

Utah Attorney General's Office

Memorandum

To: Utah Air Quality Board

From: Fred Nelson, Assistant Attorney General



Re: In the Matter of Sevier Power Company Power Plant, DAQE-AN2529001-04

Date: March 22, 2006

These matters are on the Board agenda as action items for the April 6, 2006, meeting:

1. Sierra Club's renewed request to stay proceedings.
2. Executive Secretary's Motion for Judgment on the Pleadings.
Sevier Citizens raised 14 issues in its Request for Agency Action dated March 16, 2005 (see Attachment E). The Executive Secretary has moved for Judgment on the Pleadings on issues 1-3, 6-7, and 10-13, which if granted, would leave issues 4-5, 8-9, and 14 for the Richfield hearing on May 10, 2006.
3. Executive Secretary's Motion to Dismiss the Sevier Citizens initial Request for Agency Action, dated November 1, 2004 (see Attachment D).
4. Pre-hearing conference.

The attached documents are provided for Board review in consideration of these action items:

- A. Letter from Sierra Club and Grand Canyon Trust to the Board dated March 13, 2006.
- B. Executive Secretary's Reply to Sierra Club's Withdrawal from Amicus Status dated March 20, 2006.
- C. PacifiCorp's Reply to the Sierra Club and Grand Canyon Trust's Declination to Participate any further as Amicus dated March 20, 2006.
- D. Sevier County Citizens For Clean Air and Water's ("Sevier Citizens") initial Request for Agency Action dated November 1, 2004.
- E. Sevier Citizens' Request for Agency Action dated March 16, 2005 (without attachments which supported its Petition to Intervene, already granted by the Board).
- F. Sevier Power Company's Answer to Sevier Citizens Request for Agency Action dated June 10, 2005.
- G. Executive Secretary's Response to Sevier Citizens' Request for Agency Action, dated June 10, 2005.
- H. Executive Secretary's Motion for Judgment on the Pleadings, dated February 27, 2006, and Memorandum in Support.
- I. Sevier Citizens' Response to Executive Secretary's Motion for Judgment on the Pleadings, dated March 13, 2006.
- J. Executive Secretary's Reply to Sevier County Citizens' Response to Motion for Judgment on the Pleadings dated March 20, 2006.



K. PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition to the Executive Secretary's Motion for Judgment on the Pleadings dated March 20, 2006.

L. Executive Secretary's Motion to Dismiss Sevier Citizens' first Request for Agency Action, dated February 27, 2006, and Memorandum in Support.

M. Sevier Citizens' Response to Executive Secretary's Motion to Dismiss dated March 13, 2006, and Memorandum in Support.

N. Executive Secretary's Reply to Sevier County Citizens' Response to Motion to Dismiss for Failure to State a Claim on Which Relief can be Granted, dated March 20, 2006.

O. Sevier Power Company's Memorandum in Support of Executive Secretary's Motions for Dismissal, dated March 15, 2006.

P. Witness Lists for:

Sevier Citizens dated February 15, 2006

Sevier Power Company dated February 23, 2006

Executive Secretary dated February 15, 2006



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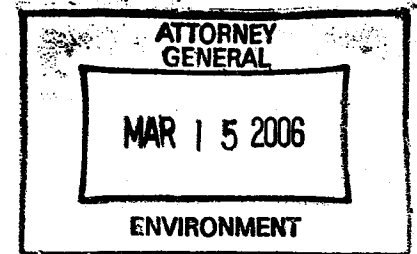




WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

March 13, 2006



Utah Air Quality Board
150 North 1950 West
Salt Lake City, Utah 84114

Re: Declining to Participate as Amicus in the Matter of Sevier Power Company Power Plant
(DAQE-AN2529001-04).

Dear Utah Air Quality Board Members:

Sierra Club and Grand Canyon Trust (collectively Sierra Club) appreciate your efforts to keep us apprised of the proceedings in the Sevier Power Company Power Plant matter currently before the Utah Air Quality Board (Board). At this time, Sierra Club wishes to make clear that it respectfully declines to participate in this matter as an amicus. We also emphasize that, as anything less than a full party, Sierra Club cannot adequately represent its interests in any proceeding before this Board adjudicating the legality of the air quality permit issued to Sevier Power Company. Finally, we underscore that Sierra Club is in no way in privity with Sevier County Citizens for Clean Air and Water (Sevier Citizens) with regard to any of the issues or claims raised by that organization and currently pending before the Board.

As you are aware, Sierra Club asked for and was denied by this Board full party status to adjudicate the claims raised in its Request for Agency Action relative to the Sevier Power Company Power Plant. Sierra Club has appealed that denial and that appeal, fully briefed and argued, is now pending before the Utah Supreme Court. Immediately after the Board denied it standing to adjudicate its Request for Agency Action, Sierra Club filed a motion with the Board asking it to stay the Sevier Citizens adjudication because, *inter alia*, Sierra Club would be harmed should an adjudication go forward without Sierra Club's full participation. The Board denied Sierra Club's motion.

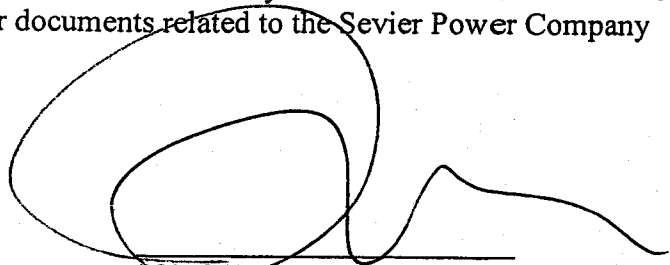
In lieu of allowing it adjudicate its own Request for Agency Action, the Board determined that Sierra Club could participate as an amicus in the Sevier Citizens adjudication of that organization's Request for Agency Action. According to the record, as an amicus, Sierra Club would **not** be allowed "to conduct discovery, examine witnesses or present other evidence . . . [or] to create or expand the scope of issues (claims or defenses) to be considered by the Board."

Letter from Richard K. Rathbun, (former) Counsel to Executive Secretary, to All Parties/Counsel of Record, *Re: Proposed Schedule for Discovery and Other Pre-hearing Matters* (June 23, 2005); see also Minutes of Utah Air Quality Board (July 6, 2005). Therefore, as an amicus, Sierra Club would be prohibited from, for example, introducing documents and data, taking depositions or presenting its own expert witnesses relative to any claim or pleading, such as the recently filed Executive Secretary's Memorandum in Support of Motion for Judgment on the Pleadings. In addition, Sierra Club would be prevented from appealing any decision of the Board, including a decision on purely legal issues. Thus, Sierra Club would be prevented from adequately representing its own interests.

Moreover, Sierra Club has consistently argued that its interests are **not** the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct. In addition, were Sierra Club to litigate issues presented in its Request for Agency Action, including issues that are similar to those now before the Board, Sierra Club **would** introduce evidence that is not currently before the Board, **would** present its own expert witnesses, **would** conduct discovery, including requests for admission and depositions of agency staff, and **would** make arguments based on that evidence and discovery that Sevier Citizens has not made and will not make. As an amicus, Sierra Club would not be able to take these steps and therefore would be unable to fully and fairly litigate its interests. As a result, Sierra Club is not and never has been in privity with Sevier Citizens.

Finally, Sierra Club repeats that its appeal before the Supreme Court is fully briefed and argued and therefore may be decided soon. As a result, the organization asks the Board to reconsider its decision not to postpone its adjudication of the Sevier Citizens Request for Agency. Rather, Sierra Club asks that the Board stay this adjudication until the Utah Supreme Court determines whether Sierra Club has standing to pursue its Request for Agency Action.

Thank you for your consideration of this matter. We ask that you continue to serve on counsel for the Sierra Club all pleadings and other documents related to the Sevier Power Company Power Plant matter.



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Attorneys for the Executive Secretary of the Utah Air Quality Board

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of:

Sevier Power Company Power Plant
Sevier County, Utah
DAQE-AN2529001-04

EXECUTIVE SECRETARY'S REPLY TO
SIERRA CLUB'S WITHDRAWAL FROM
AMICUS STATUS

COMES NOW the Executive Secretary, through undersigned counsel, and submits the following Reply to Sierra Club's Letter declining to participate as Amicus in the above-encaptioned matter.

I. INTRODUCTION

On October 12, 2004, the Executive Secretary issued an Approval Order to Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 12, 2004, Sierra Club and Grand Canyon Trust (collectively Sierra Club) filed a Request for Agency Action ("RAA") and a Petition to Intervene to appeal the Approval Order (AO). At an April 13, 2005 Air Quality Board meeting, SPC opposed the Sierra Club's standing to challenge the (AO). On May 12, 2005, the Board issued an order denying Sierra Club's Petition to Intervene, but granted Amicus status to Sierra Club.

