PAUL M. McCONKIE, USB #5881
CHRISTIAN C. STEPHENS, USB #9068
Assistant Attorneys General
MARK L. SHURTLEFF, USB #4666
Utah Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114
Telephone: (801) 366-0290
Facsimile: (801) 366-0292
Attorneys for the Executive Secretary

BEFORE THE UTAH AIR QUALITY BOARD

In the Matter of: Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	EXECUTIVE SECRETARY'S RESPONSE TO THE PETITION TO INTERVENE FILED BY SAVE OUR AIR AND RESOURCES

COMES NOW the Executive Secretary of the Utah Division of Air Quality (Executive Secretary), through undersigned counsel, and submits the following response to the Petition to Intervene filed by Save Our Air and Resources (SOAR) in the above-captioned matter.

I. Introduction

On October 12, 2004, the Executive Secretary signed an Approval Order permitting Sevier Power Company (SPC) to construct and operate a coal-fired power plant in Sevier County, Utah. On November 1, 2004, Sevier County Citizens for Clean Air and Water (Sevier County Citizens or SCC) filed a Request for Agency Action ("RFA"), contesting the terms and conditions of the Approval Order. Sevier County Citizens filed another document on March 16, 2005, attempting to set forth more specific reasons for the group's challenge. At the April 13, 2005 Board meeting, the Board

granted intervention to Sevier County Citizens and denied intervention to Sierra Club and PacifiCorp.[1]

The parties engaged in discovery according to schedules submitted to and approved by the Board, concluding on January 30, 2006. The Board presided over a hearing on the merits held in Richfield on May 10, 2006. The Executive Secretary, Sevier Power Company, and Sevier County Citizens (through its representatives James Kennon and Dick Cumiskey) called witnesses and presented evidence. The Board subsequently denied each and every claim in Sevier County Citizens' Requests for Agency Action.[2]

On June 21, 2007, James Kennon and Dick Cumiskey, on behalf of an organization called Save Our Air and Resources (SOAR), filed a new Petition to Intervene and Request for Agency Action, challenging a Board order and a letter issued by the Executive Secretary relating to the regulatory 18 month review of the SPC Approval Order. As the Executive Secretary will show, because SOAR appears to be the same group that participated in the Richfield hearing,[3] SOAR has already had its opportunity to fully and fairly litigate its challenge to the SPC Approval Order and failed to raise this claim, and consequently has foregone the right to raise it now. In addition to

---

[1] Order Re: Petitions to Intervene, In the Matter of Sevier Power Company Power Plant.

[2] Sevier County Citizens attempted to pursue its case before the Utah Court of Appeals, but its appeal was dismissed. *See* Exhibit E, attached.

[3] Judging from its Petition to Intervene, SOAR appears to be the same organization as Sevier County Citizens for Clean Air and Water, but with a new name. James Kennon and Dick Cumiskey represented Sevier County Citizens in the Richfield hearing and now represent SOAR, and all addresses and contact information for the two organizations are identical. SOAR's petition itself states that "[s]everal of the plaintiffs in this case have been involved in the permit process of SPC for over six years and have submitted comments on the process during that time period." SCC/SOAR Petition to Intervene at 3. Based on the available information, it is the Executive Secretary's belief that SOAR is in all material respects the same organization as Sevier County Citizens for Clean Air and Water.

being untimely, SOAR's petition seeks relief that is that is unavailable in this forum. Accordingly, the Petition to Intervene should be denied.

II. Eighteen-month Review

Although this Response addresses only SOAR's Petition to Intervene and not the specific allegations in the accompanying Request for Agency Action, some background is necessary to provide the Board with context for SOAR's new challenge. At the time the SPC Approval Order was issued in October 2004, Utah Admin. Code R307-401-11 required that: "[a]pproval orders issued by the executive secretary in accordance with the provisions of R307-401 shall be reviewed eighteen months after the date of issuance to determine the status of construction, installation, modification, relocation or establishment. If a continuous program of construction, installation, modification, relocation or establishment is not proceeding, the executive secretary may revoke the approval order." Therefore, as of April 12, 2006 (eighteen months after the issuance of the SPC Approval Order), the regulation required the Executive Secretary to have reviewed the SPC Approval Order to determine the status of construction.

On November 17, 2005, Sevier Power Company submitted a letter to the Division of Air Quality requesting that the Executive Secretary "hold in abeyance the running of the 18 month period for construction of the SPC power plant to start from the date that the first Request for Agency Action was filed until the formal adjudication process, including any appeals, is concluded and the review process confirms that there is a valid Approval Order."[4] The letter referenced the ongoing efforts of both the Sierra Club and Sevier County Citizens to challenge the Approval Order before the Air Quality Board,

[4] *See* Exhibit A, attached.

and that the ongoing litigation had required the Sevier Power Company to put construction on hold.[5] Therefore, the letter itself describes the "status of construction."

The letter was reviewed by New Source Review Engineer John Jenks, who in turn consulted with his supervisor Rusty Ruby of the New Source Review section. They in turn consulted with Regg Olsen of the Permitting Branch, and then with the Executive Secretary. Based upon this review, the "status of construction" was determined and it was further determined that no persuasive reason existed for revocation. Accordingly, the Approval Order was not revoked.

The Sierra Club has raised this same issue in its pending appeal before the Air Quality Board, and SOAR has made its own information requests on this issue to the Division of Air Quality, to which the Executive Secretary has responded.[6] In connection with the Sierra Club case, the Board ordered that "the Executive Secretary formalize in writing the decision on an extension request made by SPC" to clarify what transpired during that period.[7] The Executive Secretary provided that clarification in a May 21, 2007 letter to SPC, a copy of which was sent to James Kennon of SOAR.[8] SOAR's Petition to Intervene and Request for Agency Action seek to challenge both the Board's May 2 Order and the Executive Secretary's May 21 letter.

III. SOAR'S Petition Seeks Relief in the Wrong Forum or is Unavailable, and is Also Untimely, as it Could Have Raised the 18 Month Review Claim in the Prior Action

[5] SOAR makes the peculiar claim that SPC's November 17, 2005 letter "does not even mention progress toward construction." SCC/SOAR Petition at 5. The letter plainly states that construction was not progressing due to the litigation before the Board. *See* Exhibit A, attached (Sevier Power Company Letter at 4). Thus, the letter provided the Executive Secretary with notice of the status of construction.

