

2015

**Utah Physicians for a Healthy Environment and Friends of Great Salt Lake, Petitioners/ Appellants, v. Executive Director of the Utah Department of Environment and Quality, Et Al. , Respondents/ Appellees.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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UTAH PHYSICIANS FOR A HEALTHY  
ENVIRONMENT and FRIENDS OF  
GREAT SALT LAKE,

Petitioners/Appellants,

v.

EXECUTIVE DIRECTOR OF THE  
UTAH DEPARTMENT OF  
ENVIRONMENTAL QUALITY, *et al.*,

Respondents/Appellees.

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Appeal No. 2014<sup>5</sup>0344-CA

Agency Decision Nos.

N10123-0041

DAQE-AN101230041-13

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**RESPONSE BRIEF OF HOLLY REFINING AND MARKETING CO.**

---

Appeal from the Final Order of the Utah Department of Environmental Quality,  
Executive Director Amanda Smith

---

Joro Walker  
Charles R. Dubuc  
WESTERN RESOURCE ADVOCATES  
150 South 600 East, Suite 2A  
Salt Lake City, Utah 84102  
Telephone: (801) 487-9911  
*Attorneys for Petitioners/Appellants*

Steven J. Christiansen (5265)  
David C. Reymann (8495)  
Cheylynn Hayman (9793)  
Megan J. Houdeshel (12429)  
PARR BROWN GEE & LOVELESS, P.C.  
101 South 200 East, Suite 700  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
*Attorneys for Respondent/Appellee Holly  
Refining & Marketing Company—Woods  
Cross LLC*

Christian Stephens  
Marina Thomas  
UTAH ATTORNEY GENERAL'S OFFICE  
195 North 1950 West  
Salt Lake City, Utah 84116  
*Attorneys for Respondents/Appellees UDEQ  
and UDAQ and their Respective Directors*

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Salt Lake City, Utah 84102  
Telephone: (801) 487-9911  
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Steven J. Christiansen (5265)  
David C. Reymann (8495)  
Cheylynn Hayman (9793)  
Megan J. Houdeshel (12429)  
PARR BROWN GEE & LOVELESS, P.C.  
101 South 200 East, Suite 700  
Salt Lake City, Utah 84111  
Telephone: (801) 532-7840  
*Attorneys for Respondent/Appellee Holly  
Refining & Marketing Company—Woods  
Cross LLC*

Christian Stephens  
Marina Thomas  
UTAH ATTORNEY GENERAL'S OFFICE  
195 North 1950 West  
Salt Lake City, Utah 84116  
*Attorneys for Respondents/Appellees UDEQ  
and UDAQ and their Respective Directors*

## **LIST OF PARTIES**

### **Petitioners/Appellants:**

Utah Physicians for a Healthy Environment  
Friends of Great Salt Lake

### **Respondents/Appellees:**

Utah Department of Environmental Quality  
Executive Director of the Utah Department of Environmental Quality  
Utah Division of Air Quality  
Director of the Utah Division of Air Quality  
Holly Refining & Marketing Company—Woods Cross LLC

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## INTRODUCTION

This case hinges on a single question: was the Utah Division of Air Quality (“UDAQ”) reasonable in its decision to issue Holly Refining & Marketing Company—Woods Cross LLC (“Holly”) an approval order to modify and modernize its refinery (the “Holly AO”). The case is not, as Petitioners urge the Court to believe, about whether air pollution is bad as a public policy matter. Whether or not air pollution impacts public health is not before this Court, nor does it answer whether the Holly AO complies with existing law. The UDAQ, with its staff of scientists and engineers, has been tasked by the Utah Legislature to set standards and rules that permit applicants and emission sources must follow in order to protect public health. Holly complied with these standards and rules when it requested and was issued the Holly AO. The fact that Petitioners do not like those standards and rules does not mean this Court is at liberty to change them.

As is apparent from the briefing, the issues in this case are highly technical. In reviewing such issues, this Court owes considerable deference to the decisions of UDAQ that are peculiarly within its expertise. UDAQ staff have spent their careers evaluating proper methodology for emission calculations and deciding whether emission increases will impact public health. As is evident by the massive record in this case, the agency took this responsibility seriously. UDAQ thoroughly evaluated Holly’s permit application, cross-checked Holly’s emission calculations, and wrote into the permit a wide variety of emissions restrictions before issuing a permit that UDAQ’s engineers determined would be protective of public health.

The modifications and installations Holly requested will allow it to process an additional 20,000 barrels of crude oil, including black and yellow wax crude from Utah's Uintah Basin. Holly was interested in making these modifications in part because it could process local waxy crude that, due to the need to heat the crude to maintain liquidity, could not be processed at refineries in other states farther away. This will result in increased economic benefit to the state of Utah and reduce externalities of processing foreign crude, including transportation costs and associated environmental impacts. The modification will also allow Holly to modernize various equipment and processes, which will result in *significantly decreased* overall emissions at the refinery (collectively, the "Modernization Project").

The arguments Petitioners present in their Opening Brief challenging the reasonableness of UDAQ's issuance of the Holly AO were all definitively rejected by the Administrative Law Judge ("ALJ") and Executive Director in the agency adjudication below, which culminated in the Executive Director's Order Adopting Findings of Fact, Conclusions of Law, and Recommended Order on the Merits (the "Executive Director's Final Order"). In their Opening Brief, Petitioners virtually ignore the 113-page findings and conclusions entered by the ALJ and adopted by the Executive Director. Instead, they essentially ask for a do-over, urging an improper de novo review by this Court and making the exact same arguments the ALJ rejected without marshaling the significant amount of evidence in the record cited by the Executive Director that supports UDAQ's issuance of the Holly AO. For this reason alone, Petitioners fail to satisfy their burden of proof in this appeal. When that copious evidence is properly considered, it is evident that

Petitioners' arguments fail on the merits, that the Executive Director's decision was reasonable and well-supported, and that this Court should not disturb that decision on appeal.

### **STATEMENT OF JURISDICTION**

This Court has jurisdiction pursuant to Utah Code § 78A-4-103(2)(a)(B) to review a final order resulting from a permit review adjudicative proceeding. The final order or "dispositive action" under review is the Executive Director's Final Order, dated March 31, 2015. *See* Utah Code § 19-1-301.5(1)(a) (defining "dispositive action" as a "final agency action that (i) the executive director takes as part of a permit review adjudicative proceeding").

### **STATEMENT OF ISSUES AND STANDARD OF REVIEW**

First Issue: Have Petitioners adequately briefed the issue of whether the Executive Director acted unreasonably in upholding UDAQ's issuance of the Holly AO where Petitioners have not even discussed the final "dispositive action" of the agency—the Executive Director's Final Order?

Standard of Review: Where an issue does not require review of a decision of a tribunal below, no standard of review applies. *Cf. Simmons Media Grp., LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 13, 335 P.3d 885. This Court retains discretion to evaluate the adequacy of an appellant's brief. *See* Utah R. App. P. 24(k); *see also State v. Gamblin*, 2000 UT 44, ¶ 8, 1 P.3d 1108.

Second Issue: Was the Executive Director reasonable in upholding UDAQ's decision to use the NEI emission factors to estimate Holly's emissions from certain heaters and boilers being installed as part of Holly's Modernization Project?

Standard of Review: Judicial review of the Executive Director's final decision in a permit review adjudication is governed by Utah Code § 19-1-301.5(14).<sup>1</sup> Specifically, Utah Code § 19-1-301.5(14)(c) directs a reviewing court to the Utah Administrative Procedures Act ("UAPA"), § 63G-4-403(4), which requires Petitioners to show they have been "substantially prejudiced" by an agency action constituting the type of error enumerated in the section. Petitioners generally allege that the agency decision to issue

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<sup>1</sup> In 2015, the Utah Legislature revised Section 19-1-301.5. 2015 Utah Laws Ch. 378 (S.B. 282). The revisions became effective on May 12, 2015. The prior version of this statute applies here because the parties' substantive rights (DAQ's issuance of the Approval Order on November 28, 2014) and the parties' procedural rights (the filing of this appeal on April 27, 2015) each vested before the effective date of the new statute. *See State v. Clark*, 2011 UT 23, ¶¶ 12-14, 251 P.3d 829. Even were this Court to determine that the new statute applies on appeal, however, the application of the standard of review under either version of the statute is essentially the same. The new statutory language includes some changes to the language in the applicable judicial standards of review, including an express requirement for marshaling and the imposition of a clearly erroneous standard. However, because the ALJ required Petitioners to marshal below, and because a clearly erroneous standard of review still requires a determination on substantial evidence, there is no substantive difference in the application of the two standards. *Compare* Utah Code § 19-1-301.5 (15)(c)(ii) (2015) ("the appellate court shall: (ii) uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based upon the petitioner's marshaling of the evidence") *with* Utah Code § 19-1-301.5 (14)(c)(ii) (2012) ("the appellate court shall: (ii) uphold all factual, technical and scientific determinations that are supported by substantial evidence viewed in light of the record as a whole"); *see, e.g., In re: Exxonmobil Chem. Co. (Baytown Olefins Plant)*, PSD Appeal 13-11, 2014 WL 1979510, at \*17 (EAB May 14, 2014) (because there was substantial evidence supporting rejection of CCS as an add-on technology, "the Petition fails to demonstrate that the Region's determination was clearly erroneous or otherwise warrants Board review.").



the Holly AO was in error, which involves a number of legal and factual components that the Petitioners argue were improper.

Utah Code § 19-1-301.5(14)(c) clarifies the general categories of error in UAPA by providing a standard of review which requires the Court to:

- (i) recognize[] that the agency has been granted substantial discretion to interpret its governing statutes and rules; and
- (ii) uphold all factual, technical, and scientific agency determinations that are supported by substantial evidence viewed in light of the record as a whole.

