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BEFORE THE EXECUTIVE DIRECTOR OF THE  
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

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In the Matter of: Corrective Action Plan  
Approval Top Stop C-4, Located at 15  
South Main Street, Gunnison, Utah Facility  
Identification No. 2000220, Release Site  
MHB

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ORDER DENYING DIRECTOR'S MOTION  
TO SUPPLEMENT ADMINISTRATIVE  
RECORD

April 4, 2016

Richard K. Rathbun,  
Administrative Law Judge

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This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated August 29, 2013. The appointment charges me to conduct a permit review adjudicative proceeding in accordance with Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R 305-7. Now before me is the Director's Motion to Supplement the Administrative Record filed December 24, 2014, which has been briefed by the parties and submitted to me for decision. For the reasons set forth below, I DENY the motion.

Since this is a permit review adjudicative proceeding, this matter must be conducted and based only on the administrative record and not as a trial de novo. Utah Code Ann. § 19-1-301.5(8)(a). The Director's motion seeks to add to the administrative record the following documents: the Affidavit of Paul Zahn dated December 11, 2014 (the "Zahn Affidavit") and its Exhibit A, an August 22, 1991 CAP Approval letter for UST release site AGQO, Albertson's Salt Lake City Distribution Center, signed by Kent P. Gray, Executive Secretary of the Utah Solid and Hazardous Waste Board ("1991 CAP Approval").

There is a rebuttable presumption against supplementing the record. Utah Code Ann. § 19-1-301.5(8)(c)(i). However, the statute allows the ALJ to grant the motion to supplement if the Director proves that: (A) good cause exists for supplementing the record; (B) supplementing the record is in the interest of justice; and (C) supplementing the record is necessary for resolution of the issues. Utah Code Ann. § 19-1-301.5(8)(c)(iii)(A-C). All three elements must be proven; each shall be addressed separately below.

Good Cause for Supplementation. The Director argues that supplementation is required to corroborate his statement in his Response Brief on the merits of the Request for Agency Action (RAA) that “corrective action plans have been approved with conditions for many years since the inception of the Utah Underground Storage Tank Program.” (Director’s Response Brief at p. 6). Wind River responds that the 1991 CAP Approval is not in any substantive way similar to the CAP Approval at issue in the instant case, and should not be considered on the merits. Wind River further argues that the Director’s motion is untimely, asserting that the Director’s failure to request supplementation of the record earlier in these proceedings defeats the element of “good cause” for supplementation under Utah Code Ann. § 19-1-301.5(8)(c)(iii).

With regard to the timing of the Director’s motion to supplement the record, I find no specific deadlines in the statutes or DEQ administrative rules, and therefore exercise my discretion to conclude that, absent a showing of a prejudicial delay in these proceedings, the motion is timely. Since the Zahn Affidavit and 1991 CAP Approval are offered only for the purpose of documenting a history of “conditional” CAP approvals over many years by the agency, I do not find factual differences in the underlying release sites and remediation efforts (between the Albertsons Distribution Center and Gunnison Top Stop C-4) to be dispositive.

However, the Director’s history of issuing CAP Approvals with “conditions” is irrelevant

in the strictly legal question of his statutory authority to modify the CAP in his final CAP Approval, as explained in the Findings of Fact, Conclusions of Law and Recommended Order filed contemporaneously with this order. The relevant portion of the UST Act, Utah Code Ann. § 19-6-420, is not an ambiguous statute that requires going beyond its clear language for interpretation of the Director's authority. I therefore find that the Director has failed to satisfy the element of "good cause" in order to justify supplementation of the administrative record with the Zahn Affidavit and 1991 CAP Approval..

Supplementation in the Interest of Justice. The Director claims in his motion that DERR Directors "have always interpreted the statute and implementing regulations to allow conditional CAP Approval." He argues then that it would be a "miscarriage of justice" if the claim were ultimately rejected by the Executive Director "based solely on lack of evidence in the administrative record." (Director's motion at pp. 3, 4)

Wind River counters that whether or not DERR has conditionally approved CAPs in the past "has no bearing" on the Director's statutory authority to do so, and that the UST Act's § 19-6-420 is unambiguous, requiring no technical agency interpretation or history evidence of the same. I agree, for the reasons and authorities set forth in the Recommended Decision filed today, and conclude that the Director has failed to demonstrate that consideration of the Zahn Affidavit and 1991 CAP Approval is in the interest of justice, as necessary for supplementation under Utah Code Ann. § 19-1-301.5(8)(c)(iii).

Supplementation Necessary for Resolution of the Issues. The third and final statutory element to be addressed is whether supplementation is necessary for resolution of the issues, and would therefore compel a review of the specific record documents proposed by the Director. The Director argues that supplementation would allow the ALJ (and ultimately, the Executive

Director) to see and understand how the “statute and implementing regulations in controversy have been applied historically,” and that they have been “consistently applied for at least the past 26 years.” Again, on the strictly legal question of the Director’s statutory authority under an unambiguous statute, the Director’s history of interpretation, right or wrong, is accorded no deference or persuasive authority, for the reasons set forth in detail in today’s Recommended Decision.

### Conclusion

I therefore find and conclude that the Director has not satisfied his burden of proving the required elements for supplementation of the administrative record under Utah Code Ann. § 19-1-301.5(8). I note that the Director’s motion requested, in the alternative, that the Executive Director should take judicial notice of the Zahn Affidavit and 1991 CAP Approval in considering his final action on the Recommended Decision. Because by law I leave that decision to the discretion of the Executive Director, I take no action here on the Director’s alternative request. If desired, the Director will have the opportunity to address the request directly to the Executive Director in any comments filed on the Recommended Decision as provided in Utah Admin. Code R305-7-213(4).

Accordingly, IT IS HEREBY ORDERED: that the Director’s motion is denied, and the requested documents, namely the Zahn Affidavit and 1991 CAP Approval, shall be not be filed or included as part of the administrative record in this matter.

DATED this 4th day of April, 2016.

/s/ Richard K. Rathbun  
Richard K. Rathbun  
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4<sup>th</sup> day of April, 2016, a true and correct copy of the foregoing Order Denying Director's Motion to Supplement Administrative Record was sent by electronic mail to the following:

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/s/ Richard K. Rathbun  
Richard K. Rathbun  
Administrative Law Judge