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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)	**SIERRA CLUB'S REPLY BRIEF** Administrative Law Judge Richard K. Rathbun June 23, 2017

I. Having No Support in the Record for Its Decisions, DAQ Resorts to Baseless Arguments that Sierra Club did not Adequately Brief its Case or Marshal the Evidence.

In accordance with Utah R305-7-214, Sierra Club's Opening Brief appropriately marshalled the evidence in the record that DAQ provided to support the agency's determinations and the organization provided ample legal support for its claims. Yet, DAQ claims that the Tribunal should ignore all of Sierra Club's arguments because Sierra Club allegedly did not properly "classify" the issues in the case as factual, legal, or mixed questions.[1] DAQ also repeatedly claims that Sierra Club failed to adequately marshal the evidence because its Opening Brief does not provide every reference in the record that could possibly be raised by

[1] DAQ Br. at 6.

DAQ to counter Sierra Club's arguments.[2] Paradoxically, in support of its argument, DAQ cites the very case that warns that litigants, "who spend considerable time arguing over the adequacy of the [opponent's] brief, rather than addressing the merits of the [opponent's] position...are often guilty of the very deficiency of which they complain."[3] Failing to heed the advice of the case on which it relies, DAQ spends an inordinate amount of time in its brief arguing about Sierra Club's purported briefing and marshaling deficiencies rather than providing adequate responses to the merits of Sierra Club's arguments.

DAQ is wrong about the standard for inadequate briefing and marshaling and is wrong that Sierra Club's brief contains the defects outlined by the authorities the agency cites. In the first case DAQ cites, *State v. Roberts,* the court concluded that the case was adequately briefed "[u]nlike cases where the appellant 'failed to cite any case law from any jurisdiction in order to set forth the elements of, or the legal standards for, his claims."[4] DAQ has not, and cannot, point to any similar defects in Sierra Club's brief, which contains careful references for each argument. Nor does the Court's holding in *Utah Physicians* have any applicability. There, the majority of the Court found that the petitioners failed to marshal because the opening brief focused on the Director's interim permitting decision instead of pointing to the defects in Executive Director's final order.[5] Nowhere does DAQ contend that Petitioners have failed to focus on the appropriate final permitting decision. Finally, DAQ does not explain how *Maak v. IHC Health Services, Inc.* has any relevance. There, the Court found that certain claims were

[2] *E.g.,* DAQ Br. at 13-14, 21-22.
[3] *State v. Roberts*, 2015 UT 24, ¶ 19, 345 P.3d 1226, 1234 (emphasis added).
[4] 2015 UT 24, ¶ 21, 345 P.3d 1226, 1235.
[5] *Utah Physicians for a Healthy Env't v. Exec. Dir. of the Utah Dep't of Envtl. Quality*, 2016 UT 49, ¶¶ 2, 18-19, 391 P.3d 148, 154. Note the Dissenting Opinion appropriately pointed out that the majority "holds for the first time that an appellant's failure to grapple with an intermediate appellate review of a tribunal's decision is a fatal briefing defect….At worst, Utah Physicians failed to engage with the ALJ's reasoning, which could have been persuasive to this court. But a failure to address potentially persuasive counterarguments has never been a reason not to resolve an appellant's arguments." *Id*. at ¶¶ 51, 58, 391 P.3d 148, 163-64 (Durham, J., dissenting).

waived where the opening brief contained no mention of them other than a footnote.[6] All of Sierra Club's claims were properly briefed in detail.

DAQ claims Sierra Club failed to classify its claims as factual, legal, or mixed questions, and did not apply the appropriate standard of review to the facts of the case.[7] DAQ's claim is exaggerated and the agency's contention that any such omission constitutes inadequate briefing has no basis in the law. For example, for the first claim Sierra Club plainly states "DAQ's decision not to account for the flare emissions during malfunction events in the facility's potential to emit is a clearly erroneous decision of law," and Sierra Club's pre-hearing brief detailing the standard of review is referenced.[8] Though Sierra Club did not explicitly state other claims were factual or mixed questions, Sierra Club properly applied the standard of review for each claim. DAQ provides no legal requirement that a petitioner must recite magic words to meet an adequate briefing standard.[9]

DAQ also claims Sierra Club failed to adequately marshal because it purportedly failed to present all relevant evidence in the record in its Opening Brief.[10] Sierra Club provided a well-supported opening brief that accurately presents the disputed issues as they have been developed in the record. The brief presents Sierra Club's arguments with references to applicable background in DAQ's Notice of Intent and draft permit, and Revolution's application, and detailed citations to where Sierra Club raised the arguments in comments.[11] The brief details the reasons DAQ provided for rejecting Sierra Club's arguments from DAQ's Response to Comments.[12] Sierra Club thus fully met the applicable standard of marshalling by "acknowledg[ing] the evidence in the record that supports the Director's determination."[13]

