

2015

Utah Physicians for a Healthy Environment and Friends of Great Salt Lake, Petitioners vs. Executive Director of the Department of Environmental Quality and the Director of the Division of Air Quality, in Their Official Capacity, and the Department of Environmental Quality and the Division of Air Quality, Respondents

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Utah Physicians E v Department Enviro*, No. 20150344 (Utah Court of Appeals, 2015).
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Petitioners (collectively “Utah Physicians”)¹ submit their Reply Brief demonstrating that, despite contentions raised by respondents Director of the Utah Division of Air Quality, *et al.* (Director)² and Holly Refining (Holly), the record confirms that in issuing the approval order (AO) authorizing the Refinery expansion (Expansion), the Director failed to comply with Utah Administrative Code Rules 307-401 and 307-403. As a result, the Executive Director of the Department of Environmental Quality (ED) erred in upholding the Director’s permitting decision.

I. Legally Appropriate Permitting is a Critical Component in Expedient Attainment of the 24-Hour PM_{2.5} Standard.

During 2013 and 2014, when deadly inversions settled over the Wasatch Front, air quality exceeded the 24-hour national ambient air quality standards (NAAQS) for fine particulate matter (PM_{2.5}) on **56** days. For almost two months, Utahns were subjected to air pollution deemed unsafe and unhealthy at exposures lasting only 24 hours. The magnitude of the episodes was alarming. At Salt Lake City’s Hawthorne Elementary, PM_{2.5} concentrations reached 69 micrograms per cubic meter (µg/m³), 200% higher than the 35 µg/m³ standard, and stayed above 60 µg/m³ for 10 days.³

PM_{2.5} pollution is particularly insidious. Fine particles lodge in the lungs, heart and brain, causing heart attacks, strokes and an estimated 1,400 to 2,000 premature deaths annually. IR009140-44; 78 Fed.Reg. 3086, 3103 (Jan.15, 2013)

¹ Utah Physicians has standing. ADJ009528-35; ADJ009537-41; ADJ009544-50; ADJ009552- 54.

² “Director” includes the Division of Air Quality (DAQ).

³www.airmonitoring.utah.gov/dataarchive/2013%20Max%20Values%2024%20hr%20PM2.5.pdf.

(“[S]tudies...report[] consistent increases in morbidity and/or premature mortality related to ambient PM_{2.5} concentrations”); 77 Fed. Reg. 38890, 38908-09 (June 29, 2012).

In 2009, the Wasatch Front counties were declared nonattainment areas for the 24-hour PM_{2.5} NAAQS. 74 Fed. Reg. 58688 (Nov.13, 2009). Under the Clean Air Act, nonattainment is not an option and Utah must implement measures to reduce emissions and to attain the NAAQS as “expeditiously as practicable,” but no later than December 2015. *E.g.* 42 U.S.C. §7513(c)(1). Recently, the U.S. Environmental Protection Agency (EPA) acknowledged that the Wasatch Front will not attain the 24-hour PM_{2.5} standard by December 2015. 80 Fed. Reg. 69173 (Nov.9, 2015). Therefore, the nonattainment areas will be deemed “Serious,” 42 U.S.C. §7513(b), triggering Utah’s obligation to implement stricter emission reduction measures to attain the standard as “expeditiously as practicable,” but no later than December 2019. *Id.* §7513(c)(1); §7513a(b).

A critical element of Utah’s promise to reduce emissions of PM_{2.5} is its permitting program. Rule 307-401 fulfills Utah’s obligation to create a program to enforce emission limitations and other control measures “as necessary to assure” that NAAQS “are achieved.” 42 U.S.C. §7410(a)(2)(C). Rule 307-403 is designed to ensure proposed emission increases in nonattainment areas do not impede progress toward cleaner, healthier air. 42 U.S.C. §7503.

Because it seeks to enforce Rules 307-401 and 307-403, this appeal directly implicates Utah’s response to our deadly winter inversions. The Director must implement Utah’s permitting program as a crucial step toward prompt attainment of the 24-hour PM_{2.5} standard and a solution to the public health crisis created by Utah’s

unacceptable air quality. Utahns are guaranteed permits that comply strictly with the law and are supported by substantial record evidence.

II. In its Opening Brief, Utah Physicians Carried its Burden of Showing the ED Erred in Upholding the Director's Permitting Decision.

The Director mistakenly argues that Utah Physicians failed to show that the ED's decision sustaining the AO is improper. Following the §19-1-301.5 procedure,⁴ Utah Physicians properly focused on showing that the Director's factual and technical determinations were erroneous or lacked basis in the record to establish that the ED erred in upholding those determinations.

Section 19-1-301.5(14)(c)(i) directs this Court, in reviewing the ED Order, to evaluate "all agency determinations in accordance with Subsection 63G-4-403(4)."

Subsection 63G-4-403(4)

provides relief to a party challenging a formal adjudicative procedure if the agency "erroneously interpreted or applied the law," **or** based an action "upon a determination of fact...that is not supported by substantial evidence when viewed in light of the whole record before the court," **or** is "otherwise arbitrary or capricious."

Utah Chapter Sierra Club v. Air Quality Board, 2009 UT 76, ¶13, 226 P.3d 719 (citing Utah Code Ann. §§63G-4-403(4)(d), (g), (h)).

Therefore, to carry its burden, Utah Physicians need only establish that the agency erred in **one** of the ways articulated by 403(4). To show a basis for the Director's permitting action or the ED's action upholding the Director's AO is a material fact **not** supported by substantial record evidence is enough to entitle Utah Physicians to §63G-4-

⁴ The applicable 2012 version of 19-1-301.5 is attached as Tab "A."

403(4) relief. With a mixed question of law and fact, given the appropriate application of any deference due the agency, relief is forthcoming on a demonstration of an erroneous interpretation **or** application of the law **or** of a determination of fact lacking adequate record support. Utah Physicians has done exactly that.

In turn, this Court reviews “agency determinations” and therefore will necessarily evaluate the **Director’s** determinations, *id.* §19-1-301.5(14)(c)(ii), as the Director’s technical determinations are the only ones in play. It is the Director, not the ED, who must comply with Rules 307-401 and 307-403. The ED made no factual or technical determinations of her own, but instead decided whether to “uphold” those made by the Director. Utah Code Ann. §19-1-301.5(13)(b). Thus, Utah Physicians appropriately briefed this Court on the Director’s determinations. *Id.*

Examination of the ED’s Order underscores that Utah Physicians’ Opening Brief properly focused on the Director’s factual determinations and the basis he provided for them. The ED dedicates one page to adopting the Administrative Law Judge’s (ALJ) recommended order and dismissing Utah Physicians’ claims, explaining briefly:

Having reviewed the [recommended order] and the accompanying record, I am satisfied that the factual, technical, and scientific agency determinations are supported by substantial evidence taken from the record as a whole.

ADJ011651. According to the ED, her adoption of the ALJ’s recommended order was founded on review of the record and the Director’s factual determinations. Further, while the ED “**may** use the executive director’s technical expertise in making a determination,” Section 19-1-301.5(13)(e) explicitly does **not** assume that the ED will apply expertise to

any particular determination. Here, nothing in the record suggests that ED did so. The ED does not maintain that she applied any expertise.⁵ ADJ011651.

