BEFORE THE EXECUTIVE DIRECTOR OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of: Approval Order No. DAQE-AN101230041-13 Holly Refining & Marketing Company – Woods Cross, LLC Heavy Crude Processing Project Project No. N10123-0041	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PROPOSED ORDER REGARDING PETITIONERS' MOTION REQUESTING STAY OF APPROVAL ORDER** Administrative Law Judge Bret F. Randall March 25, 2014

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.

Procedural Background

On November 18, 2013, the Director of the Utah Division of Air Quality ("Director") issued approval order DAQE-AN101230041-13 (Project Number N10123-0041) (the "AO" or "Permit") to Holly Refining and Marketing Company, Woods Cross LLC ("Holly"), authorizing the construction of the Heavy Black Waxy Crude Processing Project ("Expansion Project").

On December 18, 2013, Utah Physicians for a Healthy Environment and FRIENDS of Great Salt Lake (collectively "Utah Physicians") filed a Request for Agency Action seeking administrative review of the AO, pursuant to Utah Code §§ 19-1-301.5 and 63G-4-201(1)(b), (3) and Utah Admin. Code R305-7-203.

On December 24, 2013, Utah Physicians filed a motion and supporting memorandum requesting a stay of the AO, pursuant to Utah Admin. Code R305-7-217 and Utah Code Ann. § 19-1-301.5. However, because Utah Physicians had not been granted party status and no ALJ

had yet been appointed to this matter, the time for responding to the motion to stay did not begin to run at that time.

On January 16, 2014, I entered an Order on Petition to Intervene, provisionally granting intervention to Utah Physicians for a Healthy Environment and Friends of Great Salt Lake (collectively, "Petitioners"). On the same date, I entered a Notice of Further Proceedings.

Petitioners filed a Corrected Motion and Memorandum Requesting Stay on January 21, 2014 ("Stay Motion"). I deemed that the date of the filing of the corrected motion for stay triggered a new response period for Respondents. The Stay Motion is the subject of the present Proposed Order.

Pursuant to the Utah Code, whenever a motion to stay is filed in a permit review adjudicative proceeding, "the administrative law judge shall: (i) consider a party's motion to stay a permit during a permit review adjudicative proceeding; and (ii) submit a proposed determination on the stay to the executive director." Section 19-1-301.5(15)(c), Utah Code Ann.

Following briefing on the Stay Motion, I granted Respondents' motion for oral argument, with oral argument being held on March 6, 2014. All parties appeared and participated in oral argument, which was of record through a court reporter.

Having heard argument on the Stay Motion, and being fully advised in the premises, and pursuant to Section 19-1-301.5(15)(c), Utah Code Ann., this tribunal enters the following proposed Findings of Fact and Conclusions of Law, and proposed determination that the Executive Director of the Utah Department of Environmental Quality ("DEQ") deny Petitioners' Stay Motion for the reasons set forth herein.

FINDINGS OF FACT

Regulatory Background

1. Air pollution is harmful to human health and to the environment. [IR at 009140-48; IR at 009139-45; IR at 009144-45; IR at 009145-47.]

2. In enacting the Utah Air Conservation Act, the Utah Legislature declared: "It is the policy of this state and the purpose of [the Utah Air Conservation Act] to achieve and maintain levels of air quality which will protect human health and safety, and to the greatest degree practicable, prevent injury to plant and animal life and property, foster the comfort and convenience of the people, promote the economic and social development of this state, and facilitate the enjoyment of the natural attractions of this state." Section 19-2-101(2), Utah Code Ann.

3. The Utah Legislature further declared that the "purpose" of the Utah Air Conservation Act is to "(a) provide for a coordinated statewide program of air pollution prevention, abatement, and control; (b) provide for an appropriate distribution of responsibilities among the state and local units of government; (c) facilitate cooperation across jurisdictional lines in dealing with problems of air pollution not confined within single jurisdictions; and (d) provide a framework within which air quality may be protected and consideration given to the public interest at all levels of planning and development within the state." Section 19-2-101(4), Utah Code Ann.

