

2000

# Mark Graham v. Utah Air Quality Board : Brief of Petitioner

Utah Court of Appeals

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## Recommended Citation

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IN THE COURT OF APPEALS  
OF  
THE STATE OF UTAH

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MARK GRAHAM, :  
Petitioner, : Case No. 2000 0042  
vs. :  
UTAH AIR QUALITY BOARD, : Priority No. 14  
Respondent :

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BRIEF OF PETITIONER  
MARK GRAHAM

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AN APPEAL FROM A FINAL ORDER OF  
THE UTAH AIR QUALITY BOARD  
(Case Below No. 9903004)

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**FILED**

Utah Court of Appeals

JUL 17 2000

Julia D'Alessandro  
Clerk of the Court

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## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . .	i
TABLE OF AUTHORITIES . . . . .	iv
STATEMENT OF JURISDICTION . . . . .	1
STATEMENT OF ISSUES PRESENTED FOR REVIEW AND STANDARD OF REVIEW . . . . .	2
I.    Issues . . . . .	2
II.   Statement of Grounds for Seeking Review . . . . .	3
III.  Standard of Review . . . . .	3
STATUTORY PROVISIONS . . . . .	4
STATEMENT OF THE CASE . . . . .	5
I.    Nature of the Case . . . . .	5
II.   Course of Proceedings and Dispositions Below . . . . .	6
STATEMENT OF FACTS . . . . .	7
SUMMARY OF ARGUMENT . . . . .	12
ARGUMENT . . . . .	15
I.    The Utah Air Quality Board Improperly Denied Mr. Graham the Right to Intervene. . . . .	15
A.   Mr. Graham's Legal Interests Are Substantially Affected by the Formal Adjudicative Proceeding. . . . .	17
B.   Allowing the Intervention Will Not Materially Impair the Orderly and Prompt Conduct of the Adjudicative Proceedings. . . . .	23

II. Mr. Graham Has Standing to Participate In This Matter. . . . .	29
A. Mr. Graham Suffers Distinct and Palpable Injury from the Board's Failure to Enforce WES's Permit. . . . .	30
B. Mr. Graham Has the Greatest Interest and Raises Unique Issues. . . . .	32
C. Mr. Graham Raises Unique Issues of Great Public Importance. . . . .	35
CONCLUSION . . . . .	39
CERTIFICATE OF MAILING . . . . .	42
ADDENDUM . . . . .	43
LIST OF APPELLANT'S EXHIBITS . . . . .	44

## TABLE OF AUTHORITIES

### I. Cases

<u>Aldrich, Nelson, Weight &amp; Esplin v. D.E.S.,</u> 878 P.2d 1191 (Utah App. 1994) . . . . .	32
<u>Anderson v. Farmland Industries, Inc.,</u> 70 F.Supp.2d 1218 (D.Kan. 1999) . . . . .	20
<u>Jenkins v. Swan,</u> 675 P.2d 1145 (Utah 1983) . .	29, 30, 31, 32, 33, 34, 35, 37
<u>Millard County v. Utah State Tax Commission,</u> 823 P.2d 459 (Utah 1991) . . . . .	24, 25, 26, 27
<u>National Parks and Conservation Association v.</u> <u>Board of State Lands,</u> 869 P.2d 909 (Utah 1993) . . . . .	36
<u>Natural Resources Defense Council v. United</u> <u>States Environmental Protection Agency,</u> 507 F.2d 905 (9 <sup>th</sup> Cir. 1974) . . . . .	20
<u>Sierra Club v. Department of Environmental</u> <u>Quality,</u> 857 P.2d 982 (Utah App. 1983) .	31, 33, 34, 35, 36
<u>Terracor v. Utah Board of State Lands &amp;</u> <u>Forestry,</u> 716 P.2d 796 (Utah 1986) . . .	29, 30, 36

### II. Statutes and Rules

Utah Admin. Code R307-102-3(1)(b) (1999) . .	8, 10
Utah Code § 19-2-101(2) . . . . .	21
Utah Code § 19-2-115. . . . .	21, 22
Utah Code Ann. § 63-46b-16 (1996) . . . . .	1, 3
Utah Code Ann. § 63-46b-9 (1996) . . . . .	3, 4, 6, 10, 13, 16, 23, 24, 28, 38
Utah Code Ann. § 78-2a-3(2)(a) (1996). . . .	2, 3

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Appellant, **Mark Graham** by and through counsel of record, submits the following **Brief of Appellant**:

**STATEMENT OF JURISDICTION**

The Utah Supreme Court or Court of Appeals has jurisdiction over this appeal of a final decision by the Utah Air Quality Board (hereinafter "Board"),

pursuant to Utah Code Ann. § 63-46b-16(1)(1996), which grants the appellate courts jurisdiction to review all final agency actions resulting from formal adjudicative proceedings. The Utah Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. § 78-2a-3(2)(a)(1996) (Court of Appeals has appellate jurisdiction over final orders resulting from formal adjudicative proceedings of state agencies).

**STATEMENT OF ISSUES PRESENTED FOR REVIEW  
AND STANDARD OF REVIEW**

**I. Issue**

Did the Board erroneously deny Mr. Graham's Petition to Intervene when it determined that Mr. Graham's stake in the proceedings was insufficient to establish that his "legal interests may be substantially affected by the formal adjudicative proceeding"<sup>1</sup> dealing with a regulated facility that routinely emits toxic doses of dioxin/furan in excess

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<sup>1</sup> Utah Code. Ann. § 63-46b-9(2)(a)(1996).



of its State permit, even though Mr. Graham lives 2 ½ miles from the facility?

## **II. Statement of Grounds for Seeking Review**

Utah Code Ann. § 63-46b-9 mandates that intervention "**shall**" be granted in cases like that of Mr. Graham where affected citizens seek the opportunity to participate in agency adjudication and decision-making. Since the Board nevertheless denied Mr. Graham's petition for intervention, Mr. Graham seeks judicial review of the Board's decision under Utah Code Ann. § 63-46b-16(1) and Utah Code Ann. § 78-2a-3(2)(a).

## **III. Standard of Review**

The standard of review of this issue is determined by Utah Code Ann. § 63-46b-16(1996). This provision instructs the appellate court to grant relief when a petitioner has been substantially prejudiced because an agency has "erroneously interpreted or applied the law", Utah Code Ann. § 63-46b-16(4)(d)(1996), and/or an agency action is "an abuse of the discretion delegated to the agency by statute", Utah Code Ann. § 63-46b-

16(4)(h)(i), or is "arbitrary or capricious". Utah Code Ann. § 63-46b-16(4)(h)(iv)(1996).

### STATUTORY PROVISIONS

Utah Code Ann. §63-46b-9 (1996):

(1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:

- (a) the agency's file number or other reference number;
- (b) the name of the proceeding;
- (c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and
- (d) a statement of the relief that the petitioner seeks from the agency.

(2) The presiding officer shall grant a petition for intervention if he determines that:

- (a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and
- (b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

## STATEMENT OF CASE

### I. Nature of the Case

This case turns on the issues of open government and the opportunity for citizens to influence agency decision-making. By denying Mr. Graham's petition to intervene in a permit violation proceeding, the Board effectively ruled out citizen intervention in any adjudication directly impacting air quality and the health and welfare of the public and the environment. In addressing this "confusing"<sup>2</sup> and "difficult" issue, the Board fluctuates between applying the doctrines of intervention and standing to reach the merits of Mr. Graham's petition. Moreover, the Board incorrectly applied these doctrines, concluding that Mr. Graham's intervention was not proper despite his assertions that, among other things, he lives 2 ½ miles from the facility and that he and the ecosystem of the Great Salt Lake are adversely affected by the facility's emissions in excess of its permit.

In light of Mr. Graham's showing of substantially affected legal interest, the effect of the Board's decision is to render meaningless the statutory intervention provisions of Utah Code Ann. §63-46b-9. The Court now has the opportunity to reverse the Board's erroneous ruling, preserve the principle of intervention, and uphold the legislature's mandate that citizens be allowed to participate in agency adjudication and decision-making.

## **II. Course of the Proceedings and Dispositions Below**

On January 13, 2000, Mr. Graham filed his Petition for Review in this matter seeking review and overturn of the final order of respondent Utah Air Quality Board, entered December 21, 1999. In that order, the Board denied Mr. Graham's petition to intervene in the formal adjudicative proceeding before the board captioned "In the Matter of: Davis Country Solid Waste Management and Energy Recovery Special Service District

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<sup>2</sup> "Confusing" and "difficult" are the Board's terms for the intervention standard. Record at 11, pg. 2 & 10.

d/b/a Wasatch Energy Systems (WES) (No. 99030004)"  
(hereafter "the WES matter").

#### **STATEMENT OF FACTS**

Davis County Garbage Incinerator (d/b/a Wasatch Energy Systems, a/k/a Davis County Solid Waste Management and Energy Recovery Special Service District) (hereafter "Wasatch Energy Systems", or "WES") operates a municipal waste incinerator. The facility and its air emissions are permitted and regulated by the Utah Department of Environmental Quality, Division of Air Quality (hereafter "DAQ") pursuant to Approval Order Number DAQE-850-96 (September 10, 1996). Wasatch Energy Systems has repeatedly violated this Approval Order.

The State permit, issued in 1996, prohibits Wasatch Energy Systems from emitting more than 360 ng/dscm of dioxins and furans into the air. Furthermore, the permit required the facility to test for compliance with this dioxin/furan limit in January or February of 1997. Initially, Wasatch Energy Systems failed to submit results of the February test which

showed emissions of dioxin/furan at 605.2 and 815.3 ng/dscm for stacks A and B respectively. On June 25, 1997, the Board issued a Notice of Violation (hereafter "June NOV") based on, *inter alia*, WES's failure to perform the February 1997 dioxin/furan stack test.

WES appealed the June NOV on July 17, 1997, initiating a formal adjudication under Utah Admin. Code R307-102-3(1)(b). Subsequently, WES submitted a stack test conducted in October of 1997 which showed an impermissible dioxin/furan emission level of 379 ng/dscm for stack B.

Immediately after DAQ issued the June NOV, Mr. Graham, along with some of his Layton neighbors, began to explore ways in which they could address the Board regarding the June NOV. In early 1998, the Board finally agreed to include, as part of a routine meeting, time for Mr. Graham and other residents to speak about the June NOV. At the last minute, the Board altered its agenda to exclude this participation.

Still seeking the opportunity to influence the Board's resolution of the June NOV, Mr. Graham attempted to intervene in the relevant formal

adjudication, filing his Petition to Intervene in April 1998.

Rather than address Mr. Graham's petition to intervene, the Board voted on September 9, 1998 to settle the June NOV with WES pursuant to a Consent Decree. The Board never reached the merits of Mr. Graham's petition. The September 1998 consent order had no substantive provisions, included no fines, and ignored the October 1997 permit exceedance. Most importantly, the Board has failed to force the WES to comply with its permit, via the consent order or any other action.

The very next stack test performed at the WES facility showed dioxin/furan emissions in violation of the permit. A stack test dated September 1998, showed emissions of 624 ng/dscm from stack A and 685 ng/dscm from stack B. In response to these impermissible levels of dioxin/furan emissions from the Wasatch Energy Systems, but with no apparent sense of urgency, the Board issued another Notice of Violation on July 9, 1999 (hereafter "July NOV") based on the September 1998 stack test. In addition to citing the stack test

violation, the Board again complained that the facility had not complied with the stack testing compliance demonstration requirement of the Approval Order.

On July 30, 1999, Wasatch Energy Systems again filed an appeal of the NOV<sup>3</sup>, thereby requesting a formal proceeding before the Utah Air Quality Board for the purposes of determining the merits of the notice. Utah Admin. Code R307-102-3(1)(b)(1999) ("Appeals of Notices of Violation and Orders shall be processed as formal proceedings").

Experiencing déjà vu all over again, Mark Graham filed a petition to intervene in this second formal proceeding on September 15, 1999 (In the Matter of: Davis County Solid Waste Management and Energy Recovery Special Service District d/b/a Wasatch Energy Systems (No. 99030004)), pursuant to Utah Code Ann. §63-46b-9(1996). Mr. Graham based his petition on, *inter alia*, the following:

- a. I live about 2 ½ miles from the Davis County Garbage Incinerator owned and operated by the Davis County Solid Waste Management and Energy Recovery Special Service District, dba Wasatch

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<sup>3</sup> Request for Agency Action Vacating Notice of Violation and Order for Compliance, received August 2, 1999.



Energy Systems (Davis County Garbage Incinerator District).

- b. I am concerned about the effect of air emissions from the incinerator on the air quality and on my health.
- c. I grow vegetables (tomatoes, broccoli) and herbs in my backyard garden and herbs used for cooking (basil, peppermint, oregano, sage, thyme). I also have a bosc pear tree that produces pears which I eat.
- d. The air emissions from the Wasatch Energy Systems facility are carried by the wind in many directions, including to my house and garden, and to Layton and to the Great Salt Lake.
- e. I shop, and eat at restaurants, in Layton.
- f. I am concerned about enforcement of the Approval Order issued by State of Utah to the Davis County Garbage Incinerator District, especially the emission limits. I am concerned that lack of strict enforcement of the permit may jeopardize the air quality and my health.
- g. I feel the garbage incinerator facility and its air emissions threaten the Great Salt Lake. I love the Great Salt Lake, and I watch birds on the Lake, which is an important feeding ground for millions of migratory birds of many varieties.

Record at 7.

At a December 1, 1999, hearing and in an order dated December 21, 1999, the Utah Air Quality Board summarily denied Mr. Graham's petition to intervene "for the reasons on that day orally assigned." Record at 8. Essentially, the Board determined that Mr. Graham

did not demonstrate that he had a substantial legal interest in the outcome of the proceeding. Id. The Board based its denial in part on an ill conceived notion that Mr. Graham must show that he suffered an "injury or damage specific to himself beyond that which would occur to the general public." Record at 11, pg. 16. At the same time, the Board admitted that permitting Mr. Graham to intervene would not run afoul of the second part of the intervention inquiry - his participation would not materially impair efficiency or effectiveness of the proceeding. Record at 11, pg. 2 (we "don't think the latter of that two-part [intervention] test is really much of an issue").

