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

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In the Matter of: Revolution Fuels, LLC  
Coal to Liquid Facility, Air Quality Approval  
Order (DAQE-AN154900001-16)

**SIERRA CLUB’S PRE-HEARING  
BRIEF REGARDING THE STANDARD  
OF REVIEW**

Administrative Law Judge Bret F. Randall

October 28, 2016

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On July 26, 2016, Sierra Club filed a petition for review of the Utah Department of Environmental Quality’s (UDEQ) decision to issue a minor source Approval Order for a new coal-to-liquid facility near Wellington, Utah (DAQE- 4N154900001-16). Given the Utah Legislature’s 2015 changes to Utah Code Ann. § 19-1-301.5(14)(b), in the Notice of Further Proceedings and First Prehearing Order, the Administrative Law Judge (ALJ) requested special briefing on the standard of review governing these proceedings. The ALJ specifically requested briefing on “the intent of the legislature based on objective evidence.” Notice of Further Proceedings at 3.

The Legislature modified two aspects of the provision governing administrative review of permitting decisions:

(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]~~ not clearly erroneous based on the petitioner's marshaling of the evidence

2015 Utah Senate Bill No. 282, Utah Sixty-First Legislature - 2015 General Session (March 30, 2015) (old language stricken and new language highlighted) (attached as Exhibit 1).<sup>1</sup> The standard of review was changed from “supported by substantial evidence” to “not clearly erroneous,” and the scope of the review was changed from “the record as a whole” to “based on the petitioner’s marshaling of the evidence.” Utah Code Ann. § 19-1-301.5(14)(b) now provides “[o]n review of a proposed dispositive action, the executive director shall uphold all factual, technical, and scientific agency determinations that are not clearly erroneous based on the petitioner's marshaling of the evidence.”

Regarding the scope of review, the plain text of the new statutory language evinces legislative intent to limit permit challenges to issues raised during the public comment period and referenced in the petition. In addition to the changes in § 19-1-301.5(14)(b), the 2015 Utah Senate Bill No. 282 added section § 19-1-301.5(6)(f), which requires petitioners to demonstrate each issue in the petition for review was properly preserved by “citation to where the petitioner raised the issue or argument during the public comment period” and stating each document relied upon was “part of the administrative record” and cited “with reasonable specificity.” Ex. 1, 2015 Utah Senate Bill No. 282; *see also* § 19-1-301.5(d)(v)(D)(the petition for review shall include “an explanation of how each argument...was preserved”) & (H)(“if the agency director

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<sup>1</sup> Exhibit 1 is the Westlaw version of the bill, with new language highlighted and old language crossed out. There is also a version with new language underlined available online at the Utah State Legislature, available at <http://le.utah.gov/~2015/bills/static/SB0282.html>.

addressed a finding of fact or conclusion of law ... in a response to public comment, a citation to the comment and response that relates to the finding of fact or conclusion of law and an explanation of why the director's response was clearly erroneous or otherwise warrants review”).

Utah’s legislative hearings on the proposed Senate Bill No. 282 provide objective evidence on the intent behind the legislative change from “substantial evidence” to “clearly erroneous.” Specifically, the March 10, 2015 House Judiciary Standing Committee provides the most substantive conversation about the bill. See Exhibit 2.<sup>2</sup> After Senator Dayton introduced the bill, she deferred questions to Utah Department of Environmental Quality Executive Director Amanda Smith. *Id.* at p. 2. During the question period, Representative M. Nelson asked the precise question that the ALJ posed to the parties here: why was the standard of review changed from substantial evidence to clearly erroneous, “[i]s the intent to make a challenge more or less difficult, or is there any intent by, by, by that change in standard of review?” *Id.* at 3. The following exchange resulted:

UDEQ Executive Director Amanda Smith: The intent in that change is to make this process consistent with the process that it was modeled after originally, which is the EPA, Environmental Protection Agency’s permit decision through the Environmental Review Board. And that’s because, because we do have the delegated authority. When we went to simplify the process, what we, what we’re trying to remediate is that we had this hybrid process that confused many of the attorneys who practice in this area, in the appeals area in the agency, because it was somewhat following the EPA review board process, and somewhat following our old process. So this is an attempt to make those two things consistent. Again as the senator said, so that it makes it more, it makes it easier for the attorneys who practice in the area to understand what process we’re using, rather than jumping between two different appeals processes.

Rep. M. Nelson: **So there is not an intent to make a different stand-, standard, but just to conform to the federal standard, is that it?**

UDEQ Executive Director Amanda Smith: **That’s correct.**

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<sup>2</sup> The parties met and conferred and stipulate that the attached transcripts are accurate depictions of the hearings. Exhibit 2 is the March 10, 2015 House Judiciary Standing Committee Excerpted Transcript, and Exhibit 3 is the March 3, 2015 Senate Committee Excerpted Transcript.

*Id.* at 3-4 (emphasis added). Thus, the objective evidence shows the intent of Legislature was to conform Utah’s standard of review to the standard of review used by the EPA Environmental Appeals Board (EAB), and there was no “intent to make a different standard.” *Id.* at 4.

The legislative hearings show that main purpose of the bill was to establish timeframes for resolution of appeals. Senator Dayton introduced the bill to the House as “an effort to make the appeals process more convenient for those who disagree with DEQ, [and have] some timeframes put in place.” *Id.* at 2. Similarly, at the March 3, 2015 Senate Hearing, Mr. Craig Anderson, the Attorney General representing DEQ, stated “we feel that the changes will adequately deal with those concerns to expedite the hearing process.” Exh. 3 at 2. Again, at the House Floor Vote on March 12, 2015, Representative Grover explained that “this bill [does] have some language changes... But most important part of this bill is that ... they have [the ALJ] 45 days to get back to you....[and] gives some more, again, certainty to those people that are involved in that process of having their petitions reviewed....”<sup>3</sup>

### **The Clearly Erroneous and Substantial Evidence Standards**

Consistent with the legislative intent that the 2015 amendment was not designed to change the standard of review applied in section 19-1-301.5 proceedings, the EPA’s Environmental Appeals Board (EAB) “clearly erroneous” standard is substantially similar to the prior “substantial evidence” standard used in Utah’s permit review proceedings. As explained below, the EAB standard evaluates whether there was “considered judgment” and a “rational” approach that is “adequately explain[ed]” in the record. *In re Energy Answers Arecibo, LLC*

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<sup>3</sup> The parties have not transcribed this hearing, which is available in audio. The relevant portion can be heard by clicking on SB282S1; available at [http://utahlegislature.granicus.com/MediaPlayer.php?clip\\_id=18897&meta\\_id=552853](http://utahlegislature.granicus.com/MediaPlayer.php?clip_id=18897&meta_id=552853).

*Arecibo Puerto Rico Renewable Energy Project*, PSD 13-05, 16 E.A.D. -- (March 25, 2014).<sup>4</sup>

Similarly, the “substantial evidence” standard under Utah law evaluates whether there is “adequate” evidence and “reasonable and rational” findings “to convince a reasonable mind to support a conclusion.” *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas, & Min.*, 2012 UT 73, ¶ 11, 289 P.3d 558, 562 (2012).

Petitions for review of a permitting decision at the Environmental Appeals Board are governed by 40 C.F.R. § 124.19. The regulation provides that a petition “must demonstrate that each challenge to the permit decision is based on:(A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.” *Id.* § 124.19(4)(i).

A recent decision from the EAB explains the clearly erroneous standard:

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised his or her “considered judgment.” *See, e.g., In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g., In re Shell Offshore, Inc.* (“Shell Offshore 2007”), 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer “duly considered the issues raised in the comments” and ultimately adopted an approach that “is rational in light of all information in the record.” *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer’s technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510, 560-62, 645-47, 668, 670-74 (EAB 2006).