4. Similarly, in enacting the Clean Air Act, the Congress found, among other things:

> **(2)** that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including

> injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation; [and]
>
> **(3)** that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments . . . .

42 U.S.C. § 7401(a).

5. Congress also stated that the "primary goal" of the Clean Air Act is to "encourage or otherwise promote reasonable Federal, State, and local governmental actions . . . for pollution prevention." 42 U.S.C. § 7401(c).

Permit Chronology

6. In May of 2012, Holly Refining & Marketing Company – Woods Cross, LLC ("Holly") submitted a notice of intent ("NOI") to DAQ requesting an approval order to expand its Woods Cross refinery and modernize certain equipment in a way that allowed Holly to process an additional 20,000 barrels per day of black wax crude from the Uintah Basin in eastern Utah ("May NOI"). [May NOI at IR000049-001108.]

7. In response to DAQ's request to provide additional information, Holly re-submitted its NOI in July of 2012 ("July NOI"). [July NOI at IR002798-003590.]

8. Following its technical and legal evaluation of the July NOI and related evidence, DAQ released for public comment an Intent to Approve ("First ITA"), dated November 28, 2012. The First ITA included a draft Approval Order. [First ITA at IR001967-001996.]

9. During the initial 60-day public comment period, DAQ received comments from Western Resource Advocates on behalf of Utah Physicians for a Healthy Environment ("UPHE") and Friends of Great Salt Lake ("Friends") [IR004007-004035], Blaine Rawson on behalf of Mark J. Hall [IR004202-004217], Alexander Sagady on behalf of UPHE [IR009046-009135],

the Environmental Protection Agency ("EPA") [IR004001-004005], and Holly [IR003757-003910].

10. In April 2013, Holly submitted a new netting analysis in a revised NOI. [Revised NOI at IR007335-007395.]

11. In addition to certain other changes, the Revised NOI estimated $PM_{2.5}$ emissions from Holly's gas-fired heaters and boilers based on the EPA's National Emission Inventory ("NEI") data. [*Id.*]

12. Following its technical and legal evaluation of the Revised NOI and related evidence, DAQ released, on June 5, 2013, for a second public comment period an Intent to Approve document ("Second ITA") and a Source Plan Review ("SPR"). [Second ITA at IR007498-007499, SPR at IR008480-008575.]

13. On July 25, 2013, DAQ received comments on the draft approval order from Western Resource Advocates on behalf UPHE [IR007842-007997], Blaine Rawson on behalf of Mark J. Hall [IR008579-008602], Alexander Sagady on behalf of Petitioners [IR009046-009135], the EPA [IR007840-007841], and Holly [IR007613-007836].

14. Following its review and evaluation of the foregoing information and comments, on November 6, 2013, DAQ requested additional information from Holly that DAQ believed was necessary in order to fully consider the pending comments and evidence. Holly responded to DAQ's request for additional information on November 7, 2013. [IR008021, IR008022-0052.]

15. After considering the supplemental information provided by Holly, on November 18, 2013, DAQ issued Holly a new approval order authorizing the construction of the Modernization Project ("Holly AO"). [Holly AO at IR009223-009254.]

16. Concurrently therewith, DAQ issued a Response to Comments Memorandum ("Response Memorandum") that addressed the comments made during the public comment periods, explained DAQ's response to those comments, and, where appropriate, described how the comments had been incorporated into the Holly AO. [Response Memorandum at IR009174-009222.]

17. On December 18, 2013, Petitioners filed their Request for Agency Action. On January 22, 2014, Petitioners filed their Amended Motion and Memorandum Requesting a Stay of the Approval Order. Oral argument was held on the Stay Motion on March 6, 2014.

DAQ's Permit Review

18. In their Stay Motion, Petitioners challenge three portions of the Holly AO: (1) the use of the NEI emission factors to estimate $PM_{2.5}$ emissions from Holly's new gas-fired heaters and boilers; (2) the calculated coke burn rate for Holly's proposed Fluid Catalytic Cracking Unit ("FCC Unit 25"), and (3) the calculated reduction of $PM_{2.5}$ emissions from the removal of Holly's existing propane pit flare. [Stay Motion, p. 15-37.]