[6] See Exhibit B, attached. Exhibit B includes the various requests for information made by SCC/SOAR, as well as the Executive Secretary's response.

[7] *See* Air Quality Board Order of May 2, 2007, attached as Exhibit C.

[8] *See* Exhibit D, attached.

As an initial matter, Sevier County Citizens has apparently changed its name to pursue a second opportunity to overturn the SPC Approval Order. If this is indeed the case, simply changing its name cannot disguise the fact that this same organization has already been provided a forum in which to air its grievances to the Air Quality Board.[9]

III.A. A Board Order Cannot be Appealed Back to the Board

To the extent that the Petition to Intervene seeks to challenge the Board's May 2, 2007 Order, SOAR seeks relief in the wrong forum. Review of Air Quality Board orders is available only in the Utah Court of Appeals. U.C.A. § 63-46b-16. Thus, SOAR's Petition cannot, as a matter of law, seek intervention to challenge a board order before the Board. Thus, SOAR's Petition fails as a challenge to the Board's May 2, 2007 Order.

III.B. A Request for Agency Action Can Only Contest Initial Orders of the Executive Secretary

To the extent that SOAR seeks to challenge the Executive Secretary's May 21, 2007 letter, the Executive Secretary notes that according the Utah Air Rules, a Request for Agency Action is available only to contest initial orders of the Executive Secretary.[10] Utah Admin. Code R307-103-3. The May 21 letter is not an "initial order" of the Executive Secretary (as defined Utah Admin. Code R307-103-2), but rather a letter written upon the direction of the Board to memorialize action taken the previous year. Thus, SOAR's Petition fails because it contests the Executive Secretary's May 21, 2007

[9] SCC/SOAR itself states that "[s]everal of the plaintiffs in this case have been involved in the permit process of SPC for over six years and have submitted comments on the process during that time period." SCC/SOAR Petition to Intervene at 3. This admission appears to indicate that the same people are now attempting to obtain a second review of the Approval Order, hoping that it will succeed where it has previously failed.

[10] SCC/SOAR is no doubt aware of this distinction, having already attempted to appeal the Board's order resulting from the Richfield hearing to the Utah Court of Appeals. *See* Exhibit E, attached (memorandum decision from the Utah Court of Appeals dismissing Sevier County Citizens' Petition for Review of the Board's Order denying the group's claims litigated in the May 2006 hearing in Richfield).

letter, which is not an initial order of the Executive Secretary for which a Request for Agency Action may be filed.

III.C. SOAR's Petition is Untimely, and Could Have Been Raised Previously

To contest an initial order of the Executive Secretary, a Petition to Intervene and Request for Agency Action must be filed within 30 days of the deadline for the agency's action. Utah Admin. Code R307-103-3. Failure to contest within 30 days acts as an absolute bar to intervention. Utah Admin. Code R307-103-2(2)(a). In this case, the 18 month review was completed by the April 12, 2006 deadline under the regulation. A hearing on the SPC permit (requested by Sevier County Citizens itself) was already scheduled for the following month, on May 10, 2006.

Therefore, if Sevier County Citizens believed that the review had not taken place by the April 12, 2006 deadline, it had the opportunity to petition the Board to add this new claim to its case prior to the May 10, 2006 hearing. Now, over a year later and long after the May 10, 2006 hearing, SOAR seeks to initiate new proceedings on a claim that it could have raised previously.[11] Utah courts have uniformly held that such second attempts are barred by the doctrine of res judicata: "[w]hen a second claim, demand or cause of action is essentially the same as a prior claim, demand or cause of action which has gone to final judgment, res judicata means that neither of the parties can 'again litigate that claim, demand or cause of action or any issue, point or part thereof *which he*

[11] To excuse its own failure to raise the issue in a timely manner, SCC/SOAR attempts to blame SPC and the Executive Secretary by stating that "this request for abeyance was never disclosed to the parties involved in the May 10, 2006 hearing." SCC/SOAR Petition at 5. As the Petitioner, SCC/SOAR had the burden of identifying all possible bases for its case, and cannot shift that responsibility to any other party. *See* Hartford Leasing Corp. v. State of Utah, 888 P.2d 694, 698 n.2 (Utah Ct. App. 1994) (". . . . the [petitioner], as the party initiating the lawsuit, has the primary responsibility to move the case forward . . . [t]he [respondent] has no general responsibility to move [petitioner's] action to judgment"). As a respondent, the Executive Secretary was not then and is not now required to provide SCC/SOAR with additional reasons to pursue its case. The regulation governing the 18 month review contains no requirement of public notice, and SCC/SOAR does not (and cannot) identify such a requirement.

could have but failed to litigate in the former action.'" Bradshaw v. Kershaw, 627 P.2d 528, 531 (Utah 1981) (emphasis added) (*quoting* Wheadon v. Pearson, 376 P.2d 946, 947 (Utah 1962); *see also* Ringwood v. Foreign Auto Works, Inc., 786 P.2d 1350, 1357 (Utah Ct. App. 1990) (". . . . the claim [is precluded when], even though not decided in the prior action, could and should have been litigated, but was not raised by any of the parties"). This principle of res judicata "'reflects the expectation the parties who are given the capacity to present their 'entire controversies' shall in fact do so'" and not mire the tribunal in duplicative proceedings when all claims can and should be resolved together in one proceeding.[12] Ringwood, 786 P.2d at 1358, *quoting* Restatement (Second) of Judgments § 24 Comment a (1982).

SCC did not raise this issue prior to the Richfield hearing, despite ample time to do so, and SOAR's Petition to Intervene offers no persuasive justification for pursuing this claim now. In any event, as noted above, inasmuch as SOAR seeks to challenge the Executive Secretary's June 6, 2007 letter, the letter itself is not an "initial order" that would trigger the right to file a request for agency action. As noted above, a request for agency action is only available to challenge initial orders. Utah Admin. Code R307-103-3. The action of which SOAR could have complained is not the Executive Secretary's May 21 letter, but rather the review that took place in compliance with the 18 month deadline. As of that date (April 12, 2006), the claim was ripe and the clock started for SCC to file a request for agency action or to seek to amend its previous request for agency action to include the claim. That window of opportunity closed 30 days later and cannot be retroactively re-opened. In other words, the May 21 letter does not create new

[12] Res judicata applies to administrative adjudications in Utah. *See* Career Serv. Rev. Bd. v. Utah Dept. of Corrections, 942 P.2d 933, 938 (Utah 1997).