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[6] *Maak v. IHC Health Servs., Inc*., 2007 UT App 244, ¶ 30, 166 P.3d 631, 638.
[7] DAQ Br. at 6.
[8] Sierra Club Br. at 8.
[9] *See* R305-7-213 (listing briefing requirements, all of which Sierra Club has met).
[10] *E.g.*, DAQ Br. at 13-14, 21-22
[11] *E.g.,* Sierra Club Br. at 3-4, n. 11-14.
[12] *E.g., Id*. at 5, n. 21; 7, n. 27; 8, n. 30.
[13] Utah Admin. Code R305-7-214(2)(c).

DAQ's extreme view of marshalling would create an impossible burden for petitioners, amounting to an arbitrary "gotcha" standard where DAQ could always argue that petitioner missed some fact buried in the hundreds or thousands of pages in the record. Sierra Club properly acknowledged the DAQ's Notice of Intent and Response to Comments. This is the "evidence in the record that supports the Director's determination,"[14] as presented by DAQ itself. Under DAQ's view, a petitioner's appeal would be dismissed if it did not cite every conceivable fact in the record that DAQ could reference to support its position in its response brief, even where DAQ did not provide such fact as support for its position in the Response to Comments or the Notice of Intent. The only way Sierra Club could know whether DAQ believes a fact supports its position is if DAQ clearly provides that fact to support its position in the Response to Comments or the Notice of Intent. The marshalling requirement has been met here because petitioners sufficiently referenced the facts on which DAQ relied to make its arguments in those documents.

II. DAQ Improperly Excluded Malfunction Emissions from the Potential to Emit.

DAQ's decision not to account for inevitable malfunction emissions from Revolution's flare is clearly erroneous and should be reversed. Neither DAQ nor Revolution even bothers to respond to the important fact that accounting for the flare emissions could easily push the potential to emit carbon monoxide from 84.36 tpy over the 100 tpy threshold, or the nitrogen oxides from 93.61 tpy to over 100 tpy.[15] DAQ also continues to misinterpret the *United States v. Louisiana-Pac Corp.* case, mistakenly relies on the Holly order, and ignores the many examples from other similar sources that show malfunction emissions must be counted.

[14] *Id*.
[15] Sierra Club Br. at 9, n. 34 (citing (RAR Doc. 38, AR002478), Approval Order at p. 2; (RAR Doc. 36, AR002439), RTC at p. 33; Utah Admin. Code R307-101-2 ("Major Source")).

Potential to Emit is "the maximum capacity of a …source to emit an air pollutant under its physical and operational design."[16] Focusing on this definition, *United States v. Louisiana-Pac Corp.*[17] addressed the question of whether a facility's potential to emit can be estimated by operating a plant "in a manner contrary to its design and in a manner that would never occur in normal operations."[18] The court determined that it should not, explaining: "[T]he concept of potential to emit refers to the maximum emissions a source can generate when being operated within the constraints of its design."[19] DAQ places great weight on the court's use of term "normal operations," however, the court's discussion makes clear that "normal" refers to a plant "being operated within the constraints of the design." DAQ does not dispute that the flare is part of Revolution's design or that a certain number of malfunctions will inevitably occur. Indeed, as Revolution acknowledges, flaring and the resulting emissions is part and parcel of the facility's design.[20] Instead, DAQ claims the malfunction emissions are speculative, especially for new facility.[21] Yet, a degree of uncertainty is associated with predicting all emissions from a new plant, and there are ways to estimate future emissions by, for example, referencing estimates for similar plants, such as the six permit examples that Sierra Club provided.[22]

That flaring emissions during malfunctions are routinely included in the potential to emit in permits and permit applications for other similar coal gasification plants demonstrates that other applicants and state agencies interpret potential to emit to include such emissions. DAQ claims that it properly interpreted its own regulation to exclude malfunction emissions,[23] but DAQ's definition of potential to emit is the same found in the Clean Air Act and the same or

[16] Utah Admin. Code r. 307-401-2.
[17] 682 F. Supp. 1141, 1159 (D. Colo. 1988)
[18] *Id*. at 1159 (emphasis added).
[19] *Id*. at 1157.
[20] "The federal courts and EPA have both recognized that equipment malfunctions are inevitable regardless of how well a source maintains and operates a facility." Revolution Br. at 4, n.3 (citing *United States Sugar Corp. v. EPA*, 830 F.3d 579, 606-607 (D.C. Cir. 2016).
[21] DAQ Br. at 7.
[22] Sierra Club Br. at 7, n. 26 (citing RAR Doc. 30b, AR002083-085).
[23] DAQ Br. at 10.