To carry their burden of proof with respect to their challenge of factual findings, Petitioners must demonstrate that the Executive Director's findings of fact are not supported by substantial evidence; otherwise, the Court shall "uphold all factual technical, and scientific agency determinations that are supported by substantial evidence taken from the record as a whole." Utah Code § 19-1-301.5(14)(c). Under Utah law, this Court's review on questions of fact is limited to determining if the Executive Director's factual findings "were reasonable and rational," while giving "great deference" to UDAQ's factual findings and not "reweighing" the evidence. *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 2012 UT 73, ¶ 11, 38 P.3d 291 (hereinafter *Sierra Club v. BOGM*) (internal quotation marks omitted). While reviewing an agency's determination for substantial evidence, the Court "state[s] the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency's findings." *Id.* ¶ 12.

With respect to legal questions, the Court is directed to recognize "that the agency has been granted substantial discretion to interpret its governing statutes and rules." Utah

Code § 19-1-301.5 (14)(c)(i). In this case, the governing statutes and rules include the Clean Air Act, the Utah Air Conservation Act, and the applicable regulations under these statutes. UDAQ's legal interpretation of these statutes and rules may be overturned only if Petitioners show that such interpretation is a "clearly erroneous interpretation or application of the law." *See, e.g., Sierra Club v. BOGM*, 2012 UT 73, ¶ 10; *see also Assoc. Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291 (an agency's "interpretation of the operative provisions of the statutory law it is empowered to administer" must be given deference). By contrast, UDAQ's general interpretations of the law, including constitutional questions, jurisdiction, and statutes unrelated to agency function, are granted little or no deference and are reviewed for correctness. *Sierra Club v. BOGM*, 2012 UT 73, ¶ 9.

Finally, when the agency has been granted discretion to interpret the statute or regulation at issue, mixed questions of law and fact are reviewed for abuse of discretion. *See Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶ 39, 308 P.3d 461. Here, Section 19-1-301.5(14)(c)(i) expressly grants the agency "substantial discretion to interpret its governing statutes and rules." Agency decisions on mixed questions of law and fact must be upheld under this standard if they are "rationally based" and set aside only "if they are imposed arbitrarily and capriciously or are beyond the tolerable limits of reason." *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18 (internal quotation marks omitted).<sup>2</sup>

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<sup>2</sup> In *Sevier Citizens for Clean Air and Water, Inc. v. Department of Environmental Quality*, 2014 UT App 257, 338 P.3d 831, the Court articulated the substantial discretion standard of review in § 19-1-301.5(14) as a grant of authority and not a grant of discretion or deference to the agency's interpretation of the law. *Sevier Citizens*, 2014

Petitioners raise multiple arguments with respect to the NEI emission factors that are the subject of this particular issue. Those arguments include all three categories of arguments discussed above—legal, factual, and mixed questions. The applicable standard of review for each is identified below, in Section II of the Argument, where those issues are addressed.

Third Issue: Was the Executive Director reasonable in upholding UDAQ's decision to rely on historical inventory data to calculate the PM<sub>2.5</sub> emission decreases from the removal of the propane pit flare in Holly's netting analysis?

Standard of Review: This issue presents a legal question about what UDAQ may properly rely upon to calculate emission decreases to include in a netting analysis.

UDAQ's interpretation of the law it is charged to administer—such as what historical emissions may be considered for netting calculations—must be given substantial discretion and may only be overturned if clearly erroneous. *Sierra Club v. BOGM*, 2012 UT 73, ¶ 10.

Fourth Issue: Was the Executive Director reasonable in upholding UDAQ's estimate of the PM<sub>2.5</sub> emissions from the Fluid Catalytic Cracking Unit 25 ("FCCU25") as reflecting the maximum capacity of the source to emit PM<sub>2.5</sub>?

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UT App 257, at ¶ 5. That holding, however, was based on and limited to the jurisdictional issues that were the focus of *Sevier Citizens*. The sole issue in that case was whether the Petitioners had filed a complete petition to intervene as required by § 19-1-301.5(7), which is a jurisdictional requirement. *Id.* ¶ 6. By contrast, the issues in this case do not involve agency interpretations of its jurisdiction but rather technical and factual questions for which the agency's determinations should be given deference as required by § 19-1-301.5(14).

Standard of Review: This issue presents a mixed question of law and fact, which requires the Court to grant the agency “substantial discretion to interpret its governing statute and rules” and determine whether substantial evidence in the record exists to support decision. Utah Code § 19-1-301.5(14)(c). Therefore, the Executive Director’s decision to uphold UDAQ’s PM<sub>2.5</sub> emission estimate for the FCCU25 may be set aside only if the decision was beyond the tolerable limits of reason. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18.

Fifth Issue: Was the Executive Director reasonable in determining that the limits in Holly’s Approval Order protect the short-term National Ambient Air Quality Standards (“NAAQS”) and that Holly’s modeling adequately demonstrates the NAAQS will not be exceeded?

Standard of Review: This issue presents a mixed question of law and fact, which requires the Court to grant the agency “substantial discretion to interpret its governing statute and rules” and determine whether substantial evidence in the record exists to support the decision. Utah Code § 19-1-301.5(14)(c). Therefore, the Executive Director’s decision that the Holly AO was protective of the NAAQS, including the short-term NAAQS may be set aside only if the decision was beyond the tolerable limits of reason. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18.

Sixth Issue: Was the Executive Director reasonable in determining that because Subpart Ja applies to Holly’s flares as a matter of law, Subpart Ja need not be restated within the Holly AO?

Standard of Review: This issue presents a question about the legal interpretation of Subpart Ja, its applicability to Holly's flares, and whether UDAQ is required to include Subpart Ja provisions in the AO. UDAQ's interpretation of the law it is charged to administer—such as Subpart Ja—must be given substantial discretion and may only be overturned if clearly erroneous. *Sierra Club v. BOGM*, 2012 UT 73, ¶ 10.

Seventh Issue: Was the Executive Director reasonable in determining that there were no modifications to the North Flare as part of the Modernization Project and therefore no BACT analysis of the North Flare was required, and alternatively that BACT has already been satisfied for the North Flare?

Standard of Review: This issue presents a mixed question of law and fact, which requires the Court to grant the agency "substantial discretion to interpret its governing statute and rules" and determine whether substantial evidence in the record exists to support the decision. Utah Code § 19-1-301.5(14)(c). Therefore, the Executive Director's decision that the North Flare was not modified and that BACT was not required may be set aside only if the decision was beyond the tolerable limits of reason. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18.

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This appeal involves review of the Executive Director's Final Order, the final agency action taken in a permit review adjudication to determine whether UDAQ properly issued the Holly AO. [ADJ011651-011653.] The Holly AO, issued on November 18, 2013, authorized Holly to construct new facilities to expand Holly's



production capacity and to more effectively process the waxy crudes produced in Utah's Uintah Basin. [IR09223-09254.] The administrative adjudication began with Petitioners' Request for Agency Action and subsequent Request for Stay of the Holly AO.<sup>3</sup> [ADJ009257-ADJ009373; ADJ009557-ADJ009596.] Those Requests were extensively briefed and argued before the ALJ, who rejected the Request for Stay and issued a comprehensive, 113-page ruling on the merits rejecting each of Petitioners' arguments. [ADJ011536-011648.] The ALJ's findings and conclusions were then adopted by the Executive Director in her Final Order. [ADJ011651-011653.]

The only proper issue before this Court is whether the Executive Director was reasonable in upholding UDAQ's decision to issue the Holly AO. As the administrative record makes clear, the agency relied on substantial evidence in making its decision to issue the Holly AO and acted well within its considerable discretion. In arguing to the contrary, Petitioners ignore this substantial evidence and act as though the proceedings before the ALJ never occurred. Those arguments are insufficient to warrant disturbing the agency's decision on appeal.

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<sup>3</sup> The Executive Director denied the Request for Stay on May 8, 2014, adopting the findings and conclusions of the ALJ ("Stay Order"). [ADJ011035-ADJ011039.] Petitioners did not file an appeal of that the Stay Order within the 30-day time period dictated by Utah Code § 19-1-301.5(15). Accordingly, the time period for appeal of the Stay Order has long since expired. To the extent Petitioners are requesting that this Court review the Stay Order, the Court lacks jurisdiction to consider such a request. *See* Utah Code § 19-1-301.5(15)(e).

## II. FACTUAL BACKGROUND

The factual background of this case can be divided into two distinct time periods. The first period is the permitting phase, which included Holly's request for the AO and the notice and comment period, culminating in UDAQ's issuance of the Holly AO. The second period is the administrative adjudication of the Holly AO, which resulted in the Executive Director's Final Order upholding UDAQ's issuance of the Holly AO.

### A. The Permitting Phase

In July of 2012, Holly submitted a Notice of Intent ("NOI") requesting an approval order to expand its Woods Cross refinery ("Holly Refinery") and modernize certain equipment in a way that would allow Holly to process an additional 20,000 barrels per day of black and yellow wax crude from the Uintah Basin in eastern Utah. [IR002798-003590.] The NOI requested a number of modifications, installations, and upgrades to that Holly Refinery that will result in a number of overall emission decreases at the refinery. [IR008482; IR007575.] Additionally, Holly submitted a final netting analysis to UDAQ that compiled all of the estimated emissions associated with the new modifications and installations and all other emission increases and decreases at the Refinery over the last five years to determine whether, for each pollutant of concern,<sup>4</sup> the

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<sup>4</sup> The relevant pollutants of concern requiring regulation under the Clean Air Act include Volatile Organic Compounds ("VOCs"), Sulfur Dioxide ("SO<sub>2</sub>"), Carbon Monoxide ("CO"), Nitrogen Oxides ("NO<sub>x</sub>"), Particulate Matter of ten microns or less ("PM<sub>10</sub>"), Particulate Matter of 2.5 microns or less ("PM<sub>2.5</sub>"), and Greenhouse Gas emissions ("GHG").

requested modification would be major or minor.<sup>5</sup> [IR008366-008415.] The only two pollutants that exceeded the significance thresholds, thereby constituting major modifications and triggering PSD review, were CO and GHG, neither of which is at issue in this appeal. [IR008566.] Projected emissions for the remaining pollutants (including PM<sub>2.5</sub>) did not trigger PSD or NNSR review and were addressed under Utah's minor source program. [*Id.*] Notably, because a large part of the project involved upgrades and improvements to existing equipment, the project is expected to result in a significant *decrease* in various pollutants, including 150.69 tons per year (tpy) of SO<sub>2</sub>, 21.53 tpy of NO<sub>x</sub>, and 17.02 tpy of VOCs. [IR007575]