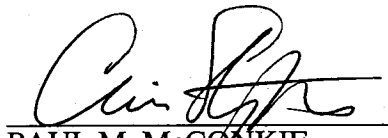
rights for SOAR or change the fact that the time for challenging the 18 month review has long expired. Sevier County Citizens/SOAR has had the hearing to which it was entitled. Accordingly, the Petition to Intervene should be denied.[13]

IV. Request for Relief

The Executive Secretary respectfully requests that the Board deny the Petition to Intervene for the reasons provided in Section III above.

DATED this 20th day of July, 2007.

MARK L. SHURTLEFF
Utah Attorney General



PAUL M. McCONKIE
CHRISTIAN C. STEPHENS
Assistant Attorneys General

[13] SCC/SOAR's Request for Agency Action is likewise deficient, in that it misapplies the applicable law. The Executive Secretary has limited her arguments in this Response to the Petition to Intervene. Should the Board decide to allow SCC/SOAR to Intervene, she will provide a complete response to the Request for Agency Action according to a schedule determined by the Board.

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2007, I caused a copy of the foregoing to be emailed, and/or mailed by United States Mail, postage prepaid, to the following:

Joro Walker
David Becker
Western Resource Advocates
425 East 100 South
Salt Lake City, UT 84111
jwalker@westernresources.org
dbecker@westernresources.org

Fred G Nelson
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, UT 84114
fnelson@utah.gov

James Kennon
Sevier County Citizens
for Clean Air and Water/Save Our Air and Resources
146 North Main Street, Suite 27
PO Box 182
Richfield, UT84701
sccaw@yahoo.com

Fred Finlinson
Finlinson & Finlinson
11955 Lehi-Fairfield Rd.
Saratoga Springs, UT 84043
f2fwcrf@msn.com

Martin K. Banks
Stoel Rives
201 S. Main, Suite 1100
Salt Lake City, UT 84111
mkbanks@stoel.com

Michael G. Jenkins
Assistant General Counsel
PacifiCorp
201 S. Main, Suite 2200
Salt Lake City, UT 84111
michael.jenkins@pacificorp.com

Brian Burnett
Callister Nebeker & McCullogh
10 East South Temple, Suite 900
Salt Lake City, UT 84133
brian.burnett@cnmlaw.com

PAUL M. McCONKIE
CHRISTIAN C. STEPHENS
Assistant Attorneys General

EXHIBIT A

RECEIVED
NOV 1 8 2005

FINLINSON & FINLINSON, PLLC
ATTORNEYS AT LAW
11955 West Fairfield Road
Saratoga Springs, UT 84043
Telephone: (801)554-0765
Fax: (801)766-8717
E-mail: f2fwcrf@msn.com

November 17, 2005

John D. Jenks, Engineer
Division of Air Quality
150 North 1959 West
PO Box 144820
Salt Lake City, UT 84114-4820

Re: Approval Order: Sevier Power Company's 270 MW Coal-Fired Power Plant, Sevier County- CDS A; ATT: PSD: NSPS, MACT, HAPs, Title IV Major, Title V Major
Project Code: DAQE-AN2529001-04

Dear John Jenks:

Our firm represents the Sevier Power Company and they have asked me to give you an update on what has happened since the Approval Order (the "AO") referenced above was issued on October 12, 2004. In short, before the ink on the AO was dry, it was appealed. A battle over standing was fought by the Parties before the Utah Air Quality Board (the "Board"). The Board determined that the Sierra Club and the Grand Canyon Trust did not have standing. These parties have appealed the Board's ruling on standing to the Court of Appeals. The Court of Appeals has denied motions from the Sierra Club and Grand Canyon Trust to enlarge the record and to stay the Board's formal adjudication of the Sevier County Citizens For Clean Air and Clean Water's Request For Agency Action. These events have taken place over the following time line:

1. October 12, 2004, The Executive Secretary issued the above mentioned Approval Order for the Sevier Power Company.

2. November 1, 2004, the Sevier County Citizens For Clean Air and Water (the "Sevier County Citizens"), filed a combined Petition For Standing to Intervene and a Request For Agency Action on the issuance of the AO. This document was filed with the Board on November 4, 2004.

3. November 12, 2004, the Sierra Club and Grand Canyon Trust (collectively the "Sierra Club") filed a Request For Agency Action and a Statement of Standing and Petition to Intervene.

4. January 4, 2005, PacifiCorp also filed a Petition to Intervene and a Statement of Standing.

5. January 6, 2005, the Board issued a "Notification of Further Proceedings" which established a schedule for briefing and reply briefing with a hearing before the Board set for March, which was subsequently reset for hearing on April 13, 2005. The parties filed extensive briefs pursuant to this schedule.

6. April 13, 2005, the Board conducted a hearing on the standing of each of the petitioning parties. The Executive Secretary and the Sevier Power Company were granted standing by Board Rule as the main parties. The Citizens For Sevier County, the Sierra Club and Utah Power may only intervene if granted permission by the Board. After the matter was fully heard, the Board determined that it would grant standing to the Sevier County Citizens, and deny standing to both the Sierra Club and Utah Power. The Board also granted amicus status to both the Sierra Club and Utah Power. The Board mentioned that it would put its ruling in written form and approve the written draft as the final order at its next meeting in May.

7. May 12, 2005, the Board, after a review of its written order prepared by Counsel Fred Nelson, adopted the May 12, 2005 as its written order which both granted and denied standing to the respective parties as mentioned above.

8. May 17, 2005, the Sierra Club filed its Petition for Review with the Court of Appeals seeking a reversal of the May 12th Board decision denying standing. The Sierra Club also filed a Motion to Stay the Sevier County Citizens' Request For Agency Action pending its appeal to the Court of Appeals.

