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BEFORE THE EXECUTIVE DIRECTOR
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of: Revolution Fuels, LLC Coal to Liquid Facility, Air Quality Approval Order (DAQE-AN154900001-16)	**REVOLUTION FUELS' PRE-HEARING BRIEF REGARDING THE STANDARD OF REVIEW** Administrative Law Judge Bret F. Randall October 28, 2016

Pursuant to the Notice of Further Proceedings and First Prehearing Order ("First Prehearing Order") and the Stipulated Order Regarding Hearing and Briefing on the Standard of Review and Briefing on the Merits, Revolution Fuels, LLC ("Revolution Fuels") submits this Pre-Hearing Brief Regarding the Standard of Review.

BACKGROUND

In the First Prehearing Order, the Administrative Law Judge ("ALJ") requested from the parties an analysis of the standard of review that resulted from the Utah Legislature's revisions to Utah Code section 19-1-301.5, which swapped the phrase "substantial evidence taken from the record as a whole," Utah Code Ann. 19-1-301.5(13)(b) (2013), with "clearly erroneous based on

the petitioner's marshaling of the evidence." *Id.* § 19-1-301.5(14)(b) (2015 Supp.). Given that the ALJ stated he intends to focus on the "objective evidence" showing the Legislature's intent in revising the statute, the parties, having met and conferred on several occasions, stipulated that the excerpted transcripts of the March 3, 2015 hearing of the Senate Government Operations and Political Subdivision Standing Committee (attached hereto as Exhibit No. 1), and the March 10, 2015 hearing of the House Judiciary Standing Committee (attached hereto as Exhibit No. 2) are accurate transcriptions.

Nevertheless, Revolution Fuels believes that the best objective evidence demonstrating the Legislature's intent in revising section 19-1-301.5 is the language of the statute itself because the language is unambiguous. Under the plain language of 19-1-301.5(14)(b), the ALJ is directed to apply a clearly erroneous standard of review to the Utah Division of Air Quality's ("UDAQ") factual, technical, and scientific determinations. The standard is different from the previous substantial evidence standard and requires the ALJ to apply a highly deferential standard that only allows remand of the agency's factual, technical, and scientific determinations that are against the clear weight of the evidence. Furthermore, while it is not controlling on the standard of review, the legislative history also supports the application of a clear error standard to this category of UDAQ determinations because the Environmental Appeals Board ("EAB") – which the legislative history references – applies a very similar standard.

I. SECTION 19-1-301.5(14)(B) IS UNAMBIGUOUS

The starting point for analyzing the impact of the 2015 revisions to 19-1-301.5 is the plain language of the statute. *State v. Watkins*, 2013 UT 28, ¶¶ 18, 23, 309 P.3d 209 (stating that the "best evidence" of legislative intent is the plain language of the statute). Only when the

review determines that the statute is ambiguous – i.e., "that its terms remain susceptible to two or more reasonable interpretations after we have conducted a plain language analysis" – does the review turn to "other modes of statutory construction" and "guidance from legislative history." *Id.* ¶ 24 (internal quotation marks omitted); *see also Myers v. Myers*, 2011 UT 65, ¶ 28, 266 P.3d 806 ("Where (as here) the text is unambiguous, it is neither troubling nor even relevant that the legislative history contains an elaboration of only some of its provisions.").

With the 2015 revisions, the Legislature directed the adjudicative proceedings to be conducted as follows: "On review of a proposed dispositive action, the executive director shall uphold all factual, technical, and scientific agency determinations that are not ***clearly erroneous based on the petitioner's marshaling of the evidence***." Utah Code Ann. § 19-1-301.5(14)(b) (2015 Supp.) This language is not susceptible to multiple reasonable interpretations; it directs the review of UDAQ's factual, technical, and scientific determinations be conducted under a clearly erroneous standard.

II. THE CLEARLY ERRONEOUS STANDARD IS A DEFERENTIAL STANDARD THAT REQUIRES REMAND ONLY WHEN THE CLEAR WEIGHT OF THE EVIDENCE IS AGAINST THE AGENCY DETERMINATION

The clearly erroneous and substantial evidence standards are both deferential standards of review that are traditionally applied to the factual findings of a lower tribunal. They are, however, different standards of review.

Utah's appellate courts describe the clearly erroneous standard of review as:

> A finding is clearly erroneous "only if the finding is without adequate evidentiary support or induced by an erroneous view of the law." Therefore, we will not disturb a finding unless it is "against the clear weight of the evidence, or if we otherwise reach a definite and firm conviction that a mistake has been made."