Therefore, given that the focus, if not the entirety, of the ED's Order centers on reviewing the record and the Director's factual determinations, it was proper for Utah Physicians to likewise concentrate its Opening Brief on these same factual determinations. Utah Physicians needs only establish that the agency erred in **one** of the ways articulated under §63G-4-403(4). For any particular issue, the organization does not need to challenge every finding in the Order. By establishing that the Director's permitting actions were legally insufficient, Utah Physicians has met its §63G-4-403(4) burden.

Finally, whether the record supports the Director's factual determinations must be evaluated on the basis he articulated when he issued the AO. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994); *Pio Pico Energy Center*, 2013 WL 4038622 *54 (E.P.A.) (EPA's "*post-hoc*" analysis of data after comment period closed "comes too late; the analysis should have been part of the record available for public comments before the Region determined the final...limits."); *id.*, fn.65 (cases cited therein).

That Sections 19-1-301.5(13)(b) and 63G-4-403(4)(g) reference "substantial evidence taken from the record as a whole," does not mean that *post-hoc* rationalization

⁵ The ALJ's recommended order by itself is owed no discretion. Despite purported qualifications, Utah Code. Ann. §19-1-301.5(5)(a); §19-1-301(5), the ALJ is not the "agency." Only an agency is entitled to discretion. *Id.* §63G-4-403(4); §19-1-301.5(13)(b); §19-1-301.5(14)(c).

of decisions already made is appropriate. The **whole** record is relevant to determining the validity of the Director's factual determinations based on the reasoning he gave at the time he made them. It is not appropriate for the Director's permitting decision to be upheld on grounds he did not articulate when he issued the AO. Such reasons are not afforded discretion, as the Director did not provide them. Rationales developed after a decision are not properly subject to public review and do not accurately reflect the actual basis for the decision.

III. Utah Physicians Addressed the ED Order Head-On.

The Director incorrectly contends that Utah Physicians failed to address the propriety of the ED Order. The organization characterized the issues on appeal exactly as whether the ED “erred in upholding the permitting decisions by the Director” and “if the ED decided correctly” that the Director had made a defensible determination that the Expansion was not a “major modification” and met his Utah Admin. Code r.307-401-8 permitting obligations. Utah Phy.Br.1-2, 5-6. Utah Physicians then explained that in reviewing the Director's permitting decision, the ED was confined to upholding the Director's factual and technical agency determinations supported by substantial evidence “taken” from the record created by the Director. Utah Phy.Br. 4.

Thus, while the Director may disagree with Utah Physicians' arguments concerning the propriety of the ED's Order, he may not argue that Utah Physicians did not address the ED's Order front and center. He may not contend that now, in its Reply, Utah Physicians is barred from continuing to establish that the ED erred in upholding the Director's decision.

IV. Utah Physicians Met its Section 63G-4-403(4) Burden Regardless of Alleged Marshaling Errors.

Although he goes on to the merits, the ALJ suggests that for no other reason than Utah Physicians failed to marshal “all of the relevant evidence,” the organization did not satisfy its Section 63G-4-403(4) burden. Findings I.11(ADJ011563); II.10(ADJ011567); III.10(ADJ011570); IV.15(ADJ011578); V.12(ADJ011585-86); VII.16(ADJ011613); X.21(ADJ011626); XI.8(ADJ011640). The record indicates that the ED did not accept this proposal.⁶ Had the ED found Utah Physicians’ purported marshaling negligence dispositive, she would not have deemed it necessary to review and uphold the Director’s factual determinations as she stated she did. ADJ011651-52.

What the record does indicate is that the ED **was** able to address the merits of Utah Physicians’ claims with full access to the record evidence. ADJ011651. Therefore, the ED acknowledged “marshaling as a natural extension of an appellant’s burden of persuasion,” *State v. Nielsen*, 2014 UT 10, ¶41, 326 P.3d 645, and “proceeded to the merits,” *id.* ¶39, of Utah Physicians’ petition. In response, then, it was completely appropriate for Utah Physicians, in its Opening Brief, to likewise focus on its Section 63G-4-403(4) burden.

In any case, Utah Physicians has no obligation to marshal “evidence” amassed in the permitting process that led to the AO. The organization was **not** a party to the permitting process, Utah Code Ann. §19-1-301.5(1)(c)(iv), and its participation in the

⁶ The ED is owed no discretion in assessing whether Utah Physicians adequately marshaled. Such matters do not fall within agency expertise.

process was limited to filing comments. Utah Admin. Code r.307-401-7. The loosely governed permitting process was **not** an adjudication, included **no** tier of facts and did **not** result in factual findings. *Id.* r.307-401; Utah Code. Ann. §§19-1-301.5(12)(b), (13)(b), (14)(c) (referring to Director’s factual “determinations”).

Finally, Utah Physicians **did** marshal the evidence, paying appropriate attention to the documents in which the Director explained his permitting decisions, including his Response to Comments, Source Plan Review and AO. *E.g.* ADJ010947; ADJ010949-57; ADJ010960-62; ADJ010964-64; ADJ010968-76; ADJ010978-82; ADJ010986-11002; ADJ011004; ADJ011249-50; ADJ011253; ADJ0112458-61; ADJ011264-68; ADJ011270; ADJ011276-77; ADJ011279; ADJ011282-83; ADJ011285; ADJ011289-90; ADJ011293-95; ADJ009635; ADJ009637-41; ADJ009643-47; ADJ009651-53.

V. EPA Silence Is Irrelevant.

The ALJ notes that EPA did not comment adversely on various aspects of the AO Utah Physicians challenges. ADJ011557; ADJ011562; ADJ011566; ADJ011570; ADJ011577; ADJ011585; ADJ011597; ADJ011602; ADJ0115611; ADJ011618; ADJ011623; ADJ011639-40. While the ALJ put much weight on the agency’s non-action, EPA’s silence is irrelevant to the propriety of the AO. *Alaska Dep’t of Env’tl. Conservation v. EPA* confirms that EPA has broad discretion to determine whether or not to enforce Clean Air Act sections 113(a)(5) and 167. 540 U.S. 461, 473, 474, 502 (2004); *Seabrook v. Costle*, 659 F.2d 1371, 1374-75 (5th Cir.1981); 42 U.S.C §7477.

To explain why agency non-action is typically not subject to judicial review, the U.S. Supreme Court noted that because enforcement discretion is broad, a decision not to act cannot be second-guessed and does not mean the law has been obeyed. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“An agency generally cannot act against each technical violation of the statute it is charged with enforcing.”). Thus, it is inappropriate to vest meaning in EPA’s silence.

VI. The Director’s Calculation of Increases in PM_{2.5} Emissions from the Expansion Is Fatally Flawed.

A. The Director’s Departure from Prior Practice and Unreasonable Reliance on the NEI Constant is Unlawful.⁷

Utah Physicians met its §63G-4-403(4) burden by confirming the consequential factual and legal errors that underlie the Director’s decision to authorize the use of an unproven NEI constant to calculate increases in PM_{2.5} emissions from the Expansion. The Director’s permitting actions and the ED’s decision upholding the Director’s AO are based on material facts **not** supported by the record, an unreasonable departure from past practices, and an erroneous interpretation of the law.⁸ Because the NEI constant

⁷ Utah Physicians adequately raised these issues before the ALJ and ED. ADJ009634-49; ADJ010889-90; ADJ011290-95; ADJ010994-11001.