Sierra Club appealed the Board's denial of the petition to the Utah Court of Appeals. Sierra Club also requested that the Board stay its denial of intervention, which was opposed by both SPC and the Executive Secretary. The Board denied the request for a stay in a June 6, 2005 order. Sierra Club subsequently requested a stay of the Board's order denying intervention before the Utah Court of Appeals, which was also denied in an order dated August 29, 2005.

The briefing of the issue of the Board's denial of intervention took place as scheduled. On December 5, 2005, the Utah Court of Appeals transferred the issue of the denial of intervention to the Utah Supreme Court. Oral argument was held before the Utah Supreme Court on February 28, 2006. All parties now await a decision of the Court.

As the Board is aware, Sevier County Citizens for Clean Air and Water (SCC) was granted standing to pursue its own RFA, and the Board has scheduled a hearing on the merits of that RFA in May 2006. On March 13, 2006, Sierra Club sent a letter to the Board in which it declared that it did not wish to participate as Amicus in this matter, but renewed its request that the Board stay the hearing on SCC's RFA. For reasons outlined below, the Board should deny Sierra Club's request.

ARGUMENT

The Executive Secretary acknowledges Sierra Club's decision to withdraw from participation as amicus in this matter, and notes that the circumstances surrounding Sierra Club's participation in this case are no different now than they were when Sierra Club first requested a stay in 2005—no court has overturned the Board's decision denying standing to Sierra Club. Sierra Club's stated reason for its decision is that the organization does not believe that participation as amicus would permit Sierra Club to protect its interests. Sierra Club has also asserted that it is not in privity with SCC as to any of the issues or claims raised by SCC.

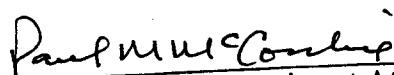
Given Sierra Club's position that its interests are not the same as SCC's, the Executive Secretary does not believe that a stay is appropriate. Since Sierra Club has declined to exercise its status as amicus, Sierra Club's eventual participation will depend on the decision of the Utah Supreme Court, a decision that is unlikely to be made before the May 2006 hearing on SCC's RFA. Moreover, Sierra Club itself asserts that its interests are not the same as SCC's. Therefore, a hearing on the merits of SCC's claims will not prejudice Sierra Club. Should the Utah Supreme Court decide that the Board wrongfully denied standing to Sierra Club, Sierra Club will have the opportunity to request relief before the Board, based on its own Request for Agency Action.

CONCLUSION

Sierra Club has declined to exercise its opportunity to participate in this case as amicus. Sierra Club has also renewed its request that the Board stay the Sevier County Citizens hearing pending a decision on Sierra Club's standing from the Utah Supreme Court. Sierra Club has asserted that its interests are not the same as SCC's. Accordingly, the Executive Secretary respectfully requests that the Air Quality Board deny Sierra Club's request for a stay, as Sierra Club's interests will not be harmed by a hearing on what Sierra Club maintains are different issues.

Dated this 20th day of March, 2006.

MARK L. SHURTLEFF
Utah Attorney General


Paul M. McConkie, Assistant Attorney General
Christian C. Stephens, Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

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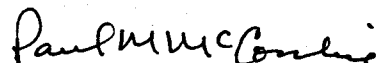
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BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power
Company, 270 MW Coal-Fired Power
Plant, Sevier County
Project Code: N2529-001
DAQE-AN2529001-04

**PACIFICORP'S REPLY TO THE
SIERRA CLUB AND GRAND CANYON
TRUST'S DECLINATION TO
PARTICIPATE ANY FURTHER AS
AMICUS**

In the Utah Air Quality Board's ("Board") Order of May 12, 2005, PacifiCorp was granted amicus status in this proceeding to "to present briefs and oral argument on issues as will be further defined by the Board." Pursuant to that Order, PacifiCorp hereby submits this reply brief ("Reply") to the Sierra Club and Grand Canyon Trust's (together "Sierra Club") March 13, 2006 letter to the Board declining to participate any further in this matter as an amicus ("Declination Letter").

I. OVERVIEW

On October 12, 2004, the Utah Division of Air Quality "UDAQ") issued an Approval Order ("AO") granting a Prevention of Significant Deterioration ("PSD") permit to the Sevier Power Company ("Sevier Power") to construct and operate a power plant in Sigurd, Sevier County, Utah. On November 1, 2004, Sevier County Citizens for Clean Air and Water ("SCC") filed its Request for Agency Action ("First RFA") with the Board contesting the AO. On March 16, 2005, SCC filed another document attempting to further substantiate its contest of the AO ("Second RFA"). In its Second RFA, SCC asserts fourteen separate claims.

On May 12, 2005, the Board issued an Order granting PacifiCorp, as well as Sierra Club, "amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board." See Order Granting Amicus Status attached hereto as Exhibit A.

On February 27, 2006, the Executive Secretary submitted a Motion for Judgment on the Pleadings, wherein it moved to dismiss most of SCC's claims, including Claim #3 -- whether the applicable statute and regulations mandate that the use of the integrated gasification combined cycle process ("IGCC") be included as an available technology in determining the best available control technology ("BACT")(the "IGCC/BACT Legal Issue").¹

Sierra Club did not file any dispositive motion of its own. Similarly, Sierra Club did not file any response or opposition to the Executive Secretary's Motion for Judgment on the Pleadings. Instead, on March 13, 2006, Sierra Club simply filed the two-page Declination Letter to the Board indicating that it "declines to participate in this matter as an amicus." See Declination Letter attached hereto as Exhibit B.

¹ PacifiCorp separately has submitted a brief in support of the Executive Secretary's Motion for Judgment on the Pleadings in regards to SCC's Claim #3 and in opposition to the SCC's Response.

II. ARGUMENT

A. Sierra Club Missed its Deadline for Filing any Dispositive Motion or any Opposition Memorandum to the Executive Secretary's Motion for Judgment on the Pleadings

Sierra Club failed to file any dispositive motion in this matter (for example, it did not file a motion for judgment on the pleadings, motion to dismiss for failure to state a claim, motion for summary judgment or any other such motion). More importantly, Sierra Club failed to file any response or opposition brief to the Executive Secretary's Motion for Judgment on the Pleadings by the March 13, 2006 deadline set forth in the Board's January 4, 2006 Amended Schedule. *See* Amended Schedule attached hereto as Exhibit C. Accordingly, having failed to timely brief the IGCC/BACT Legal Issue within the timetable established by the Board, Sierra Club waived its opportunity to brief and address this important legal issue that will be decided by the Board. Instead, well after the deadline for submitting response or opposition briefs had lapsed, Sierra Club submitted its Declination Letter. Because Sierra Club missed the filing deadline, its Declination Letter should not be recognized by the Board and should be given no weight.

B. Sierra Club was Given Every Opportunity to Participate in the Resolution of the IGCC/BACT Legal Issue, but has Opted to Decline any Further Participation

The Board, the Executive Secretary and the parties to this proceeding invited and included Sierra Club in all aspects of developing the parameters of the amicus role, the original Scheduling Order, and the Amended Scheduling Order. Nevertheless, Sierra Club has now opted not to participate any further.

In its Order granting amicus status, the Board expressly noted that it "recognizes the value of receiving input from the Sierra Club and PacifiCorp on issues raised in this adjudicatory proceeding. Therefore, the Board grants Sierra Club and PacifiCorp amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board."

Moreover, on June 23, 2005, the Executive Secretary sent a letter to Sierra Club, as well as to PacifiCorp, expressly invited their respective "input on the proper roles, i.e., allowed activities, by Sierra Club and PacifiCorp during these proceedings." The issue of what roles Sierra Club and PacifiCorp would be allowed to play was then specifically included on the agenda at the next monthly Board meeting. At that July 6, 2005 Board meeting, the Board and its counsel solicited and received input on the nature and extent of the role that Sierra Club and PacifiCorp would play in the proceedings. After receiving that input, the Board concluded that the amicus parties "would be allowed to submit briefs on any dispositive motions, and pre-hearing and post-hearing briefs. They would also participate in oral arguments on those matters." The Board also indicated that the amicus parties would be "allowed to attend depositions." *See* 7/6/05 Board minutes attached hereto as Exhibit D. Following that Board meeting, the Board issued a Schedule for Discovery and Other Pre-Hearing Matters with specific deadlines for, among other things, depositions, submitting briefs on dispositive motions, submitting response/opposition briefs on dispositive motions, submitting reply briefs on dispositive motions, pre-hearing conference, etc. On or around December 23, 2005, the parties discussed an amended schedule, prepared a proposed amended schedule, and submitted it to the Board. On January 4, 2006, the Board approved the Amended Schedule. *See* Amended Schedule attached hereto as Exhibit C.

Notwithstanding every good-faith attempt by the Board, the Executive Secretary and the parties to accommodate and include Sierra Club in the planning and procedural aspects of this proceeding, at its own initiative Sierra Club has now opted to decline any further participation.