9. June 1, 2005, the Board held a hearing on the Sierra Club's Motion to Stay the Request For Agency Action. After the matter had been briefed and all parties had presented information to the Board, it determined that it would not stay the remaining Request For Agency Action filed by the Sevier County Citizens. This order was signed by the Chairman of the Board on June 6, 2005. A schedule for Request For Agency review was adopted which provided a time for answers to be filed, discovery, motions, and a proposed hearing in December, 2005 was also adopted by the Board.

   Since the Sierra Club filed its Petition For Review with the Court of Appeals, there are now two different tracts of appeal being pursued by the Sierra Club and the Sevier County Citizens. I will attempt to weave both appeals into one common time line.

10. June 10, 2005 (DAQ), the Executive Secretary and the Sevier Power Company filed with the Board their response to the Citizens November 1, 2004 Request For Agency Action.

11. June 23, 2005 (COA), the Board filed with the Appellate Court its revised record index identifying the record of the Agency in making its decision to deny standing.

12. June 24, 2005 (COA), the Sevier Power Company filed its Motion to Intervene in the Court of Appeals review of the Board's decision on standing. Intervention was granted by the Court of Appeals.

13. July 1, 2005 (COA), the Sierra Club filed a Motion For A Stay Pending Review, with supporting memorandum, requesting the Court of Appeals to stay the administrative proceedings in the DAQ.

14. July 18, 2005 (COA), the Executive Secretary filed a Motion to Intervene in the Sierra Club's Motion for the Stay. Its request for intervene was granted by the Court and the Executive Secretary filed briefs in opposition to the Sierra Club's Motion for a Stay and Motion to Expand the Record.

15. July 19, 2005 (COA), the Sierra Club filed a Motion to Supplement Record with Supporting Memorandum, and a Motion for Enlargement of Time to File Opening Brief.

16. July 28, 2005 (COA), a mediation conference was held at the Court of Appeals. All of the parties were present and participated in the conference. Subsequently, the Court Appointed Mediator issued an order releasing the parties from further participation in mediation.

17. August 29, 2005 (COA), the Court of Appeals, after reviewing the Parties' memorandums on the various motions submitted by the Sierra Club, issued its order denying the Sierra Club's Motion to Stay and also denying the Sierra Club's Motion to Supplement the Record.

18. August 30, 2005 (COA), the Court of Appeals issued a scheduling order requiring the Sierra Club's Brief to be filed by October 3, 2005. It was filed timely. The Executive Secretary and the Sevier Power Company filed their responsive briefs on November 2, 2005. The Sierra Club has an opportunity to file one more brief by December 2, 2005. After all of the briefs have been filed, the Court of Appeals will review the briefs and determine whether a hearing should be scheduled. They did not hold a hearing before denying the two previous motions of the Sierra Club. There could still be a hearing after the briefing is completed by December 2, 2005 and then after the hearing, the Court would then issue its decision on the Board's denial of standing to the Sierra Club. A final decision from the COA is still a number of months in the future.

19. September 23, 2005 (DAQ), the Executive Secretary served a set of interrogatories and request for the production of documents on the Sevier County Citizens.

20. October 3, 2005 (DAQ), the Executive Secretary filed a Motion to Compel because of the alleged failure of the Sevier County Citizens group to respond to the Interrogatories and

Requests For Production of Documents.

21. November 2, 2005 (DAQ), the Board held a hearing on the Executive Secretary's Motion to Compel. The Parties were present and submitted information to the Board about the lack of Discovery response from the Sevier County Citizens Group. After hearing from all parties, the Board granted the Motion to Compel and entered a written Order Regarding The Executive Secretary's Motion to Compel Discovery.

22. January 2006 (DAQ), this would be the earliest that a hearing on the Request For Agency Action could be held; however, at this meeting the Parties, including the Executive Secretary and the Sevier Power Company, may request the Board to rule on Preliminary Motions, and that the actual hearing, if necessary may more likely be scheduled for the February 2006 Board Meeting, with a written order being approved at the March 2006 Board Meeting. A decision made by the Board on the Request For Approval can be appealed by any party to the Court of Appeals. A Court of Appeal review of the final agency action, could take up to another year, once the appeal has been filed.

The uncertainty associated with the formal adjudicative process based on both Requests For Agency Action, coupled with the appeal of the decision denying standing to the Court of Appeals has required the Sevier Power Company to put on hold the construction of the power plant authorized by the October 12, 2004 Approval Order.

The Sevier Power Company requests the Executive Secretary to hold in abeyance the running of the 18 month period for construction to start from the date that the first Request For Agency Action was filed (November 1, 2004) until the formal adjudication process, including any appeals, is concluded and the review process confirms that the Sevier Power Company has a valid Approval Order. Please advise if further action on the part of Sevier Power Company is necessary in order to obtain the abeyance period requested. If you have any question, please call me at the number mentioned above.

Sincerely,

FINLINSON & FINLINSON, PLLC

Fred W. Finlinson

FWF
cc: The Sevier Power Company

EXHIBIT B

Rick Sprott, Director
Utah Division of Air Quality
150 North 1950 West
Salt Lake City, Utah 84116

April 5, 2007

UTAH DEPARTMENT OF
ENVIRONMENTAL QUALITY
APR 9 2007
DIVISION OF AIR QUALITY

Dear Mr. Sprott;

I have recently heard that the permit for the Sevier Power Company has been amended. It is our understanding that the time period to start construction has been extended without public comment. Any extension of time period to construct should have been advertized in our local newspaper. Something needs to be changed if this is allowed to happen and the people that will be affected the most are not notified of any changes. The data collected for this permit goes back to the year of 2000 as it is. We ask you to reverse this decision and seek public comment on the issue.

Sincerely;

James O. Kennon

James O. Kennon, President
Sevier Citizens For Clean
Air And Water, Inc.
146 North Main Street, Suite 27
P.O. Box 182
Richfield, Utah 84701

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY
APR 25 2007
DIVISION OF AIR QUALITY

DIVISION OF AIR QUALITY
REQUEST FOR PUBLIC INFORMATION

Requester's Name: James O. Kennon

Company Name: Save Our Air & Resources

Address: P.O Box 182, Richfield Ut 84701 Telephone: (435) 896-7822
sccow@yahoo.com

Today's Date: April 25, 2007

In accordance with the Governmental Records Access Management Act (GRAMA), I am requesting to view the following record(s) (specifically described):

All correspondence with all parties concerned in extending the construction date for Sevier Power Company. Any legal notice or comment period associated with the above action. Copy of rule amending permit for extension of time to construct.