⁸ In its Opening Brief, Utah Physicians disputes the legal conclusions of Findings X.¶¶3, 56-62, demonstrating that after-the-fact stack testing is not an adequate substitute for a defensible calculation of potential to emit (PTE). Utah Phy.Br.31-32. Utah Physicians disputes X.¶¶31-34, 36, by confirming that the Director was unreasonable to deviate from his past practices of depending on manufacturer guarantees, BACT and AP-42 to calculate PTE and by authorizing the use of a number considerably at odds with these reliable sources, X.¶¶23-31, and X.¶¶40-45, 47-49, 50-55, by showing the record does not justify the Director’s abrupt departure from more reliable means of determining PTE. Finding X.¶18 concerns standard of review. Utah Phy.Br. 2-4, 6. Findings X.¶¶1-2, 4-7, 37-39, 46 provide background and/or are not material. X.¶¶17, 19, 21-23 are general

underestimates PM_{2.5} emission increases from the Expansion, the Director's decision that the project is not a major modification is invalid.

The agency's own forms and statements confirm that DAQ has long considered manufacturer specifications and AP-42 emission factors the most appropriate way to calculate emission increases from a proposed project or potential to emit (PTE). Utah Phy.Br.25-26. Using these sources, the Director and Holly consistently identified PM₁₀/PM_{2.5} emission rates ranging from 0.010 lb/MMBtu to 0.0075 lb/MMBtu for the Refinery Boilers #8-11 and the process heaters.⁹

First, in its permit application, Holly based its PM_{2.5} emission estimates on manufacturer data and EPA AP-42 emission factors. IR002829; IR002847; IR003045; IR003049. The Director ultimately decided that EPA's AP-42 – **0.0075 lb/MMBtu** – was the most representative emission factor for the **majority** of the Refinery boilers. IR008549 (7.65 lb/MMscf is 0.0075 lb/MMBtu);¹⁰ IR008558; IR009247.

Second, in its permit application, Holly calculated the PM₁₀/PM_{2.5} PTE for Boiler#11 based on the “manufacturer supplied emission rate of **0.010 lb/MMBtu**,” IR003053, and the Director confirmed that for Boiler#11, “manufacturer's data indicates a guaranteed emission factor of **0.010 lb/MMBtu**.” IR008502.

statements about burden of proof, predicated on findings Utah Physicians dispute in its Opening Brief. X.¶¶8-16, 20, 24-25 address an argument Utah Physicians did not make.

⁹ In its Opening Brief, Utah Physicians mistakenly stated that BACT was applied to Boiler#8. Utah Phy.Br.26-27. Rather, BACT was applied only to the “new” Boiler#11. IR002916; IR002834. Boiler#8 is an existing emission unit that will be modified. IR002843; IR002846. This correction does not change the relevant analysis.

¹⁰ Divide lb/MMscf by 1020 to derive lb/MMBtu. AP-42, Table 1.4-2.

Third, Holly applied best available control technology (BACT) to Boiler#11, IR002919-20, and the new heaters, IR2899-2903; IR002892, to derive “an emissions limitation...based on the maximum degree of reduction” of PM₁₀/PM_{2.5}. Utah Admin. Code r.307-401-2(1). For Boiler#11, the Refinery listed “the lowest emission rates identified in the past four years” at facilities around the nation to derive a BACT emission limit “based on **manufacturer data**” of **0.010 lb/MMBtu**. IR002920. For the process heaters, Holly reviewed EPA’s RBLC¹¹ and other databases to derive “most stringent control technologies for PM₁₀” – good combustion practices and use of gaseous fuel – to derive a BACT emission limit “based on **manufacturer data**” of **0.0075 lb/MMBtu**. IR002902.

Finally, in the 2011 AO, the permit governing the Refinery until it was superseded by the 2013 AO, IR009252, the Director applied an emission factor of **0.005 lb/MMBtu** to Boilers#8, #9 & #10 and all the then-existing process heaters. IR002033-34; IR008193 (draft permit); IR002017-18 (AO applicable to Boilers#8, #9 & #10).

Then, in the middle of the permitting process, out-of-line with sources he deemed most dependable, contrary to his 2011 AO determination and in conflict with the lowest emission rates nationally, the Director authorized use of the NEI constant **0.00042 lb/MMBtu** to make the critical permitting determination – whether the Expansion is a major modification. This NEI constant is tiny, representing a mere **4% or 1/25th** of the

¹¹ RBLC contains case-specific information from across the nation on the “best available” technologies that have been required to reduce emissions from stationary sources. <http://cfpub.epa.gov/rblc/index.cfm?action=Home.Home>.

manufacturer guarantee and “best available,” “lowest” boiler emission rates, IR008502; IR002920, **5% or 1/20th** of the manufacturer guarantee and “best available,” “lowest” heater emissions rates. IR002902-3. The inventory constant is **20-25** times less than EPA’s AP-42, the emission factor Holly used to calculate emissions from **new** Expansion boilers and heaters, IR002847; IR003043-46; IR003048-50, and which the Director applied to the majority of the Refinery heaters. IR008549; IR008558; IR009247. The record does not and cannot support the Director’s deviation from his customary practices to authorize an emission factor so out-of-sync with his past policies and approaches from across the nation.

This table illustrates the consequences of the Director’s new math. Relying on manufacturer guarantees, AP-42 and BACT, the total PM₁₀/PM_{2.5} PTE for the “NSPS” boilers and heaters is 30.38 tons per year (tpy) – **alone** three times the 10 tpy threshold for a major modification. Using the NEI constant, that number is 1.11 tpy, 3.6% or 1/27th of the total representing the rates from manufacturer’s guarantees, AP-42 and BACT.

Unit	Status IR002834	Original PM ₁₀ /PM _{2.5} PTE (tpy) IR002834	“New”PM _{2.5} PTE (tpy)
10H2	Existing	3.2 ¹	0.18 ⁶
20H3	New	1.38	0.08 ²
24H1	New	1.97	0.11 ²
25H1	New	1.48	0.08 ²
27H1	New	3.35	0.18 ²

33H1	New	4.27	0.24 ³
Boiler#8	Modified	3.0 ¹	n/a
Boiler#9
	Existing ⁵	7.82 ⁵	0.08 ⁴
Boiler#11	New	3.91	0.16 ²
Total		30.38	1.11

¹ IR003170 ⁴ IR008410

² IR008367 ⁵ IR002842

³ IR008368 ⁶ IR008366

The reasons the Director now gives for authorizing the use of the NEI constant are not compelling. When he finalized his permitting decision, the Director refused to consider the England report that accompanied the released NEI constant. IR008913-9042. IR009217 (responding to comment “the NEI emissions factor is questionable because England warned about test data limitations,” stating “this point is irrelevant because Holly...will be held to the limits in its AO.”). In this contemporaneous report, England consistently maintained the NEI constant was not representative and not ready for use. IR008998-99; IR009000-01; IR007248 (Holly consultant confirming high uncertainty associated with NEI number). The Director’s after-the-fact dismissal of England’s own characterization of his work as unreliable is necessarily *post-hoc* and unconvincing and does not accurately reflect the actual basis for the decision.