19. DAQ determined that use of the NEI emission factors to calculate $PM_{2.5}$ emissions from the new heaters and boilers was appropriate because (1) there was substantial evidence in the record supporting the accuracy of these emission factors to estimate PM emissions from gas-fired heaters and boilers, as explained in the two reports from Glenn England [*See* Glen England Reports at IR007238-007258, IR008024-008044; *see also* Response Memorandum at IR009215-009216]; (2) DAQ had imposed a stack testing requirement in the Holly AO to verify that the emission factors were an accurate representation of actual emissions [Response Memorandum at IR008129-008131]; and (3) DAQ imposed a limit derived from the NEI factors into the final Holly AO that is binding on Holly during all operations of the Woods

Cross refinery [Holly AO, Section II.B.7.a.2 at IR009248; *see also* Response Memorandum at IR009217].

20. DAQ determined that regardless of whether there were other alternative emission factor calculations for heaters and boilers that yielded higher estimates, Holly would be subject to an enforceable PM_{10} emission limit of 0.00051 lb/MMBtu, derived from the NEI emission factors. [*See* Response Memorandum IR008130.] DAQ reasoned that any failure by Holly to comply with that emission limit would result in compliance violations, which would ensure that Holly would not contribute a significant increase of PM as a result of the expansion. [*Id.*]

21. DAQ determined that 40 C.F.R. § 60.14 did not require the use of the older AP-42 emission factors, as Petitioners argued, to calculate Holly's $PM_{2.5}$ emissions from the heaters and boilers because that regulation only applies to determining applicability of the New Source Performance Standards, "which [is] separate from the New Source Review regulations that are relevant to this permitting process." [Response Memorandum at IR008130.] Moreover "EPA guidance states that sources other than the AP-42 emission factors may be used in determining emissions for PSD/NSR emissions…including '[e]mission factors from technical literature.'" [*Id.* (second alteration in original) (quoting EPA New Source Review Workshop Manual, Prevention of Significant Deterioration and Nonattainment Area Permitting, draft dated October 1990 at A.22).]

22. With respect to the $PM_{2.5}$ emission reduction of 2.19 tons per year ("tpy") from the decommissioning of Holly's propane pit flare, which Petitioners claimed was inaccurately high, the Revised NOI reflects that Holly and DAQ calculated this emission reduction using the actual emission inventory data on file at DAQ for the years 2008 and 2009. [Revised NOI at IR007339; Response Memorandum at IR009218 ("flare emissions came from the UDAQ

inventory record for reported actual emissions from 2008-2009 based on 259 MMBtu/hr and actual throughput data").]

23. As to the coke burn rate for Holly's proposed FCC Unit 25, which Petitioners claimed was inaccurately low, the emission calculations Holly provided to DAQ indicate that the rate was calculated based on actual emission data from the current FCC Unit 4, a larger unit than the proposed FCC Unit 25, and thus was a conservatively high estimate of expected emissions from the FCC Unit 25. [IR008052; *see also* Holly AO at IR009227-009229 (The FCC Unit 4 processes 8,880 barrels per day ("bpd") while the proposed FCC Unit 25 can only process 8,500 bpd.]

24. Regardless of the coke burn rate, DAQ concluded that the FCC Unit 25 is subject to a specific PM_{10} limit of 0.30lb/1000 lb. of coke burned, which is limited by the 8,500 bpd operating capacity, and is also subject to the overall PM_{10} emission cap of 47.5 tpy and 0.13 tons per day ("tpd") for combustion sources. [Response Memorandum at IR009219.] "If these limitations are not met, the refinery will be out of compliance until it remedies the problem with additional control equipment or redesign of the system until it meets these limits." [*Id.*]

25. DAQ rejected Petitioners' calculation of coke burn based on the Universal Oil Products yield estimates because they "provided no documents or primary data to support or detail [] which estimate, if any, was used to derive the suggested range of coke burn estimates." [Response Memorandum at IR009219.] "Based on UDAQ's technical experience and expertise," DAQ determined that "the 6200 lb/hr value is a fair and reasonable estimate of the quantity of coke burn in FCC Unit 25." [*Id.*]

Impacts of Modernization Project Construction

26. The Conrad Jenson Declaration submitted with Holly's opposition to the Stay Motion ("Jenson Declaration") is the most recent evidence of Holly's present construction schedule. In light of the procedural history recited above, the earlier construction timetable estimates are deemed to be updated by the facts as set forth in the Jenson Declaration, which are credited and treated as true for the purposes of this proposed order.