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<sup>4</sup> EAB Order, *available at* [https://yosemite.epa.gov/OA/eab\\_web\\_docket.nsf/Filings%20By%20Appeal%20Number/087FA0AC7FB0C0F685257CA60065AC33/\\$File/Energy%20Answers%20Arecibo.pdf](https://yosemite.epa.gov/OA/eab_web_docket.nsf/Filings%20By%20Appeal%20Number/087FA0AC7FB0C0F685257CA60065AC33/$File/Energy%20Answers%20Arecibo.pdf).

*In re Energy Answers Arecibo, LLC Arecibo Puerto Rico Renewable Energy Project*. The prior “substantial evidence” standard of review in a Utah permit review proceeding is substantially similar:

“[S]ubstantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Associated Gen. Contractors*, 2001 UT 112, ¶ 21, 38 P.3d 291 (internal quotation marks omitted). “[I]n determining whether a rule is supported by substantial evidence, courts must decide if the relevant findings were reasonable and rational, although such an assessment does not constitute a de novo review or a reweighing of the evidence.” ... Thus, the Board’s decisions “should be upheld if the quantum and quality of evidence the Board relied upon was adequate to convince a reasonable mind to support [the agency’s] conclusion.” *Associated Gen. Contractors*, 2001 UT 112, ¶ 22, 38 P.3d 291 (alteration in original) (internal quotation marks omitted).

*Utah Chapter of the Sierra Club v. Bd. of Oil, Gas, & Min.*, 2012 UT at 73, ¶ 11, 289 P.3d 558, 562.

The two standards appear to be very similar from the above-language; however, the standards are better understood by analyzing how they are applied in practice. The decision in *In re Steel Dynamics, Inc.*, where the EAB found some aspects of the agency’s decision to issue a permit to a new steel mill were clearly erroneous and others were not, helps elucidate how the EAB applies the standard. 9 E.A.D. 165 (EAB 2000). In that case, the EAB found the agency’s decision to reject Selective Catalytic Reduction (SCR) on economic infeasibility grounds clearly erroneous because the agency’s cost-effectiveness analysis was incomplete. *Id.* at \*29 (citing *In Re: Knauf Fiber Glass, GmbH*, 8 E.A.D. 121 (EAB 1999) (BACT determination clearly erroneous because permitting agency did not offer any explanation for rejecting legitimate questions on BACT design) & *In re Masonite*, 5 E.A.D. 551, 566 (EAB 1994) (BACT decision based on incomplete cost-effective analysis is clearly erroneous)). The EAB also found that the agency “clearly erred in choosing, without adequate explanation, [carbon monoxide] CO and [nitrogen oxide] NO<sub>x</sub> limits of a type completely different from those of the fifteen

representative steel mills used to determine BACT limits in this case.” *Id.* at 41. On the other hand, even where the agency failed to explain its choice of total particulate matter (PM) emissions, the EAB upheld the agency’s findings “where other information in record is adequate to deduce rationale behind limit and conclude that [the agency] applied considered judgment in setting limit.” *Id.* at 2; *see also* 2-5 (listing issues that EAB did not find clearly erroneous).

It is difficult to discern a difference between the EAB’s application of the clearly erroneous standard in *In re Steel Dynamics, Inc.* and how the Utah Supreme Court applied the substantial evidence standard to review a UDEQ permit decision granting a permit to a new coal-fired power plant in *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, 226 F.3d 719 (2009). In that case, the Sierra Club argued the Division’s factual findings supporting the Best Available Control Technology (BACT) emission limitation for nitrogen oxides were insufficient and lower emission rates for nitrogen oxides were possible. *Id.* at ¶ 47, 226 F.3d at 734. Because there was “scant evidence” to support the Division’s argument that the (lower) twenty-four-hour average and thirty-day average emission rate set in the permit were comparable, the Court found that it was “unreasonable for the agency to adopt the 0.1 twenty-four hour emission limitation when there was evidence that a lower overall emission limitation was achievable.” 2009 UT 76, ¶ 48, 226 P.3d 719, 734–35.

Utah Courts have interpreted the clearly erroneous standard from Utah R. Civ. P. 52(a)(4), which states that “[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity, to judge the credibility of the witnesses.” Although the standard has been developed in Utah caselaw, it has been applied where appellate courts are reviewing factual findings of lower courts, often involving witnesses, not where courts are reviewing agency

decisions based solely on a written administrative record. *E.g., In State ex rel. Z.D.*, 2006 UT 54, ¶ 1, 147 P.3d 401, 406 (2006) (reversal is required when a result is “against the clear weight of the evidence.”) In *In State ex rel. Z.D.*, where the court was reviewing witness credibility supporting a trial court determination that an infant child was abused, the court explained the rationale for the clearly erroneous standard:

Appellate courts...do not view first-hand witnesses’ “tells” of posture, inflection, or mood that strengthen or erode credibility. ...By the time the trial transcript reaches the hands of the appellate judge, the universal adjective describing its condition is “cold.” Thus, appellate courts have ample cause to defer to the judgment of trial judges on matters that cannot be reliably extracted and examined from such a two-dimensional record.

*Id.* ¶ 24, 147 P.3d at 404. The difference between the “clearly erroneous” standard developed under Utah R. Civ. P. 52(a)(4) and review of a UDEQ permit decision is that the UDEQ permit record does not involve the credibility of witnesses and is, in fact, a “two-dimensional record.” Thus, although the Utah Courts’ development of the “clearly erroneous” standard under Utah R. Civ. P. 52(a)(4) appears to be slightly different from the EAB’s standard, this is justified by the difference between court decisions involving the credibility of witnesses and an agency record.

### **The Executive Director’s Action Must Be Based on Substantial Evidence**

Another objective reason demonstrating that “clearly erroneous” must be substantially similar to the “substantial evidence” standard is that the Executive Director’s decision must be based on substantive evidence to withstand review at the appellate court. Utah Code Ann. § 19-1-301.5(15) governs judicial review of the Utah Court of Appeals of a dispositive action in a special adjudicative proceeding and requires that:

[T]he 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 not clearly erroneous based upon the petitioner's marshaling of the evidence.

Utah Code Ann. § 19-1-301.5(c)(emphasis added). In turn, Subsection 63G-4-403(4) of the Utah Administrative Procedures Act provides:

The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

...  
(g) *the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court.*

Subsection 63G-4-403(4)(emphasis added). *E.g., Utah Chapter of Sierra Club v. Air Quality Bd*, 2009 UT 76.

The task at hand, therefore, is to give meaning to Legislature's desire to bring the 301.5 proceedings more in line with EAB proceedings, while acknowledging that the Legislature made plain that its goal was not to change the applicable standard of review, and that the courts will continue to apply the standards of review the Legislature set out in 403(4) to judicial review of a 301.5 proceeding. Therefore, it is most appropriate to acknowledge that the EAB's interpretation of clearly erroneous is instructional and that an understanding of clearly erroneous that is in line with 403(4)'s substantial evidence is the best way to carry out the legislative intent. As reference to EAB cases does exactly that, this again underscores that this approach is appropriate.

### **CONCLUSION**

The 2015 modification to Utah Code Ann. § 19-1-301.5(14)(b) changed the standard of review of UDEQ's permitting decisions at the administrative level from "supported by substantial evidence" to "not clearly erroneous." The legislative history reveals the intent behind the change was to conform the state standard to the standard used at the EPA's Environmental Appeals Board, and there was no intent to change the standard significantly. This is confirmed

by the fact that the two standards are very similar in language, and it is difficult to detect a difference in how they are applied in practice. Though Utah has developed caselaw on the “clearly erroneous” standard under Utah R. Civ. P. 52(a)(4), these cases focus on review of trial court determinations that are based on witness credibility, which is not an issue when reviewing a written administrative record. Additionally, conflating the § 19-1-301.5(14)(b) standard with this Utah R. Civ. P. 52(a)(4) caselaw may conflict with appellate review of the administrative decision for substantial evidence under Subsection 63G-4-403(4) of the Utah Administrative Procedures Act. Thus, as the Legislature intended, the ALJ should apply the clearly erroneous standard from the EAB to this proceeding, which is very close the Utah substantial evidence standard.