On June 5, 2013, UDAQ released for public comment an Intent to Approve ("ITA") the Modernization Project and a Source Plan Review. [IR008449-008479; IR008480-008575.] The public comment period ran from June 5, 2013 through July 25, 2013, during which UDAQ received a number of comments, including comments from Petitioners. [IR007842-007997; IR008579-008602; IR009046-009135; IR007613-007836.] After the close of the public comment period, on November 6, 2013, UDAQ requested additional information from Holly pertaining to certain comments raising

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<sup>5</sup> The distinction between a minor modification and a major modification is important because where emission increases from a particular project exceed certain significance thresholds, additional review and more stringent requirements are imposed on the permit applicant that must be satisfied before a permit may be issued. *See* 40 C.F.R. § 52.21 (2)(i); 40 C.F.R. § 52.21 (b)(23) (defining "significant" as 100 tpy for CO, 40 tpy for NO<sub>x</sub>, 15 tpy for PM<sub>10</sub>, 10 tpy for PM<sub>2.5</sub>, 40 tpy for ozone, and 10,000 tpy for GHG). The review required for a major modification is sometimes referred to as Prevention of Significant Deterioration ("PSD") review or Non-attainment New Source ("NNSR") Review, which are programs under the Clean Air Act that impose certain federal requirements not otherwise applicable to minor modification projects.

questions about the ITA and final netting analysis, which Holly provided on November 7, 2013. [IR008021, IR008022-0052.] Ultimately, on November 18, 2013, UDAQ issued the Holly AO, authorizing the Modernization Project. [IR009223-009254.]

B. The Adjudication Phase

On December 18, 2013, Petitioners filed their Request for Agency Action contesting UDAQ's issuance of the Holly AO.<sup>6</sup> [ADJ009257-009373.] On January 22, 2014, Petitioners filed a Request for Stay of the Holly AO, which was denied by the Executive Director on May 8, 2015. [ADJ009619-009657.] The parties then extensively briefed the merits of the Request for Agency Action. After receiving over 600 pages of briefing and hearing over four hours of oral argument, the ALJ issued his Findings of Fact and Conclusions of Law and Recommended Order to the Executive Director, totaling over 100 pages, recommending denial of Petitioners' claims. [ADJ0111536-011648.] The Executive Director adopted the ALJ's findings and conclusions and denied the Petitioners' Request for Agency Action. [ADJ011651-ADJ011653.] It is the Executive Director's Final Order denying Petitioners' claims that is the proper subject of this appeal. *See* Utah Code § 19-1-301.5(14).

**SUMMARY OF ARGUMENT**

This case presents a scenario where agency discretion is at its zenith. The issues raised by Petitioners are highly technical in nature and particularly within the discretion and expertise of UDAQ. The Utah legislature recognized the significance of technical

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<sup>6</sup> Although Petitioners did not list Holly as a respondent in their caption, Holly is a party to the permit adjudication as a matter of law. Utah Code § 19-1-301.5(1)(c)(ii).

agency expertise in situations such as this and directed that where the agency is required to apply its expertise, it should be given great deference in its decision-making. *See* Utah Code 19-1-301.5(14)(c)(i). Accordingly, a reviewing tribunal may only disturb the outcome of these highly specialized agency functions if decision-making is beyond the limits of rationality and reasonability. *Assoc. Gen. Contractors*, 2001 UT 112, ¶ 18. Here, UDAQ thoroughly evaluated Holly's request to modify its refinery and reviewed thousands of pages in its review of the record. This review culminated in an 80-page Source Plan Review and a 49-page Response to Comments memorandum explaining in detail UDAQ's decision-making process in issuing the Holly AO. [IR008480-008575; IR009174-009222.] Holly also submitted a significant amount of scientific information clarifying and justifying its request for the AO, which the agency reviewed and considered in its decision-making process. [*See, e.g.*, IR007238-007258; IR008024-008044; IR002798-003590.]

As the Executive Director determined in her Final Order, the record demonstrates "that the factual, technical, and scientific agency determinations are supported by substantial evidence taken from the record as a whole." [ADJ011651.] UDAQ's decision to issue the Holly AO was reasonable, rational, and in accordance with Utah law and should not be disturbed by this Court.



## ARGUMENT

### **I. PETITIONERS FAIL TO MEET THEIR BURDEN ON APPEAL BY REFUSING TO ADDRESS THE EXECUTIVE DIRECTOR'S FINAL ORDER.**

Petitioners take the extraordinary position in their Opening Brief that the Executive Director's Final Order is owed no deference and that this Court may "undertake an independent evaluation of the Director's permitting decision based on the administrative record." [Opening Brief at 4.] This position is untenable for at least two reasons, either one of which is sufficient for this Court to reject Petitioners' challenge.

First, the Executive Director's Final Order is the only order subject to review by this Court. *See* Utah Code § 19-1-301.5(14)(a). As appellants, Petitioners carry the burden of persuasion to demonstrate the Executive Director's Final Order was legally or factually flawed. *See* Utah R. App. P. 24(a)(9). Part of this burden requires the Petitioners to marshal the evidence that both supports and contradicts the Order under review. Utah R. App. P. 24(a). This marshaling requirement serves the purpose of sparing an appellate tribunal from the onerous burden of undertaking an independent review of the record, particularly a lengthy and highly technical record like this one. By ignoring the Executive Director's Final Order, Petitioners foist this burden on the Court and Respondents, who are left to guess how Petitioners' arguments relate to the Final Order being reviewed.

The Utah Supreme Court has rejected this tactic, finding that an appellant may not "dump the burden of argument and research" on the appellate court. *W. Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874 (citation omitted). Indeed, "an inadequately

briefed claim is by definition insufficient to discharge an appellant's burden to demonstrate ... error." *Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶ 37, 335 P.3d 885. The record in this case is massive—more than 10,000 pages. Yet Petitioners' only acknowledgement of the Final Order at issue in their Opening Brief is a handful of footnotes containing string citations without any analysis or explanation. The rest of Petitioners' brief consists of selective and one-sided recitations of the evidence. This failure to discuss the actual order on review and the evidence on which it is based is insufficient to carry Petitioners' burden on appeal.<sup>7</sup> See *State v. Nielsen*, 2014 UT 10, ¶ 40, 326 P.3d 645 ("[A] party who fails to identify and deal with supportive evidence will never persuade an appellate court to reverse under the deferential standard of review that applies to such issues.").

Second, if Petitioners' interpretation of Utah Code § 19-1-301.5 were correct—that this Court could simply ignore the Executive Director's Final Order and conduct a do-over of the ALJ proceedings—the entire adjudicative process below would be meaningless. This interpretation is contrary to the plain language of the statute, inconsistent with this Court's standards of review, and incompatible with the rules governing exhaustion of administrative remedies. See *Warne v. Warne*, 2012 UT 13, ¶ 36, 275 P.3d 238 (the court must "avoid an interpretation that will render portions of a

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<sup>7</sup> Petitioners also failed to satisfy their marshaling obligations with the ALJ in the adjudicative proceeding below. The ALJ determined this was an independent basis for rejection of Petitioners' individual claims. [ADJ011549; ADJ011563; ADJ011567; ADJ011571; ADJ011578; ADJ011586; ADJ011603; ADJ011614; ADJ011619; ADJ011626; ADJ011640.]

statute inoperative”); *W. Water, LLC v. Olds*, 2008 UT 18, ¶ 18, 184 P.3d 578 (review is only proper after exhaustion of administrative remedies).

Either of these reasons is an independent basis for the Court to reject Petitioner’s insufficient briefing and arguments on appeal.

## **II. THE EXECUTIVE DIRECTOR WAS REASONABLE IN UPHOLDING UDAQ’S DECISION TO USE THE NEI EMISSION FACTORS.**

If the Court does reach the merits of the Petitioners’ claims, those claims also fail on the merits. Petitioners first challenge UDAQ’s use of NEI emission factors to calculate PM emissions from Holly’s new heaters and boilers.<sup>8</sup> They argue the law mandates UDAQ to use the older (and, as it turns out, far less accurate) AP-42 emission factors to estimate PM emissions, and that UDAQ’s departure from its prior use of AP-42 factors was unlawful. Petitioners also argue the NEI emission factors must be less reliable because they estimate lower PM emissions for new equipment than the older AP-42 factors. Neither argument is well taken.<sup>9</sup>

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<sup>8</sup> Emission factors are tools used to estimate emissions from equipment that has not yet been installed or operated at a particular refinery. The factors are multiplied by the fuel input and hours of operation, which results in an estimated maximum emissions in tons per year of any particular pollutant. 47 Fed. Reg. 52723-01, 52724 (Oct. 14, 2009). At issue here are particulate matter emissions (“PM”) from heaters and boilers at the Holly Refinery that were proposed to be installed as part of the Modernization Project.

<sup>9</sup> There is some irony in Petitioners’ assertion that the Modernization Project will increase overall PM pollution. Because the project will result in such significant decreases of SO<sub>2</sub>, NO<sub>x</sub>, and VOCs, [IR007575], all of which are precursors to PM pollution, [ADJ010112-010113 (PM<sub>2.5</sub> SIP for the Salt Lake City, UT Nonattainment Area, Section IX. Part A.21)], it is likely the project will have a net beneficial impact on air quality.

**A. UDAQ is Afforded Significant Discretion to Determine the Most Appropriate Emission Factors to Calculate Potential to Emit.**

Petitioners assert, without any legal support, that UDAQ has no discretion to use anything other than AP-42 factors to calculate refinery source emissions.<sup>10</sup> That assertion was properly rejected by the ALJ, who concluded “nothing in Utah’s minor source permitting regulations and nothing in the federal PSD/NSR regulations requires the use of AP-42 emission factors.” [ADJ011627.]