27. According to the Jenson Declaration, Holly's first phase of construction will not be fully installed and operational until the fall of 2015. [Exhibit A to Holly's Opposition to Petitioners Motion Requesting Stay of Approval Order ¶ 9.]

28. "[D]uring the construction of Phase I, there will not be any increase in emissions until completion of Phase I in the fall of 2015." [*Id.* ¶ 10.]

29. As confirmed by the parties during oral argument, this permit review adjudicative proceeding is expected to be fully briefed by July 9, 2014. [*See* Corrected Stipulated Order Regarding Response to Request for Agency Action and Subsequent Deadlines, dated February 19, 2014.] Oral argument likely will be scheduled before the end of July 2014 and a recommended order will likely be prepared for the Executive Director as soon as possible after oral argument, certainly by the end of September 2014. [*See* Stay Motion Hearing Transcript at p. 14-16.] During this time, it is undisputed that there will be no increase in emissions from the Holly refinery due to the Modernization Project, and no emissions for at least a year beyond the proposed adjudicative proceeding timeline. [Jenson Declaration ¶ 10.]

30. Holly has already incurred approximately $48,000,000 in costs for preliminary activities in preparation for construction. [*Id.* ¶ 6.]

31. Holly commenced construction on the Expansion Project after receiving the Holly AO. [*Id.* ¶ 7.]

32. The overall costs of the Modernization Project are anticipated to be approximately $700 to $800 million, with approximately $300 million allocated to Phase I and the remaining approximate $400 to $500 million allocated to Phase II. These estimated costs represent design/engineering, materials, and construction costs. [*Id.* ¶ 11.]

33. If the Holly AO is stayed and construction stopped, it is undisputed that Holly would experience significant demobilization and remobilization costs. According to the Jenson Declaration, the demobilization costs include hourly pay rates for the remaining contract workers who will need to secure construction equipment and the construction site safely during the stay period. It also includes costs of equipment storage. Remobilization costs would include similar expenses for restarting work that had been stopped. If construction is stayed, Holly's main contractor would charge a minimum of $625,000 per month for such delays. These figures do not account for lost profits or additional harm of further delay on the overall project schedule. [*Id.* ¶ 13.]

34. Delays in the Project are directly correlated with lost revenue that Holly would have generated if it were able to process the increased number of barrels of crude on schedule. For every month Holly is unable to process additional crude, it anticipates a loss of approximately $10,000,000. [*Id.* ¶ 15.]

35. During Phase I and Phase II of construction, Holly anticipates up to 500 people at any given time on site fulfilling construction jobs related to the project. [*Id.* ¶ 17.]

36. After Phase I of the Modernization Project is completed, Holly anticipates a 25% increase in permanent jobs at the Woods Cross refinery. After completion of Phase II, Holly

anticipates another 25% increase in permanent jobs. This is a 50% overall increase in permanent jobs at the refinery. [*Id.* ¶ 18.]

37. Overall, the Modernization Project will create a public benefit through job creation, increased state and local taxes, and capital infusion and investment in Davis County, as well as benefits from increased crude production within the state of Utah. These benefits will be delayed or may be lost if Holly is forced to stop construction on the Project. [*Id.* ¶ 19.]