C. Sierra Club has Waived and Foregone its Opportunity to Address the IGCC/BACT Legal Issue

The IGCC/BACT Legal Issue is not a factual issue, but rather a legal issue that will be resolved by statutory and regulatory interpretation.² In its Declination Letter Sierra Club complains at some length that had it been allowed to intervene, it would have would have conducted its own discovery, taken its own depositions, introduced evidence that is not before the Board, filed its own request for admissions, etc. Of course, any such factual discovery that Sierra Club may or may not have undertaken is irrelevant to the IGCC/BACT Legal Issue. Such hypothetical factual discovery may be relevant to some of the factual issues reflected in SCC's other thirteen claims, but it is clearly not relevant to SCC's Claim #3 – the IGCC/BACT Legal Issue.³

² This dispute will be resolved by an interpretation of the definition of the term BACT as contained in existing state rules. BACT requires that "production processes and available methods, systems and techniques" that are potentially applicable to the proposed source be included in a BACT analysis. UAC R307-401-6(1). However, BACT does not require that altogether different "alternatives" to the proposed source, that would replace the proposed source with a different type of source, be included in the BACT analysis. Instead, the BACT analysis need only identify the "available control technologies" for the particular emission source that the applicant has elected to propose. In this case, the applicant, Sevier Power, has elected to propose a CFB Boiler emission source. Sevier Power has not proposed a geothermal source, or a gas-fired source, or an IGCC source; rather, Sevier Power has proposed a CFB Boiler source. See PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition Brief filed separately in this matter.

³ The EPA and several states have already squarely addressed and unequivocally interpreted the BACT definition in a manner that is flatly contrary to the interpretation urged by SCC and Sierra Club. In a recent December 13, 2005 letter from Stephen D. Page, Director of EPA's Office of Air Quality, Planning and Standards, attached hereto as Exhibit E, EPA has reaffirmed its long-established policy of not requiring IGCC to be considered in such BACT analyses ("EPA's Reaffirmation Letter"). See EPA's Reaffirmation Letter attached hereto as Exhibit E. In EPA's Reaffirmation Letter, it confirmed that "[a]s noted in prior EPA decisions and guidance, *EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives.* For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting" (emphasis added). The EPA concludes by stating that "we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative" This IGCC/BACT Legal Issue will be resolved by mere interpretation of the regulatory BACT definition. See PacifiCorp's Reply to the Sevier County Citizens for Clean Air and Water's Opposition Brief filed separately in this matter.

D. **It is the Board's Prerogative, not Sierra Club's, to Determine the Circumstances Under Which Important Legal Issues will be Considered**

Although UDAQ and the Executive Secretary have already twice considered and resolved the IGCC/BACT Legal Issue, to PacifiCorp's knowledge the issue has never been considered and resolved by the Board. Although the Board has given Sierra Club the unfettered opportunity to fully brief and argue the IGCC/BACT Legal Issue as afforded under the Utah Rules of Civil Procedure, and the same unfettered opportunity as afforded to all of the other parties (full and amicus) in this proceeding, Sierra Club has decided that unless it can conduct all of its factual discovery, and brief and argue all of the factual issues, at the same time as a full party, it does not want to brief and argue this IGCC/BACT Legal Issue separately.

It is the parameters of the Utah Rules of Civil Procedure and the prerogative of the Board that dictate the time, place, nature and circumstances under which parties may present their arguments in a give case – not the individual whims of the involved parties.⁴

It appears that the Board intends to consider and resolve the IGCC/BACT Legal Issue in the context of SCC's Second RFA. The Board has gone to great lengths to ascertain who should and who should not have full party status, who should and who should not have amicus status, when briefs should be submitted, when oral argument should be heard, etc. The stage is now set for the Board to determine what it considers should be the State of Utah's policy on the IGCC/BACT Legal Issue. The Board, the Executive Secretary, the actual parties, the amicus parties, and numerous other entities and individuals have devoted considerable time and resources in getting the IGCC/BACT Legal Issue to the point where it can now be resolved. If

⁴ If Sierra Club simply needed to fine-tune the parameters of the amicus status that the Board had granted, it could and should have taken the opportunity to do so promptly after the issuance of the May 12, 2005 Order denying intervention but granting amicus status. In the Order, the Board expressly stated, under the caption Notice of the Right to Apply for Reconsideration or Review, that "[w]ithin 20 days . . . any party shall have the right to apply for reconsideration with the Board." Sierra Club opted not to apply for reconsideration, but instead submitted a Petition for Judicial Review to the Utah Court of Appeals.

the Sierra Club chooses not to participate in the process for potentially resolving the IGCC/BACT Legal Issue, Sierra Club should not hereafter be allowed to resurrect the resolved dispute in another context at some future date.

E. **Sierra Club's and SCC's Interests are Indeed the Same as to the IGCC/BACT Legal Issue**

Sierra Club goes to great length in its Declination Letter to attempt to distance itself from SCC, all in an effort to reserve for itself the opportunity to get another bite at the apple in the event that any of the issues in SCC's Second RFA are resolved adversely to SCC and Sierra Club. Curiously, Sierra Club argues that it has "consistently argued that its interests are not the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct." Irrespective of whether the Sierra Club and SCC's interests are exactly the same on every issue asserted in their respective requests for agency action, on at least one issue their interests and positions are exactly the same – the IGCC/BACT Legal Issue. SCC and Sierra Club have both consistently argued that the applicable BACT regulation should be interpreted to require the inclusion of IGCC in a BACT analysis. This is a yes or no issue; one does not partially include or partially exclude IGCC in a BACT analysis; Sierra Club and SCC are either both right or they are both wrong on this point. Indeed, on this issue their interests are exactly aligned. Sierra Club should not be allowed to "sit out" the very proceeding in which this important legal and policy issue may potentially be resolved only to ask the Board to revisit the IGCC/BACT Legal Issue at some future date on the asserted basis that its interests are not the same as SCC's on this issue.

III. **CONCLUSION**

Sierra Club missed its deadline for filing any dispositive motion or any opposition to the Executive Secretary's Motion for Judgment on the Pleadings. Although Sierra Club has been

given every opportunity to participate in the potential resolution of the IGCC/BACT Legal Issue, it has affirmatively opted not to participate any further. As a result, Sierra Club has waived and foregone its opportunity to address the IGCC/BACT Legal Issue. It is the Board's prerogative, not the Sierra Club's, to determine the circumstances under which important air quality legal issues will be resolved. Finally, Sierra Club's and SCC's interests, at least on the IGCC/BACT Legal Issue, are the same. Accordingly, for these reasons, PacifiCorp respectfully requests that the Board not recognize or give any weight to the Sierra Club's Declination Letter and that the Sierra Club should not be allowed to have the Board revisit the IGCC/BACT Legal Issue in another context at some future date.

Dated this 20th day of March, 2006.

ATTORNEYS FOR PACIFICORP

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Martin K. Banks

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Michael Jenkins ^{by MJB}

Michael G. Jenkins,
Assistant General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of March, 2006, I mailed a true and correct copy of the foregoing **PACIFICORP'S REPLY TO THE SIERRA CLUB AND GRAND CANYON TRUST'S DECLINATION TO PARTICIPATE ANY FURTHER AS AMICUS**, via U.S. First Class Mail, to the following:

