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

In re: Intent to Approve: Waxy Crude Processing Project: N10335-0058 (UDAQE-IN103350058-12) and Gasoline Loading Limit at TLR: N10335-059 (UDAQE-IN103350059-12)

Tesoro Refining and Marketing Company

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DISPOSITIVE ACTION

September 9, 2014

Administrative Law Judge Bret F. Randall

BACKGROUND

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

These permit review adjudication proceedings concern the following approval orders (“AO”) issued by UDAQ to Tesoro:

- DAQE-AN103350058-12; Approval Order: Waxy Crude Processing Project, which will be referred to as the “WCP AO” throughout this Proposed Dispositive Action. [IR2725-45; 2806-28].
- DAQE-AN103350059-12; Approval Order: Removal of gasoline loading limit at Transfer Loading Rack under the Waxy Crude Processing Project, which will be referred to as the “TLR AO” throughout this Proposed Dispositive Action. [IR2776-83], though sometimes the WCP AO and the TLR AO are referred to generally as the “permits.”

The underlying permitting process began when Tesoro filed a Notice of Intent (“NOI”) in September 2011, asking UDAQ to authorize changes to Tesoro’s Salt Lake City Refinery that

would allow Tesoro to process additional waxy crude produced in Utah's Uintah Basin. [IR0001-234]. Tesoro submitted an amended NOI for its Waxy Crude Processing Project ("WCPP") on December 21, 2011. [IR0263-571].

In February of 2012, UDAQ completed a Source Plan Review, also known as the engineering review, for the AOs. [IR0663-95 (SPR for WCP AO); IR0651-62 (SPR for the TLR AO)]. On February 16, 2012, UDAQ issued an Intent to Approve ("ITA") both the WCP AO and the TLR AO. [IR0701-25 (ITA for the WCP AO); IR0726-34 (ITA for the TLR AO)]. The ITA opened the proposed AOs to public comment and included all proposed permit conditions that would apply to Tesoro if the WCP and TLR AOs were approved. [*Id.* (permit conditions); IR0696-700, 0736 – 40 (public notice)].

The public comment period included two extensions and remained open through June 7, 2012. [IR0744, 747]. Utah Physicians for a Healthy Environment and the Utah Chapter of the Sierra Club (collectively "Petitioners") filed comments on the proposed AOs jointly on April 23, 2012. [IR1101-57]. On June 7, 2012, Tesoro submitted its own comments. [IR2452-71].

After considering public comments, on July 17, 2012, UDAQ requested additional information from Tesoro on two issues, one of which is relevant to these adjudicative proceedings. Specifically, UDAQ requested Tesoro provide "additional information" for its analysis of Best Available Control Technology ("BACT") contained in Tesoro's NOIs. [IR2887-88]. Tesoro responded to UDAQ's request for additional information and justification on July 25, 2012, by providing a supplement to the NOI that contained a detailed analysis

providing “additional support” (in the form of a five-step BACT analysis) for Tesoro’s analysis of BACT for its Fluidized Catalytic Cracking Unit.¹ [IR2473-94].

UDAQ issued a Response to Public Comments on August 22, 2012. [IR1966-2020]. Ultimately, UDAQ determined that the WCP AO and TLR AO met all applicable requirements, and, as such, UDAQ issued both AOs to Tesoro on September 13, 2012. [IR2725-45 (WCP AO); IR2776-83 (TLR AO)].²

On October 15, 2012, Petitioners filed a Request for Agency Action (“RFAA”) challenging both AOs. [RFAA, p. 1]. In their RFAA, Petitioners identified eighteen individual claims that they intended to pursue in these permit review adjudicative proceedings. [Pet. RFAA, claims labeled A through Q with two E subsections].

On April 9, 2013, UDAQ filed the administrative record pursuant to Utah Code section 19-1-301.5(8)(b)(ii) and Utah Administrative Code Rule 305-7-209(3). [Notice of Submission of Admin. Rec., April 9, 2013]. Petitioners moved to exclude from the record four documents submitted by Tesoro to UDAQ during the permitting process—including the June 7, 2012 comment response letter and the July 25, 2012 supplement. [Pet. Obj. to Admin. Rec., April 24, 2012].

Pursuant to Order, I denied Petitioners’ Objection and found that it was proper to include the documents submitted by Tesoro in the administrative record. [Order on Obj. to the Admin. Rec., May 23, 2012]. Among other things, I determined that by designating these documents as

¹ The July 25 supplement also contained analyses for two crude tanks, the Distillate Desulfurization Unit and the Vapor Recovery Unit. [IR2476, 93].

² Subsequently, UDAQ issued two administratively revised versions of the WCP AO on December 6, 2012 and February 12, 2013 to correct minor errors in the WCP AO. [IR2784-2805; 2806-28].

part of the official administrative record under section 19-1-301.5(8)(b)(ii), UDAQ affirmed that the documents formed part of the agency's basis for issuing the AOs. [*Id.*, p. 6-7]. At the same time, however, in recognition of the fact that the director relied upon information that was not part of the administrative record during the public comment period, I concluded that "Utah law affords Petitioners . . . the right to supplement their public comments, including submission of substantive evidence, as to any new information that becomes part of the Administrative Record in this matter that was not at issue and reasonably disclosed in connection with the public comment process." [*Id.* p. 8]. This conclusion was derived, in part, by the positions taken by the Respondents in their briefing on the objections as well as considerations relating to due process and the apparent intention of the Utah legislature in providing for the permit review adjudicative proceeding.

In recognition of Petitioners' right to supplement the administrative record here, I entered a Stipulated Order that provided Petitioners until June 13, 2013 to file a motion to supplement the administrative record. [Stip. Order re Br. on the Merits, ¶ 1, May 31, 2013]. Petitioners did not move to supplement the administrative record, either before or after that time. Instead, Petitioners proceeded by filing their Opening Brief on July 22, 2013. [Pet. Br., p. 1]. Petitioners' failure to submit additional evidence into the administrative record should render moot any procedural due process arguments they previously raised as to the timing of the notice and comment period relative to the supplemental information received and considered by the director.³

³ Because Petitioners seek a remand to UDAQ to conduct further analysis, their failure to take advantage of the opportunity to supplement the administrative record is significant. I infer that there is no additional, relevant information Petitioners would have UDAQ review in undertaking

On February 26, 2014, and after receiving briefs from the parties, I held extensive oral argument to hear the merits of Petitioners' RFAA. All parties appeared through their counsel.

Based on the foregoing and after duly considering all of the facts and arguments presented in the briefing and at oral argument, I hereby submit to the Executive Director the following Proposed Dispositive Action, pursuant to Utah Code Ann. section 19-1-301.5(12)(c).

I. GENERAL LEGAL RULES THAT APPLY TO THESE PERMIT REVIEW ADJUDICATIVE PROCEEDINGS

A. Standard of Review that Applies to these Permit Review Adjudicative Proceedings

Under section 19-1-301.5, the ALJ "conduct[s] a review of [UDAQ's] determination" that is "based only on the administrative record and not as a trial de novo." Utah Code Ann. §§ 19-1-301.5(8)(a) & (12)(b). Unlike many other administrative proceedings involving an ALJ, in a permit review adjudicative proceeding it is clear that the Utah legislature intended to limit the ALJ's authority to a review of UDAQ's decision, thereby placing the ALJ in an appellate-like review role. There is to be no trial. There will be no witnesses, no examination or cross examination, and no findings of fact where disputed testimony is weighed and where witness credibility is at issue, as often occurs in administrative adjudicative proceedings. Rather, all of the weighing of the evidence has already occurred at the UDAQ level. To be sure, Petitioners and other members of the public have been afforded with advance notice of the UDAQ's proposed permitting decision and the opportunity to provide comments on the proposed decision and to submit any evidence. In response to such comments and evidence submitted during the

an additional analysis of the permits at issue in this proceeding. And therefore, a remand is not warranted.

public notice and comment period, UDAQ again had the opportunity to consider the same and weigh the evidence. UDAQ also prepared and submitted a written response to public comments in connection with issuing the WCP and TLR AO. [IR1966-2020] As a result, as I understand the applicable legal standard of review, the ALJ in these proceedings is expected to defer to UDAQ's expertise and determinations where necessary.⁴ In this respect, because these proceedings are, by definition, limited to the issues raised during the public comment period, the UDAQ's written response to public comments plays a central role in evaluating whether the UDAQ's conclusions satisfy applicable legal requirements.

I further understand that Utah's substantial evidence standard of review applies to Petitioners' claims that involve questions of fact determined by UDAQ. *Id.* § 19-1-301.5(13)(b).⁵ Under Utah case law that I find to be relevant to this proceeding, the ALJ's review on questions of fact is limited to determining if UDAQ's factual findings "were

⁴ All parties to these adjudicative proceedings agreed that the ALJ, and Executive Director, review the WCP and TLR AO with appellate-like procedures and standards of review. [UDAQ Resp., pp. 16-17, 20-21; Tes. Resp., pp. 11-14; Pet. Reply, pp. 5-8; Tr. 71:4-21 (Tesoro stating the ALJ's review is appellate-like); Tr. 134:17-135:4 (Petitioners arguing that the ALJ ought to apply "the standards of appellate review" because "whether a decision is legally adequate is determined in that way")].

⁵ While subsection (13)(b) expressly applies directly to the Executive Director's review, the standard of review that the ALJ is to apply to the record is not expressly stated in the Utah Code. Under my reading of the statute, I conclude that the ALJ is to apply the same standard as the Executive Director is required to apply. This conclusion is based on my reading of the permit review adjudicative proceeding statute as a whole. In the first instance, the ALJ's express duty and authority is to undertake a permit review adjudicatory proceeding and not a trial *de novo* on the merits, resulting in a recommended ruling for the Executive Director. In other words, the role of the ALJ is to "stand in the shoes" of the Executive Director and provide her with a recommended ruling on the merits. Thus, the ALJ is to apply the same standard of review to the administrative record as the Executive Director is required to apply. Utah Code Ann. § 19-1-301.5.

reasonable and rational,” while giving “great deference” to UDAQ’s factual findings and not “reweighing” the evidence. *Utah Chapter of the Sierra Club v. Bd. of Oil, Gas & Mining*, 2012 UT 73, ¶ 11, 38 P.3d 291 (hereinafter *Sierra Club v. BOGM*) (internal quotation marks omitted).⁶ While reviewing an agency’s determination for substantial evidence, the ALJ “state[s] the facts and all legitimate inferences drawn therefrom in the light most favorable to the agency’s findings.” *Id.* ¶ 12.

On questions of law, the ALJ will apply a clearly erroneous standard of review to UDAQ’s interpretation and application of the statutory law that the agency is empowered to administer. *Id.* ¶ 10; *see also* Utah Code Ann. § 19-1-301.5(14)(c)(i).

Utah law affords differing levels of deference on mixed questions of law and fact, with the amount of deference turning on whether the Utah Legislature vested the agency with discretion to interpret and apply the law. *Union Pac. R.R. v. Utah Dep’t of Transp.*, 2013 UT 39, ¶ 16, 310 P.3d 1204; *Murray v. Utah Labor Comm’n*, 2013 UT 38, ¶ 29, 308 P.3d 461. On mixed questions in these adjudicative proceedings, the ALJ will apply an abuse of discretion standard—a more deferential standard of review—because section 19-1-301.5(14)(c)(i) affirms that UDAQ has “been granted substantial discretion to interpret its governing statutes and rules.”

⁶ Section 19-1-301.5, however, also vests the ALJ with the authority to supplement the administrative record. Utah Code Ann. § 19-1-301.5(8)(c)(iv) (The ALJ “may supplement the record with technical or factual information.”). As such, if the ALJ determines that UDAQ has not addressed an issue or UDAQ’s response to an issue is inadequate, the ALJ may request additional technical or factual information from the parties as opposed to recommending a remand of the AOs. Moreover, as I read the statute, the ALJ may also recommend a remand in the event that the UDAQ (in this case) should be asked to review and consider new technical information that is added to the administrative record during the proceeding. In no event is the ALJ authorized to undertake a trial *de novo* on the merits.

B. Petitioners’ Burden of Proof

Petitioners—*i.e.*, the party challenging UDAQ’s decision to issue the WCP and TLR AOs—carry the burden of demonstrating UDAQ’s determinations were not supported by substantial evidence, erroneous, or an abuse of discretion. *See Sierra Club v. BOGM*, 2012 UT 73, ¶ 31; *Associated Gen. Contractors v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 34, 38 P.3d 291; *Taylor v. Pub. Serv. Comm’n*, 2005 UT App 121, 2005 WL 615164, *1 (Utah Ct. App. 1993) (unpublished).

A party with the burden of proof must “fully identify, analyze, and cite its legal arguments” and “provide meaningful legal analysis” but may not “dump the burden of argument and research” on the reviewing authority. *West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874 (internal quotation marks omitted); *see also Kennon v. Air Quality Bd.*, 2009 UT 77, ¶ 29, 270 P.3d 417 (declining to review a petitioners challenge to an AO where the petitioners failed to adequately brief a claim). Moreover, a party’s briefing is inadequate where the briefing “merely contains bald citations to authority without development of that authority and reasoned analysis based on that authority.” *Allen v. Friel*, 2008 UT 56, ¶ 9, 194 P.3d 903 (internal quotation marks omitted); *State v. Lamb*, 2013 UT App 5, ¶ 11, 294 P.3d 639.

C. Petitioners’ Duty To Marshal All Relevant Evidence

On March 1, 2013, I entered a Notice of Further Proceedings and First Prehearing Order (the “NFP”) pursuant to Section 63G-4-201(3)(d) and (e), Utah Code Ann., and R305-7-206, Utah Administrative Code. The NFP provides, in part, as follows:

Because these proceedings are based solely on review of the Administrative Record, the party with the burden of proof on any issue will be held to a stringent requirement to marshal all of the applicable evidence, issue by issue, in the Administrative

Record. This expectation is particularly strong here as all parties are represented by experienced legal counsel.

NFP at 2, paragraph 7 (the “Marshaling Requirement”).

In their briefing on the merits, Petitioners have raised a number of objections to the Marshaling Requirement. I find that these objections are lacking in merit and that the Marshaling Requirement was properly imposed, either as an inherent part of Petitioners’ burden of proof or, in the alternative, pursuant to my statutory grant of authority to manage all non-dispositive aspects of these proceedings.

The Marshaling Requirement, as applied to this permit review adjudicative proceeding, arises from the burden of proof and the standard of review applicable to this proceeding, as set forth in Section 19-1-301.5, Utah Code Ann.

In a permit review adjudicative proceeding, the administrative law judge is required to “conduct a permit review adjudicative proceeding based only on the administrative record and not as a trial de novo.” U.C.A. § 19-1-301.5(8)(a). Hence, there will never be a “trial” on the merits in this matter. Rather, the Director of the Utah Division of Air Quality undertook the adjudication of the Notice of Intent after receiving and considering, among other things, public comments.

While there will not be a trial on the merits, it is equally clear that all of the evidentiary information upon which the director could have relied is contained in the formal administrative record as defined by the Utah Code. U.C.A. § 19-1-301.5(8)(b). Moreover, as to every issue raised in public comments, the director must provide a detailed, written response, which also forms part of the administrative record. U.C.A. § 19-1-301.5(8)(b)(vi). The director’s detailed response to comments provides a specific record as to how the director considered and resolved

each public comment. Moreover, the director's detailed response to comments often refers to and provides citation to other evidence in the administrative record upon which the director has relied in reaching any given conclusion. Thus, while there is no trial on the merits, the director's response to public comments provides a rather detailed "roadmap" as to the factual and legal basis for the director's decision as relating to each discrete public comment. This is an important consideration here, because the Petitioners are strictly limited in this permit review adjudicative proceeding to litigate issues that Petitioners have previously submitted to the division director by way of public comment. U.C.A. § 19-1-301.5(4), (10). Hence, the division director's response to public comments is equivalent to findings of fact and conclusions of law by the initial trier of fact.

In this proceeding, the administrative law judge's role is equivalent to the role that would be played by the Utah Court of Appeals in the event of an appeal under Section 19-10301.5(14)(a): To review the permit based solely on the facts set forth in the administrative record, applying the "substantial evidence" standard that applies to review of administrative adjudicative decisions.⁷ While the Utah Code does not specifically mention the standard of review that the administrative law judge is to apply in his or her review on the merits in this proceeding, it is abundantly clear that he or she is to apply the same standard that the Executive Director is required by statute to apply:

⁷ Under the Utah Code, the Utah Court of Appeals is required to apply the same standard of review to the permit as the Executive Director, and by inference, the administrative law judge, based on the same administrative record. U.C.A. § 19-6-301.5(14). Hence, the adjudicative role of the administrative law judge, the Executive Director, and the Utah Court of Appeals are equivalent.

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.

U.C.A. § 19-1-301.5(13)(b).

Petitioners acknowledge that they have the burden of proof in this proceeding. How that burden of proof is characterized goes to the heart of the matter at issue in responding to Petitioners' instant motion. The standard of review, and hence the burden of proof, requires the administrative law judge (and the Executive Director and the Utah Court of Appeals) to determine a very specific legal question: Whether a given factual, technical, or scientific agency determination is "supported by substantial evidence taken from the [administrative] record as a whole." Id. In my view, the only way that Petitioners can possibly carry their burden of proof in this proceeding is to convince me (or the Executive Director or the Utah Court of Appeals) that any disputed factual, technical, or scientific agency determination is ***not*** supported by substantial evidence taken from the administrative record as a whole. By extension, therefore, the only way Petitioners can carry that burden of proof is first, to show the administrative law judge (or the Executive Director or the Utah Court of Appeals) ***all*** of the evidence in the administrative record that relates to a disputed factual, technical, or scientific agency determination, both supporting and contrary. Petitioners must then demonstrate that the disputed finding is not supported by "substantial evidence" as a matter of law. Without marshaling all of the record evidence in the first instance, it would be impossible for the administrative law judge (or the Executive Director or the Utah Court of Appeals) to determine whether the disputed issue is or is not supported by "substantial evidence" in the administrative record. Thus, the Marshaling Requirement forms an inherent part of Petitioners' burden of proof in this proceeding.

The Utah Legislature has granted me, as administrative law judge, the jurisdiction to “take any action in a permit review adjudicative proceeding that is not a dispositive action.” U.C.A. § 19-1-301.5(9)(f). Although the Marshaling Requirement is not specifically adopted in the Utah Code or in the Utah Administrative Code as applied to these proceedings and Rule 24(a)(9), Utah Rules of Appellate Procedure do not expressly apply here,⁸ I have the jurisdiction under U.C.A. § 19-1-301.5(9)(f) to manage this proceeding in the most efficient and effective way that I deem appropriate.⁹ All of the policy reasons underlying Rule 24(a)(9) apply with full force to a permit review adjudicative proceeding.

The most analogous situation I can find in Utah law is the case of *Wright v. Westside Nursery*, 787 P.2d 508, 512 n.2 (Utah App. 1990), where the Utah Court of Appeals declined to undertake an independent review of a large record. The court noted that Rule 24(a)(9) was intended precisely “to spare appellate courts such an onerous burden.” Hence, the court continued, “[a]bsent exceptional circumstances, our review of the record is limited to those

⁸ It should be noted that the law governing marshaling in appellate proceedings is primarily judge-made common law, guided by one sentence in the Utah Rules of Appellate Procedure. In turn, the rules of appellate procedure are promulgated and regulated by the Utah Supreme Court. U.C.A. § 78A-3-103. By contrast, the core procedural elements and applicable standards of review applicable in a permit review adjudicative proceeding arise directly from statutory law. U.C.A. § 19-1-301.5. The statutory grant of jurisdiction to the administrative law judge to manage procedural issues in matters assigned to him or her in a permit review adjudicative proceeding seems to be equivalent to the statutory grant of authority under U.C.A. § 78A-3-103 to the Utah Supreme Court to establish procedural rules to manage cases in the state court system.

⁹ It is undisputed that should Petitioners appeal any issue arising from this proceeding to the Utah Court of Appeals, Rule 24(a)(7) would apply to their briefs on appeal. Because the administrative law judge and the Executive Director are called upon to apply the exact same standard of review to the agency determinations as the Utah Court of Appeals, it stands to reason that the marshaling requirement should also apply at the administrative law judge and Executive Director level. Moreover, Petitioners have been on notice of this procedural requirement from the outset of this proceeding and cannot therefore show undue burden or prejudice.

specific portions of the record which have been drawn to our attention by the parties and which are relevant to the legal questions properly before us.” Id. I intend to apply the same standard to my review of the administrative record in this proceeding, for the same reasons as stated by the Utah Court of Appeals. If this rule were not applied to the administrative record in a permit review adjudicative proceeding, an appellant on future appeal could potentially argue that the administrative law judge overlooked or failed to consider, under his or her independent review of the record, certain evidence of record even though that evidence was not specifically drawn to the attention of the administrative law judge.