Hale v. Big H. Const., Inc., 2012 UT App 283, ¶ 9, 288 P.3d 1046 (internal citations and quotation marks omitted).[1] The clearly erroneous standard requires the reviewing body to "give great deference" to the decision being reviewed. *Bonnie & Hyde, Inc. v. Lynch*, 2013 UT App 153, ¶ 17, 305 P.3d 196 (internal quotation marks omitted). In what appears to be the seminal Utah case on the clearly erroneous standard, the Utah Supreme Court explained that the clearly erroneous standard imposes a duty on the reviewing body to weigh the evidence with deference. Specifically, the Court stated,

> [I]t is simply unrealistic to expect an appellate court to conduct a review of a sufficiency of the evidence challenge without weighing the evidence. The appellate court must, however, go about weighing the evidence with one eye on the scales and the other fixed firmly on its duty of deference to findings of fact. Thus, it may only disturb findings that offend the 'clear weight' of the evidence. An appellate court must be capable of discriminating between discomfort over a trial court's findings of fact – which it must tolerate – and those that require the court's intercession. It must forebear disturbing the "close call."

State ex rel. Z.D., 2006 UT 54, ¶ 33 147 P.3d 401. The Court further explained that in weighing the evidence with an eye toward deference means the review must distinguish between "the situation in which we *think* that if we had been the trier of fact we would have decided the case differently and the situation which we are *firmly convinced* that we would have done so." *Id.* ¶ 34 (internal quotation marks omitted). In speaking to the concept of being firmly convinced, the Court went on to say: "it is not the role of the appellate court to reverse a trial court merely

[1] In contrast, the substantial evidence standard is articulated as: "'A decision is supported by substantial evidence if there is a quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.'" *Ivory Homes Ltd. V. Utah State Tax Comm'n*, 2011 UT 54, ¶ 11, 266 P.3d 751 (quoting *Kennon v. Air Quality Bd.*, 2009 UT 77, ¶ 28, 270 P.3d 417). In other words, the substantial evidence standards asks, would a reasonable person conclude that the determination is supported by the record. *Kennon*, 2009 UT 77, ¶ 28 (finding under the standard that "both the amount and quality of evidence were inadequate").

because it is convinced that the evidence is inadequate to sustain the result under the standard of proof applied below. [Utah case law] requires more. The result must be against the clear weight of the evidence or leave the appellate court with a firm and definite conviction that a mistake has been made." *Id.* ¶ 40.

Revolution Fuels recognizes that, as the ALJ stated, it is somewhat "perplexing" that the Legislature imposed a clearly erroneous standard where Utah law has traditionally applied the substantial evidence standard to the review of agency factual determinations. *E.g.*, Utah Code Ann. § 63G-4-403(4)(g). Moreover, the potential for confusion is understandable given that the deference created by the clearly erroneous standard grew out of the judicial recognition that a trial court's factual findings must be given deference because the lower court was able to observe first-hand witness testimony. *State ex rel. Z.D.*, 2006 UT 54, ¶ 24; *see also State v. Walker*, 743 P.2d 191, 192-93 (Utah 1987) (explaining that the clearly erroneous standard is rooted in Utah Rule of Civil Procedure 52, which, in turn, was based on Federal Rule of Civil Procedure 52).[2] But the origins of the standard do not invalidate the legislative intent that is plain on the face of section 19-1-301.5. *Watkins*, 2013 UT 28, ¶ 23 (stating that statutes must be interpreted to "give meaning to all parts, and avoid rendering portions of the statute superfluous"). Regardless of whether UDAQ observed witness testimony or not, the factual, technical, and scientific

[2] Application of the deferential clearly erroneous standard of review through URCP 52 is not limited to factual findings based on witness testimony. The rule states that findings of fact "whether based on oral *or other evidence*, must not be set aside unless clearly erroneous . . . ." Utah R. Civ. P. 54(a)(4) (emphasis added).

determinations of the agency must be reviewed under the clearly erroneous standard as expressly required by § 19-1-301.5(14)(b).[3]

Additionally, the revision to section 19-1-301.5 regarding the marshaling requirement is consistent with the clearly erroneous standard under Utah law. *See State ex rel. Z.D.*, 2006 UT 54, ¶ 39 (stating that the reviewing authority must provide some indication it performed its review "in the context of the whole record, or at least that portion of the record to which its attention was drawn by the appellant's marshaling obligation or the appellee's response to the appellant's marshaled evidence"). By adding the language regarding the marshaling the evidence, section 19-1-301.5 appears to have codified the Executive Director's prior determinations that the obligation to marshal is part of the petitioner's burden of persuasion. *E.g.*, Order Adopting Findings of Fact, Conclusions of Law, and Proposed Dispositive Action, In re: Intent to Approve: Waxy Crude Processing Project: N10335-0058, p. 2-3, Executive Director, November 17, 2014) (hereinafter "Executive Director's WCP Order") (finding that the marshaling requirement was a natural extension of an appellant's burden of persuasion); *cf.*, *Utah Physicians for a Healthy Environment v. Executive Director of the Utah Dep't of Envt'l Quality*, 2016 UT 49, ¶ 9 n.4, __ P.3d __ (rejecting an argument that the marshaling requirement imposed by an ALJ (and adopted in the Executive Director's WCP Order) through section 19-1-301.5 did not properly apply to the petitioner).