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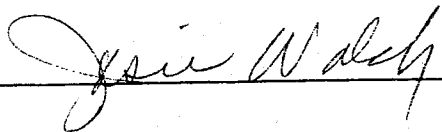
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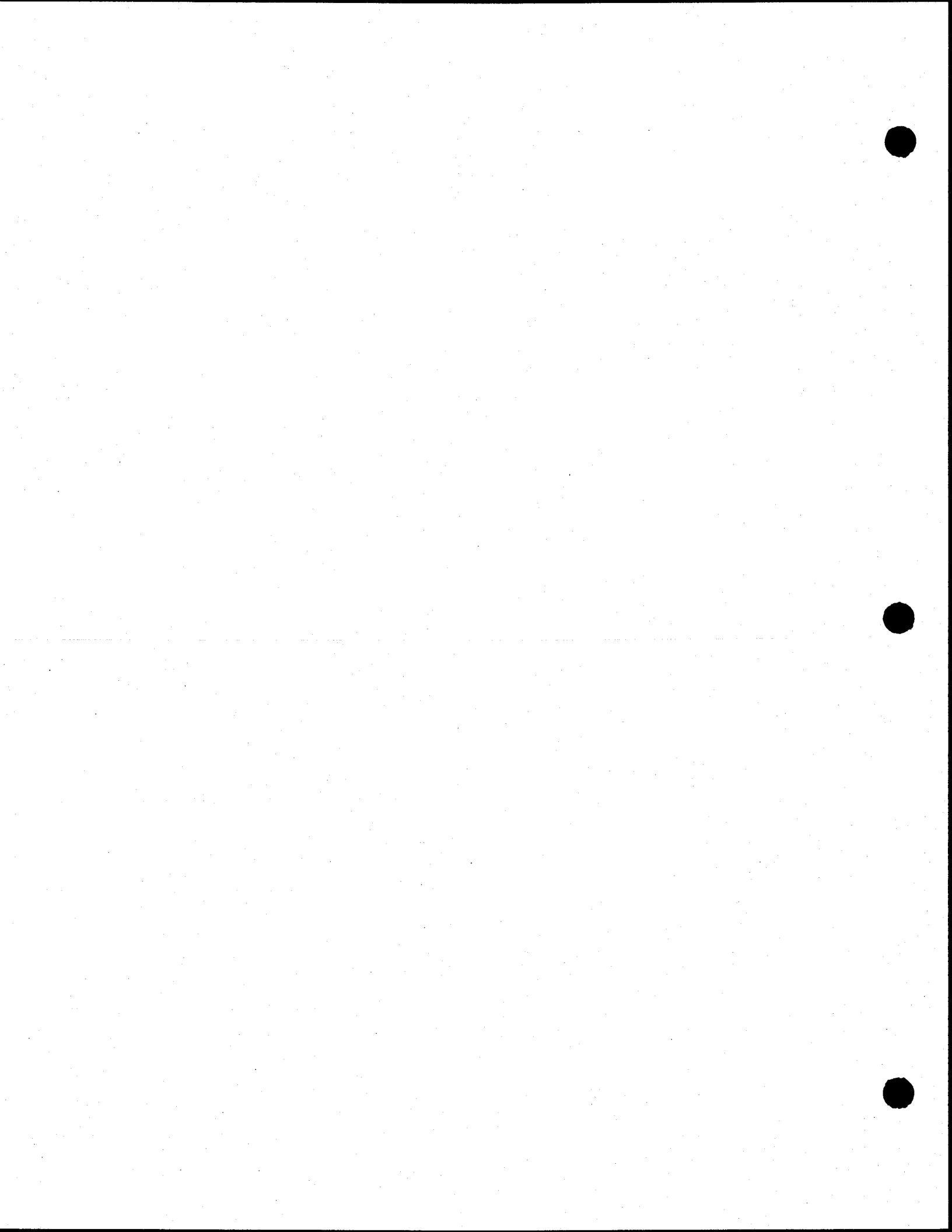


Exhibit A



BEFORE THE
UTAH AIR QUALITY BOARD

In the Matter of:

Sevier Power Company Power Plant
Sevier County, Utah
DAQE-AN2529001-04

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Order re Petitions to Intervene

On April 13, 2005, parties and participants appeared before the Utah Air Quality Board in the above-entitled matter for hearing on petitions to intervene by Sierra Club and Grand Canyon Trust, Sevier County Citizens for Clean Air and Water, and PacifiCorp. Joro Walker and Sean Phelan appeared for Sierra Club and Grand Canyon Trust, James O. Kennon and Cindy Roberts appeared for Sevier County Citizens for Clean Air and Water, Fred W. Finlinson appeared for Sevier Power Company, Michael Jenkins and Martin Banks appeared for PacifiCorp, and Richard Rathbun and Christian Stephens appeared for the Executive Secretary. Utah Air Quality Board members present were John Veranth, Dianne Nielson, Jerry Grover, James Horrocks, Richard Olson, Jeffrey Utley, Marcelle Shoop, and Ernest Wessman. Mr. Wessman recused himself because of his employment relationship with PacifiCorp. Fred Nelson acted as counsel for the Board.

1. By pleading dated November 12, 2004, the Utah Chapter of the Sierra Club and Grand Canyon Trust (collectively referred to herein as "Sierra Club") filed a Request for Agency Action seeking review of the October 12, 2004 decision by the Executive Secretary of the Utah Air Quality Board to issue an Approval Order granting a permit to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah. The Sierra Club and

Grand Canyon Trust also filed a Statement of Standing and Petition to Intervene. Sevier Power Company filed an opposition to the Sierra Club petition to intervene. The Executive Secretary filed a response not opposing the petition. Sierra Club filed a reply.

2. By pleading dated November 1, 2004, the Sevier County Citizens for Clean Air and Water (Sevier Citizens) filed a Request for Agency Action appealing the Approval Order granting a permit to Sevier Power Company to construct and operate a coal-fired power plant in Sevier County, Utah, and petitioned to intervene in the proceeding. Sevier Power Company did not contest the standing of Sevier Citizens. The Executive Secretary filed a response objecting to the Sevier Citizens petition. Sevier Citizens filed a reply to the Executive Secretary's response providing a more specific description of the basis for its petition and providing affidavits and further information with respect to its petition to intervene. At hearing, the Executive Secretary represented he no longer opposed intervention by Sevier Citizens.

3. By pleading dated January 4, 2005, PacifiCorp filed a Petition to Intervene in the above-captioned proceeding, and included a Statement of Standing. The Sierra Club and Executive Secretary filed responses opposing intervention by PacifiCorp. PacifiCorp filed replies.

Parties and Intervention

Pursuant to UAC R307-103-6, the Executive Secretary and Sevier Power Company are considered to be parties to the proceeding. Sierra Club and Grand Canyon Trust and Sevier Citizens must be granted intervention by the Board under UAC R307-103-6 in order to go forward with their Requests for Agency Action. PacifiCorp must be granted intervention in order to participate as a party in the proceedings.

The rules of the Board provide that a petition to intervene must meet UCA Section 63-46b-9 which requires a demonstration "that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law." The Board shall grant a petition to intervene if it determines that

"(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

"(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention."

Further, the Board rules provide that "[n]o person may initiate or intervene in an agency action unless that person has standing. Standing shall be evaluated using applicable Utah case law." UAC Section R307-103-6(3). Under Utah case law, standing is established under one of three general rules. First, a plaintiff may show some distinct and palpable injury that gives rise to a personal stake in the outcome of the dispute. If a plaintiff cannot meet the first standard, standing may still be established for important public issues if no one else has a greater interest in the outcome and the issues are unlikely to be raised at all unless that plaintiff has standing to raise the issues. Finally, a plaintiff may maintain a suit in a case that raises issues that are so unique and of such great importance that they ought to be decided in furtherance of the public interest. *National Parks and Conservation Association v. Board of State Lands*, 869 P.2d 909, 913 (Utah 1993).

Two additional principles, here applicable, are one, that if an association seeks standing, it must show that its individual members have standing. *Sierra Club v Dept. Of Environmental*

Quality, 857 P.2d 982, 986 n.8 (Utah App. 1993), and two, the burden of proof is on the applicant to establish standing. *Washington County Water Conservancy District v. Morgan*, 82 P.3d 1125 (Utah Ct. App. 2003).

Intervention of Sevier Citizens

The Board grants the Petition to Intervene of Sevier Citizens on two bases. First, in its response, Sevier Citizens identifies its allegations challenging the issuance of the permit by the Executive Secretary and presents information, statements, and petitions from approximately 500 members of Sevier Citizens who express concerns and raise issues with respect to the proposed plant. Sevier Citizens represents members who live in close proximity to the proposed plant site. The Board finds that based on the composition of the organization and the issues raised that Sevier Citizens is the most appropriate entity to bring the action. Second, the Board finds that Sevier Citizens has alleged, through affidavits and information from its members, a distinct and palpable injury resulting from the Executive Secretary's granting of the permit. Affidavits and statements include not only assertions of effect on visibility and the environment but contain specific claims of potential for or exacerbation of identified respiratory illnesses and other physical conditions on members and their families who live in close proximity to the proposed plant (See Attachment A of Sevier Citizens Response to Executive Secretary's Comments, dated March 16, 2005). The Board, therefore, finds Sevier Citizens has met the requirements for intervention.

Intervention of Sierra Club

The Board denies intervention to the Sierra Club. Sierra Club has standing to pursue its petition only if it can establish that it has a distinct and palpable injury resulting from the

Executive Secretary's granting of the permit, that it is the most appropriate plaintiff to bring the action, or that it raises issues of such public importance that they ought to be decided in furtherance of the public interest. Sierra Club failed to meet any of these criteria.

Sierra Club presented affidavits from three of its members to support its claim of distinct and palpable injury. Brian Cass, an Arizona resident, who owns a home in Boulder, Utah, alleges that emissions from the plant would affect visibility on the Colorado Plateau and therefore impact his activities as a videographer and a person who recreates in the area. He also expresses a belief that emissions will impair his and his family's health when in Utah. He expresses concern that the value of his property would decrease and emissions would contribute to global warming. Howard Cherry, a resident of Salina, Utah, alleges that emissions from the plant would impact visibility, his health, the value of his property, and that emissions would contribute to global warming. Cindy Roberts, a resident of Sigurd, Utah, alleges she is concerned about the effect of plant emissions on soils, waterways, fish and wildlife in the area, and her family farming operations, the effect on her health and the health of her family and neighbors, and effect on property values. Ms. Roberts also submitted a statement as a member of Sevier Citizens and, as noted above, appeared on their behalf at the hearing on the petitions to intervene.