DATED this 28th day of October 2016.

/s/ Andrea Issod

Andrea Issod  
Joro Walker  
Charles R. Dubuc, Jr.

*Attorneys for Sierra Club, et al.*



# Exhibit 1

2015 Utah Senate Bill No. 282, Utah Sixty-First Legislature - 2015 General Session

UTAH BILL TEXT

**TITLE: Substitute Administrative Law Judge Amendments**

VERSION: Adopted  
March 30, 2015  
Sen. Dayton, Margaret



[Image 1 within document in PDF format.](#)

SUMMARY: This bill modifies provisions relating to permit review adjudicative proceedings.

**TEXT:**

ADMINISTRATIVE LAW JUDGE AMENDMENTS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Margaret Dayton

House Sponsor:

Keith Grover

LONG TITLE

General Description:

This bill modifies provisions relating to permit review adjudicative proceedings.

Highlighted Provisions:

This bill:

# addresses the procedures governing an administrative review of an order relating to a permit issued by a director within the Department of Environmental Quality; and

# makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a coordination clause to reconcile conflicts between this bill and other legislation.

Utah Code Sections Affected:

AMENDS:

19-1-301.5, as enacted by Laws of Utah 2012, Chapter 333 and last amended by  
Coordination Clause, Laws of Utah 2012, Chapter 360

Utah Code Sections Affected by Coordination Clause:

19-1-301.5, as enacted by Laws of Utah 2012, Chapter 333 and last amended by  
Coordination Clause, Laws of Utah 2012, Chapter 360

Be it enacted by the Legislature of the state of Utah:

Section 1. [Section 19-1-301.5](#) is amended to read:

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)~~ ] **(15)**.

(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 ]~~ **that is cited with reasonable specificity and sufficiently enables** the director to fully consider the substance and significance of the issue.

(5) [The ] **(a) Upon request by a party, the** executive director shall [appoint ] **issue a notice of appointment appointing** an administrative law judge, in accordance with Subsections

19-1-301(5) and (6), to conduct a permit review adjudicative proceeding.

**(b) The executive director shall issue a notice of appointment within 30 days after the day on which a party files a request.**

**(c) A notice of appointment shall include:**

**(i) the agency's file number or other reference number assigned to the permit review adjudicative proceeding;**

**(ii) the name of the permit review adjudicative proceeding; and**

**(iii) the administrative law judge's name, title, mailing address, email address, and telephone number.**

(6) (a) Only the following may file a [~~request for agency action seeking~~] **petition for** 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~~] **petition for** review of a permit order shall file the [~~request;~~  
(~~†~~) ] **petition for review** 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 (e). ]~~

**(c) 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).**

**(d) A petition for review shall:**

**(i) be served in accordance with department rule;**

**(ii) include the name and address of each person to whom a copy of the petition for review is sent;**

**(iii) if known, include the agency's file number or other reference number assigned to the permit review adjudicative proceeding;**

**(iv) state the date on which the petition for review is served;**

**(v) include a statement of the petitioner's position, including:**

**(A) the legal authority under which the petition for review is requested;**

**(B) the legal authority under which the agency has jurisdiction to review the petition for review;**

**(C) each of the petitioner's arguments in support of the petitioner's requested relief;**

**(D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was preserved;**

**(E) a detailed description of any permit condition to which the petitioner is objecting;**



**(F) any modification or addition to the permit that the petitioner is requesting;**

**(G) a demonstration that the agency's permit decision is based on a finding of fact or conclusion of law that is clearly erroneous;**

**(H) if the agency director addressed a finding of fact or conclusion of law described in Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and response that relates to the finding of fact or conclusion of law and an explanation of why the director's response was clearly erroneous or otherwise warrants review; and**

**(I) a claim for relief.**

[~~(e) ] (e) A person may not raise an issue or argument in a [request for agency action ]~~

**petition for review** 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). ]~~

**(f) To demonstrate that an issue or argument was preserved in accordance with Subsection (4), a petitioner shall include the following in the petitioner's petition for review:**

**(i) a citation to where the petitioner raised the issue or argument during the public comment period; and**

**(ii) for each document upon which the petitioner relies in support of an issue or argument, a description that:**

**(A) states why the document is part of the administrative record; and**

**(B) demonstrates that the petitioner cited the document with reasonable specificity in accordance with Subsection (4)(b).**

(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 ]~~ **petition for review.**

**(c) The permittee is a party to a permit review adjudicative proceeding regardless of who files the petition for review and does not need to file a petition to intervene under Subsection (7)(b).**

~~[(e) ]~~ **(d)** 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 ]~~ **petition for review**, raises issues or arguments that are preserved in accordance with Subsection (4).

~~[(d) ]~~ **(e)** 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) ]~~ **(f)** 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) Unless the parties otherwise agree, the schedule for a permit review adjudicative proceeding is as follows:**

**(i) the director shall file and serve the administrative record within 40 days after the day on which the executive director issues a notice of appointment, unless otherwise ordered by the administrative law judge;**

**(ii) any dispositive motion shall be filed and served within 15 days after the day on which the administrative record is filed and served;**

**(iii) the petitioner shall file and serve an opening brief of no more than 30 pages:**

**(A) within 30 days after the day on which the director files and serves the administrative record; or**

**(B) if a party files and serves a dispositive motion, within 30 days after the day on which the administrative law judge issues a decision on the dispositive motion, including a decision to defer the motion;**

**(iv) each party shall file and serve a response brief of no more than 15 pages within 15 days after the day on which the petitioner files and serves the opening brief;**

**(v) the petitioner may file and serve a reply brief of not more than 15 pages within 15 days after the day on which the response brief is filed and served; and**

**(vi) if the petitioner files and serves a reply brief, each party may file and serve a surreply brief of no more than five pages within five business days after the day on which the petitioner files and serves the reply brief.**

**(b) (i) A reply brief may not raise an issue that was not raised in the response brief; and**

**(ii) a surreply brief may not raise an issue that was not raised in the reply brief.**

~~[(8) ]~~ **(9)** (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 ]~~ **petition for review**, the administrative record ~~[shall consist ]~~ **consists** 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) ]~~ **(9)**(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) ]~~ **(9)**(b)

with technical or factual information.

(iii) The administrative law judge may grant a motion to supplement the record described in Subsection [(8) ] **(9)(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)~~

~~(e)(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) ]~~ **(iv)** The department may, in accordance with Title 63G, Chapter 3, Utah

Administrative Rulemaking Act, make rules permitting further supplementation of the record.

~~[(9) ]~~ **(10)** (a) ~~[The ]~~ **Except as otherwise provided by this section, the** administrative law judge shall review and respond to a ~~[request for agency action ]~~ **petition for review** 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 ]~~

**briefs** in accordance with ~~[Section 63G-4-204 ]~~ **Subsection (8)**.

(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) ]~~ **(11)** (a) A person who files a ~~[request for agency action ]~~ **petition for review** has the burden of demonstrating that an issue or argument raised in the ~~[request for agency action ]~~

**petition for review** 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 ]~~ **petition for review** that has not been preserved in accordance with Subsection (4).