[3] Moreover, as shown in Part III, the Environmental Appeals Board applies the clearly erroneous standard to its review of EPA and other agency determinations. The lack of observation of witness testimony does not appear to have impeded the application of the standard in that context. *See* 40 CFR 124.18 (defining the administrative record).

III. LEGISLATIVE HISTORY OF 19-1-301.5

The legislative history underlying the 2015 changes to 19-1-301.5 also support the application of a clearly erroneous standard of review that implements a clear-weight-of-the-evidence test.[4] In the March 10, 2015, House Judiciary Standing Committee hearing, the following exchange occurred between Representative Merrill Nelson and Utah Department of Environmental Quality Executive Director Amanda Smith.

> Rep. M. Nelson: [I]t looks like there's a shift in the, in the standard of review changing from substantial evidence to a clearly erroneous standard. Do you know why that is? Is the intent to make a challenge more or less difficult, or is there any intent by, by, by that change in standard of review?
>
> A. Smith: The intent in that change is to make this process consistent with the process that it was modeled after originally, which is the EPA, Environmental Protection Agency's permit decision through the Environmental Review Board. And that's because, because we do have the delegated authority. When we went to simplify the process, what we, what we're trying to remediate is that we had this hybrid process that confused many of the attorneys who practice in this area, in the appeals area in the agency, because it was somewhat following the EPA review board process, and somewhat following our old process. So this is an attempt to make those two things consistent. Again as the senator said, so that it makes it more, it makes it easier for the attorneys who practice in the area to understand what process we're using, rather than jumping between two different appeals processes.
>
> Rep. M. Nelson: So there is not an intent to make a different stand-, standard, but just to conform to the federal standard, is that it?
>
> A. Smith: That's correct.

[4] The bill and complete legislative history may be found at http://le.utah.gov/~2015/bills/static/SB0282.html.

[Exhibit 2, p. 3.].[5] In other words, Executive Director Smith, explained that the change was to make the standard of review more consistent with the process used by the EAB.[6]

The EAB has articulated what is required under the clearly erroneous standard of review in a number of ways. This is because the regulations that implement the EAB's review process requires that the EAB apply a clearly erroneous standard of review to both "findings of fact or conclusions of law. 40 CFR § 124.19(a)(4)(i)(A). But in discussing how the clearly erroneous standard applies to the review of an agency's Best Available Control Technology ("BACT") determination, the EAB has held:

> In general the Board will defer to the permit issuer's judgment absent evidence of a clear error of fact or law. . . .
>
> Ultimately, [petitioners] may only prevail if the evidence in the record in support of their view *clearly outweighs* the evidence presented by the Region in in support of its decision. . . . [W]here an alternative control option has been evaluated and rejected, those

[5] The only other discussion of the standard of review occurred in a passing comment by James Holtkamp, a private attorney who was asked by the bill sponsor to discuss the revisions at the March 3, 2015 hearing of the Senate Government Operations and Political Subdivisions Standing Committee. In his remarks, Mr. Holtkamp stated, "It clarifies that the person or the entity appealing the permit must show that the agency's findings are clearly erroneous . . . ." [Exhibit 1, p. 2.]

[6] Revolution Fuels finds it is difficult to align Rep. Nelson's follow-up question – which appears to ask, in part, whether the revision creates a different standard – with Executive Director Smith's statement explaining that a change was contemplated by the legislation and the plain language that shows the standard shifts from substantial evidence to clear error. But it is important to also recognize that one cannot use legislative history to create statutory ambiguity. *Graves v. N. Eastern Servs., Inc.*, 2015 UT 28, ¶ 64, 345 P.3d 619 ("We cannot properly invoke legislative history in a manner overriding the terms of the statute. . . . It may be useful in informing our construction of ambiguities in the law."); *see also Myers*, 2011 UT 65, ¶ 28 ("But the legislative history is not law. It is at most of secondary relevance in informing our construction of the law, which is found in the statutory text."); *e.g.*, *In re Certified Question from the U.S. Court of Appeals for the 6th Circuit*, 659 N.W.2d 597, 600 n.5 (Mich. 2003) ("Legislative history cannot be used to create an ambiguity where one does not otherwise exist.").

> favoring the option must show that the evidence "for" the control option *clearly outweighs* the evidence "against" its application.

In re Inter-Power of New York, Inc., 5 EAD 130, 1994 WL 114949, *10 (March 16, 1994) (emphasis added).

Additionally, the EAB has articulated the clearly erroneous standard for technical issues as follows: "when issues raised on appeal challenge a Region's technical judgments, clear error . . . is not established simply because petitioners document a difference of opinion or an alternative theory regarding a technical matter. In cases where the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue, the Board typically will defer to the Region." *In re Dominion Energy Brayton Point, LLC*, 12 EAD 490, 2006 WL 3361084, *17 (February 1, 2006). Moreover, like the Utah Supreme Court's analysis in *State ex rel. Z.D.*, the EAB explained that an analysis against the clear weight of the evidence demands that close calls must be upheld. *In re Old Dominion Elec. Coop.*, 3 EAD 779, 1992 WL 92372, *9 (January 29, 1992) ("Even though EPA Region III, for example, might well have arrived at a different determination had it been the permit issuer of record, the Petitioners have not persuaded me that the State's choice represents clear error, because the evidence 'for' and 'against' SCR was (at the time of permit issuance) in such close balance. Differences of opinion in such circumstances do not necessarily translate into error by one and correctness by the other; rather, they can easily reflect genuine difference of opinion – i.e., differences best left for resolution to the informed discretion of the permit issuer."); *see also Inter-Power of New York*, 1994 WL 114949, *10 (finding that the petitioner did not carry its burden to show clear error "because the evidence for and against was in such close balance").

