On the Record Review: Efficiency for Environmental Permit Appeals in Utah and Other Recent Developments at the Utah Department of Environmental Quality

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In the last ten years, the Utah Department of Environmental Quality (DEQ) has seen an increase in the number of challenges to environmental permits issued by the six divisions of the DEQ. Historically, under Utah Code section 19-1-301, each permit challenge required a trial-type proceeding before either one of the DEQ boards or a hearing officer appointed by such board. *See* Utah Code Ann. § 19-1-301 (LexisNexis Supp. 2012). These proceedings were often held up for years with motion practice and evidence gathering before the formal hearing was even scheduled.[1] Once a hearing was held before the hearing officer, the recommended decision was presented to the applicable division board for review. *See id.* § 19-1-301(6)(a)–(b). The boards were generally made up of more than ten people, many of whom were not lawyers, and were not familiar with the rules governing formal administrative hearings and review of a hearing officer or an Administrative Law Judge (ALJ) decision.

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Moreover, the boards were caught between rulemaking functions and adjudicative functions creating potential conflicts of interest. In particular, it was often difficult for board members to shift from a role in which all public input was welcomed to that of an adjudicator who was supposed to avoid ex parte communications. All of this resulted in an inefficient process and inconsistent results.

In an effort to streamline the adjudicative process for permit appeals, create some decision-making consistency within DEQ, and eliminate the boards' multifunction conflict of interest, two bills were proposed in the 2012 legislative session: Senate Bill 21 (DEQ Boards Revision Bill) (SB 21) and Senate Bill 11 (DEQ Adjudicative Proceedings) (SB 11). To facilitate collaboration in drafting these bills, the Executive Director of DEQ, Amanda Smith, coordinated a Kaizen process in the fall of 2011 involving a diverse group of business, government, legal, and nongovernment/citizen stakeholders. All of the Kaizen process participants were devoted to improving DEQ's boards, procedures, and legal structure.

Both bills passed in the 2012 session of the Utah State Legislature with wide margins of bipartisan support. SB 11 passed the Utah Senate on January 25, 2012, with a favorable vote of 21-4 (4 abstentions) and passed the Utah House of Representatives on

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February 1, 2012, with a unanimous vote of 73-0 (2 abstentions). The Governor signed the bill on March 22, 2012. SB 21 also passed the Utah Senate with a favorable vote on February 6, 2012, with a vote of 23-6 (0 abstentions) and passed the Utah House of Representatives on February 22, 2012, with a vote of 47-18 (10 abstentions). The Governor signed SB 21 into law on March 23, 2012.

The following is a brief history of the origins of both bills and an explanation of how the new procedures will generate better decisions and improve the efficiency of DEQ. As DEQ's budget has decreased in recent years, the agency has been required to do more with less. These bills provide the framework to achieve that goal.

History and Purpose of SB-11

SB-11 authorizes on-the-record adjudicative review of DEQ environmental permit decisions by an ALJ utilizing an appellate-type procedural format rather than the formal trial-type evidentiary hearing mandated by the Utah Administrative Procedures Act (UAPA). *See* Utah Code Ann. § 63G-4-206 (LexisNexis 2011). Nevertheless, UAPA hearing procedures continue to apply to DEQ proceedings that do not involve the issuance or denial of environmental permits such as, for example, civil enforcement proceedings.

The intent behind SB-11 is to adopt an administrative review procedure that is similar to that currently utilized by the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB). The procedure for review of federal environmental permits is codified at 40 CFR Part 124. The Part 124 procedures apply to virtually all EPA environmental permit decisions at the Federal level. Rather than a trial-type evidentiary hearing for permit challenges, the Federal system employs an on-the-record review of the agency's decision in granting the challenged permit. The review is limited to an administrative record with very little opportunity for additional evidence gathering.