The Board finds that the Sierra Club has not met its burden of proof by demonstrating distinct and palpable injury. The allegations of effect on visibility, the environment, concern for public health, and global warming are general public concerns that do not establish a personal, particularized stake in the issuance of the permit. These general allegations raised by Sierra Club members do not rise to the level of being a demonstration of a distinct and palpable injury. Further, no evidence is proffered that the general allegations of adverse impact on Sierra Club

members are caused by the Executive Secretary's issuance of the Sevier Power Company's approval order. These interests asserted by the members of the Sierra Club are interests that are shared in common by other members of the public at large and are not particularized. Finally, the affidavits do not demonstrate a connection between the alleged improper permitting actions and a particular injury to the three affiants.

In addition, the Board finds that the issuance of the approval order for the Sevier Power Company and information presented to the Board do not establish Sierra Club as the most appropriate entity to present public issues nor are the issues raised of such great importance that would warrant standing being granted to the Sierra Club without a demonstration of particularized injury. The Board has concluded that Sevier Citizens is the most appropriate party to present issues as discussed above. Further, the Board does not consider the issuance of a permit to Sevier Power Company to be a unique matter of significant public importance that would warrant granting the petition to intervene. There are numerous other coal-fired plants that are currently permitted in Utah. The rules of the Board outline a process for receiving public input on permits pending before the Executive Secretary. Pursuant to UAC R307-401-4, the public is invited to comment on proposed approval orders. Sierra Club submitted comments and the Executive Secretary considered those comments in issuing the permit to the Sevier Power Company. This process, in addition to the process of allowing petitions for rulemaking or requests to the Board to establish policy positions on issues of public interest, are proper legal forums for persons and organizations without particularized injury to have their issues considered. Unless a distinct and palpable injury is demonstrated, or another of the standing tests is met, the adjudicative process is not available to challenge a decision by the Executive

Secretary to grant a permit. This result constitutes a balancing of the interests and legal rights of those obtaining a permit with the right to challenge the permit if injury is demonstrated.

Intervention by PacifiCorp


The Board denies the Petition to Intervene of PacifiCorp. PacifiCorp petitioned to intervene based on an affidavit from Bill Lawson, Thermal Plant Environmental Manager, that it had an interest in the proceeding. Mr Lawson asserts that PacifiCorp has a pending permit application for Hunter Unit 4 that could be affected by the Board's decision on the issues being presented to the Board in this matter. PacifiCorp also argues that the Board's decision could have an effect on other PacifiCorp power plants and possible modification of those plants in the future.

The Board denies the Petition to Intervene of PacifiCorp. Consideration of requests for approval orders from the Executive Secretary under the current rules of the Board are on a case-by-case specific determination applying the standards identified in the rules, and PacifiCorp has appropriate legal remedies to challenge any permit issued to it by the Executive Secretary. Further, PacifiCorp has not demonstrated that it has or would suffer a distinct and palpable injury from the issuance of the permit to the Sevier Power Company. Rulings of the Board in an adjudicatory proceeding are specific to the issues presented. Any decision that may result in significant impacts to members of the general public or entities in the power industry could necessitate subsequent rulemaking by the Board. Also, PacifiCorp may present to the Board rulemaking petitions or requests for consideration of policy issues, which may not be in the context of a specific adjudicatory proceeding, but are available legal avenues for presenting its concerns.

Amicus Status for Sierra Club and PacifiCorp

The Board recognizes the value of receiving input from the Sierra Club and PacifiCorp on issues raised in this adjudicatory proceeding. Therefore, the Board grants Sierra Club and PacifiCorp amicus status in the proceeding to present briefs and oral argument on issues as will be further defined by the Board.

DATED this 12 day of May, 2005.



Utah Air Quality Board

Notice of the Right to Apply for Reconsideration or Review

Within 20 days after the date this final order is signed in this matter by the Utah Air Quality Board, any party shall have the right to apply for reconsideration with the Board, pursuant to Utah Code Ann. § 63-46b-13. The request for reconsideration should state the specific grounds upon which relief is requested and should be submitted in writing to the Board at 168 North 1950 West, Salt Lake City, Utah, 84114. A copy of the request must be mailed to each party by the person making the request. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this Order.

Notice of the Right to Petition for Judicial Review

Judicial review of this Order may be sought in the Utah Court of Appeals under Utah Code Ann. § 63-46b-16 and the Utah Rules of Appellate Procedure by the filing of a proper petition within thirty days after the date of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2005, I caused a copy of the forgoing Order re Petitions to Intervene to be mailed by United States Mail, postage prepaid, to the following:

Joro Walker
Sean Phelan
Western Resource Advocates
1473 S 1100 E Suite F
Salt Lake City, Utah 84105

Rick Sprott, Executive Secretary
Utah Division of Air Quality
150 North 1950 West
Salt Lake City, Utah 84114

Chris Stephens
Assistant Attorney General
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15/ Fred G Nelson /hp
Fred G Nelson
Counsel, Utah Air Quality Board
160 East 300 South 5th Floor
Salt Lake City, Utah 84114-0873



Exhibit B





WESTERN RESOURCE ADVOCATES

Advancing Solutions for the Western Environment

March 13, 2006

Utah Air Quality Board
150 North 1950 West
Salt Lake City, Utah 84114

Re: Declining to Participate as Amicus in the Matter of Sevier Power Company Power Plant (DAQE-AN2529001-04).

Dear Utah Air Quality Board Members:

Sierra Club and Grand Canyon Trust (collectively Sierra Club) appreciate your efforts to keep us apprised of the proceedings in the Sevier Power Company Power Plant matter currently before the Utah Air Quality Board (Board). At this time, Sierra Club wishes to make clear that it respectfully declines to participate in this matter as an amicus. We also emphasize that, as anything less than a full party, Sierra Club cannot adequately represent its interests in any proceeding before this Board adjudicating the legality of the air quality permit issued to Sevier Power Company. Finally, we underscore that Sierra Club is in no way in privity with Sevier County Citizens for Clean Air and Water (Sevier Citizens) with regard to any of the issues or claims raised by that organization and currently pending before the Board.

As you are aware, Sierra Club asked for and was denied by this Board full party status to adjudicate the claims raised in its Request for Agency Action relative to the Sevier Power Company Power Plant. Sierra Club has appealed that denial and that appeal, fully briefed and argued, is now pending before the Utah Supreme Court. Immediately after the Board denied it standing to adjudicate its Request for Agency Action, Sierra Club filed a motion with the Board asking it to stay the Sevier Citizens adjudication because, *inter alia*, Sierra Club would be harmed should an adjudication go forward without Sierra Club's full participation. The Board denied Sierra Club's motion.

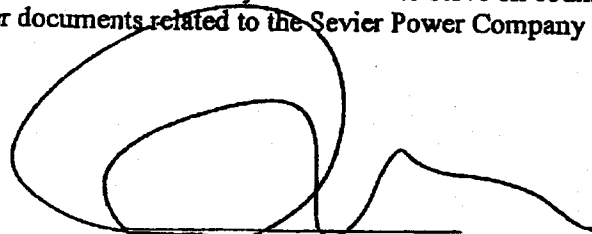
In lieu of allowing it adjudicate its own Request for Agency Action, the Board determined that Sierra Club could participate as an amicus in the Sevier Citizens adjudication of that organization's Request for Agency Action. According to the record, as an amicus, Sierra Club would not be allowed "to conduct discovery, examine witnesses or present other evidence . . . [or] to create or expand the scope of issues (claims or defenses) to be considered by the Board."

Letter from Richard K. Rathbun, (former) Counsel to Executive Secretary, to All Parties/Counsel of Record, *Re: Proposed Schedule for Discovery and Other Pre-hearing Matters* (June 23, 2005); see also Minutes of Utah Air Quality Board (July 6, 2005). Therefore, as an amicus, Sierra Club would be prohibited from, for example, introducing documents and data, taking depositions or presenting its own expert witnesses relative to any claim or pleading, such as the recently filed Executive Secretary's Memorandum in Support of Motion for Judgment on the Pleadings. In addition, Sierra Club would be prevented from appealing any decision of the Board, including a decision on purely legal issues. Thus, Sierra Club would be prevented from adequately representing its own interests.

Moreover, Sierra Club has consistently argued that its interests are not the same as the interests of Sevier Citizens and that the Sierra Club's interests relative to the Sevier Power Company Power Plant are unique and distinct. In addition, were Sierra Club to litigate issues presented in its Request for Agency Action, including issues that are similar to those now before the Board, Sierra Club would introduce evidence that is not currently before the Board, would present its own expert witnesses, would conduct discovery, including requests for admission and depositions of agency staff, and would make arguments based on that evidence and discovery that Sevier Citizens has not made and will not make. As an amicus, Sierra Club would not be able to take these steps and therefore would be unable to fully and fairly litigate its interests. As a result, Sierra Club is not and never has been in privity with Sevier Citizens.