The EAB explanation of the clearly erroneous standard is remarkably similar to how the Utah Supreme Court articulated how the standard is applied under Utah law. Both articulations rest upon a premise that the review is highly deferential and imposes a burden on petitioners to show the clear weight of the evidence is against any challenged factual, technical, or scientific determination.

CONCLUSION

The plain language and the legislative history underlying the revisions to section 19-1-301.5(14)(b) require the application of a clearly erroneous standard of review to UDAQ's factual, technical, and scientific determinations. This is a highly deferential standard of review that allows for the remand to the agency only where the clear weight of the evidence overwhelming tips the scales to such a degree that the ALJ is convinced that UDAQ's determination is wrong.

DATED October 28, 2016.

/s/ Jacob A. Santini
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2016, a true and correct copy of the forgoing REVOLUTION FUELS' PRE-HEARING BRIEF REGARDING THE STANDARD OF REVIEW was filed via e-mail with the following:

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Exhibit No. 1

SENATE GOVERNMENT OPERATIONS AND POLITICAL SUBDIVISIONS STANDING COMMITTEE

Excerpted Transcript

March 3, 2015

Members: Sen. Margaret Dayton, Chair
Sen. Lyle W. Hillyard
Sen. David P. Hinkins
Sen. Alivin B. Jackson
Sen. Daniel W. Thatcher

Members Excused: Sen. Luz Escamilla

Other speakers:
Craig Anderson, Office of the Attorney General Environmental Division, Division Chief
James Holtkamp, attorney and Chair of the Utah Manufacturers Association Air Quality Committee.
Jeff Hartley, Red Leaf Resources

COMMITTEE DISCUSSION AND VOTE RE: S.B. 282, ADMINISTRATIVE LAW AMENDMENTS (SEN. M. DAYTON)

Sen. D. Hinkins	This will be Senate Bill 282; Administrative Law Judge Amendments. Sounds complicated.
Sen. M. Dayton	Thank you committee, this is another bill dealing with DEQ, I appreciate you letting me bring again before you this bill. You might recall that three years ago, 2 or 3 years ago, we did some major changes in board construction and appeals process. This particular bill addresses the procedures governing administrative review of an order relating to a permit by the director of DEQ. I have with me today to help present, Mr. Holtkamp, who will start first. He's part of my presentation and we'll begin with him.
J. Holtkamp	Good morning, Mr. Chairman. My name is Jim Holtkamp. I am an attorney representing the Utah Manufacturers Association and Chair of their association's air committee. As Senator Dayton indicated, a few years ago, the legislature enacted some changes to the permit appeal process for environmental permits. And as part of that process, if someone appeals an environmental permit, the Department of Environmental Quality assigns the appeal to an administrative law judge. Senate Bill 282 improves that process and does a number of things; I'll cover very, very briefly.

	First of all, it makes some housekeeping changes to streamline the appeal process. We should note that this bill is a product of a joint effort by the Attorney General's Office, the Department of Environmental Quality and attorneys from the regulated community. It streamlines the process. It reduces unnecessary costs for the state but at the same time it ensures due process of law. And very briefly, this is what the changes do. First of all, it eliminates some unnecessary procedural steps that are in the current law. Secondly, it provides some deadlines for responding to various items in the, that are applicable to both the agency and to the ALJ, for example, once an appeal is filed, the bill would require that an ALJ; an administrative law judge be appointed within 30 days of the filing of the bill. It requires responses to certain motions within 45 or 60 days as the case may be. It incorporates the standard schedule for briefing on the merits. It clarifies that the person or the entity appealing the permit must show that the agency's findings are clearly erroneous and it also explicitly provides that in the appeal, what we call the petition for review in the bill that the appellant has to demonstrate that the person or the entity raise the issues during the public comment period on the, on the permit. It also clarifies that the permittee is automatically a party. Believe or not under current law, if it's your permit that's being appealed, you're not a party to the appeal unless you file a motion to intervene. And then finally it allows there to be communication with the director of DEQ, which will allow for informal resolution of some of these issues. So, Utah Manufacturers Association is supportive of this measure and we appreciate very much the ability or the opportunity to work with both the Attorney General's Office and with the Department of Environmental Quality on it. Thank you.
Sen. M. Dayton	Thank you. I appreciate his comments and I also have Mr. Craig Anderson, who is the Attorney General representing DEQ and did you want to be a part of the presentation or just respond to their questions?
C. Anderson	I'm here to respond to any questions that you may have regarding the technical issues and changes made to the bill. Adding to what Mr. Holtkamp has said, I would indicate that the proposed changes are the result of our actual experience with the hearing process under the statute as it's currently written and through this process, we have had some real experiences with hearing processes. We've had interactions with the ALJs, who represent the department during that process and we feel that the changes will adequately deal with those concerns to expedite the hearing process and furthermore to make sure that all technical issues that may come up regarding any permit reviews are handled during the public comment period where everyone is involved in the process.
Sen. M. Dayton	Okay, thank you.

