BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of:	**REVISED** **ORDER RE MOTIONS TO STAY**
PETROLEUM PROCESSING PLANT **EMERY REFINING L.L.C Approval Order Dated June 21, 2013, Project No. N14627-0001** **DAQE-AN146270001-13**	Carol Clawson, Administrative Law Judge April 17, 2014

This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated August 15, 2013. This Revised Order is issued pursuant to the Executive Director's Order Returning Recommended Order Re Motions to Stay to Administrative Law Judge for Further Action, dated April 8, 2014. As set forth below, the Motion to Stay the June 21, 2013 Approval Order is DENIED. The Stay of the Administrative Proceeding is lifted and a revised schedule is ordered.

PROCEDURAL BACKGROUND

The procedural background of this case is set forth in detail in the initial Recommended Order for a Partial Stay dated January 31, 2013 and in the Executive Director's Order Returning Recommended Order Re Motions to Stay, dated April 8, 2013. The procedural background will only be briefly summarized here.

Petitioners, Grand Canyon Trust, Living Rivers, Southern Utah Wilderness Alliance, and the Center for Biological Diversity (collectively "the Trust"), filed a Request for Agency Action and Petition to Intervene dated July 22, 2013, challenging the June 21, 2013 Approval Order (the "June AO") issued by the Director of the Utah Division of Air Quality (DAQ) for Emery Refining LLCs ("Emery") petroleum processing plant ("plant" or "refinery") near Green River, Utah.

On October 10, Emery filed a Motion for Stay of the Permit Proceedings. DAQ joined the motion on Oct. 11, 2013. On October 15, 2013, and pursuant to Utah Code §19-1-305.1(15), the Trust filed a Motion to Stay the June 2013 Approval Order.

On January 21, 2014, I entered a Recommended Order for a partial stay of the Approval Order issued on June 21, 2013. I further stayed this administrative proceeding pending the Executive Director's decision on that Recommended Order. On April 8, 2014, the Executive Director returned the Recommended Order to me for further action consistent with her Order. In her Order, the Executive Director concluded that I erred in considering Emery's October 10, 2013 NOI in that it was not part of the record in this matter. This Revised Recommended Order is now issued consistent with the Executive Director's Decision and the record in this case.

FINDINGS OF FACT

I. Statutory and Regulatory Framework

The statutory and regulatory framework were set forth in some detail in my January 31, 2014 order and will not be repeated here.

II. The Record in this Case

1. An ALJ shall conduct a proceeding based only on the administrative record. Utah Code §19-1-301.5(8)(a). The Executive Director has held that pleadings in the administrative proceeding, including any statements of fact, are not part of the "factual record," and may not be considered in deciding a motion to stay.

2. A "proceeding" includes any motion before the ALJ.

3. In conducting the proceeding, an ALJ "may take judicial notice of matters not in the administrative record, in accordance with Utah Rules of Evidence." Utah Code §19-1-3031.5(9)(e). In my initial Recommended Order, I failed to properly take judicial notice of certain matters and address the deficiency now.

4. Rule 201 of the Utah Rules of Evidence provides the basis for taking judicial notice as follows:

> Rule 201. Judicial Notice of Adjudicative Facts
>
> (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
>
> (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
>
> (1) is generally known within the trial court's territorial jurisdiction; or
>
> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
>
> (c) Taking Notice. The court:
>
> (1) may take judicial notice on its own; or
>
> (2) must take judicial notice if a party requests it and the court is supplied

with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

5. In this case, there are certain facts that are matters of public record and are not disputed by the parties. The following facts come from the public record before the DEQ. The source of these facts under these circumstances cannot be reasonably questioned and are facts on which the parties agree. According, I take judicial notice of the following undisputed facts:

a. On October 10, 2013, Emery submitted a Notice of Intent (NOI) for a modified approval order. In that NOI, Emery Refining proposed a number of modifications to its initial design. These modifications are set forth in the NOI and in summary form on DEQ's website. http://www.deq.utah.gov/businesses/emeryrefinery/index.htm

b. On March 25, 2014, the DAQ issued an Intent to Approve (ITA) Emery's October 10, 2013 NOI and has submitted the ITA to public comment. Public comment is scheduled to end on April 24, 2014.