Also at the time he authorized the use of the NEI factor, the Director did not discuss the report England prepared for Holly well after he posited his 2000-2004 NEI number, IR008911, that conspicuously lacked new data to back up his old research. IR008022-44. Thus, any opinions attributed to the Director about this report were not

ones he articulated at the time he issued the AO, are not attributable to him and therefore not entitled to deference.

When he authorized Holly's use of the NEI constant, the Director also failed to address two EPA emails stating why EPA does not consider the NEI constant an emission factor and explaining that "one of the issues we had with [England's] reports was the lack of the detailed supporting information," IR008911, and "an emissions factor would not be developed without a test report." IR009043 ("If we did proceed in the absence of a test report, the resulting quality rating score would be zero."). Utah Phy.Br.32-33.

The Director also improperly discounts the real authority of AP-42. He often refers to the NEI constant as "the 2006 EPA-**published** National Emissions Inventory (NEI) Information." IR009176. This is a far cry from EPA's own characterization of its formally adopted and "**EPA-approved** AP-42 emission factors," 74 Fed.Reg. 52723, 52724 (Oct. 14, 2009) ("The EPA-approved emissions factors are contained in an online document called the 'AP-42 Compilation of Air Pollutant Emissions Factors'"), that have been subject to public comment and national vetting. 74 Fed.Reg. 52723, 52726 (Oct. 14, 2009) (indicating that existing emission factor development process includes public comment and the publishing of the draft and final factors in "AP-42")

Finally, England's ultimate criticism of the EPA-approved AP-42 emission factors is that they can lead to estimates of condensable PM emissions five times too high – or that actual emissions are **1/5th** of the AP-42 factors. IR008030 ("Test methods with improved sensitivity and accuracy...indicate PM emissions that are as low as 1/5 of the AP-42 cPM emission factor."). However, the NEI-derived number England advocates is

1/20th of the AP-42 emission factors, proving that even based on England’s assessment, the NEI constant drastically underestimates PM emissions.

Thus, Utah Physicians has carried its §63G-4-403(4) burden by showing the record does not support the Director’s decision to embrace an emission rate out-of-sync with those derived from a host of credible sources. The Director’s action is “contrary to [his] prior practice” and he has not “justifie[d]” the departure “by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency.” Utah Code Ann. §63G-4-403(4)(h)(iii). The organization has also shown that by relying on post-construction stack tests to verify the NEI constant, the Director has subverted the Rule 307-403 “preconstruction” permitting process.

B. The Director Failed to Provide a Defensible Calculation of Emission Decreases from Closure of the Propane Pit Flare.

The Director authorized Holly to claim a credit for closing the Propane Pit Flare (PPF) allowing it to subtract 2.19 tpy from the Expansion’s PM_{2.5} emission increases. IR008564; IR008369. In its Opening Brief, Utah Physicians met its §63G-4-403(4) burden by establishing that the record does **not** support the calculation of emission decreases from the Propane Pit Flare (PPF) closure.¹² Underlying the Director’s

¹² In its Opening Brief, Utah Physicians adequately disputes Findings XI.¶¶12-13, 17, establishing that the 2.19 PM_{2.5} tpy credit is not sufficiently supported by record evidence. Utah Phy.Br.34-37. Findings XI.¶¶1-5, 6, 11, 14 provide background and/or are not material. Finding IX.¶7 concerns standard of review. Utah Phy.Br.2-4, 6. Findings IX.¶¶8-10 are general statements about burden of proof, predicated on findings Utah Physicians dispute in its Opening Brief. Utah Physicians used Finding XI.¶15 to show the Director’s inconsistent approach to calculating emissions and addressed XI.¶16 by establishing that the evidence in the record undermines the credibility of calculation of emission decreases from the PPF closure. The propriety of the Director’s factual

permitting actions and the ED's decision upholding the Director's AO are material facts **not** supported by the record.¹³

According to the Director, actual PM_{2.5} emissions from the PPF were calculated based on the appropriate AP-42 emission factors, IR002047, and the amount of propane the flare was burning. IR008564; IR009218; ADJ011101; ADJ011204. Yet, the record is devoid of any specific emission factors, conversions, equations, calculations, assumptions or monitoring data to substantiate Holly's claimed PPF emissions. IR003035; *DAQ NOI Guide* ("Give calculations of the emission estimates.... Include equations, all relevant emission factors, and references. Explain all assumptions...made in your calculations."). Thus, the record does not support this critical permitting determination.

The lack of basis for the 2.19 tpy credit is particularly problematic because AP-42 gives a vast range of emission factors, spanning from 0 to 274 µg/L depending on whether the flares are not smoking or are smoking heavily. IR002047. AP-42 emission factors calculate soot, not PM_{2.5}. *Id.* Yet, nothing in the record explains to what degree the PPF was smoking, how the emission factor for soot was used to calculate PM_{2.5} or how "actual" PM_{2.5} emissions could be exactly the same for the years 2009 to 2011. *See* IR003035.

determinations is evaluated based on the record, and the Director may not attempt to justify his decision based on evidence that is not in the record.

¹³ Utah Physicians adequately raised these issues before the ALJ and ED. ADJ009649-51; ADJ010891-92; ADJ011286-89; ADJ011003-04.

To justify the enormous levels of PM_{2.5} the Refinery claimed it was combusting in the PPF, Holly maintained “it is likely that...the flare was flaring continuously to manage the amount of gas released from the pit.” IR011204. At the same time, Holly also insisted that it was compelled by the Consent Decree to “[e]liminate the routing of continuous or intermittent, routinely-generated refinery fuel gases to” the PPF. IR004385; IR007951 (Consent Decree “requirement” for PPF to “eliminate all routinely generated gas”). Yet, nothing in the record reconciles these conflicting statements.

According to the record, 2.19 tpy represents an enormous level of PM_{2.5} emissions from a flare. The Refinery North and South flares, for example, release **no** PM_{2.5} emissions during either routine operations or upsets. IR002865 (zero PM_{2.5} emissions predicted from North and South flare upsets); IR002996 (zero routine PM_{2.5} emissions from North and South flares); IR003029; IR003069. The draft PM_{2.5} nonattainment State Implementation Plan (SIP) calculates the “actual” 2008 PM_{2.5} emissions for all Holly, Tesoro and Big West refinery flares combined as 1.44 tpy. IR008153. Yet, nothing in the record explains the extraordinary output of PM_{2.5} from the PPF.

