Joro Walker, USB #6676
David Becker USB #11037
WESTERN RESOURCE ADVOCATES
425 East 100 South Street
Salt Lake City, Utah 84111
Telephone: 801.487.9911
Fax: 801.486.4233
Attorneys for Utah Chapter of the Sierra Club

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N0327-010 DAQE-AN2529001-04	:	MOTION FOR LEAVE TO FURTHER AMEND REQUEST FOR AGENCY ACTION AND MEMORANDUM IN SUPPORT OF MOTION

MOTION FOR LEAVE TO FURTHER AMEND REQUEST FOR AGENCY ACTION AND MEMORANDUM IN SUPPORT OF MOTION

The Utah Chapter of the Sierra Club ("Sierra Club") respectfully moves to amend its First Request for Agency Action in the above captioned matter. In support of its motion, Sierra Club submits this Motion for Leave to Further Amend Request for Agency Action and Memorandum in Support of Motion. In conjunction with its motion and supporting memorandum, Sierra Club submits to the Air Quality Board ("Board") its Second Amended Request for Agency Action.

The Second Amended Request for Agency Action amends the Sierra Club's First Amended Request for Agency Action by amending the claim in Statement of Reasons # 10 based on information obtained through discovery in May and June 2007 and in the June 6, 2007 letter from the Executive Secretary formally approving an extension of the Approval Order ("AO") issued to Sevier Power Company ("SPC"). This additional

information show that the Utah Division of Air Quality and the Executive Secretary of the Utah Air Quality Board (collectively "UDAQ") conducted a review of SPC's request for an extension of the AO at some unspecified time after November 17, 2005, failed to document that review, and did not formalize the decision to extend the AO until June 6, 2007. Because the approval of the extension is unsupported by substantial evidence and departed from the procedure UDAQ followed in approving the extension of the Approval Order for Unit 3 of the Intermountain Power Project, and as further described in Statement of Reasons # 10 in the Second Amended Request for Agency Action, the Board must declare the AO invalid.

In court, Utah Rule of Civil Procedure 15(a) applies to motions to amend pleadings. In this matter, UDAQ has already responded to Sierra Club's First Amended Request for Agency Action. In these circumstances, Rule 15(a) states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."[1] Based on this rule, Sierra Club seeks the Board's permission to further amend its request for agency action.

The Utah Supreme Court has "consistently encouraged liberal treatment of motions to amend a pleading as long as justice is furthered, and not hindered, by the amendment, so as to allow examination into and settlement of all issues bearing upon the controversy, [while] safeguard[ing] the rights of the other party to have a reasonable time to meet a new issue."[2] Allowing amendment of a complaint – or, in this matter, the request for agency action – is particularly appropriate where the amendment is presented

[1] Utah R. Civ. P. 15(a) (emphasis added).
[2] Pett v. Autoliv ASP, Inc., 2005 UT 2, ¶ 6, 106 P.3d 705, 706-07 (internal quotations and citation omitted).

well before trial, and the defending parties have ample opportunity to meet the newly-raised matter.[3] The Supreme Court has approved of allowing amendments to pleadings as little as four weeks before a scheduled trial.[4]

In this matter, the amendment comes more than two months before the scheduled hearing on the merits expected in late September 2007. At the Board's hearing on April 4, 2007, the Board granted Sierra Club leave to amend its Request for Agency Action to add Statement of Reasons #10 related to the 18-month review required under Utah air quality regulations. Also at the April 4, 2007 hearing, the Board ordered UDAQ to supply the Board and the parties with additional information regarding the 18-month review. In a letter dated June 6, 2007, UDAQ complied with this order.

UDAQ Environmental Engineer John Jenks testified at his deposition on May 30, 2007 regarding the 18-month review process. Mr. Jenks was given an opportunity to review the transcript of that deposition, and he signed a correction sheet on July 11, 2007. The corrected transcript was delivered to the Sierra Club on July 17, 2007. This motion to further amend the request for agency action is filed the same day.[5] The request for leave to amend is therefore timely, and the UDAQ and other parties will have ample time to respond to the issue as amended.

---

[3] Gillman v. Hansen, 26 Utah 2d 165, 486 P.2d 1045-46 (1971) (stating that the court should "allow amendments freely where justice requires, and especially is this true before trial"); Lewis v. Moultree, 627 P.2d 94, 98 (Utah 1981).
[4] Savage v. Utah Youth Village, 2004 UT 102, ¶¶ 9-10, 104 P.3d 1242, 1245-46.
[5] By comparison, UDAQ's response to the Board's order for more information on April 4, 2007, on which this motion to amend is based in part, was sent more than two months after that order, on June 6, 2007.

