
**BEFORE THE EXECUTIVE SECRETARY
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY
DIVISION OF AIR QUALITY**

In the matter of:

**TESORO REFINING AND MARKETING
COMPANY WAXY CRUDE PROCESSING
PROJECT: NO. N10335-0058 AND 0059 AND
THE RESULTING PERMITS FOR THE
WAXY CRUDE PROCESSING PROJECT
(DAQE-IN103350058-12) AND THE
REMOVAL OF GASOLINE LOADING
LIMIT AT THE TLR (DAQE-IN103350059-
12) ON OCTOBER 15, 2012 APPROVAL
ORDERS/INTENTS TO APPROVE**

**ORDER ON OBJECTIONS TO THE
ADMINISTRATIVE RECORD**

May 23, 2013

Administrative Law Judge Bret F. Randall

INTRODUCTION

This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated February 15, 2013. The appointment charges me to conduct a permit review adjudicative proceeding in this matter in accordance with Utah Code Ann., § 19-1-301.5 and Utah Admin. Code R305-7.

On September 13, 2012, the Director issued approval orders (“AOs”) UDAQE-AN103350058-12 and UDAQE-AN103350059-12 to Tesoro. On October 15, 2012, Utah Physicians for a Healthy Environment and the Salt Lake Chapter of the Sierra Club (“Petitioners”) filed a Request for Agency Action and Petition to Intervene pursuant to Utah Code Ann. § 63G-4-201 and Utah Admin. Code R305-7-203 and R305-7-204. On March 1, 2013, I provisionally granted the Petition to Intervene (in part) and issued a Notice of Further Proceedings, pursuant to § 63G-4-

201(3)(d)(iii). UDAQ and Tesoro filed responses to Petitioners' Request for Agency Action on April 1, 2013. Pursuant to Utah Admin. Code R305-7-206(4), on April 9, 2013, UDAQ filed and served the Administrative Record supporting the Director's decision to issue the Approval Orders.

On April 24, 2013, Petitioners filed a document entitled Objection to Administrative Record ("Objection"). The Objection seeks the following relief:

Therefore, Utah Physicians seeks an order declaring that inclusion of the Tesoro letters in the record is unlawful and striking any documents from the record submitted by Tesoro after the close of the comment period or not disclosed in a manner that allowed the public at least 30 days after the issuance of the AOs to review the documents in preparation of filing its Request for Agency Action. Similarly, all references to these documents in the remaining record should be removed. Alternatively, Utah Physicians asks for an order voiding the AOs, enjoining the Waxy Crude Project and remanding the AOs to the Director with instructions that the public be given sufficient opportunity to comment on the Tesoro letters and any and all significant analyses and actions undertaken by the Director during and after the close of the comment period.

Objection at 5.

On April 26, 2013, Tesoro Refining and Marketing Company and Tesoro Logistics Operations LLC filed a Motion in Response to the Director's Submission of the Administrative Record ("Tesoro AR Motion"). The Tesoro AR Motion sought to reopen the Administrative Record for the limited purpose of including certain documents that apparently were inadvertently omitted from the Administrative Record.

On May 9, 2013, the parties filed a Stipulation, providing in relevant part as follows:

- 1) The contents of the Administrative Record should be determined prior to briefing on the merits;
- 2) The current briefing schedule should be suspended until this Tribunal resolves the pending motions regarding the Administrative Record;

3) The four documents referenced in Tesoro's Motion in Response to Director's Submission of Administrative Record should be included in the

Administrative Record:

- July 17, 2012 letter from Martin D. Gray, Manager New Source Review Section, to Matthew Buell, Tesoro Refining and Marketing Company
- Source Plan Review for the 2006/1007 FCCU Reliability Project
- April 19, 2006, Holly Energy Press Release, Holly Energy Partners Announces Las Vegas Pipeline Project
- Approval Order DAQE-AN103350056-12

4) The Director of the Division of Air Quality (Director) will number these documents accordingly, serve them upon the parties pursuant to Utah Admin. Code R305-5-209, and update the official Index to the Administrative Record.

* * * *

On the same date, I entered a Stipulated Order adopting the foregoing stipulation of the parties. The Stipulation and Order having resolved the Tesoro AR Motion and the briefing as to the Objections being complete, I hereby enter the following Order.

ANALYSIS

A. Scope of Motions and Objections to the Administrative Record

In these proceedings, objections to the Administrative Record are to be made by motion pursuant to Utah Admin. Code R305-7-209(4). Administrative Record challenges are intended to address the contents of the record as compiled by the Director. *Id.* The Administrative Record is a

critical part of these proceedings since review is limited to information that is part of the designated record. I read Utah Code Ann. § 19-1-301.5(8)(b) and Utah Admin. Code R305-7-209 to focus objections to the Administrative Record to the question of the Director’s compliance with the law governing the record rather than addressing issues that are more appropriately considered in connection with a decision on the merits.