38. The Modernization Project may also result in a number of calculated emission reductions at the Holly refinery, including a reduction in NO_x by 21.53 tpy, a reduction in SO_2 by 150.69 tpy, and a reduction in VOC by 17.02 tpy. [IR007575.] DAQ has determined that these pollutants are precursors to $PM_{2.5}$ and major contributors to wintertime inversions in the Salt Lake Valley. [Utah State Implementation Plan, § IX.A, dated December 4, 2013, § 1.6.] According to the recent Utah State Implementation Plan for $PM_{2.5}$, reductions in these pollutants would have the secondary effect of reducing wintertime $PM_{2.5}$ levels. [*Id.*]

39. Based on the evidence, these emission reductions are the result of voluntary pollution control strategies that Holly has proposed for the Modernization Project and that are incorporated in the Holly AO. [*See* SPR at IR008564, IR008568-008569; *see also* IR007335.] These reductions fall into five different categories:

a. Holly will install a new wet gas scrubber as part of the new FCC Unit 25 and will route its existing gas streams that presently are emitted after treatment in an existing sulfur recovery unit ("SRU") through that wet gas scrubber, reducing overall SO_2 emissions [*See* July NOI IR002812, 002821, 002823-002824.];

b. Holly will remove both its propane pit flare and the frozen earth propane pit storage facility, which will reduce NO_x and VOC emissions, respectively [*See* July NOI at IR002828, 003035];

c. Holly will replace four gas-driven compressor engines with electric engines, which will reduce NO_x emissions [*See* Revised NOI at IR007335];

d. Holly will add selective catalytic reduction technology to three current heaters and boilers, further reducing NO_x emissions [*See* Source Plan Review at IR008551; Holly AO at IR009248]; and

e. Holly will be subject to overall, refinery-wide emissions limitation reductions for PM_{10}, NO_x, and SO_2. [*See* Holly AO at IR009225.]

40. Based on the evidence of record, if the Holly AO is stayed or remanded, these emission control strategies will either be delayed or will not be implemented because they are approved and authorized by the Holly AO. [*See* SPR at IR008564, IR008568-008569; *see also* IR007335.]

CONCLUSIONS OF LAW

1. This is a permit review adjudicative proceeding pursuant to Utah Code § 19-1-301.5 and Utah Admin. Code R305-7.

2. The Stay Motion is governed by Section 19-1-301.5(15), Utah Code Ann., providing:

> (a) The filing of a request for agency action does not stay a permit or delay the effective date of a permit.
>
> (b) A permit may not be stayed or delayed unless a stay is granted under this Subsection (15).
>
> (c) The administrative law judge shall:

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

(ii) submit a proposed determination on the stay to the executive director.

(d) The administrative law judge may not recommend to the executive director a stay of a permit, or a portion of a permit, unless:

(i) all parties agree to the stay; or

(ii) the party seeking the stay demonstrates that:

(A) the party seeking the stay will suffer irreparable harm unless the stay is issued;

(B) the threatened injury to the party seeking the stay outweighs whatever damage the proposed stay is likely to cause the party restrained or enjoined;

(C) the stay, if issued, would not be adverse to the public interest; and

(D) there is a substantial likelihood that the party seeking the stay will prevail on the merits of the underlying claim, or the case presents serious issues on the merits, which should be the subject of further adjudication.

3. In order to prevail on the Stay Motion, Petitioners must satisfy all four of the statutory elements listed above. Failure to satisfy even one element is fatal to the Stay Motion. *See Utah Med. Prods. Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998).

4. Petitioners' burden to satisfy the four factors listed above is more stringent under Utah Code Section 19-1-301.5 than under the analogous state (or federal) procedural stay standards. Utah Code Section 19-1-301.5 represents statutory language enacted by the Utah Legislature. By contrast, the law governing interlocutory relief in state and federal courts is primarily judge-made common law, guided by procedural rules. In Utah, the rules of civil procedure do not rise to the level of statutory law but are promulgated and regulated by the Utah Supreme Court. Section 78A-3-103, Utah Code Ann. The express statutory language provides

governing stays in permit review adjudicative proceedings states that the ALJ "**may not**" recommend a stay of a permit "**unless**" the moving party establishes all four statutory elements. By contrast, Rule 65A of the *Utah Rule of Civil Procedure* begins with a neutral presumption and simply provides that a court "may issue" an injunction upon a showing of four elements. *See* Utah R. Civ. P. 65A(e) ("A restraining order or preliminary injunction may issue only upon a showing that . . . ."). This permissive language is consistent with the touchstone of interlocutory relief in state and federal courts: the broad discretion afforded state and federal judges. *See Southwest Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009) ("The district court's discretion in [granting an injunction] is necessarily broad . . . ."); *Purkey v. Roberts*, 2012 UT App 241, ¶ 21, 285 P.3d 1242 ("Ultimately, the decision of whether to issue an injunction remains within the discretion of the trial court."). It is also worth noting that the federal courts of appeals have articulated differing versions of the discretionary, balancing tests applicable to interlocutory orders. However, these legal tests relate to a trial judge's discretion and are therefore not directly applicable here in light of the clear and unambiguous requirement in the Utah Code that the moving party prove the application of all four statutory standards.

