



State of Utah

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Environmental Quality

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Executive Director

DIVISION OF AIR QUALITY
Bryce C. Bird
Director

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DAQ-001-20

**UTAH AIR QUALITY BOARD
WORKING LUNCH**

Wednesday, January 8, 2020 – 11:30 a.m.
195 North 1950 West, Room 4100 (4th floor)
Salt Lake City, Utah 84116

Discussion about compliance and enforcement with the Attorney General's Office, Division staff, and the Board.

In compliance with the Americans with Disabilities Act, individuals with special needs (including auxiliary communicative aids and services) should contact Larene Wyss, Office of Human Resources at (801) 536-4281, TDD (801) 536-4284 or by email at lwyss@utah.gov.



Compliance & Enforcement

Presentation to the Utah Air
Quality Board, January 8, 2020
Utah Attorney General's Office



Director: "The director has the power to institute and maintain in the name of the state any and all enforcement proceedings." Utah Code 19-2-116(1).
(Utah Code §§ 19-2-110(1), 19-2-107(2)(a)(xiii)).



Two avenues: (1) Notice of Violation
(2) State District Court

Who Has the Authority to Enforce?

Notice of Violation Route

Process and Available Enforcement Tools




Utah Code §§ 19-2-110(1), 19-2-107(2)(a)(xiii)

The Director may issue a NOV when he “has reason to believe that a violation of any provision of this chapter or any rule issued under it has occurred.” 19-2-110(1)

The Director has authority to enforce the law through issuance of orders. 19-2-107(2)(a)(xiii)

- ▶ The NOV must “specify the provision of this chapter or rule alleged to be violated [and] the facts alleged to constitute the violation.” UCA § 19-2-110(1).
- ▶ Purpose: to place the source on notice of the accusations of violation.



NOV Requirements & Purpose

After NOV Issues

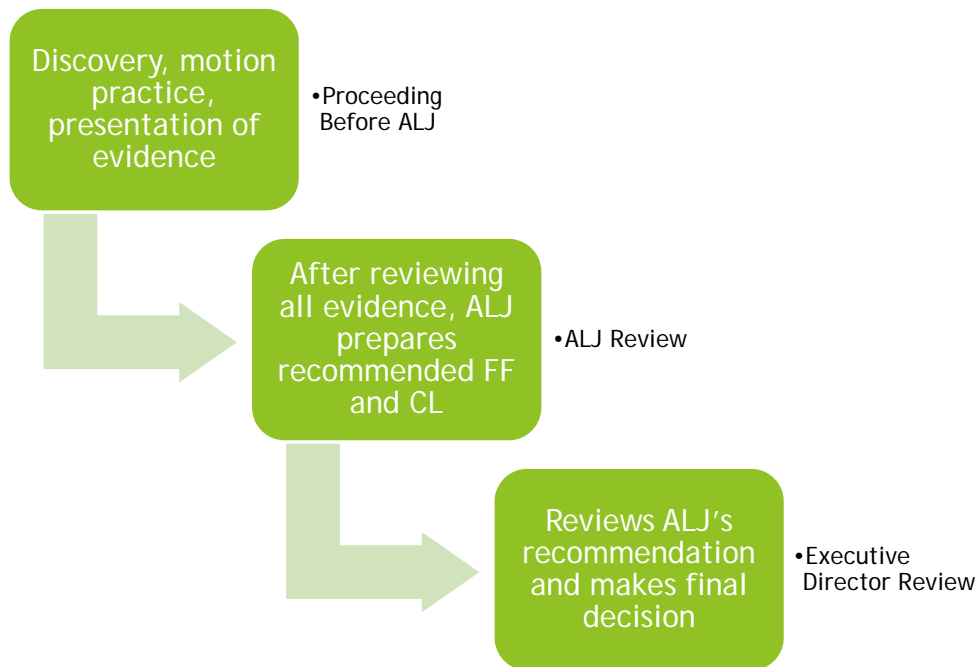
Not Contested

- ▶ Becomes final (violations are established by failure to contest) and enforceable in 30 days after issuance
- ▶ DAQ can sue for penalties or settle the NOV
- ▶ DAQ can ask for injunctive relief in district court

