond those required under the CAA and EPA regulations.

Because the Tribe has not identified any mistake of material fact or point of law in the Board's Order, and instead seeks to reargue issues it previously raised and the Board addressed, the Petition for Reconsideration should be denied.

C. The Board Correctly Decided the Environmental Justice Claims.

In its Order, the Board concluded that the Tribe had not demonstrated that the Region's actions in conducting an environmental justice analysis and issuing the title V permit were

inconsistent with the 2023 Executive Order and the Agency's environmental justice policies.[1] The Tribe argues that this conclusion is "clearly erroneous and inconsistent with EPA's own policies requiring integration of such values where possible." Motion for Reconsideration at 9. The Tribe further argues that the Board's approval of "EPA's view that environmental justice can be 'considered' at EPA's discretion but cannot change substantive permit conditions" is clearly erroneous because it "nullifies the intent of the federal government's policy." *Id*. The Tribe argues that the Board's decision to decline to review environmental justice concerns that fall outside the scope of a permitting decision "is subject to de novo judicial review under *Loper* and cannot be afforded unbridled deference." *Id*. at 9-10.

As an initial matter, the Tribe seeks to relitigate the assertions, originally raised in its Petition and Reply Brief, that the EPA should have included substantive permit conditions and provided the Tribe additional compensation, either through private funding or in-kind activities, to address environmental justice. The Tribe's point that "[t]he Clean Air Act does not expressly prohibit compensation" falls short. *Id.* at 9. The EPA implements authorities conveyed to it by Congress. The Tribe's assertion that the statute does not prohibit an action does not identify or explain how or where Congress provided EPA with the authority to take such action. The Tribe fails to engage with the Board's careful reasoning and explanation of how its decision is consistent with relevant statutory and regulatory provisions, as well as EPA policy. Secondly, the EPA did not articulate the broad view characterized by the Tribe, that environmental justice considerations cannot change substantive permit conditions; rather the EPA appropriately

[1] Before addressing the bulk of the Tribe's environmental justice claims, the Board concluded that the Petitioner did not properly preserve with sufficient specificity the issue of CO2 emissions and even if it had, Petitioner failed to show that the Region clearly erred or abused its discretion by omitting CO2 emissions requirements from the permit. Order Denying Review at 19-21.

evaluated the environmental justice implications of its action in light of the facts presented in this case and explained its limited authorities under title V to address the specific actions the Tribe requested. Finally, the Tribe does not identify a basis to find the Board clearly erred in declining to review environmental justice concerns that fall outside the scope of a permitting decision and, as described above, the *Loper* decision does not apply to the Board's review of EPA permitting actions.

Because the Tribe has not identified any mistake of material fact or point of law in the Board's Order, and instead relies on an irrelevant Supreme Court decision to reargue issues it has previously raised and the Board has addressed, the Petition for Reconsideration should be denied.

D. The Board Correctly Decided the Federal Trust Relationship Claims.

The Board ruled against the Tribe's federal trust relationship claims.[2] In its motion for reconsideration, the Tribe seeks to relitigate those claims under a different legal theory that it now introduces for the first time. The Board should deny the motion. As mentioned above, motions for reconsideration are not vehicles for new legal theories, and substantively, the Tribe's new theory fails as a matter of law.

The Tribe's motion argues a new legal theory. Specifically, the Tribe appears to argue that even though it cannot satisfy settled legal standards to establish a claim for a conventional trust relationship, the Board erred by failing to separately "consider" the federal trust responsibility as part of determining whether the EPA's permit issuance was arbitrary and capricious. But new

[2] The Board held that the Region fulfilled the general trust responsibility and declined to accept the claim that the EPA has a conventional trust relationship with the Tribe concerning air resources. Order Denying Review at 31-33.

legal theories are not permitted in a motion for reconsideration, and the Board should reject the Tribe's new theory for this reason alone. *See Standard of Reconsideration* section above (a motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion;" and should not "serve as the occasion to tender new legal theories for the first time.").

Moreover, the Tribe's new theory also fails as a matter of law. The Tribe argues that "[t]he federal trust responsibility exists beyond express statutorily conferred fiduciary duties establishing a stand-alone cause of action for breach of trust." Motion for Reconsideration at 10. As explained by the Board's order denying review, the scope of the federal trust relationship includes both conventional trust relationships (which may include fiduciary relationships) and the general trust responsibility. Order Denying Review at 31-33. While the Tribe is correct that the general trust responsibility exists in addition to conventional trust relationships, the existence of the general trust responsibility does not change the result in this case. The Board held that the Region fulfilled the general trust responsibility.[3] *Id*. Thus, contrary to the Tribe's new theory, there is nothing more for the Board to consider.

Even if the Board were to consider the Tribe's new theory, the Tribe does not provide any legal authority that supports it. The cases cited by the Tribe are inapposite. In all four cases cited by the Tribe, courts acknowledged conventional (or fiduciary) trust relationships that were based upon federal statutes. The courts did not, as the Tribe contends, separately consider the trust responsibility as part of an arbitrary and capricious analysis of agency action in the absence of an underlying conventional (or fiduciary) trust relationship. *Kenai Oil and Gas, Inc. v. U.S. Department of Interior*, 671 F.2d 383, 386-87 (10th Cir. 1982) (Dept. of Interior fiduciary trust responsibility based upon Mineral Leasing Act to manage Indian lands profitably for Indians);

[3] Importantly, the Tribe's motion did not contest this holding as erroneously decided.

Cheyenne-Arapaho Tribes of Oklahoma v. U.S., 966 F.2d 583, 586, 588-89 (10th Cir. 1992) (same, citing *Kenai Oil and Gas, Inc.*); *Woods Petroleum Corp. v. U.S. Department of Interior*, 18 F.3d 854, 859 (10th Cir. 1994) (citing trust responsibility holdings in *Kenai Oil and Gas, Inc.* and *Cheyenne-Arapaho Tribes of Oklahoma v. U.S.*); *Mandan Hidatsa & Arikara Nation v. U.S. Department of Interior*, 95 F.4th 573, 583 (8th Cir. 2024) (Bureau of Land Management trust responsibility based upon General Allotment Act to protect tribal sovereignty of lands held in trust for tribal members). The cited cases thus fail to support the Tribe's claim, and the Board did not commit error in denying that claim.

V. CONCLUSION

The Board should deny the Tribe's Motion for Reconsideration because, as explained above, the Motion fails to identify a mistake of fact or law or a change in the applicable law that would provide a basis for reconsideration, and instead improperly attempts to relitigate prior arguments and raise new legal theories.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(f)(5), the undersigned attorneys certify that this Response to Petitioner's Motion for Reconsideration does not exceed 7,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing EPA Region 8's Response to Petitioner's Motion for Reconsideration in the matter of Deseret Power Generation and Transmission Cooperative Bonanza Power Plant, CAA Appeal No. 24-01, was filed electronically with the Environmental Appeals Board's E-filing system, and was served on the following persons, this 7th day of October, 2024, in the manner indicated below.

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