Mr. Graham seeks immediate judicial review of the Board's inappropriate denial of his petition to intervene and refusal to allow him to participate in decisions affecting the quality of his environment.

#### **SUMMARY OF ARGUMENT**

A petition for intervention "**shall**" be granted if two conditions are met. First, the petitioner's "legal interests" must "be substantially affected by the

formal adjudicative proceeding". Utah Code Ann. §63-46b-9. Second, allowing the intervention must not materially impair the interests of justice and the orderly and prompt conduct of the adjudicative proceedings. Id. Mr. Graham's petition for intervention satisfies both of these conditions.

The Utah Air Quality Board improperly denied Mr. Graham the right to intervene in the administrative proceeding captioned "In the Matter of: Davis County Solid Waste Management and Energy Recovery Special Service District d/b/a Wasatch Energy Systems (No. 99030004)" (hereafter "the WES matter"). Because he is subjected to WES's excessive and unlawful dioxin/furan emissions, Mr. Graham's legal interests are substantially affected by this formal adjudicative proceeding. Furthermore, allowing Mr. Graham to intervene will not materially impair the orderly and prompt conduct of the adjudicative proceedings. Mr. Graham therefore should be allowed to intervene.

Moreover, to the extent that the inquiry is instructive to a determination that Mr. Graham's interests qualify him to intervene, Mr. Graham also

satisfies the criteria to establish standing in this matter. Mr. Graham suffered distinct and palpable injury from the Board's failure to enforce its permit for the WES facility. With respect to resolving the unique issues he raises, Mr. Graham has the greatest interest of any party. Furthermore, the unique issues raised by Mr. Graham are of unique public importance. Mr. Graham therefore meets the conditions for having standing to participate in this matter.

## ARGUMENT

### I. THE UTAH AIR QUALITY BOARD IMPROPERLY DENIED MR. GRAHAM THE RIGHT TO INTERVENE

Mr. Graham is exactly the type of intervenor the legislature anticipated should be involved in the Board's formal adjudication. Utah Code Ann. § 63-46b-9(2) establishes that the presiding officer "**shall**" grant a petition for intervention if he or she determines that "the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding" and "the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention." Utah Code Ann. § 63-46b-9(2). Since Mr. Graham's case satisfies both of these conditions, the Board should have allowed Mr. Graham to intervene.

In its Order dated December 21, 1999, the Board stated that it

finds and concludes that [Mr. Graham's] concerns, absent other claims or harms potentially requiring relief or redress for Mr. Graham specifically, do not constitute such "legal rights or interests" which "may be substantially affected" by the instant

proceedings as would allow intervention under Utah Code Ann. §63-46b-9.

Record at 9.

For several reasons, the Board's reasoning is flawed. First, the Board did not apply the appropriate standard in making its determination to deny Mr. Graham's petition to intervene. As established above, the Utah Administrative Procedures Act mandates intervention for any individual who has a substantial legal interest in the proceeding. Utah Code Ann. §63-46b-9(2). The standard says nothing about comparing these affected interests to the interests of anyone else and no such comparison is valid. An intervenor need not distinguish her or his interest from that of the general public.

Second, even under the standards used by the Board, Mr. Graham qualifies for intervention - his interest in the matter is different and more substantially affected than the interest of the general public. As Mr. Graham made clear, he lives but 2 ½ miles from the facility and is understandably effected by WES's unlawful and excessive emissions of cancer-causing dioxin/furans.

**A. Mr. Graham's Legal Interests Are Substantially Affected by the Formal Adjudicative Proceeding**

Dioxin is incredibly harmful. A cancer epidemiologist at Boston University's School of Public Health has called dioxin "the Darth Vader of toxic chemicals" due to its widespread harmful effects on many of the body's systems. Washington Post, May 17, at A01, Exhibit "A" attached. In its permit to WES facility, the state Division of Air Quality has promulgated maximum levels of dioxin/furan emissions. Notice of Violation and Order for Compliance, July 9, 1999 at ¶ 2, Exhibit "C" attached. More recently, the United States Environmental Protection Agency reasserted and intensified its assessment of the serious health risks posed by dioxins and furans and the harm they pose. The EPA found the risk of developing cancer from dioxin "could be as high as 1 in 100", placing the risk "10 times as high as the EPA's previous projections". Washington Post, May 17, at A01, Exhibit "A" attached.

At issue in the formal adjudication before the board and in the previous proceeding in which Mr.

Graham tried to intervene were WES's violations if its permit and the responsive actions, if any, the state would take to protect public health and welfare. In any case, Mr. Graham is exposed to and affected by dioxin in unlawful quantities. Clearly, these emissions in levels in excess of the permit's requirements impact Mr. Graham.

As stated in Mr. Graham's affidavit, he lives 2 ½ miles from the WES incinerator facility. Record at 7. He alleged, and the Board did not contest, that wind carries the airborne emissions from the incinerator in many directions, depositing them on Mr. Graham's house and garden, Layton, and the Great Salt Lake. Id. Mr. Graham not only lives and breathes the air 2 ½ miles from the WES facility, but he also grows vegetables, fruit, and herbs in his backyard garden. Because these plant products grow under conditions of impermissibly high dioxin/furan levels, Mr. Graham is exposed to even higher levels of these carcinogenic chemicals by consuming the products of his garden.

Mr. Graham also eats local food products such as milk and cheese produced commercially in the Layton area,



one of the most agriculturally productive areas of the state. Id. Consuming this food further concentrates the harmful carcinogens unlawfully emitted from the WES facility in Mr. Graham's body, directly harming him and greatly increasing his risk of cancer. Washington Post, May 17, at A01, Exhibit "A" attached.

Furthermore, as stated in his affidavit, Mr. Graham watches and appreciates birds on the Great Salt Lake and its tributary streams, important feeding grounds and rest stops for millions of migratory and resident birds. Record at 7. The food eaten by these birds includes plants and fish, organisms that similarly develop under dangerously high levels of dioxins and furans. Through operation of the food consumer pyramid, this passes even higher concentrations of carcinogens on to upper-level consumer species. Such levels pose a serious harm to the birds whose presence and good health Mr. Graham values.

Furthermore, in instructive federal cases, impermissibly excessive emissions by industrial combustion facilities such as incinerators and

refineries have been found to cause injury in fact to citizens living in their vicinities where they "impaired the quality of the air that plaintiffs breathed". Anderson v. Farmland Industries, Inc., 70 F.Supp.2d 1218, 1222 (D.Kan. 1999). Federal courts have also held that exposure to unlawfully unclean air per se qualifies as injury. See, e.g., Natural Resources Defense Council v. United States Environmental Protection Agency, 507 F.2d 905 (9<sup>th</sup> Cir. 1974). In NRDC v. EPA, the court found injury to the plaintiff Abbuhl merely because he was a resident of the state for which the EPA approved an implementation plan: "There is no doubt, however, that Dr. Abbuhl, as a resident of Arizona, will suffer injury if compelled to breathe air less pure than that mandated by the Clean Air Act." NRDC v. EPA, 507 F.2d at 910.

Mr. Graham's claim of injury is even clearer than that in NRDC insofar as he lives only 2 ½ miles from the polluting facility. Similar to the injury suffered by Dr. Abbuhl, Mr. Graham is subject to WES's dioxin/furan excessive and unlawful emissions violations which impaired the quality of the air that

he breathes. Moreover, WES's violations impaired the quality of the edible plants Mr. Graham grows. WES's emissions standards violations therefore clearly cause injury in fact to Mr. Graham.

Furthermore, the legislature has determined that violation of a permit itself causes injury. The legislature has also determined that enforcement of permits is necessary to protect public health and the environment. As stated in the Air Conservation Act,

[i]t is the policy of this state and the purpose of this chapter to achieve and maintain levels of air quality which will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, [and] foster the comfort and convenience of the people.

Utah Code § 19-2-101(2). One of the State's key tools for achieving this purpose is the enforcement of permits, such as the Approval Order for WES. *E.g.* Utah Code Ann. § 19-2-109. The seriousness with which the legislature takes permit violations is demonstrated by penalty provisions in the Air Conservation Act, which sets civil penalties of up to \$50,000 per day for each violation and establishes criminal penalties for willful permit violations. See Utah Code § 19-2-115(2)

(establishing a \$10,000 per day fine for permit violations); Utah Code § 19-2-115(5) (making a willful permit violation a misdemeanor).

Finally, Mr. Graham's interest is substantially affected by the proceeding before the Board. If the Board allows WES to continue to release dioxin or fails to force WES to conform to the emissions limits contained in its permit, then Mr. Graham will continue to be harmed as detailed above. Even the Board's failure to attempt to deter WES from future emission violations will result in continued harm to Mr. Graham.

Furthermore, if the Board had allowed Mr. Graham to intervene, the parties might have reached a more favorable result with respect to Mr. Graham's health and safety. For example, had the Board permitted Mr. Graham's participation, he might been able to persuade it to incorporate into the settlement his concerns, as shared by the United States Environmental Protection Agency. Both Mr. Graham and the federal agency have serious objections to the resolution of the July NOV embodied in the settlement agreement. Letter from Ron Rutherford, Acting Director, Technical Enforcement,

Office of Enforcement, Compliance and Environmental Justice, US EPA, to Ursula Kramer, Executive Secretary, Utah Air Quality Board, March 3, 2000, Exhibit "D" attached. Based on the possibility of affecting the proceeding, Mr. Graham satisfies the prong of the statutory test for intervention contained in Utah Code Ann. §63-46b-9(2) that is before the court in this matter.

**B. Allowing the Intervention Will Not Materially Impair the Orderly and Prompt Conduct of the Adjudicative Proceedings**

Oddly, even though Mr. Graham satisfies both of the conditions for granting an intervention, the Board denied his petition. While the Board's Order seems to rely on the conclusion that Mr. Graham's legal rights are not substantially affected by the administrative proceeding, the Board's discussion also focused on concerns of setting a precedent of allowing interventions. Record at 11, pg 13.

The Board's argument rejecting Mr. Graham's petition for intervention is unsound and - ironically - leads to bad legal precedent the Board wished to avoid.

Following the Board's reasoning, if Mr. Graham is not allowed to intervene, then no one would be allowed to intervene. This would prevent any citizen, no matter how affected by permit violations, from fully participating in the formal adjudication affecting air quality. Such nihilistic logic destroys the very concept of intervention in such cases.

The Supreme Court of Utah has recognized the folly of such a path: "To disallow intervention in this case would justify disallowing it in every case and render the intervention statute a nullity." Millard County v. Utah State Tax Commission, 823 P.2d 459, 463 (Utah 1991). Similarly, denying Mr. Graham's petition for intervention would justify denying all petitions for intervention in every such case, thus eviscerating the statutory intervention provisions of Utah Code Ann. §63-46b-9.

Intervention should not be denied on the grounds that many members of the public might qualify to intervene. Highly relevant to the present case is Millard County, 823 P.2d 459. In Millard County, the Tax Commission's order denying Millard County's

petition to intervene was reversed because the Tax Commission improperly denied Millard County's right to intervention. The Utah Supreme Court found that the County had met both the statute's and the Commission's requirements for intervention. Millard County at 463.

The County sought intervention in a proceeding before the Commission to determine the tax liability of Intermountain Power Agency ("IPA"), a major taxpayer. In its denial of the County's petition for intervention, the Commission voiced concerns that allowing the County to intervene would extend the right to intervene to hundreds of other taxing districts. Because the Commission believed that allowing the County's intervention would "create an administrative nightmare, greatly increas[ing] the cost of administering the system," and "clog[ging] the entire system including the appeal and hearing system". Millard County at 462. The County concluded that the interests of justice and the orderly and prompt conduct of the proceedings would be impaired by intervention. The Millard County court found that the Commission's conclusion was not realistic. Millard County at 463.

In rejecting this argument, the Utah Supreme Court notes that what matters to the intervention inquiry is that the County did have a protected legal interest in the matter: "Its participation in the proceedings may have resulted in a different, more favorable settlement of IPA's tax liability." Millard County at 463.

Similarly, in the instant case, Mr. Graham's participation in the formal adjudication might have resulted in a more favorable settlement of the issue of WES's permit violations concerning public health. Mr. Graham therefore qualifies for intervention under the Millard County test.

Even if it were relevant to the present inquiry, the suggestion that Mr. Graham's are common to the public at large is plainly wrong. Because Mr. Graham lives practically in the shadow of the WES facility, his interest in this matter is greater than that of his neighbors and other local residents of the Wasatch Front who live and work farther away from the facility.

Furthermore, if Mr. Graham were just like everyone else, the holding in Millard County dictates that intervenors must still be given the opportunity to



participate. In that case, the Court noted that while allowing intervention may complicate proceedings to a degree, the agency should devise procedures to minimize the burden without undermining the right of local entities to intervene where appropriate. Id. If intervention and full participation of numerous similarly situated entities would be unduly burdensome to the agency, the Commission should, for example, allow one local entity to act on behalf of other similarly situated entities.

When there is an identity of interests among a number of taxing agencies, it is unlikely, in any event, that multiple interventions would be sought. Even if they were, the interests of the agencies can be adequately accommodated in most instances by a procedure that allows one party, or perhaps a few, to act on behalf of others.

Millard County at 462.

In cases like that of Mr. Graham, granting an intervention does not require the court to examine any issues extraneous to the initial inquiry; in fact, allowing the intervention gives the court access to a different perspective not originally included. In Millard County, the court noted that the tax assessment in dispute in that matter necessarily turned on facts

and legal issues that were identical with respect to the County and the Commission, and that therefore allowing the County to intervene would be proper. Similarly, in Mr. Graham's case, the permit violation in dispute necessarily turns on facts and legal issues that are identical with respect to Mr. Graham and the Board: namely, the harmful dioxin/furan emissions in violation of WES's permit. Because Mr. Graham thereby satisfies both of the statutory elements for intervention under Utah Code Ann. §63-46b-9, his petition to intervene should have been granted by the Board.