Historically, EPA, like the State of Utah, utilized administrative trial-type hearings for adjudicative review of certain environmental permits most notably National Pollutant Discharge Elimination System (NPDES) discharge permits under the Federal Clean Water Act (CWA). This trial-type review procedure was employed by EPA, in large part, because of certain early United States Court

of Appeals decisions interpreting the CWA to require formal evidentiary hearings under the Federal Administrative Procedures Act (APA). *See, e.g., Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 876 (1st Cir. 1978) ("[T]he APA does apply to proceedings pursuant to [CWA §] 402."); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1264 (9th Cir. 1977); *United States Steel Corp. v. Train*, 556 F.2d 822 (7th Cir. 1977).

During the 1980s, however, it became apparent that formal trial-type adjudicative hearings were an inefficient and unnecessary legal procedure for review of environmental permits. EPA therefore began to modify its adjudicative hearing rules moving away from formal trial-type evidentiary hearings in order to make the process more efficient. At the same time, the opinions of two federal appellate courts questioned the validity of the earlier decisions mandating formal evidentiary hearings. *See Chem. Waste Mgmt. v. United States Envtl. Prot. Agency*, 873 F.2d 1477 (D.C. Cir. 1989); *see also Buttrey v. United States*, 690 F.2d 1170, 1175 (5th Cir. 1982) (Congress did not intend that the "public hearings" called for in [CWA] section 404 be trial-type hearings on the record.). For example, in *Chemical Waste Management*, the D.C. Circuit approved procedural rules adopted by EPA under the Resource Conservation and Recovery Act authorizing informal procedures for administrative hearings. 873 F.2d at 1478. In addition, the appellate court specifically cited the *Seacoast* and *Marathon Oil* decisions and said, "we decline to adhere any longer to the presumption raised in [this line of cases]." *Id.* at 1481. Finally, the appellate court explained,

> it is not our office to presume that a statutory reference to a "hearing," without more specific guidance from Congress, evinces an intention to require formal adjudicatory procedures, since such a presumption would arrogate to the court what is…clearly the prerogative of the agency, *viz.*, to bring its own expertise to bear upon the resolution of ambiguities in the statute that Congress has charged it to administer.

Id. at 1482.

The trend away from formal adjudicatory hearings for Federal environmental permits continued during the 1990s, when, on February 21, 1995, the President directed all Federal agencies to review and eliminate obsolete or burdensome rules. In response, on December 11, 1996, EPA published in the *Federal Register* a proposed rule to Streamline the National Pollutant Discharge Elimination System Program Regulations. 61 Fed. Reg. 65268 (Dec. 11, 1996). Among other things, EPA determined that the procedural rules requiring trial-type hearings for review of CWA permits needed to be replaced: "today's notice…would revise the permit appeals process for EPA- issued NPDES permits by replacing the evidentiary hearing procedures…with a direct appeal to the Environmental Appeals Board." *Id.* at 65269. EPA justified its actions by referring to the formal evidentiary hearing procedures as unnecessary. *Id.* at 65275. In addition, one of EPA's primary arguments was that of efficiency: "EPA's experience with the evidentiary hearing process suggests that it causes significant delays in…permit issuance without causing noticeable improvements in the quality of the permit decisions made." *Id.* at 65276. Moreover, "EPA statistics suggest that "it takes an average of 18-21 months to complete the 2-part appeals process…[and] EPA has maintained the process primarily due to concerns about the legality of adopting less formal procedures.…[T]hese concerns no longer hold true." *Id.* Finally, from a legal perspective, the agency explained, "EPA has concluded that due to the progress of the law in the Courts of Appeals, the *Seacoast* and *Marathon* decisions are **no longer good law**, and that the CWA may be interpreted not to impose a formal hearing requirement." *Id.* (emphasis added).

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On May 15, 2000, EPA finalized new administrative adjudicatory procedures, codified at 40 CFR Part 124, that adopt a single set of procedural rules for all environmental permits utilizing on-the-record appellate-type review in lieu of formal trial-type evidentiary hearing procedures. 65 Fed. Reg. 30886 (May 15, 2000). In the preamble accompanying the final rule, EPA

reported: "None of the comments received suggest that retaining formal adjudicatory proceedings is required under [CWA] section 402(a) or due process or consistent with the public interest. Therefore, EPA is today adopting the proposed rule, eliminating evidentiary hearing procedures." *Id*. at 30900. In the final rule itself, EPA specifically noted that: "EPA eliminated the previous requirement for…permits to undergo an evidentiary hearing after permit issuance." 40 C.F.R. § 124.21(b) (2012).