As a general observation, it appears that the UPHE Objection includes a number of arguments that go to the merits of the record review at issue in these proceedings. While a motion to challenge the contents of the administrative record is appropriate, substantive argument on the perceived flaws in the overall administrative process in such a motion is not. To the extent that the UPHE Objection goes to the merits of these proceedings, further ruling on the UPHE Objection will be deferred to a decision on the merits. Moreover, the UPHE Objection seeks for relief overstates jurisdiction and role of the ALJ in these proceedings. More specifically, Petitioners seek to strike several documents from the Administrative Record or, in the alternative, to void the relevant Approval Orders (“AOs”), enjoin the underlying project and remand the AOs for another round of public comment.¹

B. The Administrative Record and the Objection.

The Utah Code defines Administrative Record, for purposes of these proceedings (and otherwise), as follows:

¹ The UPHE Objection seeks the following specific relief from the ALJ: “an order voiding the AOs, enjoining the Waxy Crude Project and remanding the AOs to the Director with instructions that the public be given sufficient opportunity to comment on the Tesoro letters and any and all significant analyses and actions undertaken by the Director during and after the close of the comment period.” According to the Utah Code and related regulations, the ALJ’s jurisdiction in these proceedings is limited to making non-dispositive rulings, opening the Administrative Record for good cause, and submitting written recommendations to the Executive Director as to a decision on the merits or other dispositive resolution of these proceedings (*e.g.* dismissal based on procedural grounds). As I read Utah law, the ALJ does not have jurisdiction in these proceedings to void the AOs, enjoin the project, or to remand the matter to the Director with directions to reopen the public comment period.

(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).

In other words, the administrative record in a given case contains all relevant material required by rule or statute, agreed upon by the parties, and all material requested, received, and relied upon by the Director to issue a permit. Utah Admin. Code R305-7-209(3) further requires the Director to prepare and serve the record within 40 days of the Notice of Further Proceedings. By preparing and filing the record pursuant to Utah Admin. Code R305-7-209(3)(a), the Director has formally designated that the contents of the filed administrative record represent the basis for his decision to issue the AOs.

Based UDAQ's representations in its briefing, pursuant to statute and rule, UDAQ compiled the formal Administrative Record for these proceedings, including specifically all of the documents required by Utah Admin. Code R305-7-209. More specifically, UDAQ represents that the Administrative Record as designated in these proceedings includes "the documents either received or generated by UDAQ and Tesoro during or after the public comment period had closed, but prior to the issuance of the AOs." Director's Response to Western Resource Advocates' Objection to Administrative Record ("UDAQ Response to Objection") at 4.

The Objection relates to the inclusion in the Administrative Record of documents numbered 26-3, 26-4, 26-5, 26-6, and 26-8. Objection at 2. The Objection also takes issue with UDAQ's response to public comments document to the extent that it "adds additional review or analysis" to the record. *Id.* at 2 n.2. Aside from the Response to Comments document, the documents at issue are letters that Tesoro submitted to respond to UDAQ requests for information or to provide Tesoro's response to public comments. The letters also provide supplemental analysis for the agency to consider.

UDAQ has designated its response to comments document as part of the Administrative Record in these proceedings. Index of Administrative Record, Doc. No. 26 (August 22, 2012, Response to Public Comments). UDAQ cites four of the documents Petitioners identify, Nos. 26-3, 26-4, 26-5, and 26-6, in its formal Response to Public Comments document. *See* Doc. No. 26, at IR001969, IR002012-19. These four documents all appear to be properly designated as part of the Administrative Record under Section 19-1-301.5(8)(b)(vi), Utah Code Ann., governing agency responses to public comment. These records also appear to be properly designated as part of the Administrative Record pursuant to Section 19-1-301.5(8)(b)(ii), Utah Code Ann. as a substantive

explanation for the decision to issue the AOs. In addition, all five documents appear to have been properly included in the Administrative Record for the following reasons:

No. 26-3: A May 14, 2012 letter in which Tesoro supplements its NOI. Accordingly, the letter falls under the permit application category in Section 19-1-301.5(8)(b)(i). Since the agency notes in the response to public comments that the May 14, 2012 letter was submitted in response to a request from the UDAQ (Doc. No. 26, at IR001969), this letter also falls under the category of information requested by the Director and designated as part of the basis for the permitting decision. *See* Utah Code Ann. § 19-1-301.5(8)(b)(vii).

No. 26-4: Tesoro's June 7, 2012 Public Comment letter is part of the record as written public comment. *See* Section 19-1-301.5(8)(b)(v).

