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

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In the matter of:

**APPROVAL ORDER NO. DAQE-  
AN101230041-13 (11/18/2013)  
HOLLY REFINING & MARKETING  
COMPANY—WOODS CROSS, LLC  
HEAVY CRUDE PROCESSING PROJECT  
PROJECT NO. N10123-0041**

**ORDER ON PETITION TO  
INTERVENE**

January 16, 2014

Administrative Law Judge Bret F. Randall

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This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated January 9, 2014. The appointment charges me to conduct a permit review adjudicative proceeding in this matter in accordance with Utah Code Ann., § 19-1-301.5 and Utah Admin. Code R305-7.

On December 18, 2013, Utah Physicians for a Healthy Environment (“UPHE”) and FRIENDS of the Great Salt Lake (“FRIENDS”) filed a Request for Agency Action as well as a Petition to Intervene in the above-referenced matter. The Petition to Intervene (and its attachments) appears to have been served on all parties to this matter.

On or about January 3, 2014, Holly Refining & Marketing Company – Woods Cross, LLC (“Holly”) submitted a Notice of Appearance and Statement Regarding Premature Motion for Stay of Approval Order. This notice and statement did not directly address the Petition to

Intervene but raised a procedural objection as to the timing of Holly's response to a Motion Requesting Stay of Approval Order, also filed by UPHE and FGSL on December 20, 2013.

This order is limited to the Petition to Intervene. Pursuant to R305-7-212, Utah Administrative Code, Respondents have the right to challenge the Petition to Intervene by motion or in the parties' briefs on the merits. All findings reached in this order are thus provisional in nature and are subject to reconsideration at a later stage in these proceedings.

### **BACKGROUND**

The Petition to Intervene asserts that UPHE "is the largest community organization of health professionals in Utah" whose members include "local physicians, toxicologists, biologists and engineers dedicated to protecting the health and well-being of the citizens of Utah through political participation and communication with local business leaders, media and concerned citizens." The Petition also states that UPHE has "repeatedly submitted comments to state and federal regulators regarding the impacts of decisions that will impact the health of the community and otherwise participated in public processes . . . ." The Petition is supported by the Declaration of Tyler Yeates ("Yeates Decl.") and the Declaration of Brian Moench ("Moench Decl."), on behalf of UPHE.

As for FRIENDS, the Petition states that the organization "has, as its mission, the preservation and protection of the Great Salt Lake ecosystem" and that it "seeks to increase public awareness and appreciation of the Lake through education, research and advocacy." The Petition is supported by the Declaration of Lynn de Freitas, Executive Director and a member of FRIENDS. ("de Freitas Decl.").

## ANALYSIS

Intervention in this permit review adjudicative proceeding is governed by Section 19-1-301.5(7), providing in part as follows:

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

(b) A person who seeks to intervene in a permit review adjudicative proceeding under this section shall, within 30 days after the day on which the permit order being challenged was issued, file:

(i) a petition to intervene that:

(A) meets the requirements of Subsection 63G-4-207(1); and

(B) demonstrates that the person is entitled to intervention under Subsection (7)(c)(ii); and

(ii) a timely request for agency action.

(c) An administrative law judge shall grant a petition to intervene in a permit review adjudicative proceeding, if:

(i) the petition to intervene is timely filed; and

(ii) the petitioner:

(A) demonstrates that the petitioner's legal interests may be substantially affected by the permit review adjudicative proceeding;

(B) demonstrates that the interests of justice and the orderly and prompt conduct of the permit review adjudicative proceeding will not be materially impaired by allowing the intervention; and

(C) in the petitioner's request for agency action, raises issues or arguments that are preserved in accordance with Subsection (4).

(d) An administrative law judge:

(i) shall issue an order granting or denying a petition to intervene in accordance with Subsection 63G-4-207(3)(a); and

(ii) may impose conditions on intervenors as described in Subsections 63G-4-207(3)(b) and (c).

Each element related to intervention will be reviewed in turn.

### **I. Timeliness of Petition to Intervene.**

The Petition for Intervention must be filed “within 30 days after the day on which the permit order being challenged was issued.” Based on the limited record before me at this time, it

appears that the Petition for Intervention was filed within 30 days after the date of the permit orders being challenged.

## **II. The Requirements of Subsection 63G-4-207(1)**

The Petition for Intervention must satisfy the requirements of Section 63G-4-207(1), providing:

- (1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:
  - (a) the agency's file number or other reference number;
  - (b) the name of the proceeding;
  - (c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and
  - (d) a statement of the relief that the petitioner seeks from the agency.

