Utah Attorney General's Office
Memorandum

To: Utah Air Quality Board

From: Fred Nelson, Counsel to Board

Re: Motions in IPP/Sevier Power approval order appeals.

Date: March 21, 2007

Attached you will find the pleadings that will be considered for decision at the Air Quality Board Meeting on April 4, 2007. Additional replies may be filed by March 26 (a date established by the Board) and they will be forwarded separately.

In part, because of the volume of the materials and use of numerous legal terms, I provide the following information in an attempt to facilitate your review.

Sierra Club has challenged the issuance by the Executive Secretary of two approval orders to construct coal-fired power plants, one for a third unit at the IPP plant near Delta, and one for a power plant to be constructed near Fillmore by the Sevier Power Company. The appeals are called "Requests for Agency Action" under the Utah Administrative Procedures Act. The Utah Air Quality Board set the hearing dates for those challenges to be September (for Sevier Power) and November (for IPP Unit 3). The Board also established the April meeting as a time for hearing initial "dispositive" motions in both appeals. Dispositive motions are allowed under the rules, in part, to potentially simplify and resolve matters that do not need a full evidentiary hearing. A dispositive motion is an assertion by a party that an issue can be resolved without an evidentiary hearing. It can take the form of a Motion to Dismiss (ie. no jurisdiction), or a Motion for Judgment on the Pleadings (there are no fact issues and the decision can be made by only considering the statements and allegations made in the Request for Agency Action), or a Motion for Summary Judgment (supporting affidavits with uncontested facts that can justify a decision without an evidentiary hearing).

In this case various parties have filed Motions for Judgment on the Pleadings and Motions for Summary Judgment. In considering a Motion for Judgment on the Pleadings the Board should assume as true the facts as stated in the Request for Agency Action and determine whether it can rule on each presented issue without an evidentiary hearing. For a Motion for Summary Judgment, the Board should consider the presented information to determine whether there are uncontested facts upon which the decision can be based, with no evidentiary hearing necessary. The granting of a Motion for Judgment on the Pleadings or a Motion for Summary Judgment means the Board would be making a decision on the issue now and, therefore, would not further consider that issue at its September/November hearings. A decision to deny a Motion for Judgment on the Pleadings or Motion for Summary Judgment would not constitute a determination, one

way or the other, as to the validity of a claim, it would mean the issue would go to an evidentiary hearing.

All parties have submitted dispositive motions on some issues raised or requested to be part of Sierra Club's Requests for Agency Action. The motions are attached in Sections A, B, and C. Much of the attached information and argument is duplicative because the issues are common to both cases. I recommend the Board, at its April 4th meeting, consider first the Motions of Sierra Club in Section A, because if those motions are granted, the approval orders may be considered revoked and the matters would be remanded back to the Executive Secretary. In that circumstance, it would not be necessary for the Board to consider the Motions filed by IPP, Sevier Power, or the Executive Secretary. If the Board denies Sierra Club's motions, the Board would then consider the motions attached in Section B.

Under Section A, you have the following documents:

Tab 1. Sierra Club's Motions to Amend its Request for Agency Action in both the IPP and Sevier Power appeals to add a claim that the approval orders have expired because construction has not taken place within 18 months of the issuance of the approval orders.

Tab 2. IPP, Sevier Power, and Executive Secretary Opposition memos to the Motions to Amend the Requests for Agency Action.

Tab 3. Sierra Club's Motions for Summary Judgment in both cases based on the 18 month provision issue that the approval orders be determined no longer valid, and, further, in the IPP case, that the Executive Secretary did not follow the rules in approving a modification to the approval order changing the approved boiler technology.

Tab 4. IPP, Sevier Power, and Executive Secretary Opposition memos to Sierra Clubs' Motions for Summary Judgment.

The primary determination to be made under the pleadings in Section A is whether to allow Sierra Club to add the claim concerning the 18 month provision and whether to grant judgment to Sierra Club in both cases based on that claim.

Section B contains Motions for Judgment on the Pleadings filed by IPP, Sevier Power, and the Executive Secretary, on two issues common to both appeals. The two issues are 1) whether the Executive Secretary erred by not considering the technology referred to as IGCC in determining Best Available Control Technology, and 2) whether the Executive Secretary erred by not considering carbon dioxide and greenhouse gases in issuance of the approval orders. IPP also moves for judgment on the pleadings on a third issue, whether the Executive Secretary was required to consider specific coal chemistry information different from the coal information provided.

Section B includes:

Tab 1. Motions for Judgment on the Pleadings by IPP, Sevier Power, and the Executive Secretary.

Tab 2. Sierra Club's Consolidated Opposition to Motions for Judgment on the Pleadings.

The determination to be made by the Board under the Section B is whether to grant or deny all or part of each motion.

Section C is Sierra Club's Protective Motion under Utah Rules of Civil Procedure 56(f) that requests that if the Board treats any of the Motions for Judgment on the Pleadings as Motions for Summary Judgment, Sierra Club be given further time to do discovery before the Board rules on the motion. As explained above, a Motion for Summary Judgment requires submission of evidence and a party countering such a motion must respond with evidence demonstrating there are issues of fact that require that the issue should go to hearing.

If you have any questions, please call (801-366-0285). I would remind each Board member that this is an adjudicative proceeding and that you may not participate in dialog or conversation with or receive information from any of the parties (Sierra Club, IPP, Sevier Power, and the Executive Secretary) outside the forum of a Board meeting where all parties are given the opportunity to be present.