5. Based on the foregoing and without limiting the potential discretion of the Executive Director in granting preliminary injunctive relief in permit review adjudicative proceedings, it is clear that the Utah Legislature employed mandatory language that is not found in the analogous federal and state procedural rules and case law. As a result, the state and federal cases governing stays and injunctive relief, while important to consider, also apply less stringent legal standards than the Utah Legislature has directed be applied to the Stay Motion. Analysis of the following factors is therefore undertaken in light of the more stringent statutory standard established by the Utah Legislature.

Irreparable Harm

6. Irreparable harm being the *sine qua non* of interlocutory relief, the moving party has a particularly heavy burden to prove it. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004) (noting that the irreparable harm factor is the "single most important prerequisite for the issuance of a preliminary injunction") (internal quotations and citation omitted); *accord, Sys. Concepts, Inc. v. Dixon*, 669 P.2d 421, 427 (Utah 1983); *see also New York v. NRC*, 550 F.2d 745, 753 (2d Cir. 1977). Irreparable harm must be non-speculative and imminent: there must be evidence supporting a conclusion that irreparable harm will, in fact, occur if the relief is not granted. *See Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir. 1991).

7. In the context of a permit review adjudicative proceeding, the irreparable harm must necessarily relate to the period of time between the date of the motion for stay and the final determination on the merits. This conclusion is particularly important in the instant proceeding, where no evidentiary hearing or trial is provided. In an analogous situation, Judge Posner wrote: "When persons harmed by administrative action bring a suit for injunction in a federal district court, it is not because they want, or are entitled to, a trial." *Cronin v. United States Dep't of Agriculture*, 919 F.2d 439, 443 (7th Cir. 1990). Rather, he continued, such persons are entitled to judicial review of the agency action, applying the standard touchstones of administrative law. *Id.* After considering the legal standards that might be applied to that case, involving a Forest Service decision to allow for the cutting of timber on federal land, Judge Posner concluded: "But all this assumes that the decision whether to grant or deny the preliminary injunction is preliminary to a full hearing on the plaintiff's claim. If it is not[, then] the two stages are

collapsed into one because there will never be a fuller hearing . . . ." Id. at 445. *See also Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir. 1998) (noting that a petitioner must show that "the harm … [is] so imminent as to be irreparable if a court waits until the end of trial to resolve the harm."). Stated differently, "if a trial on the merits can be conducted before the injury would occur there is no need for interlocutory relief." 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2948.1, at 129 (3d ed. 2013). Such is certainly the case in these proceedings: the decision on the merits will be rendered prior to the time that the Expansion Project begins operation.

8. Petitioners have failed to carry their burden of proof that they will suffer irreparable harm if the Permit is not stayed prior to the time that the review on the merits is completed in this matter. The record supports the finding that hearing and determination on the merits in this case will be completed by the end of the summer of 2014, long before the Expansion Project is operational, being the fall of 2015 at the earliest. [Jenson Declaration ¶ 10.] If Petitioners are successful on their claims on the merits, then the proper remedy would be to remand to the Director to reconsider the Permit. In that event, the Petitioner would not have the Permit necessary to operate the Expansion Project as required by the Utah Air Conservation Act and the Clean Air Act ("CAA"). The requested injunctive relief would therefore be self-enforcing and no claimed irreparable harm could result.[1] If Petitioners' claims fail on the merits, then injunctive relief would not be warranted in any event.