While EPA has identified the AP-42 factors as *one method* of estimating potential emissions under the PSD/NSR program, it has never said they are the *only* emission factors an agency can use. To the contrary, EPA has sanctioned numerous other methods for emission calculations, including “emissions from technical literature,” which is what the NEI emission factors are. [EPA New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting, draft dated October 1990 (“NSR Manual”), ADJ010180-010190.]<sup>11</sup> Indeed, as detailed below, EPA has specifically *encouraged* state regulatory agencies to use alternative emissions factors for estimates of PM emissions from newer equipment because the older AP-42 factors are

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<sup>10</sup> This argument is a legal question about regulations UDAQ is charged to administer. UDAQ’s interpretation must be given substantial discretion and may only be overturned if clearly erroneous. *Sierra Club v. BOGM*, 2012 UT 73, ¶10.

<sup>11</sup> See also Bernard F. Hawkins, Jr., & Mary Ellen Ternes, *The Clean Air Act Handbook*, 142 (3d ed. 2011), ADJ010226-010231 (“Numerous methods may be used to estimate potential emissions.... The applicant should discuss the selected method with the permitting agency to ensure the agency’s acceptance. Available methods include obtaining data from equipment vendors, actual operating data from similar sources ... emissions data from EPA or state agencies, AP-42 emissions estimate factors, and data contained in trade and technical journals.”).

likely to be inaccurately high. *See* 75 Fed. Reg. 80118-01, 80132. And because selecting emission factors is a highly technical determination, UDAQ has broad discretion to make that decision. *See, e.g., In re: N. Mich. Univ. Ripley Heating Plant*, 2009 WL 443976, PSD Appeal No. 08-02, at 53 (EAB Feb. 18, 2009) (“[Q]uestions pertaining to the appropriate pollutant emissions rates and other inputs to air quality models raise scientific and technical concerns that generally are best left to the specialized expertise and reasoned judgment of the permitting authority.”).<sup>12</sup>

In arguing otherwise, Petitioners attempt to rely on a document entitled DAQ NSR *Form 19*, which they attach as Exhibit H to their brief. That document, however, is nowhere in the record because Petitioners never raised that argument below, despite the fact that the document has been publicly available since at least December 2010. [*See* Ex. H, p.3.] Having failed to present that argument below, Petitioners have waived it on appeal. *See, e.g., Columbia HCA v. Labor Comm’n*, 2011 UT App 210, ¶ 6, 258 P.3d 640.

Furthermore, nothing in *Form 19* “commands” any particular action. It is simply a guide for permit applicants to assist them with emission calculations. Indeed, UDAQ’s NOI Guide expressly states that AP-42 factors “*may* be used as a reference when applicable.” [ADJ010221 (emphasis added).] The NOI guide goes on to state that “in

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<sup>12</sup> *See also, e.g., In re: Newmont Nev. Energy Inv., LLC, TS Power Plant*, 12 E.A.D. 429, 444 (EAB 2005) (“[W]e accord broad deference to permitting authorities with respect to issues requiring the exercise of technical judgment and expertise.”); *Utah Dep’t of Admin. Servs. v. Pub. Serv. Comm’n*, 658 P.2d 601, 610 (Utah 1983) (“[A] court should afford great deference to the technical expertise or more extensive experience of the responsible agency.”).



some cases, the results from properly conducted stack tests may be used as emission factors.” [Id.] As explained in detail by Glen England in two separate expert reports, that is exactly how the NEI emission factors were developed. [IR007238-007245; IR008024-008044.] Quite apart from Petitioners’ arguments to the contrary, UDAQ specifically *permits* the use of factors like the NEI emission factors in cases where such use is justified.

This discretion likewise disposes of Petitioners’ related assertion that because UDAQ has used AP-42 factors in the past, it can never change to newer, more accurate emission factors. Aside from making little practical sense, to depart from prior practices, the agency need only have a “fair and rational basis” for doing so. Utah Code § 63G-4-403(4)(h)(iii). And as detailed below, there is an extremely good reason to use NEI emission factors to estimate PM emissions from newer heaters and boilers—they are far more accurate.

**B. There is Substantial Evidence in the Record Supporting UDAQ’s Decision to Use the NEI Emission Factors.**

The AP-42 factors are over twenty years old. In the time since they were promulgated, EPA and regulatory agencies have come to learn that the factors suffer from a critical flaw in the way they estimate PM emissions, particularly from newer equipment. The problem originates in the way the factors were developed. To calculate PM emissions, the AP-42 factors employed what is known as a “stack test impinger method,” an older technology in which a gas stack sample is drawn through a heated filter and then a series of iced “impingers”—essentially cold protuberances in the filter

chamber that cause condensation of SO<sub>2</sub> gas into PM. [ADJ011631.] To be accurate, the impingers would need to cause the formation of particulate matter at a rate that simulates what happens in actual ambient air conditions, thereby predicting the PM emissions rate under normal operating circumstances. [*Id.*]

That, however, is where the impinger method fails—the SO<sub>2</sub> gas chemically reacts with the impinger solution and creates what is known as “pseudo-particulate” matter, a reaction that does not take place in normal ambient conditions. [IR008029.] This causes a dramatic overestimation of PM emissions because the pseudo-particulate matter is erroneously included as PM in the AP-42 factors. As EPA has explained, “sulfur dioxide (SO<sub>2</sub>) gas (a typical component of emissions from several types of stationary sources) can be absorbed partially in the impinger solutions and can react chemically to form sulfuric acid. This sulfuric acid ‘artifact’ is not related to the primary emission of [condensable particulate matter] from the source, but may be counted erroneously as [condensable particulate matter].” 75 Fed. Reg. 80,118, 80,121 (Dec. 21, 2010). EPA also has acknowledged “that SO<sub>2</sub> in particular, and perhaps other gaseous compounds, can react with the collecting liquids used in the [stack test impinger] method to form materials (artifacts) that would not otherwise be solid and would not condense upon exiting the stack.” 72 Fed. Reg. 20,586, 20,653 (Apr. 25, 2007).

This problem is particularly acute for gas-fired sources—the equipment at issue here—because their baseline emissions are so low as compared to other types of emission sources. [IR008028.] As the ALJ concluded, these measurement errors “are so

significant when applied to gas-fired boilers and heaters ... that they partially or completely obscure the true emission level.”<sup>13</sup> [ADJ011632.]

To remedy this deficiency, experts and regulatory agencies have developed a newer, more accurate methodology—on which the NEI emission factors are based—that avoids the pseudo-particulate artifacts included in the AP-42 factors. That method, called “dilution sampling,” takes a gas sample and cools it with filtered air (rather than impingers), similar to what happens in the course of natural ambient air dilution of emissions from a stack. [ADJ011633.] Because there is no impinger solution, there is no chemical reaction to create pseudo-particulate matter; only actual PM is measured. [IR008032.] This evidence was all before the agency and the ALJ below, including “two independent expert reports explaining why the NEI factors were more accurate and better predictors of emissions than the AP-42 factors.” [ADJ011622.]

EPA itself has recognized the superiority of this newer testing method, observing “that a dilution sampling method for measuring direct PM<sub>2.5</sub> *eliminates essentially all artifact formation and provides the most accurate emissions quantification.*” 72 Fed. Reg. 20,586, 20,653 (Apr. 25, 2007) (emphasis added). In fact, EPA has expressly identified certain applications “where dilution sampling provides advantages over the standard test methods,” and actively “*encourage[d]* sources that encounter these

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<sup>13</sup> In addition to being based on flawed test methods which measure artifacts that do not actually constitute particulate matter, the relevant AP-42 PM<sub>2.5</sub> factors are based on limited data. The AP-42 PM<sub>2.5</sub> factors are based on only 11 tests of four emissions units for condensable particulate matter (which forms the majority of PM<sub>2.5</sub> emissions). [ADJ011633-011634.] By contrast, the NEI emission factors were based on 20 test runs of six units for condensable particulate matter. [ADJ009697; IR008039-008040.]

situations to request that the regulatory authority ... *use this method* to approve the use of dilution sampling as *an alternative* to the test method specified for determining compliance.” 75 Fed. Reg. 80118-01, 80132 (emphasis added).

EPA has approved at least two State Implementation Plans that identify a dilution-based test method similar to the dilution method used to develop the NEI emission factors as an acceptable testing method. *See* 72 Fed. Reg. 18, 19 (Jan. 3, 2007) (Maryland SIP); 71 Fed. Reg. 70,468, 70,470 (Dec. 5, 2005) (Missouri SIP). Other states similarly permit use of the dilution-based Conditional Test Method 039 by regulation (another test similar to the dilution method used to develop the NEI emission factors). *See, e.g.,* Mont. Admin. R. 10 CSR 10-6.030(5). And in this case, EPA raised no objection to UDAQ’s use of the NEI emission factors to calculate Holly’s emissions in its comment letter submitted during the public comment period, [IR007840-007841], nor has EPA raised any objection to UDAQ’s recent authorization of the NEI emission factors for purposes of calculating Holly’s PM<sub>2.5</sub> under UDAQ’s PM<sub>2.5</sub> State Implementation Plan. [See Utah SIP § I.X.H.11(k)(i), dated January 8, 2014 (“SIP Part H”), ADJ010175.]

In reading Petitioners’ Opening Brief, one would be unaware of any of this substantial evidence, including the *sixteen pages* of findings and conclusions discussing the NEI factors in the ALJ’s ruling. [ADJ011622-011638.] That is because Petitioners fail to even discuss that ruling or the basis for the ALJ’s conclusion that use of the NEI emission factors was particularly appropriate in this case.