Based on the limited record before me, I find that the Petition to Intervene, when read in light of the Request for Agency Action, satisfies the procedural requirements set forth in subsections (1)(a), (b), and (d). Analysis of subsection 1(c) will be included below.

## **III. Timely Request for Agency Action and Issue Preservation.**

Petitioner(s) must file a timely request for agency action. In this matter and for purposes of the present Petition to Intervene, it appears that intervenors have filed a timely Request for Agency Action, consisting of 117 pages of written objections, an explanation of the relief requested, and a representation that the issue has been preserved or that there exists a legal basis for waiver of the preservation requirement. For purposes of this provisional order, I find that the Petitioners here have filed a timely Request for Agency Action and have adequately shown that the issues raised in the Request for Agency Action have been preserved (or the factual and legal basis that could support a finding that preservation is excused).

#### **IV. Standing**

Section 63G-4-207(1)(c) requires that petitioners seeking intervention include “a statement of facts demonstrating that the petitioner’s legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law.” Section 19-1-301.5(7)(c)(ii)(a) charges the administrative law judge to grant intervention in a permit review adjudicative proceeding if the ALJ finds that the petitioner “demonstrates that the petitioner’s legal interests may be substantially affected by the permit review adjudicative proceeding . . . .”

“Utah standing law operates as gatekeeper to the courthouse, allowing in only those cases that are fit for judicial resolution.” Sierra Club v. Utah Air Quality Board, 2006 UT 74, ¶17, 148 P.3d 960 (*citations and internal quotation marks omitted*). The underlying policy of standing is to restrict the judicial branch to “the resolution of those disputes most effectively resolved through the judicial process” by preventing the “significant inroad on the representative form of government that would occur if courts case themselves in the role of supervising the coordinate branches of government or as an open forum for the resolution of political and ideological disputes about the performance of government.” Id. (*citations and internal quotation marks omitted*).

Before reaching a detailed analysis here, it should be noted that associations have standing only “if its individual members have standing and the participation of the individual members is not necessary to the resolution of the case.” Sierra Club, 2006 UT 74, ¶21 (*citing Utah Rest. Assoc. v. Davis County Bd. of Health*, 709 P.2d 1159, 1163 (Utah 1985)). In Sierra Club, the Court found affidavits from Sierra Club members demonstrated that those members

had standing under the traditional test because “the affiants have identified personal adverse effects, sufficient causation, and redressability ... [and] their individual participation is not essential to the resolution of this case.” Sierra Club, 2006 UT 74, ¶21.

#### **A. Traditional Standing Analysis.**

Under Utah law there are two tests for standing: traditional and alternative. The touchstone of the traditional analysis is whether the petitioning party “has suffered or will suffer some distinct and palpable injury that gives it a personal stake in the outcome of the legal dispute.” Sierra Club, 2006 UT 74, ¶19 (*internal quotation marks omitted*). By contrast, an individual whose injuries are not materially different than the public at large will not have standing under the traditional test. Id. at ¶25 (recognizing that “in some settings this court has been hesitant to address injuries shared by too many members of the public.”). That said, the Utah Supreme Court also recognizes “that there may be cases where it is appropriate to grant standing to persons who share the same or similar grievances as other individuals or groups.” Id.

The Sierra Club case involved the granting of air permits for a new coal fired power plant to be located near Sigurd, Utah. Affidavits from two members of the Sierra Club established that the power plant could impact their livelihoods. One affiant worked as a videographer who regularly worked in the area to be impacted. He also alleged that the power plant would impair visibility near his home near the site of the power plant, as well as negatively impact his health and property values. Sierra Club, 2006 UT 74, ¶4. The other Sierra Club member owned a 25-acre farm located less than one mile away from the proposed power plant and also farmed an additional 328 acres located approximately four miles from the proposed location. This individual also alleged that the power plant would adversely impact property values, crops that

the family would grow and eat, and longstanding recreational activities such as hiking and bird watching. Id. at ¶5. The Utah Supreme Court was careful to point out that even in the absence of allegations of direct economic impacts, the Sierra Club members in that case alleged “sufficient adverse effects” by “claiming injuries to their health, property, and recreational activities.” Id. at ¶24.

The question of whether a petitioning party “has suffered or will suffer some distinct and palpable injury that gives it a personal stake in the outcome of the legal dispute” is answered by applying a three-part analysis, asking whether the petitioning party (1) “has been or will be adversely affected by the [challenged] actions”; (2) whether there exists “a causal relationship between the injury to the party, the [challenged] actions and the relief requested”; and (3) whether the relief requested is “substantially likely to redress the injury claimed.” Id. at ¶19. Each element will be addressed in turn.