This conclusion finds significant support in Utah case law. To be sure, following briefing on the merits and oral argument in these proceedings, the Utah Supreme Court issued a decision clarifying the Marshaling Requirement as applied to appellate cases and specifically repudiated its prior cases holding a party’s failure to marshal the evidence may result in procedural default on claims challenging factual findings. *State v. Nielsen*, 2014 UT 10 at ¶ 41, 326 P.3d 645 (released April 29, 2014). I read *State v. Nielsen* to support my conclusions about the nature of the burden of proof in these proceedings and the permitted inference the administrative law judge may draw by a party’s failure to marshal the applicable evidence. The marshaling standard I have adopted above would not result in a procedural default upon failure to marshal the evidence. Rather, I believe it is appropriate for the administrative law judge to limit his or her review of the administrative record which have been drawn to his or her attention by the party with the burden of proof.

In *State v. Nielsen*, the Utah Supreme Court clarified that the reviewing authority was to consider a party’s failure to marshal as it considered the merits of a claim challenging a factual

finding, reasoning that the requirement to marshal is “a natural extension of an appellant’s burden of persuasion” and “a party who fails to identify and deal with supportive evidence *will never* persuade an appellate court to reverse under the deferential standard of review that applies” to challenges to the sufficiency of the evidence supporting a factual finding. *Id.* ¶¶ 40 – 41; *e.g.*, *Simmons Media Group, LLC v. Waykar, LLC*, 2014 UT App 145, ¶¶ 46, ___ P.3d ___ (dismissing a claim where the appellant “does not identify and deal with the supportive evidence” (internal quotation marks omitted)); *Nebeker v. Summit County*, 2014 UT App 137, ¶ 46, ___ P.3d ___ (“To prevail on such a challenge, the County must acknowledge the evidence that supports the findings and demonstrate ‘a basis for overcoming the healthy dose of deference owed to factual findings’” (quoting *Nielsen*, 2014 UT 10 ¶¶ 41-42); *Wachocki v. Luna*, 2014 UT 139, ¶ 11, n. 6, ___ P.3d ___ (holding that because appellants failed to marshal the evidence, appellants did not carry their burden on appeal).

This conclusion finds further support in Utah case law in the cases cited below, subject to the understanding that all of the following cases are clarified that the potential for a procedural default upon failure to marshal the record is not an appropriate result, as held in *State v. Nielsen*, *supra*. To the extent that Utah case law regarding the burden of proof and marshaling does not deal with the procedural default issue, it is still good law and should be considered as being relevant here. *See West Jordan City v. Goodman*, 2006 UT 27, ¶ 29, 135 P.3d 874; *Heinecke v. Dep’t of Commerce*, 810 P.2d 459, 464 (Utah Ct. App. 1991) (holding that a party fails to meet their burden to marshal the evidence when they leave “it to the court to sort out what evidence actually supported the finding” and instead argued their “own position without regard for the evidence supporting the . . . findings”). The duty must fall to Petitioners in this permit review

adjudicative proceeding, as the party challenging a factual finding underlying an agency’s determination is required to marshal “all” evidence supporting the agency’s determination. *Utah Chapter of Sierra Club v. Bd. of Oil, Gas and Mining*, 2012 UT 73, ¶ 12, 289 P.2d 558; *see also Kennon v. Utah Air Quality Bd.*, 2009 UT 77, ¶ 27 (“When challenging factual findings, a party is obligated to marshal ‘all record evidence that supports the challenged finding.’” (quoting Utah R. App. P. 24(a)(9))); *First Nat’l Bank of Boston v. County Bd. of Equalization of Salt Lake County*, 799 P.2d 1163, 1165 (Utah 1990) (In an appeal of an agency action, “the party challenging the finding . . . must marshal all of the evidence supporting the finding . . .”). The duty to marshal the evidence also applies to parties challenging an agency’s determination on mixed questions of fact and law. *Peterson Hunting v. Labor Comm’n*, 2012 UT App 14, ¶ 15, 269 P.3d 998; *see also United Park City Mines Co. v. Stichting Mayflower Mountain Fonds*, 2006 UT 35, ¶ 25, 140 P.3d 1200 (“Even where the defendants purport to challenge only the legal ruling, as here, if a determination of the correctness of a court’s application of a legal standard is extremely fact-sensitive, the [appellants] also have a duty to marshal the evidence.” (internal quotation marks omitted)).

A party obligated to marshal the evidence must do so for each claim that the marshaling mandate applies. *Sierra Club 2012*, 2012 UT 73, ¶ 30 & n.3 (holding that Petitioners failed to marshal one claim while determining that the same Petitioners marshaled another claim). At its core, the marshaling requirement demands that a party “marshal all of the evidence supporting the findings and show that despite the supporting facts, the . . . findings are not support by substantial evidence.” *Id.* at ¶ 30. To do so, the party may not “simply attack [the agency’s] credibility.”

Associated Gen. Contractors v. Bd. of Oil, Gas and Mining, 2001 UT 112, ¶ 34, 38 P.3d 291 (quoting *Brewer v. Denver & Rio Grande W. R.R.*, 2001 UT 77, ¶ 36, 31 P.3d 557).

In light of the Marshaling Requirement, I have previously ordered that Petitioners will not be subject to a page limitation in their briefing on the merits. Rather, I have required only that their briefing be of reasonable length. Thus, Petitioners have been afforded every opportunity to carry their burden of proof in this proceeding to convince me that any disputed factual, technical, or scientific agency determination is not supported by substantial evidence taken from the administrative record as a whole. In order to meet that burden of proof, it will be necessary for Petitioners to bring to my attention all evidence from the administrative record that relates to any such disputed issue.

In conclusion, because the administrative law judge is required to apply the same standard of review in a permit review adjudicative proceeding as the Utah Court of Appeals, my responsibility, as I understand it from the foregoing analysis, is to review the specific portions of the administrative record that Petitioners have drawn to my attention, and which are relevant to the legal questions before me. *Wright*, 787 P.2d at 512 n.2. I find and conclude that the types of “exceptional circumstances” that may warrant deviation from this rule, as stated in *Wright*, do not apply to the present proceedings.¹⁰

¹⁰ There is simply nothing in the Utah Code to suggest that the administrative law judge in a permit review adjudicative proceeding has an independent duty to comb through the entire Administrative Record to identify all relevant facts in support of a disputed factual, technical, and scientific agency determination, particularly where, as here, Petitioners are represented by experienced and competent legal counsel. To be sure, a more generous standard of briefing may apply to a permit review adjudicative proceeding where parties appear *pro se*. Because no *pro se* parties are involved in the instant proceeding, I will not speculate as to the potential applicability of the Marshaling Requirement in cases where parties are not represented by legal counsel.

D. Petitioners Must Demonstrate Each Issue or Argument Raised was Preserved per the Mandate of Section 19-1-301.5

Under section 19-1-301.5, the ALJ “shall dismiss, with prejudice, any issue or argument raised in a [RFAA] that has not been preserved.” Utah Code Ann. § 19-1-301.5(10)(b).¹¹

Section 19-1-301.5 sets out the method that a party may preserve an argument as the statute states,

[A] person who challenges a permit order . . . 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 by sufficient information or documentation to enable the director to fully consider the substance and significance of the issue.

Utah Code Ann. § 19-1-301.5(4). Additionally, section 19-1-301.5(6)(c) further prescribes the arguments that a party may pursue in a RFAA. That section states,

A person *may not* raise an issue or argument *in a request for agency action* unless the issue or argument:

- (i) was preserved in accordance with Subsection (4); or
- (ii) was not reasonably ascertainable before or during the public comment period.

(emphasis added).

These provisions place the burden on Petitioners to demonstrate as part of their RFAA that each issue raised in the RFAA was either preserved with a specific comment raised during the public comment period with sufficient information for UDAQ to consider the issue or, in the alternative, show that the issue was not reasonably ascertainable during the public comment

¹¹ Section 19-1-301.5 applies to these adjudicative proceedings. *See* Procedural Background, *supra*, p. 3 (identifying UDAQ’s steps to extend the public comment period to ensure the public had an opportunity to preserve their claims under the newly-enacted section 19-1-301.5).

period. The showing, however, must occur in the Petitioners' RFAA as Petitioners must include all issues in their RFAA at the outset of the case, as required in the emphasized language quoted from section 19-1-301.5(6)(c) above. *See also* Utah Admin. Code R305-7-203(3)(h) (mandating that a RFAA provide a showing on preservation).

Moreover, by failing to raise issues in their RFAA, Petitioners frustrate the apparent goals of the permit review adjudicative process by failing to place Respondents on notice of their specific claims. This failure of notice prevents Respondents from assessing whether they should in turn move to supplement the record in response to the newly presented claims in the RFAA. Utah Code Ann. § 19-1-301.5(8)(c); *cf. id.* R305-7-210 (allowing parties to respond to supplemental information). Additionally, by not raising issues in the RFAA, and waiting to only reveal their actual claims until merits briefing, Petitioners prevented Tesoro from assessing the full risks of proceeding with construction under an AO subject to a permit challenge.

Thus, the ALJ reviews Petitioners' comment letter (for claims that were actually preserved) and Petitioners' RFAA (for claims that Petitioners argue were not reasonably ascertainable during the comment period) to determine if each of Petitioners' claims were preserved under section 19-1-301.5.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE CLAIMS PETITIONERS FAILED TO BRIEF

Petitioners' RFAA contains a number of claims that Petitioners did not raise in their briefing on the merits. Those claims are:

- Petitioners' Claims F & M—all arguments related to the Transfer Loading Rack AO. [RFAA, pp. 11-12, 24-25].
- Petitioners' Claim D—arguments related to the analysis of the impact of feedstock on emissions. [RFAA, pp. 8-9].

- Petitioners’ Claim E(1) & E(2)—arguments related to the SO₂ emission limit for the FCCU. [RFAA, pp. 9-11].
- Petitioners’ Claim G—arguments related to the demand growth calculation. [RFAA, p. 13].
- Petitioners’ Claims J & O—arguments related to aggregation of emissions. [RFAA, pp. 20-22, 28-29].
- Petitioners’ Claim K—arguments related to Tesoro’s H₂SO₄ emissions. [RFAA, pp. 22-23].
- Petitioners’ Claim P—arguments related to netting and PSD analyses. [RFAA, pp. 29-32].

In their respective Responses, Respondents both pointed out that Petitioners failed to brief these claims and thus waived them. [UDAQ Resp., pp. 23-24; Tes. Resp., pp. 15-16]. Petitioners did not attempt to rebut Respondents’ argument.

Petitioners having failed to brief the foregoing claims on the merits, I recommend that these specific claims identified above be dismissed with prejudice, on the following legal grounds: (a) waiver; (b) failure to carry Petitioners’ burden of proof as described above; and (c) Petitioners’ failure to marshal the evidence in their briefing on the merits, as required by the NFP. *See Sierra Club v. BOGM*, 2012 UT 73, ¶ 31; *Kennon*, 2009 UT 77, ¶ 29, 270 P.3d 417; *West Jordan City v. Goodman*, 2006 UT 27, ¶ 29. *See also Anderson v. Kriser*, 2009 UT App 319, *2 n.3 (“[A]rguments not raised in an appellant’s initial brief are waived, and we do not consider this argument.”); *Brown v. Glover*, 2000 UT 89, ¶ 23, 16 P.3d 540 (“Generally, issues raised by an appellant in the reply brief that were not presented in the opening brief are considered waived and will not be considered by the appellate court.”).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO THE CLAIMS PETITIONERS BRIEFED ON THE MERITS

Of the 18 individual claims Petitioners raised in their Opening Brief, 10 of them relate to the claim that UDAQ's BACT analysis was insufficient to satisfy applicable legal requirements. Separate findings and conclusions will be offered as to each argument, in turn.

A. BACT Determination – Supplemental Information

The first claim to be addressed here has to do with the nature and adequacy of UDAQ's BACT analysis, including consideration of data and information submitted after the close of the public comment period.

1. Findings of Fact on UDAQ's BACT Determination—Supplemental Information

1. Before the close of the public comments June 7, 2012, UDAQ had provided two rather similar descriptions of the BACT analysis it undertook for the Tesoro FCCU. First, the Tesoro Updated Notice of Intent, December 21, 2011 provided:

Tesoro has conservatively considered BACT for the FCCU for emissions of particulate (PM₁₀/PM_{2.5}), NO_x, and SO₂ since there is expected to be an increase in actual emissions associated with the Project. A BACT analysis was recently conducted (2007) for the FCCU as part of the minor modifications to the FCCU to improve reliability (N0335-028). Continued operation of the ESP was selected as BACT for particulate emissions. The use of additional necessary SO_x reducing catalyst to meet NSPS limits was selected as BACT for SO₂ emissions. Additional NO_x control equipment would not be economically feasible; therefore Tesoro will continue to comply with its NO_x emission limit. Tesoro proposes to continue using these control technologies as BACT for the FCCU.

[IR 000321].

3. Second, Director's Updated Source Plan Review, February 16, 2012 stated, in part:

Tesoro has conservatively considered BACT for the emissions of particulate (PM₁₀/PM_{2.5}), NO_x, and SO₂ at the FCCU as there is expected to be an increase in actual emissions associated with this project. UDAQ agrees that continued operation of the

ESP, use of SO_x reducing catalyst, reducing catalyst, and installation of a tail gas treatment unit (TGTU) at the SRU/TGI shall be considered BACT for this project. Tesoro shall comply with its established emission caps for these pollutants.

[IR 000668].

4. In its NOI, Tesoro's BACT analysis concluded that the existing controls for the FCCU—namely the Electrostatic Precipitator for particulate matter emissions, and SO_x reducing catalysts of SO_x emissions—were BACT for the FCCU. [IR0321].¹² In making this determination, Tesoro referenced another BACT determination conducted in 2007. [IR0321]. Tesoro's prior BACT analysis, which is dated May 2006, is contained in the administrative record for the WCP AO. [IR1172-1127 (hereinafter the "2006 BACT Analysis")]. The 2006 BACT Analysis contains a complete "top-down" analysis that identified and analyzed the possible available controls for the FCCU. [IR1186-96]. The administrative record in these proceedings also contains UDAQ's review of BACT for the 2007 project. [IR2830, 2840-51]. The same engineer reviewed both the 2007 project and the WCP AO. [*compare* IR2830 with IR0663].

5. The foregoing references represented the scope of the UDAQ's the FCCU BACT analysis for purposes of (a) informing the public as to the basis upon which UDAQ concluded that the BACT requirement was met in connection with its preliminary decision to issue the permits at issue in this matter; and (b) for soliciting comments from the public as to the UDAQ's preliminary decision to issue the permits generally and UDAQ's BACT analysis in particular.

6. UDAQ reviewed and accepted Tesoro's analysis and made an initial determination that the existing controls at the FCCU remained BACT for the FCCU. [IR0668 (SPR)].

¹² Tesoro's analysis concluded that there were no technological or economically feasible controls for the FCCU's NO_x emissions. [IR0321].

7. While the 2006 BACT Analysis is relevant for purposes of the WCP AO at issue in these proceedings and was later added to the administrative record (following closure of the public notice and comment period), at the time of the public notice and comment period for the permits at issue in these proceedings, the BACT analysis for the WCP AO was unclear and would likely have been confusing for the public to understand as of the date of the time the public was asked to submit comments. [See IR750-761; IR763-768; IR774].

8. In part because the administrative record regarding the UDAQ's BACT analysis was not clear, UDAQ received numerous public comments regarding the BACT analysis for the WCP AO, including detailed, written comments submitted by Petitioners. [IR1101-1659].

9. In their comments, Petitioners did not submit their own proposed BACT analysis nor did Petitioners suggest any specific pollution control technology that should have been considered by UDAQ in its BACT analysis but was not considered, only that the administrative record lacked adequate, independent BACT analysis. [IR1112].

10. The public notice and comment process as defined by the Utah legislature in connection with a permit review adjudicative proceeding was effective in identifying either that the BACT analysis for the WCP AO may not have been adequate to support the permits or that the administrative record was not clear as to what information UDAQ considered in reaching its BACT determination. After reviewing public comments on the proposed WCP AO, UDAQ requested Tesoro provide "additional information and justifications" for the BACT determination contained in Tesoro's NOI. [IR2887 (July 17, 2012 letter)].

11. The July 17, 2012 letter is similar to letters UDAQ sent Tesoro as to other issues that it found to be inadequate in the record, after considering public comments. [IR779 (as to ozone offset requirements); IR2495 (as to compliance with R307-420, Utah Administrative Code)].

12. Tesoro responded to UDAQ's request with a letter and technical memorandum (dated July 25, 2012) that supplemented Tesoro's NOI with information supporting the conclusion that Tesoro's existing controls and emission limitations constituted BACT for Tesoro's FCCU. [IR2473-94]. This submission included a complete "top down" BACT analysis. Tesoro specifically stated that the information contained in Tesoro's response was "additional support of the Utah State BACT review submitted by Tesoro in the NOI" and that the memorandum provides "updates to the 2007 analysis, including a review of more recent BACT determinations, updated control costs estimates, and an expanded evaluation of technically feasible control technologies." [IR2473, 2493]. This supplement provided documentation that supported Tesoro's original BACT analysis contained in Tesoro's NOI.

13. The U.S. Environmental Protection Agency was also directly involved in the process that ultimately led to the issuance of the permits at issue in these proceedings. See, e.g., IR1660-1664 (EPA comment letter dated April 23, 2012); IR1665-1676 (EPA comment letter dated June 7, 2012). In fact, EPA's June 7, 2012 letter specifically mentions certain comments raised by Petitioners here (as to aggregation issues) and asks UDAQ to address these comments. [IR1667].

14. With the supplemental information in hand and after considering public comments regarding BACT-related issues, UDAQ issued the WCP AO. [IR2806-28]. After Petitioners initiated these adjudicative proceedings, UDAQ designated Tesoro's July 25 supplement as part

of the basis supporting UDAQ's determinations in the WCP AO by including the supplement in the official administrative record for these adjudicative proceedings. *See* Order on Obj. to the Admin. Rec., pp. 6-7, May 23, 2013 (finding that by designating the supplement under section 19-1-301.5(8)(b)(ii) UDAQ designated the supplement as a substantive explanation for the decision to issue the AO); *see also* Utah Code Ann. § 19-1-301.5(8)(b)(vii) (stating that the administrative record includes information requested and submitted to UDAQ that is designated by UDAQ as part of the agency determination); UDAQ Resp., p. 13 (stating UDAQ "consulted with Tesoro" and received additional information for UDAQ consideration), p. 43 (identifying the July 25 supplement as part of UDAQ's decision), p. 45 (stating that the July 25 supplement provides "support and justification for UDAQ's BACT determination"), p. 52 (stating UDAQ considered the July 25 supplement as part of its review); UDAQ Surreply, p. 29 (stating the July 25 supplement supports UDAQ's BACT determination)].

15. After considering this additional BACT analysis, the Directed stated, in his August 22, 2012 Response to Comments, in part as follows: "Tesoro's comment response letter addressed multiple individual comments under this topic. UDAQ agrees with Tesoro's analysis, *which is similar to UDAQ's own.*" [IR 002018] (emphasis added).

16. The Director further explained in relation to BACT analysis:

Comment #116: Tesoro Letter of July 25, 2012. In this letter, Tesoro supplied two final pieces of information in response to the comments[.]. . . Tesoro also included additional information on BACT applicability.

UDAQ Response: With respect to the additional information on BACT applicability, Tesoro provided additional clarification on the emitting units specifically included in the Waxy Crude Processing project, but also revisited the BACT for the 2007 FCCU Reliability project. . . . The emitting units included in the current project were adequately addressed in Tesoro's revised NOI, and sufficient information was provided for UDAQ to properly review.

[IR at 002019].