substantially the same as the definition used by other states.[24] DAQ also erroneously claims that it "meticulously" considered each of the six examples of permits and permit applications in the record, and that Sierra Club's analysis was insufficient and conclusory.[25] As Sierra Club explained in its opening brief, DAQ's analysis of the six similar examples is limited to three themes: 1) the insignificant fact that the examples are major sources; 2) that DAQ believes it is unclear whether the examples are including malfunctions as a regulatory requirement; or 3) some other irrelevant distinction, such as that the example facility was a coal-to-synthetic natural gas project instead of a coal-to-liquid project.[26] DAQ still does not explain why the fact that a facility is a major or minor source or differs in design are meaningful distinctions given that the same definition of potential to emit applies.[27] In all these similar facilities, the permitting agency determined that emissions from flares must be included in the calculation of potential to emit and that meaningful estimates of these emissions could be made.

DAQ also continues to reject EPA's position as reflected the Riva Memo. The Riva Memo plainly states that "to determine PTE, a source must estimate its emissions based on the worst-case scenario taking into account startups, shutdowns, and malfunctions."[28] DAQ makes no plausible argument why this plain statement by this expert agency is not compelling.

DAQ also improperly relied on the Holly Order to support its determination that malfunction emissions should not be included in potential to emit.[29] This is discussed further in the next section.

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[24] 40 C.F.R. § 52.21(b)(4); Utah Admin. Code R307-101-2(same definition); *see also e.g.,* 5 CCR § 1001-5:3A.I (same PTE definition in Colorado); and Wyo. Admin. Code § ENV AQ Ch. 6 s 4 (same).
[25] DAQ Br. at 10.
[26] Sierra Club Br. at 7; AR002441 ("The fact that a source attempts to include flare emissions in a permit application does not mean it is a regulatory requirement."); AR002442 ("FutureGen is a major PSD source…[Revolution] should not be compared with a major PSD source."); AR002442 (regarding Medicine Bow gasification project, "the comment does not state that this inclusion was pursuant to a regulatory requirement.").
[27] 40 C.F.R. § 52.21(b)(4); Utah Admin. Code R307-101-2 (same definition).
[28] (RAR Doc. 30b, AR002139-140), Riva Memo, Exhibit E, at pp. 1-2.
[29] (RAR Doc. 36, AR002435, AR002463), RTC at p. 29, 57.

III. DAQ Improperly Exempted Malfunction Emissions from Any Regulation.

Under Utah's Breakdown Rule (UBR), a "breakdown" occurs only where there are "emissions in excess of those allowed by approval order or Title R307."[30] DAQ fails to provide a rational response explaining how the UBR could possibly apply to malfunction emissions from Revolution's flare when there are no permit (or approval order) limits that apply during malfunction events that could be exceeded and trigger the UBR.[31] Revolution acknowledges that emissions from the flare, defined as malfunction events, will occur. DAQ does not dispute that the Revolution permit does not contain any conditions limiting these flare malfunction emissions. Instead, DAQ claims that the permit's limits only apply during normal operations, which DAQ contends does **not** include malfunctions and that because the Revolution permit does not specifically allow malfunction emissions, any malfunction emissions would be in excess of the permit.[32] To make this ill-conceived argument, DAQ only references its unsupported explanation in the Response to Comments and provides no support for these assertions in the law or the permit. DAQ's explanation is also contradicted by its explanation in the Holly Order.

Neither DAQ nor Revolution has provided a single authority to support the position that any emissions not permitted under the permit are prohibited. DAQ's UBR argument continues to rely solely on its Response to Comments, which, without citing to any reference for support, state: "The limits in the proposed permit contemplate zero emissions from the flare. Any exceedance of the permit limits, due to upset conditions or otherwise, is a violation of the permit."[33] The Revolution permit includes no provision that limits flare emissions, prohibits malfunctions or "contemplates" zero emissions in any way. In fact, the face of the Approval Order states that it only violations of its express conditions would constitute a violation: "This air

[30] R307-107-2.
[31] R307-107-1.
[32] *See* DAQ Br. at 12-13.
[33] DAQ Br. at 12 (citing RTC, AR002436).

quality AO authorizes the project with the following conditions and failure to comply with any of the conditions may constitute a violation of this order."[34] Likewise, the UBR applies only emissions in excess of permit limits. Therefore, DAQ's Response to Comments statements that the "contemplations" of the permit are not legally enforceable and would not be helpful in any potential enforcement action. DAQ's unsupported opinion is not a legally supportable way to regulate emissions.