In addition to timeliness, Utah courts consider the justification for the delay and any prejudice to responding parties in deciding a motion for leave to amend.[6] As described above, completion of fact discovery (including correction and finalization of the Jenks deposition transcript) and receipt of the June 6, 2007 UDAQ letter were necessary to establish the factual basis for the amended claim. The delay in further amending the request for agency action is fully justified by the previous unavailability of the information regarding the UDAQ's 18-month review of the SPC AO.[7]

A motion for leave to amend a pleading should be granted unless there would be "undue or substantial" prejudice to the responding party.[8] The Utah Supreme Court has held that a motion to amend should be denied only where "the opposing side would be put to unavoidable prejudice by having an issue adjudicated for which he had not had time to prepare."[9] In this matter, there is no prejudice to the other parties – much less undue, substantial, or unavoidable prejudice. The other parties have received or provided the information regarding the 18-month review over the course of the past six weeks, and thus are aware of the basis for the revised claim. More than two months remain before the hearing on the merits of this claim, which is ample time for the parties to respond to the issues raised in the amended claim – including, if necessary, to submit supplemental expert testimony (either live at the hearing or by supplement to existing pre-filed

---

[6] Savage, 2004 UT 102, ¶ 9.

[7] A party is fully justified in waiting to move to amend until reliable confirmation of the facts can be obtained. Kelly v. Hard Money Funding, Inc., 2004 UT App 44, ¶ 38, 87 P.3d 734. Furthermore, by moving to amend immediately after the completion of fact discovery, Sierra Club is not acting out of "dilatory motive, bad faith, or unreasonable neglect" that would justify denying the motion for leave to amend. Swan Creek Village Homeowners v. Warne, 2006 UT 22, ¶ 24, 134 P.3d 1122, 1127.

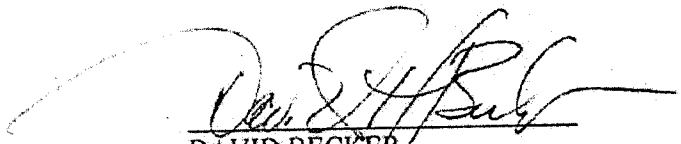
[8] Swan Creek, 2006 UT 22, ¶ 21.

[9] Kasco Servs. Corp. v. Benson, 831 P.2d 86, 92 (Utah 1992) (internal quotations and citation omitted).

testimony). Because there is no prejudice to the parties who are already on notice of the basis of the amended claim, the Board should grant the motion for leave to amend.

For the reasons stated above, Sierra Club respectfully submits that it is in the interest of justice to allow this amendment and respectfully requests that the Board grant Sierra Club leave to file its Second Amended Request for Agency Action in this matter.

Dated: July 17, 2007



DAVID BECKER
JORO WALKER
Attorneys for Utah Chapter of the Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July 2007, I caused a copy of the foregoing Motion for Leave to Further Amend Request for Agency Action and Memorandum in Support of Motion to be emailed to the following:

Fred G. Nelson
Counsel, Utah Air Quality Board
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

Christian Stephens
Paul McConkie
Assistant Attorneys General
150 North 1950 West
Salt Lake City, Utah 84114
cstephens@utah.gov
pmcconkie@utah.gov

E. Blaine Rawson
George Haley
Holme Roberts & Owen
299 S. Main Street #1800
Salt Lake City, Utah 84111
bliane.rowson@hro.com
haleyg@hro.com

Fred Finlinson
11955 Lehi-Fairfield Road
Saratoga Springs, Utah 84043
f2fwcrf@msn.com

Michael Keller
Matthew McNulty
VanCott Bagley
50 South Main, Suite 1600
Salt Lake City, Utah 84114
mkeller@vancott.com
mmcnulty@vancott.com

Martin Banks
Stoel Rives
201 West main, Suite 1100
Salt Lake City, Utah
mkbanks@stoel.com

Michael Jenkins
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, Utah
michael.jenkins@pacificorp.com

Brian Burnett
Callister Nebeker
10 West South Temple, Suite 900
Salt Lake City, Utah 84133
brianburnett@cnmlaw.com

DAVID BECKER