The accuracy of the NEI emission factors is a factual question. When challenging an agency action, the appealing party bears the burden of marshaling all of the evidence

and “demonstrating that the agency’s factual determinations are not supported by substantial evidence.” *Sierra Club v. BOGM*, 2012 UT 73, ¶ 12; accord Utah Code § 63G-4-403(4)(g). Where the question revolves around an express statutory delegation of discretion, as exists in this case,<sup>14</sup> such that the law allows for “a range of ‘acceptable’ answers ... from which the agency ... is free to choose ... without regard to what an appellate court thinks is the ‘best’ answer,” the agency’s factual determinations are reviewed for an abuse of discretion. *Union Pac. R.R. v. Utah Dep’t. of Transp.*, 2013 UT 39, ¶ 16, 310 P.3d 1204 (citation and additional quotations omitted); accord *Sierra Club v. BOGM*, 2012 UT 73, ¶ 13. The Utah Supreme Court has held such decisions are entitled to “great deference” and the agency’s findings may be “set aside only if they are imposed arbitrarily and capriciously or are beyond the tolerable limits of reason.” *Sierra Club v. BOGM*, 2012 UT 73, ¶ 13 (quoting *Associated Gen. Contractors*, 2001 UT 12, ¶ 18).

Petitioners here have failed to carry that burden. The record is replete with evidence that the NEI factors are not only a reasonable alternative to the AP-42 factors, but in fact are vastly superior. Accordingly, Petitioners cannot show that UDAQ’s decision to apply those factors to newer gas-fired equipment here was beyond the tolerable limits of reason.

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<sup>14</sup> See Utah Code § 19-1-301.5(14)(c) (expressly “recognizing that [DAQ] has been granted substantial discretion to interpret its governing statutes and rules”).

C. **Petitioners Specific Challenges to the NEI Factors Fail.**

Aside from ignoring all of the evidence that does not support their position, Petitioners advance three specific arguments as to why they believe UDAQ's decision to use the NEI factors was unacceptable. All three arguments fail.

1. **UDAQ Was Reasonable in its Reliance on Stack Testing Requirements and Permit Limits to Support Use of the NEI Factors.**

Petitioners contend that UDAQ's reliance on stack testing to demonstrate compliance with the emission limits calculated using the NEI emission factors is inappropriate because it is inconsistent with Utah's preconstruction permitting process.<sup>15</sup> [Opening Brief at 31.] That argument confuses permitting issues, which are before this Court, with enforcement issues, which are not.

Holly is subject to a permit limit in its AO reflecting an amount equal to the NEI emission factors estimates of PM<sub>10</sub> emissions. That limit became enforceable at the time the Holly AO was issued, with compliance verified by stack testing. [IR008080, § II.B.7.a.2 (providing that "[t]he emissions of PM<sub>10</sub> from the following NSPS Boilers and heaters shall not exceed 0.00051 lb/MMBtu").] As UDAQ explained: "[T]he [Holly AO] requires stack test verification of PM emissions upon start up and then every year on NSPS heaters and boilers. Should results of these stack tests indicate that the equipment cannot meet the 0.00051 lb/MMBtu for PM<sub>10</sub>, Holly Refinery *would be out of compliance with its permit* and would be required to either install additional control

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<sup>15</sup> This argument presents a mixed question of law and fact, which is reviewed for abuse of discretion and reasonableness. *Murray*, 2013 UT 38, ¶ 39.

equipment to comply with this limit, or submit an application to reevaluate the project for PSD and Major NSR applicability based on actual PM stack testing data.” [IR009216 (emphasis added)]; *see also* 67 Fed. Reg. 80,186, 80,190-91 (Dec. 31, 2002) (explaining when an emissions limitation is enforceable).

In other words, Holly is precluded by law from producing PM emissions from its heaters and boilers in any greater quantity than what the NEI emission factors predicted.<sup>16</sup> That alone should allay Petitioners’ fears that the NEI emission factors are too low—even if they are, Holly will be held to those low limits and will be out of compliance if it exceeds them. But ultimately that is an enforcement issue between Holly and UDAQ. It does not mean the permit itself is improper.

Petitioners also argue that “post-construction application of Major NSR is too late” to remedy this deficiency. [Opening Brief at 32.] But Holly has been subject to its PM emission limitations since the issuance of the Holly AO, and any exceedance of these limits by the heaters and boilers would be a permit violation. If Holly desires to emit higher quantities of PM (pushing its emissions over the major modification threshold and subjecting it to NNSR review<sup>17</sup>), it must submit a new permit application to UDAQ. *See*

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<sup>16</sup> *See* 40 C.F.R. § 52.21(b)(4) (including in the definition of potential to emit that “any physical or operational limitation on the capacity of the source to emit a pollutant ... shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable”). The term “federally” in this definition is interpreted as meaning “practically enforceable” by a federal, state, or local entity. 67 Fed. Reg. 80,186, 80,191 (Dec. 31, 2002).

<sup>17</sup> If a project is subject to NNSR, additional restrictions apply, such as the application of the lowest achievable emission limitations (“LAER”) standards and requiring offsets for

Utah Admin. Code R307-401-3(b) (requiring a new permit for any “modification ... which will or might reasonably be expected to increase the amount ... of air contaminants discharged.”) Thus, Holly will never be allowed to emit quantities of PM emissions that exceed major modification thresholds without the review Petitioners insist is necessary. That Petitioners dislike the legal framework allowing emission limits in permits to ensure the project remains a minor modification does not undermine the reasonableness of UDAQ’s issuance of the Holly AO.

2. Petitioners’ Reliance on the Statements of “EPA Experts” is Inaccurate and Irrelevant.

Petitioners argue that “EPA lacks faith in the NEI constants” and that the factors are unreliable.<sup>18</sup> [Opening Brief at 33.] But the Executive Director specifically found that “[t]he cautionary statements regarding the NEI emission factors upon which Petitioners rely ‘do not suggest in any way that those factors are insufficiently supported by data or should not be used.’” [ADJ011635 (citing IR008033).] Moreover, the emails from EPA staff that Petitioners cite to support their arguments are misconstrued. The email from Ron Meyers does not state the NEI factors are “not reliable,” but rather that if that data were to be used to generate an updated emission factor, Mr. Meyers would like to have additional supporting information. [IR008911.] Mr. Meyer’s desire for additional supporting information is a far cry from a finding that the data is unreliable—

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any proposed increase of criteria pollutants in a non-attainment area. See Utah Admin. Code R307-403.

<sup>18</sup> This argument presents a factual question on which UDAQ’s decision is given “great deference.” *Sierra Club v. BOGM*, 2012 UT 73, ¶ 11.



indeed, Meyers stated that he felt the data *was* “reasonably reliable.” [IR008911.] The other email cited by Petitioners does not discuss the NEI factors at all, but rather is a general statement that an emission factor would not be developed without EPA being provided a test report for the underlying data. [IR009043.] The data underlying the NEI factors *was* accompanied by test reports. [IR008032.]

Regardless, the fact that there are varying opinions regarding the NEI emission factors does not undermine the substantial scientific evidence in the record here supporting the accuracy of the factors that UDAQ relied upon, nor does it allow Petitioners to substitute their judgment for that of UDAQ. The question is simply whether there was a reasonable basis for UDAQ to use those factors, which there was. *See* Utah Code § 19-1-301.5(14)(c)(i); *see also* *Alta Pacific Assoc., Ltd. v. Utah State Tax Comm’n*, 931 P.2d 103, 117 (Utah 1997) (Zimmerman, J., concurring) (“there are substantial institutional reasons why appellate courts refrain from substituting their judgment for that of an agency”).

3. 42 U.S.C. § 7430 Does Not Preclude the Use of NEI Emission Factors to Calculate PM Emissions.

Petitioners’ argument that 42 U.S.C. § 7430 precludes UDAQ’s use of the NEI emission factors to calculate Holly’s PM emissions<sup>19</sup> was definitively rejected by the

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<sup>19</sup> Whether 42 U.S.C. § 7430 precludes UDAQ’s use of the NEI emission factors is a legal question about the laws UDAQ is charged to administer and thus, UDAQ’s interpretation is entitled to substantial discretion. *Sierra Club v. BOGM*, 2012 UT 73, ¶ 10.

Executive Director.<sup>20</sup> [ADJ011628.] First, the plain language of the statute contradicts Petitioners' argument because it only applies to emission factors used to measure "carbon monoxide, volatile organic compounds, and oxides of nitrogen from sources of such air pollutants." 42 U.S.C. § 7430. The statute says nothing about the use of emission factors to estimate the quantity of PM—the only pollutant for which UDAQ used the NEI emission factors. Second, EPA has specifically recognized that state permitting authorities may use other methods without obtaining approval under Section 7430, so long as the permitting authority can support the methods chosen. [ADJ011629 (citing Public Participation Procedures for EPA Emission Estimation Guidance Materials at 2 (May 1997)).] As the Executive Director decided in her Final Order and as summarized above, UDAQ relied on substantial evidence in the record to support its use of the NEI emission factors, and Petitioners advance no credible argument to disturb this decision on appeal.

For all of these reasons, UDAQ's discretionary decision to use NEI emissions factors to calculate PM emissions from Holly's new gas-fired heaters and boilers was grounded in substantial evidence in the record and well within the reasonable limits of its discretion.

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<sup>20</sup> Not only did the Executive Director reject this argument on the merits, but she found that the argument had not been preserved during the public comment period as required by Utah Code § 19-1-301.5(4). [ADJ011624-011625.] Having failed to properly preserve this argument in the administrative adjudication, Petitioners are precluded from making the argument on appeal.

### **III. THE EXECUTIVE DIRECTOR WAS REASONABLE IN UPHOLDING UDAQ'S CALCULATION OF THE PROPANE PIT FLARE EMISSION REDUCTION.**

Petitioners make a number of short arguments claiming that the credit Holly received in its netting analysis for removal of its propane pit flare was too large. These arguments are all based on the assertion that the reduced emissions from the flare were calculated inaccurately. As both the ALJ and Executive Director concluded below, those arguments all fail because the emissions credit was based on *actual historical inventory data* from the flare, which is precisely what the law requires. [ADJ011638-011642.]