Following the promulgation of the streamlined permit review procedural rules in 2000, no one filed any appeal challenging the rule. Indeed, the revised EPA permit review procedures were subsequently upheld by reviewing federal courts. *See, e.g., Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 18 (1st Cir. 2006) ("The [EPA's] conclusion that evidentiary hearings are unnecessary and that Congress…did not mean to mandate evidentiary hearings seems reasonable…."). It is this federal model of on-the-record review proceedings that SB 11 is intended to emulate. DEQ realized, as had the EPA, that evidentiary hearings for permit review challenges was inefficient, caused significant delays, and did not produce consistent or more reasoned results. Instead, an on-the-record-review procedure for environmental permit challenges, implemented through SB 11, will result in better up-front permit drafting and more meaningful and efficient review.

History and Purpose of SB21

In addition to streamlining and improving the permit appeal procedures, DEQ was interested in reforming the DEQ division boards in both makeup and responsibility with the intent of making the boards more efficient. The DEQ boards had become too large in size to be able to create effective policy. Moreover, because they sometimes served in both adjudicative functions as well as rulemaking functions on the same matters, a potential conflict of interest existed that often made performing either task confusing and difficult.

The various environmental boards consist of individuals who, by state statute, represent a particular constituency affected by the particular program overseen by the board. Each board includes representatives of regulated industry, environmental groups, local governments, and public health professionals. The policy underlying the boards' makeup is to provide for input by affected stakeholders directly to board members representing their interests and to assure a diverse board membership.

As the number and complexity of permit appeals increased over the years, so did the tension between the board members' roles as policymakers and adjudicators. Conflicts of interest inevitably arose with regard to particular board members during contested adjudications, and some board members found it difficult to avoid ex parte contacts during such adjudications.

In an effort to address these concerns, in October 2011, the DEQ sponsored a two-day Kaizen process bringing a diverse group of stakeholders together to develop ideas to improve the procedures for adjudication and rulemaking within the agency. It was DEQ's intention to involve members of the public, members of the legal community, and members from state and federal regulatory agencies to collaborate on a bill that would improve all aspects of DEQ. A variety of stakeholders were invited to participate including non-governmental organizations, industry representatives and government representatives. After two long days of deliberation, the general contours of SB 21

were formed. The result was a framework for improving efficiency at DEQ.

The major ideas developed in the Kaizen process were to remove the adjudicative responsibilities of the boards and reduce the number of members on each of the boards. Additionally, the group agreed to give the Executive Director of DEQ the final adjudicative say on permit appeals after an on-the-record-review by an ALJ. These changes removed the potential conflict of interest between the boards' rulemaking and adjudicative functions and allowed the boards to fully function as a meaningful policy-making body.

Once these general ideas were established, more work was done to draft a bill that would put into law the results of the Kaizen process. It was the intention of SB 21 to capture the recommendations that came out of the Kaizen process. Specifically, SB 21 does this by reducing the number of representatives on each board to nine, one of whom is the executive director and the other eight are nominated by the executive director and appointed by the governor with the consent of the Utah senate. The make up of the boards under SB 21 includes one individual, who by training and expertise is an expert in the subject matters handled by the board; two non-federal government representatives; two representatives from the applicable regulated industry; one representative of a non-governmental organization; one public health representative; and one attorney with expertise in the particular subject matter. Additionally, some of the terminology in the previous statute was changed to better reflect applicable board responsibilities, such as changing the title of the heads of the various DEQ division heads to director rather than executive secretary. Many of the statutory board authorities were transferred to the directors, especially those that were purely administrative in nature, including issuance, amendment, renewal, or revocation of permits. By reducing the number of individuals on the boards and focusing the boards' responsibilities, SB 21 allows the boards to focus on more effective rulemaking and policy.