Without providing any explanation, Revolution points to R307-401-1(Purpose) and R307-401-9 (Small Source Exemption) to support its conclusion that "sources subject to the approval order process are prohibited from emitting air pollutants that are not first authorized by DAQ in an approval order."[35] But Revolution makes a leap in the logic that is not at all clear from the text of those provisions, which "establish[] the application and permitting requirements for new installations and modifications to existing installations,"[36] and exempt small stationary sources from the approval order requirement under certain circumstances.[37] Moreover, DAQ did not support its own decision with this argument, and nowhere does the Approval Order state that any emissions not permitted under the Order are prohibited.

DAQ new argument that "The Holly emissions cap did not mean that Holly's malfunction emissions would have to exceed the cap before the UBR would apply, as the UBR applies to *any* malfunction emissions, just as it does to the Revolution facility" is inconsistent with what DAQ said in upholding the Holly Approval Order.[38] As provided in Sierra Club's Opening Brief, DAQ upheld the Holly Order because it contains a federally enforceable overall emissions cap which effectively limits its malfunction emissions to zero. DAQ stated:

[34] (Approval Order), RAR Doc. 38, AR002478.
[35] Revolution Br. at 3-4.
[36] Utah Admin. Code R307-401-1 (Purpose).
[37] Utah Admin. Code R307-401-9 (Small Source Exemption).
[38] DAQ Br. at 13 (emphasis in original).

> 30. Holly assumed a limit of zero tpy for malfunction emissions, which it factored into its emissions totals for the SO2 and PM10 emission caps in the Holly AO. [*See* IR002857, July 2012 NOI ("Startup, shutdown, malfunction events were considered to be zero.").] The SO2 and PM10 emission caps, which include emissions from all combustion sources including flares, are federally enforceable operational limitations. [*See* IR009245, Holly AO (Section II.B.6.a, "The emission of SO2 into the atmosphere from all sources (excluding routine turnaround maintenance sessions) shall not exceed 110.3 tons per rolling 12-month period or 0.31 tons per day."); *see also* IR009247, Holly AO (Section II.B.7.a "PM10 emissions from all combustion sources shall not exceed 47.5 tons per rolling 12-month period.").]
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> 31. If Holly exceeds its emission caps due to an upset or malfunction, Holly will be in violation of its permit and subject to enforcement by UDAQ. [See IR009196, Response to Comments Memo ("All limits of the permit apply at all times, which include periods of startup, shutdown and malfunction.").] The UBR was put in place to deal with these very kinds of emissions.[39]

The distinction between Holly having enforceable emissions caps and Revolution having none is the critically important difference of whether or not there is an enforceable limit on flaring emissions. The Holly Order plainly states: "If Holly exceeds its emission caps due to an upset or malfunction, Holly will be in violation of its permit and subject to enforcement by UDAQ." Additionally, DAQ's argument here that "the limits in the AO apply only to normal operations"[40] is inconsistent with its position in the Holly case, where it stated: "All limits of the permit apply at all times, which include periods of startup, shutdown and malfunction."

DAQ's failure to regulate Revolution's malfunction emissions is clearly erroneous and not supported by substantial evidence.

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[39] Findings of Fact, Conclusions of Law, and Recommended Order on the Merits, 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 (Holly Order) at 46 (March 11, 2015), available at http://www.deq.utah.gov/Admin/proceedings/docs/2015/06Jun/HollyALJRecommendedOrder.pdf, adopted by Order Adopting Findings of Fact, Conclusions of Law, and Recommended Order on the Merits (March 31, 2015), available at http://www.deq.utah.gov/Admin/proceedings/docs/2015/06Jun/HollyFinalExecutiveDirectorOrder.pdf.

[40] DAQ Br. at 12.

IV. DAQ Failed to Analyze BACT for the Flare.

Because the Revolution flare is a source of emissions, *i.e.,* it is an emissions unit that "emits or would have the potential to emit any air pollutant,"[41] DAQ must derive and impose a BACT emission limitation on the flare.[42] Sierra Club explained at length in its Opening Brief why the flare is a source of air pollution subject to BACT.[43] In short, the application states that "…all process equipment is routed to the flare…," and the flare will combust "any syngas or vent gas" during startup, shutdown, or upset conditions."[44] Further proof is that DAQ imposed conditions limiting the flare emissions to four startups and four shutdowns per year.[45] DAQ agrees that flare is an emission unit subject to BACT for the emissions from the pilot light,[46] but DAQ denies that the flare is otherwise a source of emissions because "it only combusts emissions generated elsewhere in the system."[47] Initially, DAQ provides no basis for its argument – particularly in relation to the BACT rule – that the agency is excused from BACT analysis for an emission unit combusting "emissions generated elsewhere." Moreover, DAQ's position is illogical because the "source" of emissions is irrelevant to a BACT determination. The point where the emissions are being released into the atmosphere is what is relevant because that is the point that can be controlled and where limits can be imposed. For example, syngas is routed to the flare for combustion during startups, shutdowns, and malfunctions.[48] Syngas is not an emission, it is an intermediate product produced by the gasification system that will ultimately be transformed into