Specifically, the Executive Director found that “for purposes of netting emissions in permit applications, the regulations expressly provide that historical inventory information may be used as a baseline for calculating emissions increases and decreases.” [ADJ011641 (citing 40 C.F.R. § 52.21(b)(48)(ii).] Holly is required to submit annual emission inventory information to UDAQ reporting actual emissions from its flares and other emission sources. *See* Utah Admin. Code R307-150. Holly complied with this obligation for the 2008-09 reporting year (and every other year). [IR009218]. When Holly compiled its historic emissions pursuant to 40 C.F.R. § 52.21(b)(48) to net the overall emissions from the Modernization Project, it used these 2008-09 emission inventory reports for the PM<sub>2.5</sub> emissions from the propane pit flare, as the regulations expressly allow. It did not re-calculate emissions using AP-42 or any other method as Petitioners claim. [ADJ011639.] Petitioners’ unfounded skepticism about the accuracy of that historical data does not mean UDAQ acted improperly in relying on it.

Petitioners' only other argument is that the pit flare calculation should be rejected because the record does not contain the underlying historical emissions data used to calculate the reduction. Petitioners do not mention, however, that when UDAQ compiled the record for the administrative adjudication and asked Petitioners whether they wanted to include that voluminous information, Petitioners said no. [ADJ011379; ADJ011411-11412.] Petitioners cannot now argue, after affirmatively declining to include such data in the record, that the lack of such evidence in the record supports their claims of error.

**IV. THE EXECUTIVE DIRECTOR WAS REASONABLE IN UPHOLDING UDAQ'S ESTIMATE OF PM EMISSIONS FROM THE FCCU25.**

Petitioners contest the predicted PM emissions from the new fluid catalytic cracking unit 25 ("FCCU25")—a piece of equipment used to break down crude petroleum molecules into different components—arguing that emissions were underestimated because they were lower than what Petitioners contend "world leader[s] in FCCU technology" have estimated for unidentified FCC units at unidentified locations. [Opening Brief at 38.] This argument fails both because Holly based its FCCU25 emission estimate on actual test data from a similar operating FCC unit at the Holly Refinery, and because the permit requires Holly to achieve the estimated limit as part of the PM emission caps in the Holly AO.

As part of every permit request evaluated by the UDAQ for installation of new equipment, an estimate of maximum potential emissions must be calculated for each new piece of emission-generating equipment. *See* Utah Admin. Code R307-401-2 (defining Potential to Emit ("PTE") as "the maximum capacity of a stationary source to emit an air

contaminant under its physical and operational design”). Holly proposed to install, as part of its Modernization Project, the FCCU25, which triggered the PTE calculation obligation. One method of estimating PTE is to use actual stack test emission data from a similar unit to predict the emissions from the new unit. [See NSR Manual, ADJ01085 (“Methods of estimating potential to emit may include ... performance test data on similar units”).] Holly estimated PTE for the FCCU25 by taking actual stack test emission data from a similar (but larger capacity) FCCU4 already operating at the Refinery. That method resulted in a conservative coke burn estimate of 6200 lbs/hour for the maximum capacity of 8500 barrel per day (bpd), leading to a total PM emission level of 8.15 tons per year. [IR008052; IR002811; IR009227.]

Petitioners contend this PTE estimate is improper because the FCCU25 might process different crude than the FCCU4, and that crude might have a higher coke load, and that might mean a 6200 lbs/hour coke burn rate and corresponding 0.3 lb PM<sub>10</sub>/1000 lbs coke burned estimate is too low. Petitioners also contend there is no limit on the amount of coke burned—making the 8.15 ton per year PM<sub>10</sub> PTE too low. The ALJ and Executive Director both rejected these arguments for two reasons.

First, the Executive Director recognized that a highly technical PTE calculation for a unit like this is uniquely within the technical expertise and experience of the agency. [IR009219.] In those circumstances, the amount of agency discretion that should be afforded by a reviewing tribunal is at its highest. *See In re: Newmont Nev. Energy Inv., LLC, TS Power Plant*, 12 E.A.D. 429, 444 (EAB 2005) (“[W]e accord broad deference to permitting authorities with respect to issues requiring the exercise of technical judgment

and expertise.”) UDAQ here considered the substantial evidence in the record that supported Holly’s calculations, including the information from the test data of the FCCU4 [IR008052], the maximum crude throughput capacity of the FCCU25 [IR003160]; and the even *larger* capacity of the similar FCCU4 and its emission potential [IR009227.] All of this evidence supported and justified the agency’s reliance on the calculated PTE for the new FCCU25.<sup>21</sup>

Second, and even more compelling, regardless of which PTE estimate is more accurate, Holly must remain in compliance with its source-wide PM emission cap that restricts the amount of PM emissions generated by each unit at the Holly Refinery—including the FCCU25. [IR009219; IR07768; IR009247, Holly AO (“PM<sub>10</sub> emissions from all combustion sources shall not exceed 47.5 tons per rolling 12-month period or 0.12 tpd”).] Thus, if Petitioners are correct in their assertion that Holly has underestimated its PTE for the FCCU25, and PM emissions from the FCCU25 reach the high estimates that Petitioners believe they will, Holly will be out of compliance with its PM emission limit and will either need to decrease PM emissions from some other source or be subject to enforcement action. [IR009208 (“regardless of maximum throughput

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<sup>21</sup> Petitioners cite to data from Universal Oil Products to support their claim that black wax crude will generate higher coke levels and consequently create more PM emissions. [Opening Brief at 38.] This reliance is misplaced because the underlying calculations and verification data of the yield estimates from this supposed “world leader in FCC Unit technology” were not provided in the record—even when such estimates were requested by UDAQ. [See IR009219 (UDAQ stated that with respect to the UOP yield estimates, Petitioners “provided no documents or primary data to support or detail to which estimate, if any, was used to derive the suggested range of coke burn estimates.”).] Additionally, yield estimates are simply never as accurate as actual stack test data, which is what Holly used in this case.

rates, the emissions are limited at the values established in ITA”); IR009219 (agency explanation that FCCU25 is subject to a PM emission cap and any exceedance would be a violation).] In other words, as was the case with the use of the NEI emission factors, the inclusion of binding emissions limits in the Holly AO serves as the ultimate backstop in ensuring that the estimated emission levels will not be exceeded.

That is all that is necessary to conclude that the permit adequately ensures PM emissions remain below the major modification threshold. Petitioners are not entitled to obtain a remedy now for something they predict might happen in the future—that Holly will exceed its federally enforceable emission cap for PM—and that would be an enforcement matter between UDAQ and Holly in any event. The PTE estimate for the FCCU25 Holly submitted and UDAQ approved was derived from accepted methods and is supported by substantial evidence in the record.

**V. THE EXECUTIVE DIRECTOR WAS REASONABLE TO UPHOLD UDAQ’S CONCLUSION THAT THE LIMITS IN HOLLY’S AO WILL PROTECT THE SHORT-TERM NAAQS.**

Petitioners make three arguments in support of their assertion that the Holly AO will not comply with short-term National Ambient Air Quality Standards (“NAAQS”). First, they argue upset emissions from the flares will violate the NAAQS, despite the fact that such malfunction emissions are an enforcement issue governed by Utah’s “Unavoidable Breakdown Rule,” not part of the Holly AO. Second, Petitioners argue Holly’s modeling, showing no risk to the NAAQS, was flawed because it extrapolated hourly numbers from annual data (an assertion that is exactly backwards from the facts). And third, Petitioners argue the Holly AO should have included short-term emission

limits, even though UDAQ is under no obligation to impose them. Each of these arguments is addressed below.

**A. The Holly AO Does Limit Emissions From the Flares.**

Petitioners argue that the Holly AO does not limit flare emissions, and thus does not protect the NAAQS as required by R307-401-8(1)(b)(vii). Petitioners repeatedly assert the Holly Refinery will emit 240 tons of SO<sub>2</sub> and 8 tons of NO<sub>x</sub> by way of flare upset emissions<sup>22</sup> that were not accounted for in the PTE for the flares. This, they argue, will allegedly cause an exceedance of the NAAQS. The Executive Director addressed these same arguments and rejected them because the Holly AO *does* limit flare emissions through source-wide emission caps.

Upset flare emissions are emissions caused by malfunctions at a refinery. They function as a safety valve to avoid catastrophic failure of emissions-generating equipment. When calculating the PTE of flares for purposes of permitting, the law does

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<sup>22</sup> Petitioners completely ignore the Executive Director's finding that the 240 ton estimate of SO<sub>2</sub> and 8 tons of NO<sub>x</sub> was a conservative overestimation in Holly's NOI that included three standard deviations of the average actual malfunction emissions from 2005-2009. [IR003780.] The *actual* emissions were significantly lower and represented combined emissions from both of Holly's flares, not totals for each flare:

12.7 tons of SO<sub>2</sub> in 2009

25.5 tons of SO<sub>2</sub> in 2008

91.0 tons of SO<sub>2</sub> in 2007

19.7 tons of SO<sub>2</sub> in 2006

20.8 tons of SO<sub>2</sub> in 2005

*Id.* Accordingly, contrary to Petitioners' contention that 240 tons of SO<sub>2</sub> from the flares will be emitted on a yearly basis, the highest emissions in any one given year was only 91 tons and the lowest was 12.7 tpy for both flares combined.



not require the inclusion of upset emissions because such upset emissions are not considered part of normal operations. See *Sierra Club v. Wyoming Dep't of Env'tl. Quality*, 251 P.3d 310, 314 (Wyo. 2011) (holding that “hypothesizing the worst possible emissions from the worst possible operation is the wrong way to calculate potential to emit ... PTE includes only emissions that occur during normal operations” thus “cold start” emissions and “malfunctions” were properly excluded from the plant’s PTE); *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1141, 1158 (D. Colo. 1988) (same). Accordingly, malfunction emissions were not included in Holly’s PTE calculations for the flares, which instead are based on the “average non-upset throughput to [the] flare” and appropriate emissions factors.<sup>23</sup> [See IR003175.]