## **II. MR. GRAHAM HAS STANDING TO PARTICIPATE IN THIS MATTER.**

While the proper standards for granting intervention are codified in Utah Code Ann. §63-46b-9, the Board seems also to have considered issues of standing. To the extent that the standards for standing are the proper criteria for granting an intervention, Mr. Graham also qualifies to have standing in this matter. Utah's doctrine of standing is intended to allow access to courts to redress injury

while ensuring the procedural integrity of judicial adjudications. This is achieved by requiring all parties to a lawsuit to have both sufficient interest in the subject matter of the dispute and sufficient adverseness that the disputed issues will be completely explored. Jenkins v. Swan, 675 P.2d 1145, 1150 (Utah 1983). See also Terracor v. Utah Board of State Lands & Forestry, 716 P.2d 796, 798 (Utah 1986). This doctrine arises from the general principles of separation of powers established in Article V of the Utah Constitution. Id. The courts are therefore limited to resolving "crystallized disputes concerning specific factual situations." Id. at 799.

The Supreme Court of Utah has referred to three general standards for determining whether a litigant has standing. See Jenkins, 675 P.2d at 1150 (Utah 1983). If any of these conditions are met, the litigant must be allowed access to the courts. Id. The first general criterion is that the plaintiff must demonstrate "some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute." Terracor, 716 P.2d at 799 (quoting

Jenkins v. Swan, 675 P.2d at 1150). Second, if the plaintiff does not meet the first criterion, he or she has standing "if no one else has a greater interest in the outcome of the case and the issues are unlikely to be raised at all unless that particular plaintiff has standing to raise the issue." Terracor, 716 P.2d at 799. Third, a plaintiff who meets neither of the above criteria nonetheless has standing "if the issues are unique and of such great importance that they ought to be decided in furtherance of the public interest". Id.

**A. Mr. Graham Suffers Distinct and Palpable Injury  
From the Board's Failure to Enforce WES's Permit**

The first prong of the Jenkins standing inquiry requires distinct and palpable injury to the plaintiff as well as a causal relationship between that injury and the agency's actions.

The first and most widely used standard to show standing requires a plaintiff to show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute... A mere allegation of adverse impact is not sufficient; there must also be some causal relationship between the injury to the plaintiff and the governmental actions.

Sierra Club v. Dept. of Env. Quality, 857 P.2d 982, 986 (Utah App. 1993) (citing Jenkins at 1150).

As detailed above, Mr. Graham's exposure to dioxin constitutes distinct and palpable injury giving rise to a personal stake in the outcome of the WES matter. As stated in his affidavit, he lives but 2 ½ miles from the incinerator, and eats locally raised foods both from his garden and from local dairies and agricultural enterprises.

Record at 7. Both WES's repeated permit violations and the very pollution itself cause Mr. Graham injury in fact.

Furthermore, there is a causal relationship between the injury to Mr. Graham and the Board's actions. By refusing to enforce the terms of WES's State permit, the Board causes and allows the injury to Mr. Graham to continue. Mr. Graham's participation may influence the adjudication toward a more favorable resolution - indeed, a resolution that reflects the serious concerns that he and the US EPA share regarding the settlement of the July NOV. Exhibit "D"

attached. Such a causal relationship satisfies the second requirement of the first Jenkins inquiry.

**B. Mr. Graham Has the Greatest Interest and Raises Unique Issues**

Even supposing Mr. Graham does not qualify for standing under the first test, he still qualifies under the two-part second Jenkins test.

[I]f the aggrieved party does not have standing under the first part, a court may still grant standing if there is no other party who has a greater interest in the outcome of the case than the aggrieved party and if the issue is unlikely to be raised at all if standing is denied.

Aldrich, Nelson, Weight & Esplin v. D.E.S., 878 P.2d 1191, 1194 (Utah App. 1994) (citing Jenkins).

The first element of this second Jenkins test is being the most appropriate plaintiff. In Jenkins, where Jenkins challenged the several educational and legislative systems within the state, he lacked standing because he did not live in any of the geographic areas whose systems he challenged:

"Jenkins' interest is less direct than the interest of those living in the relevant school districts or legislative districts." Jenkins, 675 P.2d at 1151.

Mr. Graham's case differs markedly from that of Jenkins - Mr. Graham lives in the geographic area directly affected by WES's continued harmful and unlawful emissions. Applying the second Jenkins test to the facts of Mr. Graham's case, Mr. Graham raises issues relevant to a resident living near the incinerator which are different from the issues raised by the state. Mr. Graham therefore qualifies as the "most appropriate plaintiff" in this matter and therefore meets the first element of the second Jenkins test.

In Sierra Club, the court applied the second Jenkins test to a different set of facts. There, the Sierra Club sought to review a state agency's approval of a commercial hazardous waste incinerator project. Standing was not granted because the court found the environmental group not to be the most appropriate plaintiff. However, the court's reasoning in Sierra Club demonstrates that Mr. Graham is just the sort of plaintiff that is the most appropriate:

Sierra Club is not the most appropriate plaintiff to challenge the Board's decision... [A]ppropriate plaintiffs with a greater interest in this dispute might include emergency response personnel, other persons working in the area of the proposed CIF,

**owners of property near the site**, or public or private entities located in proximity to the site.

Sierra Club, 857 P.2d at 987 (emphasis added).

Mr. Graham is easily distinguishable from the Sierra Club as a plaintiff. Unlike the Sierra Club, Mr. Graham owns property and resides 2 ½ miles from the incinerator site in this matter. He is among the entities highlighted in Sierra Club as appropriate plaintiffs. This clearly satisfies the proximity requirement embodied in the Sierra Club opinion. If Mr. Graham does not live sufficiently close to the incinerator site to qualify as the most appropriate plaintiff, then neither could practically any other person. He will provide to the adjudication the perspective of one who cares about air quality and its impact. Unlike the state, Mr. Graham need not balance issues of economics and with health-related concerns. These issues and this perspective will not be raised without his participation. Mr. Graham therefore satisfies the first element of the second Jenkins approach to standing.



Furthermore, for these reasons, the issues Mr. Graham seeks to raise are unlikely to be raised if Mr. Graham is denied standing. This is the second essential component of the second Jenkins test for standing: "Even if a plaintiff cannot show that it suffered some distinct injury, standing may still be established if no other plaintiff has a greater interest in the outcome and if the issue is unlikely to be raised at all if the plaintiff is denied standing." Jenkins, 675 P.2d at 1150. See also Sierra Club, 857 P.2d at 987 (following the Jenkins test). Mr. Graham should therefore be granted standing based on being the most appropriate plaintiff to represent his interests in this matter.

**C. Mr. Graham Raises Unique Issues of Great Public Importance**

Even if Mr. Graham does not qualify for standing under the first two Jenkins tests, he does qualify for standing under the third, "public importance" test. Under this approach, standing is granted where the plaintiff raises unique issues of great public importance.

In Sierra Club, the court considered this means of granting standing. "Sierra Club would nonetheless have standing if the issues presented are 'unique and of such great public importance that they ought to be decided in furtherance of the public interest'."

Sierra Club, 857 P.2d at 987 (quoting Terracor v. Utah Bd. of State Lands & Forestry, 716 P.2d at 799 ). See also National Parks and Conservation Association v. Board of State Lands, 869 P.2d 909, 913 (Utah 1993) (finding standing for an environmental group challenging transfer of state land within national park to county). However, in Sierra Club, where future public involvement was upcoming in the agency's own procedures, the court found that the issues raised were not of great public important and therefore declined to grant standing to the plaintiff.

Sierra Club is challenging determinations by the Board that constitute internal procedural decisions preceding any public involvement in the permit process. The issues, at this stage, are not of great public importance and it is not in the public interest to seek review of the Board's internal operating procedures.

Sierra Club, 857 P.2d at 987.

Mr. Graham, on the other hand, raises unique issues of public importance which the Board refuses to consider in a meaningful matter. No other party in the matter raises the unique issues of the harms to local residents caused by the WES incinerator's illegal and excessive emissions violations. The dramatically increased risk to the public of cancer and other disease posed by exposure to the impermissibly high levels of carcinogens emitted by the WES facility is certainly an issue of great public interest. The facility's unwillingness and/or inability to comply with its permit, and the State's response to this situation, are also matters of great public importance. Mr. Graham therefore qualifies under the third Jenkins test because he raises unique issues of great public importance.

Thus, to the extent that the standing inquiry is instructive here, Mr. Graham qualifies for standing under any of the three Jenkins tests. This strongly suggests that Mr. Graham's petition for intervention in the administrative proceeding should be granted.

## CONCLUSION

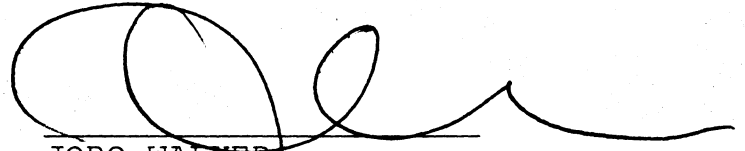
By denying Mr. Graham the right to intervene in the WES matter, the Board violated its duty under Utah Code Ann. §63-46b-9. In that provision, the legislature clearly envisioned that affected citizens like Mr. Graham would and should be allowed the opportunity to influence agency adjudication. Mr. Graham meets the legislature's criteria for intervention - his legal interests are substantially affected by the proceeding before the Board. His concerns about his own health and the well-being of the Great Salt Lake ecosystem entitle him to participate in the proceeding dealing with WES's unlawful emissions of toxic dioxins. Allowing the intervention will not materially impair the interests of justice and the orderly and prompt conduct of the adjudicative proceedings. Mr. Graham is concerned only with the issues before the Board - WES's permit violations and the State's response to those violations. Because Mr. Graham meets both of the statutory criteria for the mandatory granting of a petition for intervention, the

Utah Air Quality Board improperly denied Mr. Graham the right to intervene. The Board's decision to deny Mr. Graham's petition to intervene should be overturned, and Mr. Graham's petition should be granted.

Furthermore, insofar as inquiry into standing is informative here, Mr. Graham qualifies to have standing to participate in the adjudicative proceeding concerning the WES incinerator facility's violations of its emissions standards. Mr. Graham suffers distinct and palpable injury from WES's permit violations, and should be involved in the Board's handling of those violations. If WES is sufficiently deterred from violating the appropriate dioxin/furan standards contained in the Approval Order, these harmful carcinogens will continue to harm and cause injury in fact to Mr. Graham. Mr. Graham's proximity to the facility gives him at least as great an interest in the proceeding as any other party. With respect to the particular and relevant issues that he raises, Mr. Graham has the greatest interest of any party in this matter. Finally, Mr. Graham raises unique issues of great public importance. While Mr. Graham is most

directly injured by the WES facility's unlawful permit violations because of his closeness to the incinerator, the polluting of the heavily populated Wasatch Front and the critical Great Salt Lake ecosystem with deadly carcinogens is certainly a matter of great public importance. The fact that Mr. Graham qualifies to have standing to participate in this matter further compels a finding of intervenor status. Because all factors indicate that Mr. Graham is entitled to intervene, the Board's decision to deny Mr. Graham's petition to intervene should be overturned, and Mr. Graham's petition should be granted.

RESPECTFULLY SUBMITTED, this 17<sup>th</sup> day of July,  
2000.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a long horizontal stroke extending to the right.

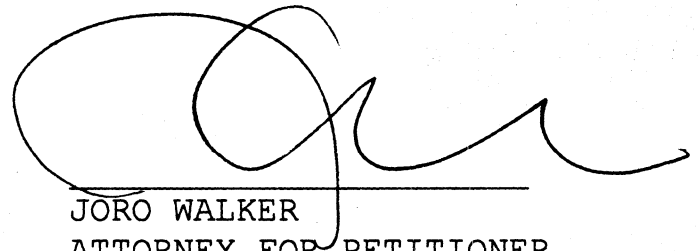
JORO WALKER  
ATTORNEY FOR PETITIONER  
MARK GRAHAM

**CERTIFICATE OF MAILING**

I hereby certify that on the 17<sup>th</sup> day of JULY 2000,  
I caused to be mailed copies of the above and foregoing  
pleading appellant **Mark Graham's** Brief of Petitioner  
with attachments to:

Richard Rathbun  
Fred Nelson  
Assistant Attorneys General  
160 East 300 South Street, 5<sup>th</sup> Floor  
PO Box 140873  
Salt Lake City, UT 84114-0873

Larry Jenkins  
500 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, Utah 84111

A large, stylized handwritten signature in black ink, appearing to read 'Joro Walker', is written over a horizontal line.

JORO WALKER  
ATTORNEY FOR PETITIONER  
MARK GRAHAM



## **ADDENDUM**

**INDEX OF RECORD**  
**UTAH DIVISION OF AIR QUALITY CASE NO. 99030004**  
**MARK E. GRAHAM v. UTAH AIR QUALITY BOARD**  
**APPELLATE CASE NO. 20000042-CA**

	Page
1. Index of Record .....	1
2. Petition to Intervene .....	2
3. Affidavit of Mark E. Graham .....	7
4. Utah Air Quality Board Order .....	8
5. Transcript of Relevant Portion of the December 1, 1999 Utah Air Quality Board Meeting .....	11

The Utah Air Quality Board

In the matter of		Petition to Intervene
Wasatch Energy Systems		
No. 99030004		

Petitioner Mark E. Graham submits this Petition to Intervene in the above matter pursuant to Utah Code 63-46b-9.

Statement of facts demonstrating that the Petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law:

In this matter the Utah Air Quality Board finds Wasatch Energy Systems (the Davis County Garbage Incinerator District, or the "District") in violation of the emission limits and compliance demonstration requirement stated as Conditions 7 and 8 of the Approval Order issued September 10, 1996 to the source, and orders the source to "immediately initiate all actions necessary to achieve total compliance with all applicable provisions of the [Utah Air Conservation] Act." Further, the Board orders the source to "notify this office in writing on or before the 15<sup>th</sup> day of receipt of this letter of W.E.S.' intent to comply with this ORDER and indicate the date(s) on which W.E.S. will again perform stack testing at both the Unit A and the Unit B Discharge Points of the Bi-Flue Stack to demonstrate that compliance with the dioxin furan emission limit found in Condition 7 of the A.O. dated September 10, 1996 has been achieved." (Notice of Violation and Order for Compliance, issued by Utah Air Quality Board Executive Secretary Ursula Trueman on July 9, 1999, at 2)

In a written reply dated July 16, 1999 pursuant to the ORDER, the source failed to state its intent to comply with the order, failed to indicate what action, if any, it would take to achieve compliance with all applicable provisions of the Utah Air Conservation Act and the emission limits in its permit, and instead argued for the Board to accept a December, 1998 stack test and ignore and forget the September, 1998 stack test.