The notion that Utah Physicians is responsible for what the Director omitted from the record has no traction. ADJ011330. First, Utah Physicians’ email does not endorse leaving anything out of the record. ADJ011351. Second, as Holly maintained, “[w]e agree that the ALJ can take judicial notice of these documents in the event that parties desire to cite any information contained in these inventories.” ADJ011349. Thus, according to Holly, both the Director and the company are free to refer to the inventories if they wish. *Id.* Third, it is up to the Director to include in the record any information

that is “part of the basis for the decision relating to the permit order[.]” Utah Code Ann. §19-1-301.5(9)(b)(vii)(B); (8)(a)(i) (“the director shall file and serve the administrative record “). If the Director based his AO decision on the inventories, it was up to him to put the documents in the record. Thus, the propriety of the Director’s factual determinations is based on the record and reference to what might or could have been in the record is irrelevant.

Utah Physicians has met its §63G-4-403(4) burden by showing that factual errors and erroneous legal interpretations underlie the Director’s decision to authorized a 2.19 tpy credit for the PPF closure. The record does not support the contention that the PPF actually emitted exactly 2.19 PM_{2.5} tpy from 2009-2011.

C. The Director’s Estimate of the FCCU25 PM_{2.5} Emissions Does Not Reflect the “Maximum Capacity of the Source to Emit” PM_{2.5}.¹⁴

The purpose of the Expansion is to use the newly installed fluidized catalytic cracking unit (FCCU25) to refine black waxy crude feedstock. Utah Phy.Br. 38. To properly permit the Expansion, the Director must calculate the PM_{2.5} emission increases from FCCU25 to determine if the project is a major modification for PM_{2.5}. The Director did this, using an AO limit of 0.3-lb PM₁₀/1000-lb coke burned, IR008559; IR009243, and Holly’s “engineering calculation” of a “maximum” coke-burn rate of 6200-lbs/hr, IR003047, to arrive at a PM_{2.5} PTE of 8.15 tpy. IR008367.

¹⁴ Utah Physicians adequately raised these issues before the ALJ and ED. ADJ009652-56; ADJ010890-91; ADJ011275-81; ADJ011001-03.

However, the coke-burn rate of 6200-lbs/hr is not supported by the record and therefore the Director's PTE calculation is necessarily inadequate. Holly based its calculation on the 2013 operation of the **existing** FCCU4, IR008052, and not on an estimate of FCCU25 processing "the most pollutant-generating" feedstock. *NSR Manual c.2 (Appendix)*.¹⁵ This is particularly important because the FCCU4 has a hydrotreater, IR008052, and FCCU25 does not. IR002937. Holly admits that "hydrotreating...lowers coke load," but does not document any effort to adjust its calculation to reflect that FCCU25 has no hydrotreater. IR008052.

Moreover, a defensible PTE may not be based on "[h]istoric usage rates alone[.]" *NSR Manual c.2 (Appendix)*. Rather, PTE must represent the maximum capacity of FCCU25 to emit PM_{2.5} as it processes "the most pollutant-generating" feedstock. The Director specifically declined to determine the PTE of FCCU25 under these circumstances, IR009194, and there are no permit limits on feedstock. Therefore, the 8.15 tpy does not reflect the maximum capacity of FCCU25 to emit PM_{2.5}.

In addition, 8.15 tpy does not reflect the maximum capacity of FCCU25 to emit PM_{2.5} because the AO fails to impose an enforceable limitation that restricts the coke-burn rate or the amount of coke/hr that Holly may burn. IR009242-43. Without a coke-burn limit, Holly may burn feedstock with a higher coke-burn rate than 6200-lbs/hr and therefore emit more PM_{2.5} than the Director calculated.

¹⁵ <http://www.epa.gov/sites/production/files/2015-07/documents/1990wman.pdf>

The Director defends his PTE by claiming that the capacity of FCCU25 – an “annual average capacity of 8,500 bpd,” IR009229, is a limit on PTE. IR009192; IR009208. But the Director does not connect the 8,500 bpd capacity to the coke-burn rate of 6200-lb/hr. He does not explain why the unit’s **annual** average barrel-per-day capacity will prevent FCCU25 from exceeding the 6200-lb/hr rate on a short-term basis. Again, regardless of a capacity limit, without a coke-burn limit, Holly may burn feedstock with a higher coke-burn rate than 6200-lbs/hr, *e.g.* IR008599-600, and therefore emit more PM_{2.5} than the Director calculated.

Thus, Utah Physicians has carried its §63G-4-403(4) burden by showing the record does not support the Director’s PM_{2.5} PTE for FCCU25. Utah Physicians has also established that the Director misinterpreted the law governing PTE.¹⁶

VII. In Approving the Expansion, the Director Did Not Meet the Requirements of Rule 307-401-8.

A. Although the Flares Are a Considerable Source of Air Pollution, the Director Fails to Protect Short-Term NAAQS from Flare Emissions.

The North and South flares are a significant source of emissions. Each is predicted to release a 120 tons of SO₂, 21 tons of CO, 4 tons of NO_x and 8 tons of VOCs each year during upset events. IR008561; IR002865. The AO contains “no limits on the flares,”

¹⁶ In its Opening Brief, Utah Physicians disputes the legal conclusions of Findings VIII.¶¶4-5, 23-28, demonstrating that the record does not support the Director’s PM_{2.5} PTE for FCCU25 and the Director misinterpreted the law governing PTE. Utah Phy.Br. 38-42. Findings VIII.¶15, 21 concern standard of review. Utah Phy.Br.2-4, 6. Findings VIII.¶¶1-3, 6, 8-10, 22 provide background and/or are not material. Findings VIII.¶¶14, 16-20, 29 are general statements about burden of proof, predicated on findings Utah Physicians dispute in its Opening Brief. Utah Physicians addresses Findings VIII.¶¶7, 11-13, which concern preservation. Utah Phy.Br. 5.

IR009186-87; IR009245-48, except that annual “non-upset” NO_x emissions from the flares are included in the source-wide cap. IR009249. The AO does not limit any “upset” flare emissions for any pollutants. IR009241-51.¹⁷

Most flare emissions occur during upsets, and therefore will spike during these short-term episodes. IR008561; IR002865; IR009187 (acknowledging significant variability in refinery emissions). Because the AO does not limit flare emissions, the Director has not met his obligation to protect short-term NAAQS and comply with Rule 307-401-8(1)(b)(vii).

The Director claims that Holly’s air quality modeling demonstrates “no violation of short-term NAAQS would occur,” IR009187; IR009190, but admits that Holly’s modeling did not include any “upset” flare emissions. IR009214. Because most flare emissions are upset emissions, IR008561; IR009187, modeling that does not include upset emissions will not successfully show protection of short-term NAAQS. IR009225; IR009245. Modeling flare upset emissions may not be required by law, IR009214-15, but in the absence of models that include upset flare emissions, the Director may not claim that modeling demonstrates protection of the short-term NAAQS.

¹⁷ In its Opening Brief, Utah Physicians disputes the legal conclusions of Findings V.¶¶2-3, 15, 22, 27-28, establishing that without including upset flare emissions and **without** modeling maximum short-term emissions, Holly concludes that 95% of the NO₂ NAAQS will be consumed as a result of the project, and of Findings V.¶¶5-7, 15, 22, 27-28, arguing that Holly did not model “maximum emissions” or “short-term spikes” and that modeling that does not include upset flare emissions cannot show protection of short-term NAAQS. Findings V.¶¶1, 4, 8-10, 16-21, 25-26, 29-39, provide background, are not material and/or constitute legal argument. Findings V.¶¶11-14, 23, are general statements about burden of proof addressed elsewhere.