Finally, Sierra Club repeats that its appeal before the Supreme Court is fully briefed and argued and therefore may be decided soon. As a result, the organization asks the Board to reconsider its decision not to postpone its adjudication of the Sevier Citizens Request for Agency. Rather, Sierra Club asks that the Board stay this adjudication until the Utah Supreme Court determines whether Sierra Club has standing to pursue its Request for Agency Action.

Thank you for your consideration of this matter. We ask that you continue to serve on counsel for the Sierra Club all pleadings and other documents related to the Sevier Power Company Power Plant matter.



JORO WALKER
SEAN PHELAN
Attorneys for Sierra Club and
Grand Canyon Trust

Cc:

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Exhibit C



File
11-1-81

BEFORE THE UTAH AIR QUALITY BOARD

<p>SEVIER COUNTY CITIZENS FOR CLEAN AIR AND WATER,</p> <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">and</p> <p>SEVIER POWER COMPANY; and the EXECUTIVE SECRETARY of the UTAH AIR QUALITY BOARD,</p> <p style="text-align: center;">Respondents.</p>	<p style="text-align: center;">ORDER REGARDING AMENDED SCHEDULE FOR DISCOVERY AND RELATED MATTERS</p>
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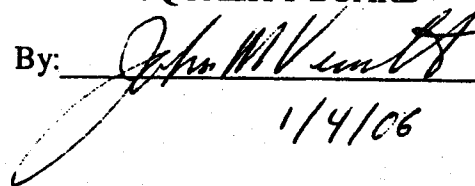
Pursuant to the stipulation of the parties, the Utah Air Quality Board hereby orders and approves the following amended discovery schedule for the above-encaptioned matter:

ITEM	DATE
Discovery begins	Currently underway
Discovery ends	Monday, January 30 th
Deadline to file dispositive motions	Monday, February 27 th
Parties exchange lists of witnesses (both fact and expert)	Wednesday, February 15 th
Responses/ Opposition memos, etc. re any dispositive motions	Monday, March 13 th
Replies (by moving parties)	Monday, March 20 th
Board to consider motions or set date for further proceedings	April Board meeting
Pre-hearing conference of parties to discuss status, hearing dates, etc.	April Board meeting
Hearing on the merits	<i>May Board meeting</i>

Dated this 4th day of January, 2006.

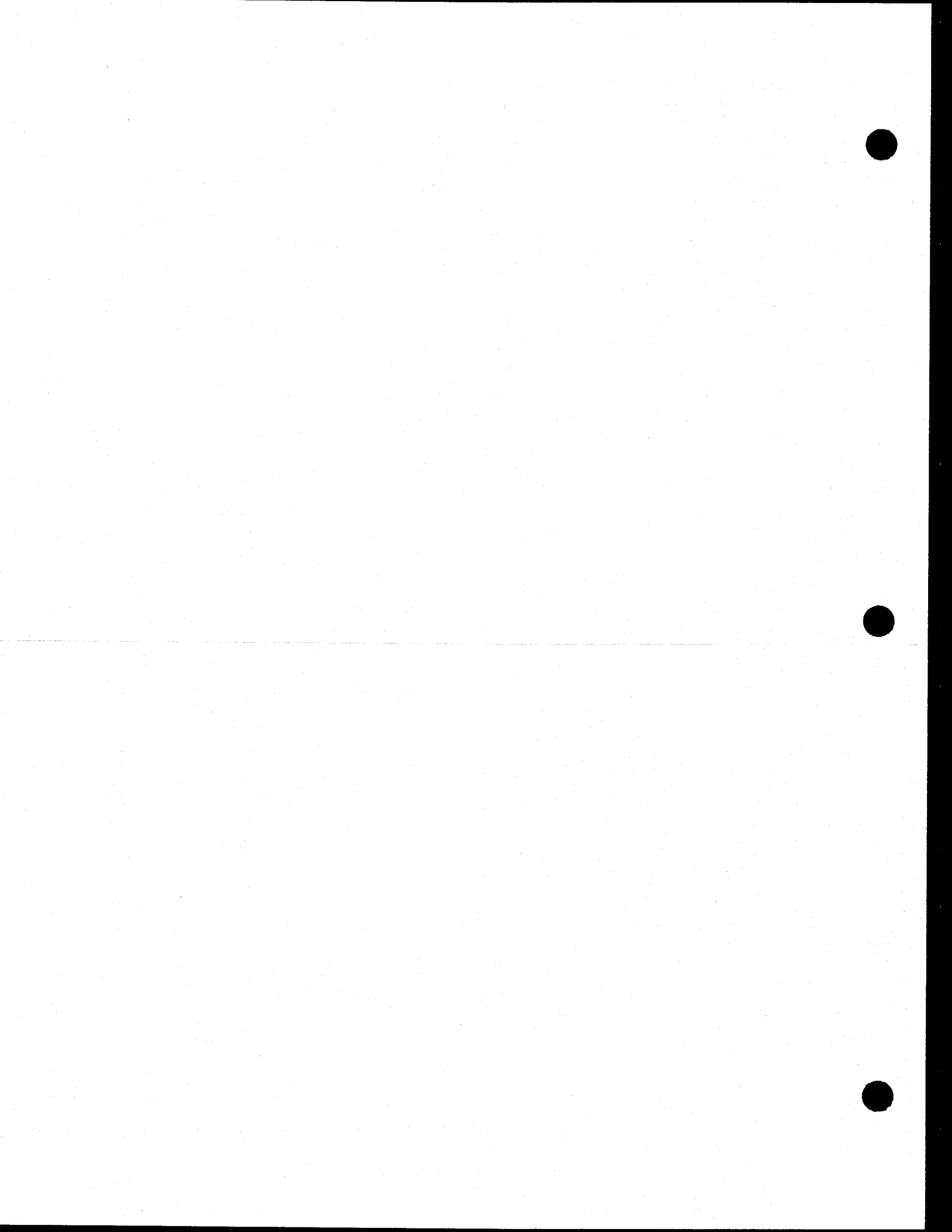
UTAH AIR QUALITY BOARD

By:

A handwritten signature in black ink, appearing to read "John W. Vent", written over a horizontal line.

1/4/06

Exhibit D



UTAH AIR QUALITY BOARD MEETING

July 6, 2005

MINUTES

I. Call to Order.

John Veranth called the meeting to order at 1:05 p.m.

Board members present:

Nan Bunker	Dianne Nielson	Marcelle Shoop
Jerry Grover	Wayne Samuelson	John Veranth
Jim Horrocks	JoAnn Seghini	Ernest Wessman

Acting for Executive Secretary: Cheryl Heying

II. Next Meeting.

August 3, 2005, and September 7, 2005.

III. Minutes.

There was one correction in the court reporter minutes located on page 48, line 22. The word "coal" in the phrase "coal technology mean," should be changed to "control."

- Jim Horrocks moved to approve the minutes, Nan Bunker seconded, and the Board approved unanimously.

IV. Election of Board Chair and Vice Chair.

- Jim Horrocks moved to nominate John Veranth as Board Chairman, and Wayne Samuelson seconded. Motion to close nominations by Nan Bunker and seconded by Wayne Samuelson. The Board approved the nomination unanimously.
- Jim Horrocks moved to nominate Ernest Wessman as Board Vice Chairman, and Wayne Samuelson seconded. Motion to close nominations by Nan Bunker and seconded by Marcelle Shoop. The Board approved the nomination unanimously.

Note: The agenda items were presented out of order, but for the minutes, they will be presented in order.

SIP demonstration to determine compliance with the NAAQS. Instead, the PSD program evaluates the affect of a new source based on current ambient measurements. Ms. Delaney gave an example of a new 500 ton SO₂ source that would be located in Salt Lake County. Under the new rule R307-421, that source would be required to obtain SO₂ offsets to address the secondary formation of PM₁₀ in the Salt Lake County maintenance area. The offsets could be obtained from banked emissions. That same source would also be evaluated under the PSD program for impact on the SO₂ NAAQS. The emissions from the new source would be modeled using current ambient SO₂ levels as the background to see if the source would cause a violation of the SO₂ NAAQS. Banked emissions would not be a part of this modeling. The SO₂ increment consumption would also be evaluated. The source would not be evaluated under the PSD program for PM₁₀ because precursors are not currently addressed in the PSD program.