[41] Utah Admin. Code R307-401-2(1);*see* DAQ Br. at 14.
[42] Utah Admin. Code R307-401-2(1) (Best Available Control Technology applies to emissions units); *see* Sierra Club Br. at 13-17;
[43] Sierra Club Br. at 14-15.
[44] (RAR Doc. 30b, AR002082), Sahu Attachment at 1 (citing Section 2.8 of Revolution Fuels NOI, p. 2-10, (RAR Doc. 1, AR000016).
[45] (RAR Doc. 38, AR002479, AR002482), Approval Order at 3, 6.
[46] DAQ Br. at 16.
[47] *Id*. at 15. Revolution also argues "control equipment does not qualify as pollutant-emitting activities." Revolution Br. at 12. But pollution is emitted from the flare, making it a pollutant-emitting activity.
[48] DAQ Br. at 15.

the diesel fuel, jet fuel, LPG, and naphtha.[49] Emissions are produced by the combustion of the syngas in the flare, logically making it an emissions unit and indicating, contrary to DAQ's assertions otherwise, that the flare is the source of the emissions. Finally, as the multiple examples Sierra Club provided make clear, agencies across the nation have applied BACT to flare emissions despite the fact that the gas being combusted in and released from the flare is being generated elsewhere.

DAQ argued in the Response to Comments that the flare is not a source of air pollution because it is a control technology, so Sierra Club pointed to the emissions limits for the Reaction Chamber, which are controlled by SCR, to show the fallacy of DAQ's position. Both the flare and the SCR are emission units where air pollution is emitted to the atmosphere. Yet, the Revolution permit limits emissions from the SCR – which is a control technology. Neither Utahns who breathe air around the plant or the Clean Air Act or Utah law recognizes any distinction between the two sources of pollution. DAQ does not provide any distinction except to repeat the illogical argument that the flare is not a source of emissions.[50]

Revolution's argument that Sierra Club's position would mean that the SCR on the gasification burners would be subject to BACT is baseless.[51] The Revolution permit contains an emissions limit for the SCR on the gasification burners that represents the best available control.[52] There would be no need for a separate BACT analysis from the same emission source.

DAQ continues to argue that the visible emission limit is sufficient for BACT for the flare.[53] Thought it recites Sierra Club's arguments, it does not address them. DAQ provides no answer to how a visible emissions limit could possibly limit any gaseous pollutants from the flare, possibly including combustion products of the process gas (*e.g.*., SO2, NOx, CO, etc.),

[49] (NOI), AR000011.
[50] DAQ Br. at 16.
[51] *See* Revolution Br. at 13.
[52] (RAR Doc. 38, AR002479, AR002482), Approval Order at 3, 6.
[53] DAQ Br. at 16-17.

and also air toxic compounds.[54] Additionally, contrary to DAQ's position, there is no permit condition that provides that all malfunction events are violations of the permit.[55]

Sierra Club's brief and comments suggested two sources DAQ could reference for BACT on flare management, yet DAQ continues to erroneously claim that Sierra Club failed to provide any BACT examples.[56] Sierra Club suggested New Source Performance Standards for Petroleum Refineries (Subpart Ja) and Utah's limitations and monitoring on the Salt Lake area as a starting point for BACT.[57] DAQ perfunctorily argues "Sierra Club again fails to provide any basis or analysis for its desired application of Subpart Ja to the flare," but the NSPS is clear on its face.[58] Sierra Club even listed the requirements that DAQ should consider in its Opening Brief:

> NSPS for refineries includes: "1) develop and implement a flare management plan; 2) conduct root cause analyses and take corrective action when waste gas sent to the flare exceeds a flow rate of 500,000 standard cubic feet (scf) above the baseline flow to a flare in any 24-hour period; 3) conduct root cause analyses and take corrective action when the emissions from the flare exceed 500 lb of SO2 in a 24-hour period; and 4) optimize management of the fuel gas by limiting the short-term concentration of H2S to 162 ppmv during normal operating conditions (determined hourly on a 3-hour rolling average basis)."[59]

There is no reason why DAQ could not evaluate these options particularly given that DAQ provides no reasons for its refusal to do so.