The Director is wrong to insist that Holly modeled “maximum emissions” or “short-term spikes.” The inputs for Holly’s short-term model represent annual emissions spread evenly over the year. Utah Phy.Br.46-49. There is no difference between the NO_x values used for the short-term and annual models. *Compare* IR002994-96 to IR002997-2999. When converted to tons per year, the inputs for the short-term model equate exactly to annual emission limits or estimates of annual emissions (PTE). *Id.* Therefore, Holly’s short-term model merely reflects annual emission rates and so smooths out any variability in emissions that occurs on a short-term basis. *Id.* Moreover, without including upset flare emissions and **without** modeling maximum short-term emissions, Holly concludes that 95% of the NO₂ NAAQS will be consumed as a result of the project – leaving a very small margin before the standard will be exceeded. IR00003596.¹⁸

B. The Director Fails to Protect Short-Term NAAQS from Refinery Emissions.

The Director has neglected his duty to ensure that the Refinery emissions do not impede attainment or maintenance of the NAAQS. The Director has not imposed short-term emission limits on the Refinery emission limits. Again, there is no modeling to

¹⁸ In its Opening Brief, Utah Physicians disputes the legal assertions in Findings IV.¶¶7, 19-24, showing that the Breakdown Rule does not apply to the Refinery flares because there can be no “excess emissions” and therefore no “breakdown” when the flares are operating under upset conditions. Utah Phy.Br.50-51. Utah Physicians also addresses Finding IV.¶¶2-3, 23, explaining that the AO does not regulate flares emissions except for non-upset annual NO_x emissions. *Id.* at 40. Findings IV.¶¶1, 4-6, 8, 22 provide background and/or are not material. Utah Physicians addresses Findings IV.¶¶9-13, which concern preservation. Utah Phy.Br.5.

show that short-term NAAQS will be protected. There are no hourly source-wide short-term emission limits although the Director maintained that protection of the NAAQS is achieved on a source-by-source basis. IR009186; IR009245; IR009248 (only daily and yearly source-wide SO₂ and NO_x emission limitations). Combined with upset flare emissions, Refinery emissions that are not subject to short-term limits may exceed the NAAQS.

Utah Physicians has carried its 63G-4-403(4) burden by showing that the Director failed to protect the short-term NO₂ and SO₂ NAAQS from Refinery emissions, particularly when combined with flare emissions. The Director's assertion that 307-107 regulates upset flare emissions is a misinterpretation of the law.

C. The Director Failed his Permitting Obligations Because the AO Does Not Specify Subpart Ja Terms and Conditions to the North and South Flares.

The Director may not forego specifying in his AO the particular New Source Performance Standards (NSPS) Subpart Ja terms and conditions applicable to the two flares. IR009212; IR009183. The AO claims to “authorize[] the project with the following conditions,” cautioning that “failure to comply with any of the conditions may constitute a violation of this order.” IR009226. Yet, the AO contains no specific NSPS conditions applicable to the flares. A single ambiguous statement in the AO that does not mention flares and imposes no emission limits, terms or conditions is not adequate under 307-401. *See* IR009252 (Section III stating “all applicable provisions of the following

federal programs...apply to this installation” including “NSPS (Part 60) Ja: Standards of Performance for Petroleum Refineries”); IR008477 (draft permit); IR009212.¹⁹

This approach is especially inappropriate because implementation of Subpart Ja necessitates interpretation of several subparts, choices among alternatives and judgment calls, none of which the AO reflect. 40 C.F.R. §60.102a(g) requires compliance with “the emission limits in...(g)(1) through (3),” while (g)(1) requires compliance “with **either** the emission limit in paragraph (g)(1)(i)...**or** the fuel gas concentration limit in...(g)(1)(ii).” 40 C.F.R. §60.103a(a) mandates a flare management plan and 40 C.F.R. §60.103a(b) requires a flare root cause analysis. 40 C.F.R. §§60.107(a)(1) and (a)(2) impose different monitoring protocols depending on whether the flare is subject to §60.102a(g)(1)(i) or §60.102a(g)(1)(ii). Yet, none of this is in the AO.

As a result, the AO is impermissibly ambiguous. It is impossible to determine if the Director fulfilled his 307-401 duty to ensure that the Refinery “will meet the applicable requirements” of the NSPS or whether he should not have issued the AO because NSPS conditions have not been met. Utah Admin. Code r.307-401-8(1)(b)(vi); r.307-401-8(5); r.307-210. The public is prevented from addressing the adequacy of the Director’s permitting decision or enforcing the permit itself. *Id.* r.307-401-7; 42 U.S.C. §7604(a)(1)(A). Indeed, to this day, Utah Physicians has not been able to provide

¹⁹ To add to the confusion, the AO also states that Subpart J (no “a”) applies to the Refinery.

meaningful comment on the Director's purported application of Subpart Ja to the flares because neither the draft nor final permit reveals if and how this was done.

What is stated in other record documents is not relevant to assessing the Director's compliance with 307-401. *See* IR009212; IR009181; IR009191. These documents do not represent the Director's final permitting decision. These documents were **not** upheld by the ED. ADJ011652. These documents do not mention the 40 C.F.R. §60.102a(g)(2)-(3), 40 C.F.R. §60.103a(a)-(b) or 40 C.F.R. §60.107(a)(1)-(2) terms and conditions, much less apply them to the flares. These documents confuse, rather than clarify, if and how Subpart Ja applies to the flares.

Thus, whether it is characterized as an erroneous interpretation of the law or a factual determination lacking support in the record, the Director's refusal to include in the AO the specific Subpart Ja terms and conditions applicable to the flares is improper.²⁰ Utah Physicians has documented the flaws – both legal and technical – in the Director's decision. Here and in its Opening Brief, Utah Physicians carried its §63G-4-403(4) burden, adequately responding to the ALJ's findings by focusing on the record and the Director's permitting actions and establishing that the ED erred in upholding the Director's NSPS decision.

²⁰ In its Opening Brief, Utah Physicians dispute Findings I.¶¶1-4, 12-16, establishing that the AO must include specific Subpart Ja terms and conditions and that record evidence confuses, rather than clarifies, if and how the Director applied Subpart Ja to the flares. Utah Phy.Br.52-54. Findings I.¶¶7-8 concern standard of review. Utah Phy.Br.2-4, 6. Findings I.¶¶9-11 are general statements about the burden of proof, predicated on findings Utah Physicians dispute in its Opening Brief. Findings I.¶¶5, 17-18 are not relevant.

D. The Record Does Not Support the Director’s Determination that the North Flare Is Exempt from BACT.

With the goal of securing from the Director clarification on the NSPS terms and conditions applicable to the North Flare, Utah Physicians pointed to discrepancies in the record. Utah Phy.Br.54-55.²¹ The Director’s statement that “the North Flare is not being modified as part of” the Expansion, IR009183, could mean he did not consider the North Flare subject to the newer, stricter Subpart Ja. A “modification” can trigger the application of Subpart Ja. 40 C.F.R. §60.100a(c).