17. At oral argument, Petitioners raised a new objection, for the first time, to the July 25 supplement by arguing that UDAQ affirmatively stated or admitted that it did not rely on Tesoro's supplement to its initial BACT analysis. [Tr., 29:6-30:1 (referencing UDAQ response #116 (IR2019))]. But even ignoring the procedural impropriety of Petitioners raising an argument for the first time at the hearing on the merits, turning to the merits of the argument, I find that it is not reasonable to infer from UDAQ's statement in Response Number 116 that UDAQ made any such admission to the effect that it did not review or rely upon or otherwise concur with Tesoro's July 25 supplement.¹³

18. The comment shows UDAQ in fact reviewed Tesoro's July 25, 2012 letter. [IR2019]. The focus of the comment is on BACT applicability and UDAQ's conclusion that the 2007 project was separate from the WCP AO. [*Id.*]. But for the WCP AO—which UDAQ identified as the “current project”—UDAQ found that the BACT analysis was adequate in

¹³ The comment states:

With respect to the additional information on ***BACT applicability***, Tesoro provided additional clarification on the emitting units specifically included in the [WCPP], but also revisited the BACT for the 2007 FCCU Reliability Project. As explained in the response to comments #17, #18, #26, #27, and #31 through #36, UDAQ did not require that an additional BACT analysis be performed for the 2007 FCCU Reliability project. UDAQ considers the 2007 project and the current [WCPP] to be separate projects. The emitting units included in the ***current project*** were adequately addressed in Tesoro's revised NOI, and sufficient information was provided for UDAQ to properly review.

[IR2019 (emphasis added)].

Tesoro’s revised NOI, which included the supplemental information contained in the July 25 supplement.

19. Based on the foregoing, I reasonably infer from the administrative record that UDAQ intended to adopt, and did adopt, as its own analysis, the “top down,” written BACT analysis provided by Tesoro after close of the public comment period, in addition to the 2006 BACT Analysis. [IR 2476-94].

20. Ultimately, the BACT analysis resulted in the following conditions for Tesoro’s FCCU:

Pollutant	Control Identified as BACT	Limitation
PM	Electrostatic Precipitator (“ESP”) IR0321—NOI IR0668—SPR IR1195-96—2006 BACT IR2490-94—7/25 supp. IR2849-51—2007 SPR	69 tons per year IR0721—ITA IR2476—7/25 supp. IR2865—2007 SPR IR2824—WCP AO
SOx	SOx reducing catalyst IR0321—NOI IR0668—SPR IR1192-95—2006 BACT IR2485-89—7/25 supp. IR2846-49—2007 SPR	9.8 lb/1,000-lb coke burned 705 tons per year ¹⁴ IR0715—ITA IR2476—7/25 supp. IR2859—2007 SPR IR2818-19—WCP AO
NOx	No additional controls are technically or economically feasible IR0321—NOI	174 tpy IR0321—NOI IR0721—ITA

¹⁴ The 705 tpy limit was not expressed in the source plan review or proposed WCP AO because UDAQ’s initial review concluded that this limit could be removed. After reviewing Petitioners’ comment on this limit, Tesoro and UDAQ agreed that it was appropriate for the WCP AO to retain this emission limitation. [IR2472 (Tesoro withdrawing the request to remove the limit); IR1974 (stating UDAQ will re-insert the limit per Tesoro’s request); IR2819 (WCP AO; condition II.B.4.c)].

	IR1187-92—2006 BACT IR2478-85—7/25 supp. IR2841-46—2007 SPR	IR2476—7/25 supp. IR2864—2007 SPR IR2824—WCP AO
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**2. Conclusions of Law Regarding UDAQ’s BACT Determination—
Supplemental Information.**

1. BACT for Utah’s minor source permitting program is established in Rule 307-401. Utah Admin. Code R307-401-1(2) (defining BACT); R307-401-5(2)(d) (requiring a project proponent to submit a BACT analysis as part of its NOI); R307-401-8(1)(a) (making BACT a condition that must be satisfied before an AO is issued).¹⁵

2. The WCP AO is a permit issued under UDAQ’s minor New Source Review (“NSR”) program. [IR0667 (SPR); 2808 (WCP AO)]. UDAQ’s minor NSR program is codified as rule 307-401-1 to -19 of the Utah Administrative Code. Of particular importance to a review of a minor AO issued by UDAQ is rule 307-401-8, which outlines the conditions that must be met for UDAQ to issue an AO. As such, the ALJ’s recommendations necessarily flow through rule 307-401-8, and to prevail on their RFAA, Petitioners must show that UDAQ’s decision to issue the WCP AO violates this rule.

3. Utah’s regulations establish three air permitting programs: (1) the prevention of significant deterioration (“PSD”) program, which applies to major sources and major modifications for sources located in attainment areas; (2) the nonattainment NSR (“NA NSR”) program, which applies to major sources and major modifications for sources located in nonattainment areas; and (3) the minor NSR program, which applies statewide to minor sources

¹⁵ There is no requirement for a state minor NSR program to include a BACT requirement. *See* 40 C.F.R. Section 51.160 (setting forth the requirements for state minor NSR programs).

and minor modifications that do not trigger PSD or NA NSR.¹⁶ As the minor and major terminology suggests, the minor NSR program addresses sources and modification that are deemed to be of lesser significance.¹⁷ EPA has exercised far less oversight over minor source permitting programs and has largely left it to the states to determine what requirements are necessary for the permitting of minor sources and minor modifications of existing sources. *See* 76 Fed. Reg. 38748, 38752/1 (July 1, 2011) (“These Federal requirements for minor NSR programs are considerably less prescribed than those for major sources and as a result there is a larger variation of requirements in the state minor NSR programs.”).

4. Given that BACT for Utah’s minor NSR program is derived exclusively from Utah regulations, UDAQ’s discretion is at its highest when it is construing and applying these regulations. Utah Code Ann. § 19-1-301.5(14)(c)(i); *Taylor v. Utah State Training School*, 775 P.2d 432, 434 (Utah Ct. App. 1989) (reviewing existing caselaw and noting that Utah courts have provided deference to agency interpretations that “involve the interpretation of terms or phrases more easily understood by the agency . . . because the term or phrase involved is within the agency’s area of expertise”); *see also Via Christi Regional Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1272 (10th Cir. 2007) (recognizing that a reviewing court “must give substantial deference to an agency’s interpretations of its own regulations” and stating that deference is

¹⁶ The distinction between minor and major modifications is based upon whether the modification results in a “significant net emissions increase.” Utah Admin. Code R307-101-2(1) (defining “major modification” and “significant”).

¹⁷ *See, e.g.*, 75 Fed. Reg. 64864, 64866/3 (Oct. 20, 2010) (“The SER [significant emission rate], defined in tons per year (tpy) for each regulated pollutant, is used to determine whether the emissions increase from any proposed source or modification can be excluded from [major NSR] review on the grounds that the increase of any particular pollutant is *de minimis*. An emission increase for a particular pollutant that is greater than the SER defined in the NSR regulations for that pollutant is considered to be a significant increase.”).

particularly important where “the regulation concerns a complex and highly technical regulatory program” (internal quotation marks omitted)).

5. Based on the foregoing, existing standards of review afford UDAQ greater discretion to interpret and apply its regulations implementing its minor NSR program than it does for the PSD and NA NSR programs.

6. BACT for Utah’s minor NSR program is somewhat distinguishable from BACT established under Utah’s major NSR programs which are dictated by the Clean Air Act and EPA’s PSD regulations. *Utah Chapter of the Sierra Club v. Air Quality Board*, 2009 UT 76, ¶ 21, 226 P.3d 719 (finding that UDAQ’s construction of its PSD regulations must be interpreted in a manner consistent with EPA’s interpretations) (hereinafter “*Sierra Club 2009*”).

7. All of the authority that Petitioners have relied on in their briefing in these adjudicative proceedings relates to PSD-level BACT. [Pet. Br. (citing to *Sierra Club 2009* and *Kennon*, 2009 UT 77, throughout and various appeals decided by the Environmental Appeals Board)]. In particular, Petitioners’ rely heavily and repeatedly on the Utah Supreme Court’s decision in *Sierra Club 2009*. [Pet. Br., pp. 14-18 (relying on *Sierra Club 2009* for Petitioners’ construction of BACT)].

8. However, *Sierra Club 2009* is a case that reviewed an AO issued under Utah’s PSD program. 2009 UT 76, ¶ 1. The Supreme Court did not decide the discretion that UDAQ had to interpret and implement BACT for Utah’s minor NSR program in *Sierra Club 2009*. So, while *Sierra Club 2009* and other PSD cases may be viewed as being instructive, the ALJ also recognizes that UDAQ’s discretion is at its highest when it is interpreting and applying its own regulations, as is the case with Utah’s minor NSR program.

9. BACT under Utah’s minor source permitting program is framed up almost exclusively from the broad definition of BACT that is contained in Rule 307-401-2. This definition reads:

“Best available control technology” means an *emissions limitation* (including a visible emissions standard) based on the maximum degree of reduction for each air contaminant which would be emitted from any proposed stationary source or modification which the director, on a *case-by-case* basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available *methods, systems, and techniques*, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. . . . If the director determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. . . .

Utah Admin. Code R307-401-2(1) (emphasis added).

10. The regulatory definition for Utah’s minor source permitting BACT analysis is complex and technical and requires that UDAQ exercise technical expertise, judgment, and discretion to determine what constitutes BACT. UDAQ’s analysis covers a broad array of potential control options that is focused by a site-specific analysis into the methods, systems, and techniques that may be used to control emissions from a source. [See IR1987 (response #28; stating that BACT is a case-by-case analysis)].

11. BACT is defined as “an emission limitation,” a term that is itself broadly defined:

“Emission Limitation” means a *requirement* established by . . . the director . . . which *limits the quantity, rate or concentration of emission* of air pollutants on a continuous emissions reduction including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction.

Utah Admin. Code R307-101-2(1) (emphasis added).

12. This regulatory definition clarifies that a BACT determination may result in a potential broad array of requirements that may include imposition of air pollution control equipment or methods, a numeric emission limitation, or both. Each, however, must have the effect of limiting the quantity, rate or concentration of emissions of air pollutants. There is no requirement in Utah's minor NSR program that BACT must result in a numeric emission limitation.

13. By law and regulation, a BACT analysis begins with the applicant, who, as part of their permit application, is obligated to conduct a BACT analysis for its proposed project. Utah Admin. Code R307-401-5(2)(d) ("The notice of intent shall include . . . [a]n analysis of [BACT] for the proposed source or modification."). Indeed, UDAQ further explained this obligation in guidance. For instance, UDAQ's NOI Guide directs applicants to "Conduct a BACT analysis. Explain why the pollution control equipment or operational practice (or no control) you have selected should be considered BACT." UDAQ, *The NOI Guide*, 10th Ed., Item IV.I., p. 3. Moreover, UDAQ states that the agency's analysis is a review to validate the information submitted by the applicant.

DAQ staff does not do calculations for you. They only review and validate the analyses and calculations you present in the NOI.

Id., Item V., p. 4.

14. There is nothing inappropriate about the fact that the UDAQ asked Tesoro for additional BACT analysis in connection with UDAQ's review and consideration of public comments. Pursuant to the Utah Air Conservation Act, Tesoro had the duty to provide the Director with notice of its expansion project plans (U.C.A. § 19-2-108(1)) and the director had

the discretion to “require, as a condition precedent to the construction, modification, installation, or establishment of the air contaminant source or indirect source, the submission of plans, specifications, and other information as he finds necessary to determine whether the proposed construction, modification, installation, or establishment will be in accord with applicable rules in force under this chapter” (U.C.A. § 19-2-108(2)(a)(i) (emphasis added)). In order to resolve any doubt, R305-7-202(4), Utah Admin. Code, provides: “In preparing a comment response document, the Director may request that the permit applicant provide information in response to comments received during the public comment period.” (emphasis added). Based on the foregoing, if anything, the fact that UDAQ asked Tesoro for supplemental BACT information suggests that the permit review adjudicative process was effective in helping UDAQ to make well-informed and well-documented permitting decisions, just as the Utah legislature intended.

15. Utah’s minor NSR regulations establish a permitting program that requires a permit applicant to submit a BACT analysis as part of its permit application and UDAQ is required to evaluate that analysis. Rule 307-401-5 establishes the items that a permit applicant must include in a notice of intent and requires the applicant to submit “[a]n analysis of [BACT] for the proposed . . . modification.” Utah Admin. Code R307-401-5(2)(d). Indeed, UDAQ’s guidance on preparing a notice of intent states, “DAQ staff does not do calculations for you. They only review and validate the analyses and calculations you present in the NOI.” UDAQ, NOI Guide, Item V., p. 4. Furthermore, rule 307-401-8 directs UDAQ to issue an approval order if the agency determines that the degree of air pollution control is BACT. *Id.* R307-401-8(1)(a). These sections, taken together, do not direct UDAQ to conduct an entirely independent review of BACT, as Petitioners argued.

16. Additionally, UDAQ may not have the resources to conduct an entirely independent BACT analysis for every minor NSR permit submitted to UDAQ. [Tr. 76:22-77:9]. The reality that the permitting authority does not have the resources to conduct BACT analyses independent of the source is reflected in both Utah law as well as EPA's guidance, providing in part:

The applicant's role is primarily to provide information on the various controls options and, when it proposes a less stringent control option, provide a detailed rationale and supporting documentation for eliminating the more stringent options. It is the responsibility of the permit agency **to review the documentation and rationale** and: (1) ensure that the applicant has addressed all of the most effective control options that could be applied and; (2) **determine that the applicant has adequately demonstrated** that energy, environmental, or economic impacts justify any proposal to eliminate the more effective control options. Where the permit agency does not accept the basis for the proposed elimination of a control option, the agency may inform the applicant of the need for more information regarding the control option.

EPA NSR Manual, B.53 (emphasis added); *see also id.* B.11 (step 1), B.19 (step 2), B.24 (step 3), B.26 (step 4). Likewise, the EAB has acknowledged the pragmatic approach of a reviewing authority "concurring" with a permit applicant's BACT analysis where it finds that analysis meets the BACT requirements. *In re Tondu Energy Co.*, 9 E.A.D. 710, , 2001 WL 312458, *11 (EAB 2001).¹⁸

¹⁸ EPA's NSR Manual and the EAB caselaw is not binding precedent in a permit review adjudicative proceedings reviewing UDAQ's decision to issue an AO under Utah's minor source permitting program. However, I find that this authority is relevant as relating to the present argument. By contrast, I am not persuaded by Petitioners' citation to footnote 2 of *Sierra Club 2009* to argue that the Utah Supreme Court adopted a rule that requires UDAQ to do the entire BACT analysis itself. [Pet. Reply, p. 19 (arguing UDAQ is responsible to conduct all five steps of the top-down BACT analysis)]. Such a rule is not supported by Utah's applicable regulations and is in conflict with other portions of the *Sierra Club 2009*, 2009 UT 76, ¶ 4. Furthermore, the footnote reference to the Director doing part of the analysis is *dicta*.

17. In this instance, Tesoro submitted an initial permit application that referenced the 2006 BACT Analysis, which provided a top-down analysis of available controls for Tesoro's FCCU. [IR0321]. Upon further examination, UDAQ determined that its review of the WCP AO would "benefit from addition information and justification" for Tesoro's BACT analysis. [IR2887]. Only after receiving additional information from Tesoro did UDAQ issue the WCP AO. This, of course, is the permitting process in action as it was contemplated when the Utah Legislature enacted section 19-1-301.5. Utah Code Ann. § 19-1-301.5(8)(b)(vii) (defining the administrative record to include information "requested by and submitted to the director"). If after receiving the July 25 supplement UDAQ believed that further information was necessary, UDAQ could have requested additional information from Tesoro. UDAQ was satisfied with Tesoro's BACT analysis and issued the permit.¹⁹

18. UDAQ's review and issuance of the WCP AO was consistent with its guidance and regulations. In its NOI, Tesoro's BACT analysis concluded that the existing controls for the FCCU—namely the Electrostatic Precipitator for particulate matter emissions, and SOx reducing catalysts of SOx emissions—were BACT for the FCCU. [IR0321].²⁰ In making this determination, Tesoro referenced another BACT determination conducted in 2007. [IR0321]. Tesoro's prior BACT analysis, which is dated May 2006, is contained in the administrative record for the WCP AO. [IR1172-1127 (hereinafter the "2006 BACT Analysis")]. The 2006 BACT Analysis contains a complete top-down analysis that identified and analyzed the possible

¹⁹ Insofar as Petitioners argue that UDAQ was required to re-evaluate its BACT determination after receiving the July 25 supplement, the record demonstrates that UDAQ reviewed the information supplementing Tesoro's NOI before issuing the WCP AO. Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2.

²⁰ Tesoro's analysis concluded that there were no technological or economically feasible controls for the FCCU's NOx emissions. [IR0321].

available controls for the FCCU. [IR1186-96]. The record also contains UDAQ's review of BACT for the 2007 project. [IR2830, 2840-51]. The same engineer reviewed both the 2007 project and the WCP AO. [*compare* IR2830 with IR0663].

19. While it was not inappropriate for UDAQ to rely on Tesoro's BACT analysis, it is potentially troubling that UDAQ did not re-open the public notice and comment period as to the new, substantive information UDAQ received and relied upon only after the close of the public notice and comment period. As to this new, substantive information, the general public was not provided with the opportunity to consider the information or to provide comments for UDAQ. Given the central importance of BACT analysis in relation to the permits, this procedural failure gives me some pause.

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

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

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

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

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

U.C.A. § 19-2-108(3).

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

25. While there is no mandatory requirement for public notice as to permits and orders issued under U.C.A. § 19-2-108, the Utah Code does expressly provide that any person “aggrieved” by an order or permit is entitled to a permit review adjudicative proceeding. U.C.A. § 19-2-108(3). Advance notice and a reasonable opportunity to be heard being the touchstone of procedural due process, the ALJ has concerns about whether the process outlined by the Utah Code and regulations, and as followed in this instance, were sufficient to meet procedural due process requirements as to the Director’s final BACT analysis. It appears that reasonable advance notice is or should be required in order for members of the public to determine whether or not they have been “aggrieved” by a permitting decision, whether to file a RFAA, and if they file a RFAA within thirty days as required, what claims they might have and what relief they

might be entitled to obtain. Without timely, advance notice of the substantive information upon which the Director relies in a permitting decision, it would seem to be difficult if not impossible for members of the public, including Petitioners, to enforce their rights through a permit review adjudicative proceeding.

26. In a permit review adjudicative proceeding conducted pursuant to Section 301.5, an aggrieved person may raise two types of claims. First, a person may raise issues or arguments preserved by raising those issues during the public comment period. Utah Code Annotated §§ 19-1-301.5(4), (6)(c)(i). Second, a person may raise issues or arguments in its RFAA that were “not reasonably ascertainable before or during the public comment period.” *Id.* § 19-1-301.5(6)(c)(ii). For issues that were not reasonably ascertainable until after public comment closed, Section 19-1-301.5 permits a person to raise issues or arguments that it could not have raised earlier by moving to supplement the administrative record “with technical or factual information.” *Id.* § 19-1-301.5(8)(c).

27. Because Petitioners had the opportunity to appeal both types of claims outlined in Conclusion of Law 26 and because of the additional procedures followed in these proceedings, I conclude that Petitioners’ procedural due process rights have been adequately protected. I previously concluded that Petitioners were excused from the limitations set forth in section 19-1-301.5(4) as to any and all information which the director received and relied upon after close of the public notice and comment period. Further I opened the administrative record in these proceedings to allow Petitioners the opportunity to submit any additional evidence. I also allowed Petitioners the opportunity to make any and all legal arguments regarding the substance of the BACT analysis in connection with these proceedings, including the waiver of all page

limitations in their briefing. *See* Order on Objections to the Administrative Record (May 23, 2013).

28. Notwithstanding the foregoing accommodations made in the interest of protecting Petitioners' procedural due process rights, Petitioners, having failed to submit any substantive, additional evidence relevant to the Director's BACT determination, I conclude that it is appropriate for the ALJ to reach the merits of the review of the BACT determination without remand to the Director.

29. Based on my review of the administrative record and after consideration of the parties' legal arguments, I conclude that the provisions addressed in Finding of Fact No. 20 satisfy, as a matter of law, the BACT requirement contained in Utah's minor NSR program that UDAQ establish requirements limiting emissions. For PM and SO_x emissions, UDAQ required Tesoro to use specific controls. For all pollutants at issue in these adjudicative proceedings (including NO_x, which UDAQ determined there were no additional controls that were technically or economically feasible) UDAQ specified numeric emission limitations.²¹

30. Petitioners have failed to carry their burden to overcome UDAQ's BACT determination, and have failed to offer specific emission limitations supported by the kind of case-by-case analysis that UDAQ relies upon for the FCCU. While Petitioners rely on *Sierra*

²¹ Petitioners did not challenge the BACT determination for the FCCU's CO emissions until filing their Reply. [Pet. Reply p. 22, n.10]. As such, any claims related to BACT for the FCCU's CO emissions are untimely and waived. *See* Utah Admin. Code R305-7-212(2); Part II, *supra*, p. 13. Even so, BACT was analyzed and established for CO emissions from the FCCU. [IR2820 (WCP AO; condition II.B.4.c.1(e) setting a 500 ppm by volume emission limitation for the FCCU's CO emissions); IR0680 (SPR; same); IR0716 (ITA; same); IR2465 (Tesoro July 7, 2012 letter; identifying the 500 ppm by volume emission limitation and the CO Boiler as a control); IR2492 (July 25 supplement; same)].