In a written "Request for Agency Action Vacating Notice of Violation and Order for Compliance" dated July 30, 1999, the source disputes the validity of the September 15-17, 1998 stack test, which provided the evidence of violation used as the basis for the N.O.V.O.T.C., suggests a later (December, 1998) stack test which was not approved or accepted by the Department of Environmental Quality (DEQ) ought to be accepted, disputes the legal authority of the Utah Air Quality Board to issue or enforce the Approval Order as written, and once again cites a disputed, industry-provided "health risk assessment", totally irrelevant to the Approval Order, as evidence of the safety of burning garbage in a residential area.

Simply put, Petitioner has a legal right and interest, as do other local residents, in having the Utah Air Quality Board enforce the Approval Order and the emission limits and compliance demonstration requirement therein. It is a matter of air quality and public health. The Legislature passed the Act to protect air quality and public health. Title 19, Chapter 2, the Utah Air Conservation Act, established the Utah Air Quality Board and gave it the authority to issue permits with emission limits. The Utah Rules contain 4 separate categories of violations of varying severity and corresponding ranges of monetary penalties. Monetary penalties can have a deterrent effect on future air pollution. Furthermore, written and legally binding Orders from the Utah Air Quality Board have the force of law and can cause a source to take steps necessary to reduce air emissions to the environment.

Also, the Approval Order from September 10, 1996 was issued pursuant to the Utah State Implementation Plan and therefore is enforceable under the federal Clean Air Act as amended. Petitioner has a legal right & interest in having the Clean Air Act enforced.

Petitioner sought to intervene in a similar matter before pursuant to Utah Code 63-46b-9, namely Utah Air Quality Board v. Wasatch Energy Systems, which originated with a June 25, 1997 Notice of Violation and Order for Compliance. Petitioner was never allowed to intervene in that matter, not because the Board chose to deny the Petition to Intervene which Petitioner submitted in about April, 1998, but because somebody at Air Quality either forgot or neglected to include Petitioner's written brief on his standing to intervene with the packet of information sent to Board members in July, 1998. That matter was settled before the Board ever addressed even allowing or not allowing that Petition.

If the source's appeal / request for agency action is granted, it will have the following effects:

- 1) Dioxin emissions in excess of the emission limit set in the Approval Order will continue, with the continuing long term negative consequences for air quality and public health.
- 2) The Utah Air Conservation Act, the Approval Order, and Notice of Violation and Order for Compliance will not be enforced. Petitioner has a legal right and interest that all of the above should be and must be enforced.
- 3) A precedent will be set for this source and others statewide that written Orders from the Board can be circumvented via sufficiently intense, spirited and aggressive legal posturing and maneuvering, once again thwarting the interests of the Utah Legislature in protecting air quality and public health. Other sources will be tempted to follow this course of action.

Wasatch Energy Systems' consultant, Greg Rigo of Rigo & Rigo Associates, Inc. has submitted a report to the State dated January, 1999 on the expected relationship between dioxin/furan emissions and flue gas temperature as it enters the air pollution control system. This report provides the "scientific" basis for Wasatch Energy Systems' challenge and appeal and Request for Agency Action. However, Figures 7 and 8 in that report, on page 18, do not say what the District wants them to. The District implies there is an inverse relationship between dioxin/furan stack concentrations and flue gas inlet temperatures, but the data do not show this relationship to

be as strong as suggested, let alone strong enough to contradict the results of a properly and carefully performed stack test. Figure 7 shows dozens of data points, most of which are far from the line which has been drawn on the graph, supposedly as the best fit line. The standard deviation of this data set and this relationship is huge. The large number of data points lying a long way from the line proves that the supposed relationship does not exist or is not as reliable, pronounced, and distinct as the District claims.

If the Board accepts this argument about dioxin/furan emission rates and flue gas temperature, and their relationship, and vacates the N.O.V.O.T.C. based on it, then the Board will have ceased to regulate dioxin/furan emissions directly, and will have begun to regulate dioxin/furan emissions by proxy only, the proxy being A.P.C.S. inlet temperature. This is contrary to the plain language of the Approval Order. Furthermore, such an interpretation amounts to a modification of the Approval Order, which cannot be stipulated by the Board. If the Board wishes to modify the Approval Order it must follow the formal procedures including public comment and hearing as specified in the Utah Air Conservation Act.

Relief sought by Petitioner:

- 1) Strict enforcement of the Utah Air Conservation Act, the Approval Order, and Notice of Violation and Order for Compliance, each and every one of them, including but not limited to:
  - a) fines appropriate to the violation(s)
  - b) a Written Order from the Utah Air Quality Board to the source to cause the source to take concrete action in terms of pollution control equipment or operational procedures or filtering out certain waste, or a combination of the above, in order to reduce dioxin emissions to below the permitted level
  - c) a Written Declaratory Order from the Utah Air Quality Board on the accuracy, interpretation, and understanding of stack tests (air emissions tests) particularly Method 23 and any other tests used for dioxin emissions, including grounds on which such a test can be challenged in the future
  - d) A finding of whether, in light of the arguments raised by the source, there was a violation of either Condition 7 or Condition 8 of the Approval Order dated September 10, 1996, in September, 1998, and the specific reasons why or why not in each case.
  - e) A written resolution of the legal argument raised by the source based on the "more stringent rule" limitation on the power of the Board, found at page 6 of the source's Request for Agency Action. A written request to the Utah Attorney General to clarify the meaning and applicability of this provision.
  - f) A written resolution of the supposed relationship between dioxin emission levels and temperature levels at garbage incinerators (municipal solid waste incinerators) of this type, which the source raised in its Request for Agency Action and in a separate report

submitted to the Board by Greg Rigo of Rigo & Rigo Associates, Inc. and how the Board uses that relationship, if at all, to assess apparent dioxin emission violations.

- g) A written clarification of the notice requirement, if any, applicable to "retests", and when a stack test is considered a "test" versus when it is considered a "retest". If notice requirements are different for "tests" and "retests", a statement of the logical, scientific, and regulatory basis for that difference. If the Board did not intend any meaningful difference between the terms "test" and "retest", a written statement clarifying the Board's intent.
  - h) A written finding that the source has failed to state its intent to comply with the Order within the given time limit.
  - i) A written statement that neither the Division of Air Quality nor the Board has imposed a gag order on DAQ employees to prevent them from speaking to the media or the general public. The District is apparently under the impression that at one time such a gag order was imposed or promised or intended, and this misunderstanding has caused problems with some DAQ employees' communications with the media and the general public.
  - j) A written statement from the Board that based on the professional opinions of the staff of the Division of Air Quality, and the "second opinion" provided by the Utah Division of Solid and Hazardous Waste, and given the lack of any statement from either the sampling company (Air Pollution Testing, Inc. of Wheat Ridge, CO) or the analytical company (Phillips Analytical Services of Ontario, Canada) that anything went wrong at any point in the stack test process, the evidence available proves there was a violation of the dioxin/furan emission limit in the September 15-17, 1998 stack test.
- 2) such other relief as the Board may feel is appropriate.

This source has succeeded in avoiding even one dollar of fines from the Board since early 1992. Yet the record shows this is not the result of clean and legal operations, but of repeated violations followed in every instance by aggressive, intense appeals, disputing, contesting, and fighting the permit. The Board should be aware that the District has a vested financial interest in doing so, and in causing the Board to back down not partially but totally, on this and future N.O.V.O.T.C.s. Such a vested financial interest arises from a promise which the District made to the Trustee representing the holders of its \$28 million in bonds. The bond covenant includes the promise that following each fiscal year through 2006, the District will make a Written Certification to the Trustee that "the facility and the landfill were operated in compliance with all applicable federal, state and local rules, regulations, and laws . . . ." The ultimate threat to the District presented by this N.O.V.O.T.C. is that it will be unable to make that Written Certification in about August, 2000. The District may default, however technically, on its bond covenant and face a lower bond rating. Such a vested financial interest drives the District's intense opposition to enforcement of the Utah Air Conservation Act, the A.O., the N.O.V.O.T.C., and the emission limits therein, even in the face of clear evidence of a violation.

Knowing that the Board was faced with a very similar enforcement action in 1997-98, and indeed some of the exact same issues (the "no stricter rule" for example) were raised by the District at the time, and knowing that despite written objections from about 3 dozen local citizens the Board approved a Stipulation and Consent Order on September 9, 1998, which avoided and failed to resolve all of the major issues, and omitted any penalties, and failed to state whether there had even been a violation in February, April, or October, 1997, and knowing that the September, 1998 stack test revealed dioxin/furan emissions about 80% over the emission limits in the Approval Order, one can draw the obvious and correct conclusion. The Board has failed to enforce the Act and the A.O. in the past and has failed to require the District to reduce its dioxin emissions.

A democracy works best, if at all, when the public interest is strongly and consistently put at the top of the agenda of all branches of government. Negotiations behind closed doors are inherently non-public, and leave a great opportunity for the public interest to either be of secondary importance or not important at all. The source has aggressively challenged enforcement actions such as this in the past (1997-98) and succeeded in undermining enforcement of the Act, the A.O., the N.O.V.O.T.C., and avoided having to reduce its air pollution. This is an unacceptable outcome of the regulatory process. Citizen input should be encouraged, and allowed in the form of this Petition to Intervene.

Thank you.

Mark E. Graham

October 6, 1999\*

Mark E. Graham

Layton, Utah  
Davis County

\* Note: This is the second copy I have submitted to the Board. The first copy was mailed certified and was received on or about September 16th.

Affidavit of Mark E. Graham

- 1) I, Mark E. Graham, am at least 18 years of age.
- 2) I live at 2211 East 1200 North, Layton, Utah 84040
- 3) I live about 2 ½ miles from the Davis County Garbage Incinerator owned and operated by the Davis County Solid Waste Management and Energy Recovery Special Service District, dba Wasatch Energy Systems (Davis County Garbage Incinerator District).
- 4) I am concerned about the effect of air emissions from the incinerator on the air quality and on my health.
- 5) I grow vegetables (tomatoes, broccoli) and herbs in my backyard garden and herbs used for cooking (basil, peppermint, oregano, sage, thyme). I also have a bosc pear tree which produces pears which I eat.
- 6) The air emissions from the garbage incinerator are carried by the wind in many directions, including to my house and garden, and to Layton and to the Great Salt Lake.
- 7) I shop, and eat at restaurants, in Layton.
- 8) I am concerned about enforcement of the Approval Order issued by State of Utah to the Davis County Garbage Incinerator District, especially the emission limits. I am concerned that lack of strict enforcement of the permit may jeopardize the air quality and my health.
- 9) An employee of the Division of Air Quality has told me, "The most important science in political science." Unfortunately, it seems (and I believe) that this statement accurately captures the state of the State's efforts, such as they are, to enforce the emission limits which it has set for this source.
- 10) I feel the garbage incinerator facility and its air emissions threaten the Great Salt Lake. I love the Great Salt Lake, and I watch birds on the Lake, which is an important feeding ground for millions of migratory birds of many varieties.

Signed,

Mark E. Graham

Mark E. Graham

October 6, 1999

date

Note: This is the second copy I have submitted to the Board. The first copy was mailed certified and was received on or about September 16th.



IN THE MATTER OF:

No. 99030004

Mr. Graham expressed in his petition, attachments and arguments to the Board his interest in seeing enforcement of the approval order and in prevention against environmental degradation generally. The Board finds and concludes that these concerns, absent other claims or harms potentially requiring relief or redress for Mr. Graham specifically, do not constitute such "legal rights or interests" which "may be substantially affected" by the instant proceedings as would allow intervention under Utah Code Ann. § 63-46b-9. Accordingly:

IT IS ORDERED that the Petition to Intervene by Mark Graham is hereby denied.

Dated this 21 day of December, 1999.

Utah Air Quality Board

By: 

J. Howard Van Boerum  
Board Chairman

Notice of the Right to Apply for Reconsideration or Review

Within 20 days after the date that a final order is signed in this matter by the Utah Air Quality Board, any party shall have the right to apply for reconsideration with the Board, pursuant to Utah Code Ann. § 63-46b-13. The request for reconsideration should state the specific grounds upon which relief is requested and should be submitted in writing to the Board at 150 North 1950 West, P.O. Box 144820, Salt Lake City, Utah 84114-4820. A copy of the request must be mailed to each party by the person making the request. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of an order.