Copying policy and fees:

1. We will process your copying request as soon as possible. However, depending on the number of copies requested and file room workload, copying may take up to ten (10) working days. Copies will be available for pickup or mailing upon payment of copying fee, in the form of exact cash or check.
2. Cost of copies $0.25 per page.
3. Copies made by the requestor are $.05 per page after the first ten pages.

I understand the above copying policy, and if I desire that copies be produced, I am prepared to pay copying fees as described above.

James O. Kennon — April 25, 2007
(Signature) (Date)

AGENCY USE ONLY

Department:	Environmental Quality
Division:	Air Quality
Address:	150 North 1950 West, Salt Lake City, Utah 84116
Mailing Address:	P.O. Box 144820, Salt Lake City, Utah 84114-4820

Total Number of Copies _____ Copying Fee:

Mailing Fee:

Total:

Date of Request:

Date Completed:

Division Signature:

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

State of Utah

Department of
Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

DAQ-038-07

May 8, 2007

James O. Kennon
Save Our Air and Resources
Sevier Citizens for Clean Air and Water
P.O. Box 182
Richfield, Utah 84701

Re: 18 Month Review of Approval Order for Sevier Power Company

Dear Mr. Kennon:

I write in response to your April 5, 2007 letter and Government Records Access Management Act (GRAMA) request of April 25, 2007.

Your letter states: "I have recently heard that the permit for Sevier Power Company has been amended. It is our understanding that the time period to start construction has been extended without public comment." Your GRAMA request asks for "[a]ll correspondence with all parties concerned in extending the construction date for Sevier Power Company. Any legal notice or comment period associated with the above action. Copy of rule amending permit for extension of time to construct."

To respond to your requests for information, the Sevier Power Approval Order has not been amended, nor has any amendment been requested or required. The Sevier Power Company Approval Order is available for your inspection on the Division of Air Quality website: http://www.airquality.utah.gov/Permits/DOCS/AN2529001-04.pdf.

Enclosed you will find a letter sent by Sevier Power Company to the Executive Secretary in November of 2005. The letter concluded with a request that the Executive Secretary "hold in abeyance the running of the 18 month period for construction to start from the date that the first Request for Agency Action was filed . . . until the formal adjudication process, including any appeals, is concluded and the review process confirms that the Sevier Power Company has a valid Approval Order."

The Executive Secretary reviewed this letter at the time it was received and determined that no persuasive reason existed for revoking the Approval Order, but did not issue a formal response. The only document

generated by the Division of Air Quality in this matter was a handwritten note (also enclosed) written by the permit engineer.

In the April 4, 2007 Air Quality Board meeting, the Board requested that the Executive Secretary formalize in writing the decision on the request made by SPC's November 17, 2005 letter. The Division of Air Quality received the Board's final order on May 4, and therefore has not yet provided the written decision. A copy of the order is enclosed with this letter.

To conclude, no extension was required under the regulation, and none was granted. The Approval Order has not been amended, nor has Sevier Power requested any amendment. Therefore, the enclosed documents are the only relevant documents in the possession of the Division of Air Quality. The Division of Air Quality will send you a copy of the Executive Secretary's response to Sevier Power Company when it is completed.

Thank you for this opportunity to be of assistance.

Sincerely,

Richard W. Sprott
Executive Secretary, Utah Air Quality Board

cc: Fred Nelson
Paul McConkie
Christian Stephens
Fred Finlinson
Brian Burnett
Marty Banks

Enclosures

12/19/05 contacted
Re: 18 month
Tech analysis

EXHIBIT C

BEFORE THE
UTAH AIR QUALITY BOARD

UTAH DEPARTMENT OF
ENVIRONMENTAL QUALITY
MAY - 4 2007
DIVISION OF AIR QUALITY

In the Matter of:	*	
	*	
Sevier Power Company Power Plant Sevier County, Utah DAQE-AN2529001-04	*	Order
	*	
And	*	
Unit 3, Intermountain Power Service Corporation, Millard County, Utah DAQE-AN0327010-04	*	
	*	

On April 4, 2007, the Utah Air Quality Board in the above-entitled matters heard dispositive motions on Sierra Club's Requests for Agency Action appealing the Approval Orders granting permits to Sevier Power Company ("SPC") to construct and operate a coal-fired power plant in Sevier County, Utah ("SPC Appeal") and to Intermountain Power Service Corporation ("IPSC") to construct and operate a Unit 3 in Millard County, Utah ("IPSC Appeal"). Joro Walker and David Becker appeared for the Sierra Club, Blaine Rawson appeared for IPSC, Fred W. Finlinson and Brian W. Burnett appeared for SPC, Martin K. Banks appeared for PacifiCorp (granted intervention in the SPC Appeal as per Sierra Club and PacifiCorp Stipulation Regarding Intervention into SPC Matter dated January 25, 2007), and Paul M. McConkie and Christian C. Stephens appeared for the Executive Secretary. Fred Nelson acted as counsel for the Board. Utah Air Quality Board members present were Ernest E. Wessman, Dianne R. Nielson, Wayne M. Samuelson, H. Craig Petersen, James R. Horrocks, Nan Bunker, Stead Burwell, Stephen C. Sands, Don J. Sorensen, Kathy Van Dame, and, Darrell Smith. Mr. Wessman, Mr. Sands, and

Ms. Van Dame recused themselves. Mr. Wessman left the proceeding. Mr. Sands remained in the proceeding but did not participate or vote. Ms. Van Dame remained in the proceeding and did not vote but did make comments and asked questions. IPSC objected to Ms. Van Dame making comments and asking questions. Mr. Horrocks, who chaired the hearing, advised that once the Board member recused herself, and therefore would not vote, the Board, being made aware of the conflict, would allow participation.

After review of the written motions and memorandums in support, the Board heard summary oral argument on each motion and made the following decisions:

1. The Sierra Club filed a Motion for Leave to Amend its Request for Agency Action to add an Issue 10 in the SPC Appeal and filed a Motion for Summary Judgment based on the issue raised in that amendment that the SPC approval order was allegedly invalid because construction had not commenced within 18 months. The Board granted the Motion for Leave to Amend but denied the Motion for Summary Judgment and requested that the Executive Secretary formalize in writing the decision on an extension request made by SPC. The vote of the Board was seven in favor (Nielson, Peterson, Sorensen, Burwell, Bunker, Samuelson, and Smith), none opposed.

