
**BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

In the Matter of:

U.S. Oil Sands PR Spring Mine, Mine
Expansion and Ground Water Discharge
Permit-by-Rule

**ORDER ADOPTING FINDINGS OF
FACT AND CONCLUSIONS OF LAW,
AND GRANTING MOTIONS TO
DISMISS**

May 20, 2016

The motions of the Director, Division of Water Quality and U.S. Oil Sands to dismiss Living Rivers' two Requests for Agency Action are granted.

Background

On February 17, 2015, Living Rivers filed two Requests for Agency Action concerning a Ground Water Discharge Permit-by-Rule held by U.S. Oil Sands (USOS). On April 9, 2015, Executive Director Amanda Smith appointed Richard K. Rathbun as Administrative Law Judge (ALJ) to adjudicate this matter.

The Director of the Division of Water Quality (Director) and USOS (collectively Respondents) filed motions to dismiss each Request for Agency Action (RAA). Living Rivers (Petitioner) opposed those motions. The Administrative Law Judge received the parties' briefs and heard oral argument on the motions.

On February 18, 2016, after considering the pleadings, exhibits, initial administrative record, and the arguments of counsel, the Administrative Law Judge submitted his Findings of Fact, Conclusions, Of Law, and Recommended Decision on the motions to dismiss the RAAs.

Executive Director's Action

Ruling on Objections to New Evidence

The Director, in his *Response to Living Rivers' Comments on ALJ's Recommended Order*, March 10, 2016, and USOS, in its *Reply Comments in Support of ALJ Recommended Decision*, March 10, 2016, each object to Exhibits E, G, H, and I that Living Rivers attached to its *Comments on ALJ's Recommended Order*, March 3, 2016. Their collective objections are that these Exhibits post-date Living Rivers' RAAs, that Living Rivers did not attach these Exhibits to its *Response to Motions to Dismiss*, that the Administrative Law Judge did not consider these Exhibits, that in motions to dismiss, only the allegations in the RAAs may be considered, and that because of these deficiencies, the Administrative Law Judge did not consider and could not have considered them.

Living Rivers' RAAs were filed February 17, 2015. Exhibit E to Living Rivers' *Comments on ALJ's Recommended Order*, the Division of Oil, Gas, and Mining's (DOGM) *Notice of Tentative Decision to Approve*, was signed on April 7, 2015. Exhibit G, a DOGM letter to USOS, was dated February 24, 2015. Exhibit H, apparently a part of a publication entitled, "Science of the Total Environment," was "accepted,"

presumably by the editor of the publication, on May 28, 2015. Exhibit I, DOGM's *Final Decision Approving Revised NOI*, was signed on July 17, 2015. Each of the challenged Exhibits is dated after the filing date of the RAAs.

I borrow the Administrative Law Judge's labels for the two RAAs. When I consider his recommendation on the § 19-1-301 RAA, I am to base my final dispositive action on the "record of the proceeding before the administrative law judge." Utah Code Ann. § 19-1-301(7)(d). The challenged Exhibits are not in Living Rivers' RAAs; they did not exist when the RAAs were filed. I do not find these Exhibits in Living Rivers' *Response in Opposition to DWQ and US Oil Sands' Motions to Dismiss Living Rivers' Requests for Agency Action* or elsewhere in the administrative record prior to their appearance in Living Rivers' *Comments on ALJ's Recommended Order*.

I conclude the challenged Exhibits were not part of the record of the proceeding before the administrative law judge. Living Rivers' inclusion of these documents in its *Comments* was inappropriate and Respondents' objections are sound. I do not consider Exhibits E, G, H, and I in my decision concerning the § 19-1-301 RAA.

In considering the Respondents' objections to these Exhibits in the context of the § 19-1-301.5 RAA, I reach the same conclusion. I do not consider Exhibits E, G, H, and I in my decision concerning the § 19-1-301.5 RAA.

Administrative Law Judge's Recommendations Accepted

Having received the Administrative Law Judge's proposed dispositive decision, I may now: (1) adopt, adopt with modifications or reject the proposed dispositive decision;

or (2) return the proposed dispositive decision to the Administrative Law Judge for further action as directed. Utah Code Ann. §§ 19-1-301(7)(b), 19-1-301.5(14)(a).

Under authority of Utah Code Ann. §§ 19-1-301(7)(b-d) and 19-1-301.5(14), I have reviewed the record in this case, including Living Rivers' RAAs and related documents, the Respondents' motions to dismiss, Living Rivers' opposition to the motions to dismiss, the Respondents' replies to Living Rivers' opposition to their motions to dismiss, oral arguments on the motions to dismiss, the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommended Decision, and the parties' comments on the Recommended Decision. I adopt the Administrative Law Judge's Findings of Fact and Conclusions of Law.

Discussion

Permit Orders

The Legislature has established an exclusive system to resolve challenges to permit orders under the Environmental Quality Code. The Legislature has defined "permit order" as an order issued by the Division Director that approves, renews, denies, modifies or amends, or revokes and reissues a permit. Utah Code Ann. § 19-1-301.5(1)(f)(i).¹ When the Director issues a permit order, a member of the public may challenge it by requesting a special administrative proceeding. Utah Code Ann. § 19-1-305.1(5)(g).