Ms. Shoop asked for a more detailed explanation for why the staff was recommending changing the definition of baseline date. Ms. Delaney explained that a major baseline date of January 5, 1975 corresponded to the date of the first PSD program. EPA wanted to give credit to sources that reduced emissions after this date, even though the minor source baseline date had not been triggered. In 1975 four counties along the Wasatch Front were nonattainment for TSP and Salt Lake County was nonattainment for SO₂. If 1975 is considered the major source baseline date in these areas, then all of the emission reductions that occurred to bring these areas into attainment for the TSP and SO₂ NAAQS (and the subsequent PM₁₀ NAAQS) would essentially expand the increment to a level that exceeds the NAAQS. This would make an increment analysis meaningless because a new source would cause a violation of the NAAQS well before the source approached the baseline level, much less the increment of degradation that is allowed beyond that baseline level. The CAA does not address the transition of nonattainment areas to the PSD program, and it is contrary to the overall purpose of PSD to expand increment while the area is nonattainment. By making the major source baseline date the date that the area is redesignated to attainment, the PSD increment becomes meaningful, and allows growth in emissions in the area, without completely eroding the gains that have been made due to the TSP, SO₂ and PM₁₀ SIPs. The PSD program focuses on keeping clean areas clean. EPA's comments on this rule change asked for further justification of how this would be permitted under the language of the CAA. UDAQ will continue to discuss this with EPA.

- Dianne Nielson moved to approve the adoption of new rule R307-421, and modify R307-101-2 "Baseline Date" to July 6, 2005. JoAnn Seghini seconded and the Board approved unanimously.

VIII. Scheduling of Discovery Matters for NEVCO Appeal and Determination of Role of Amici Curiae. Presented by: Fred Nelson.

Mr. Nelson reported that the parties had met and agreed upon a schedule to handle the hearing in this matter. The discovery process will occur up through the first part of October 2005. There will be a certain time frame to file motions. The Board will hear any motions in November 2005, and set a hearing date at that time. All parties will follow R307-103. Mr. Nelson discussed the role of the amicus parties that they would be allowed to submit briefs on any dispositive motions and pre-hearing and post-hearing briefs. They would also participate in oral arguments on those matters. The amicus parties will not be allowed to do discovery, but will be allowed to attend depositions.

Ernie Wessman recused himself from this item.

- JoAnn Seghini moved that the Board accept the schedule and description of the amicus status. Nan Bunker seconded and the Board approved unanimously.

IX. Propose For Final Adoption: R307-101-2, Update Definition of Volatile Organic Compounds. Presented by: Jan Miller.

Ms. Miller reported that the update went out for public comment and was followed by a public hearing. No one attended the hearing, and no comments were received. Staff recommends the proposal be adopted.

- Ernie Wessman moved to approve R307-101-2, Update Definition of Volatile Organic Compounds. Jerry Grover seconded and the Board approved unanimously.

X. Propose To Approve Five-Year Reviews and Continuation of Rules: Presented by Jan Miller.

A. R307-115, General Conformity.

B. R307-320, Davis, Salt Lake and Utah Counties, and Ogden City: Employer-Based Trip Reduction Program.

Ms. Miller reported to the Board that Title 40, Part 93, Subpart B, of the Code of Federal Regulations, requires that states set up procedures for federal agencies to follow to determine that projects do not interfere with SIP plans. Subpart B meets that requirement and has been approved by EPA. There have been no amendments to Subpart B and no need to change R307-115.

- Jim Horrocks moved to approve R307-115, General Conformity and Marcelle Shoop seconded and the Board approved unanimously.

Ms. Miller explained that rule R307-320 is part of the Ozone Maintenance Plan. The state statute allows the Board to apply the rule to federal, state and local government agencies, including school districts. It can also be applied to private business, but that has never been done. There are about 80 agencies that are affected by this rule. The Bureau of Reclamation has the lowest drive-alone rate at 35%. This program began in 1994 with UTA doing most of the promotional work. DAQ collects statistics once each year.

- Jerry Grover moved to approve the Five-Year Reviews and Continuation of Rules B. R307-320, for Davis County, Salt Lake County, Utah County, and Ogden City: Employer-Based Trip Reduction Program. Wayne Samuelson seconded and the Board approved unanimously.

Cheryl Heying presented the advertisements that Environmental Quality has placed in the Deseret News and Salt Lake Tribune regarding the Choose Clean Air Campaign.

XI. Propose to Approve to Modify the Equipment Requirement in Approval Order DAQE#862-01 or Kennecott Copperton Concentrator Site. Presented by: Nando Meli.



Exhibit E





UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

DEC 13 2005

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

Mr. Paul Plath
Senior Partner
E3 Consulting, LLC
3333 South Bannock Street, Suite 740
Englewood, Colorado 80110

Subject: Best Available Control Technology Requirements for Proposed Coal-Fired Power Plant Projects

Dear Mr. Plath:

Your firm's letter to me dated February 28, 2005, from D. Edward Settle, asks for the U.S. Environmental Protection Agency's (EPA) position regarding whether an analysis of Best Available Control Technology (BACT) for proposed coal-fired power plants must specifically include evaluation of alternative designs of coal-fueled processes such as integrated gasification combined cycle (IGCC). Generally, the Clean Air Act (CAA) requires an applicant to apply BACT as a condition for issuance of a prevention of significant deterioration (PSD) construction permit in an attainment area. This response provides EPA's view of how the CAA should be interpreted and EPA regulations applied under the particular circumstances presented based on prior EPA policy statements and adjudicatory decisions.

There are two different parts of the PSD permitting process where consideration of alternative designs or production processes may occur. One part is under Section 165(a)(2) where it is required that the permitting authority allow an "opportunity for interested persons ... to appear and submit written or oral presentations on the air quality impact of such source, *alternatives thereto*, control technology requirements, and other appropriate considerations" (emphasis added). The other part is section 165(a)(4), which requires that a proposed facility subject to PSD apply BACT. In Section 169(3) of the CAA, BACT is defined as "an emission limitation based on the maximum degree of reduction ... which the permitting authority ... determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant."

EPA's view is that, through this language, Congress distinguished "production processes and available methods, systems and techniques" that are potentially applicable to a particular type of facility and should be considered in the analysis of BACT from "alternatives" to the proposed source that would wholly replace the proposed facility with a different type of facility. Although we read this language to draw such a distinction, in practice, it is often not clear when another production process should be considered to fit within the BACT definition and when it should be considered an alternative to the proposed source. This distinction is especially difficult to make for coal gasification because the definition of BACT includes "innovative fuel combustion techniques" in a list of examples of production processes or available methods, systems, or techniques to be considered in the BACT analysis. However, even assuming that coal gasification were in all respects an innovative fuel combustion technique for producing electricity from coal, we do not believe Congress intended for an "innovative fuel combustion technique" to be considered in the BACT review when application of such a technique would redesign the proposed source to the point that it becomes an alternative type of facility, which, as discussed below, we believe would be the case if IGCC were applied to a proposed SCPC unit.

As noted in prior EPA decisions and guidance, EPA does not consider the BACT requirement as a means to redefine the basic design of the source or change the fundamental scope of the project when considering available control alternatives. For example, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a natural gas-fired combustion turbine as part of a BACT analysis, even though the turbine may be inherently less polluting per unit product (in this case electricity). In *re SEI Birchwood Inc*, 5 E.A.D. 25 (1994); In *re Old Dominion Electric Cooperative*, 3 E.A.D. 779 (1992).

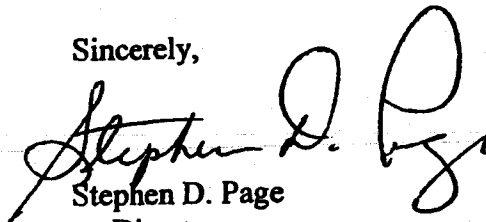
Therefore, the question in this instance is whether IGCC results in a redefinition of the basic design of the source if the permittee is proposing to build a supercritical pulverized coal (SCPC) unit. In this situation, EPA's view is that applying the IGCC technology would fundamentally change the scope of the project and redefine the basic design of the proposed source. Portions of an IGCC process are very similar to existing power generation designs that we have previously identified as a redefinition of the basic design of source when an applicant proposed to construct a pulverized coal-fired boiler. The combined cycle generation power block of an IGCC employs the same turbine and heat recovery technology that is used to generate electricity with natural gas at other electrical generation facilities. As noted above, we do not require applicants proposing to construct a coal-fired steam electric generator to consider building a gas-fired combustion turbine as part of a BACT analysis. Furthermore, the core process of gasification at an IGCC facility is more akin to technology employed in the refinery and chemical manufacturing industries than technologies generally in use in power generation (i.e., controlled chemical reaction versus a true combustion process). This technology would necessitate different types of expertise on the part of the company and its employees to produce the desired product (electricity) than the typical SCPC unit. Therefore, where an applicant proposes to construct a SCPC unit, we believe the IGCC process would redefine the basic design of the source being proposed.

Accordingly, consistent with our established BACT policy, we would not require an applicant to consider IGCC in a BACT analysis for a SCPC unit. Thus, for such a facility, we would not include IGCC in the list of potentially applicable control options that is compiled in the first step of a top-down BACT analysis. Instead, we believe that an IGCC facility is an alternative to an SCPC facility and therefore it is most appropriately considered under Section 165(a)(2) of the CAA rather than section 165(a)(4).