2. The Sierra Club filed a Motion for Summary Judgment in the IPSC Appeal based on Issues 20 and 21 of its First Amended Request for Agency Action alleging that changes to the approval order were not properly noticed for public comment and were made without required modeling and analyses and without changing permit terms and conditions. The Board denied the Motion for Summary Judgment by a vote of six in favor (Nielson, Peterson, Sorensen, Bunker, Samuelson, and Smith) and one opposed (Burwell) concluding there were contested issues of fact.

3. IPSC, SPC, PacifiCorp, and the Executive Secretary filed Motions for Judgment on the Pleadings on the issue of whether the Executive Secretary appropriately considered Integrated Gasification Combined Cycle ("IGCC") in the BACT determination for the IPSC Unit 3 and the SPC Plant. The Board denied the motions of each of the parties on the IGCC issue by a vote of five in favor (Nielson, Peterson, Bunker, Samuelson, and Burwell) and two opposed (Sorensen and Smith) on the basis that there were contested issues of fact that would require an evidentiary hearing and not just questions of law.

4. IPSC, SPC, PacifiCorp, and the Executive Secretary filed Motions for Judgment on the Pleadings on the issue of whether the Executive Secretary appropriately addressed carbon dioxide and other greenhouse gases relating to IPSC Unit 3 and the SPC Plant. The Board granted the Motions for Judgment on the Pleadings on this issue (Issue 1 in the SPC Appeal and Issue 3 in the IPSC Appeal) by a vote of seven in favor (Nielsen, Peterson, Burwell, Samuelson, Smith, Bunker, and Sorenson) and none opposed.

While the United States Supreme Court has recently determined that carbon dioxide and other greenhouse gases come within the definition of "air pollutant" subject to regulation under the federal Clean Air Act (Massachusetts v EPA, 127 S.Ct. 1438 (April 2, 2007)), neither the EPA (as recognized in the U.S. Supreme Court opinion) nor the Utah Air Quality Board have, to date, promulgated rules requiring limitations or consideration of carbon dioxide or other greenhouse gases as part of a new source review or a BACT determination. The definition of "air pollution" as defined in UCA Section 19-2-102(3) over which the Board has authority to control and regulate (UCA Section 19-2-104) is "the presence in the ambient air of one or more air contaminants in the quantities and duration and under conditions and circumstances as is or

tends to be injurious to human health or welfare . . . as determined by the rules adopted by the board." Inasmuch as the Board has yet to promulgate rules governing carbon dioxide or other greenhouse cases, it has not, as a matter of law, required limitations or consideration of carbon dioxide or other greenhouse gases as part of the approval order or permit process.

The Board rejects Sierra Club's argument that the definition of BACT requires consideration of all pollutants that could be regulated, to include carbon dioxide, and other greenhouse gases. The Board interprets the language of its rule to mean that the phrase "pollutant subject to regulation under the Clean Air Act and/or the Utah Air Conservation Act" in the definition of BACT (UAC R307-101-2) references pollutants for which the Board has established rules, not pollutants that could potentially be subject to rules. Since the Board has not promulgated rules governing carbon dioxide and other greenhouse gases, the Executive Secretary had no rules to enforce, and, with respect the issue of not requiring limitations and consideration of carbon dioxide and other greenhouse gases, the Executive Secretary correctly, as a matter of law, issued approval orders to IPSC and SPC.

5. Sierra Club withdrew its Motion for Leave to Amend its Request for Agency Action to add an Issue 22 in the IPSC Appeal and also withdrew its Motion for Summary Judgment based on that amendment. Therefore, no action of the Board is required with respect to these motions.

6. IPSC withdrew its Motion for Judgment on the Pleadings on Issue 5 in Sierra Club's First Amended Request for Agency Action in the IPSC Appeal. Therefore, no action of the Board is required with respect to that motion.

This Order is not considered final for purposes of any party's right to apply for

reconsideration or review pursuant to Utah Code Ann. § 63-46b-13 or right to petition for judicial review under Utah Code Ann. § 63-46b-16 until the Board issues a final order on all issues in the respective Request for Agency Action in the SPC Appeal and the IPSC Appeal.

Dated this 2nd day of May, 2007.

James R. Horrocks, Presiding Officer
Utah Air Quality Board

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May, 2007, I caused a copy of the forgoing Order to be mailed by United States Mail, postage prepaid, to the following:

Joro Walker
David Becker
Western Resource Advocates
425 East 100 South Street
Salt Lake City, Utah 84111

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

Chris Stephens
Assistant Attorney General
Utah Division of Air Quality
150 North 1950 West
Salt Lake City, Utah 84114

Paul McConkie
Assistant Attorney General
160 E 300 S
Salt Lake City, Utah 84114

Fred Finlinson
Finlinson & Finlinson PLLC
11955 Lehi-Fairfield Rd
Saratoga Springs, Utah 84043

Martin K. Banks
Stoel Rives
201 South Main, Suite 1100
Salt Lake City, Utah 84111

Michael G. Jenkins
Assistant General Counsel
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, Utah 84111

E. Blaine Rawson
Holme Roberts and Owens
299 S Main Street #1800
Salt Lake City, 84111-2263

Brian W. Burnett
Callister Nebeker and McCullough
10 East South Temple, Suite 900
Salt Lake City, Utah 84133

H. Michael Keller
Matthew F. McNulty, III
VanCott Bagley Cornwall and McCarthy
50 South Main Street, Suite 1600
Salt Lake City, Utah 84114-0340

Fred G Nelson
Counsel, Utah Air Quality Board
160 East 300 South 5th Floor
Salt Lake City, Utah 84114-0873

EXHIBIT D

State of Utah

Department of Environmental Quality

Dianne R. Nielson, Ph.D.
Executive Director

DIVISION OF AIR QUALITY
Richard W. Sprott
Director

JON M. HUNTSMAN, JR.
Governor

GARY HERBERT
Lieutenant Governor

DAQ-041-07

June 6, 2007

Fred W. Finlinson
FINLINSON & FINLINSON, PLLC
11955 Lehi/Fairfield Rd.
Saratoga Springs, UT 84043

Re: 18 Month Review of Approval Order for Sevier Power Company

Dear Mr. Finlinson:

On November 17, 2005, you submitted the attached letter to John Jenks on behalf of Sevier Power Company (SPC). The letter requested that I hold in abeyance the running of the 18 month period for construction of the SPC power plant to start from the date that the first Request for Agency Action was filed until the formal adjudication process, including any appeals, is concluded and the review process confirms that there is a valid Approval Order. The letter referenced the ongoing efforts of two environmental groups to challenge the Approval Order before the Air Quality Board, and that the ongoing litigation had required the Sevier Power Company to put construction on hold.