Notice of the Right to Petition for Judicial Review

Judicial review of this Order may be sought in the Utah Court of Appeals under Utah Code Ann. § 63-46b-16 and the Utah Rules of Appellate Procedure by the filing of a proper petition within thirty days after the date of this Order.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be MAILED a true and correct copy of the foregoing ORDER this 21<sup>st</sup> day of December, 1999 to the following:

Mark Graham  
2211 East 1200 North  
Layton, Utah 84040

Larry S. Jenkins  
Richard Armstrong  
Wood Crapo, LLC.  
500 Eagle Gate Tower  
60 East South Temple  
Salt Lake City, UT 84111

Fred G Nelson  
Utah Attorney General's Office  
160 East 300 South, 5th Floor  
P.O. Box 140873  
Salt Lake City, Utah 84144-0873

Richard K. Raftery

## PETITION TO INTERVENE BY MARK GRAHAM

Basically, a petition to intervene is fairly common in litigation. It's also something that we have seen before in the administrative procedures setting. It asks that, in this case, a non-party to the formal proceeding which is before you be allowed to participate as a party. As Mr. Nelson mentioned, the Wasatch Energy Systems was issued an NOV by the Executive Secretary and exercised its right to appeal that and bring it before you for a formal hearing on that, something which this Board has seen and virtually all the environmental Boards have seen quite often. Where a non-party comes into the picture then is where Mr. Griffin who has an interest, I'm sorry, Mr. Graham, has an interest in this matter has

1 filed a petition asking to intervene. And what that means is if he's allowed to intervene, he will become  
2 party to the proceeding, he will be allowed to participate just as the other parties do, which means present  
3 evidence, call witnesses, present documentary or other evidence, cross examine witnesses, make  
4 arguments to the Board. And again, it's not that uncommon a proceeding, particularly in civil litigation.  
5 The standard that you need to apply, though, is addressed in the Utah Administrative Code, I'm sorry, in  
6 the Administrative Procedures Act, in Utah Code, section 63.46.B-9, which is entitled "Intervention."  
7 And it basically says that when someone wishes to intervene in an administrative proceeding, they  
8 should file a written application, which in this case Mr. Graham has done, and that the presiding officer  
9 shall grant the petition to intervene if you find that the petitioner's, or in this case Mr. Graham's, legal  
10 interests may be substantially affected by the proceeding and that neither the interest of justice nor the  
11 prompt conduct of the proceedings will be materially impaired. I don't think the latter of that two-part  
12 test is really much of an issue, but we'll address that in just a second. The real question then is whether  
13 Mr. Graham has expressed, in his petition and in the affidavit which was attached, a legal interest which  
14 is, or may be, substantially affected by these proceedings. It's there where we have very little guidance.  
15 I can tell you that there is a little bit of case law on this that is not defined in the Administrative  
16 Procedures Act. Best direction I can give you is a case law both in Utah and at the federal level on this  
17 basically says that someone who intervenes must show that they have a legal interest which is specific to  
18 himself, or to herself, as opposed to a general interest as a member of the public. Now in some extreme  
19 cases that can be described as a specific injury or specific damage that has been done, but it doesn't  
20 actually require a physical injury or damage, but still, a specific interest in the outcome of the hearing  
21 which will impact that person beyond, in a specific personal way, as opposed to just a general interest as  
22 a member of the public in seeing that the environmental laws are enforced. That's a difficult, I know and  
23 sometimes not real clear description of the dilemma that you're in and I hope to answer any other  
24 questions you may have when we get into the discussion, but I also in my role as Board counsel will

1 defer to the parties after I have given you a little bit more of this. Perhaps we can hear from them and  
2 they can describe their view of this. In particular, Mr. Graham has expressed that in his petition and in  
3 his affidavit and he can further address that today as far as how his legal interests have been affected or  
4 may be affected. But that's what you have to decide and it's under the Administrative Procedures Act.  
5 Case law again, it kind of draws the line between a specific inquiry or a specific interest, not necessarily  
6 injury, of the plaintiff, or in this case the intervenor versus the vindication of just an undifferentiated  
7 public interest in seeing the laws applied. Your options of course are either to grant or deny, but as far as  
8 the consequences of that, let me try to give you just a little bit of a description of what I think the  
9 consequences could be. In granting intervention, you would allow Mr. Graham to join, as a party, again  
10 as I mentioned earlier, with all the rights to present evidence and examine, cross examine and the like.  
11 That in itself is not a negative at all on the proceedings, other than it may lengthen the proceeding  
12 slightly, but I don't think the Board would be very concerned with that. And just as an aside, I have  
13 found in litigation experience that sometimes two heads are better than one. When you have more  
14 parties sometimes they gather and address some things that I've forgotten, so that's not necessarily a bad  
15 thing. But it's just something to keep in mind. And in the larger context where someone is allowed to  
16 intervene, you also have the possible precedent setting, or precedential affect, of allowing a member of  
17 the public to intervene in one of these matters. Again, that's not a legal bar; you can still go ahead and  
18 do it, but just, I just hope you can make your decision knowing all the possible consequences. It's not a  
19 legal, it would not be a legally binding precedent in the sense that, by allowing Mr. Graham in, you're  
20 required to allow other interveners in the future, but just know you will hear the same arguments that  
21 you've heard from him in the future for intervention in matters where you may not think intervention is  
22 appropriate. So, just be aware of those possible consequences. There's also the possible consequence of  
23 granting the intervention, I guess, as a possible objection by the respondents, and again, you can hear  
24 from them directly, not from me, but I know that Wasatch Energy Systems potentially could complain of

1 the intervention by way of seeking relief from the Court of Appeals. I don't know that they would do so,  
2 but I just want to mention that's a possibility. The flip side of that is if you deny the intervention, we go  
3 forward with the hearing with the parties who are already here, that is the Executive Secretary and the  
4 staff and Wasatch Energy. Mr. Graham, if he chose to, could seek relief from the Court of Appeals, the  
5 granting or denial of an intervention request is generally viewed as a final order which is appealable. So,  
6 if he wished, he could apply to the Utah Court of Appeals and make his case there that, you know, he had  
7 demonstrated a substantial legal interest and that because of that you should have allowed intervention.  
8 If the Court of Appeals agreed with him, they would most likely remand the case back to you for a  
9 hearing and have you hear it with Mr. Graham present. If, when that happens, you have not already  
10 heard the case, really there's not a whole lot of harm done, perhaps a little bit of delay, but otherwise no  
11 harm done. If you've already heard it, you would have to hear it again and just go through it again. But  
12 again, those are just the procedural consequences. And on the issue of procedural, let me just mention  
13 too that whatever your decision today, as Board counsel, I usually offer my assistance to the Board  
14 chairman in drafting an order, since the Administrative Procedures Act requires a written order on your  
15 decision, and I will do that, and I also urge you to express your opinions, your reasoning, and your, any  
16 findings that you wish to express today on the decision because those can be incorporated into the order.  
17 It's better for the process that people hear your reasoning and it's also frankly easier for me as your  
18 lawyer if it ever goes to an appeal to have your reasoning expressed on the record. And that's just  
19 something that we have had a little directive from the Court of Appeals over the course of many cases,  
20 not just in the environmental Boards, that the better expressed your reasoning the easier it is to review.  
21 That is usually included in the order, but also in the recorded discussion today. That's just sort of a quick  
22 overview. Again, I would defer to the parties themselves to really make their case to you because I  
23 wanted to just lay it out, I hope in neutral fashion, but I'm here to answer any questions as well.

1 **Howard Van Boerum:** Okay. Who may we hear from today? We could hear from the petitioner, we  
2 could hear from Wasatch Energy, we could hear from the staff, we could hear from...

3 **Mr. Rathbun:** I would suggest that you hear from all three if they wish, in whatever order, probably  
4 petitioner, since he is asking for the relief.

5 **Mr. Van Boerum:** Okay. Mr. Graham would you like to take a few minutes?

6 **Mark Graham:** Yes, please. Well, Mr. Chairman, members of the Board, I'm not gonna go over  
7 everything that I stated in the petition to intervene. It's hopefully self explanatory. I am glad that we've  
8 finally gotten to this point; it seems to have taken a while. I'm not an attorney, but I do have a little bit  
9 of experience in this. You probably remember that I attempted a petition to intervene in a very similar  
10 matter in 1998. We got to the issue of, as your counsel was just talking about, the question of does a  
11 person, do I under the Utah Administrative Procedures Act, do I qualify. He mentioned two tests; he  
12 wasn't worried about the second one, but under the first test it's essentially a question of standing. And  
13 we got to that point, but of course the Board never heard it; never ruled on it. I did some research into  
14 that, both under case law at the state level, which is very limited, and there's case law at the federal level  
15 which is, there's lots of it. This is not the federal case, per se, this is not Clean Air Act; however, we all  
16 know that a lot of things that the Air Quality Board does are by way of implementing the Clean Air Act.  
17 My reading, and I'm not an attorney, of the case law that I was able to find says that general  
18 environmental degradation is sufficient injury for a person to have standing. So I would say that if  
19 you're going to rule on this you should have the benefit of... Yes, please.

20 **Richard Olson:** Would you repeat that last statement again. I didn't get it.

21 **Mark Graham:** There was a Supreme Court case, Morton, which goes back twenty-some years and that  
22 was really the first court case that attempted to define what would constitute standing for, in that case it  
23 was not an individual, but it was a citizens group, and they were alleging environmental harm and from  
24 reading that case, the Supreme Court said that general environmental degradation was sufficient injury



1 that a person could have standing, you know, if a person was seeking to intervene, or I guess to sue  
2 maybe in that case, but in such a way as to prevent that injury. In other words, as I would look at this  
3 situation, we have a municipal waste incinerator located in a densely populated residential area. There  
4 are some 60,000 residents in Layton. I am not the nearest; I live approximately 2-1/2 miles away from  
5 the smoke stacks, from the plant. There are, there is Mountain View Elementary school 1-1/2 miles  
6 away. The nearest homes are approximately a quarter mile away. The thing about air pollution is that it  
7 affects everybody. Air pollution knows no boundaries. If the test is, "Am I the only person affected by  
8 the air pollution?," clearly I'm not and I don't think that's the test. It doesn't seem common sense to me.  
9 So, I would encourage the Board, if you're going to rule on this issue which, without having it being said  
10 by your counsel it's an issue of standing, I would encourage you to have the benefit of reading the case  
11 law that I have found at the federal level, which I believe supports, would support my standing. The  
12 other thing is that it's a public agency. I have made, well this is not my first effort, on a line of efforts  
13 that I have made in order to be able to communicate my views on this particular source, Wasatch Energy  
14 Systems, with the Board, I have found it difficult, and I believe that this is my last resort. I believe that  
15 the Administrative Procedures Act was set up specifically to give a mechanism for citizens who are  
16 interested in protecting the environment, such as myself, to have access to share my opinion with you  
17 prior to your ruling on this NOV and whatever resolution there may be. I think that if the Board is to  
18 deny this petition, it's the last, it's the avenue of last resort for the public to have input in the decision  
19 making process at this level. We can all speak to our legislators and 20 years ago or whatever when they  
20 passed the Air Conservation Act, that was the right time to do it. But at this level, at the administrative  
21 level, I believe that a petition to intervene is the avenue of last resort. I don't really have anything  
22 further to say on that. Further questions?

23 **Joseph Thompson:** Does this case, this Morton case from a couple decades ago at the Supreme Court  
24 level, they're alleging environmental damage. I guess you had alleged that whatever violation they got

1 an NOV for caused some environmental damage?

2 **Mr. Graham:** Right.

3 **Mr. Thompson:** Okay. So they'd be equal in that regard. The Attorney General's guy says that you  
4 would have to show injury specific to yourself beyond the general public, and I guess, you know, that's  
5 what DAQ is there for is to protect the general public. If you have some standing beyond that of the  
6 general public, that's what the Attorney General was, I think that's what he told us. You know, your  
7 petition, you know, says you live close by, fruit which you grow in your yard, you're concerned about  
8 important enforcement, you think that it impacts the Great Salt Lake and you like the birds there and  
9 what not. Those all seem to me to be things that (inaudible) the general public and your injury, you  
10 know, or your interest would have to be something, according to the Attorney General, specific to  
11 yourself that would impact you beyond that, that would impact the general public. So, I wanted to see  
12 what you think is different about you than the general public, for this injury.

13 **Mr. Graham:** Okay. General public, and they all breathe the same air. I've made substantially more  
14 effort personally, individually, than the general public to, well to bring accountability, to the source and  
15 to have their emissions minimized. In that sense, I'm different from the general public. My neighbors to  
16 the left and my neighbors to the right arguably breathe virtually identically the same air. They don't take  
17 their time to express their opinions to the Air Quality Board; they're not making an effort to get involved  
18 in their government and improve the environment. I think your understanding of what your counsel said  
19 is, that's the same thing that I heard and understood, and I just, I think that's too limiting. I think that  
20 would exclude everybody.

21 **Mr. Thompson:** If that's the test though. If that were the test, just for a thought experiment, if that's the  
22 test, the fact that you've been active in these matters wouldn't set you apart from the general public, it  
23 would say that you regard the injury more acutely maybe than your neighbor that doesn't come here. But  
24 I'm trying to, you know, if you appeal this, the Supreme Court, they're gonna be rubbin the same spot. I

1 don't want to over dwell on it, but specific to yourself beyond that that it affects the general public, aside  
2 from coming here.

3 **Mr. Graham:** Certainly, and I don't want to say anything that seems like I'm waiving my rights, but if  
4 that were the test, then certainly, I'm basically, in terms of the air I breathe and how it affects my body,  
5 I'm not, you know, I don't have lung cancer or respiratory problems that would necessarily make me  
6 more susceptible.

7 **Mr. Thompson:** I don't know that you have to say it's injury or damage; it's your legal rights.

8 **Mr. Graham:** That's what I was going to say.

9 **Mr. Thompson:** It's not different than the general public.

10 **Mr. Graham:** Well, no. If you read the Administrative Procedures Act, 46.B-9, as your counselor  
11 referred to, what that says is the petitioner demonstrates legal rights that would be substantially affected  
12 by the proceeding. The test is not in there. The Administrative Procedures Act does not have this test  
13 that says I have to demonstrate, that I have to be different from Joe and Jane Public. The Administrative  
14 Procedures Act says that I demonstrated substantial, or legal rights and interests that could be  
15 substantially affected by the proceeding, and I think I have.

16 **Mr. Olson:** Mr. Graham, I'm a little bothered about, I've just been thinking in my mind, anybody can  
17 appear before anybody and make any charge, we all know that. I guess it comes down to the facts of the  
18 matter and documentation and such. Now, it seems that, it seems in order to, in order to claim injury of  
19 some, in some way, there has to be documentation of injury, and, so I ask you, is there documentation.  
20 What is the injury and such to the environment, or whatever you claim?

1 **Mr. Graham:** It would be the, the documentation that I would rely on to answer your question is the  
2 exact same documentation that this Board relied on when it issued the Notice of Violation and Order for  
3 Compliance in July 9 of 1999, and that is exceedance of the source's emission limits for dioxins on both  
4 of the stacks. I would rely on that exact same documentation.

1 **Mr. Van Boerum:** Do Board members have any questions of Mr. Graham, further explanations on his  
2 position? If not, thank you.

3 **Mr. Graham:** Thank you Mr. Chairman. If counsel for Wasatch Energy Systems says something that I  
4 feel a need to reply to, will I be given the opportunity?

5 **Mr. Van Boerum:** Sure.

6 **Mr. Graham:** Thank you very much.

7 **Mr. Van Boerum:** Does Wasatch Energy Systems wish to make a statement.

8 **Richard Armstrong:** Yes, just briefly, if I might. My name is Richard Armstrong and I do represent  
9 Wasatch Energy Systems today, and I'm filling in for Mr. Jenkins.

10 **Mr. Thompson:** Could I say at this point, Wood Crapo is the law firm, right?

11 **Mr. Armstrong:** That's correct.

12 **Mr. Thompson:** They represent Thiokol, and in fact, they are representing us on another matter. So I  
13 just want that known.