Contested

- ▶ Administrative enforcement proceeding starts before an Administrative Law Judge (ALJ)
- ▶ Utah Code § 19-1-301, Utah Administrative Procedures Act, and Utah Administrative Code R305-7 apply
- ▶ Formal adjudicative proceeding
- ▶ Settlement is still possible

Administrative Enforcement Proceeding



Executive Director's Decision



Final agency action



Subject to judicial review (Utah Court of Appeals or Utah Supreme Court)



Decision by one of the state appellate courts is the final decision and is not subject to further review

If DAQ Prevails in Administrative Enforcement Action, it Can...

“. . . seek enforcement of an order by seeking civil enforcement in the district courts.” Utah Code § 63G-4-501(1)(a)

Lawsuit for civil penalties (“not to exceed \$10,000 per day for each violation” Utah Code § 19-2-115(2)(a))

Penalty for each violation it proves

District court judge has considerable discretion to determine the penalty amount, but the cap is at \$10K per day

Injunction: asking the court to order the source to comply

State District Court Route

Process and Available Enforcement Tools



- ▶ The Director may go directly to state district court and file a lawsuit alleging violations of a permit, statute, or rule that applies to the source
- ▶ Director does NOT file a NOV and no administrative hearing is held before DEQ
- ▶ The entire case (fact of violations and penalty amount) is litigated in the state district court
- ▶ Discovery, motion practice, and evidentiary hearing available



State District Court Process

State District Court Process

- Same penalty determination as when the case is filed in the district court after administrative adjudication
- Judge has all the power and discretion to determine penalty within \$10K per day limit
- Appellate review available in the Utah Court of Appeals or Utah Supreme Court
- Settlement is always possible

Air Quality Board Role in Enforcement

Process and Available Tools



What is Air Quality Board's Role in Enforcement?

- ▶ (1) Review and either approve or disapprove settlement negotiated by the Director with civil penalty of \$25K or more (board ensures compliance with statutes and regulations) 19-2-104(3)(b)(i)

What is Air Quality Board's Role in Enforcement?

- ▶ (2) May recommend certain actions to the Director under 19-2-104(3)(a)(ii):
 - ▶ (a) to hold a hearing relating to any aspect of or matter in administering Air Conservation Act
 - ▶ (b) to issue orders to enforce Air Conservation Act
 - ▶ (c) to enforce orders through administrative or judicial proceeding
 - ▶ (d) to institute judicial proceedings to secure compliance with Air Conservation Act
 - ▶ (e) to advise, consult, contract, and cooperate with other agencies of the state, local governments, industries, other states, interstate or interlocal agencies, federal government, or interested persons or groups

What is Air Quality Board's Role in Enforcement?

- ▶ (3) Rulemaking authority under 19-2-104(1)
 - ▶ (a) the Board created general penalty policy in Utah Admin. Code R307-130
 - ▶ (b) the Board can amend this rule, but the statute caps the per day penalty amount at \$10K

R307-130-1. Scope

- ▶ This policy provides guidance to the director in negotiating with air pollution sources penalties for consent agreements to resolve non-compliance situations. It is designed to be used to determine a reasonable and appropriate penalty for the violations based on the nature and extent of the violations, consideration of the economic benefit to the sources of non-compliance, and adjustments for specific circumstances.

R307-130-2. Categories

- ▶ Violations are grouped in four general categories based on the potential for harm and the nature and extent of the violations. Penalty ranges for each category are listed.
- ▶ (1) Category A. \$7,000-10,000 per day:
 - ▶ Violations with high potential for impact on public health and the environment including:
 - ▶ (a) Violation of emission standards and limitations of NESHAP.
 - ▶ (b) Emissions contributing to nonattainment area or PSD increment exceedences.
 - ▶ (c) Emissions resulting in documented public health effects and/or environmental damage.
- ▶ (2) Category B. \$2,000-7,000 per day.
 - ▶ Violations of the Utah Air Conservation Act, applicable State and Federal regulations, and orders to include:
 - ▶ (a) Significant levels of emissions resulting from violations of emission limitations or other regulations which are not within Category A.
 - ▶ (b) Substantial non-compliance with monitoring requirements.
 - ▶ (c) Significant violations of approval orders, compliance orders, and consent agreements not within Category A.
 - ▶ (d) Significant and/or knowing violations of "notice of intent" and other notification requirements, including those of NESHAP.
 - ▶ (e) Violations of reporting requirements of NESHAP.