~~[(11) ]~~ **(12)** In response to a dispositive motion, **within 45 days after the day on which oral argument takes place, or, if there is no oral argument, within 45 days after the day on which the reply brief on the dispositive motion is due**, the administrative law judge ~~[may ]~~ **shall:**

**(a)** submit a proposed dispositive action to the executive director recommending full or partial resolution of the permit review adjudicative proceeding, that includes:

~~[(a) ]~~ **(i)** written findings of fact;

~~[(b) ]~~ **(ii)** written conclusions of law; and

~~[(c) ]~~ **(iii)** a recommended order~~[- ];~~ **or**

**(b) if the administrative law judge determines that a full or partial resolution of the permit review adjudicative proceeding is not appropriate, issue an order that explains the basis for the administrative law judge's determination.**

~~[(12) ]~~ **(13)** For each issue or argument that is not dismissed or otherwise resolved under Subsection ~~[(10) ]~~ **(11)**(b) or ~~[(11) ]~~ **(12)**, the administrative law judge shall:

(a) provide the parties an opportunity for briefing and oral argument **in accordance with this section;**

(b) conduct a review of the director's determination, based on the record described in

Subsections ~~[(8) ]~~ **(9)**(b), ~~[(8) ]~~ **(9)**(c), and ~~[(9) ]~~ **(10)**(e); and

(c) **within 60 days after the day on which the reply brief on the dispositive motion is due**, 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) ]~~ **(14)** (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 ]~~ **not clearly erroneous based on the petitioner's marshaling of the evidence.**

~~[(e) (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) ]~~ **(c)** 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) ]~~ **(d)** The executive director may use the executive director's technical expertise in making a determination.

~~[(14) ]~~ **(15)** (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) ]~~ **(9)**(b), ~~[(8) ]~~ **(9)**(c), ~~[(9) ]~~ **(10)**(e), and

~~[(13)(d) ]~~ **(14)**(c); 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 ]~~ **not clearly erroneous based upon the petitioner's marshaling of the evidence.**

~~[(15) ]~~ **(16)** (a) The filing of a ~~[request for agency action ]~~ **petition for review** 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) ]~~ **(16)**.

(c) The administrative law judge shall:

(i) consider a party's motion to stay a permit during a permit review adjudicative proceeding; and

(ii) **within 45 days after the day on which the reply brief on the motion to stay is due**, 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.

**(17) (a) Subject to Subsection (17)(c), the administrative law judge shall issue a written response to a non-dispositive motion within 45 days after the day on which the reply brief on the non-dispositive motion is due or, if the administrative law judge grants oral argument on the non-dispositive motion, within 45 days after the day on which oral argument takes place.**

**(b) If the administrative law judge determines that the administrative law judge needs more time to issue a response to a non-dispositive motion, the administrative law judge may issue a response after the deadline described in Subsection (17)(a) if, before the deadline expires, the administrative law judge gives notice to the parties that includes:**

**(i) the amount of additional time that the administrative law judge requires; and**

**(ii) the reason the administrative law judge needs the additional time.**

**(c) If the administrative law judge grants oral argument on a non-dispositive motion, the administrative law judge shall hold the oral argument within 30 days after the day on which the reply brief on the non-dispositive motion is due.**

Section 2. Coordinating S.B. 282 with S.B. 173 -- Superseding, technical, and substantive amendments.

**If this S.B. 282 and S.B. 173, Financial Assurance Determination Review Process, both pass and become law, it is the intent of the Legislature that the Office of Legislative Research and General Counsel, in preparing the Utah Code database for publication, modify Section**

**19-1-301.5 to read as follows:**

"19-1-301.5. Permit review and financial assurance determination special 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~~] **special** adjudicative proceeding; and

(ii) is subject to judicial review, in accordance with Subsection [~~(14)~~] **(15)**.

(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) "Financial assurance determination" means a decision on whether a facility, site, plan, party, broker, owner, operator, generator, or permittee has met financial assurance or financial responsibility requirements as determined by the director of the:**

**(i) Division of Radiation Control under Subsection 19-3-104(12); or**

**(ii) Division of Solid and Hazardous Waste under Subsection 19-6-108(9)(c).**

[~~(e)~~] **(d)** "Party" means:

(i) the director who issued the permit order **or financial assurance determination that is** being challenged in the [~~permit review~~] **special** adjudicative proceeding **under this section;**

(ii) the permittee;

(iii) the person who applied for the permit, if the permit was denied; [~~or~~]

**(iv) the person who is subject to a financial assurance determination; or**

[~~(iv)~~] **(v)** a person granted intervention by the administrative law judge.

[~~(d)~~] **(e)** "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)~~ ] **(f)** (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. ]

**(g) "Special adjudicative proceeding" means a proceeding under this section to resolve a challenge to a:**

**(i) permit order; or**

**(ii) financial assurance determination.**

(2) This section governs permit [~~review adjudicative~~ ] **special** 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~~ ] **special** adjudicative proceeding **under this section.**

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

(a) the person raised during the public comment period; and

(b) was supported with [~~sufficient~~ ] information or documentation [~~to enable~~ ] **that is cited with reasonable specificity and sufficiently enables** the director to fully consider the substance and significance of the issue.

(5) [~~The~~ ] **(a) Upon request by a party, the** executive director shall [~~appoint~~ ] **issue a notice of appointment appointing** an administrative law judge, in accordance with Subsections

19-1-301(5) and (6), to conduct a [~~permit review~~ ] **special** adjudicative proceeding **under this section.**

**(b) The executive director shall issue a notice of appointment within 30 days after the day on which a party files a request.**

**(c) A notice of appointment shall include:**

**(i) the agency's file number or other reference number assigned to the special adjudicative proceeding;**

**(ii) the name of the special adjudicative proceeding; and**

**(iii) the administrative law judge's name, title, mailing address, email address, and telephone number.**

(6) (a) Only the following may file a [~~request for agency action seeking~~ ] **petition for** review of a permit order **or financial assurance determination**:

(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~~ ] **petition for** review of a permit order **or a financial assurance determination** shall file the [~~request: (i)~~ ] **petition for review** within 30 days after the day on which the permit order **or the financial assurance determination** is issued[ ~~and~~ ].

[~~(ii) in accordance with Subsections 63G-4-201(3)(a) through (e).~~ ]

**(c) 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).**

**(d) A petition for review shall:**

**(i) be served in accordance with department rule;**

**(ii) include the name and address of each person to whom a copy of the petition for review is sent;**

**(iii) if known, include the agency's file number or other reference number assigned to the special adjudicative proceeding;**

**(iv) state the date on which the petition for review is served;**

**(v) include a statement of the petitioner's position, including, as applicable:**

**(A) the legal authority under which the petition for review is requested;**

**(B) the legal authority under which the agency has jurisdiction to review the petition for review;**

**(C) each of the petitioner's arguments in support of the petitioner's requested relief;**

**(D) an explanation of how each argument described in Subsection (6)(d)(v)(C) was preserved;**

**(E) a detailed description of any permit condition to which the petitioner is objecting;**

**(F) any modification or addition to a permit that the petitioner is requesting;**

**(G) a demonstration that the agency's permit decision is based on a finding of fact or conclusion of law that is clearly erroneous;**

**(H) if the agency director addressed a finding of fact or conclusion of law described in Subsection (6)(d)(v)(G) in a response to public comment, a citation to the comment and response that relates to the finding of fact or conclusion of law and an explanation of why the director's response was clearly erroneous or otherwise warrants review; and**

**(I) a claim for relief.**

~~(e) ] (e) A person may not raise an issue or argument in a [request for agency action ]~~

**petition for review** 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). ]~~

**(f) To demonstrate that an issue or argument was preserved in accordance with Subsection (4), a petitioner shall include the following in the petitioner's petition for review:**

**(i) a citation to where the petitioner raised the issue or argument during the public comment period; and**

**(ii) for each document upon which the petitioner relies in support of an issue or argument, a description that:**

**(A) states why the document is part of the administrative record; and**

**(B) demonstrates that the petitioner cited the document with reasonable specificity in accordance with Subsection (4)(b).**

(7) (a) A person who is not a party may not participate in a ~~[permit review ]~~ **special** adjudicative proceeding **under this section** unless the person is granted the right to intervene under this Subsection (7).

(b) A person who seeks to intervene in a ~~[permit review ]~~ **special** adjudicative proceeding under this section shall, within 30 days after the day on which the permit order **or the financial assurance determination** 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)[(e) ]~~ **(d)(ii)**; and

(ii) a timely ~~[request for agency action ]~~ **petition for review**.