¹ In Utah Code Ann. § 19-5-106(2)(g), the Legislature instructs the Director to, after public notice and opportunity for public hearing, issue, continue in effect, renew, revoke, modify, or deny discharge permits. When the Legislature enacted Utah Code Ann. § 19-1-301.5, it established a new and comprehensive mechanism for adjudicative proceedings to resolve challenges to permit orders issued under the Environmental Quality Code. Section 19-5-106(2)(g) of the Water Quality Act does not change the system the Legislature created in section 19-1-301.5. Further, the Director is required to provide public notice and an opportunity for public hearing to "continue in effect" an existing PBR only when he takes an action concerning that permit as described in section 19-1-301.5(1)(f)(i). He took no such action in this case, and there was thus no event requiring public notice or public hearing.

In the winter of 2014-2015, the Director did not approve, renew, deny, modify or amend, or revoke and reissue USOS's Permit-by-Rule. Living Rivers thinks he should have done one or more of these things and argues that in not so doing, he has, in fact, made a permitting decision that Living Rivers can challenge.

Living Rivers is effectively asking me to create a new category of challengeable permit order, a category for circumstances where the Director decides he does not need to issue a permit order. The Legislature has not given me authority to create such a category, and I decline to do so. If such a category is ever created, the Legislature must create it, not the Executive Director.

Non-Permit Actions

The Legislature has also established a procedure in Utah Code Ann. § 19-1-301 for challenging agency actions that are not permit orders. The Legislature directs that in these non-permit matters, the Department is to comply with the procedures of: the Utah Administrative Procedures Act, Utah Code Ann. Title 63, Chapter 4; the Environmental Quality Code, Utah Code Ann. Title 19; rules adopted by the Department; and the Utah Rules of Civil Procedure. Utah Admin. Code R305-7-303 sets the Department's rules for non-permit adjudicative proceedings, in accordance with subsection 63G-4-102(6) and the Environmental Quality Code.

The Administrative Law Judge concluded that this system allows for four kinds of proceedings to challenge non-permit actions: (1) proceedings contesting a Notice of Violation; (2) proceedings contesting an Initial Order; (3) enforcement proceedings; and (4) proceedings to terminate permits. I concur with the ALJ's analysis.² Like the ALJ, I

² Most "enforcement proceedings" will probably take the form of Notices of Violation or Initial Orders.

cannot fit what Living Rivers says the Director did or failed to do into any of these categories.

The Director did not issue a Notice of Violation or an Initial Order; nor did he take some other enforcement action. Clearly the Director did not terminate USOS' Permit-by-Rule. Living Rivers may believe the Director should have done any or all of these things, but the Director has considerable discretion in determining when and how to take administrative action to enforce the Water Quality Act. Utah Code Ann. § 19-5-111. Living Rivers has no citizen suit authority to compel the Director in his exercise of that discretion.

The Director took no action that Living Rivers may challenge under Utah Code Ann. § 19-1-301.

Balancing of Interests

Where the Legislature has provided no right for Living Rivers to challenge the Director's actions, I have no obligation to balance interests in deciding this matter. When, to promote clarity, I do balance interests, I nevertheless conclude that Living Rivers' RAAs must be dismissed.

Living Rivers has an interest in having the actions of the Director be open to public scrutiny. It does not want the Director to take agency action in secret, where no one knows what he does or why he does it. It wants the Director to receive and consider new information that might alter his conclusion that USOS qualifies for a Ground Water Discharge Permit-by-Rule. The Executive Director and the Director of the Division of Water Quality share those interests.

The Director also has an interest in administering his program in an orderly manner and in having his reasonable exercise of discretion respected. Were he

required to take agency action every time someone tells him there is new information the informant thinks should cause him to modify or terminate a permit, it would create a significant administrative burden, frustrating the Division's efforts to protect the waters of the State of Utah. While the Director should be open to all information relevant to the discharge of his duties, he is not obligated to take formal agency action whenever someone presents him with information seeking to affect a previous Permit-By-Rule decision.

As the Utah Supreme Court said in *Living Rivers v. US Oil Sands, Inc.*, USOS has an interest in knowing that an agency action is final as it invests time and capital into its project. 2014 Utah 25, ¶ 26; 344 P3d 568, 573 (2014).

I conclude that the Director exercised his discretion reasonably in deciding that the information he received concerning the contemplated changes USOS submitted to the Utah Division of Oil, Gas, and Mining in its "Notice of Intention to Revise Large Mining Operations" did not require him to issue a permit order. His actions did not improperly interfere with Living Rivers' interests in being aware of and having the ability to challenge actual permit orders. USOS may continue to operate under its Ground Water Discharge Permit-by-Rule.


ORDER

Therefore, the motions of USOS and the Director to dismiss both of Living Rivers' Requests for Agency Action are GRANTED; the Requests for Agency Action are DISMISSED with prejudice; and these administrative proceedings are TERMINATED.

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Under Utah Code Ann. §§ 19-1-301, 19-1-301.5, and 63G-4-403, a party may seek judicial review in the Utah Court of Appeals or the Utah Supreme Court within thirty days of the date of this Order.

DATED this 20th day of May, 2016.



ALAN MATHESON
Executive Director
Utah Department of Environmental Quality

CERTIFICATE OF SERVICE

I certify that on this 20th day of May, 2016, a true and correct copy of the foregoing ORDER ADOPTING FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND GRANTING MOTIONS TO DISMISS was sent by electronic mail to:

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