6. Emery indicated that it was willing to stipulate that it would not engage in *any* activity that is not authorized in the June AO. Emery has further agreed that "the construction of the terminal facility units and crude distillation plant units, and the purchase and installation of the equipment identified in No. 10 of the Project Timeline and Project Table . . ." are not included in the June AO. (Emery Supp. Brief at 11 and Exh. D.)

7. Any construction that is in violation of the June AO is subject to an enforcement action by DAQ.

CONCLUSIONS OF LAW

1. The administrative law judge may not recommend to the executive director a stay of a permit, or 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 used, 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.

Utah Code §19-1-301.5(15).

1. In order for the stay or injunctive relief to be granted, the party seeking the injunction must meet all four of the elements of the statute. *See Utah Med. Prods. Inc. v. Searcy*, 958 P.2d 228, 231 (Utah 1998).

2. Irreparable harm: Based on the facts judicially noted above and except as noted here, I affirm my analysis of irreparable harm as set forth in Part IIB of my January 31, 2014 Recommended Order. Nonetheless, given Emery's stipulation regarding elements of the construction that fall outside the June AO, it is likely that the determination on the merits of this matter will be completed prior to the project becoming

operational. A stay at this point also seems futile given the time for comment and review of any recommended decision. If Petitioners are successful on their claims, 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, and no claimed irreparable harm would occur.

3. Likelihood of success on the merits: Although the parties originally briefed this requirement for a stay, I did not allow full oral argument on the merits when I continued the matter pending the parties' negotiations for resolution of the stay. Moreover, I anticipate that the merits will be briefed in greater detail in the parties' briefs on the merits. Without further briefing and argument and solely for purposes of this 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.

The Motion for Stay of the Approval Order is DENIED.

REVISED SCHEDULE

This proceeding has been subject of an extensive delay, primarily as a result of the stay motions. While I agree that, in light of DAQ's issuance of the ITA for Emery's project, proceeding in this matter *may* be result in inefficiencies and additional expense, I find that any further delay of the administrative proceeding, absent a stipulation by the

parties, would likely be prejudicial to the Petitioners. The Administrative Stay is therefore lifted.

The schedule is this proceeding is amended as follows:

- May 19, 2014: Opening Brief (Petitioners)
- June 11, 2014: Response brief (Agency, Permittee)
- June 27, 2014: Reply brief (Petitioner)
- July 8, 2014: Surreply brief (Agency, Permittee)
- July 17, 2014: Oral Argument
- August 1, 2014: Submission of Proposed Findings and Conclusions of Law by all parties

These proceedings are based solely on review of the Administrative Record, not a *de novo* determination. The scope of the technical and associated factual issues raised in the Request for Agency Action is both detailed and broad and I understand that the Administrative Record associated with these proceedings is voluminous. Accordingly, 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. In order to carry its burden of proof, Petitioner will be required to marshal the evidence supporting the permit, as well as the evidence that support Petitioner's Request for Agency Action. For all parties, all references to factual matters must include all relevant citations to the Administrative Record. The requirement for the party with the burden of proof to marshal the evidence is imposed, in part, in order to assist me in fulfilling my charge in light of the complexity of the technical and related factual issues and the voluminous Administrative Record. *See* Wright v. Westside Nursery, 787 P.2d 508, 512 n.2 (Utah App. 1990). This *sua sponte* determination is made based on my statutory (and

inherent) jurisdiction under Section 19-1-301.5, Utah Code Ann.

For purposes of convenience, I also ask the parties to agree of 15 or 20 (or some other such reasonable number) of "core exhibits" from the record with which I should be familiar before the hearing begins. Paper copies of the core exhibits will be delivered me seven days before the beginning of the hearing. This is not designed to give emphasis to any particular document or portion of the record, but to assist me in preparation for the hearing. Paper copies of legal authority upon which the parties rely for their substantive arguments must also be made available to me either with their briefs or at the hearing.

DATED THIS 17th day of April, 2014.

CAROL CLAWSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2014, a true and correct copy of the foregoing **REVISED DECISION RE MOTIONS TO STAY**was served by e-mail upon the following:

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