Club 2009, this case is instructive on how Petitioners here have failed to meet their burden of proof. The petitioners in *Sierra Club 2009* prevailed because they identified an available control that UDAQ did not consider in its BACT determination. 2009 UT 76, ¶ 46 (finding that UDAQ’s BACT determination was unreasonable because UDAQ did not consider integrated gasification combine cycle technology as an available control). Additionally, the petitioners prevailed in *Sierra Club 2009* because the petitioners identified specific emission limitations—an emission limitation that caps NOx emissions at 0.1 ppm measured on a 24-hour average—that could have been imposed on the facility. *Id.* ¶ 48.²² In contrast to the specific evidence presented in *Sierra Club 2009*, Petitioners’ Opening Brief and Reply identified no controls that were omitted from the BACT analysis underlying the WCP AO and no specific emission limitations associated with any control technology.

31. In reaching the foregoing Conclusions of Law, I rely in part on the independent determination of EPA that the permits (and, by definition, UDAQ’s BACT analysis) are acceptable, notwithstanding Petitioners’ objections. In *Alaska Dep’t of Envtl. Conservation v. EPA*, 540 U.S. 461, 124 S. Ct. 983 (2004), the U.S. Supreme Court held that EPA is entitled to review the reasonableness of state permitting authorities’ BACT determinations under the PSD program and has authority to issue stop construction orders if it reasonably believes that a BACT designation is erroneous or unreasonable. The CAA also provides EPA with concurrent enforcement authority that is directly applicable to the present proceeding. 42 U.S.C. §§ 7477, 7413(a)(5)(A) (describing the enforcement options available to the EPA when it finds that a state

²² Petitioners also cites to the Utah Supreme Court’s decision in *Kennon*, 2009 UT 77, for the premise that UDAQ’s BACT determination must be supported by record evidence. [Pet. Br., p. 16, 18]. *Kennon* is distinguishable from the WCP AO because there was no BACT analysis—from either the source or UDAQ—that supported UDAQ’s determination. 2009 UT 77, ¶ 28.

is not complying with any requirement of the CAA with respect to construction of a new source or modification of an existing source). *See* Jennifer A. Davis Foster, Note, EPA Oversight in Determining Best Available Control Technology: The Supreme Court Determines the Proper Scope of Enforcement, 69 Missouri L. Rev., Issue 4, at 1 (Fall 2004). Based on the foregoing, it is clear that if in EPA’s independent judgment, any of the objections and issues Petitioners have raised on the merits were deserving of further evaluation, comment, or reconsideration, EPA had an independent duty and authority to pursue such issues. EPA declined to do so even after being given the opportunity in connection with the permits that are at issue in these proceedings. *See* IR762 (suggesting that Petitioners specifically requested EPA to intervene in the permits at issue in these proceedings); IR1667 (EPA comment to UDAQ requesting that UDAQ address Petitioners’ comments on aggregation issues).

32. In this permit review adjudicative proceeding, we have a somewhat unusual situation in administrative law where not one but two regulatory agencies with significant technical expertise and concurrent (and somewhat overlapping) legal jurisdiction have been involved in the procedural and substantive process that led to the issuance of the permits. This situation provides a second layer of regulatory oversight to ensure that the applicable procedural and substantive requirements of the CAA, as adopted and enforced through the Utah Air Conservation Act in the spirit of “cooperative federalism,” have been met.

B. Petitioners’ Claim C – *Status Quo* Argument

In Claim C of Petitioners’ Opening Brief, Petitioners argued that the ALJ should infer that the BACT analysis underlying the WCP AO is insufficient because UDAQ did not, in fact, impose *new* emission limitations on Tesoro’s FCCU in the WCP AO despite the passage of time.

[Pet. Br. pp. 19-20]. Petitioners' argument is based on a premise that there is a *per se* error in an AO where the final permit maintains the *status quo* at an existing facility after the passage of years. Petitioners have asked the ALJ to remand the WCP AO to UDAQ for the limited purposes of further analyzing whether the existing controls for Tesoro's FCCU represent BACT.

The ALJ recommends that the Executive Director affirm UDAQ's BACT determination because Petitioners failed to marshal the evidence supporting UDAQ's BACT determination for the FCCU. In the alternative, the ALJ recommends that the Executive Director find that Petitioners have not met their burden of proof as they have not shown that UDAQ's BACT determination was not rational because Petitioners only rely on a categorical argument, not tied to the specific facts of the case, that the WCP AO must result in new controls and emission limitations for Tesoro's FCCU.

Findings and conclusions on Claim C—preservation

The ALJ finds that this argument was preserved in Petitioners' comments and RFAA, which argued that the BACT determination is "out of date." [*See* IR1120; RFAA p. 15].

Findings and conclusions on Claim C—marshaling the administrative record

Petitioners' argument on this point demonstrates the importance of the ALJ's requirement for marshaling the evidence. Pursuant to this argument, Petitioners want the ALJ to infer that due merely to the passage of time, there simply must be better control technologies available. Yet Petitioners' attempt to carry their burden of proof (and marshal the administrative record) amounts to a single footnote that is limited to a string of record citations. [Pet. Opening Br., p. 20, n.5; Pet. Reply, p. 14 (referring to footnote 5 of their Opening Brief their "specific BACT

marshaling effort”). This footnote is patently insufficient to carry Petitioners’ burden of proof on this issue.

To the contrary, an examination of the administrative record shows that an inference that BACT must be out of date based solely on the passage of time is not warranted: BACT is supported by a top-down analysis that evaluated the technical and economic feasibility of all potential controls that could be used at the FCCU to control emissions. [See IR1186-96 (Tesoro 2006 BACT Analysis); IR2840-51 (2006 SPR BACT analysis); IR2887-88 (UDAQ July 17, 2012 letter requesting additional information for the 2012 BACT analysis); IR2473-94 (July 25 supplement)].

Based on the foregoing, I find and conclude that Petitioners failed to carry their burden of proof on this issue. I therefore recommend that the Executive Director affirm UDAQ’s BACT determination.

Findings and conclusions on Claim C—merits of Petitioners’ argument

In the alternative to dismissal of Petitioners’ argument that the passage of time alone serves as proof that UDAQ’s BACT analysis is defective on the grounds of failure to carry their burden of proof or marshal all relevant evidence in the administrative record, I recommend that the Executive Director dismiss Petitioners’ *status quo* argument on the merits.

Petitioners argue that the BACT determination for the WCP AO is invalid because it maintains the “status quo” for controls and emission limitations at Tesoro’s FCCU. [Pet. Opening Br., pp. 19-20]. This argument presents a mixed question of law and fact because Petitioners ask for a review of UDAQ’s determination that the existing controls and emission

limitations for the FCCU remain BACT for the FCCU. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

Accordingly, UDAQ's determination is reviewed for an abuse of discretion.

Petitioners' have not met their burden of showing UDAQ's BACT determination for the FCCU is not rational as Petitioners' argument in Claim C presumes that UDAQ's finding is out of date but does not provide any specific information or argument showing UDAQ's BACT determination is outdated. *Sierra Club 2009*, 2009 UT 76, ¶ 46 (affirming a petitioners' challenge where petitioners identified substantive errors in UDAQ's analysis). Petitioners' argument in Claim C is devoid of substance and relies on bald, unsupported assertion. *Allen v. Friel*, 2008 UT 56, ¶ 9; *State v. Lamb*, 2013 UT App 5, ¶ 11. There is no requirement that a BACT determination result in something new, nor have Petitioners identified any authority to the contrary. Petitioners having failed to suggest any specific, alternate technology for consideration, they have failed in their burden of proof. There is simply no legal or factual basis in the administrative record from which to draw a conclusion that the BACT determination is faulty simply because the *status quo* has been preserved notwithstanding the passage of time.

To support my recommended ruling on the merits of the *status quo* issue, I incorporate by reference the Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2., to the effect that the UDAQ's BACT determination is sufficient to support the permits, notwithstanding the fact that the *status quo* was preserved despite the passage of time.

C. Petitioners' Claim D—Subpart Ja Represent the Minimum BACT Emission Limitations for Tesoro's FCCU

In Claim D of Petitioners' Opening Brief, Petitioners argue that the BACT analysis underlying the WCP AO is insufficient because the AO established emission limitations that were different than those provided in 40 CFR Part 60, Subpart Ja. 40 CFR 60.100a, et seq.

(hereinafter “Subpart Ja”); [Pet. Opening Br., pp. 21-23]. Petitioners request that the ALJ remand the WCP AO to UDAQ to either subject Tesoro’s FCCU to the conditions of Subpart Ja or explain why the technologies contained in Subpart Ja are not achievable at Tesoro’s FCCU. [Pet. Opening Br., p. 23].

The ALJ recommends that Claim D be dismissed with prejudice because Petitioners did not preserve this claim, either in their initial public comment letter or their RFAA. In the alternative, the ALJ recommends that this claim be dismissed on the merits because Petitioners have not demonstrated as a matter of law that Subpart Ja was an “applicable” standard for Tesoro’s FCCU, the threshold showing required under the definition of BACT.

Findings and conclusions on Claim D—preservation

Petitioners’ comments related to the BACT determination for the proposed WCP AO were contained in a single section titled, **The Record Does Not Support DAQ’s BACT Determination**. [IR1119-22]. In this section, Petitioners identified numerous general arguments related to the BACT analysis for the proposed WCP AO but at no point did Petitioners raise the issue that Subpart Ja represented the minimum emission limitations that UDAQ could adopt as BACT for Tesoro’s FCCU with sufficient specificity so as to permit UDAQ to provide a substantive response to the issue. [IR1119- 22].

Petitioners’ argue that the Subpart Ja issue was not reasonably ascertainable during public comment, yet Petitioners failed to raise their Subpart Ja argument in their RFAA. Petitioners’ BACT claims are contained in a sectioned that reads, **The BACT Analysis and Determinations Are Not Legally Sufficient and Are Not Supported by the Record**. [RFAA, p. 14-19]. In this section, Petitioners recite their original comments and add a paragraph in response to Tesoro’s

July 25 supplement. [RFAA, p. 18-19].²³ In this paragraph, Petitioners identified the documents attached to their comment letter and EPA’s Control Technique Guidance as the only sources of information that they believed dictated different emission limitations for Tesoro’s FCCU. It was not until Petitioners filed their Opening Brief that they raised, for the first time, an argument that BACT for the FCCU was influenced by Subpart Ja. [Pet. Br., pp. 21-23].

The record suggests that the Subpart Ja issue was reasonably ascertainable on the face of the proposed WCP AO. In the source plan review and draft WCP AO, UDAQ identified proposed emission limitations that the FCCU would be subject to through the WCP AO. [IR0679 (SPR; condition II.B.4.c—SOx emission limitations); IR0684 (SPR; condition

²³ The paragraph states in full:

As indicated above, the Refinery submitted further BACT analysis on July 18, 2012, after the close of the public comment period. . . . [T]his recently revealed analysis does nothing to rehabilitate the AOs—even should it include the July 18 analysis, the record does not support the BACT analysis or determinations. This is because, the BACT analysis:

- does not result in an emission limit;
- is without foundation, is not based on any cited authority, credible source or other convincing underpinning and is mere assertion;
- makes no effort to quantify actual emission reductions achieved as a result of the present configuration;
- provides no basis in the record for cost or pollution reduction estimates;
- conflicts with existing information;
- fails to address the requirement under Utah law that [BACT] shall be at least as stringent as any Control Technique Guidance document that has been published by EPA that is applicable to the source;
- does not address why its cost effectiveness calculations vary so wildly from those provided in the exhibits attached to Utah Physicians Comments;
- is not rigorous;
- lacks a baseline from which to compare the referenced control technologies;
- does not explain why the emission limits achieved by FCCU as referenced by the RBLC and by the exhibits attached to [Petitioners’] Comments cannot be achieved at the Refinery’s facility in a cost effective manner;
- is not BACT.

II.B.5.b—NO_x emission limitations); IR0685 (SPR; condition II.B.6.a—PM emission limitations); IR0715 (ITA; condition II.B.4.c—SO_x emission limitations); IR0721 (ITA; condition II.B.5.b—NO_x emission limitations); IR0721 (ITA; condition II.B.6.a—PM₁₀ emission limitations)]. Petitioners specifically commented that these emission limitations were not BACT and identified alternative limitations that Petitioners believed were BACT for Tesoro’s FCCU, with no mention of Subpart Ja. [IR1120-21].

The ALJ, therefore, recommends that Petitioners’ Subpart Ja argument in Claim D be dismissed, with prejudice, because Petitioners did not preserve this issue in their public comment letter or RFAA and the issue was reasonably ascertainable during the public comment period.

Findings and conclusions on Claim D—marshaling the administrative record

Because the Subpart Ja argument was not raised during the public comment period, UDAQ did not have the opportunity to consider or respond to the argument in its detailed response to comments. For this reason, the argument is subject to dismissal with prejudice under the Utah Code provisions dealing with preservation of arguments. Under section 19-1-301.5, the ALJ “shall dismiss, with prejudice, any issue or argument raised in a [RFAA] that has not been preserved.” Utah Code Ann. § 19-1-301.5(10)(b). The only exception is as to issues that are not reasonably ascertainable at the time of the public comments. Petitioners having failed to raise the Subpart Ja issue in their public comments and having failed to show how or why the Subpart Ja issue was not reasonably ascertainable at the time that public comments were due, the ALJ has no choice but to dismiss the argument with prejudice.

Findings and conclusions on Claim D—merits of Petitioners’ argument

In the alternative to a finding that Petitioners did not preserve the Subpart Ja issue, the ALJ recommends that this claim be dismissed on the merits, as a matter of law. More specifically, Petitioners have failed to show that UDAQ’s legal position on this issue is irrational. In their Opening Brief, Petitioners argued that the WCP AO must be remanded to UDAQ for further analysis of why the Subpart Ja emission limitations for FCCUs were not imposed on Tesoro’s FCCU as part of UDAQ’s BACT determination. [Pet. Br., pp. 21-23]. This claim presents a mixed question of law and fact because it asks for a review of UDAQ’s determination of whether Subpart Ja must be applied to Tesoro’s FCCU as a result of UDAQ’s BACT determination. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

In response to Petitioners’ Opening Brief, UDAQ explained that Petitioners failed to show that Subpart Ja set the minimum emission limitations for the FCCU’s BACT determination because Petitioners did not show that Subpart Ja was an “applicable” New Source Performance Standard. Petitioners’ argument arose from the regulatory definition of BACT, which, in part, states,

In no event shall application of [BACT] result in emissions of any pollutant which would exceed the emissions allowed by any ***applicable*** standard under 40 CFR parts 60 and 61.

Utah Admin. Code R307-401-2(1) (emphasis added). UDAQ explained its interpretation of this regulatory language and concluded that Petitioners did not show Subpart Ja had become an “applicable” standard to the FCCU. [UDAQ Resp., p. 27 (“[T]he project does not trigger Subpart Ja requirements. . . . [Petitioners] must make the threshold showing that subpart Ja is an applicable standard.”); *see also* Tes. Resp., p. 18, n.12]. Ultimately, UDAQ determined that the phrase “applicable” had meaning (as all regulatory terms must); that meaning being, that there

must be a showing that the NSPS was triggered for the FCCU before the NSPS is used to establish the minimum emission limitations as part of a BACT determination. Moreover, UDAQ determined that Subpart Ja was not triggered in fact by the changes to the FCCU authorized by the WCP AO.

The authority Petitioners identified as rebutting UDAQ's interpretation was limited to two administrative decisions by the EPA administrator and EPA's NSR Manual. [Pet. Reply, p. 36 (citing *In re St. Lawrence County Solid Waste Disposal Authority*, 1990 WL 324098 (Admin. July 27, 1990); *In re Columbia Gulf Transmission Co.*, 2 E.A.D. 824, 1989 WL 266361 (Admin. June 21, 1989); EPA NSR Manual, B.12). Each of these authorities acknowledges that the NSPS must be applicable for the NSPS to influence a BACT determination. *St. Lawrence*, 1990 WL 324098, *1; *Columbia Gulf*, 1989 WL 266361, *4; EPA NSR Manual, B.12. However, none of these authorities analyze what the term "applicable" means when considering a permit authorizing changes to an existing source. *St. Lawrence*, 1990 WL 324098, *1 (evaluating whether a new facility is subject to a proposed NSPS, which by definition backdates to the date the NSPS was proposed); *Columbia Gulf*, 1989 WL 266361, *4 (evaluating whether BACT may be more stringent than a 10 year old NSPS); EPA NSR Manual, B.12 (stating that BACT analysis may consider controls that are more stringent than an applicable NSPS).

Petitioners' authority does not answer the question what the term "applicable" means in Utah's BACT definition. UDAQ's two-part explanation—i.e., that the term "applicable" required a showing that Subpart Ja was triggered for the FCCU and that the WCP AO did not, in fact, make Subpart Ja applicable to Tesoro's FCCU—is a rational interpretation based on UDAQ's technical expertise and experience in the field. Given that UDAQ's interpretation and

application is rational, the Petitioners have not met their burden of showing UDAQ abused its discretion as argued in Claim D.

Based on the foregoing, in the event that the Executive Director concludes that the Subpart Ja issue has been preserved as required by law, I recommend that the Executive Director rule, on the merits, by deferring to UDAQ's interpretation as to the legal applicability of Subpart Ja and concluding that Subpart Ja is not legally applicable to the permits. In either event, I recommend that the Executive Director dismiss Petitioners' Claim D. In further support of my recommended ruling on the merits of Claim D, I incorporate by reference the Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2., to the effect that the UDAQ's BACT determination is sufficient to support the permits.

D. Petitioners' Claim E—UDAQ did not Establish Defensible Emission Limitations in Its BACT Analysis for the FCCU

In Claim E of Petitioners' Opening Brief, Petitioners argued that the BACT analysis for the FCCU is insufficient because UDAQ did not establish specific emission limitations based on a comparison to other FCCUs using the same technology as Tesoro. [Pet. Opening Br., pp. 23-25]. Petitioners argue that it is particularly hard to make sense of the refinery's BACT analysis for NO_x, which concludes: "Available control technologies are not technically or economically feasible for control of NO_x emissions from the FCCU/CO Boiler. Tesoro will continue to operate in compliance with its existing emission limit of 174 tons per year." [IR 002485]. Petitioners request that the WCP AO be remanded to UDAQ for re-evaluation of what emission limitations Tesoro may achieve with its current suite of controls. [*Id.*, p. 24-25].

The ALJ recommends that the Executive Director dismiss this claim, with prejudice, because Petitioners failed to preserve this issue in their comment letter and RFAA, and the issue

was reasonably ascertainable during the public comment period. In the alternative, the ALJ recommends that the Executive Director affirm UDAQ's BACT determination on the merits.

Findings and conclusions on Claim E—preservation

Petitioners identified eight comments contained in their public comments that they claim preserved this issue. Two of these comments are generic complaints about UDAQ's BACT analysis and do not preserve the issue they raised in their Opening Brief. [Pet. Reply, p. 38 (identifying IR1112 as stating that the BACT analysis is "legally insufficient" and IR1113 as stating that the record "lacks adequate BACT analysis")]. Five other comments are generalized complaints that UDAQ did not establish emission limitations as part of the WCP AO. [*E.g.*, Pet. Reply, p. 38 (identifying IR1120-21 and various quotes that claim the WCP AO "does not result in an emission limit.")]. Finally, Petitioners identified a quote that was part of a paragraph focused on the 2006 BACT Analysis. [Pet. Reply, p. 39 (quoting 1120)]. None of these comments raised the issue with sufficient information or documentation that allowed UDAQ to consider and respond to the specific claim that UDAQ did not establish emission limitations based on a comparison to other FCCUs using the *same* technology as Tesoro.²⁴

As to Petitioners' argument that the issue was not reasonably ascertainable during public comment, Petitioners' RFAA takes the issue no further than Petitioners' original comment letter. [RFAA, pp. 14-19]. Indeed, at no point do Petitioners contend that they raised this issue in their RFAA. Furthermore, the argument was, in fact, reasonably ascertainable during the public

²⁴ In a footnote in Petitioners' Opening Brief, Petitioners raised a claim that UDAQ's BACT determination was not rational because Tesoro's NOI showed that Tesoro's FCCU can achieve lower emissions. [Pet. Br., p. 25, n.9]. This argument was not preserved because Petitioners did not raise it in their comment letter or RFAA. [IR1119-22; RFAA, pp. 14-19]. Furthermore, the issue was reasonably ascertainable during the public comment period because Petitioners' argument is based on data contained in Tesoro's NOI. [Pet. Br. p. 25, n.9 (citing to the NOI)].

comment period because both the source plan review and proposed WCP AO identified the controls and emission limitations that Tesoro's FCCU would be subject to as a result of the WCP AO.