No. 26-5: Tesoro's June 25, 2012 letter withdraws its request in the NOI to remove a relaxed SOx limit in the AO. By requesting to withdraw a request for a new limit, Tesoro was supplementing its application, and the letter falls under the "permit application" provision. Utah Code Ann. § 19-1-301.5(8)(b)(i).

No. 26-6: Tesoro's July 25, 2012 letter responds to a request in a July 17, 2012 UDAQ letter that all parties agree is part of the record. *See* Order Re: Administrative Record and Scheduling, paragraph 1. In the July 17, 2012 letter, UDAQ asked Tesoro to "submit additional supporting information as well as explanations that respond to the concerns raised by the comments." Therefore, the July 25, 2012 letter is information requested by the Director and then "designated as part of the basis for the decision relating to the permit order." Utah Code Ann. § 19-1-301.5(8)(b)(vii).

No. 26-8: Tesoro's August 30, 2012 letter responds to UDAQ's August 29, 2012 letter (No. 26-7). UDAQ's August 29, 2012 requested that Tesoro submit additional information to address the ozone offset requirements of Utah Admin. Code R307-420. Therefore, Tesoro's August 30, 2012 letter in response is information requested

C. Petitioners' Right to Supplement Administrative Record

At its core, Petitioners' Objection appears to be based on due process concerns to the effect that Petitioners will not be afforded adequate opportunity to respond to new information that becomes part of the Administrative Record after closing of the public comment period.

While Utah law requires that a person desiring to intervene and appeal must first raise all substantive issues (factual and legal) relating to a permit during the public comment process (Utah Code Ann. §19-1-301.5(4); Utah Admin. Code R305-2-202) (the "Public Comment Rule"), I am

persuaded that Utah law affords Petitioners with the right to supplement their public comments, including submission of substantive evidence, as to any new information that becomes part of the Administrative Record in this matter that was not at issue and reasonably disclosed in connection with the public comment process, notwithstanding the Public Comment Rule. According to UDAQ's memorandum, Petitioners have "the option of moving to supplement the record with [their] comments on the additional material. Utah Code Ann. § 19-1-301.5(8)(c)(ii); Utah Admin. Code R305-7-209(1)(j). Alternatively, pursuant to Utah Code Ann. § 19-1-301.5(6)(c), [Petitioners] may address the additional material in its brief on the merits." UDAQ Response to Objection at 11. This approach to dealing with supplemental information admitted to the Administrative Record is fully consistent with the way the EPA addresses similar issues under federal law, as Tesoro has noted. *See* Tesoro Response to Objection at 10 (citing and attaching federal case law allowing intervenors/petitioners to supplement objections to respond to new information). Stated differently, it appears that neither UDAQ nor Tesoro will object to the Petitioners' attempt to supplement the Administrative Record with evidence and related legal arguments (in briefing on the merits) as to new information on the sole basis that Petitioners did not include such evidence or argument in connection with their public comments, as would otherwise have been required under the Public Comment Rule. It appears that, from a due process standpoint, the Public Comment Rule should not be interpreted to purport to apply to evidence and arguments that become part of the Administrative Record only after closure of the public comment period. To the extent that I misinterpret Respondents' position on this issue, I note that my conclusions as to Petitioners' rights to supplement the Administrative Record and associated legal argument notwithstanding the Public Comment Rule, are provisional and therefore subject to reconsideration in connection with briefing on the merits.

CONCLUSION

Petitioners' Objection appears to be premised on a misperception as to the opportunity Petitioners should and will be afforded in these proceedings to provide meaningful responses to evidence and argument that have and may in the future become part of the Administrative Record after closure of the public comment period. As discussed more fully above, Utah law and regulations afford Petitioners with a meaningful opportunity to present rebuttal evidence and argument as to new matters that form part of the Administrative Record. Based on the information presented to me in connection with the Objection, it appears that UDAQ has compiled the Administrative Record in compliance with Utah Admin. Code R305-7-209 and that the present Administrative Record properly includes all of the information presented to, and relied upon, by the UDAQ in connection with its decision to issue the AOs, and that such information properly includes certain information submitted to UDAQ by Tesoro after closure of the public comment period (the documents that are the subject of the Objection). My intention is to provide Petitioners with a reasonable opportunity in connection with these proceedings to present meaningful rebuttal evidence and related legal and technical argument as to the documents that are the subject of the Objection as well as any information that may yet become part of the Administrative Record.

ORDER

Based on the foregoing, the Objection is hereby DENIED.

DATED this 23rd day of May, 2013.



BRET F. RANDALL
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2013, a true and correct copy of the foregoing **ORDER ON OBJECTION TO ADMINISTRATIVE RECORD** was served by e-mail upon the following:

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