In an apparent effort to clarify whether he imposed Subpart Ja on both flares, the Director referenced the Consent Decree and Semi-Annual Reports, which actually apply the older Subpart J, and **not** Ja, to the flares. IR004800-01; IR007946; IR007951; 40 C.F.R. §§60.100-109. He cited the Source Plan Review, IR009183, which asserts that Subpart Ja applies to the “flares,” IR008571, but does **not** indicate which emission limitations are imposed as a result, IR008572, and in listing “applicable federal requirements,” does **not** mention Subpart Ja in connection with the flares. IR008483-84. Moreover, under Subpart Ja, it is critical to pinpoint the date of a modification to derive compliance deadlines, 40 C.F.R. §§60.107a(e)-(f), but no date was specified. Therefore, to rely on this confusing record to show compliance with rules 307-401-8(1)(b)(vi), 307-401-8(5), 307-210 and 307-401-7 is erroneous, especially when the AO does not connect Subpart Ja and the flares and imposes no Subpart Ja terms or conditions on the flares.

²¹ ALJ Findings II.¶¶1-19 represent a misunderstanding of Utah Physicians’ claim and are not relevant.

Record inconsistencies also preclude an assessment of whether the Director was required to impose BACT on the North Flare. *See* Utah Admin. Code r.307-401-8(1)(a). The Director states that “the North Flare is not being modified as part of” the Expansion, IR009183, but admits that previously it was “modified” as defined by 40 C.F.R. §60.100a(c) and therefore subject to Subpart Ja. IR008571; IR007168. Thus, the question remains as to whether this past modification triggered BACT.²² While the Director did not make this argument when he issued the AO, the ALJ ultimately suggests that imposition of Subpart Ja on the North Flare would constitute BACT. ADJ011573 (¶20). This proposal is only valid if the AO specified the exact Subpart Ja terms and conditions applicable to the flares.

Thus, that the AO must specify exactly if and how the Director implemented Subpart Ja to the flares is well-grounded in 307-401 and is necessary to implement 40 C.F.R. §§60.100a-109a. This is further warranted if the application of Subpart Ja to the North Flare is intended to satisfy BACT.

CONCLUSION

Based on the deficiencies identified above, Utah Physicians asks that the AO be revoked, vacated and remanded with instructions that the Director undertake a defensible calculation of the emission increases and decreases to determine whether the Expansion is a major modification subject to Rule 307-403. Revocation and remand is also

²² It is impossible to determine whether the Director decided the North Flare was not subject to BACT because it was not part of the Expansion or because the flare would not undergo a physical change or an increase in emissions. IR009189.

warranted because the Director has failed to assure that the Refinery will not impede attainment or maintenance of the short-term NAAQS and has not properly applied Subpart Ja to the Expansion.

Respectfully submitted this 28th day of December 2015.

A handwritten signature in black ink, appearing to be 'Joro Walker', written above a horizontal line.

JORO WALKER
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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2015, I caused the above-entitled instrument to be emailed and served by first-class mail to the following persons:

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Certificate of Compliance With Rule 24(f)(1)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 6990 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).
2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word using 13 point Times New Roman Font.

Dated this 28th day of December, 2015.



JORO WALKER
Attorney for Utah Physicians

Exhibit A

19-1-301.5 Permit review adjudicative proceedings.

(1) As used in this section:

- (a) "Dispositive action" means a final agency action that:
 - (i) the executive director takes as part of a permit review adjudicative proceeding; and
 - (ii) is subject to judicial review, in accordance with Subsection (14).
- (b) "Dispositive motion" means a motion that is equivalent to:
 - (i) a motion to dismiss under Utah Rules of Civil Procedure, Rule 12(b)(6);
 - (ii) a motion for judgment on the pleadings under Utah Rules of Civil Procedure, Rule 12(c); or
 - (iii) a motion for summary judgment under Utah Rules of Civil Procedure, Rule 56.
- (c) "Party" means:
 - (i) the director who issued the permit order being challenged in the permit review adjudicative proceeding;
 - (ii) the permittee;
 - (iii) the person who applied for the permit, if the permit was denied; or
 - (iv) a person granted intervention by the administrative law judge.
- (d) "Permit" means any of the following issued under this title:
 - (i) a permit;
 - (ii) a plan;
 - (iii) a license;
 - (iv) an approval order; or
 - (v) another administrative authorization made by a director.
- (e)
 - (i) "Permit order" means an order issued by a director that:
 - (A) approves a permit;
 - (B) renews a permit;
 - (C) denies a permit;
 - (D) modifies or amends a permit; or
 - (E) revokes and reissues a permit.
 - (ii) "Permit order" does not include an order terminating a permit.
- (f) "Permit review adjudicative proceeding" means a proceeding to resolve a challenge to a permit order.

(2) This section governs permit review adjudicative proceedings.

(3) Except as expressly provided in this section, the provisions of Title 63G, Chapter 4, Administrative Procedures Act, do not apply to a permit review adjudicative proceeding.

(4) If a public comment period was provided during the permit application process, a person who challenges a permit order, including the permit applicant, may only raise an issue or argument during the permit review adjudicative proceeding that:

- (a) the person raised during the public comment period; and
- (b) was supported with sufficient information or documentation to enable the director to fully consider the substance and significance of the issue.

(5) The executive director shall appoint an administrative law judge, in accordance with Subsections 19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.

(6)

- (a) Only the following may file a request for agency action seeking review of a permit order:
 - (i) a party; or
 - (ii) a person who is seeking to intervene under Subsection (7).
- (b) A person who files a request for agency action seeking review of a permit order shall file the request:

- (i) within 30 days after the day on which the permit order is issued; and
 - (ii) in accordance with Subsections 63G-4-201(3)(a) through (c).
 - (c) A person may not raise an issue or argument in a request for agency action unless the issue or argument:
 - (i) was preserved in accordance with Subsection (4); or
 - (ii) was not reasonably ascertainable before or during the public comment period.
 - (d) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline described in Subsection (6)(b)(i).
- (7)
- (a) A person who is not a party may not participate in a permit review adjudicative proceeding unless the person is granted the right to intervene under this Subsection (7).
 - (b) A person who seeks to intervene in a permit review adjudicative proceeding under this section shall, within 30 days after the day on which the permit order being challenged was issued, file:
 - (i) a petition to intervene that:
 - (A) meets the requirements of Subsection 63G-4-207(1); and
 - (B) demonstrates that the person is entitled to intervention under Subsection (7)(c)(ii); and
 - (ii) a timely request for agency action.
 - (c) An administrative law judge shall grant a petition to intervene in a permit review adjudicative proceeding, if:
 - (i) the petition to intervene is timely filed; and
 - (ii) the petitioner:
 - (A) demonstrates that the petitioner's legal interests may be substantially affected by the permit review adjudicative proceeding;
 - (B) demonstrates that the interests of justice and the orderly and prompt conduct of the permit review adjudicative proceeding will not be materially impaired by allowing the intervention; and
 - (C) in the petitioner's request for agency action, raises issues or arguments that are preserved in accordance with Subsection (4).
 - (d) An administrative law judge:
 - (i) shall issue an order granting or denying a petition to intervene in accordance with Subsection 63G-4-207(3)(a); and
 - (ii) may impose conditions on intervenors as described in Subsections 63G-4-207(3)(b) and (c).
 - (e) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules allowing the extension of the filing deadline described in Subsection (7)(b).
- (8)
- (a) An administrative law judge shall conduct a permit review adjudicative proceeding based only on the administrative record and not as a trial de novo.
 - (b) To the extent relative to the issues and arguments raised in the request for agency action, the administrative record shall consist of the following items, if they exist:
 - (i) the permit application, draft permit, and final permit;
 - (ii) each statement of basis, fact sheet, engineering review, or other substantive explanation designated by the director as part of the basis for the decision relating to the permit order;
 - (iii) the notice and record of each public comment period;
 - (iv) the notice and record of each public hearing, including oral comments made during the public hearing;
 - (v) written comments submitted during the public comment period;