### **1. Adverse Effects**

The first element of traditional standing analysis is whether the petitioner has been or will be adversely affected by the challenged actions. The evidence set forth in the Yeates Decl. and Moench Decl. (on behalf of UPHE) and in the de Freitas Decl. (on behalf of FRIENDS) is sufficient to satisfy the adverse effects element of the traditional standing analysis, for purposes of this provisional order and in the absence of argument and evidence to the contrary.

## **2. Causation.**

The second element of causation requires a finding of a causal relationship linking the injury of the petitioning party and the challenged actions and the relief requested. *Sierra Club*, 2006 UT 74, ¶19. In this matter and based on the record before me, the declarations as outlined above allege sufficient causation between the alleged injuries, the challenged actions, and the relief requested, to satisfy the second element of traditional standing analysis for purposes of this provisional order and in the absence of evidence or argument to the contrary.

## **3. Effectiveness of Relief Requested**

The final element of traditional standing analysis requires that the petitioning party demonstrate that the relief requested is “substantially likely to redress the injury claimed.” *Id.* In this matter and based on the record before me, I find that the declarations as outlined above demonstrate that if either UPHE or FRIENDS prevail in this matter, the relief requested (denial of the permits in question) will likely redress the claimed injuries. Thus, this element is satisfied for purposes of this provisional order and in the absence of evidence or argument to the contrary.

### **B. The Alternative Standing Test.**

The Utah Supreme Court has developed an alternative standing test, applicable when a party may not meet the traditional standing test. It consists of two elements: First, “is the plaintiff an appropriate party” and if so, “does the dispute raise an issue of significant public importance.” *Cedar Mountain Environmental, Inc. v. Tooele County*, 2009 UT 48, ¶ 15 (*citing Sierra Club*, 2006 UT 74, ¶¶36-39). To meet the “appropriateness” test, a petitioner “is required to show that it has the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if



the party is denied standing.” Cedar Mountain, 2009 UT 48, ¶16 (*quotations and citations omitted*). Also, petitioners “hoping to intervene must still show a real and personal interest in the dispute.” Sierra Club, 2006 UT 74, ¶138 (*quotations and citations omitted*). As to the second element of the alternative standing test, the Utah Supreme Court has offered additional detail for application of the test, as follows:

Once a party has established that it is an appropriate party to the litigation, it must also demonstrate that the issues it seeks to raise are of sufficient public importance in and of themselves to warrant granting the party standing. This requires the court to determine not only that the issues are of a sufficient weight but also that they are not more appropriately addressed by another branch of government pursuant to the political process. The more generalized the issues, the more likely they ought to be resolved in the legislative or executive branches.

Sierra Club, 2006 UT 74, ¶139 (*quotations and citations omitted*).

Applying these standards here and based on the Petition to Intervene, the declarations in support, the Statement of Standing, and the Request for Agency Action, I find that both UPHE and FRIENDS, through their representative, individual members, have satisfied the alternative standing test, for purposes of this provisional order and in the absence of evidence or argument to the contrary. More specifically, UPHE and FRIENDS have demonstrated that they are appropriate parties to the litigation because they have the personal interest, experience, background, and resources necessary to assist, effectively and efficiently, the Utah Department of Environmental Quality (and any other reviewing court) in developing and reviewing all relevant legal and factual questions and that the issues are unlikely to be raised if the party is denied standing. Moreover, UPHE and FRIENDS have carried their burden to establish, and I find, that this matter involves disputes over issues of significant public importance. As to the second element, the question in this permit review adjudicative proceeding is whether Utah

Department of Environmental Quality complied with federal and state statutes, rules, and regulations in granting the permits and approvals that are at issue here. As the Utah Supreme Court in Cedar Mountain court further explained, “the legislative and executive branch had already addressed the issue by passing environmental legislation and adopting administrative procedures. Thus, whether government officials complied with the legislation and procedures was not more appropriately addressed by other branches, but was instead the proper providence of the judiciary.” Cedar Mountain, 2009 UT 48, ¶118 (*citing* Sierra Club, 2006 UT 74, ¶144). Based on the foregoing, I find that the second element of the alternative standing test is met here, for purposes of this provisional order and in the absence of evidence or argument to the contrary.

**ORDER**

Based on the foregoing, it is hereby ordered that the Petition to Intervene is provisionally granted as to Utah Physicians for a Healthy Environment and FRIENDS of the Great Salt Lake.

DATED this 16<sup>th</sup> day of January, 2014.



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BRET F. RANDALL  
Administrative Law Judge

**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of January, 2014, a true and correct copy of the foregoing **ORDER ON PETITION TO INTERVENE** was served by e-mail upon the following:

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