	That completes my presentation. We're open for questions.
Sen. D. Hinkins	Thank you. Any questions for the committee? Seeing none. Do we have anyone from the public who would like to speak on this, if you could come forward and state your name.
J. Hartley	My name is Jeff Hartley. I'm here representing Red Leaf Resources. I appreciate the opportunity to speak on behalf of Red Leaf Resources an oil shale developer in Uintah County, with over 50,000 acres of school trust lands under lease in the Uintah Basin. We appreciate Senator Dayton bringing the original legislation forward 3 years ago to help expedite the appeal process. I think first and foremost, it should be noted that when these permits are granted through the Department of Environmental Quality, there's, there is a full, there's a full review and vetting process before the permits granted. The, the administrative law judge processes on the appeal and that's after a complete permitting process takes place and those processes are long. They are extensive. They're thorough. These divisions within DEQ know that there'll be an appeal process. They know that they'll be challenged. They go through a very thorough process to make sure that the permits are air tight before they grant them and because of that the ALJ process is helpful in expediting the appeal process because it's already been a long process by the time it gets to that point and for companies that have invested millions of dollars to get there, delaying that process even further is hard. And we want to get into development as quickly as possible and I'd just like to give you a little bit of flavor of what that means to a company. Red Leaf's revolutionary oil shale extraction technology has built more than 20 patents. It was developed here in Utah. The company is based here in Utah. The technology is from Utah. Red Leaf has an estimated 550 million barrels of recoverable oil on the 50,000 acres of trust lands, that it leases from SITLA. The SITLA royalties that Red Leaf will pay over time, scale up to 12 ½ percent, which on $50 oil and we hope that there's a settling point north of $50 oil, but on $50 oil that will, that will exceed $3 billion to SITLA over time. So as the legislature looks to solve the education funding challenges, we hope to be part of that. But that's $3 billion from one company over time if we're able to develop our resources, which requires our permits. I share the background to tell the committee that when companies, like Red Leaf face delays in permitting procedures, ___ subtle impact to the company but it's impactful to the state. Again, we appreciate Senator Dayton bringing this forward I think that Mr. Holtkamp outlined the, what the, what this bill does to help streamline the process adequately. And so, I won't go back over the details of it, but I would just like to say as a company that has been going through this process with an administrative law judge, we appreciate that Senator Dayton is trying now to tighten up the timelines and tighten up the process so that it can't be delayed unnecessarily. We recognize that it's important the state regulate us as

	a company. We recognize that it's important that we seek permits and that we have requirements upon us. We don't want to get around that process, we just want it to be done quickly and done correctly and again we appreciate the opportunity to, to have this done in a more expedited and smooth process and appreciate this bill coming forward. Thank you.
Sen. D. Hinkins	Thank you. Does anyone else would like to speak for or against this bill, if not we'll come back to the committee for action. Senator Jackson.
Sen. A. Jackson	Yeah, I would like to make a motion that we report Senate Bill 282 from this committee and to the floor for further action.
Sen. D. Hinkins	Thank you. Senator Dayton would you like to respond or to?
Sen. M. Dayton	Yes. I appreciate the motion. And I just want to reiterate again, it's so important when these permits are granted that the people understand they're not granted without having public hearings with opportunity for input from all the stakeholders those for and against and the expedited time process is a time saver for everybody who's interested in the whole issue. So I hope you will support the motion.
Sen. D. Hinkins	Okay. Back to the committee for, would you like to sum? Waive?
Man	Waive
Sen. D. Hinkins	All those in favor of passing out Senate Bill 282 with a favor of recommendation to the Senate floor, say Aye.
	Aye.
Sen. D. Hinkins	Aye. Opposed if anybody? I guess that's unanimous. Would you like this on consent?
Sen. M. Dayton	I would love it on consent.
	Senator Jackson would you like to nominate this for consent?
Sen. A. Jackson	Yeah. I would make a motion that we put it on the consent calendar, yes.
Sen. D. Hinkins	Since no opposition to this, I would propose that all those in favor say aye.
	Aye.
Sen. D. Hinkins	Oppose if any, it is unanimous and it will be on consent. Thank you.

	Thank you.