Because Petitioners did not preserve this issue, which was reasonably ascertainable during the public comment period, the ALJ recommends that this issue be dismissed with prejudice.

Findings and conclusions on Claim E—marshaling the evidence

Petitioners attempt to carry their burden of proof by citing a string administrative record citations. [Pet. Br., p. 20, n.5]. As discussed in more detail above, I have presumed that all of the evidence relating to this issue is found in the sections of the administrative record as cited by Petitioners and I have not undertaken an independent evaluation of the administrative record to identify all evidence that may be relevant to this argument. There does not appear to be much evidence of record, however, because Petitioners failed to preserve the argument and, hence, there is little if any evidence of record relating to these points. Based on the foregoing, I recommend that Claim E be dismissed with prejudice for Petitioners' failure to carry their burden of proof.

Findings and conclusions on Claim E—merits of Petitioners' argument

As an alternative to findings that Petitioners did not preserve this issue or otherwise carry their burden of proof, I find that UDAQ's BACT determination is rational and is supported by substantial evidence in the record as a matter of law. The Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2., are incorporated herein by this reference.

To the extent that this argument is not fully addressed in the above-referenced findings and conclusions, I make the following additional findings and conclusions:

Petitioners' Opening Brief requests that the WCP AO be remanded to UDAQ to enable the agency to establish emission limitations for Tesoro's FCCU based upon a review of other FCCUs using the same control technology. [Pet. Br., pp. 23-25]. Given that this issue is a challenge to UDAQ's BACT determination, this argument presents a mixed question of law and fact that is reviewed under an abuse of discretion standard. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

An issue that was live during UDAQ's review of the WCP AO was an argument that UDAQ did not establish any emission limitations as part of the agency's BACT determination for the FCCU. [IR1120]. Petitioners are simply wrong in this regard. As determined previously, the WCP AO resulted in a determination that the FCCU would be subject to the existing limitations that controlled emissions from the FCCU. *See* Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2, and specifically Finding of Fact No. 20.

As to Petitioners' argument that UDAQ had to compare Tesoro's emission limitations to those of other facilities using the same technology, Petitioners have not carried their burden of showing that the emission limitations for the FCCU are not BACT. UDAQ's BACT determination is supported by a site-specific BACT analysis that analyzed an array of controls, with associated emission reduction levels, that possibly could be installed at Tesoro's FCCU. [IR1181-96 (2006 BACT Analysis); IR2840-51 (2006 SPR); IR0321 (NOI); IR2473-94 (July 25 supplement)]. This analysis led to a conclusion that the existing controls and emission limitations represented BACT for the FCCU. Petitioners, however, have not shown it was

irrational to conclude that because the controls at Tesoro's FCCU were not changing, the established emission limitations remained BACT.

Furthermore, even though they had the opportunity to do so during the public comment period and in these adjudicative proceedings, Petitioners produced no information or authority that demonstrates other FCCUs using an electrostatic precipitator and SO_x reducing catalyst are subject to different emission limitations. *Compare Sierra Club 2009*, 2009 UT 76, ¶ 47 (siding with a permit challenger who identified an alternative, more stringent emission limitation for the same technology than the limitation imposed by UDAQ for that technology).²⁵

Accordingly, the ALJ recommends that this claim be dismissed on the merits because Petitioners failed to show UDAQ abused its discretion when it determined that the existing emission limitations that applied to Tesoro's FCCU represented BACT for the FCCU.

²⁵ Petitioners also argued that the BACT determination was unreasonable because the prior actual emissions for the FCCU were below the emission limitations set in the WCP AO. [Pet. Br. p. 25, n.9]. Petitioners did not preserve this claim in their comment letter or RFAA and this claim was reasonably ascertainable at the time that public comments were due and therefore should not be considered further. Even if the issue had been preserved, it lacks merit. UDAQ's BACT definition does not require UDAQ to set emission limitations based on the lowest emission rate that a facility previously achieved. Utah Admin. Code R307-401-2(1). Moreover, Petitioners' argument is contrary to Environmental Appeals Board decisions, which state "that permitting agencies have the discretion to set BACT limits at levels that do not necessarily reflect the highest possible control efficiencies but, rather, will allow permittees to achieve compliance on a consistent basis." *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 2001 WL 624778, *12 (EAB May 30, 2001); *In re Masonite Corp.*, 5 E.A.D. 551, 1994 WL 615380, *6 (EAB Nov. 1, 1994). Indeed, the Board has acknowledged that it is appropriate for permit agencies to allow for a "safety factor" when setting emission limitations. *In re Newmont Nevada Energy Investment, LLC*, 12 E.A.D. 429, 2005 WL 4905114, *13 (EAB Dec. 21, 2005); *In re Cardinal FG Co.*, 12 E.A.D. 153, 2005 WL 701329, *15 (EAB March 22, 2005). The administrative record shows that the FCCU's emission limitations—limitations that were carried forward into the WCP AO—were established with a safety factor that allowed Tesoro to achieve compliance on a consistent basis. [IR1181-85 (Tesoro 2006 NOI; proposing emission limitations based on actual emissions and a safety factor below the regulatory significant emission rate); IR2838-40 (2006 SPR; establishing emission limitations based on actual emissions and a safety factor)]. Tesoro should not now be penalized for having implemented safety factors.

E. Petitioners' Claim F—Petitioners' Evidence of “More-Stringent” BACT Emission Limitations

In Claim F of their Opening Brief, Petitioners argued that UDAQ provided an insufficient response to three documents Petitioners submitted as part of their comments on the proposed WCP AO. [Pet. Br., pp. 25-27]. The three documents are:

- Mid-Atlantic Regional Air Management Association, Assessment of Control Technology Option for Petroleum Refineries in the Mid-Atlantic Region, January, 2007. [IR1263-1468 (hereinafter the “MARAMA Report”)].
- A Consent Decree (unsigned and containing no case number) in the matter captioned as *United States v. Holly Refinery and Marketing Company—Woods Cross*. [IR1469-1609 (hereinafter the “Holly Consent Decree”)].
- A draft Statement of Basis and Ambient Air Quality Impact Report prepared by EPA Region IX as part of a draft permit for Big West of California’s Bakersfield Refinery. [IR1610-1659 (hereinafter the “Proposed Big West Permit”)].

Petitioners request that the WCP AO be remanded to UDAQ so the agency can reconsider the information contained in the three documents. [*Id.*, p. 27].

The ALJ recommends that the Executive Director affirm UDAQ’s BACT determination because Petitioners did not carry their burden of proof on this issue or, in the alternative, because Petitioners failed to marshal the evidence in support of UDAQ’s determination. In the alternative, I recommend that this issue be dismissed on the merits because the administrative record demonstrates that UDAQ in fact considered these documents and the information contained therein and concluded that nothing in these documents changed UDAQ’s site-specific BACT determination for the FCCU.

Findings and conclusions on Claim F—preservation

The ALJ concludes that Petitioners preserved this claim. [See IR1120-21; RFAA, pp. 16-17].

Findings and conclusions on Claim F—marshaling the administrative record

Petitioners' Opening Brief made no specific effort to marshal the evidence supporting UDAQ's review of the three documents Petitioners attached to their comments or the evidence supporting UDAQ's BACT determination. I find that footnote 5 in Petitioners' opening brief is inadequate to marshal the evidence supporting UDAQ's BACT determination on this issue and therefore recommend that the Executive Director affirm UDAQ's BACT determination for failure to carry the burden of proof or, in the alternative, to marshal the evidence. Petitioners have simply failed to demonstrate that the permits at issue in these proceedings, and the BACT analysis in particular, are not supported by substantial evidence in the administrative record or are contrary to law. Based on the foregoing, Claim F should be dismissed based on Petitioners' failure to carry their burden of proof.

Findings and conclusions on Claim F—merits of Petitioners' argument

In the alternative, I recommend that this issue be dismissed on the merits because UDAQ's analysis and treatment of Petitioners' three documents was rational and is supported by substantial evidence, as a matter of law. Petitioners argue that the WCP AO must be remanded to allow UDAQ to reconsider the BACT analysis for the FCCU in light of Petitioners' three documents. This issue presents a mixed question of law and fact because, at its core, Petitioners' argument asks the ALJ to review whether UDAQ gave sufficient consideration to certain documents when it was making its BACT determination. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

The Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2., are incorporated herein by this reference.

To the extent that this argument is not fully addressed in the above-referenced findings and conclusions, I make the following additional findings and conclusions:

Under the applicable regulations, UDAQ is required to “consider all comments received during the public comment period . . . and, if appropriate, will make changes to the proposal in response to comments before issuing an [AO].” Utah Admin. Code R307-401-7(3).

UDAQ, in fact, considered Petitioners’ comment and provided the following response:

With the exception of EPA’s Big West Permit the documents referenced by the comment are not NSR permitting documents and any limitations established by them were not established for BACT purposes. Specifically, the MARAMA report is a listing of control technology options being reviewed for SIP RACT purposes. The establishment of RACT as part of a SIP process involves adding improved or additional controls at sources in order for an airshed to reach attainment of the NAAQS (see 40 CFR 51.1010). This takes place outside of the NSR process. The Holly Consent Decree is a settlement between Holly and the federal government. Any limitations imposed are the result of negotiations between the parties and not necessarily through the NSR process. The Big West Permit document is a PSD permitting action and where applicable could be consulted in an NSR BACT analysis. However, establishment of BACT is a case-by-case determination performed for each pollutant emitted by the modification in question (see the definition of BACT (R307-401-2(1)) and quoted in response to comment #26 above). Selectively identifying permit limits from a variety of documents and stating that those limits are BACT bypasses the case-by-case review process required by BACT’s very definition.

[IR1987 (response #28)].

Upon review of this response, I find and conclude that UDAQ’s analysis and reasoning are rational. In discussing the BACT process, UDAQ interpreted BACT as necessarily being a site-specific inquiry into what controls are technically and economically feasible to install at a facility. This is drawn from, and supported by, UDAQ’s definition of BACT. Utah Admin.

Code R307-401-2(1) (defining BACT as a “case-by-case” determination based upon “application of production processes or available methods, systems, and techniques . . . for control of such pollutant”); *see also Newmont Nevada*, 2005 WL 4905114, *36 (“[A] BACT determination is inextricably tied to a specific set of assumptions regarding the type of pollution control technology that will be in place.” (internal quotation marks omitted)).

UDAQ undertook an un-rebutted, site-specific BACT analysis for the FCCU. *See* Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2. UDAQ’s determination that the foregoing three Petitioners’ three documents did not change whether it was feasible to install each control evaluated for Tesoro’s FCCU is rational and is supported by substantial evidence. Petitioners’ evidence on this point simply shows that other FCCUs are subject to different emission limitations than Tesoro’s FCCU. But Petitioners have not taken the next step in the necessary analytical process to show what technology led to those different standards and, importantly, why UDAQ’s determination that those controls are not feasible for Tesoro’s FCCU is an abuse of discretion. *Sierra Club 2009*, 2009 UT 76, ¶ 46.

Based on the foregoing, I recommend that to the extent that Claim F should be decided on the merits, that the Executive Director find that the permits are supported by substantial evidence in the administrative record that that UDAQ did not abuse its discretion.

F. Petitioners’ Claim G—UDAQ’s Independent Review

In Claim G of Petitioners’ Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ failed to conduct an independent, “critical review” of Tesoro’s BACT analysis. For support, Petitioners rely on the fact that UDAQ did not change its conclusion as to the BACT determination in response to the information contained in Tesoro’s July 25 supplement. [Pet.

Br., p. 28-29]. Furthermore, Petitioners argue that UDAQ erred when it did not require Tesoro to submit more back-up documentation for the BACT analysis. Petitioners argue that this BACT determination “cannot be sustained.” I understand that if Petitioners prevail in this argument, the remedy sought would be to remand the WCP AO to UDAQ for further, independent BACT analysis. [*Id.*, p. 29].

The ALJ recommends that the Executive Director affirm UDAQ’s BACT determination for a variety of reasons. First, Petitioners failed to carry their burden of proof by showing me that UDAQ’s BACT determination is not based on substantial evidence in the administrative record. Second, the law, including UDAQ’s implementing regulations, does not mandate that UDAQ conduct a *de novo*, independent review of BACT. Thus, the UDAQ’s conclusions regarding BACT are consistent with applicable legal requirements. Third, turning to the merits, I find that UDAQ did undertake an adequate BACT analysis to support the WCP AO, pursuant to the Findings of Fact and Conclusions of Law set forth above.

Findings and conclusions on Claim G—preservation

The ALJ concludes that Petitioners preserved this claim. [*See* IR1120; RFAA, p. 15].

Findings and conclusions on Claim G—burden of proof and marshaling the administrative record

Petitioners have made no specific effort to carry their burden of proof on this argument. Based on the briefing provided to me, Petitioners have failed to demonstrate that UDAQ’s BACT determination is not based on substantial evidence in the record before me. As determined previously, Petitioners’ footnote 5 is inadequate to marshal the evidence supporting

UDAQ's BACT determination and, as a result, the ALJ recommends that the Executive Director affirm UDAQ's BACT determination for failure to carry their burden of proof.

Findings and conclusions on Claim G—merits of Petitioners argument

In the alternative, Claim G should be dismissed on the merits. The issues pertaining to this argument have been addressed in detail above. The Findings of Fact and Conclusions of Law set forth above in Section III.A.1. and 2., are incorporated herein by this reference. I find that the issues raised separately in Claim G are fully addressed in the above-referenced Findings of Fact and Conclusions of Law, as to the merits of this argument.

Based on the foregoing, I recommend that the Executive Director find that UDAQ's BACT determination was rational, as UDAQ's analysis followed the applicable regulations and guidance governing UDAQ's BACT determinations.

G. Petitioners' Claim H—Short-Term Emission Limitations

In Claim H as set forth in Petitioners' Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not ensure that the short-term SO₂ and NO_x NAAQS would be protected because the WCP AO did not impose emission limitations based on one-hour averages for the FCCU. Alternatively, Petitioners argued that UDAQ needed to explain why such short-term emission limitations for SO₂ and NO_x are unnecessary. [Pet. Opening Br., p. 29-30]. More specifically, Petitioners contend: "After all, an air quality agency 'must either include maximum allowable hourly emissions limitations for SO₂ and NO_x and explain how it concluded that the limitations are protective of the respective one-hour NAAQS or provide sufficient rationale for not including such emissions limitations.' *In Re: Mississippi Lime*, PSD Appeal No. 11-01 (August 9, 2011); 2011 WL 3557194 at 17-18." [Pet. Opening Br., p. 29].

If granted, Claim H may require that the WCP AO be remanded to UDAQ to consider whether short-term emission limitations were necessary for Tesoro's FCCU.

I recommend that the Executive Director dismiss Petitioners' short-term emission-limitation argument with prejudice because Petitioners did not preserve this issue in their comment letter or RFAA, and the issue was reasonably ascertainable during the public comment period. To the extent that the issue was adequately preserved, I recommend that the Executive Director affirm UDAQ's determination because Petitioners did not carry their burden of proof on this issue or, in the alternative, did not marshal the evidence on this issue. In the alternative, the ALJ recommends that this issue be dismissed on the merits.

Findings and Conclusions on Claim H—preservation

Petitioners' comments regarding the BACT analysis for the proposed WCP AO are set forth in a section of their comments under the heading: "**The Record Does Not Support DAQ's BACT Determination.**" [IR1119-22]. In this section, Petitioners did not specifically cite to the 1-hour SO₂ or NO_x standards, nor did they argue for emission limitations based on a 1-hour average, either specifically or generally, that they now argue are necessary for the WCP AO to be valid. Similarly, Petitioners' RFAA does not raise the issue of emission limitations based on the 1-hour standards for the FCCU. [RFAA, pp. 14-19].

Based on the foregoing, Petitioners' contend that the argument regarding short-term NAAQS was not reasonably ascertainable until Petitioners reviewed Tesoro's July 25 supplement was not preserved.

As I read the Utah Code, the apparent purpose of the preservation requirement is to allow the division director to consider all relevant substantive issues on the merits, prior to making a

final decision as to the propriety of granting a given permit. *See* Utah Code Ann. § 19-1-301.5(4) (providing that a person challenging a permit order must raise an issue or argument during public comment that is “supported by sufficient information or documentation to enable the director to fully consider the substance and significance of the issue.”). In this matter, the process seems to have worked as intended in relation to, for example, public comments as to the BACT determination: As described more fully above, the UDAQ requested supplemental, detailed BACT information and data in response to public comments.

While I believe that the standard of proof for preservation of issues in public comments should be relatively low in light of the relative level of sophistication, information, and knowledge as between members of the public on the one hand and UDAQ on the other, in this instance I am not persuaded that Petitioners adequately preserved Claim H as required by the Utah Code. While Petitioners now allege that this claim was not reasonably ascertainable at the time they generated their original public comments, Petitioners’ own comments show this issue was likely reasonably ascertainable during the public comment period. In their comment letter, Petitioners argued that the FCCU should be subject to NO_x and SO₂ emission limitations based on annual and weekly averages and a PM emission limitation based on a 3-hour average.

[IR1120-21].

The Utah Code provision dealing with permit review adjudicative proceedings is clear and unambiguous as to the disposition of matters that were not raised in public comments (where a public comment period is provided): The ALJ is to dismiss such issues out of hand: Under section 19-1-301.5, the ALJ “shall dismiss, with prejudice, any issue or argument raised in a [RFAA] that has not been preserved.” Utah Code Ann. § 19-1-301.5(10)(b). *See also* Utah

Code Ann. § 19-1-301.5(4) (describing the standard for preservation). Based on the foregoing, I, recommend that Petitioners' short-term NAAQS arguments be dismissed with prejudice for failure to preserve this issue in their comment letter or RFAA, where the issue was reasonably ascertainable during the public comment period.

All of that said, it appears that EPA, in its public comments, raised concerns that seem to be similar to Claim H, specifically relating to 1-hour emission limits as relating to NO₂ monitoring. *See* EPA Comments on Intent-to-Approve for Tesoro SLC Refinery Waxy Crude Project (April 23, 2012), Comment 2, p. 3 [IR-001662] (“EPA Comment No. 2”). To the extent that EPA Comment No. 2 is the same as Claim H, I find that it has been preserved and that Petitioners have standing to assert it in these proceedings because UDAQ in fact considered it and rendered a detailed response [IR2004-05 (response #67)]. To the extent that Claim H goes beyond EPA Comment No. 2, I find and conclude that it should be dismissed for failure to preserve as required by the Utah Code.

Finding and conclusions on Claim H—burden of proof and marshaling the evidence

In the interest of creating a complete record for appeal and in the interest of judicial economy, I believe it is appropriate to consider Claim H as to burden of proof and on the merits, notwithstanding the finding that this issue was not preserved as required by the Utah Code. This is not too surprising because it appears that Petitioners failed to raise Claim H in connection with their public comments. Because of their failure to raise Claim H in the first instance, UDAQ did not directly address this issue in connection with its Response to Public Comments. However, UDAQ did consider and respond to EPA Comment No. 2. The UDAQ's failure to address Claim H is not surprising, given Plaintiffs' failure to preserve this issue. But even so, as to the burden

of proof, Petitioners appear to rely on the string of citations that Petitioners provided in footnote 5 of their Opening Brief. Plaintiffs made no serious attempt to carry their burden of proof by marshaling the evidence on their claim that UDAQ was required to impose emission limitations based on 1-hour averages in the WCP AO. On this record, the Marshaling Requirement would not directly apply since UDAQ apparently did not consider Claim H in the first instance and reached no direct conclusions on the matter. The present scenario underscores the procedural importance of the requirement that all issues be raised in connection with the public notice period so that the division director may fully consider such issues on the merits prior to issuing the permit, and thereby creating a record for review. Based on this record I find that Petitioners have failed to carry their burden of proof and failed to marshal the record as to Claim H.

Therefore Claim H should be dismissed on this basis.

Findings and conclusions on Claim H—merits of Petitioners’ argument

In the alternative to dismissing Petitioners’ argument on preservation, burden of proof, and marshaling grounds and in the interest of creating a complete record for appeal, the ALJ recommends that the Executive Director affirm UDAQ’s determination on the merits.