14 **Mr. Armstrong:** My comments are going to be very brief because, let me just preface my comments by  
15 stating that we really do not specifically oppose the petition that was filed in this case by Mr. Graham.  
16 But, I would like to reiterate what you pointed on, Mr. Thompson, and that is that Mr. Graham needs to  
17 show an injury specific to himself beyond simply an injury to the general public, and in his petition on  
18 page 2, at the top of the page, he indicates that he has a legal right and interest as do other residents. And  
19 then he states in the sentence after that that it is a matter of air quality and public health. I don't know if  
20 you can, if you see where I was reading there, at the top of page 2 of his petition. But I think those  
21 interests that he points to are really interests that belong to the public. In the Attorney General's Office,  
22 I'll let the Attorney General speak for the Attorney General's Office, but I think the representation there  
23 is adequate to represent the interests of Mr. Graham that's he's expressed in his petition and having said  
24 that, I'll turn the time over to Mr. Nelson, unless you have some questions for me.

1 **Mr. Van Boerum:** Anyone have any questions for Mr. Armstrong? Fred.

2 **Fred Nelson:** I just have a couple of comments on behalf of the staff. The staff has not filed an  
3 objection to the petition to intervene. We believe that the staff will adequately represent the interests  
4 presented by the Notice of Violation and on behalf of the public. There are a number of issues raised by  
5 Mr. Graham that we do not believe, as a staff, are relevant to the proceeding and we would, if he's  
6 granted the opportunity to intervene, we would make the appropriate objections to those issues at the  
7 time of the hearing. But at this point, we haven't filed an objection; it's just a matter the Board needs to  
8 consider if Mr. Graham is allowed to participate. We don't support that, but we don't oppose it either.  
9 It's a neutral position.

10 **Mr. Van Boerum:** Okay. I'd like to hear another comment from Mr. Rathbun about the case law that  
11 was cited by Mr. Graham and your response to that.

12 **Mr. Rathbun:** Thank you Mr. Chairman. The case law is voluminous at the federal level, as  
13 Mr. Graham mentioned. There's a lot of cases and it's been changing over the last, well I've practiced  
14 law 20 years now, it's been changing over the last 20 years. I don't think it's accurate to say that general  
15 environmental degradation is the test of a substantial legal interest. Quite clearly, under the various  
16 cases that have come down just in the last five years or so at the Supreme Court level, standing to  
17 challenge, or standing to enforce environmental laws, has been considerably narrowed. I didn't use the  
18 term "standing" because I didn't want to confuse the Board because it's often used in a confusing way.  
19 Let me just say that in this context, "standing" refers to the status of a person, or the position of a person,  
20 to actually come before you, and it's often been melded into the concept of whether that person has an  
21 injury which is, can be remedied in a court of law. So, if you have no injury and need no remedy, you  
22 really don't have a cause of action. That's a little different from the question of standing. The best  
23 example I can give you on standing is foreign corporations historically, in most states, if a corporation  
24 runs their trucks through the state of Utah, but has not registered to do business in the state of Utah, it's

1 an out-of-state corporation, it doesn't have offices here, but happens to run through the state in their  
2 truck, and has an accident and decides it wants to sue somebody, the courts have not allowed that  
3 because they've said you do not have legal standing to sue in the state because you have not followed  
4 (inaudible) to become an authorized corporation in the state of Utah. You may have an injury. You  
5 very well may have an injury because of that accident, but legally we do not recognize your right to step  
6 into the shoes of a litigate in our courts until you comply with the law and register with the registered  
7 agent and all those things. That's the simplest example of standing I can give you. As I said, it's often  
8 being confused with the concept of legal rights or remedies that may come along and courts, just like the  
9 rest of us, sometimes get confused and blend those two concepts together and so someone doesn't have  
10 injury, they say they don't have standing. That's the court's analysis, but that doesn't necessarily answer  
11 the question. But still, in that context at the federal level, the ability of a person to assert standing to  
12 appear in federal court and either claim the sort of a private attorney general right to enforce the law in a  
13 citizen suit context under the federal statutes or to actually seek injunctive relief for some kind of  
14 damages or other type of damages or an injury has been narrowed considerably and I can say I think with  
15 a great deal of confidence that the general test is, the test is not general environmental degradation, it is  
16 narrowed to a specific requirement that the party who wishes to intervene must show they've had a  
17 substantial legal interest that's been impacted, or may be impacted. It doesn't have to be an actual  
18 physical injury or monetary damages, it can be a legal right or legal interest, but it has to be specific to  
19 that person beyond those rights and interests which the man on the street has. We all have an interest in  
20 environmental enforcement. We all may have different views of it, but I think we all have a legal  
21 interest in seeing that environmental enforcement is brought about in an effective way. And if that is the  
22 test, than any person living in the state of Utah or at least in Davis County somewhere near this site could  
23 come in and ask to intervene and you will be asked then to possibly, I'm not sure that many people  
24 would be interested, but potentially, people, on that test, could be allowed to intervene because they want

1 to see the environmental laws enforced. The statutory scheme as it's set up as I see it with DEQ and the  
2 Executive Secretary and with some public participation built into the system doesn't contemplate, in my  
3 view, that sort of intervention en masse by people without a specific injury. Mr. Graham is right that  
4 under the Administrative Procedures Act all we have is the bare language of the Act; we don't have  
5 really a definition of substantial legal interest or right, but I can tell you too we have a little help from the  
6 Court of Appeals. Back in about 1992 or so, the Sierra Club was challenging the, some of the permit, the  
7 granting of the permit and some of the permit terms for the Clive incineration facility out in Tooele  
8 County. This was before the Utah Solid and Hazardous Waste Control Board, and they were allowed to  
9 intervene on a very limited basis by stipulation of the parties. But when it got to the Court of Appeals,  
10 because they basically lost their challenge to the permit and the permit was issued, when they appealed to  
11 the Court of Appeals, they basically challenged that and the Court of Appeals addressed the standing  
12 issue and with language that was fairly strong actually, said that mere allegations, or at least allegations  
13 by members of the Sierra Club that their use and enjoyment of the western Utah, western Utah generally,  
14 and that their use would be adversely impacted by the Clive incineration facility failed to show any  
15 specific injury such as to grant standing or to allow intervention. They had been allowed to intervene by  
16 stipulation, but on the other issue beyond that, and that allowed them actually to intervene for very  
17 limited issues, not even for the entire matter. That's why the issue came up on appeal. So, it's not a  
18 binding decision necessarily, but I think you can get a sense of the way the Utah Court of Appeals has  
19 viewed it so far, that that language indicates they are very specifically following the trend in the federal  
20 law requiring a specific injury or interest, not a general interest common to the man on the street. I think  
21 that's the law and I think you need to obviously take that under serious consideration. I think on the  
22 merits of this, these things are never easy and if you allow Mr. Graham to participate, so be it. But keep  
23 in mind, however you're inclined to rule, the law indicates a requirement of a specific interest, not a  
24 general interest, and that's what you need to decide today--has he demonstrated that?.

1 **Mr. Thompson:** Would granting, if we said we think that Mark's arguments are compelling and that  
2 because he's interested in this we think he ought to have standing, is that somehow precedent setting?  
3 You said that we'd start hearing that back again. I don't want 90,000 people trooping through...

4 **Mr. Rathbun:** It is, but let me not overstate that. It's not precedent setting in the sense of a legally  
5 binding decision.

6 **Mr. Thompson:** But it would be an example.

7 **Mr. Rathbun:** Right. So the next time if in another hearing someone wanted to intervene they couldn't  
8 say "You're bound by that decision." It would be a whole new case. You'd be entitled to make your  
9 decision again on the merits, but they would certainly use that decision as an example of why you should  
10 follow a similar decision.

11 **Mr. Thompson:** What about the appeals court? Would the appeals court find some weight in granting  
12 Mark's standing here, I mean like later, another new case, unrelated.

13 **Mr. Rathbun:** They might. I guess what you're asking is in another case if we allowed, or disallowed,  
14 some request to intervene and then they appeal to the Court of Appeals and argue well, they've allowed it  
15 before. Maybe. I think the Court of Appeals would still want to, clearly they are entitled to make a  
16 decision on the facts in the law, independent of the Board on a decision like that because it is a legal  
17 decision. Again, this is beyond the scope of really what we want to talk about today. I have practiced  
18 law 20 years and I still don't always understand...factual decisions versus legal, but clearly on that it's a  
19 legal decision the Court of Appeals would decide. I don't think they would really care that much, but  
20 certainly the argument would be made that the Board allowed it, why not again. It would not be binding  
21 on the Court of Appeals; they hear it.

22 **Mr. Thompson:** It's not binding on the Board either.

23 **Mr. Rathbun:** Right. It's not.

24 **Mr. Van Boerum:** Probably our discussions ought to focus on the facts that are available, the law that's



1 available, the arguments that have been given and not on any supposition of what might or might not  
2 happen in later situations. Does the Board wish to hear from any other parties involved in this? I think  
3 we've given each party ample opportunity to express their position.

4 **Mr. Thompson:** Mark might want to rebut that or talk again.

5 **Mr. Graham:** There are a couple of things. I read that court case, 1992 Utah Court of Appeals, and it  
6 was fresh in my mind right about the time of July of 1998 when Wasatch Energy Systems had submitted  
7 a legal filing to this Board that claimed I did not have standing. It's not nearly as fresh in my mind at  
8 this point, and I really think that there are some differences between that case and this. One of the things  
9 that that court said was that you cannot stipulate standing, which apparently had been done. The court  
10 said that I just don't buy that you can stipulate standing in the first place. It was a little different in, as a  
11 blur, there are many processes and many steps in many processes that you take and you can make a  
12 decision and then somebody can appeal your decision and at this point you're not, the only thing the  
13 Board has done with this source is issued a Notice of Violation and Order for Compliance. It's a little bit  
14 different, you're at a little bit different step in a process, and I believe you're in a little bit different  
15 process than was contemplated in that case. I would really appreciate and request the right to be able to  
16 review that case and tell you what I think it says and what I think it does not say before you're going to  
17 make this decision. If I'd known that I should be prepared and fluent in that case today, believe me I  
18 would have been. I didn't. As long as we're talking about federal law, the Clean Air Act section 7604 is  
19 the provision for citizen suits, and it spells out the rights of a citizen to do two things: one is to sue either  
20 a source or the Environmental Protection Agency and another one is to intervene. I'm going to focus on  
21 the provision of the Clean Air Act that talks about intervention, and I remember this verbatim because  
22 the language is so absolutely clear. First, it says, it defines the circumstances and the steps that a person  
23 has to take in order to sue under the Clean Air Act section 7604, and then it says in any such case, and I  
24 quote, "Any person may intervene as a matter of right," end quote. That's the federal law. I think that's

1 crystal clear. If we're talking about federal law, I think that's perfect guidance. Regarding the fact that  
2 Mr. Nelson mentioned that are some issues that I have raised in my petition that he and the staff feel are  
3 not totally relevant, the Board could, of course, grant the petition to intervene, but exclude certain items.  
4 You can say, okay Mark, we're just not going to talk about the following, a, b, c and d. And that  
5 problem would be taken care of. Another thing I remember from case law is the concept of creating a  
6 private attorney general. This is a term that's come down in federal case law. The citizen suit provision  
7 was put into the United States Clean Air Act because Congress saw the need for creating a mechanism  
8 for people to get involved, and this is what they called private attorneys general. Basically it would be  
9 because there could be circumstances where either the regulatory agency is stretched too thin to devote  
10 sufficient resources to a source, or in some rare cases, there's conflict of interest and the agency simply  
11 is more sympathetic to the source than to the public. But it could be for either one of those reasons that  
12 Congress created the citizen suit provision and to encode into law, to codify, the private attorneys general  
13 concept and I think that the Attorney General, the one we have in Utah, doesn't need a personal injury, so  
14 would a private attorney general need to have, to demonstrate personal injury? I don't think so.  
15 Speaking of injury and back to that Utah Court of Appeals case from 1992, members of the Sierra Club  
16 in that case alleged future, their use and enjoyment of the west desert would be jeopardized if a  
17 hazardous waste incinerator facility was going to be permitted. It think it's a little, when dioxins go into  
18 the air and that's the reason this Board sent the Notice of Violation out, it's a specific thing, it's  
19 emissions of dioxins into the air and dioxins, they're bad for you. You can ask your toxicologist and  
20 your scientists how bad dioxins are for you, but I think it's a more of a real thing than the fact that I can't  
21 enjoy the west desert as much. Anyway, and the last point I want to make is if you're afraid that you will  
22 have dozens, or hundreds, or possibly thousands of citizens of the state of Utah attempting to intervene in  
23 every matter that comes your way, I would want to reassure you that I don't think that's going to happen.  
24 Right now you're looking at one person, and that's me. I think the citizens of this state do care about

1 clean air, but I don't think you're gonna have just a parade of all kinds of people into that door to this  
2 room petitioning to intervene. I simply don't believe that that would happen. And I thank you for your  
3 time. Does anybody else have another question?

4 **Mr. Van Boerum:** Does the Board have questions? Mr. Rathbun, do you have any final comments?

5 **Mr. Rathbun:** No, I don't believe so. I'd be glad to answer any other questions.

6 **Mr. Van Boerum:** Okay. I think the Board has been sufficiently briefed and has heard both sides of the  
7 argument, has been briefed by our attorney. Guess you've taken notes as I have on what he has said  
8 relative to the law, so I'd entertain a motion by a member of the Board to either grant or deny the petition  
9 to intervene.

10 **Mr. Thompson:** I'd make a motion to not grant petition to intervene based on the requirement for him  
11 to show an injury or damage specific to himself beyond that which would occur to the general public.

12 **Mr. Olson:** I'd second that motion with this statement that as well intended as Mr. Graham's petition to  
13 intervene may be, I only have legal counsel to direct my thoughts for the most part, but it seems to me  
14 like it does fall short in meeting his obligation to show cause of impact or injury. So, I'll second the  
15 motion.

16 **Mr. Van Boerum:** We have a motion and a second. Do we have any comments from the Board on the  
17 motion. Call for the question?

18 **Board Member:** I'll call the question.

19 **Mr. Van Boerum:** Okay. All in favor?

20 **Board Members:** Aye

21 **Mr. Van Boerum:** Opposed?