Contrary to Petitioners’ contention that upset emissions are unlimited under the AO, this means that UDAQ set a limit of *zero* tpy for malfunction emissions, which it factored into the emission totals for the emission caps in the Holly AO. [See IR002857, July 2012 NOI (“Startup, shutdown, malfunction events were considered to be zero.”).] The emission caps in the Holly AO, which do not include allowance for upset emissions, are federally enforceable operational limits. [IR009245 (Section II.B.6.a “The emission of SO<sub>2</sub> into the atmosphere from all sources (excluding routine turnaround maintenance sessions) shall not exceed 110.3 tons per rolling 12-month period or 0.31 tons per day.”); IR009248 (Section II.B.8.a “NO<sub>x</sub> emissions...from all sources shall not exceed 347.1

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<sup>23</sup> Non-upset throughput to a flare is typically a very low, constant level of purge gas that keeps positive air flow going out through the flare and prevents air intake. If outside air is drawn into the flare network, it can mix with hydrocarbon gases and cause an explosion.

tons per rolling 12-month period or 2.09 tpd”) IR009247 (Section II.B.7.a “PM<sub>10</sub> emissions from all combustion sources shall not exceed 47.5 tons per rolling 12-month period.”).] These limits are intended, in part, to avoid NAAQS exceedances. If Holly exceeds its emission caps due to an upset or malfunction via the flare, Holly will be in violation of its permit and subject to enforcement by UDAQ. [See IR009196, (“All limits of the permit apply at all times, which include periods of startup, shutdown and malfunction.”).] This provides incentive for the refinery to ensure its equipment is functioning properly to avoid upset emissions.

All machines malfunction on occasion. But if resulting upset emissions occur in excess of Holly’s AO limits, those emissions are an *enforcement* issue for UDAQ, not a permitting issue, because the permit sets those limits at zero. At that point, such emissions may be excused if they satisfy the requirements of Utah’s Unavoidable Breakdown Rule (“UBR”). See Utah Admin. Code R307-107. Under the UBR, unavoidable breakdown emissions can be violations of an approval order, but UDAQ is afforded discretion as to whether to seek enforcement if a source is in compliance with the other requirements of the rule, including monitoring and good combustion practices. *Id.* The text of the regulation makes crystal clear that this is an issue of enforcement, not permitting, stating that “[t]he director will evaluate, on a case-by-case basis, the information submitted in R307-107-1 and 2 to determine whether to pursue enforcement action.” *Id.* R307-107-3.

Petitioners assert, with little explanation, that the UBR does not apply to Holly's upset emissions<sup>24</sup> because the Holly AO allows "unlimited 'upset' emissions from the flares." [Opening Brief at 51.] Even if that enforcement issue were properly before this Court—it is not—Petitioners are incorrect. As discussed above, the Holly AO *does* have limits that contemplate zero upset emissions from the flares. Any exceedance of those limits, due to upset conditions or otherwise, is a violation of the Holly AO. If Petitioners dislike the enforcement discretion granted by the UBR, their remedy lies in a rulemaking action, not judicial policymaking.

**B. Holly's Modeling Confirms There Will Be No Exceedance of the NAAQS.**

Petitioners' argument that Holly's NAAQS modeling was flawed is based on a misunderstanding of Utah's minor source permitting program. Petitioners are incorrect in their statement that Congress has established a minor source program to protect the short-term NAAQS. [Opening Brief at 42-43.] It is the Utah Legislature that has established the minor source program under Title 19 of the Utah Code, which regulates minor sources of air pollutants (those sources generating a total of 250 tpy or less of any criteria pollutant or one of 27 listed source types generating 100 tpy or less of a criteria pollutant) and minor modifications of major sources (those modifications resulting in emission increases below significance levels). *See* Utah Code § 19-2-101, *et seq.* While it is true

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<sup>24</sup> The Executive Director determined in her Final Order that Petitioners arguments regarding the UBR had not be preserved in Petitioners' comments during the comment period. [ADJ011577-011578.] Accordingly, this argument can be rejected on appeal for failure to preserve the argument in the administrative adjudication below.

that EPA has delegated to the state of Utah authority to implement the major source program under the Clean Air Act, including enforcement measures to ensure compliance with the short-term NAAQS under 42 USC § 7410 (a)(2)(C), Utah independently operates its minor source program pursuant to state law—indeed, there is no analogous minor source program required under the federal Clean Air Act. UDAQ has in turn been directed by the Utah Legislature to draft regulations to implement the minor source program setting forth thresholds for when modeling of emissions are required to ensure NAAQS protections. *See* Utah Admin. Code R307-410-4. Based on UDAQ’s technical expertise, it has made a scientific judgment about what level of proposed emission increases resulting from modifications should trigger modeling requirements to ensure emission levels remain at protective levels for human health. *Id.* (Table 1).

With respect to Holly’s Modernization Project, the estimated emission increases for PM, SO<sub>2</sub>, and NO<sub>x</sub> all fell below the modeling thresholds in R307-410-4 and the major modification significance thresholds in 40 C.F.R. § 52.21(b)(23) that would trigger modeling requirements. [IR009186.] Indeed, the regulation requiring a demonstration that the proposed modification would not cause or contribute to a NAAQS violation is only applicable to major modifications. 40 C.F.R. § 52.21(a)(2)(ii) (“The requirements of paragraphs (j) through (r) of this section apply to ... the major modification of any

existing major stationary source.”).<sup>25</sup> Whether or not a modification is major is determined on a pollutant-by-pollutant basis:

Applicability of the major NSR program must be determined in advance of construction and is pollutant-specific. In cases involving existing sources, this requires a pollutant-by-pollutant determination of the emissions change, if any, that will result from the physical or operational change.... Once a modification is determined to be major, the PSD requirements apply only to those specific pollutants for which there would be a significant net emissions increase.

67 Fed. Reg. 80,186, 80,188 & n.5 (Dec. 31, 2002).

This means Holly was not required to perform NAAQS modeling for any of the pollutants that fell below the thresholds set by UDAQ. But Holly did so anyway.

[IR002980-003020.] And that modeling demonstrated that none of the emissions associated with the Modernization Project would cause an exceedance of NAAQS thresholds, including the short-term NAAQS. [*Id.*; IR003596 (Tom Orth, a modeler at UDAQ, verifying that “the proposed project’s impacts, when combined with other industrial sources and ambient background, would comply with federal standards”).]

Petitioners attack this modeling on two grounds. First, they argue the modeling does not include upset flare emissions. Second, they argue the emission rates modeled do not represent “maximum emissions” or “short-term spikes.” [Opening Brief at 46.] Both arguments fail.

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<sup>25</sup> See also Utah Admin. Code R307-403-3 (“Every ... major modification must be reviewed by the director to determine if a source will cause or contribute to a violation of the NAAQS.”).

First, Petitioners' insistence that upset emissions be included in modeling is unsupported by law. Rather, the regulations dictating modeling procedures expressly exclude from the model any upset or malfunction emissions, which by definition are unpredictable and impossible to model. *See* 40 C.F.R. § 51, App'x W; [IR009214]. UDAQ's interpretation of the applicable regulations is consistent with guidance from EPA providing additional clarification of the modeling requirements under Appendix W (the Federal regulations applicable to modeling). [ADJ011592 (citing Memorandum from Tyler Fox, Leader Air Quality Modeling Group to Regional Air Division Directors, *Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO<sub>2</sub> National Ambient Air Quality Standard* (Mar. 1, 2011)).] There, EPA stated that modeling for compliance with the 1-hour NAAQS should only

address emission scenarios that can logically be assumed to be relatively continuous or which occur frequently enough to contribute significantly to the annual distribution of daily maximum 1-hour concentrations based on existing modeling guidelines, which provide sufficient discretion for reviewing authorities to not include intermittent emissions from emergency generators or startup/shutdown operations from compliance demonstrations for the 1-hour NO<sub>2</sub> standard under appropriate circumstances.

*Id.* at 2.

EPA further clarified that “we are concerned that assuming continuous operations for intermittent emissions would effectively impose an additional level of stringency beyond that intended by the level of the standard itself. As a result, we feel that it would be inappropriate to implement the 1-hour NO<sub>2</sub> standard in such a manner and recommend that compliance demonstrations for the 1-hour NO<sub>2</sub> NAAQS be based on emission scenarios that can logically be assumed to be relatively continuous or which occur

frequently enough to contribute significantly to the annual distribution of daily maximum 1-hour concentrations.” *Id* at 9. The same logic applies to the 1-hour SO<sub>2</sub> standard. Thus, UDAQ’s decision not to include upset emissions in the modeling for Holly’s emissions was neither unreasonable nor unlawful.

Second, Petitioners argue that because the modeled short-term hourly emission rates correspond mathematically with the modeled annual emission rates, the model must have extrapolated backwards from annual emission averages to get hourly emissions. This, Petitioners argue, would fail to accurately model short-term spikes. [Opening Brief at 46-47.] Petitioners’ assertion is simply wrong on the facts. The emission rates used in the modeling represent the maximum worst-case PTE emissions for each source on an *hourly* basis. [IR002993-96; IR000041 (“Maximum hourly potential to emit (PTE) emissions for existing and proposed sources will be input to the model.”).] In other words, the model calculated the maximum emissions each unit could generate in one hour operating at maximum capacity—precisely what Petitioners say should be done. *Annual* emissions estimates were derived from those hourly maximum emissions by multiplying them by the number of hours in a year. [*Id.*] That is why the short-term rates correspond with the annual rates. If anything, this resulted in annual emissions estimates that are conservatively high because it is unlikely every unit would be operating at maximum capacity every hour of every day.

Petitioners, therefore, simply have it backwards. The units at the refinery are restrained by their maximum capacity, and where that maximum hourly emission rate is modeled, there is no possibility for short-term spikes.

For these reasons, UDAQ was well within its discretion in determining that the modeling showed no risk to the short-term NAAQS.

C. **Short-Term Emission Limits are Not Required in Every Instance for Minor Modifications.**

Petitioners' final argument regarding the NAAQS is that UDAQ was required to include short-term emission limits in the Holly AO. This argument fails because where, as in this case, UDAQ is considering a minor modification, UDAQ has discretion to determine whether or not short-term limits are necessary for each criteria pollutant.

[ADJ011170 (citing Memorandum from Stephen D. Page, Office of Air Quality Planning and Standards, to Regional Air Division Directors, at 2 (Aug. 23, 2010) (with respect to implementation guidance for the short-term NAAQS requiring short-term limits, "this guidance does not bind state and local governments and permit applicants as a matter of law."))].] There is no "free-standing regulation" that requires short-term emission limits. [IR009186.]

