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

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**	**AMENDED ORDER CLARIFYING MARSHALING REQUIREMENT** September 12, 2014 Administrative Law Judge Bret F. Randall

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 January 16, 2014, 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 8 (the "Marshaling Requirement").

On April 16, 2014, Petitioners filed a Motion for Clarification Regarding Notice of Further Proceedings. In this motion, Petitioners take issue with the Marshaling Requirement as stated in the NFP.

On April 17, 2014, I issued an Order Clarifying Marshaling Requirement (the "Marshaling Order"). Shortly after the date of the Marshaling Order, 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).

Because *State v. Nielsen* overruled in part some of the cases cited in the Marshaling Order, and in anticipation of oral argument in this matter on the merits, the following Amended Order is intended to state how I believe that the Marshaling Requirement should be applied to these proceedings in light of *State v. Nielsen*. This Amended Order is provisional in the sense that I will take oral argument as to the Marshaling Requirement during the hearing on the merits and reserve the right to modify the application of the requirement in connection with the recommended decision on the merits.

ANALYSIS

As I understand and intend to apply Utah law to 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.[1] 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:

> 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).

It is undisputed that Petitioners 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

[1] 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.

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,[2] I have the jurisdiction under U.C.A. § 19-1-301.5(9)(f) to manage this proceeding in the most efficient and effective

[2] 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.

way that I deem appropriate.[3] 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 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, consistent with *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

[3] 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.

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.[4]

[4] 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

AMENDED ORDER

Based on the foregoing, it is hereby ordered as follows:

1. Petitioners' Motion to Clarify Notice of Further Proceedings is granted in part, with this Order standing as my clarification of the NFP.

2. The NFP is formally amended to include the following, clarified provision:

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. The Administrative Record associated with these proceedings is voluminous. Based on the foregoing, 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. Thus, 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). My review of the Administrative Record will be limited to those specific portions of the Administrative Record which have been drawn to my attention by the parties and which are relevant to the legal questions properly before me. This *sua sponte* determination is made as a reflection of Petitioner's burden of proof that is inherent in this proceeding, consistent with on my statutory (and inherent) jurisdiction under Section 19-1-301.5, Utah Code Ann.

DATED this 9th day of September, 2014.

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

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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.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2014, a true and correct copy of the foregoing **AMENDED ORDER CLARIFYING MARSHALING REQUIREMENT** was served by e-mail upon 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
BRET F. RANDALL
Administrative Law Judge