**(c) In a special adjudicative proceeding to review a permit order, the permittee is a party to the special adjudicative proceeding regardless of who files the petition for review and does not need to file a petition to intervene under Subsection (7)(b).**

~~[(e) ]~~ **(d)** An administrative law judge shall grant a petition to intervene in a ~~[permit-review ]~~ **special** 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 ]~~ **special** adjudicative proceeding;

(B) demonstrates that the interests of justice and the orderly and prompt conduct of the

~~[permit-review ]~~ **special** adjudicative proceeding will not be materially impaired by allowing the intervention; and

(C) in the petitioner's ~~[request-for-agency-action ]~~ **petition for review**, raises issues or arguments that are preserved in accordance with Subsection (4).

~~[(d) ]~~ **(e)** 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) ]~~ **(f)** 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) Unless the parties otherwise agree, the schedule for a special adjudicative proceeding is as follows:**

**(i) the director shall file and serve the administrative record within 40 days after the day on which the executive director issues a notice of appointment, unless otherwise ordered by the administrative law judge;**

**(ii) any dispositive motion shall be filed and served within 15 days after the day on which the administrative record is filed and served;**

**(iii) the petitioner shall file and serve an opening brief of no more than 30 pages:**

**(A) within 30 days after the day on which the director files and serves the administrative record; or**

**(B) if a party files and serves a dispositive motion, within 30 days after the day on which the administrative law judge issues a decision on the dispositive motion, including a decision to defer the motion;**

**(iv) each party shall file and serve a response brief of no more than 15 pages within 15 days after the day on which the petitioner files and serves the opening brief;**

(v) the petitioner may file and serve a reply brief of not more than 15 pages within 15 days after the day on which the response brief is filed and served; and

(vi) if the petitioner files and serves a reply brief, each party may file and serve a surreply brief of no more than five pages within five business days after the day on which the petitioner files and serves the reply brief.

(b) (i) A reply brief may not raise an issue that was not raised in the response brief.

(ii) A surreply brief may not raise an issue that was not raised in the reply brief.

~~[(8) ]~~ (9) (a) An administrative law judge shall conduct a ~~[permit review ]~~ special 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 ]~~ petition for review, the administrative record ~~[shall consist ]~~ consists of the following items, if they exist:

(i) (A) for review of a permit order, the permit application, draft permit, and final permit; or

(B) for review of a financial assurance determination, the proposed financial assurance determination from the owner or operator of the facility, the draft financial assurance determination, and the final financial assurance determination;

(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 or the financial assurance determination;

(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 or the financial assurance determination;

(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 or the financial assurance determination;

(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) ]~~ (9)(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) ] **(9)(b)**

with technical or factual information.

(iii) The administrative law judge may grant a motion to supplement the record described in Subsection [(8) ] **(9)(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)(e)(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) ]~~ **(iv)** The department may, in accordance with Title 63G, Chapter 3, Utah

Administrative Rulemaking Act, make rules permitting further supplementation of the record.

~~[(9) ]~~ **(10)** (a) ~~[The ]~~ **Except as otherwise provided by this section, the** administrative law judge shall review and respond to a ~~[request for agency action ]~~ **petition for review** 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 ]~~

**briefs** in accordance with ~~[Section 63G-4-204 ]~~ **Subsection (8)**.

(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 ]~~ **special** adjudicative proceeding:

(i) may not participate in an ex parte communication with a party to the ~~[permit review ]~~ **special** adjudicative proceeding regarding the merits of the ~~[permit review ]~~ **special** 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 ]~~ **special** 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 ]~~ **special** adjudicative proceeding that is not a dispositive action.

~~[(10) ]~~ **(11)** (a) A person who files a ~~[request for agency action ]~~ **petition for review** has the burden of demonstrating that an issue or argument raised in the ~~[request for agency action ]~~

**petition for review** 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 ]~~ **petition for review** that has not been preserved in accordance with Subsection (4).

~~[(11) ]~~ **(12)** In response to a dispositive motion, **within 45 days after the day on which oral argument takes place, or, if there is no oral argument, within 45 days after the day on which the reply brief on the dispositive motion is due**, the administrative law judge ~~[may ]~~ **shall:**

**(a)** submit a proposed dispositive action to the executive director recommending full or partial resolution of the ~~[permit review ]~~ **special** adjudicative proceeding, that includes:

~~[(a) ]~~ **(i)** written findings of fact;

~~[(b) ]~~ **(ii)** written conclusions of law; and

~~[(c) ]~~ **(iii)** a recommended order~~[- ]~~; **or**

**(b) if the administrative law judge determines that a full or partial resolution of the special adjudicative proceeding is not appropriate, issue an order that explains the basis for the administrative law judge's determination.**

~~[(12) ]~~ **(13)** For each issue or argument that is not dismissed or otherwise resolved under Subsection ~~[(10) ]~~ **(11)**(b) or ~~[(11) ]~~ **(12)**, the administrative law judge shall:

(a) provide the parties an opportunity for briefing and oral argument **in accordance with this section;**

(b) conduct a review of the director's **order or** determination, based on the record described in Subsections ~~[(8) ]~~ **(9)**(b), ~~[(8) ]~~ **(9)**(c), and ~~[(9) ]~~ **(10)**(e); and

(c) **within 60 days after the day on which the reply brief on the dispositive motion is due**, 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) ]~~ **(14)** (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 ]~~ **not clearly erroneous based on the petitioner's marshaling of the evidence.**

~~[(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) ]~~ (c) In reviewing a proposed dispositive action during a ~~[permit review ]~~ **special** 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) ]~~ (d) The executive director may use the executive director's technical expertise in making a determination.

~~[(14) ]~~ (15) (a) A party may seek judicial review in the Utah Court of Appeals of a dispositive action in a ~~[permit review ]~~ **special** 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 ]~~

**special** adjudicative proceeding **under this section** to:

(i) the record described in Subsections ~~[(8) ]~~ (9)(b), ~~[(8) ]~~ (9)(c), ~~[(9) ]~~ (10)(e), and

~~[(13)(d) ]~~ (14)(c); and

(ii) the record made by the administrative law judge and the executive director during the ~~[permit review ]~~ **special** 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 ]~~ **not clearly erroneous based upon the petitioner's marshaling of the evidence.**

~~[(15) ]~~ (16) (a) The filing of a ~~[request for agency action ]~~ **petition for review** does not:



(i) stay a permit **order or a financial assurance determination**; or

(ii) delay the effective date of a permit **order or a portion of a financial assurance determination**.

(b) A permit **order or a financial assurance determination** may not be stayed or delayed unless a stay is granted under this Subsection [~~(15)~~ ] **(16)**.

(c) The administrative law judge shall:

(i) consider a party's motion to stay a permit **order or a financial assurance determination** during a [~~permit review~~ ] **special** adjudicative proceeding; and

(ii) **within 45 days after the day on which the reply brief on the motion to stay is due**, 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 **order or a financial assurance determination**, or a portion of a permit **order or a portion of a financial assurance determination**, 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 **order or a financial assurance determination** to the Utah Court of Appeals, in accordance with

Section 78A-4-103.