Legislative History of SB 11 and SB 21

Both SB 11 and SB 21 received an extraordinary amount of editing and critique before being signed into law in the spring of 2012. In September 2011, SB 11 was presented to the Natural Resource Agriculture and Environment Interim Committee. There was discussion about the purpose and history of the bill and how it would improve the DEQ adjudication process. No vote was held on the bill at this first presentation. Then, after the DEQ Kaizen process, both SB 11 and SB 21 were presented at a second gathering of the Natural Resource Agriculture and Environment Interim Committee in November 2012. After deliberation on both of the bills, they passed out of the Senate interim committee with favorable recommendations. The bills were further discussed and critiqued during the 2012 legislative session passing through the senate to the House Committees, where SB 21 was slightly amended. Finally, in May 2012, having passed through favorably on both chambers of the Utah Legislature, the Utah Governor signed the bills into law. This high level of scrutiny for both bills ensured the contents were well drafted and could be effectively implemented to improve the structure, efficiency, and functions of Utah's DEQ.

In order to fully implement this new legislation, the agency promulgated new procedural rules for administrative adjudication of DEQ permits. SB 21 gives the executive director of DEQ the authority to implement new rules that apply to all of the DEQ divisions. *See* Utah Code Ann. § 19-1-201(1)(d)(ii) (LexisNexis Supp. 2012). This grant of authority allows for continuity between the Divisions and allows for a streamlined rule adoption procedure. The new administrative adjudication rules were initially released for public comment in the Utah State Bulletin on August 15, 2012, when DEQ and the Utah Attorney General's Office published two notices proposing to delete the old DEQ administrative adjudication rules and to adopt new rules. In response to comments received on the new DEQ administrative adjudication rule, the DEQ published a revised rule on January 1, 2013, that took effect on January 31, 2013. The new rule will be codified in the Utah Administrative Code at R305-7. These new rules and the new legislation will provide the framework for the DEQ Divisions to draft comprehensive permits up front, and conduct a meaningful and timely review of those permits if a challenge is initiated. Overall, environmental permits in the state of Utah will be improved as a result of SB 11, SB 21, and the Agency's new implementing rules.

CONCLUSION

The two new DEQ statutes passed in the 2012 Utah General Session, SB 11 and SB 21, are intended to improve the efficiency and effectiveness of the DEQ divisions. SB 11 was modeled after the Federal EPA's adjudication procedure for review of environmental permits. This is a tested system that produces timely, consistent

and meaningful results for the EPA. Utah adopted similar procedures to what EPA had promulgated in order to improve the permit review adjudication procedures in the state of Utah. SB 21 was the result of a collaborative process where diverse stakeholders came together to brainstorm ways to improve the DEQ divisions. Those ideas were transformed into the language of SB 21, and will dramatically improve the rulemaking and policy functions of the DEQ division boards. The Utah DEQ has a continuing challenge to find ways to improve its function while dealing with a shrinking budget. These new bills allow the agency to do more with less.

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1. *Kennon v. Air Quality Bd.*, 2009 UT 77, 270 P.3d 417 (with respect to the same project as in the previous two cited cases, the Utah Supreme Court determined that despite the on-going multi-year litigation, the permit was invalid because the defendants had not commenced construction within the authorized statutory time period); *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2009 UT 76, 226 P.3d 719 (five years after initial permit granted to defendants, the Supreme Court finally reached the merits of the case and affirmed in part and reversed in part the agency's decision); *Utah Chapter of Sierra Club v. Air Quality Bd.*, 2006 UT 74, 148 P.3d 960 (two years after initial permit was issued and Plaintiffs petitioned to intervene with request for agency action, Utah Supreme Court held that parties had standing to challenge the permit and matter was remanded back to agency); *See, e.g., Utah Chapter of Sierra Club v. Air Quality Bd.*, 2006 UT 73, 148 P.3d 975 (two years after initial permit was issued and Plaintiffs filed request for agency action, Utah Supreme Court held that Plaintiffs had standing to challenge permit and matter was remanded to agency).