Your letter did not specifically request guidance on whether IGCC should be considered in a LAER analysis for a SCPC, but I am taking this opportunity to address the issue. As with BACT, an applicant must generally comply with LAER as a condition for issuance of a nonattainment new source review (NSR) permit in a nonattainment area. Section 173(a)(5) of the CAA requires an applicant to conduct, "*an analysis of alternative sites, sizes, production processes and environmental control techniques for such proposed source.*" (emphasis added). Because we believe IGCC results in a redefinition of the source in this situation, it should not be considered in a LAER analysis for a SCPC unit. Nonetheless, we believe that the technology should be considered under Section 173(a)(5) when an SCPC unit is proposed in nonattainment areas.

I trust that this response addresses the issues raised in your letter.

Sincerely,



Stephen D. Page
Director

Office of Air Quality, Planning
and Standards



CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 2006, I caused a copy of the foregoing to be mailed by United States Mail, postage prepaid, to the following:

Joro Walker
Sean Phelan
Western Resource Advocates
425 East 100 South
Salt Lake City, UT 84111

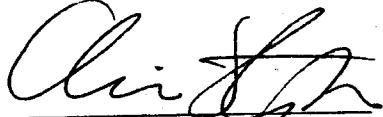
Fred G Nelson
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114
(by hand delivery)

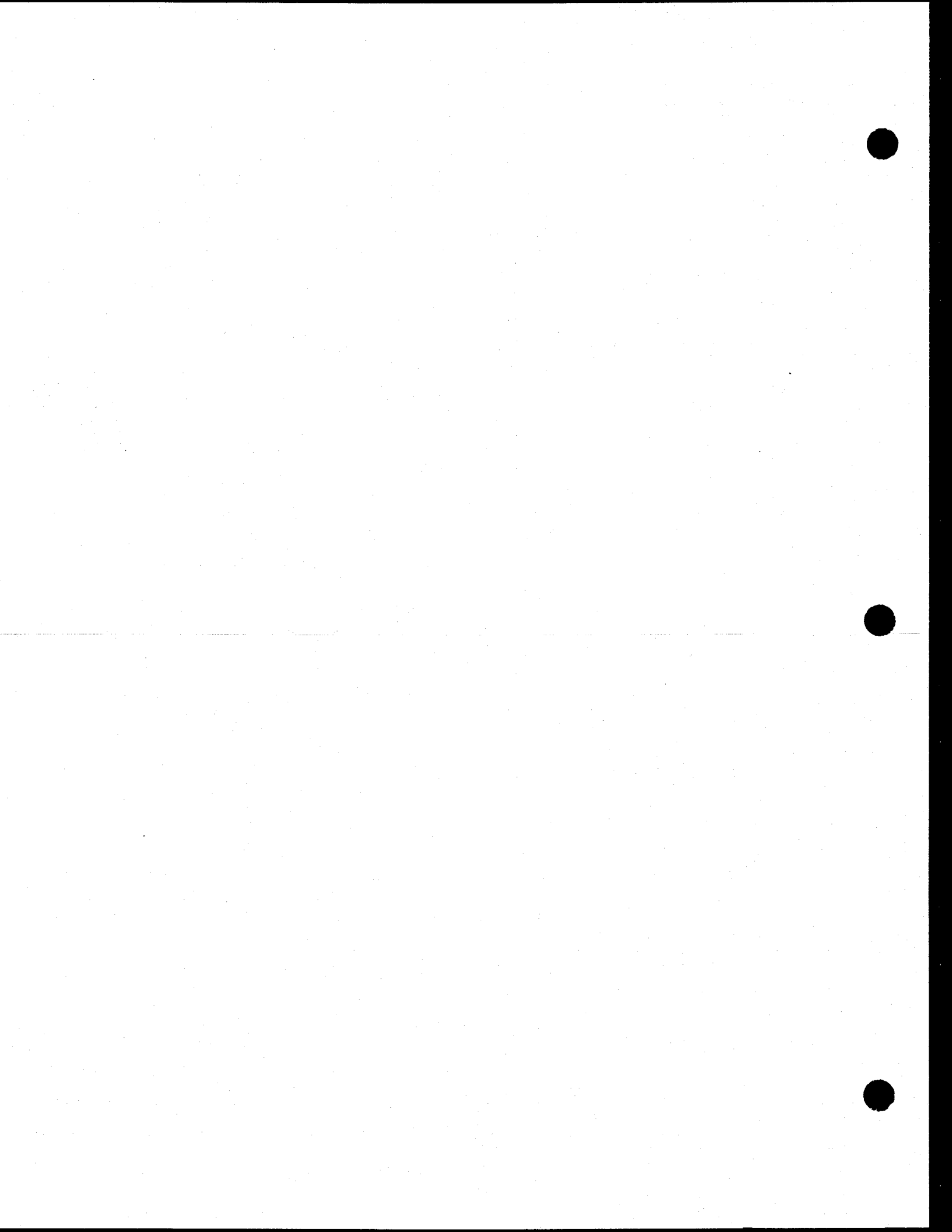
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AIR QUALITY

November 1, 2004

James O. Kennon, President
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P.O. Box 182
Richfield, Utah 84701
Telephone: 435-896-2822

BEFORE THE EXECUTIVE SECRETARY
UTAH DIVISION OF AIR QUALITY

In Re: AUTHORIZATION TO CONSTRUCT A 270 MW COAL-FIRED
POWER PLANT NEAR SIGURD, SEVIER COUNTY, UTAH TO
NEVCO LLC
DAQE-AN2529001-04 Engineer- Mr. John Jenks

Pursuant to Utah Admin. Rule R307-103-3{1}, Sevier County
Citizens For Clean Air And Water, [Sevier Citizens] herein demonstrates
sufficient facts to establish standing to bring this Request For Agency
Action to the Executive Secretary, Air Quality Board, Division of Air
Quality, concerning the Intent To Permit, No. DAQE-IN2529001, issued to
Sevier Power Company {NEVCO LLC}. Furthermore, Sevier Citizens
hereby petitions to intervene in the Adjudication of the Sevier Power
Company Permit, as required by Utah Admin. Code R307-103-6.

INTRODUCTION

On October 12, 2004, by order of the Utah Division of Air Quality, through Executive Secretary of the Utah Air Quality Board, Rick Sprott, authorized NEVCO L.L.C. to construct a 270 MW coal-fired power plant near Sigurd, Sevier County, Utah. Sevier Citizens seek a formal proceeding according to Utah Admin. Rule 307-103-4. Sevier Citizens are a Party as covered under Utah Admin. Rule R307-103-6. As demonstrated herein, Sevier Citizen has a substantial interest in the Air Quality, Quality of Life, and ecological integrity of the Sevier Valley and nearby National Parks. Accordingly, Sevier Citizens petition to intervene should be granted because Sevier Citizens has standing to request action from the Utah Department of Air Quality [UDAQ] regarding the significant environmental impacts of the challenged UDAQ Permit.

ARGUMENT

Sevier Citizens suffer a "distinct and palpable injury" to its interests relating to the Air quality, Quality of Life, and ecological functioning of the Sevier Valley and National Parks, that results from UDAQ authorization of the Sevier Power Company permit. As well, the authorization of this coal-fired plant raises important public issues the Sevier Citizens is properly situated to raise in an adjudicated forum. Furthermore, environmental impacts to the area National Parks, that are a major attraction for people around the world, raises issues of tremendous importance. Accordingly, pursuant to Utah Admin. Rules, Sevier Citizens has standing to bring this Request for Agency Action.

SEVIER CITIZENS HAS STANDING TO REQUEST AGENCY ACTION

A. SEVIER CITIZENS SUFFER A DISTINCT AND PAPERABLE INJURY TO ITS ENVIRONMENTAL INTEREST THAT ATTACHES A PERSONAL STAKE IN THE OUTCOME OF UDAQ'S PERMIT.

Under the first standing standard, a party has standing to challenge governmental action when the challenged action gives rise to an injury to an established interest that attaches a personal stake in the dispute. More specifically, a party has a personal stake in the government's action when it establishes:

[1] the existences of an adverse impact on plaintiffs rights, [2] a causal relationship between the governmental action that is challenged and the adverse impact on the plaintiff's rights, and [3] the likelihood that relief requested will redress the injury claimed, *Society of Professional Journalists V. Bullock*, 743 P.2d 1166, 1172-B [Utah 1987]

Here, the UDAQ authorized construction of a 270 MW coal-fired power plant has an adverse impact on Sevier Citizen's environment, ecological, aesthetic, financial, and public health interests that derive from preserving the air quality of Sevier County. The UDAQ authorized this construction and has the duty to administer the Utah Air Conservation Act and all Federal mandated Clean Air Provisions, as such, revocation of the permit will redress Sevier Citizens injuries.

1. THE SEVIER POWER COMPANY PERMIT ADVERSELY IMPACTS SEVIER CITIZENS ENVIRONMENTAL AND ECOLOGICAL INTERESTS.

Sevier Citizens mission is to preserve and protect the Air Quality and