**(17) (a) Subject to Subsection (17)(c), the administrative law judge shall issue a written response to a non-dispositive motion within 45 days after the day on which the reply brief on the non-dispositive motion is due or, if the administrative law judge grants oral argument on the non-dispositive motion, within 45 days after the day on which oral argument takes place.**

**(b) If the administrative law judge determines that the administrative law judge needs more time to issue a response to a non-dispositive motion, the administrative law judge may issue a response after the deadline described in Subsection (17)(a) if, before the deadline expires, the administrative law judge gives notice to the parties that includes:**

**(i) the amount of additional time that the administrative law judge requires; and**

**(ii) the reason the administrative law judge needs the additional time.**

**(c) If the administrative law judge grants oral argument on a non-dispositive motion, the administrative law judge shall hold the oral argument within 30 days after the day on which the reply brief on the non-dispositive motion is due."**

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**NETSCAN**

## Exhibit 2

**HOUSE JUDICIARY STANDING COMMITTEE MEETING**

**Excepted Transcript**

**March 10, 2015**

Members: Rep. LaVar Christensen, Chair  
Rep. Merrill Nelson, Vice Chair  
Rep. Fred C. Cox  
Rep. Bruce Cutler  
Rep. Brian M. Greene  
Rep. Craig Hall  
Rep. Brian S. King  
Rep. Curtis Oda  
Rep. V. Lowry Snow  
Rep. Kevin J. Stratton  
Rep. Mark A. Wheatley

Other speakers:

Amanda Smith, Executive Director of the Utah Department of Environmental Quality  
Jeff Hartley, Red Leaf Resources

**COMMITTEE DISCUSSION AND VOTE RE: S.B. 282 ADMINISTRATIVE LAW  
JUDGE AMENDMENTS (SEN. M. DAYTON)**

Rep. Nelson	M.	That brings us to the third item on the agenda. Senator Dayton. Welcome. Senate Bill 282 Administrative Law Judge Amendments.
Sen. Dayton	M.	Thank you Representative Nelson and thank you Committee. And I'm sorry we've had to reschedule a couple of times. You've had a very interesting agenda.
Rep. Nelson	M.	We also apologize. We know that you, you've been patient working with us, so we're glad you could be here.
Sen. Dayton	M.	We all just make adjustments.
Rep. Nelson	M.	Yes.
Sen.	M.	I have with me um, Amanda Smith who is director of DEQ, and we are

Dayton	addressing another DEQ bill before you. Three years ago we made some changes in appeals. Let me explain that the various boards that are under DEQ on a regular basis will grant permits. Permit granting is only allowed after publicly announced and publicly held hearings and discussions. Not everybody agrees with the decisions that are made by these boards and thus, they have to have an opportunity to make an appeal. In legislation that was changed three years ago, we made it, we intended to make it easier for those people who have appeals to have a comfortable appeals process. This bill before you today is a refinement of what we did last year in an effort to make the appeals process more convenient for those who disagree with DEQ, there's some timeframes put in place. This doesn't change anything about public hearings. There are still public hearings. They have to be posted, they have to be open. It doesn't change the people who can present. It doesn't prevent people from hearing. What it does is it more carefully defines the role and the timeframe that the ALJ has to respond to the concerns and the protests. So, that is the bill and um, if you have questions, that's why Amanda Smith is here. And that concludes my presentation.
Rep. M. Nelson	Thank you very much. Let's go to the committee for clarifying questions. Representative King.
Rep. B. King	Thank you Mr. Chair. I'm, I'm looking at lines 249 through 251, right around there. And it indicates that there'll be timeframes within which there'll be resolution by the administrative law judges. There are a final, is there a timeframe within which a decision has to be made on a particular request for action?
UDEQ Executive Director A. Smith	Do you want me to answer that?
	Please.
UDEQ Executive Director A. Smith	My name's Amanda Smith. I'm the executive director of Department of Environmental Quality. And yes there is. If you follow on down, I believe it's line 270 if I'm kind of on the fly finding it. Within 60 days after the day submitted the executive dec-, director proposed dispositive action, maybe it's a little further. So I think that that is the timeframe for the final decision on that line. It starts there and then follows onto the next page. So basically in, in practical terms that means that after the way that I'm reading that, after the ALJ has a final decision or recommendation to the executive director, a decision within 60 days. Since the process changed three years ago with Senate Bill 21 and Senate Bill 11, I think I have reviewed 3-4 decision recommendations from ALJs, and my timeframe I usually try to make a final decision within 2 or 3 weeks. So that we're trying to, uh, make sure that the record is, is put together and that the executive director is tracking along with

	the process so that there isn't un-, undue delay in those final decisions. So that, as you know, the next step is an appeal to district court, and we want to make sure that we're not delaying those actions going forward either.
Rep. B. King	Is there any sort of reporting process, I mean, in the judiciary, there's a reporting process within which the judges have to report on how long a case has been pending, how long a motion's been under advisement—that kind of thing. I mean, what's the remedy if, an ALJ just doesn't make a decision in a timely way?
UDEQ Executive Director A. Smith	That is a very good question. I'm not sure that there is a remedy at this time. And maybe that will be a further refinement.
Rep. B. King	Do, do you know how long the ALJs have had things under advisement? I mean is there a reporting mechanism to you?
UDEQ Executive Director A. Smith	There is. So, um, our assistant attorney general Craig Anderson and his staff keep a list of the pending matters, which ALJs they're before. And so we have very good records about where things are in the process. I guess the incentive for the ALJs to be timely before this or to report are that they are contract ALJs, and if they're not meeting the needs of the department, I guess our remedy would be to end the contract and find ALJs who were willing to work under that circumstance.
Rep. B. King	Okay, thank you.
Rep. M. Nelson	Thank you very much. I see no other lights, so let me ask a clarifying question if I could. On lines 278, and I see again on lines 305 and 306, it looks like there's a shift in the, in the standard of review changing from substantial evidence to a clearly erroneous standard. Do you know why that is? Is the intent to make a challenge more or less difficult, or is there any intent by, by, by that change in standard of review?
UDEQ Executive Director A. Smith	The intent in that change is to make this process consistent with the process that it was modeled after originally, which is the EPA, Environmental Protection Agency's permit decision through the Environmental Review Board. And that's because, because we do have the delegated authority. When we went to simplify the process, what we, what we're trying to remediate is that we had this hybrid process that confused many of the attorneys who practice in this area, in the appeals area in the agency, because it was somewhat following the EPA review board process, and somewhat following our old process. So this is an attempt to make those two things consistent. Again as the senator said, so that it makes it more, it makes it easier for the attorneys who practice in the area to understand what process we're using, rather than jumping between two different appeals processes.

Rep. Nelson	M.	So there is not an intent to make a different stand-, standard, but just to conform to the federal standard, is that it?
UDEQ Executive Director Smith	A.	That's correct.
Sen. Dayton	M.	And Representative if I can respond to that as well.
Rep. Nelson	M.	Sure.
Sen. Dayton	M.	Um, I, I am not, I'm not sure everybody's thrilled with DEQ and what they do. But I would much rather that we have our own state DEQ than dealing with the EPA, which was our alternative. We can have our own DEQ and set our standards that conform with what EPA, the guidelines they give us. Or if we don't have our own state-driven DEQ, then we would have to work directly with Region 8 EPA in Colorado. It doesn't really meet the needs of Utah, it doesn't really work for us. And I am really grateful that DEQ will work with, within their parameters to try to make it convenient for us in the state to have a say in the issues that they address. That's another reason I felt good about bringing this bill forward. The public deserves and needs to have these hearings. And they deserve and need to have an option to protest if they don't agree with the decision. And they deserve to have a timeline on that decision-making process. And that would be the refinement that we're bringing for you today.
Rep. Nelson	M.	Very good. I see no other lights. Is there anyone in the, in the public that would like to comment on Senate Bill 282? I see one hand. Would you come forward, please? Mr. Hartley. State your name for the record and who you might represent.
J. Hartley		Thank you Mr. Chairman. My name is Jeff Hartley. I'm here representing Red Leaf Resources, an oil shale extraction company. We appreciate the opportunity to speak to this committee. I spent a lot of time with the Natural Resources Committee and with other committees and don't get to spend any time with, with you all I'm talking about oil and oil shale. But I'd just like to let you know Red Leaf Resources is a Utah company. It has Utah technology, with over 20 US patents. It has several thousand school trust lands acres under lease. It has, it has several different blocks it has under lease with SITLA. It has the potential to develop several million barrels of oil on its trust lands leases. It pays royalties a scale up to 12 and-1/2% to SITLA, which on \$100 oil is significant, on \$50 oil is half as sig-, half as significant, but still on \$50 oil, on Red Leaf's conservative estimates of the oil they have in their oil shale would equal over the life of their oil shale leases \$3 billion to