After review of the record, it is clear that UDAQ provided a rational basis for the inferred determination that the 1-hour NAAQS did not need to be evaluated as part of the WCP AO. Petitioners argued that the WCP AO must be remanded to UDAQ to either impose emission limitations on the FCCU that are based on the 1-hour NAAQS or provide an explanation as to why such emission limitations are not necessary. [Pet. Br. pp. 29-30]. This argument presents a mixed question of law and fact as Petitioners have requested the ALJ to review UDAQ’s BACT determination. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

Petitioners' Opening Brief leads one to believe that UDAQ did not consider the short-term NAAQS at all while considering the WCP AO. This impression is not accurate. As explained below, the administrative record includes an explanation of the whether further analysis of the 1-hour NO₂ standards was required for the WCP AO. [IR2004-05 (response #67)].

Based on my review of the administrative record and briefing of the parties, I make the following supplemental findings of fact and conclusions of law as to Claim H:

1. In commenting on the proposed WCP AO, EPA submitted a comment letter that asked UDAQ to analyze the area surrounding Tesoro's Refinery for compliance with the 1-hour NO₂ NAAQS by conducting either an ambient air impacts analysis or initiating monitoring of the 1-hour NO₂ NAAQS. [IR-1662 (EPA Comment No. 2)].

2. Claim H was not preserved and is therefore barred to the extent that it goes beyond the issues raised in EPA's Comment No. 2.

3. UDAQ considered EPA Comment No. 2 and determined that the agency did not need to make changes to the WCP AO for several reasons, including (1) the increase in annual emissions were not enough to trigger an ambient impacts analysis under R307-410-4, (2) the project was not increasing hourly emissions from the FCCU, (3) UDAQ was already monitoring 1-hour NO₂ concentrations near Tesoro's refinery, and (4) UDAQ intended to install another monitor for the 1-hour NAAQS. [IR2004-05 (response #67)].

4. I find that this determination as to EPA Comment No. 2 is rational and unchallenged in these adjudicative proceedings.

5. By contrast to these proceedings, commenting parties (including one of the two Petitioners in the instant proceeding) did raise the specific short-term emission limitation objections in opposition to a similar permit issued to the Holly Refinery in another matter, but in that matter, the comment was supported by sufficient information to allow UDAQ to provide a substantive response to the issue in connection with its review of public comments. In UDAQ's Response to Public Comment in that permit proceeding, UDAQ rejected Petitioners' claim that limitations that cap NO₂ and SO₂ emissions on an hourly basis are required for all minor source permits. See Memorandum from Camron Harry, Engineer, to Mary Gray, NSR Manager, p. 13, November 18, 2013 (hereinafter "Holly Response to Comments") which may be found at the UDEQ website: http://www.airquality.utah.gov/Public-Interest/Holly_refinery/index.htm (see Response No. 20, rejecting the applicability of EAB's decision in *In re Mississippi Lime* relating to 1-hour short term emission limits).²⁶ I find and conclude that had UDAQ been provided with a timely comment on Claim H here, its analysis and conclusion would have been the same as in the Holly permit, on the merits of Claim H. This conclusion is based, in part, on the legal briefing submitted by the parties on the merits.

6. Given UDAQ's explanations and the technical nature of the determination, the ALJ recommends that the Executive Director defer to UDAQ's determination that an analysis of the 1-hour NAAQS was not necessary for UDAQ to issue the WCP AO.

²⁶ Because this reference involves similar modifications and permit and is relevant both as to the procedural and substantive issues relating to Petitioners' Claim H, including specific reliance on *In re Mississippi Lime*, I take judicial notice of UDAQ's consideration of the applicability of 1-hour emission limits in connection with the Holly permits, as I am allowed to do in section 19-1-301.5(9)(e). Nevertheless, this finding-conclusion is not determinative of resolution of Claim H on the merits.

Based on the foregoing, to the extent that the Executive Director reaches the merits of Claim H, I recommend that this claim be dismissed because UDAQ's determination is rational and is supported by substantial evidence.

H. Petitioners' Claim I—PM_{2.5} Emission Limitations

Claim I of Petitioners' Opening Brief reads, in its entirety, as follows:

R307-401-2(1) defines BACT as “an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction **for each air contaminant** which would be emitted from any proposed stationary source or modification[.]” The Tesoro Refinery FCCU will emit PM_{2.5} and, indeed, increases in PM_{2.5} emissions from the FCCU will result from the Waxy Crude Project. IR 000301. However, the Director's BACT analysis does not result in any emission limitations that controls in any way, much less to the maximum degree, emissions of PM_{2.5} from the FCCU. Moreover, there is nothing in the record to indicate why any such emission limit may be infeasible. As a result, the Director's BACT analysis is indefensible.

[Pet. Opening Br., p. 30]. If successful, Petitioners' argument would result in remand of the WCP AO to evaluate whether Tesoro's FCCU should be subject to a PM_{2.5} emission limit.

As discussed more fully below, while I find that this claim was adequately preserved, I find that Petitioners have failed to carry their burden of proof. In the alternative, I find that Claim I should be dismissed on the merits because UDAQ's determination that it was more appropriate to regulate the FCCU's PM_{2.5} emissions as part of UDAQ's development of a PM_{2.5} SIP is rational.

Findings and conclusions on Claim I—preservation

As an initial matter, the ALJ is required to make a finding as to whether Claim I was adequately preserved in public comments as required by the Utah Code provisions outlined in more detail above. I find that the claim was adequately preserved.

Tesoro's NOI identified, among other things, the distinction between total PM, PM₁₀ and PM_{2.5}. [IR0300-01, 338-39, 349-54]. Petitioners' public comments contain lengthy references of facts supporting a conclusion that particulate matter generally, and PM₁₀ and PM_{2.5} in particular, are dangerous to human health and the environment. [IR-001103-1108]. Moreover, Petitioners specifically claim that the Director's particulate matter analysis "does not result in an emission limit" [IR-001121] and that there is no PM₁₀ limit [IR-001123]. Moreover, the UDAQ's response to public comments addresses these PM-related comments, as discussed in more detail below. Based on the foregoing, I find that Claim I was preserved, to the extent that Claim I as presently characterized was in fact stated in Petitioners' comments. That said, to the extent that Claim I attempts to recharacterize or expand Petitioners' comments, Claim I has not been preserved and should be dismissed with prejudice.

Findings and conclusion on Claim I—merits of Petitioners' argument

Turning to the merits of Claim I, the ALJ concludes that Petitioners did not carry their burden of proof, the ALJ recommends that this claim be dismissed because UDAQ provided a rational basis for its decision to not impose a PM_{2.5} emission limitation for Tesoro's FCCU as part of the WCP AO. Petitioners argue that the WCP AO must be remanded to UDAQ to consider whether the FCCU must be subject to a PM_{2.5} emission limitation as part of the WCP AO. [Pet. Opening Br., p. 30]. This issue presents a mixed question of law and fact because Petitioners requested the ALJ to review UDAQ's BACT determination for the FCCU. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

As for factual issues related to Claim I, Petitioners do not provide citations as to evidence in the administrative record supporting their Claim I or marshal the evidence on this claim.

Indeed, UDAQ's response to comments, as quoted and analyzed below, provided an explanation as to why UDAQ did not impose a PM_{2.5} emission limitation on Tesoro's FCCU as part of the WCP AO. [IR1968 (response #4)]. As briefed, Claim I does not provide enough information upon which to conclude that the UDAQ's decision is not based on substantial evidence. The ALJ, and the Executive Director, therefore, are entitled to presume that the UDAQ's decision is correct. Based on the foregoing, I recommend that the Executive Director affirm UDAQ's determination regarding PM_{2.5} emission limitations and dismiss Claim I.

As to legal issues related to Claim I, in its Response to Public Comments, UDAQ provided a detailed explanation for why it did not impose PM_{2.5} emission limitations in the WCP AO. Specifically, in Response Number 4, UDAQ explained:

The comment refers to a general state of air pollution, and not to any specific aspect of either the ITAs or the underlying source plan reviews. UDAQ is currently developing a SIP for PM_{2.5}, and the contribution to the valley airshed from the Tesoro refinery will be part of that evaluation.

UDAQ processes NOIs and issues AOs based on existing regulations. All requirements from the PM₁₀ and SO₂ portions of the Utah SIP which pertain to the Tesoro refinery have previously been incorporated into the AOs issued to Tesoro, and such language remains in place in this most recent ITA. . . .

[IR1968 (response #4)]. Stated differently, UDAQ found that it was more appropriate to regulate Tesoro's PM_{2.5} emissions as part of its evaluation and development of the SIP for the entire nonattainment area.

This is a technical issue and the ALJ recommends that the Executive Director defer to UDAQ's determination that it would be more appropriate to evaluate and control PM_{2.5} emissions from Tesoro's FCCU as it develops the PM_{2.5} SIP, a determination that is further

supported in the Holly permit proceedings. As such, the ALJ recommends that this issue be dismissed.

I. Petitioners' Claim K—NSPS Applicability to Tesoro's Flares

In Claim K of Petitioners' Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not determine whether Tesoro's flares were subject to Subpart Ja as a result of the WCP AO. [Pet. Br., pp. 31-35]. Based on this argument, Petitioners requested that the WCP AO be remanded to UDAQ to determine if Tesoro's flares are subject to Subpart Ja.

The ALJ recommends that the Executive Director dismiss this claim with prejudice because Petitioners did not preserve the issue in their comment letter or RFAA. In the alternative, the ALJ recommends that the Executive Director affirm UDAQ determination because Petitioners did not marshal the evidence supporting UDAQ's determination. Furthermore and also in the alternative, the ALJ recommends that the Executive Director dismiss this claim because the issue is moot.

Findings and conclusions on Claim K—preservation

While Petitioners' public comments may have been more specific, I find that they are sufficient to preserve Claim K. [IR1125-27; IR 1139-46]. For example, Tesoro took the initial position that the flares were not subject to Subpart Ja, showing that what is now Claim K was understood by Respondents. [IR0312-15, 27]. And while Petitioners narrowed their claims in their RFAA, I find that Claim K has been adequately preserved. [RFAA, p. 25-28 (focusing exclusively on the FCCU); p. 32-33 (focusing exclusively on UDAQ's determination that BACT was not triggered for the flares)]. This conclusion is based in part on the finding that UDAQ has

sufficient technical knowledge and as a result has been afforded significant discretion in its BACT determinations to have responded to the scope of Petitioners' comments.

Findings and conclusions on Claim K—merits of Petitioners' argument

Petitioners attempted to marshal the evidence on this claim in a footnote that provides a string of record citations for the ALJ to review. [Pet. Opening Brief, p. 32, n.13; Pet. Reply, p. 47, n. 29]. As discussed more fully above, I am entitled to assume that these record citations represent the only record of evidence relevant to Claim K. I find that this record citation is insufficient for Petitioners to carry their burden of proof that UDAQ's findings of fact are not supported by substantial evidence in the record. Accordingly, the ALJ recommends that the Executive Director affirm UDAQ's determination on this issue based on Petitioners' failure to carry their burden of proof.

In the alternative to affirming UDAQ's determination on burden of proof grounds, the ALJ recommends that this claim be dismissed because Petitioners' argument is rendered moot by Tesoro's acknowledgement that other projects have in fact triggered Subpart Ja applicability for Tesoro's flares.

In this claim, Petitioners argued that the WCP AO must be remanded to the agency for a determination that Subpart Ja applies to Tesoro's flares as a result of the WCP AO. Petitioners' argument presents a mixed question of law and fact because Petitioners' claim requested that the ALJ review UDAQ's determination of whether an NSPS applies to Tesoro's flares (requiring an interpretation of when the NSPS applies) as a result of certain physical changes (requiring an application of the facts to the law) to the flares. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

While Petitioners demand that the WCP AO be remanded to UDAQ to consider whether Subpart Ja applies to Tesoro's flares, I conclude that such a remand is unnecessary because Tesoro has acknowledged that other projects triggered Subpart Ja's applicability to Tesoro's flares and that the refinery will comply with the NSPS. [IR2453 (Tesoro June 7, 2012 letter)]. As a result, there is nothing for UDAQ to do on remand as Tesoro will be required to comply with the Ja provisions governing flares as required by the NSPS.

To be sure, Petitioners contend that this argument should be rejected because Tesoro was required to comply with Subpart Ja by November 13, 2012 and not November 11, 2015. [Pet. Reply p. 49]. To the best of my understanding, it appears that the November 2012 applicability date applies to a provision that limits the amount of hydrogen sulfide contained in the fuel gas that flows to the flare. 40 CFR 60.103a(f) & (h). The concentration limitation is carried over from Subpart J—a prior NSPS for petroleum refineries—that maintains an existing limitation as a flare transferred between Subpart J and Subpart Ja. 73 Fed. Reg. 35838, 35842/2 (June 24, 2008) (stating that the hydrogen sulfide concentration limit is “equivalent” to a concentration limit contained in Subpart J). The limit, however, only applies when the flare was previously subject to Subpart J. 40 CFR 60.103a(f). Petitioners have not shown that Tesoro's flares were previously subject to Subpart J and Tesoro stated at oral argument that the flares were not previously subject to Subpart J. [Tr. 160:9-24].

Given that this issue is moot, and Tesoro's flares will be required to comply with Subpart Ja by November 2015 in accordance with applicable law, the ALJ recommends this claim be dismissed.

J. Petitioners' Claim L—Exemption of Tesoro's Flares from NSR

In Claim L of Petitioners' Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ exempted Tesoro's flares from all emission limitations and monitoring, which precluded UDAQ from ensuring that the changes to Tesoro's refinery would not lead to violations of the short-term NAAQS. [Pet. Br., pp. 35-36]. If accepted, Petitioners' argument would require the ALJ to remand the WCP AO to UDAQ to determine what, if any, additional emission limitations and monitoring requirements should be imposed on Tesoro's flares.

The ALJ recommends that this issue be dismissed, in part, because Petitioners did not preserve the argument in their comment letter or RFAA. In the alternative, the ALJ recommends that the Executive Director affirm UDAQ's determination because Petitioners did not meet their burden of proof. Furthermore and also in the alternative, the ALJ recommends that this argument be dismissed on the merits because Petitioners have not shown that UDAQ was required to impose an emission limitation or monitoring requirement on Tesoro's flares as part of the WCP AO.

Findings and conclusions on Claim L—preservation

Petitioners' public comments argued that alleged UDAQ improperly excluded flare emissions from review of the WCP AO [IR1143-44]. Petitioners' RFAA states that UDAQ's analysis of the SRU Flare was not consistent with Tesoro's analysis of the SRU Flare [RFAA, pp. 32-33]. Thus, these issues have been preserved for determination on the merits.

By contrast, in their briefing on the merits, Petitioners appear to have expanded their arguments beyond what was stated in their public comments. Specifically, Petitioners' public comments did not specifically suggest that the UDAQ ought to set separate emission limits that

protect the short-term NAAQS, nor does the RFAA include an argument that the SRU Flare ought to be subject to specific emission limitations.²⁷

As discussed above in more detail, the apparent purpose of the preservation requirement is to allow the division director to consider and make a determination, especially as to very specific technical issues that fall within the discretion and expertise of the division director. The issue of setting of emission limitations on Tesoro's flares represents a good example of the applicability of this policy to a specific issue. Had this specific issue been raised in the public comments, the Division Director would no doubt have issued a response in the ordinary course. Therefore, Claim L was preserved to the extent of the arguments raised in Petitioners' public comments and arguments and issues reasonably inferred therefrom. I do not believe that it is reasonable to conclude that the division director should have known from their public comments that Petitioners were suggesting that the UDAQ ought to specifically set separate emission limits that protect the short-term NAAQS or that the SRU Flare ought to be subject to specific emission limitations. Moreover, there is nothing in the record upon which to conclude that Claim L, as fully described, was not reasonably ascertainable at the time Petitioners submitted their public comments. Therefore, I find that Claim L has been preserved in part and that part of Claim L has not been adequately preserved. Based on the foregoing, I recommend that the Executive Director dismiss the portion of Petitioners' Claim L stating that the flares must be subject to emission limitations and monitoring, with prejudice for failure to preserve the argument as required by the Utah Code.

Findings and conclusions on Claim L—merits of Petitioners' argument

²⁷ Petitioners failed to argue this issue, as presently described, was not reasonably ascertainable during the public comment period.

In addition and alternative to a finding that Petitioners' failed to preserve this claim, the ALJ recommends that the Executive Director dismiss Claim L on the merits. In short, Petitioners have failed to demonstrated that UDAQ was required to establish emission limitations and monitoring requirements for Tesoro's flares in the WCP AO.

Petitioners argued that the WCP AO must be remanded to UDAQ to allow the agency to impose emission limitations on Tesoro's flares as part of the WCP AO to protect the short-term NAAQS. This issue presents a mixed question of law and fact because it requires a review of UDAQ's interpretation of when the agency must establish an emission limitation and then apply the facts of the WCP AO to the law.

As to factual issues related to Claim L, Petitioners appear to attempt to marshal the evidence on this issue by providing a single footnote that provides a string of record citations. [Pet. Opening Br. p. 35, n.15]. Nevertheless, as discussed above, some of the specific issues in Claim L were not raised in Petitioners' public comments. As a result, there does not appear to be much in the administrative record concerning these specific arguments and therefore nothing to marshal. Based on the foregoing and in the alternative, I recommend that Claim L be dismissed in part as to the claim that the flares must be subject to emission limitations and monitoring be dismissed with prejudice based on Petitioners' failure to carry their burden of proof.

As to legal issues related to Claim L, in both their Opening Brief and Reply, Petitioners identified three provisions of Utah's minor source rule as requiring UDAQ to set emission limitations for Tesoro's flares. [Pet. Opening Br., p.36 ; Pet Reply, p. 52]. Yet, notwithstanding these arguments, Petitioners failed to show how two of these three provisions, namely (i) Utah Administrative Code R307-401-8(1)(b)(ii) (applying to permits issued under the PSD program);

and (ii) R307-401-8(1)(b)(viii) (applying to hazardous air pollutants), are legally applicable to the WCP AO. There is simply no basis to my knowledge to support a conclusion that these provisions are legally applicable to the WCP AO. Petitioners' third citation, R307-401-8(1)(b)(ix), is a generic reference to the entire Utah State Implementation Plan and does not appear to be directly applicable to the WCP AO. More specifically, Petitioners, provided no specific analysis of how or why the Utah SIP mandates that UDAQ must establish emission limitations on flares as part of a permit.

Turning to the specific issues Petitioners did raise in their public comments, Petitioners argued that UDAQ exempted flare emissions from its analysis of the WCP AO. [IR1143-44]. UDAQ responded to this comment in several comment responses. [IR1968 (response #3; stating that the emission limitations for the WCP AO apply at all times); IR2002-03 (response # 61; stating that "the flare emissions were not exempted from the NSR analysis" and flare emissions "are accounted for" in UDAQ's analysis); IR2003 (responses #62; stating that Tesoro's flares were not modified or experiencing a change in method of operation as a result of the WCP AO); *see also* IR0336 (Item B.1.3; stating that the new DDU reactor will vent to Tesoro's South Flare during startup, shutdown, and malfunction events and to estimate these emissions, Tesoro assumed all gases contained in the reactor would be vented once annually); IR0336-37 (Item B.1.4; stating that the new VRU vessels will vent to Tesoro's North Flare during startup, shutdown, and malfunction events and to estimate these emissions, Tesoro assumed all gases contained in the reactor would be vented once annually); IR0341 (Item B.2.6; stating that Tesoro estimated emissions based on the sour gas flow rate that occurred during the largest, most recent flaring event (2002) and conservatively assuming that two such events could occur annually)].

While Respondents do not have the burden of proof, the foregoing record analysis, provided by Respondents, clearly demonstrates that the UDAQ's response to Petitioners' public comments as to the flare issue is both rational and supported by substantial evidence in the record. Accordingly, Petitioners have not carried their burden to show that UDAQ abused its discretion on this issue, to the extent it has been preserved, and the ALJ recommends this issue be dismissed on the merits.

K. Petitioners' Claim M—BACT for Tesoro's Flares

In Claim M of Petitioners' Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not subject Tesoro's flares to a BACT analysis as part of its evaluation of the AO. [Pet. Opening Br., pp. 36-38]. Petitioners ask that the WCP AO be remanded to UDAQ to conduct a BACT analysis that imposes emission limitations on Tesoro's flares. [*Id.*, p. 38].

The ALJ recommends that Claim M be dismissed because, as an initial matter, Petitioners failed to carry their burden of proof. In the alternative, Claim M should be dismissed on the merits.

Findings and conclusions on Claim M—preservation

In their public comments and their RFAA, Petitioners raised the argument that UDAQ was required to conduct a BACT analysis for Tesoro's flares. [IR1122; RFAA, pp. 17-18]. The claim that a BACT analysis should have been conducted on the flares was stated with sufficient specificity that the UDAQ provided relatively detailed responses to the argument, which are part of the administrative record. I conclude that Claim M has been preserved as required by Utah law to the extent of Petitioners' public comments.