Sierra Club also explained that additional BACT options for the flare could not be analyzed because the application did not provide critical details on the flare design.[60] After the close of the public comment period, Revolution submitted information on the flares that DAQ

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[54] (RAR 30b, AR002082), Sahu Attachment at p.1.
[55] DAQ Br. at 17.
[56] DAQ Br. at 15; *see also* Sierra Club Br. at 16.
[57] Sierra Club Br. at 14-15, n. 62 (citing (RAR 30, AR000450),Sierra Club Comments at p. 15, fn 82).
[58] DAQ Br. at 17.
[59] Sierra Club Br. at 15, n. 62 (citing 77 Fed. Reg. 56422, 56430 (Sept. 12, 2012)).
[60] Sierra Club Br. at 16, n. 74 citing ((RAR Doc. 30, AR000447), Sierra Club Comments at p. 12; (RAR Doc. 30b, AR002082-083),Sahu Attachment at pp. 1-2). DAQ's claim that Sierra Club brought up a new argument in its brief is false. *See* DAQ Br. at 15 ("Sierra Club now claims…").

claims "was sufficient to comment on available control technologies,"[61] essentially admitting that there was not sufficient information in the record during the public comment period. In any event, the post-permit information is still not sufficient because it does not include, for example, basic details on the flare tip, and whether the flare is air or steam assist. Additionally, the information was submitted *after* the close of the public comment period, and is not relevant to the question or whether or not DAQ conducted a legally sufficient BACT analysis at the time it made its permitting decisions and so that the public could make meaningful comments on the permit.[62]

DAQ claims that Sierra Club failed to marshal the evidence because "it provides only a handful of record citations, and no meaningful analysis explaining why the flare is an emission unit subject to BACT."[63] In fact, Sierra Club provided all relevant record citations. After all, chief among Sierra Club's arguments is that the record does not support the purported BACT review of the flare. Sierra Club also thoroughly explained why the flare is an emission unit.[64] DAQ's desire to have more than "a handful" of record cites is arbitrary and not based on any authority, and it failed to point to any supposed relevant evidence that Sierra Club failed to marshal.

Similarly unwarranted is DAQ's attack on Sierra Club's reference to EAB cases analyzed in its standard of review brief.[65] Sierra Club's brief explained in detail why DAQ's failure to conduct a BACT analysis was clearly erroneous, including DAQ's failure to explain how a visible emission limit can be BACT for all potential emissions, failure to consider Sierra Club's BACT suggestions, and failure to provide sufficient details to undertake a proper BACT analysis.[66] Sierra Club appropriately referenced three cases that held that BACT analyses are clearly

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[61] DAQ Br. at 15.
[62] *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575 (10th Cir.1994); *Pio Pico Energy Ctr.*, 2013 WL 4038622, at *54 (E.P.A. Aug. 2, 2013) (EPA's "post-hoc" analysis of data after comment period closed "comes too late; the analysis should have been part of the record available for public comments before the Region determined the final…limits."); *id*., fn.65 (cases cited therein).
[63] DAQ Br. at 14.
[64] Sierra Club Br. at 13-15.
[65] DAQ Br. at 17-18.
[66] Sierra Club Br. at 13-17.

erroneous for similar failures, which are analyzed in greater detail on page 6 of its standard of review brief.

V. DAQ's BACT Analysis for the Coal Storage Pile Was Clearly Erroneous and Not Supported by Substantial Evidence.

DAQ does not dispute that the entire extent of its BACT analysis for the coal storage pile was merely to "review[] the BACT analysis submitted by Revolution," nor does it dispute that it the record contains no evidence to support the conclusion that enclosure of the pile is cost-prohibitive.[67] DAQ conducted no due diligence on its own, did not consider Sierra Club's BACT examples, and had no basis other than one unsupported sentence from the Applicant for making its determination. Moreover, DAQ's position in its response brief rejects the basic premise that it has the duty to conduct a BACT analysis and support its decision in the record.

DAQ perplexingly faults Sierra Club's analysis of DAQ's BACT review.[68] Yet, Sierra Club analyzed the one sentence that constituted DAQ's entire analysis frontwards and backwards, and supplied example BACT determinations for coal piles that were applied at similar sources. Sierra Club also cited the Utah Supreme Court *Sierra Club* case as authority that DAQ's analysis was inadequate because the case holds that "DAQ must provide sufficient evidence to show BACT emission limits are achieving the maximum reduction of pollutants possible."[69] DAQ claims that Sierra Club did not provide enough "meaningful analysis" of this case, but the case needs no further analysis. The Utah Supreme Court reversed two of the Board's BACT findings for a proposed coal plant because the Board failed to provide sufficient evidence to support its determinations.[70] Here, as Sierra Club established in its Opening Brief, DAQ failed to provide

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[67] DAQ Br. at 19, 21-22.
[68] DAQ Br. at 19.
[69] Sierra Club Br. at 18, n. 86 ((RAR Doc. 30, AR000452), Sierra Club Comments at p. 17; *see also* Utah Admin. Code R307-401-2(1), *Utah Chapter of Sierra Club v. Air Quality Bd*., 2009 UT 76, 226 P.3d 719, 734.
[70] *Utah Chapter of Sierra Club*, 2009 UT 76, 226 P.3d at 733 (Board should have considered IGCC (integrated gasification combined cycle) in BACT analysis); at 734 ("if adequate evidence is presented that a control technology, including production processes, is operating or permitted for similar operations,

any analysis to support its BACT determination for the coal storage pile and should similarly be reversed.