22 **Dannie McConkie:** I'd like to abstain.

23 **Mr. Van Boerum:** That's been abstained. Okay. The petition to intervene has been denied by  
24 unanimous vote of the Board. Thank you all.

1     **Mr. Nelson:** Mr. Chairman, may I raise an issue?

2     **Mr. Van Boerum:** Yes.

3     **Mr. Nelson:** And that is because there are seven members of the Board and we have one abstaining, I  
4     think the Chairman needs to vote because you have to have six votes.

5     **Mr. Van Boerum:** All in favor?

6     **Board Members:** Aye

7     **Mr. Van Boerum:** Opposed? Okay, it still passes. Thank you.

1 I, Hannie M. Moeller, do hereby certify:

2 That the foregoing proceedings were transcribed into typewritten copy from an audio tape  
3 recording of the December 1, 1999, meeting of the Utah Air Quality Board.

4 That the foregoing pages contain a true and correct transcription of the audio recording to the  
5 best of my knowledge and ability.

6 In Witness Whereof, I have subscribed my name this 21st day of January, 2000.

7  
8 Hannie M. Moeller  
9 HANNIE M. MOELLER  
10 ADMINISTRATIVE SECRETARY  
11 DIVISION OF AIR QUALITY

Board Proceedings Document Certificate

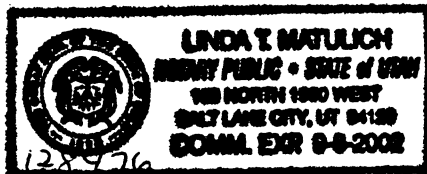
State of Utah

County of Salt Lake

On this 21st day of January, 2000, before me  
personally appeared Hannie Moeller, to me as a notary public, on  
evidence in the document attached as Administrative Secretary on  
behalf of the Division of Air Quality, Air Quality Board.


Linda Matulich  
Notary Public

September 8, 2002  
Commission Expires




## LIST OF EXHIBITS

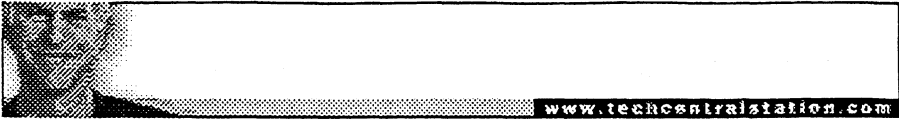
- A. "EPA Links Dioxin to Cancer", Washington Post, May 17, 2000, pg. A01.
- B. Notice of Violation, June 25, 1997.
- C. Notice of Violation, July 9, 1999.
- D. Letter from Ron Rutherford, Acting Director, Technical Enforcement, Office of Enforcement, Compliance, and Environmental Justice, US EPA, to Ursula Kramer, Executive Secretary, Utah Air Quality Board

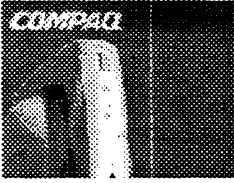

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## EPA Links Dioxin To Cancer

By *Cindy Skrzycki and Joby Warrick*  
Washington Post Staff Writers  
Wednesday, May 17, 2000; Page A01

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The Clinton administration is preparing to dramatically raise its estimate of health threats from dioxin, citing new evidence of cancer risk from exposure to the toxic chemical compound.

A draft of a long-awaited report by the Environmental Protection Agency concludes for the first time that dioxin is a "human carcinogen." The report notes that emissions of dioxin have plummeted from their peak levels in the 1970s but still may pose a significant cancer threat to some people who ingest the chemical through foods in a normal diet.

Dioxin comes from both natural and industrial sources, such as medical and municipal waste incineration and paper-pulp production. The chemical enters the food chain when animals eat contaminated plants. Dioxin then accumulates in the fat of mammals and fish. It has been linked to several cancers in humans, including lymphomas and lung cancer.


For a small segment of the population who eat large amounts of fatty foods, such as meats and dairy products that are relatively high in dioxins, the odds of developing cancer could be as high as 1 in 100, the report says. That estimate places the risk 10 times as high as the EPA's previous projections.

Exposure to dioxin occurs over a lifetime, and the danger is cumulative, the report said. Studies have found that people all over the globe have some dioxin in their bodies.

The report, obtained by The Washington Post, links low-grade exposure to dioxin to a wide array of other health problems, including changes in hormone levels as well as developmental defects in babies and children.

It also concludes that children's dioxin intake is proportionally much higher than adults' because of the presence of the chemical in dairy products and even breast milk.

"It's the Darth Vader of toxic chemicals because it affects so many

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systems [of the body]," said Richard Clapp, a cancer epidemiologist at Boston University's School of Public Health. "The amounts are coming down, but even small amounts are harmful."

The EPA's draft assessment, if finalized in its current form, would solidify dioxin's status as one of the most potent chemical toxins known to science.

Although the risk from dioxin varies widely--and may be nearly zero for many people--the findings suggest that dioxin already contributes to a significant number of cancer deaths each year. Environmentalists, extrapolating from the EPA's risk findings, have estimated that about 100 of the roughly 1,400 cancer deaths occurring daily in the United States are attributable to dioxin.

Officials predicted yesterday that the report would stimulate many questions about the safety of the food supply. Administration officials said, however, that the higher dioxin risks should not discourage people from eating nutritious foods and following dietary guidelines emphasizing low-fat foods. The report stressed that mothers should continue to breast-feed because the benefits far outweigh the risk of dioxin exposure.

In an indication of the potentially far-reaching implications of the report, the White House has intervened in an unusual way to coordinate its release. The report is scheduled to be released in June and will be evaluated by scientific reviewers.

It's not clear that the findings will lead to new regulations on dioxin emissions, but EPA briefing papers discussed several strategies for reducing human exposure to the chemical, including better monitoring.

The findings came as a surprise even to EPA policymakers who have tracked slowly falling levels of dioxin in the environment--the result of a series of tough new regulations on dioxin-emitting industries.

The EPA said industrial emissions of dioxins have been reduced some 80 percent between 1987 and 1995.

"We're heading in the right direction because we're seeing dioxin levels decrease," said one administration official who spoke on the condition of anonymity. But while dioxin levels in the population are declining, "our ability to understand the risk has improved," the official said.

Dioxin came to public attention as the contaminant in Agent Orange, a controversial herbicide used by U.S. forces in Vietnam. In 1983, the EPA forced the evacuation and demolition of the entire town of Times Beach, Mo., after the discovery of dioxin contamination on city streets.

Industry scientists have long accused the EPA of overstating the threat from dioxin, and many believed the agency's review would result in a



downgrading of the official risk estimate.

C.T. Kip Howlett, vice president and executive director of the Chlorine Chemistry Council, said the EPA has a conservative view of the health risks of dioxin and they are "out of sync" with the rest of the world's view on safe levels of the chemical.

Howlett said the agency "has a real problem on it's hands" in expressing apocalyptic concern about dioxin, while also stressing that the food supply is safe, breast feeding is the right thing to do and regulatory initiatives are working.

"There are a lot of things in this report that are counterintuitive to what the facts are," Howlett said.

Keith Holman, chief regulatory counsel of the U.S. Chamber of Commerce, said no industry wants to produce dioxin--which is an unintended by-product of combustion--"but let's make sure we have sound science before we regulate down to a zero level where it's clearly not warranted."

Environmentalists supported the EPA's findings but raised concerns that the agency would use falling dioxin levels as an excuse to delay any further tightening of regulations to control dioxins.

"They seem to be taking a triage approach, not worrying about emissions but dietary exposures of human beings," said Rick Hind of Greenpeace International's toxics program. "That suggests they can't walk and chew gun at the same time."

The agency's understanding of dioxin has improved since the agency began in-depth studies in 1991, and this installment is particularly important because it includes results of landmark human epidemiological studies from Europe and the United States.

In a briefing to EPA managers on May 10, the agency said it expected "many stakeholders to take dramatic action when the draft reassessment is released," and pressure from other interests given the "extraordinary" findings of the reassessment.

For the first time, the agency's draft report classifies the most potent form of dioxin--2,3,7,8-tetrachlorodibenzo-p-dioxin (TCDD)--as a "human carcinogen," a step above the previous ranking of "probable carcinogen." More than 100 other dioxin-like compounds were classified as "likely" human carcinogens.

Over the past five years, the EPA has imposed regulations on major dioxin emitters, including municipal waste combustors, medical waste incinerators, hazardous waste incinerators, cement kilns that burn

hazardous waste, pulp and paper operations, and sources of PCBs.

When those regulations become fully effective over the next few years, the agency expects further declines of dioxin levels.

"We still have a certain amount of dioxin circulating in the environment. We need to focus on the idea of reducing exposure and not simply going after all sources to the environment," said one administration official.

One source likely to be targeted is uncontrolled residential waste burning, such as burning trash in back yards, particularly in rural areas, EPA briefing papers said. Such burning is "one of the largest unaddressed dioxin sources and one that could have a disproportionately large contribution to the food supply."

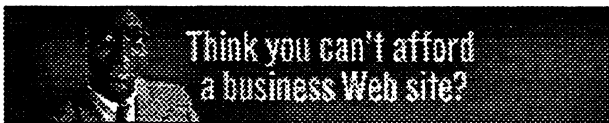
The agency also is discussing the possible regulation of other sources such as sludge disposal from privately owned waste-treatment facilities and the regulation of other air sources of pollution.

Sources said that there have been lengthy discussions at the EPA on how to release the report and answer questions stemming from it.

Several federal agencies have been involved in the preparation of the report and are expected to participate in the review of it. Agencies such as the Agriculture Department and the Food and Drug Administration, as well as the Food Safety Council, are readying their own responses to questions about the safety of the food supply, advice on following the dietary guidelines and breast feeding.

"People were not expecting this was an issue they had to deal with," an administration official said. "Over the last eight years there have been regulations that have already cut dioxin emissions from the most likely sources."

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DEPARTMENT OF ENVIRONMENTAL QUALITY  
DIVISION OF AIR QUALITY

Michael O. Leavitt  
Governor  
Dianne R. Nielson, Ph.D.  
Executive Director  
Ursula K. Trueman  
Director

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Salt Lake City, Utah 84114-4820  
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(801) 536-4099 Fax  
(801) 536-4414 T.D.D.

Certified Mail

DAQC-846-97

June 25, 1997

LeGrand Bitter  
Davis County Energy Recovery Facility  
650 East Highway 193  
Layton, Utah 84041-8647

Dear Mr. Bitter:

**Re: DAVIS COUNTY ENERGY RECOVERY FACILITY - NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE** - Conditions 7 and 8 of Approval Order (AO) DAQE-850-96 Dated September 10, 1996- Davis County

On June 9, 1997, an inspector representing the Executive Secretary of the Utah Air Quality Board performed a review of the results of stack testing performed on the Davis County Energy Recovery Facility Incinerator in February and April, 1997 located at 650 East Highway 193, Davis County. As a result of the stack test review, it was determined that Davis County Energy Recovery Facility was in violation of Conditions 7 and 8 of the AO dated September 10, 1996.

The enclosed **NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE** is based on the findings documented by the inspector. Please be advised that compliance with this **ORDER** is mandatory and will not relieve the company of liability for any past violations.

Written notification of Davis County Energy Recovery Facility's intent to comply, outlining how compliance is to be achieved, must be submitted to the Division of Air Quality within 15 days of the receipt of this notice. A meeting will then be arranged to discuss the violation, findings, and resolution. Questions regarding this matter may be directed to Anthony DeArcos at (801) 536-4028.

Sincerely,

Ursula K. Trueman, Executive Secretary  
Utah Air Quality Board

UKT:AD:tj

Enclosure: NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE

cc: Department of Environmental Quality, Dianne R. Nielson  
EPA Region VIII, Lee Hanley  
Davis County Health Department



Exhibit B

THE UTAH AIR QUALITY BOARD

ooOoo

	:	NOTICE OF VIOLATION
In the Matter of	:	AND ORDER FOR
Davis County Energy	:	COMPLIANCE
Recovery Facility	:	No. 97060024
		ooOoo

This NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE is issued by the UTAH AIR QUALITY BOARD (the Board) pursuant to the Utah Air Conservation Act (Act) Section 19-2-101, et seq., Utah Code Annotated 1953, as amended. The Executive Secretary is authorized to issue Notices of Violation pursuant to Section 19-2-110 of Utah Code Annotated. The Board has delegated to the Executive Secretary authority to issue ORDERS in accordance with Section 19-2-107(2)(g) of the Utah Code Annotated.

FINDINGS

1. Davis County Energy Facility operates a waste incinerator at 650 East Highway 193, in Davis County, Utah.
2. On September 10, 1996, the Executive Secretary issued an Approval Order (AO) to Davis County Energy Recovery Facility in accordance with Utah Administrative Code (UAC) R307-1-3.1.

A. Condition 7 of the AO states, in part:

"Emissions to the atmosphere from each discharge point of the bi-flue stack shall not exceed the following rates and concentrations..."

HCl(Hydrogen Chloride): 330 ppm<sub>dv</sub> @ 7% O<sub>2</sub>.

B. Condition 8 of the AO states, in part:

"Initial compliance testing shall be done for all contaminants specified in this approval order for both incinerators during January/February 1997... The Executive Secretary is fully aware that performing the requisite tests may prove impossible during very cold weather due to procedural difficulties and will allow rescheduling testing to more clement weather should the ambient temperature be below 20 degrees F at the start of the scheduled test..."

3. On February 5-8, 1997, and April 17, 1997, Air Pollution Testing, Inc. conducted stack tests at Davis County Energy Recovery Facility's Incinerator Stacks A and B. Stack test results were to be submitted to the Division of Air Quality (DAQ) 30 days after the stack tests were performed. Stack test results for both test dates were submitted on May 30, 1997.
4. On June 9, 1997, a representative of the Executive Secretary (inspector) performed a review of the Davis County Energy Recovery Facility's stack test report results submitted to the DAQ by Air Pollution Testing, Inc. As part of the review, the inspector found that results were 339.3 ppm<sub>dv</sub> @ 7% O<sub>2</sub> for HCl (Hydrogen Chloride) on Stack A for the February 5-8, 1997, stack test and 350 ppm<sub>dv</sub> @ 7% O<sub>2</sub> for HCl (Hydrogen Chloride), on Stack A for the April 17, 1997, stack test.
5. On June 9, 1997, the inspector also found in reviewing the stack test report that the Davis County Energy Recovery Facility did not complete testing for Dioxins/Furans during the February 5-8, 1997, stack tests. Data from the National Weather Service shows that the ambient temperature was not below 20 degrees F. during the time of testing as Davis County Energy Recovery Facility claims in the stack test report.