Exhibit No. 2

HOUSE JUDICIARY STANDING COMMITTEE MEETING

Excepted Transcript

March 10, 2015

Members: Rep. LaVar Christensen, Chair
Rep. Merrill Nelson, Vice Chair
Rep. Fred C. Cox
Rep. Bruce Cutler
Rep. Brian M. Greene
Rep. Craig Hall
Rep. Brian S. King
Rep. Curtis Oda
Rep. V. Lowry Snow
Rep. Kevin J. Stratton
Rep. Mark A. Wheatley

Other speakers:

Amanda Smith, Executive Director of the Utah Department of Environmental Quality
Jeff Hartley, Red Leaf Resources

COMMITTEE DISCUSSION AND VOTE RE: S.B. 282 ADMINISTRATIVE LAW JUDGE AMENDMENTS (SEN. M. DAYTON)

Rep. M. Nelson	That brings us to the third item on the agenda. Senator Dayton. Welcome. Senate Bill 282 Administrative Law Judge Amendments.
Sen. M. Dayton	Thank you Representative Nelson and thank you Committee. And I'm sorry we've had to reschedule a couple of times. You've had a very interesting agenda.
Rep. M. Nelson	We also apologize. We know that you, you've been patient working with us, so we're glad you could be here.
Sen. M. Dayton	We all just make adjustments.
Rep. M. Nelson	Yes.

Sen. M. Dayton	I have with me um, Amanda Smith who is director of DEQ, and we are addressing another DEQ bill before you. Three years ago we made some changes in appeals. Let me explain that the various boards that are under DEQ on a regular basis will grant permits. Permit granting is only allowed after publicly announced and publicly held hearings and discussions. Not everybody agrees with the decisions that are made by these boards and thus, they have to have an opportunity to make an appeal. In legislation that was changed three years ago, we made it, we intended to make it easier for those people who have appeals to have a comfortable appeals process. This bill before you today is a refinement of what we did last year in an effort to make the appeals process more convenient for those who disagree with DEQ, there's some timeframes put in place. This doesn't change anything about public hearings. There are still public hearings. They have to be posted, they have to be open. It doesn't change the people who can present. It doesn't prevent people from hearing. What it does is it more carefully defines the role and the timeframe that the ALJ has to respond to the concerns and the protests. So, that is the bill and um, if you have questions, that's why Amanda Smith is here. And that concludes my presentation.
Rep. M. Nelson	Thank you very much. Let's go to the committee for clarifying questions. Representative King.
Rep. B. King	Thank you Mr. Chair. I'm, I'm looking at lines 249 through 251, right around there. And it indicates that there'll be timeframes within which there'll be resolution by the administrative law judges. There are a final, is there a timeframe within which a decision has to be made on a particular request for action?
UDEQ Executive Director A. Smith	Do you want me to answer that?
	Please.
UDEQ Executive Director A. Smith	My name's Amanda Smith. I'm the executive director of Department of Environmental Quality. And yes there is. If you follow on down, I believe it's line 270 if I'm kind of on the fly finding it. Within 60 days after the day submitted the executive dec-, director proposed dispositive action, maybe it's a little further. So I think that that is the timeframe for the final decision on that line. It starts there and then follows onto the next page. So basically in, in practical terms that means that after the way that I'm reading that, after the ALJ has a final decision or recommendation to the executive director, a decision within 60 days. Since the process changed three years ago with Senate Bill 21 and Senate Bill 11, I think I have reviewed 3-4 decision recommendations from ALJs, and my timeframe I usually try to make a final decision within 2 or 3

	weeks. So that we're trying to, uh, make sure that the record is, is put together and that the executive director is tracking along with the process so that there isn't un-, undue delay in those final decisions. So that, as you know, the next step is an appeal to district court, and we want to make sure that we're not delaying those actions going forward either.
Rep. B. King	Is there any sort of reporting process, I mean, in the judiciary, there's a reporting process within which the judges have to report on how long a case has been pending, how long a motion's been under advisement—that kind of thing. I mean, what's the remedy if, an ALJ just doesn't make a decision in a timely way?
UDEQ Executive Director A. Smith	That is a very good question. I'm not sure that there is a remedy at this time. And maybe that will be a further refinement.
Rep. B. King	Do, do you know how long the ALJs have had things under advisement? I mean is there a reporting mechanism to you?
UDEQ Executive Director A. Smith	There is. So, um, our assistant attorney general Craig Anderson and his staff keep a list of the pending matters, which ALJs they're before. And so we have very good records about where things are in the process. I guess the incentive for the ALJs to be timely before this or to report are that they are contract ALJs, and if they're not meeting the needs of the department, I guess our remedy would be to end the contract and find ALJs who were willing to work under that circumstance.
Rep. B. King	Okay, thank you.
Rep. M. Nelson	Thank you very much. I see no other lights, so let me ask a clarifying question if I could. On lines 278, and I see again on lines 305 and 306, it looks like there's a shift in the, in the standard of review changing from substantial evidence to a clearly erroneous standard. Do you know why that is? Is the intent to make a challenge more or less difficult, or is there any intent by, by, by that change in standard of review?
UDEQ Executive Director A. Smith	The intent in that change is to make this process consistent with the process that it was modeled after originally, which is the EPA, Environmental Protection Agency's permit decision through the Environmental Review Board. And that's because, because we do have the delegated authority. When we went to simplify the process, what we, what we're trying to remediate is that we had this hybrid process that confused many of the attorneys who practice in this area, in the appeals area in the agency, because it was somewhat following the EPA review board process, and somewhat following our old process. So this is an attempt to make those two things consistent. Again as the senator said, so that it makes it more, it makes it easier for the attorneys