Nevertheless, and despite Petitioners' arguments to the contrary, there *are* a number of short-term emission limits in the Holly AO. [IR009223-009254 (§II.B.6.a SO<sub>2</sub> limit of .05 tpd for each FCCU, 0.21 tpd limit for other SO<sub>2</sub> sources, §II.B.7.a PM<sub>10</sub> limits of 0.13 tpd for all combustion sources, §II.B.8.a NO<sub>x</sub> limits of 2.09 tpd from all sources, §II.B.8.c three-hour average NO<sub>x</sub> limits for heaters and boilers, §II.B.9.a one-hour average CO limits for heaters and boilers).] Petitioners have failed to explain how these short-term limits are inadequate to protect the short-term NAAQS, particularly



where modeling has shown the NAAQS are not threatened by the emissions authorized by the Holly AO.

For all of these reasons, Petitioners' assertions that the Holly AO is insufficiently protective of the NAAQS are not well taken. UDAQ's conclusion on this issue was reasonable and well supported by the record.

**VI. UDAQ IS NOT REQUIRED TO RESTATE AND EXPLAIN THE APPLICABLE PROVISIONS OF SUBPART Ja IN THE HOLLY AO.**

Subpart Ja is a section in the Code of Federal Regulations that is one of many New Source Performance Standards ("NSPS") EPA has promulgated for particular types of new or modified sources. *See generally* 42 U.S.C. § 7411; 40 C.F.R. Part 60. The applicability of a particular NSPS to a particular source is often specifically outlined in the text of the regulation applicable to that source category. *See, e.g.*, 40 C.F.R. § 60.100a (defining modification for purposes of Subpart Ja applicability). Applicability of NSPS is evaluated separately from other Clean Air Act regulations, such as the PSD program, which is implemented through individual pre-construction permits like the Holly AO. *See generally* 42 U.S.C. §§ 7475, 7503 (setting forth pre-construction permitting requirements).

No one disputes that Subpart Ja applies to Holly's flares. [*See* IR009252; IR002866-87; IR002962; IR009183.] Unlike the PSD program, the NSPS regulations apply to a source whether or not that source is undergoing a modification requiring a pre-construction approval order. *See, e.g.*, 40 C.F.R. § 60.1(a) (defining NSPS applicability); *id.* § 60.2 (defining when "construction" or "modification" takes places for purposes of

NSPS applicability); *Env't'l Defense v. Duke Energy Corp.*, 549 U.S. 561, 577-78 (2007) (recognizing the distinction between NSPS and PSD regulations). Therefore, NSPS compliance and/or applicability determinations are not dependent upon inclusion of the NSPS regulation's language in the pre-construction permit. Compliance or non-compliance with NSPS is entirely separate from the PSD permitting process.

Petitioners insist, however, that UDAQ had an obligation to restate and explain Subpart Ja *in the Holly AO itself*—apparently including all of its “ten extensive sections, replete with equations, definitions, technical terms, cross references, options, and alternatives.” [Opening Brief at 53 (citing 40 C.F.R. § 60.100a-109a).] And it is curious why Petitioners stop there, instead of also insisting that all other applicable regulations, and perhaps the Clean Air Act too, should also be included in the permit.

Needless to say, there is no requirement that an agency recite the text of applicable regulations and laws in a permit. Those regulations and laws apply whether they are recited or not. And imposing such a requirement would be incredibly impractical; aside from the undue length of resulting permits, regulations and statutes are frequently revised—in many cases, more frequently than permits are. If Petitioners' position were the law, every permit would need to be amended and reissued every time a governing statute or regulation were amended.

Petitioners' assertion that they cannot understand how Subpart Ja applies to Holly is beside the point. It is not UDAQ's obligation to include a legal explanation in every permit it issues. And besides that, whether Holly is in compliance with the provisions of Subpart Ja, which apply regardless of its inclusion in an AO, is a matter of enforcement,

not permitting. For those reasons, the Executive Director properly rejected Petitioners' argument regarding Subpart Ja. [ADJ011563-011565.] This Court should do the same.

**VII. THE NORTH FLARE WAS NOT MODIFIED BY THE MODERNIZATION PROJECT AND ALREADY COMPLIES WITH BACT.**

Petitioners' final argument is that Holly's North Flare was "modified" in 2010 when decommissioned South Flare gases were redirected there. Petitioners argue this modification means Subpart Ja applies to the North Flare under the NSPS program; and that Best Available Control Technology ("BACT") applies to the North Flare under the PSD program. Both arguments are without merit.

First, as explained above, no one disputes that Subpart Ja applies to the North Flare. So whether or not the North Flare was "modified" for purposes of NSPS applicability is irrelevant.

Second, with respect to BACT, Petitioners erroneously conflate the definition of "modification" for purposes of BACT applicability with the broader definition of "modification" for purposes of NSPS (and Subpart Ja) applicability. The two definitions are different. [ADJ011571-011572]; *see, e.g., Env't'l Defense*, 549 U.S. at 577 ("The 1980 PSD regulations on 'modification' simply cannot be taken to track the Agency's regulatory definition under the NSPS.").

In order to be a "modification" for BACT purposes, the modification must cause an "increase" in air contaminants discharged. Utah Admin. Code R307-401-3(1)(a). The only change to the North Flare was a rerouting of gases in 2010 (long before the subject matter of this appeal). The ALJ correctly concluded that "[a] shift of emissions from one

flare to the other does not result in increased emissions, only *redistributed* emissions.”

[ADJ011572.] *See also* 77 Fed. Reg. 56,422, 56,438 (Sept. 12, 2012) (“Interconnections between flares will not alter the cumulative amount of gas being flared (i.e., interconnecting two flares does not result in an emissions increase relative to the two single flares prior to interconnection....”).<sup>26</sup> As a result, no BACT requirement was triggered when gases were rerouted in 2010.

Nevertheless, whether or not the North Flare was “modified” for BACT purposes is irrelevant because it is undisputed that the North Flare *already complies* with BACT. In particular, UDAQ has determined that compliance with Subpart Ja *is* BACT for flares. [See IR008516 -17 (“The only technically feasible control options for emissions of all pollutants from flares are: (1) equipment design specifications and good combustion work practices ...; and (2) flare gas recovery systems.... DAQ NSR recommends compliance with the requirements of 40 CFR 60 Subpart Ja as BACT.”).] Because Subpart Ja applies to the North Flare, the North Flare already complies with BACT. In addition, as part of Holly’s obligations under Utah’s Utah PM<sub>2.5</sub> SIP, Holly is already required to install a flare gas recovery system on the North Flare—the top available emission control device for flares. *See* Utah State Implementation Plan for PM<sub>2.5</sub>, Section IX Part H, p. 43 (“all major source petroleum refineries in or affecting a designated PM<sub>2.5</sub> non-attainment area within the State shall install and operate a flare gas

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<sup>26</sup> The NSPS definition of “modification,” on which Petitioners rely, applies when “new piping” is installed, which arguably would be triggered by a rerouting of gases. *See* 40 C.F.R. § 60.100a (c)(1). But that only means Subpart Ja applies; it does not trigger a BACT analysis.

recovery system”). Therefore, even if BACT required something beyond compliance with Subpart Ja, there is no credible argument that the North Flare does not comply with BACT.

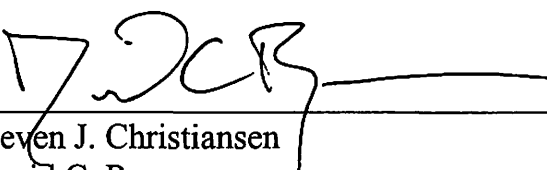
For all of these reasons, Petitioners’ arguments regarding the North Flare were properly rejected below.

### CONCLUSION

This case involves highly technical issues that are within the specialized knowledge and expertise of UDAQ. Judicial review of those types of decisions is highly deferential. It is not the de novo do-over Petitioners urge this Court to conduct. Petitioners have presented nothing on appeal that undermines the careful, comprehensive, and detailed ruling issued by the ALJ below and adopted by the Executive Director. This Court should decline to disturb the Executive Director’s Final Order on appeal.

RESPECTFULLY SUBMITTED this 28th day of October, 2015.

PARR BROWN GEE & LOVELESS, P.C.

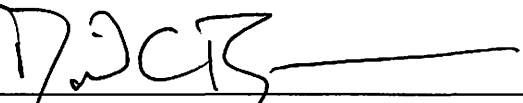
  
\_\_\_\_\_  
Steven J. Christiansen  
David C. Reymann  
Cheylynn Hayman  
Megan J. Houdeshel

Attorneys for Holly Refining & Marketing  
Company – Woods Cross, LLC

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 24(f)(1)(C) of the *Utah Rules of Appellate Procedure*, the undersigned counsel hereby certifies that according to the word count function of the word processing system used to prepare the Response Brief of Holly Refining & Marketing Co., this Brief contains 12,986 words, exclusive of the title page, list of parties, table of contents, table of authorities, table of citations, addendum, and certificates hereto.

PARR BROWN GEE & LOVELESS, P.C.


  
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David C. Reymann

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 28th day of October 2015, I served two copies of the foregoing **RESPONSE BRIEF OF HOLLY REFINING AND MARKETING CO.** via U.S. Mail on the following:

Joro Walker ([joro.walker@westernresources.org](mailto:joro.walker@westernresources.org))  
Charles R. Dubuc, Jr. ([rob.dubuc@westernresources.org](mailto:rob.dubuc@westernresources.org))  
WESTERN RESOURCE ADVOCATES  
150 South 600 East, Suite 2A  
Salt Lake City, UT 84102  
Counsel for Appellants

Christian C. Stephens ([cstephens@utah.gov](mailto:cstephens@utah.gov))  
Marina Thomas ([mthomas@utah.gov](mailto:mthomas@utah.gov))  
ASSISTANT UTAH ATTORNEYS GENERAL  
ENVIRONMENTAL & HEALTH DIVISION  
195 North 1950 West  
Salt Lake City, UT 84116  
Counsel for Appellees

  
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David C. Reymann