At that time, the request was reviewed by the Division of Air Quality, pursuant to Utah Admin. Code R307-401-11, (the governing 18 month review provision), and the decision was made to not revoke the Approval Order. Your letter requested no formal response, and consistent with the Division's standard practice regarding 18 month reviews, no formal response letter was issued.

Why this formal response now? As you know, at the April 4, 2007 Air Quality Board meeting, the Board allowed the Sierra Club to amend its Request for Agency Action to include a new issue. This new claim calls into question whether an 18 month review took place pursuant to R307-401-11, and the resulting decision therefrom. Sierra Club moved for summary judgment to invalidate the Approval Order on that basis, but the Board denied the motion. However, because the issue has been raised, the Board has ordered that "the Executive Secretary formalize in writing the decision on an extension request made by SPC" to clarify what transpired during that period. *See* Air Quality Board Order of May 2, 2007.

Governing Regulation

At the time the Approval Order was issued, the governing regulation was Utah Admin. Code R307-401-11, which stated: "[a]pproval orders issued by the executive secretary in accordance with the provisions of R307-401 shall be reviewed eighteen months after the date of issuance to determine the status of construction, installation, modification, relocation or establishment. If a continuous program of construction, installation, modification, relocation or establishment is not proceeding, the executive secretary may revoke the approval order."

Sevier Power Company Approval Order 18 Month Review

On October 12, 2004, the Approval Order to Sevier Power Company was issued to construct and operate a new coal-fired power plant in Sevier County, Utah. Almost immediately thereafter, on November 1, 2004 and November 15, 2004, respectively, Sevier County Citizens for Clean Air and Water and Sierra Club/Grand Canyon Trust filed Requests For Agency Action before the Air Quality Board challenging the issuance of the Approval Order. By way of memorializing, on November 17, 2005, your letter on behalf of Sevier Power Company was submitted to the Division of Air Quality. The letter cited the attendant delays in construction of the power plant necessitated by the ongoing litigation before the Board, which had required Sevier Power Company to put on hold the construction of the power plant. The letter requested that the running of the 18 month period for construction be held in abeyance for construction to start from the date that the first Request for Agency Action was filed until the formal adjudication process, including any appeals, is concluded and the review process confirms that the Sevier Power Company has a valid Approval Order.

With the understanding that the expressly-stated purpose of the 18 month review requirement is "to determine the status of construction, installation, modification, relocation or establishment" (Utah Admin. Code R307-401-11) and that revocation is discretionary with the Executive Secretary, the matter was reviewed by New Source Review Engineer John Jenks, who in turn consulted with his supervisor Rusty Ruby of the New Source Review section. They in turn consulted with Regg Olsen of the Permitting Branch, and then with me. Based upon this review, it was determined that no persuasive reason existed for revocation, and I consequently did not revoke the Approval Order. No formal response to the letter was requested, and again, consistent with the DAQ's standard practice regarding 18 month reviews, none was issued. Although the regulation in place at the time of the issuance of SPC's Approval Order did not require an extension, in light of the Board's order, this letter formalizes in writing my decision made at that time not to revoke the Approval Order.

Thank you for this opportunity to be of assistance.

Sincerely,

Richard W. Sprott
Executive Secretary, Utah Air Quality Board

cc: Fred Nelson
Brian Burnett
Christian Stephens
Paul McConkie
Marty Banks
Blaine Rawson
Joro Walker
David Becker
Mike Jenkins

EXHIBIT E

FILED
UTAH APPELLATE COURTS

DEC 07 2006

IN THE UTAH COURT OF APPEALS

----ooOoo----

James O. Kennon and Dick Cumiskey, Petitioners, v. Air Quality Board and Sevier Power Company, Respondents.	MEMORANDUM DECISION (Not For Official Publication) Case No. 20060778-CA F I L E D (December 7, 2006) 2006 UT App 486

Original Proceeding in this Court

Attorneys: James O. Kennon, Richfield, and Dick Cumiskey, Monroe, Petitioners Pro Se
Mark L. Shurtleff and Fred G. Nelson, Salt Lake City, for Respondent Air Quality Board

---

Before Judges Bench, Billings, and Thorne.

PER CURIAM:

James O. Kennon and Dick Cumiskey petition for review of the Air Quality Board's (the Board) final decision issued August 7, 2006.

The Board initially filed a motion to dismiss the petition on the basis that Kennon and Cumiskey were not proper parties herein. Based on their response to the motion to dismiss, the court allowed Kennon and Cumiskey to substitute themselves with the real party in interest pursuant to rule 38(b) of the Utah Rules of Appellate Procedure. See Utah R. App. P. 38(b). Kennon and Cumiskey subsequently substituted Sevier Citizens for Clean Air and Water, Inc. (Sevier Citizens) as the real party in interest. However, the court noted that Sevier Citizens was an incorporated entity. Accordingly, the court ordered Sevier Citizens to file an amended docketing statement by and through counsel. Rather than obtain counsel, Kennon and Cumiskey have now filed a response to this court's order, requesting this court to "reinstate" them as pro se petitioners.