	who practice in the area to understand what process we're using, rather than jumping between two different appeals processes.
Rep. M. Nelson	So there is not an intent to make a different stand-, standard, but just to conform to the federal standard, is that it?
UDEQ Executive Director A. Smith	That's correct.
Sen. M. Dayton	And Representative if I can respond to that as well.
Rep. M. Nelson	Sure.
Sen. M. Dayton	Um, I, I am not, I'm not sure everybody's thrilled with DEQ and what they do. But I would much rather that we have our own state DEQ than dealing with the EPA, which was our alternative. We can have our own DEQ and set our standards that conform with what EPA, the guidelines they give us. Or if we don't have our own state-driven DEQ, then we would have to work directly with Region 8 EPA in Colorado. It doesn't really meet the needs of Utah, it doesn't really work for us. And I am really grateful that DEQ will work with, within their parameters to try to make it convenient for us in the state to have a say in the issues that they address. That's another reason I felt good about bringing this bill forward. The public deserves and needs to have these hearings. And they deserve and need to have an option to protest if they don't agree with the decision. And they deserve to have a timeline on that decision-making process. And that would be the refinement that we're bringing for you today.
Rep. M. Nelson	Very good. I see no other lights. Is there anyone in the, in the public that would like to comment on Senate Bill 282? I see one hand. Would you come forward, please? Mr. Hartley. State your name for the record and who you might represent.
J. Hartley	Thank you Mr. Chairman. My name is Jeff Hartley. I'm here representing Red Leaf Resources, an oil shale extraction company. We appreciate the opportunity to speak to this committee. I spent a lot of time with the Natural Resources Committee and with other committees and don't get to spend any time with, with you all I'm talking about oil and oil shale. But I'd just like to let you know Red Leaf Resources is a Utah company. It has Utah technology, with over 20 US patents. It has several thousand school trust lands acres under lease. It has, it has several different blocks it has under lease with SITLA. It has the potential to develop several million barrels of oil on its trust lands leases. It pays royalties a scale up to 12 and-1/2% to SITLA, which on $100

	oil is significant, on $50 oil is half as sig-, half as significant, but still on $50 oil, on Red Leaf's conservative estimates of the oil they have in their oil shale would equal over the life of their oil shale leases $3 billion to the trust lands fund—which is significant to the state of Utah. So when Red Leaf is seeking permits from DEQ, our, our permits are significant to the state of Utah. We are in the process of the ALJ review. And I won't speak specifically to that process because it is currently underway, but we appreciate Senator Dayton creating the process three years ago for DEQ. And we appreciate the opportunity to tighten that process up a little bit. It's, it is significantly better as Senator Dayton indicated than going through an EPA process, and we're lucky that we have a state DEQ that we can work with. But it's, I think most importantly for this committee, it's important to understand that this is a, this process is set up with an administrative law judge to review appeals to our permits. These are permits that are fully vetted, these are permits that have been reviewed for a significant amount of time. They are carefully gone over and carefully reviewed by the permitting agencies because they know they will be appealed. The permits are pretty airtight when they are given, and because of that, this, the appeal process doesn't need to be lengthy, it doesn't need to be burdensome and cumbersome. It just needs to be reviewed to make sure they didn't miss anything. And I think that's important to know when you're looking at the review and um, our desire, um and it seems this legislation's desire to apply brevity to the process, because there has been a thorough vetting. Red Leaf Resources has a water quality permit that it sought, even though there's no discharge water from their process. It has a discharge water permit that it really didn't need. But it sought it anyway. That went through appeal. And it was, um, that whole process has taken a couple of years. A couple of years that the company didn't really need to go through, but it went through to get that step out of the way in advance of going into production. And as with any resource development, time costs money, and they're in the process of building a $300 million commercial demonstration project, and the time cost of money is significant at that level. So, I, we, I appreciate Senator Dayton brining this forward. We would appreciate the committee's support of this bill. Thank you.
Rep. M. Nelson	So, Mr. Hartley, you're in support of the bill and its new procedures, new timelines?
J. Hartley	Correct.
Rep. M. Nelson	Good. So who's taking the appeals? I assume some third-party doesn't like that you received a permit.
J. Hartley	That's correct. It's protested by a consortium of environmental groups.

