
**BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

In the Matter of:

**PETROLEUM PROCESSING PLANT
EMERY REFINING L.L.C Approval
Order Dated June 21, 2013, Project No.
N14627-0001
DAQE-AN146270001-13**

**ORDER RETURNING RECOMMENDED
ORDER RE MOTIONS TO STAY TO
ADMINISTRATIVE LAW JUDGE FOR
FURTHER ACTION**

**Amanda Smith
Executive Director
Department of Environmental Quality**

April 8, 2014

On the grounds and for the reasons set forth herein, the January 31, 2014
Recommended Order Re: Motions to Stay is returned to the Administrative Law Judge
(ALJ) for further action in accordance with the directions given in this Order.

Findings of Fact

1. Petitioners, Grand Canyon Trust, Living Rivers, Southern Utah Wilderness Alliance, and the Center for Biological Diversity (Collectively, the GCT) filed a Request for Agency Action (RFAA) dated July 22, 2013 challenging the June 21, 2013 Approval Order (AO) the Director of the Division of Air Quality (DAQ) issued to Emery Refining LLC to construct and operate a petroleum refinery near Green River, Utah. The statement regarding the preservation of issues contained in the RFAA alleges that specific technical inadequacies exist in the AO.

2. On August 15, 2013, I appointed Carol Clawson as Administrative Law Judge to conduct an adjudicative proceeding on the RFAA and submit to me a proposed dispositive action on this matter. Judge Clawson has jurisdiction under Utah Code Annotated § 19-1-301.5(5) over the July 22, 2013 Request for Agency Action.

3. On October 1, 2013, DAQ filed the administrative record identifying all of the issues, arguments, and comments received during the public comment period on the AO issued in June, 2013.
4. On October 10, 2013, Emery submitted a Notice of Intent (NOI) for a modified approval order. Emery subsequently filed a motion to stay further proceedings on the RFAA pending a determination on the NOI.
5. On October 15, 2013, GCT filed a motion to stay the AO based on the modifications proposed by Emery in the new NOI.
6. Judge Clawson's proposed Order dated January 31, 2014 recommends that the Executive Director enter a partial stay of the June, 2013 AO. The proposed Order does not include findings of fact or conclusions of law; nor does it contain references to the record.
7. Judge Clawson's Recommended Order invited the Parties to file comments on the decision with the Executive Director. The Parties therefore submitted written comments after the date of the Recommended Order. The following comments have been received: Utah Division of Air Quality's Comments on Recommended Order Re Motions to Stay, February 21, 2014; Emery Refining, LLC's Comments Opposing ALJ's Recommended Order Re Motions to Stay, February 21, 2014; Grand Canyon Trust's Response to Comments on Recommended Order Re Motions to Stay, March 5, 2014.
8. The Director, DAQ has prepared an Intent to Approve (ITA) Emery's October 10, 2013 NOI and has submitted the ITA to public comment. Public comment ends April 24, 2014. The Director has neither issued an Approval Order for that NOI nor denied it.

Conclusions of Law.

9. Judge Clawson's jurisdiction in this matter is limited to the June 21, 2013 AO and the issues, arguments and comments preserved in the October 1, 2013 administrative record. A person may not raise an issue or argument unless it was preserved. Utah Code Ann. § 19-1-301.5(6)(c). The ALJ shall conduct a proceeding based only on the administrative record. Utah Code Ann. §19-1-301.5(8)(a).

10. Judge Clawson's conclusion that Emery's October 10, 2013 NOI voided the Director's June 21, 2013 Approval Order, and Emery therefore has no permit, is rejected. The October NOI was not an issue raised or preserved in the record. Furthermore, a conclusion that the October NOI voided the June AO would terminate the ALJ's jurisdiction.

11. The June Approval Order is effective until it is superseded by a subsequent Approval Order, is otherwise terminated, is finally determined to be invalid, or is stayed in accordance with Utah Code Ann. § 19-1-301.5(15). Until such an event occurs, Emery may construct and operate under the existing Approval Order. If Emery violates that order, the rules, or the Air Conservation Act, Emery is subject to an enforcement action by DAQ.

12. The Director, DAQ has not issued an Approval Order for the October 10, 2013 NOI. There can be no Request for Agency Action challenging such an order before he issues it. Therefore, Judge Clawson has no jurisdiction over the October 10, 2013 NOI, and her recommended disposition of the GCT's Motion to Stay the June, 2013 AO cannot be based on that NOI.

13. If the Director, DAQ approves the October 10, 2013 NOI, and if his Approval Order is challenged, decisions will then be made regarding the management of a second Request for Agency Action.

14. The Director, DAQ must follow applicable decision-making procedures, including reviewing public comments, before he makes a decision on the October 10, 2013 NOI. That decision is not relevant to the Petitioners' challenge to the June 21, 2013 Approval Order.

15. The ALJ may not recommend to the Executive Director a stay of a permit unless the party seeking the stay demonstrates all four elements of the statute. Utah Code Ann. § 19-1-301.5(15). Judge Clawson's analysis of the elements necessary for a stay is predicated on the conclusion that Emery lacks a permit for the refinery it now intends to build. The rejection of that conclusion undermines the ALJ's analysis, and her recommended decision does not support her ultimate conclusion that GCT has satisfied all of the statutory elements required for a stay.

Directions to the Administrative Law Judge

16. The Administrative Law Judge has jurisdiction over the June 21, 2013 Approval Order. She is to review Petitioners' RFAA and Motion for Stay based on the October 1, 2013 administrative record for that order, as described in Utah Code Ann. § 19-1-301.5(8)(b), the Parties' pleadings concerning the Motion for Stay, and the Parties' comments on the ALJ's recommended Order on the Motion. She does not have jurisdiction over the October 10, 2013 NOI, and she is not to consider that NOI in determining whether the Petitioners have met the requirements described in Utah Code Ann. § 19-1-301.5(15)(d)(ii) for a stay of the June 21, 2013 Approval Order.

17. I give no instructions to Judge Clawson regarding Emery's motion to stay the proceedings on the June 21, 2013 Approval Order.

DATED this 8th day of April, 2014.



Amanda Smith
Executive Director
Department of Environmental Quality
195 North 1950 West
PO Box 144810
Salt Lake City, UT 84114-4810
Amandasmith@utah.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 8th Day of April, 2014, I caused a copy of the forgoing **ORDER RETURNING RECOMMENDED ORDER RE MOTIONS TO STAY TO ADMINISTRATIVE LAW JUDGE FOR FURTHER ACTION** to be e-mailed to the following:

Anne Mariah Tapp for Grand Canyon Trust, *et. al.*, atapp@grandcanyontrust.org

Charles R. Dubuc, Jr., rob.dubuc@westernresources.org

Christian Stephens, Assistant Attorney General, cstephens@utahgov.com

Steve Christiansen, Parr Brown Gee & Loveless, schristiansen@parbrown.com
Megan Houdeshel, Parr Brown Gee & Loveless, mhoudeshel@parbrown.com

Administrative Proceedings Record Officer, DEQAPRO@utah.gov



Debbie Oberndorfer
Administrative Assistant
Department of Environmental Quality