R307-130-2. Categories (Cont'd)

- ▶ (3) Category C. Up to \$2,000 per day.
- ▶ Minor violations of the Utah Air Conservation Act, applicable State and Federal Regulations and orders having no significant public health or environmental impact to include:
 - ▶ (a) Reporting violations
 - ▶ (b) Minor violations of monitoring requirements, orders and agreements
 - ▶ (c) Minor violations of emission limitations or other regulatory requirements.
- ▶ (4) Category D. Up to \$299.00.
- ▶ Violations of specific provisions of R307 which are considered minor to include:
 - ▶ (a) Violation of automobile emission standards and requirements
 - ▶ (b) Violation of wood-burning regulations by private individuals
 - ▶ (c) Open burning violations by private individuals.

R307-130-3. Adjustments

- ▶ The amount of the penalty within each category may be adjusted and/or suspended in part based upon the following factors:
 - ▶ (1) Good faith efforts to comply or lack of good faith. Good faith takes into account the openness in dealing with the violations, promptness in correction of problems, and the degree of cooperation with the State to include accessibility to information and the amount of State effort necessary to bring the source into compliance.
 - ▶ (2) Degree of wilfulness and/or negligence. In assessing wilfulness and/or negligence, factors to be considered include how much control the violator had over and the foreseeability of the events constituting the violation, whether the violator made or could have made reasonable efforts to prevent the violation, and whether the violator knew of the legal requirements which were violated.
 - ▶ (3) History of compliance or non-compliance. History of non-compliance includes consideration of previous violations and the resource costs to the State of past and current enforcement actions.
 - ▶ (4) Economic benefit of non-compliance. The amount of economic benefit to the source of non-compliance would be added to any penalty amount determined under this policy.
 - ▶ (5) Inability to pay. An adjustment downward may be made or a delayed payment schedule may be used based on a documented inability of the source to pay.

R307-130-4. Options

- ▶ Consideration may be given to suspension of monetary penalties in trade-off for expenditures resulting in additional controls and/or emissions reductions beyond those required to meet existing requirements. Consideration may be given to an increased amount of suspended penalty as a deterrent to future violations where appropriate.



Litigation Update

Enforcement Matters



When Does a Matter go to Litigation?



- ▶ Settlement negotiations broke down
- ▶ Source is not responsive (ignoring the agency's communication)
- ▶ Source is not complying and not paying the penalty
- ▶ Source is in bankruptcy

Quick Numbers

- ▶ In the last two years we have filed 9 cases and participating in 1 bankruptcy case
- ▶ Major source compliance: 2 cases (U.S. Magnesium)
- ▶ Minor source compliance: 7 cases (2 cases for asbestos section)
- ▶ 3 cases resolved with penalty paid and compliance achieved (two cases within a few months and one case within a year)
- ▶ 2 cases: Defendant (source) defaulted and penalty was sent to state collections to collect
- ▶ 4 cases are still pending (plus 1 bankruptcy case)

Current Enforcement Cases

- ▶ U.S. Magnesium (Tooele County): 3 NOVs
- ▶ JRJ Services (sand & gravel pit in Duchesne County): 2 NOVs
- ▶ Gordon Creek Energy (natural gas compressor station in Carbon County): 1 NOV
- ▶ Pacific Energy & Mining (oil & gas company in Grand County): bankruptcy
- ▶ Strang Excavating (crushing & screening operation in Salt Lake County (Kearns)): 1 NOV

U.S. Magnesium

Two NOVs in Third District Court (Tooele County); 1 NOV in administrative proceedings.

Reason: negotiations over penalties broke down.