#### VIOLATIONS

1. Based on the foregoing FINDINGS, Davis County Energy Recovery Facility is in violation of UAC R307-1-3.1 and the AO dated September 10, 1996, Condition 7, for exceeding the emissions limit for Stack A.
2. Based on the foregoing FINDINGS, Davis County Energy Recovery Facility is in violation of UAC R307-1-3.1 and the AO dated September 10, 1996, Condition 8, for failing to perform a stack test for Dioxins/Furans in January/February 1997.

#### ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, Davis County Energy Recovery Facility, pursuant to Section 19-2-107(2)(g) of the Utah Code Annotated, is hereby ORDERED TO:

1. Immediately initiate all actions necessary to achieve total compliance with all applicable provisions of the Act.

2. Notify this office in writing on or before the 15th day of receipt of this letter, of Davis County Energy Recovery Facility's intent to comply with this ORDER and indicate how compliance is to be achieved.

COMPLIANCE, OPPORTUNITY FOR A HEARING

This ORDER is effective immediately and shall become final unless Davis County Energy Recovery Facility within thirty (30) days pursuant to Utah Code Annotated 19-2-110. Section 19-2-115 of the Utah Code Annotated provides that violators of the Utah Air Conservation Act and/or any ORDER issued thereunder may be subject to a civil penalty of up to \$10,000.00 per day for each violation.

Dated 26 day of June, 1997.

Ursula K. Trueman  
Ursula K. Trueman, Executive Secretary  
Utah Air Quality Board



DEPARTMENT OF ENVIRONMENTAL QUALITY  
DIVISION OF AIR QUALITY

CMA

Michael O. Leavitt  
Governor  
Dianne R. Nielson, Ph.D.  
Executive Director  
Ursula K. Trueman, P.E.  
Director

150 North 1950 West  
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(801) 536-4099 Fax  
(801) 536-4414 T.D.D.

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DAQC-330-99

July 9, 1999

Received  
Office of Enforcement

JUL 23 1999

Compliance & Env. Justice

Mr. LeGrand Bitter  
Wasatch Energy Systems  
650 East Highway 193  
Layton, Utah 84041-8647

Dear Mr. Bitter:

RE: **NOTICE OF VIOLATION AND ORDER TO COMPLY** - Utah Administrative Code (UAC)  
R307-401 and Conditions 7 and 8 of Approval Order (AO) dated September 10, 1996 - Wasatch  
Energy Systems - Davis County

On January 15, 1999, the Division of Air Quality received a report dated January 12, 1999, of compliance testing performed at the Unit A Discharge Point and the Unit B Discharge Point of the Bi-Flue Stack on September 15, 1998, through September 17, 1998. The report data indicate that at the time of testing, dioxin/furan emissions from the Unit A Discharge Point of the Bi-Flue Stack averaged 624 nanograms per dry standard cubic meter corrected to seven percent oxygen (ng/dscm @ 7% O<sub>2</sub>), and that dioxin/furan emissions from the Unit B Discharge Point of the Bi-Flue Stack averaged 685 ng/dscm @ 7% O<sub>2</sub>. These are violations of Condition 7 of the AO dated September 10, 1996, which limits dioxin/furan emissions from each point of the Bi-Flue Stack to 360 ng/dscm @ 7% O<sub>2</sub>.

In February, 1999, the Division of Air Quality received a report dated February 3, 1999, of compliance testing performed at the Unit A Discharge Point and the Unit B Discharge Point of the Bi-Flue Stack commencing on December 1, 1998. DAQ was not notified of the testing as required by Condition 8 of the AO and the tests were not conducted for Dioxin/Furan using an arithmetic average of three 4-hour minimum stack test runs as required by Condition 7 of the AO. Therefore, the December testing does not constitute a compliance demonstration as required by Condition 8 of the AO.

The enclosed **NOTICE OF VIOLATION AND ORDER TO COMPLY** is based on the data contained in the stack test report. The **ORDER** is effective immediately. Compliance with the **ORDER** is mandatory and will not relieve the company of liability for any past violations. To request a formal administrative hearing, the procedures detailed in the paragraph entitled "Compliance, Opportunity for a Hearing" must be followed.

Exhibit C

DAQC-330-99

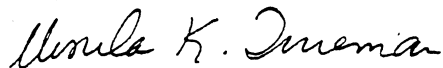
July 9, 1999

Page 2

The **ORDER** requires Wasatch Energy Systems to submit written notification of its intent to comply, including the date(s) when stack testing will again be performed to demonstrate that compliance with the dioxin/furan emission limit has been achieved at both the Unit A and Unit B Discharge Points, to the Division of Air Quality within 15 calendar days of receiving the **ORDER**. A meeting will then be arranged to discuss the violations, findings, and resolution. Questions regarding this matter may be directed to Harold Burge at (801)536-4129.

**WHEN RESPONDING, DO NOT REFER TO DAQC#, REFER TO THE DATE ON THIS LETTER.**

Sincerely,



Ursula K. Trueman, Executive Secretary  
Utah Air Quality Board

UKT:HAB:vmn

Enclosure: NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE

cc: Dianne R. Nielson, Executive Director Department of Environmental Quality  
Carol Smith, EPA Region VIII  
Davis County Health Department



THE UTAH AIR QUALITY BOARD

ooOoo

In the Matter of	:	NOTICE OF VIOLATION
Wasatch Energy Systems	:	AND ORDER FOR
(WES)	:	COMPLIANCE
	:	No.99030004

ooOoo

This NOTICE OF VIOLATION AND ORDER FOR COMPLIANCE is issued by the UTAH AIR QUALITY BOARD (the Board) pursuant to the Utah Air Conservation Act (Act) Section 19-2-101, et seq., Utah Code Annotated 1953, as amended. The Executive Secretary is authorized to issue Notices of Violation pursuant to Section 19-2-110 of Utah Code Annotated. The Board has delegated to the Executive Secretary authority to issue ORDERS in accordance with Section 19-2-107(2)(g) of the Utah Code Annotated.

FINDINGS

1. WES operates two municipal waste combustor units (Units A and B) located at 650 East Highway 193, Layton, Davis County, Utah. WES' offices are located at that same address.
2. On September 10, 1996, the Executive Secretary issued an Approval Order (AO) to WES in accordance with Utah Administrative Code (UAC) R307-401. Condition 7 of that AO limits dioxin/furan emissions from each discharge point of the Bi-Flue Stack to 360 nanograms per dry standard cubic meter corrected to seven percent oxygen (ng/dscm @ 7% O<sub>2</sub>). Condition 8 of the AO requires annual stack tests for a compliance demonstration.
3. On January 15, 1999, the Executive Secretary received a report dated January 12, 1999, of compliance testing performed at the Unit A Discharge Point of the Bi-Flue Stack and the Unit B Discharge Point of the Bi-Flue Stack on September 15, 1998, through September 17, 1998. The report data indicate the following:
  - A. At the time of testing, dioxin/furan emissions from the Unit A Discharge Point of the Bi-Flue Stack averaged 624 ng/dscm @ 7% O<sub>2</sub>.
  - B. At the time of testing, dioxin/furan emissions from the Unit B Discharge Point of the Bi-Flue Stack averaged 685 ng/dscm @ 7% O<sub>2</sub>.
4. In February, 1999, the Division of Air Quality received a report dated February 3, 1999, of compliance testing performed at the Unit A Discharge Point and the Unit B Discharge Point of the Bi-Flue Stack commencing on December 1, 1998. DAQ was not notified of the testing as required by Condition 8 of the AO and the tests were not conducted for Dioxin/Furan using an arithmetic average of three 4-hour minimum stack test runs as required by Condition 7 of the AO.

### VIOLATIONS

Based on the foregoing FINDINGS, WES is in violation of the following:

- A. Condition 7 of the AO dated September 10, 1996, for exceedance of the dioxin/furan emission limit at the Unit A Discharge Point of the Bi-Flue Stack.
- B. Condition 7 of the AO dated September 10, 1996, for exceedance of the dioxin/furan emission limit at the Unit B Discharge Point of the Bi-Flue Stack.
- C. Condition 8 of the AO for failing to conduct testing which constitutes an annual compliance demonstration.

### ORDER

Based on the foregoing FINDINGS AND VIOLATIONS, WES, pursuant to Section 19-2-107(2)(g) of the Utah Code Annotated, is hereby ORDERED TO:

1. Immediately initiate all actions necessary to achieve total compliance with all applicable provisions of the Act.
2. Notify this office in writing on or before the 15th day of receipt of this letter, of WES' intent to comply with this ORDER and indicate the date(s) on which WES will again perform stack testing at both the Unit A and Unit B Discharge Points of the Bi-Flue Stack to demonstrate that compliance with the dioxin/furan emission limit found in Condition 7 of the AO dated September 10, 1996, has been achieved.

### COMPLIANCE, OPPORTUNITY FOR A HEARING

This ORDER is effective immediately and shall become final unless Wasatch Energy Systems requests, in writing, a hearing within thirty (30) days of receipt of this Notice pursuant to Utah Code Annotated 19-2-110. Section 19-2-115 of the Utah Code Annotated provides that violators of the Utah Air Conservation Act and/or any ORDER issued thereunder may be subject to a civil penalty of up to \$10,000.00 per day for each violation.

Dated 9th day of July, 1999.

Ursula K. Trueman  
Ursula K. Trueman, Executive Secretary  
Utah Air Quality Board



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500  
DENVER, COLORADO 80202-2466

8ENF-T

MAR 3 2000

Ms. Ursula Kramer  
Executive Secretary,  
Utah Air Quality Board  
P.O. Box 144820  
Salt Lake City, Utah 84114-4820

Re: High Priority Violations at Wasatch Energy Systems

Dear Ms. Kramer :

This letter is to inform you of the United States Environmental Protection Agency's concern with the operations of the Davis County incinerator and the proposed settlement between the State of Utah and Wasatch Energy Systems (W.E.S.). As you are aware, the U.S. Environmental Protection Agency (EPA) has been closely following the operations of this municipal waste incinerator. According to information provided by your staff, emissions from the incinerator have historically exceeded emission limits for a variety of pollutants. EPA is particularly concerned with the exceedances of the dioxin/furan limit. W.E.S. is a current High Priority Violator based on violation of the State permit limit for dioxins/furans as demonstrated by Reference Method testing on September 17, 1998. Recent test results show one of the units emitting 1100 ng/dscm of dioxins/furan, more than three times the emission limit.

We understand that the Utah Division of Air Quality issued a Notice of Violation and Compliance Order for the September 1998 violations and is planning to issue a second NOV for the recent violations. We are also aware that W.E.S. has twice previously been listed as a Significant Violator and yet was not assessed an appropriate penalty by the State for these violations.

As you have discussed with Martin Hestmark, there are a number of compelling issues of concern at W.E.S., including a history of noncompliance, a lack of cooperation in remedying the violations, a potential conflict of interest in that a member of the Air Quality board holds a position with W.E.S., numerous citizen complaints including a pending citizen's suit, and possible public health concerns regarding the dioxin/furan emissions. EPA believes that W.E.S. is not currently in compliance with emission limits based on Reference Method Testing. EPA would appreciate being

informed of the results from the December 1999 Reference Method testing once the results are received by the State.

We understand that the State is preparing to enter into a settlement with W.E.S. that requires only the early installation of air pollution controls that will be required by the proposed New Source Performance Standards. While this action will clearly benefit the environment, EPA views it as insufficient to resolve W.E.S.' past and current violations. To be acceptable to EPA, any settlement must also include substantial penalties that factor in the economic benefit that WES has enjoyed during its lengthy period of non-compliance, including both control equipment and operation and maintenance practices. The BEN and Project models should be run to determine this economic benefit.

The settlement also must require W.E.S. to immediately come into and remain in compliance with the requirements of the 1996 Approval Order, with no variances allowed. Monthly or quarterly testing should be required, with appropriate stipulated penalties for exceedances. Compliance with the current permitted emission limits is critical for ensuring protection of human health and the environment. While the State has assured the public that the Davis County incinerator poses no risk, EPA does not believe that there is sufficient data to make such a conclusion. Attached for your consideration is EPA's regional toxicologist's evaluation of the "Characterization of Soil and Milk Samples from the Wasatch Energy Systems Facility Environs" report dated January 6, 1999. The report was required by the State's previous Consent Agreement with W.E.S. The evaluation memorandum, written by our regional toxicologist, Suzanne Wuerthele, Ph.D., points out some serious flaws in the report and outlines where additional information is needed in order to draw conclusions about the safety of human health and the environment surrounding the incinerator. We request a discussion with your office once this evaluation is reviewed by your staff. It is our belief that declarations that there is no risk cannot be made based on this report.

A settlement between the State and W.E.S. must also include a firm schedule for installation and startup of the new controls with intermediate milestones and stipulated penalties for any missed milestones. In the interim, it is imperative that W.E.S. take steps to minimize dioxin/furan formation and emissions, including operating and maintaining the plant in a manner consistent with good air pollution control practices. Close monitoring of operational parameters and more frequent testing (monthly or quarterly) are needed.

We realize that these issues need to be raised to State and EPA Senior Managers and possibly the Executives per the "Air Program Compliance /Enforcement Process from the FY2000 Performance Partnership Agreement". Our management is prepared to respond to any questions. However, if the State signs a settlement with W.E.S. that does not include each of the components discussed above, EPA will consider taking its own enforcement action pursuant to the provisions of the Utah/EPA

Cooperative Enforcement Agreement. We hope to continue working cooperatively with the State in our joint goal of bringing W.E.S. into permanent compliance. If you have any questions or would like to discuss this matter, please feel free to contact me at (303) 312-6180. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ron Rutherford", with a stylized flourish at the end.

Ron Rutherford  
Acting Director, Technical Enforcement  
Office of Enforcement, Compliance, and  
Environmental Justice

Enclosure

cc: Marvin Maxell, UT-DAQ  
Jeff Dean, UT-DAQ