	<p>the trust lands fund—which is significant to the state of Utah. So when Red Leaf is seeking permits from DEQ, our, our permits are significant to the state of Utah. We are in the process of the ALJ review. And I won't speak specifically to that process because it is currently underway, but we appreciate Senator Dayton creating the process three years ago for DEQ. And we appreciate the opportunity to tighten that process up a little bit.</p> <p>It's, it is significantly better as Senator Dayton indicated than going through an EPA process, and we're lucky that we have a state DEQ that we can work with. But it's, I think most importantly for this committee, it's important to understand that this is a, this process is set up with an administrative law judge to review appeals to our permits. These are permits that are fully vetted, these are permits that have been reviewed for a significant amount of time. They are carefully gone over and carefully reviewed by the permitting agencies because they know they will be appealed. The permits are pretty airtight when they are given, and because of that, this, the appeal process doesn't need to be lengthy, it doesn't need to be burdensome and cumbersome. It just needs to be reviewed to make sure they didn't miss anything. And I think that's important to know when you're looking at the review and um, our desire, um and it seems this legislation's desire to apply brevity to the process, because there has been a thorough vetting.</p> <p>Red Leaf Resources has a water quality permit that it sought, even though there's no discharge water from their process. It has a discharge water permit that it really didn't need. But it sought it anyway. That went through appeal. And it was, um, that whole process has taken a couple of years. A couple of years that the company didn't really need to go through, but it went through to get that step out of the way in advance of going into production. And as with any resource development, time costs money, and they're in the process of building a \$300 million commercial demonstration project, and the time cost of money is significant at that level. So, I, we, I appreciate Senator Dayton bringing this forward. We would appreciate the committee's support of this bill. Thank you.</p>
Rep. M. Nelson	So, Mr. Hartley, you're in support of the bill and its new procedures, new timelines?
J. Hartley	Correct.
Rep. M. Nelson	Good. So who's taking the appeals? I assume some third-party doesn't like that you received a permit.
J. Hartley	That's correct. It's protested by a consortium of environmental groups.
Rep. M. Nelson	Okay, good. Any further questions for this witness? Seeing none. Any further comment from the public? I see none. So we'll come back to the committee for action. Representative Stratton.



Rep. Stratton	K.	Thank you Mr. Vice Chair. I move that we pass out Senate Bill 282 Administrative Law Judge Amendments with a favorable recommendation. I'd like to speak to that.
Rep. Nelson	M.	Very good. Go ahe-, the motion is to pass out Senate Bill 282 with a favorable recommendation. Representative Stratton to that motion.
Sen. Dayton	M.	First sub, right?
Rep. Nelson	M.	Um . . .
Sen. Dayton	M.	Is that what you have in front of you?
Rep. Nelson	M.	I do not have a sub.
Sen. Dayton	M.	I'm glad we clarified that.
Rep. Nelson	M.	We need to move . . .
Rep. Stratton	K.	I'll withdraw and move to adopt that if we need to do that.
Rep. Nelson	M.	Did you want a sub adopted?
Sen. Dayton	M.	I'm sorry. I, I thought you had that. Let me just, there is, there is no substantive change in this bill. There's an alignment of technicalities. But rather than just trying to do a huge amendment, there is no substantive change and I apologize. I thought you had the first sub in front of you.
Rep. Nelson	M.	There is one on the machine.
Sen. Dayton	M.	Okay.
Rep. Nelson	M.	But we have . . .
Sen. Dayton	M.	So we do need to make that substitute.

Rep. Nelson	M.	Okay.
Sen. Dayton	M.	And we have been speaking to the first substitute the whole time.
Rep. Nelson	M.	Very good. And under our procedures, we wait until committee action to adopt those. And so Representative Stratton, if you'd want to withdraw your motion, and, and make another motion.
Rep. Stratton	K.	Just give me, yes, I would like to withdraw my previous motion. And I would like to move that we pass out . . .
Rep. Nelson	M.	First of all.
Rep. Stratton	K.	I would like, thank you Mr. Chair. Vice Chair. I'd like to move that we adopt Senate Bill 282 First Substitute.
Rep. Nelson	M.	Very go-, very good. So the motion is to adopt, uh, uh . . .
Rep. Stratton	K.	Adminis- . . .
Rep. Nelson	M.	First Substitute. Yeah.
Rep. Stratton	K.	Administrative Law Judge, Ame-, Judge Amendments, thank you, sorry.
Rep. Nelson	M.	First Substitute Senate Bill 282 in place of Senate Bill 282. And would you like to speak to that motion Representative Stratton?
Rep. Stratton	K.	I'll waive.
Rep. Nelson	M.	To the sponsor, would you like to speak to that motion to substitute?
Sen. Dayton	M.	Not to substitute except to apologize that I didn't say it sooner.
Rep. Nelson	M.	That's fine, thank you. Any other discussion among the committee? I see none, and so back to Representative Stratton. Any summing, any summing on this?

Rep. Stratton	K.	I'll waive.
Rep. Nelson	M.	Waived. And so we'll place it for a vote. All in favor of the motion to substitute, First Substitute Senate Bill 282 in place of original Senate Bill 282, please say "aye."
		Aye.
Rep. Nelson	M.	Any opposed? The motion to substitute passes unanimously. And now back to Representative Stratton.
Rep. Stratton	K.	Thank you. With that, I move that we pass out Senate Bill 282 First Substitute Administrative Law Judge Amendments with a favorable recommendation. I'm glad to speak to that.
Rep. Nelson	M.	Very good. The motion is to pass out First Substitute Senate Bill 282 with a favorable recommendation. Representative Stratton to that motion.
Rep. Stratton	K.	Thank you. I appreciate the work of the sponsor. This First Substitute strengthens the bill adding a coordination clause with the other agencies, and that's very important. I would just state as we look at our public lands and the resources are held there, but also in our privately, this is a key avenue that our, those are seeking to do and carry forth business response matter within our state have this as a tool. I do greatly appreciate the sponsor and those that have supported this work and invite us all to pass this out favorably. Thank you.
Rep. Nelson	M.	Thank you. No other comment to the motion. Back to the sponsor for summation.
Sen. Dayton	M.	Thank you. I appreciate you hearing this and lest I sound like I was denigrating DEQ, which I didn't mean to, because I just like them better than EPA. Let me just, okay it's getting worse. Let me try to do this better. I need to say the work of DEQ is important. But what I really want to acknowledge is the service that's given by the people on the boards, which is volunteer service. And the boards are made up of, by code, by members of local government and organized environmental groups and regulated industries. And it's very important that all these people and experts in these technical fields come and review all of these issues. And it's donated time, for which we are, as a state, all indebted. But their work, in spite of the fact that it's donated and valuable, it also needs to have the opportunity to be challenged by those who disagree. And so as I said earlier, the purpose of this is to make it more efficient for those who want to challenge whatever permits are granted. So with appreciation for your time, I would speak in support of the motion and ask you to pass the bill.

Rep. Nelson	M.	Very good. Thank you. Back to Representative Stratton for summation.
Rep. Stratton	K.	Government closer to the people is always better. And we're grateful for the work of our good environmental quality unit here in the state. Thank you.
Rep. Nelson	M.	Very good. We'll place the motion to pass out favorably Substitute House Bill 282 with a favorable recommendation. All in favor say "aye."
		Aye.
Rep. Nelson	M.	Any opposed? The motion passes unanimously.
Sen. Dayton	M.	Thank you Committee.
Rep. Nelson	M.	Thank you Senator.