DAQ continues to attempt to justify its unsupported BACT determination by claiming that it was "not aware of any additional control technologies that would be technologically and economically feasible."[71] Yet, in the next paragraph, DAQ acknowledges that Sierra Club provided actual examples of BACT used on coal storage piles in its comments. DAQ refused to consider these BACT options on the wrongful belief that it was not required to consider BACT options from another state.[72] In fact, BACT requires consideration of all available controls, even if they have only been used in other countries,[73] and selection of the most stringent control technology.[74] As the Utah Supreme Court has explained,

> The EPA and its appeals board have defined available technologies as those that have a "practical potential for application ... includ[ing] those employed outside of the United States." EPA, *New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting* B.5 (1990). For a technology to be practically applied, it must have been applied to or permitted for a full-scale operation. *Id*. at B.13. Thus, "the term available is used in its broadest sense under the first step and refers to control options with a 'practical potential for application to the emissions unit' under evaluation." *Knauf Fiber Glass, GmbH*, 8 E.A.D at 130 (emphasis in original) (quoting *New Source Review Workshop Manual* at B.5). This definition is not binding on the Division or the Board, but in our view, because it is included in a manual created to guide air-permitting authorities throughout the nation, it is very persuasive. Further, while the Board has discretion to interpret its own regulations, as we discussed in Part I, it must do so with an eye to furthering the goals of the PSD program. As indicated in its title, the purpose of the BACT review is to ensure that the best available

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the permitting authority should consider the technology available…Because IGCC was available and the plain language of the BACT definition indicates it should be considered in the BACT analysis, we vacate the Board's BACT analysis conclusions."); at 734-36 ("it was unreasonable for the agency to adopt the 0.1 twenty-four hour emission limitation when there was evidence that a lower overall emission limitation was achievable; therefore we set aside the Division's determination that this standard was BACT for nitrogen oxides.")

[71] DAQ Br. at 19.

[72] DAQ Br. at 20, n.139.

[73] *Utah Chapter of Sierra Club*, 226 P.3d at 733.

[74] *Id*. at 723 (citing EPA, New Source Review Workshop Manual: Prevention of Significant Deterioration and Nonattainment Area Permitting B.2 (1990), http://www.epa.gov/region07/programs/artd/air/hsr/hsrmemos/1990wman. pdf)

> control technology is adopted. Implicit in this purpose is a goal to encourage the adoption of new technologies.[75]

Revolution attempts to bolster DAQ's rejection of Sierra Club's BACT examples have no basis in the record and cannot serve as a proxy for the agency's decision-making record. Revolution's new arguments about why DAQ rejected Sierra Club's examples should not be considered because they do not appear anywhere in the administrative record.[76] An agency's decision must be upheld by reasons articulated by the agency in the record.[77] Additionally, Revolution's argument that DAQ imposed BACT that is more stringent than Subpart Y is contradicted by the record as well as Revolution's own argument.[78]

BACT requires the agency to adopt the most stringent technology unless it can show that the most stringent technology is "not achievable due to energy, environmental, or fiscal impacts."[79] Here, DAQ did not provide <u>any</u> showing that enclosing the coal storage pile is economically infeasible. In DAQ's Response Brief, without providing any support or cost estimates, DAQ declares that enclosing the coal pile is "obviously cost-prohibitive."[80] This is an especially illustrative example of DAQ's misunderstanding of its duty under BACT to make a decision based on reasoning and evidence in a record. Fortunately for Utahns, the law does not allow DAQ to make decisions on an unsupported opinion of an agency official or lawyer, no matter how "obvious" it might seem to that individual. The record does not support the agency's contention that enclosing the coal pile is "obviously cost-prohibitive" because there is no estimate or evidence of enclosure cost anywhere in the record. Further, DAQ made no attempt to explain why it believes enclosure is cost prohibitive in the record. The post-hoc statements by

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[75] *Id*. at ¶ 45, 226 P.3d 719, 733 (emphasis in original).
[76] Revolution Br. at 17-19.
[77] *See infra* note 62.
[78] AR002456 ("The DAQ has determined the Subpart Y meets BACT for Revolution Fuels, and that source compliance with the applicable provisions of Subpart Y is BACT for the coal handling operations").; Revolution Br. at 19 ("DAQ imposed Subpart Y as a minimum standard.")
[79] *Utah Chapter of Sierra Club*, 2009 UT 76, ¶ 4, 226 P.3d at 723.
[80] DAQ Br. at 20; *see also* Revolution Br. at 17 (arguing same is "facially clear").