[1] This conclusion is an important consideration here because the case law cited by Petitioners supporting the Stay Motion is distinguishable from the case at bar. Here, success on the merits would itself result in a self-enforcing injunction, inasmuch as the Permit is required in order for Holly to operate the Expansion Project in the first instance. Thus, this matter is distinguishable from *Davis v. Mineta*, 302 F3d 1104 (10th Cir. 2002), where construction of the highway project in question without proper wetland fill permits under the Clean Water Act may have caused irreparable harm.

9. Petitioners have failed to carry their burden of proof that "bureaucratic momentum" will result in irreparable harm prior to the time that hearing on the merits is completed. There is no evidence to support any such conclusion. Moreover, the instant permit review adjudicative proceeding is easily distinguishable from the cases cited by Petitioners, supporting their "bureaucratic momentum" argument for irreparable harm. Here, the provisions of the CAA impose substantive requirements on Holly within the permitting process or upon a remand. *See Sierra Club v. Marsh*, 872 F.2d 497, 503 (1st Cir. 1989) (holding that where a statute substantively "*require[s]* the agency to change direction," such as the Clean Water Act at issue in *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982), or the Alaska National Interest Lands Conservation Act in *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531 (1987), "bureaucratic commitment to a project" does not constitute irreparable harm). Indeed, the one case to address the "bureaucratic commitment" theory in the context of the CAA permitting process expressly rejected the argument. *Sierra Club v. Larsen*, 769 F. Supp. 420 (D. Mass. 1991), *aff'd* 2 F.3d 462 (1st Cir. 1993). The National Environmental Protection Act ("NEPA") case law upon which Petitioners rely for their "bureaucratic momentum" argument is simply inapplicable in this case. *See Marsh*, 872 F.2d at 503*;* 15 U.S.C. § 793(c)(1) ("No action taken under the CAA shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act."). Stated differently, under the CAA, Holly is required to have, maintain, and follow a legal and valid permit in order to operate the Expansion Project. This scenario is easily distinguishable from a NEPA situation, where the law requires, and only requires, that full consideration of the environmental impacts of all applicable options be undertaken and completed *before the "federal action" can be initiated.* More specifically, the principle in *Sierra Club* that a violation of NEPA

constitutes an irreparable injury rests on NEPA's purpose to foster informed decision-making. *Sierra Club*, 872 F.2d at 500. In the context of NEPA, irreparable harm to the environment, almost by definition, occurs because uninformed decisionmakers commit themselves to a course of action that rarely can be undone given "a chain of bureaucratic commitment that will become progressively harder to undo the longer it continues." *Id.* Such considerations are not applicable here, where the substantive requirements of the CAA will continue to have prospective application.

10. Petitioners' failure to carry their burden of proof as to irreparable harm is dispositive to the Stay Motion. However, analysis of the remaining factors is warranted.

Likelihood of Success on the Merits

11. Petitioners raise three issues in their Stay Motion regarding the merits: (1) the assertion that DAQ erred in allowing the use of the NEI emission factors to calculate $PM_{2.5}$ emissions from Holly's gas-fired heaters and boilers; (2) the assertion that Holly overestimated the $PM_{2.5}$ emission reductions that will be realized through the decommissioning of the propane pit flare; and (3) the assertion that DAQ underestimated the coke burn rate from the FCC Unit 25, which Petitioners argue will result in higher $PM_{2.5}$ emissions. [Stay Motion pp. 15-37.]

12. The merits have not yet been fully briefed and argued by the parties.

13. DAQ is granted substantial discretion to interpret its governing statutes and rules. *See* Utah Code § 19-1-301.5(14)(c) (expressly "recognizing that [DAQ] has been granted substantial discretion to interpret its governing statutes and rules"). Moreover, Section 19-1-301.5 instructs that DAQ's factual, technical and scientific determinations should be upheld if they are supported by substantial evidence in the record. Utah Code § 19-1-301.5(14)(c).

14. Solely for purposes of this Recommended Order, I conclude that Petitioners have failed to carry their burden of showing that they are likely to succeed on the merits, or that the case presents serious issues on the merits, which should be the subject of further adjudication. Carrying this burden here requires a showing that DAQ abused its discretion or lacked substantial evidence to support its factual, technical and scientific determinations in connection with the Permit.