By contrast, in their Reply [Pet. Reply, p. 54], Petitioners expanded their argument to include a claim that Tesoro's flares were physically modified in the WCP AO. As to Petitioners' new argument, raised for the first time in their reply brief, that the flares were physically modified, this argument was not specifically raised with sufficient detail to allow UDAQ to respond during the public comment period as required by Utah law. As a result, this specific argument should be dismissed with prejudice as required by Utah law.

Findings and conclusions on Claim M—merits of Petitioners' argument

In the event the Executive Director reaches the merits of Claim M, the ALJ recommends that the Executive Director affirm UDAQ's BACT determination for the flares. In Claim M of their Opening Brief, Petitioners' only challenged UDAQ's interpretation of when BACT is triggered, which coincided with the argument raised in their comment letter and RFAA. [Pet. Br., pp. 37-38]. This issue presents a question of law that requires the ALJ to review UDAQ's interpretation of the rules underlying Utah's minor source permitting program for clear error.

As to factual issues relating to Claim M, Petitioners did not marshal the specific evidence supporting UDAQ's determination on whether the WCP AO triggered BACT for Tesoro's flares. Petitioners' Opening Brief leads one to the mistaken conclusion that UDAQ provided no basis for its conclusion that BACT was not triggered for Tesoro's flares. Petitioners did not challenge UDAQ's interpretation of its own rules but rather stated that UDAQ did not "really explain[]" how its interpretation "overcomes the plain language of BACT." [Pet. Br., p. 37]. As detailed below, UDAQ did, in fact, provide a reasoned basis for its interpretation of when BACT is triggered [IR1983-84 (response #26)] and Petitioners were required to confront that interpretation.

Given that Petitioners failed to challenge UDAQ's interpretation of its own rules, the ALJ recommends that the Executive Secretary dismiss this claim based on Petitioners' failure to carry their burden of proof as required by Utah law.

Moreover, as to the new permutation of Claim M raised for the first time in their Reply, Petitioners have failed to carry their burden of proof, apparently because the issue was not raised during public comment. On this basis, the sub-argument under Claim M, that Tesoro's flares were physically modified in the WCP AO, thereby triggering a BACT analysis, should be dismissed for failure to carry the burden of proof.

As to legal issues relating to Claim M, UDAQ interpreted Utah's minor source permitting program as requiring a BACT analysis for "new emission units and those existing *units* where both a physical modification and an increase in emissions takes place." [IR1984 (response #26; emphasis added)]. Under this interpretation, BACT applies on a unit-by-unit basis (e.g., the AO may trigger BACT for the FCCU but not for the flares) and is only triggered when the specific unit undergoes a (1) physical change that (2) leads to an increase in emissions at the modified unit. UDAQ's interpretation is grounded in UDAQ's implementing regulations and begins with the definition of BACT, where UDAQ determined that the definition by itself does not define *when* a BACT analysis is required. [IR1983]. In turn, UDAQ found the definitions of "modification," "stationary source," "building, structure, facility, or installation," "potential to emit," "net emissions increase," and "emission" informed UDAQ on when BACT is triggered for an existing unit. [IR1983-84].

UDAQ's interpretation coincides with federal regulations, Environmental Appeals Board decisions, and EPA guidance. 40 CFR 52.21(j)(3); *In re Masonite Corp.*, 1994 WL 615380, *5;

EPA Workshop Manual, B.4. *see also* Letter from Robert Miller, Chief of EPA Region V, to Lloyd Eagan, Director of the Wisconsin Bureau of Air Management, p. 2 (“[W]here an emissions unit has not undergone a physical or operations change, BACT does not apply.”) (Exhibit 13 to Tesoro’s Resp.).²⁸

Based on the foregoing, I recommend that the Executive Director find that UDAQ’s determination that BACT for a minor modification is unit specific and only applies when the unit is both physically modified and subject to an increase in emissions is not clearly erroneous as it is supported by Utah’s regulatory definitions.

As to Petitioners’ new argument, raised for the first time in their reply brief, that the flares were physically modified, the ALJ recommends—in addition and alternative to a finding that this claim was not preserved—that this argument be dismissed because Petitioners have not carried their burden to show UDAQ’s determination was an abuse of discretion.²⁹ UDAQ found that none of Tesoro’s flares would themselves be physically modified as a result of the WCP AO and BACT was not triggered for the flares. [IR1989-90 (response #36)]. Petitioners, however, contend that the flares were subject to a physical modification as it is defined by Subpart Ja. [Pet. Reply, p. 54]. Petitioners, however, have not provided any information or argument supporting a contention that a physical modification under the NSPS constitutes a modification

²⁸ As discussed more fully above, EPA guidance regarding BACT is not dispositive on UDAQ’s interpretation of BACT applying to Utah’s minor NSR program.

²⁹ In contrast to the initial analysis contained in this section, Petitioners’ unpreserved claim presents a mixed question of law and fact because the argument requests the ALJ review whether UDAQ’s application of the facts in the WCP AO triggered BACT.

for purposes of BACT.³⁰ In order to prevail, Petitioners must show that the flares were modified under Utah's regulations governing minor modifications and they have failed to do so.

Petitioners have not met their burden to show UDAQ's determination that Tesoro's flares were not physically modified, as defined by Utah's minor source permitting program, was an abuse of discretion. Nor have they shown an error in UDAQ's determination that it will apply UDAQ's traditional definition of a physical modification applies to Tesoro's flares. The ALJ, therefore, recommends that this claim be dismissed.

L. Petitioners' Claim N—BACT for Tesoro's DDU and VRU

In Claim N of their Opening Brief, Petitioners argued that the BACT determination for Tesoro's DDU and VRU is invalid because the record lacks information supporting UDAQ's determination that work practice standards—namely the venting of gases during startup, shutdown, and malfunctions to Tesoro's North and South Flares—are BACT for the DDU and VRU. [Pet. Br., p. 38-39]. If granted, Petitioners' argument would require that the WCP AO be remanded to UDAQ to further develop the record to support UDAQ's conclusion.

The ALJ recommends that the Executive Director affirm UDAQ's BACT determination for the DDU and VRU because Petitioners failed to carry their burden of proof. In the alternative, the ALJ recommends that this issue be dismissed on the merits because UDAQ's determination that work practice standards—taking the form of venting emissions from the DDU and VRU to flares during startup, shutdown, and malfunction events—are BACT for the DDU and VRU is rational.

³⁰ In Subpart Ja, EPA adopted a unique rule for defining what constitutes a physical change of a flare that is different from EPA's traditional definition of a physical change that otherwise applies to EPA's NSPS. See 40 CFR 60.101a(c) (excluding flares from the definition of modification contained in 40 CFR 60.14(f)).

Findings and conclusions on Claim N—preservation

Petitioners preserved this argument in their comments on the proposed WCP AO and in their RFAA. [IR1122; RFAA, p. 17].

Findings and conclusions on Claim N—merits of Petitioners’ argument

In the alternative to the prior grounds justifying dismissal, the ALJ recommends that this argument be dismissed on the merits. Stated simply, the administrative record supports a conclusion that UDAQ’s determination that flares are work practice standards for the DDU and VRU is rational. Petitioners’ argument requested that the ALJ remand the WCP AO to UDAQ to allow the agency to provide additional support for its conclusion that flares represent BACT for Tesoro’s DDU and VRU. While Petitioners frame their argument as a factual question, the argument presents a mixed question of law and fact because UDAQ was required to interpret the definition of BACT as it analyzed the DDU and VRU as part of the WCP AO. [IR1989 (response #35)]. As such, the ALJ reviews UDAQ’s BACT determination for the DDU and VRU for an abuse of discretion.

As to factual matters relating to Claim N, Petitioners did not attempt to marshal the evidence related to the BACT analysis for the DDU and VRU in their Opening Brief. Rather, Petitioners’ Opening Brief alleges a lack of certain record evidence. [Pet. Opening Br. p. 38-39 (“[T]here is no evidence in the record as to what the Director thinks about flares as BACT for the DDU and VRU.”); Pet. Reply, p. 55]. Petitioners’ first attempt to show me (and Respondents) record citations relevant to Claim N came by way of a footnote containing a string of citations to the administrative record. [Pet. Reply, p. 55, n.34]. Petitioners’ marshaling effort was untimely and denied Respondents of the opportunity to respond and the ALJ of the benefit of fully-

developed briefing. Utah Admin Code R305-7-213(2). Even if considered, the record citations in note 34 do not satisfy Petitioners' obligation to carry the burden of proof. The ALJ, therefore, presumes UDAQ's determination is supported by the administrative record. As a result, Claim N should be dismissed for failure to carry Petitioners' burden of proof as required by Utah law.

As to legal issues relating to Claim N, UDAQ interpreted the definition of BACT as allowing the agency to impose work practice standards—in lieu of specific controls or numeric emission limitations—“when the measurement of emissions is infeasible.” [IR1989 (response #35)]. This interpretation is supported by Utah's regulatory definition of BACT. Utah Admin Code R307-401-2(1); *see also* EPA NSR Manual, B.2.

As to UDAQ's BACT determination for the DDU and VRU, in its response to comments UDAQ determined: (1) the only emissions from the DDU and VRU occur during startup, shutdown, and malfunctions; (2) the measurement of emissions during these events is infeasible due to safety concerns; (3) the flares represent work practice standards that are best industry standards for upset conditions at the DDU and VRU, and (4) there was no evidence of other controls that represent BACT for these units. [IR1989 (response #35)]. These determinations were supported by information contained in the administrative record. [IR0336-37 (stating that the DDU and VRU will be vented to flares during SSM events); IR2466 (Tesoro July 7, 2012 letter)].

Furthermore, UDAQ's determination is mirrored in EPA's decision to impose work practice standards for flares when the federal agency revised Subpart Ja in mid-2012. 77 Fed. Reg. 56422, 56442/1 (Sept. 12, 2012) (finding that setting standards of performance for refinery

flares “is not feasible”); *Id.* at 56437/3 (stating that it is “very difficult, if not impossible, to measure [flare emissions] accurately”).

Ultimately, UDAQ made a technical determination that it was infeasible for Tesoro to measure the DDU’s and VRU’s emissions because they occur during SSM events and that flares were work practice standards that represent BACT for these units. Petitioners provided no documents, analysis, or arguments that contradict UDAQ’s determination. The ALJ therefore recommends that the Executive Director defer to UDAQ’s technical determination and find that UDAQ’s determination that flares represent BACT for the DDU and VRU was rational.

M. Petitioners’ Claim O—BACT for the SRU & TGTU

In Claim O of Petitioners’ Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not conduct a BACT analysis for either Tesoro’s SRU or TGTU as part of its evaluation of the WCPP. [Pet. Opening Br., pp. 39-42]. I understand that if they were successful on Claim O, Petitioners would request that the WCP AO be remanded to UDAQ to conduct a BACT analysis for both the SRU and TGTU.

Findings and conclusions on Claim O—preservation

Petitioners comment letter stated generally that UDAQ was required to conduct a BACT analysis for Tesoro’s SRU [IR1122] and specifically that UDAQ should perform a BACT analysis for the SRU’s SO₂ emissions. [*Id.*]. Petitioners’ RFAA repeats the same claims: the RFAA contains a verbatim copy of the claim raised in Petitioners’ public comments. [RFAA, p. 17]. While Petitioners’ comment and RFAA did not directly preserve an argument that a BACT analysis was required for the TGTU or that a BACT analysis was required for the SRU for any pollutant other than SO₂, these ancillary arguments may be reasonably related to the public

comment. I conclude from the foregoing that the arguments in Claim O have been adequately preserved for consideration on the merits.

Findings and conclusions on Claim O—merits of Petitioners’ argument

Turning to the merits of Claim O, the ALJ recommends that the Executive Director affirm UDAQ’s BACT determinations for these units. Petitioners’ argument requests that the WCP AO be remanded to UDAQ to conduct a BACT analysis for both the SRU and the TGTU. Whether BACT was triggered by a project presents a mixed question of law and fact for the ALJ to review. *Sierra Club 2009*, 2009 UT 76, ¶ 44.

As to factual matters related to Claim O, Petitioners’ attempt to carry their burden of proof on Claim O is very limited. Based on the scant record analysis made no attempt to marshal the evidence on their argument that UDAQ was obligated to conduct a BACT analysis for Tesoro’s SRU and TGTU. Similarly, in challenging UDAQ’s determination that the SRU was not modified by the WCP AO, Petitioners quote a summary statement of UDAQ’s determination for the SRU but do not identify or challenge the basis that UDAQ provided for its determination. [Pet. Br., p. 41]. As such, Petitioners have failed to show that UDAQ’s determination that the SRU is not subject to BACT was an abuse of discretion. *In re Town of Ashland Wastewater Treatment Facility*, 2001 WL 238562, *6; *see also West Jordan City v. Goodman*, 2006 UT 27, ¶ 29.

As to legal issues relating to Claim O, as discussed above, UDAQ’s interpretation of its regulations of when BACT is required—i.e., when a unit undergoes a physical change that leads to an increase in emissions from an emission unit—was rational and supported by Utah’s regulations. UDAQ determined that it did not need to subject the SRU to a BACT analysis

because the SRU was not modified as a result of the WCP AO. [IR1982 (response #24; stating that the prior statements regarding the TGTU being BACT made the point that the TGTU would be BACT *if* a BACT analysis was necessary, but finding that a BACT determination was not required because the SRU was not modified as part of the WCPP)]. This determination is supported by the administrative record, which shows that SO₂ emissions were decreasing as a result of the installation of the TGTU and that the TGTU was installed as a separate contemporaneous project to the WCPP. [IR0279, 303-04; 340-41]. Furthermore, UDAQ determined that Tesoro's installation of the TGTU was not a modification of the SRU as part of the WCP AO because the installation of the TGTU was a "voluntar[y]" reduction in air contaminants under Rule 307-401-12. [IR1982 (response #24)]. Petitioners have not challenged UDAQ's determination and have not met their burden of showing UDAQ's determination was not rational.

As to Petitioners' claim that a BACT analysis was mandatory for the TGTU—this is in addition and alternative to the ALJ recommendation that this claim be dismissed because it was not preserved—Petitioners have not carried their burden of showing that BACT was required for the TGTU. The TGTU is a piece of control equipment—not an emission unit—that was installed for the sole purpose of reducing SO₂ emissions generated from other refinery processes. [IR0279, 303-04]. The WCPP could have proceeded without the TGTU installation. [IR279, 303-04]. Petitioners have not shown that a BACT analysis is required for the installation of equipment that controls emissions. Accordingly, Petitioners have not met their burden to show UDAQ abused its discretion when it did not apply BACT to the TGTU as part of the WCP AO.

N. Petitioners’ Claim P—Short-Term Emission Limitations for the SRU/TGI/TGTU

In Claim P of Petitioners’ Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not impose emission limitations based on the 1-hour NO₂ and SO₂ NAAQS on Tesoro’s SRU as part of the WCP AO. [Pet. Opening Br., p. 42-43]. If granted, Petitioners claim would require that the WCP AO be remanded to UDAQ to either set such short-term emission limitations or explain why such limitations are not necessary for Tesoro’s operations.

Findings and conclusions on Claim P—preservation

In their public comments, Petitioners identified the emission limitation that capped the SO₂ emissions at the SRU to 60 lbs per year. [IR1122].³¹ Petitioners then argued that the limit ought to be “expressed in a shorter term emission limit.” [Id.]. Petitioners did not specifically advocate for any specific short-term limit, whether it be monthly, weekly, daily or hourly. Petitioners’ RFAA contains the same argument that refers to an undefined short-term limit. [RFAA, p. 17].³² While Petitioners’ comment letter and RFAA do not specifically mention the 1-hour NAAQS, Petitioners did raise this specific argument in their Opening Brief. I find that Petitioners raised Claim P in their public comments with sufficient detail so as to allow the UDAQ to address the issue, particularly where the UDAQ is vested with the technical and legal expertise to make its own evaluation as to the specifics of any limit that should be imposed. Petitioners’ failure to identify the specific short-term limit that should apply does not detract

³¹ The limit was 60 tons per year, not pounds. [IR0676 (condition II.B.3.a)].

³² Petitioners did not argue that this issue was not reasonably ascertainable during the public comment period.

from the fact that they raised this issue in such a way that UDAQ had a fair opportunity to consider and address it.

Findings and conclusions on Claim P—merits of Petitioners’ argument

Turning to the merits of Claim P, Petitioners’ argument requested that the ALJ remand the WCP AO to UDAQ to either set 1-hour SO₂ and NO_x emission limitations for Tesoro’s SRU or explain why such emission limitations are not necessary. Petitioners’ argument presents a mixed question of law and fact because it asks the ALJ to review UDAQ’s determination as to whether emission limitations were required as a result of the WCP AO.

As to factual issues relating to Claim P, Petitioners attempt to marshal the evidence on this claim through a footnote that provided a string of citations to the administrative record. [Pet. Br., p. 42, n.20]. I conclude that this level of effort does nothing to show me all of the evidence of record relating to Claim P, all the evidence supporting UDAQ’s determination, or all of the detracting evidence in such a way that I can determine that UDAQ’s determination is not based on substantial evidence.

The ALJ also recommends that this argument be dismissed because Petitioners have not carried their burden of showing that UDAQ’s determination is not rational. In their comment letter and RFAA, Petitioners raised the issue that the SRU must be subject to an emission limitation that is “shorter” than an annual limit. [IR1122; RFAA, p. 17]. The WCP AO imposes such a shorter limit because the AO limits the SRU to 1.68 tons per day of SO₂ emissions. [IR2816 (WCP AO; condition II.B.3.b); IR0712 (ITA; condition II.B.3.a)].

As to Petitioners’ issue that UDAQ was required to set an emission limitation that capped the SRU’s SO₂ emissions on a 1-hour basis, the ALJ recommends that this argument be

dismissed because Petitioners have not met their burden of showing that such an emission limitation was required for the SRU under Utah’s permitting program. Petitioners identified two administrative rules—(1) R307-401-8(b)(ii), which applies to Utah’s non-applicable PSD program, and (2) R307-401-8(b)(vii), which references the NAAQS—but do not provide any explanation as to why those provisions require 1-hour emission limitations for all AOs issued under Utah’s minor source permitting program. [Pet. Br., p. 42]. Furthermore, Petitioners cite to the Environmental Appeals Board’s decision in *Mississippi Lime*. [*Id.*] This is a PSD-level case that UDAQ distinguished as not dictating that UDAQ impose 1-hour emission limitations in AOs issued under Utah’s minor NSR program.

Having failed to show UDAQ abused its discretion in not imposing an emission limitations based on the 1-hour NAAQS, the ALJ recommends this claim be dismissed on the merits.

O. Petitioners’ Claim Q—NSPS Applicability to the FCCU

In Claim Q of Petitioners’ Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ determined that the WCPP did not make the FCCU subject to Subpart Ja. [Pet. Br., pp. 44-48]. Specifically, Petitioners argued that the administrative record shows that hourly emissions from the FCCU will increase as a result of the WCP AO, meaning that the FCCU is modified for NSPS purposes. If accepted, Petitioners argument would require that the WCP AO be remanded to UDAQ to reconsider its determination that the WCPP did not trigger Subpart Ja for Tesoro’s FCCU.

Findings and conclusions on Claim Q—preservation

Petitioners preserved this claim in their comments and RFAA. [IR1125-27; RFAA, p. 25-28].

Findings and conclusions on Claim Q—merits of Petitioners’ argument

Turning to the merits of Claim Q, the ALJ recommends that the Executive Director dismiss this claim because UDAQ’s determination that the FCCU will not experience an increase in the maximum hourly emission rate as a result of the WCP AO is rational. Petitioners’ argument requests that the ALJ remand the WCP AO to UDAQ to reconsider whether Subpart Ja applies to Tesoro’s FCCU as a result of the WCP AO. This issue presents a mixed question of law and fact as it asks the ALJ to review UDAQ’s interpretation of when an NSPS is triggered and UDAQ’s application of the facts underlying the WCP AO to that interpretation. The ALJ, therefore, reviews UDAQ’s determination for an abuse of discretion.

As to questions of fact, Petitioners’ attempt to marshal the record supporting UDAQ’s determination is limited to a footnote that contains a string of citations to the administrative record. [Pet. Br., p. 44, n.21]. This does not satisfy Petitioners’ obligation to marshal the evidence under Utah law as part of their burden of proof. Moreover, while the text of Petitioners’ Opening Brief identifies a number of statements contained in Tesoro’s NOI that Petitioners argue show the WCP AO made Subpart Ja applicable to the FCCU, Petitioners do not marshal Tesoro’s or UDAQ’s analysis of why WCP AO did not trigger Ja for the FCCU. [IR0312-14 (Tesoro NOI); IR0689 (SPR); IR2467-69 (Tesoro June 7 letter); IR1992-94 (response #41)]. Petitioners’ omission misconstrues the administrative record and shows Petitioners did not marshal the evidence to meet their burden of persuasion.