RECEIVED
DEC - 7 2006
DEQ
Environmental Response & Remediation

As the Board noted in its initial motion to dismiss, Kennon and Cumiskey were not parties to the proceedings below. Pursuant to Utah Code section 63-46b-14, only "[a] party aggrieved may obtain judicial review of final agency action." Utah Code Ann. § 63-46b-14(1) (2004). Thus, Kennon and Cumiskey, as individuals, may not file a petition for review. Moreover, as this court explained in its previous order, Sevier Citizens's status as a corporation "precludes self-representation because corporations are artificial entities that are not allowed to represent themselves in court." Hartford Leasing Corp. v. State, 888 P.2d 694, 700 (Utah Ct. App. 1994). In addition, "[a] nonlawyer may not undertake legal representation of a corporate litigant." DeBry v. Cascade Enters., 879 P.2d 1353, 1362 (Utah 1994). Instead, it is well settled in Utah that "a corporate litigant must be represented in court by a licensed attorney." Tracy-Burke Assocs. v. Dep't of Employment Sec., 699 P.2d 687, 688 (Utah 1985) (per curiam). Because Kennon and Cumiskey have failed to obtain counsel, we must dismiss this petition. See id.

Accordingly, we dismiss the petition.

Russell W. Bench

Russell W. Bench,
Presiding Judge

Judith M. Billings

Judith M. Billings, Judge

William A. Thorne Jr., Judge

CERTIFICATE OF MAILING

I hereby certify that on the 7th day of December, 2006, a true and correct copy of the attached DECISION was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

DICK CUMISKEY
270 E 2200 N
MONROE UT 84754

JAMES O. KENNON
312 N 300 W
KOOSHAREM UT 84744

MARK L SHURTLEFF
ATTORNEY GENERAL'S OFFICE
FRED G NELSON
ASSISTANT ATTORNEY GENERAL
160 E 300 S 5TH FL
PO BOX 140873
SALT LAKE CITY UT 84114-0873

DEPT OF ENVIRONMENTAL QUALITY
ATTN: KIMBERLY SELLERS
168 N 1950 W
SALT LAKE CITY UT 84114-4810

Deborah Hernandez
Judicial Secretary

TRIAL COURT: DEPT OF ENVIRONMENTAL QUALITY, AN2529001-04
APPEALS CASE NO.: 20060778-CA

Fred W. Finlinson (1078)
Finlinson & Finlinson, PLLC
11955 Lehi-Fairfield Road
Saratoga Springs, UT 84043
Telephone: 801-554-0765
Facsimile: 801-766-8717

Brian W. Burnett (3772)
James D. Gilson (5472)
Callister Nebeker & McCullough
10 East South Temple, Suite 900
Salt Lake City, UT 84133
Telephone: 801-530-7428
Facsimile: 801-364-9127

Attorneys for Sevier Power Company

UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY
JUL 20 2007
DIVISION OF AIR QUALITY

BEFORE THE UTAH AIR QUALITY BOARD

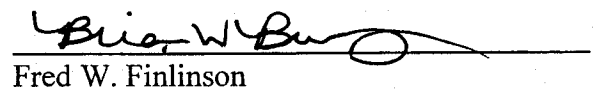
In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	**SEVIER POWER COMPANY'S RESPONSE TO SAVE OUR AIR AND RESOURCES AND JAMES O. KENNON AND DICK CUMISKEY'S STATEMENT OF STANDING AND PETITION TO INTERVENE AND REQUEST FOR AGENCY ACTION**

The Sevier Power Company ("SPC"), through undersigned counsel, hereby submits this response to the Notification of Further Proceedings ("Notification") issued by the Utah Air Quality Board ("Board") on July 11, 2007 in the above-captioned matter. The Notification requested that any responses to be filed by July 20, 2007 to the Statement of Standing and Petition to Intervene filed on behalf of Save Our Air and Resources ("SOAR") and James O. Kennon and Dick Cumiskey.

SPC has reviewed the Executive Secretary's Response dated July 20, 2007, to the Notification in this proceeding. SPC concurs with the arguments and request for relief as set forth in the Executive Secretary's Response and urges the Board to adopt the same.

RESPECTFULLY SUBMITTED this 20th day of July, 2007.

FINLINSON & FINLINSON, PLLC
CALLISTER NEBEKER & McCULLOUGH



Fred W. Finlinson
Brian W. Burnett
James D. Gilson
Attorneys for Sevier Power Company

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2007, the undersigned served a copy of the foregoing **SEVIER POWER COMPANY'S RESPONSE TO SAVE OUR AIR AND RESOURCES AND JAMES O. KENNON AND DICK CUMISKEY'S STATEMENT OF STANDING AND PETITION TO INTERVENE AND REQUEST FOR AGENCY ACTION** on the following by:

Joro Walker
David H. Becker
Western Resource Advocates
425 East 100 South
Salt Lake City, Utah 84111
jwalker@westernresources.org
dbecker@westernresources.org

VIA EMAIL

Rick Sprott, Executive Director
Cheryl Heying, Acting Executive Director
Division of Air Quality
150 North 1950 West
Salt Lake City, Utah 84116
rsprott@utah.gov

VIA EMAIL

Chris Stephens
Assistant Attorney General
Environment Division
Utah Attorney General's Office
150 North 1950 West
Salt Lake City, UT 84114
cstephens@utah.gov

VIA EMAIL

Paul M. McConkie
Assistant Attorney General
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
pmcconkie@utah.gov

VIA EMAIL

Michael G. Jenkins
Assistant General Counsel
PacifiCorp
1407 North Temple #310
Salt Lake City, Utah 84116
Michael.Jenkins@PacifiCorp.com

VIA EMAIL

Fred W. Finlinson
Finlinson & Finlinson, PLLC
11955 Lehi/Fairfiled Road
Saratoga Springs, Utah 84043
f2fwcrf@msn.com

VIA EMAIL

Fred G. Nelson
Attorney General's Office
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

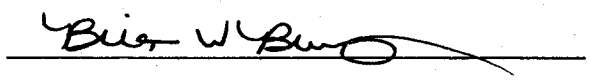
VIA EMAIL

E. Blaine Rawson
Holme Roberts & Owens, LLP
299 South Main Street, Suite 1800
Salt Lake City, UT 84111-2263
Blaine.Rawson@hro.com

VIA EMAIL

H. Michael Keller
Matthew F. McNulty, III
VanCott Bagley Cornwall & McCarthy
50 South Main Street, Suite 1600
Salt Lake City, UT 84114-0340
mkeller@vancott.com
mmcnulty@vancott.com

VIA EMAIL

Martin K. Banks
Stoel Rives
201 South Main Street, Suite 1100
Salt Lake City, UT 84111
mkbanks@stoel.com

VIA EMAIL