- (vi) responses to comments that are designated by the director as part of the basis for the decision relating to the permit order;
 - (vii) any information that is:
 - (A) requested by and submitted to the director; and
 - (B) designated by the director as part of the basis for the decision relating to the permit order;
 - (viii) any additional information specified by rule;
 - (ix) any additional documents agreed to by the parties; and
 - (x) information supplementing the record under Subsection (8)(c).
- (c)
- (i) There is a rebuttable presumption against supplementing the record.
 - (ii) A party may move to supplement the record described in Subsection (8)(b) with technical or factual information.
 - (iii) The administrative law judge may grant a motion to supplement the record described in Subsection (8)(b) with technical or factual information if the moving party proves that:
 - (A) good cause exists for supplementing the record;
 - (B) supplementing the record is in the interest of justice; and
 - (C) supplementing the record is necessary for resolution of the issues.
 - (iv) The administrative law judge may supplement the record with technical or factual information on the administrative law judge's own motion if the administrative law judge determines that adequate grounds exist to supplement the record under Subsections (8)(c)(iii)(A) through (C).
 - (v) In supplementing the record with testimonial evidence, the administrative law judge may administer an oath or take testimony as necessary.
 - (vi) The department may, in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, make rules permitting further supplementation of the record.
- (9)
- (a) The administrative law judge shall review and respond to a request for agency action in accordance with Subsections 63G-4-201(3)(d) and (e), following the relevant procedures for formal adjudicative proceedings.
 - (b) The administrative law judge shall require the parties to file responsive pleadings in accordance with Section 63G-4-204.
 - (c) If an administrative law judge enters an order of default against a party, the administrative law judge shall enter the order of default in accordance with Section 63G-4-209, following the relevant procedures for formal adjudicative proceedings.
 - (d) The administrative law judge, in conducting a permit review adjudicative proceeding:
 - (i) may not participate in an ex parte communication with a party to the permit review adjudicative proceeding regarding the merits of the permit review adjudicative proceeding unless notice and an opportunity to be heard are afforded to all parties; and
 - (ii) shall, upon receiving an ex parte communication, place the communication in the public record of the proceeding and afford all parties an opportunity to comment on the information.
 - (e) In conducting a permit review adjudicative proceeding, the administrative law judge may take judicial notice of matters not in the administrative record, in accordance with Utah Rules of Evidence, Rule 201.
 - (f) An administrative law judge may take any action in a permit review adjudicative proceeding that is not a dispositive action.

(10)

- (a) A person who files a request for agency action has the burden of demonstrating that an issue or argument raised in the request for agency action has been preserved in accordance with Subsection (4).
- (b) The administrative law judge shall dismiss, with prejudice, any issue or argument raised in a request for agency action that has not been preserved in accordance with Subsection (4).
- (11) In response to a dispositive motion, the administrative law judge may submit a proposed dispositive action to the executive director recommending full or partial resolution of the permit review adjudicative proceeding, that includes:
 - (a) written findings of fact;
 - (b) written conclusions of law; and
 - (c) a recommended order.
- (12) For each issue or argument that is not dismissed or otherwise resolved under Subsection (10) (b) or (11), the administrative law judge shall:
 - (a) provide the parties an opportunity for briefing and oral argument;
 - (b) conduct a review of the director's determination, based on the record described in Subsections (8)(b), (8)(c), and (9)(e); and
 - (c) submit to the executive director a proposed dispositive action, that includes:
 - (i) written findings of fact;
 - (ii) written conclusions of law; and
 - (iii) a recommended order.
- (13)
 - (a) When the administrative law judge submits a proposed dispositive action to the executive director, the executive director may:
 - (i) adopt, adopt with modifications, or reject the proposed dispositive action; or
 - (ii) return the proposed dispositive action to the administrative law judge for further action as directed.
 - (b) On review of a proposed dispositive action, the executive director shall uphold all factual, technical, and scientific agency determinations that are supported by substantial evidence taken from the record as a whole.
 - (c)
 - (i) The executive director may not participate in an ex parte communication with a party to the permit review adjudicative proceeding regarding the merits of the permit review adjudicative proceeding unless notice and an opportunity to be heard are afforded to all parties.
 - (ii) Upon receiving an ex parte communication, the executive director shall place the communication in the public record of the proceeding and afford all parties an opportunity to comment on the information.
 - (d) In reviewing a proposed dispositive action during a permit review adjudicative proceeding, the executive director may take judicial notice of matters not in the record, in accordance with Utah Rules of Evidence, Rule 201.
 - (e) The executive director may use the executive director's technical expertise in making a determination.
- (14)
 - (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive action in a permit review adjudicative proceeding, in accordance with Sections 63G-4-401, 63G-4-403, and 63G-4-405.
 - (b) An appellate court shall limit its review of a dispositive action of a permit review adjudicative proceeding to:
 - (i) the record described in Subsections (8)(b), (8)(c), (9)(e), and (13)(d); and

- (ii) the record made by the administrative law judge and the executive director during the permit review adjudicative proceeding.
- (c) During judicial review of a dispositive action, the appellate court shall:
 - (i) review all agency determinations in accordance with Subsection 63G-4-403(4), recognizing 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.
- (15)
 - (a) The filing of a request for agency action does not stay a permit or delay the effective date of a permit.
 - (b) A permit may not be stayed or delayed unless a stay is granted under this Subsection (15).
 - (c) The administrative law judge shall:
 - (i) consider a party's motion to stay a permit during a permit review adjudicative proceeding; and
 - (ii) submit a proposed determination on the stay to the executive director.
 - (d) The administrative law judge may not recommend to the executive director a stay of a permit, or a portion of a permit, unless:
 - (i) all parties agree to the stay; or
 - (ii) the party seeking the stay demonstrates that:
 - (A) the party seeking the stay will suffer irreparable harm unless the stay is issued;
 - (B) the threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;
 - (C) the stay, if issued, would not be adverse to the public interest; and
 - (D) there is a substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits, which should be the subject of further adjudication.
 - (e) A party may appeal the executive director's decision regarding a stay of a permit to the Utah Court of Appeals, in accordance with Section 78A-4-103.

Enacted by Chapter 333, 2012 General Session

Amended by Chapter 360, 2012 General Session, (Coordination Clause)