Turning to the legal analysis relating to Claim Q, as part of its review of whether the WCP AO made Tesoro's FCCU subject to Subpart Ja, UDAQ interpreted federal regulations to determine what activity triggers the applicability of a given NSPS. [IR1992-93 (response #41)]. The federal regulatory definitions, guidance and case law are applicable to this issue because UDAQ has been delegated the authority to implement the federal NSPS requirements. 40 CFR 60.4(c); 67 Fed. Reg. 58998, 58998 (Sept. 19, 2002); *see also* (Utah Admin. Code R307-210 (incorporating by reference the NSPS into Utah's regulations). This stands in contrast to UDAQ's administration of its minor NSR BACT requirements, which is entirely a Utah permitting program that does not have a federal analog.

With that background, UDAQ specifically determined that an NSPS is triggered when an applicable emission unit is physically modified or subject to a change in method of operation and the unit experiences an increase in its maximum physical capacity. [IR1991 (evaluating what equipment is part of the FCCU, as defined by Subpart Ja); IR1992 (stating that Subpart Ja applicability is based on "hourly emission potentials"). UDAQ's interpretation is in line with the federal regulatory definitions, EPA guidance, and federal caselaw. *See* 40 CFR 60.14(a) & (b) (defining a modification as "physical or operational change which results in an increase in the emission rate" based on emissions measured as kilograms per hour); 57 Fed. Reg. 32314, 32316 (July 21, 1992) (identifying the same two-step process); *Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901, 905 (7th Cir. 1990).

One critical aspect to UDAQ's interpretation and ultimate determination is that the calculation of whether there is an increase in emissions is based on a comparison of the maximum physical *capacity*—not actual emissions—before and after changes to the unit.

[IR1992]; Again, UDAQ's interpretation is in accord with federal regulations and caselaw. *See also* 57 Fed. Reg. at 32316/2 (“[E]missions increases, for applicability purposes, are calculated by comparing the hourly emission rate, at *maximum physical capacity*, before and after the physical or operational change.” (emphasis added)); *Id.* at 32331/2 (“[E]mission increases for NSPS purposes are determined by changes in the hourly emission rates at maximum physical capacity, regardless of how the unit has actually operated.”); *United States v. Ohio Edison Co.*, 276 F.Supp.2d 829, 875 (S.D. Ohio 2003) (stating the same).³³

In their public comments, Petitioners conceded that emission increases are evaluated based on maximum capacity for NSPS purposes. [IR1125 (“[T]he source will calculate and compare the hourly emissions rate (lb/hr) at maximum capacity before and after the change for each unit.”)]. Yet, in their Opening Brief, Petitioners argued that Subpart Ja became applicable to Tesoro's FCCU because the FCCU would experience an increase in actual, not maximum capacity, hourly emissions because annual emissions were increasing and the FCCU would operate for the same number of hours annually. [Pet. Opening Br., pp. 45-46]. Under UDAQ's interpretation, this analysis must be focused instead on whether the FCCU's maximum physical capacity was changing as a result of the WCP AO, not on actual emissions.

³³ The way emission increases are calculated for purposes of NSPS is fundamentally different from how emissions increase are calculated for purposes of major NSR. For PSD, federal regulations evaluate actual annual emissions before the physical modification compared to projected actual annual emissions as a result of the physical modification. 57 Fed. Reg. at 32316/1 (“In the second step [e.g. the evaluation for an emission increase], the applicable rules branch apart, reflecting the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR. . . . Emissions increases for NSPS purposes are determined by changes in hourly emissions rates at maximum physical capacity. On the other hand, the NSR regulations examine total emissions to the atmosphere”).

The administrative record supports UDAQ's determination that there was no increase in maximum potential emissions at Tesoro's FCCU as a result of the WCPP. Specifically, the record shows—and UDAQ found—that the WCP AO would not increase the maximum physical capacity of the FCCU because the key inputs that control that capacity—namely maximum feed rate and coke burn rate—would not increase as a result of the WCP AO. [IR1993 (response #41); see also IR0313-15 (Tesoro NOI); IR0689 (SPR); IR2468-69 (Tesoro June 7, 2012 letter)]. Petitioners introduced no evidence that maximum physical capacity is increasing at the FCCU.

Petitioners have argued that federal regulations impose a presumption that an increase in production rate constitutes a modification unless Tesoro shows the increase was not the result of a capital expenditure based on 40 CFR 60.14(e)(2). [Pet. Br., p. 47]. Section 60.14(e) does not dictate that the FCCU was modified because this section is an exception to the NSPS modification rules that only applies if a unit has been subject to a physical modification that led to an increase in emission rate. UDAQ found that the WCP AO did not result in an increase in maximum emissions rate [IR1992-94 (response #41)]. Accordingly, the analysis never moves to the exception contained in section 60.14(e).

Based on the foregoing, I conclude that UDAQ's determination was rational, as it was based on an interpretation of federal regulations supported by EPA's own interpretation and a factual basis for concluding that the FCCU would not experience an increase in maximum emission rates as a result of the WCP AO. The ALJ, therefore, recommends that this argument be dismissed.

P. Petitioners' Claim R—Compliance with the Utah SIP

In Claim R of Petitioners' Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not require Tesoro to meet certain emission limitations, emission factors, metering, and measuring techniques expressed in the SIP approved by EPA in 1994. [Pet. Br., pp. 48-49].

Findings and conclusions on Claim R—preservation

In their public comments, Petitioners preserved an argument that the WCP AO was invalid because UDAQ did not impose certain emission limitations that were contained in the version of Utah's PM₁₀ SIP that was approved by EPA in 1994. [IR1122-23]. In Petitioners' RFAA and in their Opening Brief, however, Petitioners seem to expand their argument to contend that the WCP AO is invalid because UDAQ did not include the "emission factors" and "metering or other measuring techniques" expressed in the Utah SIP when UDAQ issued the WCP AO. [RFAA, p. 19; Pet. Br., p. 48].³⁴ I conclude that Petitioners' expansion of the argument is sufficiently related to their initial comments so as to allow the UDAQ to respond to this comment, particularly where UDAQ is vested with substantial technical expertise and knowledge to make an independent determination as to the appropriate standard to apply. I conclude that the preservation requirement has been met as to Claim R.

Findings and conclusions on Claim R—merits of Petitioners' argument

Turning to the merits of Claim R, as to factual matters, Petitioners make no attempt to marshal the evidence supporting UDAQ's determination related to Petitioners' SIP argument.

³⁴ Petitioners, however, did not identify any emission factors, metering or other measuring techniques that UDAQ did not account for when issuing the WCP AO. As such, Petitioners have not adequately briefed these unpreserved claims.

Moreover, following the public comment, UDAQ provided a detailed response. UDAQ's response to comments concludes that the WCP AO does not conflict with the Utah SIP for a number of reasons. Specifically, UDAQ stated,

UDAQ has identified several problems with this comment. First, none of the 1994 SIP limits identified by the commenter are being changed as a result of the current ITA. Previous permitting actions have dealt with the 1994 SIP limits to which the comment refers, including numerous permitting actions between the 1994 SIP and the present. Accordingly, the limitations identified as discrepancies are not discrepancies at all, and are irrelevant to the current ITA.

Second, the ITA limits are consistent with those contained in a 2001 consent decree between EPA and Tesoro. That consent decree was subject to public comment and approved by a federal judge. DAQ issued an Approval Order in 2002 that incorporated the terms of the consent decree. The limits in that 2002 AO were the basis for the 2005 SIP rulemaking. In any event, the time to take issue with any of these SIP actions has long since passed, and such actions cannot be collaterally attacked by submitting public comment on the ITA.

Third, the ITA limits are consistent with the 2005 SIP rulemaking, which was also subject to notice and comment rulemaking. On July 6, 2005, the Utah Air Quality Board adopted revisions to the PM10 SIP. UDAQ recognizes this SIP as current state law. The draft permits (ITAs: DAQE-IN103350058-12 and DAQE-IN103350059-12) both comply with all terms and provisions of the 2005 SIP revision.

Fourth, as the comment itself states, the 1994 SIP was approved by EPA and is therefore federally enforceable. However, the commenter fails to acknowledge that the 1994 SIP expressly allows for changes to limitations contained therein, pursuant to the following provision: "Specific limitations for installations within a source listed in the SIP which are not specified will be set by order of the Board. Specific limitations for installations within a source may be adjusted by order of the Board provided that the adjustment does not adversely affect achieving the applicable NAAQs." . . . Approval Orders are orders of the Board. Accordingly, provided that the AO meets the provisions of the 1994 SIP and other applicable requirements, the federally

enforceable SIP upon which the commenter relies authorizes the exact action proposed by the ITA. Likewise, several of the actions referenced above have also been taken consistent with this provision.

[IR1990 (response #37)].

In their Opening Brief and Reply, Petitioners largely ignored UDAQ's interpretation and explanation as to why the limits identified by Petitioners were not material to the WCP AO and Petitioners did not adequately brief their claim, as their analysis was limited to the following:

It is important to note that EPA has specifically rejected the State's request that EPA approve a modified version of the PM₁₀ SIP. Indeed, the agency did so, *inter alia*, because it determined that the proposed modifications would not achieve attainment of the PM₁₀ air quality standards and would adversely affect, interfere with and delay achievement of the PM₁₀ NAAQS. In addition, the consent decree between Tesoro and EPA in no way alleviates the company from complying with the SIP and in no way amends the SIP. The duty to comply with a SIP is also an ongoing obligation. Finally, an AO is not an Air Quality Board order, but rather an order issued by the Executive director.

[Pet. Br., p. 49 (internal citations omitted)].

This cursory and conclusory argument, lacking legal citation and detailed argument, does not satisfy Petitioners' obligation to adequately brief their argument and challenge UDAQ's determination. *Allen v. Friel*, 2008 UT 56, ¶ 9; *In re Town of Ashland Wastewater Treatment Facility*, 2001 WL 238562, *6.

Moreover, as to the merits of the legal interpretation, I conclude that Petitioners' argument requires the ALJ to review UDAQ's legal interpretation of its own statute and regulations, which presents a question of law reviewed for clear error.

Petitioners have failed to meet their burden of showing that R307-401-8—UDAQ's legal authority to issue a permit under Utah's minor NSR permitting program—requires the outcome

that Petitioners seek. Petitioners cited to Rule 307-401-8(1)(b)(ix) as requiring UDAQ to issue a permit that mirrors the version of the Utah SIP approved by EPA in 1994. [Pet. Br., p. 48]. But the rule requires compliance with the Utah SIP as approved on May 4, 2011, not the version approved by EPA in 1994. *See* Utah Admin. Code R307-401-8(1)(b)(ix) (requiring compliance with the applicable requirements of “R307-110, Utah State Implementation Plan”); *Id.* R307-110-17 (2012) (identifying the applicable SIP as the version adopted on May 4, 2011); *see also* Tr., 143:13-15 (Petitioners acknowledge that the PM₁₀ SIP has been modified for purposes of state law). The authority Petitioners rely on does not support their argument, and Petitioners make no argument the AO violates the 2011 Utah SIP.

Furthermore, Petitioners have failed to show UDAQ’s legal interpretations are clearly erroneous. UDAQ determined the following: (1) none of the limits Petitioners identified were at issue in the WCP AO;³⁵ (2) the limits in the proposed WCP AO were consistent with the limits established in a consent decree between Tesoro and EPA, which were made enforceable through an AO issued by UDAQ; (3) the limits were consistent with SIP revisions taken by UDAQ in 2005; (4) the 1994 SIP authorized UDAQ to make adjustments to limits expressed in the SIP, and prior actions exercised that authority to make adjustments. [IR1990 (response #37)]. The administrative record supports UDAQ’s determination that the limitations identified by Petitioners were changed in prior actions and are not the subject of the WCP permitting action that is the subject of these adjudicative proceedings. [IR2511-36 (2002 NOI); IR2537-54 (2002

³⁵ At oral argument, Petitioners conceded that the only emission limitations at issue in the WCP AO were the emission limitations tied to the units modified as part of the WCP AO. [Tr. 131:1-7]. Petitioners therefore conceded that none of the facility-wide or capped sources emission limitations that they identified in their comments and Opening Brief were at issue in the WCP AO. [IR1122-23; Pet. Br., p. 49].

AO); IR2555-2642 (consent decree)].³⁶ Petitioners, however, have only challenged UDAQ’s interpretations with conclusory statements lacking legal citation. [Pet. Br., p. 49]. Furthermore, in their Reply Petitioners shift their argument to what is essentially a federal-level citizen suit for enforcement, which is not allowed in a permit review proceeding. [Pet. Reply, p. 57-58 (relying exclusively on federal law and not discussing any language from the SIP or any of the prior AOs that adjusted Tesoro’s limits)].³⁷

As to the merits of Claim R, the ALJ finds that Petitioners did not meet their burden to show UDAQ’s interpretations of Rule 307-401-8 and the SIP were clearly erroneous. The ALJ, therefore, recommends that Petitioners’ Claim R be dismissed.

Q. Petitioners’ Claim S—Fugitive Emissions and Dust from Truck Traffic

In Claim S of Petitioners’ Opening Brief, Petitioners argued that the WCP AO is invalid because UDAQ did not treat Tesoro’s “road network” as an “emission unit” by quantifying the increase in emissions associated with diesel truck traffic and applying BACT to this network. [Pet. Br. p. 50].

³⁶ The ALJ takes judicial notice of the Utah SIP amendments by the Air Quality Board in 2005 and 2011, which are available at: <http://www.airquality.utah.gov/Pollutants/ParticulateMatter/PM25/SIPImp/Sipcomp.htm>. (hyperlinks “PM₁₀ Emission Limits and Operating Practices: Section IX.H” and PM₁₀ Maintenance Plan Salt Lake County: Section IX.A.10”).

³⁷ Indeed, at oral argument Petitioners presented their argument as requiring the state to “enforce federal law.” [Tr., 144:18-21]. Prior permit reviews by the Utah Department of Environmental Quality have determined that state-level permit challenges do not present forums for citizens to seek enforcement. *See In the Matter of S. Davis Sewer Dist.*, UPDES Permit Nos. UT0021636, UT0021628, Order, Executive Director Amanda Smith, p. 11 (March 29, 2011), [Tes. Reply, Attachment C]; *In the Matter of Denison Mines (USA) Corp.*, Memorandum and Recommended Order, ALJ Sandra K. Allen, p. 7 (February 8, 2012) (the Utah Air Quality Board approved the ALJ’s Recommended Order in an Order Approving the Recommended Order and Decision of the Administrative Law Judge on March 12, 2012) [Tes. Reply, Attachments D & E]).

Findings and conclusions on Claim S—preservation

In their comments, Petitioners preserved a claim that argued UDAQ needed to account for the “increase in diesel emissions” from the vehicles bringing waxy crudes to Tesoro’s refinery. [IR1109]. Specifically, Petitioners argued:

Nowhere in the NOI or the ITA is there any acknowledgement of or accounting for the increase in diesel emissions from hundreds of truck trips bringing in the black wax crude substrate. Those emissions have profound health impacts. Two ground breaking studies on the toxicity of diesel emissions revealed that long-term exposure to even low levels of diesel exhaust raises the risk of dying from lung cancer about 50% for urban residents, and about 300% for occupationally exposed workers (Tesoro employees).

[*Id.*] While in their briefing Petitioners failed to respond to arguments by Respondents that they failed to preserve Claim S, the record shows that this argument was, in fact, preserved and UDAQ provided a response.

Findings and conclusions on Claim S—merits of Petitioners’ argument

Turning to the merits of Claim S, in response to UDAQ provided a reasoned response to this claim, specifically determining that the tailpipe emissions from the haul trucks would not be considered in the WCP AO because vehicle emissions are regulated under Title II of the Clean Air Act and UDAQ’s permitting programs for stationary sources are founded in Title I of the Act. [IR1969 (response #7), IR1992 (response #40)]. Petitioners did not challenge UDAQ’s response.

Claim S presents a simple question of law. Petitioners comment letter and briefing in these proceedings did not explain how Tesoro’s roads could or should be deemed an “emission unit” that must be regulated as a stationary source. Moreover, Petitioners’ RFAA (or briefing)

does not raise any issue related to, or explain why Tesoro's road network in their arguments on the BACT analysis underlying the WCP AO.

Based on the foregoing, the ALJ recommends that Claim S be dismissed on the merits.

R. Petitioners' Claim T—Procedural Due Process

In Claim T of Petitioners' Opening Brief, Petitioners argue that UDAQ violated section 19-1-301.5 and the Due Process clause of the Utah Constitution by providing public notice of the decision to issue the WCP AO on its website and by sending Petitioners a generic e-mail a day after issuing the WCP AO. [Pet. Br., p. 51-52]. It is unclear what remedy Petitioners seek as a result of this claim and what remedy the ALJ could recommend because Petitioners filed a timely RFAA.

The ALJ recommends that this issue be dismissed because Petitioners have not adequately pleaded their arguments. In the alternative, the ALJ recommends that this issue be dismissed because, while the ALJ and Executive Director have an independent responsibility to ensure that the instant proceedings are implemented according to the applicable laws and regulations, including due process, there is no showing that either the ALJ or the Executive Director has legal jurisdiction over stand-alone claims brought under the state or federal constitution. Therefore, while the ALJ expressed concern above regarding the due process implications of the Utah Code as relating to the permit review adjudicative proceeding generally, I am satisfied that those issues have been adequately addressed in these proceedings such that Petitioners' due process rights have been protected and preserved. If Petitioners desire to pursue independent constitutional claims or arguments, these will need to be properly addressed by the Utah Court of Appeals or the Utah Supreme Court, in due course.

Findings and conclusions on Claim T—preservation

Petitioners raised their Due Process argument in their RFAA. [RFAA, pp. 3-4].

Findings and conclusions on Claim T—marshaling the administrative record

Petitioners were not required to marshal the evidence on this claim because the argument presents a question of law.

Findings and conclusions on Claim T—failure to adequately plead the argument

Petitioners failed to adequately brief their Due Process claim. Petitioners’ argument is devoid of any citation to, quotation of, or any legal analysis of Utah’s Due Process clause. Moreover, Petitioners ignored the ALJ’s instruction to brief whether *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306 (1950), governed the argument and whether the ALJ has jurisdiction over constitutional questions. [2d Prehearing Order, ¶ 3, May 23, 2013]. Having determined Petitioners failed to adequately brief their constitutional argument, the ALJ recommends that Petitioners’ Due Process claim be dismissed.

Findings and conclusions on Claim T—merits of Petitioners’ argument

In the alternative, the ALJ recommends that Petitioners’ Due Process claim be dismissed because, while the ALJ and Executive Director have a duty to ensure that due process is afforded in connection with permit review adjudicative proceedings, it has not been shown that either the ALJ or the Executive Director has jurisdiction over constitutional claims. Petitioners argue that UDAQ violated Utah’s Due Process clause and section 19-1-301.5 by providing public notice of the agency’s decision to issue the WCP AO by posting the AO on its website and providing Petitioners e-mail notification a day after UDAQ made its final decision. Petitioners’ constitutional argument presents a question of law that is reviewed for correctness. Petitioners’

argument under section 19-1-301.5 also presents a question of law, but this question is reviewed for clear error because it arises from an interpretation of a statute that UDAQ administers.

On the constitutional question, I conclude that Petitioners' procedural due process rights have been adequately protected in connection with these proceedings; to the extent that Petitioners desire to pursue a Constitutional claim relating to the events occurring prior to the appointment of the ALJ, it has not been shown that the ALJ has jurisdiction. *Nebeker v. Utah State Tax Comm'n*, 2001 UT 74, ¶ 23, 34 P.3d 180. The ALJ, accordingly, recommends Petitioners' Due Process argument be dismissed. Finally, it is undisputed that Petitioners received actual notice of the WCP AO and filed a timely RFAA as a result. That conclusion is sufficient for purposes of rendering the foregoing proposed dispositive ruling.

CONCLUSION AS TO THE ALJ'S RECOMMENDED ORDER

For the reasons stated above, the ALJ recommends that each of Petitioners' arguments be dismissed and that UDAQ Director's decision to issue the WCP AO and TLR AO be affirmed.

DATED this 9th day of September, 2014.

/s/ Bret F. Randall
BRET F. RANDALL
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of September 2014, I served the foregoing
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED DISPOSITIVE

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