
**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**

**REQUEST FOR SUPPLEMENTAL
BRIEFING**

June 18, 2014

Administrative Law Judge Bret F. Randall

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.

Following briefing and oral argument on the merits, I have taken this matter under advisement.

After considering the briefs on the merits and oral argument, I would like to request that the parties submit supplemental briefing on the following issues, within one week of the date of this request. This request is optional.

Following close of the final public notice and comment period, UDAQ requested supplemental information from Tesoro regarding the BACT analysis. UDAQ accepted and

relied on this new information in connection with its decision on the permits at issue in these proceedings. However, UDAQ did not re-open the public notice and comment period as to the new, substantive information UDAQ received and relied upon only after the close of the public notice and comment period. As to this new, substantive information, the general public was not provided with the opportunity to consider the information or to provide comments for UDAQ. Given the central importance of BACT analysis in relation to the permits, this procedural setting gives me some pause.

The Utah Code provides a mandatory public notice and comment period for actions by UDAQ to establish or change emission control requirements and air quality standards, by rulemaking procedures. U.C.A. § 19-2-109.

By contrast, under Utah's permit review adjudicative process, public review and comment is not expressly required by statute as to any portion of the permits. Rather, the statute provides that *if* a public comment period is provided in connection with the permit, then persons objecting to the permit may only raise in an appeal such issues that they, in fact, raised during the public notice and comment period. U.C.A. § 19-1-301.5(4).

The permit review adjudicative proceeding statute is silent, however, as to how the ALJ is to address matters where no public notice and comment was provided.

The underlying permitting section of the Utah Code applicable to these proceedings provides in relevant part:

In addition to any other remedies, any person aggrieved by the issuance of an order either granting or denying a request for the construction of a new installation, and prior to invoking any such other remedies shall, upon request, in accordance with the rules of the department, be entitled to a permit review adjudicative proceeding conducted by an administrative law judge as provided by Section 19-1-301.5.

U.C.A. § 19-2-108(3).

The “rules of the department,” R305-7-203(5) provide that any person may appeal a permit by filing a request for agency action (RFAA) within thirty (30) days of the date of the permit or order. The rule also provides that the RFAA must specify all facts and relief requested, and that if public notice was provided, then the RFAA will be limited to issues that the moving party raised during the public comment period. Again, the rule is silent as to data and information the Director considers, and upon which the Director relies in making a decision as to a permit, but which data or information was submitted only after close of the public notice and comment period.

While there is no mandatory requirement for public notice as to permits and orders issued under U.C.A. § 19-2-108, the Utah Code does expressly provide that any person “aggrieved” by an order or permit is entitled to a permit review adjudicative proceeding. U.C.A. § 19-2-108(3). Advance notice and a reasonable opportunity to be heard being the touchstone of procedural due process, I have yet unresolved concerns about whether the process outlined by the Utah Code and regulations, and as followed in this instance, were sufficient to meet procedural due process requirements as to the Director’s final BACT analysis. It appears that reasonable advance notice is or should be required in order for members of the public to determine whether or not they have been “aggrieved” by a permitting decision, whether to file a RFAA, and if they file a RFAA within thirty days as required, what claims they might have and what relief they might be entitled to obtain. Without timely, advance notice of the substantive information upon which the Director relies in a permitting decision, it would seem to be difficult if not impossible for

members of the public, including Petitioners, to enforce their rights through a permit review adjudicative proceeding.

Notwithstanding my concerns about procedural due process, as applied to these proceedings, I have attempted in these proceedings to protect Petitioners' procedural due process rights as to the BACT analysis that was submitted after-the-fact. I previously concluded that Petitioners were excused from the limitations set forth in section 19-1-301.5(4) as to any and all information which the director received and relied upon after close of the public notice and comment period. Further I opened the administrative record in these proceedings to allow Petitioners the opportunity to submit any additional evidence. I also allowed Petitioners the opportunity to make any and all legal arguments regarding the substance of the BACT analysis in connection with these proceedings, including the waiver of all page limitations in their briefing. *See Order on Objections to the Administrative Record (May 23, 2013).*

Based on the foregoing, I would appreciate supplemental briefing by the parties to as to the procedural due process considerations outlined above and whether Petitioners' due process rights have been adequately protected in these proceedings. This request is optional, not mandatory. I would like to see any additional briefing within one week of the date of this request, but if additional time is desired, please propose a recommended due date by email served upon all parties.

DATED this 18th day of June, 2014.



BRET F. RANDALL
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June, 2014, a true and correct copy of the foregoing REQUEST FOR SUPPLEMENTAL BRIEFING was served by e-mail upon the following:

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