Violations: failed stack tests (PM, HCl, chlorine), failures to test equipment, failures to submit various reports, failure to keep records and properly certify reports, failure to timely test.

U.S. Magnesium: Current Status

- ▶ Two separate cases were filed and recently (Nov. 2019) consolidated into one case.
- ▶ The case went through the initial stages of discovery and motion practice. One of the cases also was in administrative proceedings before ALJ earlier and we stipulated that the violations occurred.
- ▶ The main battle in the case is over duration of the violations and whether they lasted one day or multiple days (huge impact on the penalties).

U.S. Magnesium: Current Status

- ▶ Two rulings from the district court judge that U.S. Magnesium tried to appeal before the case was concluded (interlocutory appeal).
- ▶ (1) The district court can decide on the duration of the violations (one day vs. multiple days). It doesn't have to be an ALJ.
- ▶ (2) The district court can admit evidence showing that a violation lasted multiple days but there is no automatic presumption that the source is out of compliance for multiple days after a failed stack test and until the next successful stack test.

U.S. Magnesium: Current Status

- ▶ U.S. Magnesium filed two petitions for interlocutory appeal. DAQ opposed both.
- ▶ Utah Supreme Court agreed denying both petitions. The case will now proceed further in district court. Need to agree on discovery schedule.
- ▶ Third case: in administrative proceedings right now.
- ▶ Strategy is to file it with the district court and consolidate with the other case.

JRJ Services

Sand & gravel pit in Duchesne County

Violations: inadequate dust suppression efforts (no water sprays), unpermitted equipment

Reason: the source is not responsive to the agency (not responsive to other agencies as well - Division of Oil, Gas, and Mining)

JRJ Services: Current Status

- ▶ Complaint was filed to collect penalty and compel compliance.
- ▶ The company did not properly answer the complaint.
- ▶ DAQ asked for an entry of the default judgment. The judgment entered and the State Office of Debt Collections was successful at collecting \$67K penalty (\$2.5K is owing - the bank account didn't have enough funds - and will be collected).
- ▶ The company is still out of compliance even after we sent it the court's order compelling compliance and even after it has been collected on!
- ▶ DAQ is filing for civil contempt, additional fines, and compliance this week.

Gordon Creek Energy

Natural gas compressor station in Carbon County. Owned by the Canadian company.

Violations: unpermitted equipment

Reason: source was not responsive to the agency

Gordon Creek Energy: Current Status

- ▶ DAQ filed a district court case to collect penalties and compel compliance.
- ▶ As a result of that we had representatives of another company that was buying Gordon Creek's assets come in and talk to DAQ.
- ▶ This new company is responsible for compliance and will be taking steps to comply.
- ▶ Gordon Creek never answered the complaint, and DAQ motioned the court for entry of the default judgement.
- ▶ Default judgment entered, and DAQ referred the case to State Office of Debt Collections for collecting the penalty.
- ▶ Penalty amount is \$28K.
- ▶ The difficulty for collections is that the company is in Canada. Collections served a writ of garnishment on the new buyer (sale just went through about a month ago).

Pacific Energy & Mining

The Board approved the settlement with this company in the summer of 2019.

Penalty amount: \$71K.

The company filed for bankruptcy before the payment due date.

Automatic stay is in place and we cannot collect the penalty.

We have filed our proof of claim in the bankruptcy case in November 2019.

The case was recently converted to Chapter 7 (liquidation) from Chapter 11 (reorganization). Meeting of the creditors is scheduled for the end of January. DAO's counsel will attend.

Unsecured creditor: last in line.

Strang Excavating

Crushing & screening operation in Salt Lake County (Kearns)

Violations: failure to apply for a permit prior to modifications

Reason: company not responsive to the agency

Strang Excavating: Current Status

- ▶ DAQ filed a complaint to compel compliance and collect penalty.
- ▶ The company never properly answered, and we asked the Court to enter default. Default certificate was entered in April of this year.
- ▶ Before we asked for entry of default judgment, DAQ was able to settle with the company administratively.
- ▶ Settlement agreement is being drafted right now and the district court case will be dismissed once the agreement is signed.



▶ Questions?