Rep. M. Nelson	Okay, good. Any further questions for this witness? Seeing none. Any further comment from the public? I see none. So we'll come back to the committee for action. Representative Stratton.
Rep. K. Stratton	Thank you Mr. Vice Chair. I move that we pass out Senate Bill 282 Administrative Law Judge Amendments with a favorable recommendation. I'd like to speak to that.
Rep. M. Nelson	Very good. Go ahe-, the motion is to pass out Senate Bill 282 with a favorable recommendation. Representative Stratton to that motion.
Sen. M. Dayton	First sub, right?
Rep. M. Nelson	Um . . .
Sen. M. Dayton	Is that what you have in front of you?
Rep. M. Nelson	I do not have a sub.
Sen. M. Dayton	I'm glad we clarified that.
Rep. M. Nelson	We need to move . . .
Rep. K. Stratton	I'll withdraw and move to adopt that if we need to do that.
Rep. M. Nelson	Did you want a sub adopted?
Sen. M. Dayton	I'm sorry. I, I thought you had that. Let me just, there is, there is no substantive change in this bill. There's an alignment of technicalities. But rather than just trying to do a huge amendment, there is no substantive change and I apologize. I thought you had the first sub in front of you.
Rep. M. Nelson	There is one on the machine.
Sen. M. Dayton	Okay.

Rep. M. Nelson	But we have . . .
Sen. M. Dayton	So we do need to make that substitute.
Rep. M. Nelson	Okay.
Sen. M. Dayton	And we have been speaking to the first substitute the whole time.
Rep. M. Nelson	Very good. And under our procedures, we wait until committee action to adopt those. And so Representative Stratton, if you'd want to withdraw your motion, and, and make another motion.
Rep. K. Stratton	Just give me, yes, I would like to withdraw my previous motion. And I would like to move that we pass out . . .
Rep. M. Nelson	First of all.
Rep. K. Stratton	I would like, thank you Mr. Chair. Vice Chair. I'd like to move that we adopt Senate Bill 282 First Substitute.
Rep. M. Nelson	Very go-, very good. So the motion is to adopt, uh, uh . . .
Rep. K. Stratton	Adminis- . . .
Rep. M. Nelson	First Substitute. Yeah.
Rep. K. Stratton	Administrative Law Judge, Ame-, Judge Amendments, thank you, sorry.
Rep. M. Nelson	First Substitute Senate Bill 282 in place of Senate Bill 282. And would you like to speak to that motion Representative Stratton?
Rep. K. Stratton	I'll waive.
Rep. M. Nelson	To the sponsor, would you like to speak to that motion to substitute?

Sen. M. Dayton	Not to substitute except to apologize that I didn't say it sooner.
Rep. M. Nelson	That's fine, thank you. Any other discussion among the committee? I see none, and so back to Representative Stratton. Any summing, any summing on this?
Rep. K. Stratton	I'll waive.
Rep. M. Nelson	Waived. And so we'll place it for a vote. All in favor of the motion to substitute, First Substitute Senate Bill 282 in place of original Senate Bill 282, please say "aye."
	Aye.
Rep. M. Nelson	Any opposed? The motion to substitute passes unanimously. And now back to Representative Stratton.
Rep. K. Stratton	Thank you. With that, I move that we pass out Senate Bill 282 First Substitute Administrative Law Judge Amendments with a favorable recommendation. I'm glad to speak to that.
Rep. M. Nelson	Very good. The motion is to pass out First Substitute Senate Bill 282 with a favorable recommendation. Representative Stratton to that motion.
Rep. K. Stratton	Thank you. I appreciate the work of the sponsor. This First Substitute strengthens the bill adding a coordination clause with the other agencies, and that's very important. I would just state as we look at our public lands and the resources are held there, but also in our privately, this is a key avenue that our, those are seeking to do and carry forth business response matter within our state have this as a tool. I do greatly appreciate the sponsor and those that have supported this work and invite us all to pass this out favorably. Thank you.
Rep. M. Nelson	Thank you. No other comment to the motion. Back to the sponsor for summation.
Sen. M. Dayton	Thank you. I appreciate you hearing this and lest I sound like I was denigrating DEQ, which I didn't mean to, because I just like them better than EPA. Let me just, okay it's getting worse. Let me try to do this better. I need to say the work of DEQ is important. But what I really want to acknowledge is the service that's given by the people on the boards, which is volunteer service. And the boards are made up of, by code, by members of local government and organized environmental groups and regulated industries. And it's very important that all these people and experts in these technical fields come and review all of these issues. And it's donated time, for which we are, as a state, all indebted. But their work, in spite of the fact that it's donated and valuable, it also needs to

	have the opportunity to be challenged by those who disagree. And so as I said earlier, the purpose of this is to make it more efficient for those who want to challenge whatever permits are granted. So with appreciation for your time, I would speak in support of the motion and ask you to pass the bill.
Rep. M. Nelson	Very good. Thank you. Back to Representative Stratton for summation.
Rep. K. Stratton	Government closer to the people is always better. And we're grateful for the work of our good environmental quality unit here in the state. Thank you.
Rep. M. Nelson	Very good. We'll place the motion to pass out favorably Substitute House Bill 282 with a favorable recommendation. All in favor say "aye."
	Aye.
Rep. M. Nelson	Any opposed? The motion passes unanimously.
Sen. M. Dayton	Thank you Committee.
Rep. M. Nelson	Thank you Senator.