15. In reaching Conclusion No. 14, I rely in large part on the independent determination of EPA that the Permit is acceptable, notwithstanding Petitioners' objections. *See* EPA Comment Letters [IR004001-004005; IR007840-007841]. 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 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 Permit.

16. 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 Permit. 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. Solely for purposes of the Stay Motion, therefore, I conclude that EPA's independent review and acceptance of the Permit demonstrates that Petitioners do not have a substantial likelihood of success on the merits or that the case presents serious issues on the merits, which should be the subject of further adjudication

17. Petitioners' failure to carry their burden of proof as to success on the merits should, standing alone, be dispositive of the Stay Motion.

Public Interest

18. Air pollution is harmful to humans and ecological receptors. Thus, it is self-evident that the public interest is served by reduction and elimination of air pollution. Under our system, however, a source's compliance with the requirements set forth in the CAA, as implemented through the Utah Air Conservation Act and related rules and regulations, satisfies, as a matter of law, the public policy of protection of human health and the environment from exposures to air pollution.

19. Petitioners have failed to make a showing of cognizable harm that will occur during the pendency of these proceedings unless the Holly AO is stayed. As a result, they have failed to show that the public interest favors a stay.

20. To the extent that a violation of the CAA and other applicable law may have occurred in connection with the Permit, the instant proceedings will be concluded prior to the time that the Expansion Project begins operation. And in the event that Petitioners are successful on the merits, injunctive relief, in a sense, would be self-executing since a valid permit is required to operate the Expansion Project in the first instance. Hence, I find that the public interest is adequately protected by compliance with the existing permitting requirements set forth in the Utah Air Conservation Act and the CAA.

21. The record also shows that the Holly AO will result in substantial emission reductions in SO_2, NO_x, and VOCs, which are precursors to PM pollution along the Wasatch Front. The Holly AO will also lower refinery-wide emissions limits for PM10, NOx, and SO2. Staying the Holly AO will delay implementation of pollution control technologies that will result in these emission reductions, harming the public interest.

22. Finally, the public interest also extends to the economic activity, including jobs the Modernization Project design and construction will generate. This undisputed factor weighs against the Stay Motion.

23. Petitioners' failure to establish that the Stay Motion is in the public interest should be dispositive of the Stay Motion.

Balance of Harms

24. Petitioners have failed to carry their burden to show that the balance of harms tips in their favor.

25. The increased emissions about which Petitioners complain will not occur until after construction is completed in 2015, long after determination on the merits is completed. By

contrast, a stay would result in the immediate cessation of design and construction activities for the Expansion Project, resulting in the undisputed harms that are of record.

26. Finally, if Petitioners are successful on the merits, injunctive relief would be self-executing as discussed above. The balance of the harms, therefore, does not tip in Petitioners' favor.

27. Petitioners' failure to carry their burden to demonstrate that the balance of harms tips in their favor should be dispositive of the Stay Motion.

PROPOSED ORDER

Based on the forgoing, I recommend that the Executive Director deny the Stay Motion.

DATED this 25th day of March, 2014.

BRET F. RANDALL
Administrative Law Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 25th day of March 2014, I served the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER REGARDING PETITIONERS' MOTION REQUESTING STAY OF APPROVAL ORDER** via email on the following:

Administrative Proceedings Record Officer
deqapro@utah.gov

Joro Walker
Charles R. Dubuc, Jr.
WESTERN RESOURCE ADVOCATES
joro.walker@westernresources.org
rob.dubuc@westernresources.org

Steven J. Christiansen
David Reyman
Megan Houdeshel
Cheylynn Hayman
PARR BROWN GEE &LOVELESS, P.C.
185 S. State Street, Suite 800
Salt Lake City, UT 84111
schristiansen@parrbrown.com
dreymann@parrbrown.com
mhoudeshel@parrbrown.com
chayman@parrbrown.com

Christian C. Stephens
Veronique Jarrell-King
ASSISTANT UTAH ATTORNEYS GENERAL
cstephens@utah.gov
vjarrellking@utah.gov

/s/ Bret F. Randall, ALJ