DAQ and Revolution's lawyers in their response briefs[81] cannot be used justify DAQ's determination.[82] Without support in the record, this Tribunal cannot uphold DAQ's determination that enclosure is economically infeasible.

Incredibly, DAQ faults Sierra Club for not addressing the "evidence in the record relevant to the cost of the enclosure."[83] This statement is conspicuously unsupported with a reference to any evidence in the record because there is none. Sierra Club searched the record for the agency's facts and reasoning and directly addressed in its comments and opening brief the one sentence in Revolution's application on which DAQ relied to assess controls on the coal pile. DAQ's argument that it is the Sierra Club's responsibility to submit a cost estimate for enclosing Revolution's coal storage pile[84] rather than the agency's obligation to make permitting decisions supported by record evidence, would turn the administrative process on its head. After all, the Utah BACT rule states without ambiguity that it is DAQ's obligation to derive and impose BACT, while, at a minimum, under Utah law, DAQ's permitting decision must be supported by record evidence.[85]

Whether the record supports the DAQ's factual determinations must be evaluated on the basis DAQ articulated in the record,[86] yet in its response brief DAQ attempts to support its decision with a 2009 statement from EPA that DAQ never before considered anywhere in the record.[87] Moreover, EPA's statement is not relevant to BACT since it was made in the context of selecting the NSPS, which as Sierra Club has explained, is "the absolute floor...and a starting point from which a search for the best available control technology may begin."[88] Thus, at most,

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[81] *E.g.* Revolution Br. at 17.
[82] *See infra* note 62.
[83] DAQ Br. at 22.
[84] DAQ Br. at 21 (arguing that Sierra Club should have established a "feasibility standard").
[85] *See* Utah Admin. Code R307-401-8(1)(a); *see infra* note 62.
[86] *See infra* note 62.
[87] DAQ Br. at 20-21; *see also* Revolution Br. at 17-18.
[88] (AR000453), *Id*. at p. 18, fn 100 (citing Utah Admin. Code R307-401-2(1) ("In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61.")).

EPA's statement only reflects EPA's opinion that "at this time," in 2009, enclosure of coal piles was not the minimum control technology to be applied to all new coal piles. It has nothing to do with DAQ's selection of the best available control technology in 2015/2016.

DAQ also argues that Sierra Club's claim should be dismissed because it failed to marshal "the size of the coal pile, the amount of emissions from the pile, the various controls identified by Revolution and reviewed by UDAQ, and the effectiveness of the imposed BACT controls.[89] As an initial matter much of DAQ's claim is false. Sierra Club's brief plainly includes the amount of emissions from the coal pile.[90] Sierra Club also detailed the controls identified by Revolution and UDAQ with references to DAQ's Source Plan Review,[91] Response to Comment,[92] and Appendix G of the Application,[93] and it did discuss DAQ's decision to rely on NSPS Subpart Y.[94] That Sierra Club did not mention the size of the coal pile or that NSPS "can reduce...emissions...up to 90 percent" (NSPS is not, as DAQ claims, 90% effective)[95] does not amount to a fatal marshalling failure. Sierra Club included the key facts and marshalled the "evidence in the record that supports the Director's determination,"[96] as presented by DAQ itself. DAQ did not find it worth mentioning the fact of the size of the coal pile or that NSPS could control up to 90% of emissions in its Response to Comments on the coal storage pile, nor did it justify its decision anywhere in the record with its new argument that it is "obvious" that the cost of enclosing the coal storage pile to control is economically unfeasible.[97]

[89] DAQ Br. at 21-22.
[90] Sierra Club Br. at 17.
[91] *Id*. at 17, n.79.
[92] *Id*. at 17, n.80.
[93] *Id*. at 18, n.81.
[94] *Id*. at 18- 19.
[95] DAQ Br. at 20.
[96] Utah Admin. Code R305-7-214(2)(c).
[97] RTC at AR002455-58; *see* DAQ Br. at 20.

VI. Conclusion

Based on the deficiencies outlined in Sierra Club's Opening Brief and above, Sierra Club respectfully requests that the Director revoke Revolution's permit and/or remand Revolution's permit to DAQ with instructions that the agency comply with the law by undertaking a full and proper analysis.

Dated this 23rd day of June 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2017, a true and correct copy of the forgoing **SIERRA CLUB'S REPLY BRIEF** was filed via e-mail with the following:

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