## Exhibit 3

**SENATE GOVERNMENT OPERATIONS AND POLITICAL SUBDIVISIONS  
STANDING COMMITTEE**

**Excerpted Transcript**

**March 3, 2015**

Members: Sen. Margaret Dayton, Chair  
Sen. Lyle W. Hillyard  
Sen. David P. Hinkins  
Sen. Alivin B. Jackson  
Sen. Daniel W. Thatcher

Members Excused: Sen. Luz Escamilla

Other speakers:

Craig Anderson, Office of the Attorney General Environmental Division,  
Division Chief  
James Holtkamp, attorney and Chair of the Utah Manufacturers Association Air  
Quality Committee.  
Jeff Hartley, Red Leaf Resources

**COMMITTEE DISCUSSION AND VOTE RE: S.B. 282, ADMINISTRATIVE LAW  
AMENDMENTS (SEN. M. DAYTON)**

Sen. D. Hinkins	This will be Senate Bill 282; Administrative Law Judge Amendments. Sounds complicated.
Sen. M. Dayton	Thank you committee, this is another bill dealing with DEQ, I appreciate you letting me bring again before you this bill. You might recall that three years ago, 2 or 3 years ago, we did some major changes in board construction and appeals process. This particular bill addresses the procedures governing administrative review of an order relating to a permit by the director of DEQ. I have with me today to help present, Mr. Holtkamp, who will start first. He's part of my presentation and we'll begin with him.
J. Holtkamp	Good morning, Mr. Chairman. My name is Jim Holtkamp. I am an attorney representing the Utah Manufacturers Association and Chair of their association's air committee. As Senator Dayton indicated, a few years ago, the legislature enacted some changes to the permit appeal process for environmental permits. And as part of that process, if someone appeals an environmental permit, the Department of Environmental Quality assigns the appeal to an administrative law judge. Senate Bill 282 improves that process and does a number of things; I'll cover very, very briefly.

	<p>First of all, it makes some housekeeping changes to streamline the appeal process. We should note that this bill is a product of a joint effort by the Attorney General’s Office, the Department of Environmental Quality and attorneys from the regulated community. It streamlines the process. It reduces unnecessary costs for the state but at the same time it ensures due process of law. And very briefly, this is what the changes do. First of all, it eliminates some unnecessary procedural steps that are in the current law. Secondly, it provides some deadlines for responding to various items in the, that are applicable to both the agency and to the ALJ, for example, once an appeal is filed, the bill would require that an ALJ; an administrative law judge be appointed within 30 days of the filing of the bill. It requires responses to certain motions within 45 or 60 days as the case may be. It incorporates the standard schedule for briefing on the merits. It clarifies that the person or the entity appealing the permit must show that the agency’s findings are clearly erroneous and it also explicitly provides that in the appeal, what we call the petition for review in the bill that the appellant has to demonstrate that the person or the entity raise the issues during the public comment period on the, on the permit. It also clarifies that the permittee is automatically a party. Believe or not under current law, if it’s your permit that’s being appealed, you’re not a party to the appeal unless you file a motion to intervene. And then finally it allows there to be communication with the director of DEQ, which will allow for informal resolution of some of these issues. So, Utah Manufacturers Association is supportive of this measure and we appreciate very much the ability or the opportunity to work with both the Attorney General’s Office and with the Department of Environmental Quality on it. Thank you.</p>
Sen. M. Dayton	<p>Thank you. I appreciate his comments and I also have Mr. Craig Anderson, who is the Attorney General representing DEQ and did you want to be a part of the presentation or just respond to their questions?</p>
C. Anderson	<p>I’m here to respond to any questions that you may have regarding the technical issues and changes made to the bill. Adding to what Mr. Holtkamp has said, I would indicate that the proposed changes are the result of our actual experience with the hearing process under the statute as it’s currently written and through this process, we have had some real experiences with hearing processes. We’ve had interactions with the ALJs, who represent the department during that process and we feel that the changes will adequately deal with those concerns to expedite the hearing process and furthermore to make sure that all technical issues that may come up regarding any permit reviews are handled during the public comment period where everyone is involved in the process.</p>

Sen. M. Dayton	Okay, thank you.
	That completes my presentation. We're open for questions.
Sen. D. Hinkins	Thank you. Any questions for the committee? Seeing none. Do we have anyone from the public who would like to speak on this, if you could come forward and state your name.
J. Hartley	<p>My name is Jeff Hartley. I'm here representing Red Leaf Resources. I appreciate the opportunity to speak on behalf of Red Leaf Resources an oil shale developer in Uintah County, with over 50,000 acres of school trust lands under lease in the Uintah Basin. We appreciate Senator Dayton bringing the original legislation forward 3 years ago to help expedite the appeal process. I think first and foremost, it should be noted that when these permits are granted through the Department of Environmental Quality, there's, there is a full, there's a full review and vetting process before the permits granted. The, the administrative law judge processes on the appeal and that's after a complete permitting process takes place and those processes are long. They are extensive. They're thorough. These divisions within DEQ know that there'll be an appeal process. They know that they'll be challenged. They go through a very thorough process to make sure that the permits are air tight before they grant them and because of that the ALJ process is helpful in expediting the appeal process because it's already been a long process by the time it gets to that point and for companies that have invested millions of dollars to get there, delaying that process even further is hard. And we want to get into development as quickly as possible and I'd just like to give you a little bit of flavor of what that means to a company. Red Leaf's revolutionary oil shale extraction technology has built more than 20 patents. It was developed here in Utah. The company is based here in Utah. The technology is from Utah. Red Leaf has an estimated 550 million barrels of recoverable oil on the 50,000 acres of trust lands, that it leases from SITLA. The SITLA royalties that Red Leaf will pay over time, scale up to 12 ½ percent, which on \$50 oil and we hope that there's a settling point north of \$50 oil, but on \$50 oil that will, that will exceed \$3 billion to SITLA over time. So as the legislature looks to solve the education funding challenges, we hope to be part of that. But that's \$3 billion from one company over time if we're able to develop our resources, which requires our permits. I share the background to tell the committee that when companies, like Red Leaf face delays in permitting procedures, ___ subtle impact to the company but it's impactful to the state. Again, we appreciate Senator Dayton bringing this forward I think that Mr. Holtkamp outlined the, what the, what this bill does to help streamline the process adequately. And so, I won't go back over the details of it, but I would just like to say as a company that has been going through this process with an administrative law</p>



	<p>judge, we appreciate that Senator Dayton is trying now to tighten up the timelines and tighten up the process so that it can't be delayed unnecessarily. We recognize that it's important the state regulate us as a company. We recognize that it's important that we seek permits and that we have requirements upon us. We don't want to get around that process, we just want it to be done quickly and done correctly and again we appreciate the opportunity to, to have this done in a more expedited and smooth process and appreciate this bill coming forward. Thank you.</p>
Sen. D. Hinkins	<p>Thank you. Does anyone else would like to speak for or against this bill, if not we'll come back to the committee for action. Senator Jackson.</p>
Sen. A. Jackson	<p>Yeah, I would like to make a motion that we report Senate Bill 282 from this committee and to the floor for further action.</p>
Sen. D. Hinkins	<p>Thank you. Senator Dayton would you like to respond or to?</p>
Sen. M. Dayton	<p>Yes. I appreciate the motion. And I just want to reiterate again, it's so important when these permits are granted that the people understand they're not granted without having public hearings with opportunity for input from all the stakeholders those for and against and the expedited time process is a time saver for everybody who's interested in the whole issue. So I hope you will support the motion.</p>
Sen. D. Hinkins	<p>Okay. Back to the committee for, would you like to sum? Waive?</p>
Man	<p>Waive</p>
Sen. D. Hinkins	<p>All those in favor of passing out Senate Bill 282 with a favor of recommendation to the Senate floor, say Aye.</p>
	<p>Aye.</p>
Sen. D. Hinkins	<p>Aye. Opposed if anybody? I guess that's unanimous. Would you like this on consent?</p>
Sen. M. Dayton	<p>I would love it on consent.</p>
	<p>Senator Jackson would you like to nominate this for consent?</p>
Sen. A. Jackson	<p>Yeah. I would make a motion that we put it on the consent calendar, yes.</p>
Sen. D. Hinkins	<p>Since no opposition to this, I would propose that all those in favor say aye.</p>

	Aye.
Sen. D. Hinkins	Oppose if any, it is unanimous and it will be on consent. Thank you.
	Thank you.