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

In the matter of:

**US Magnesium LLC
UDAQ Notice of Violation and Order to
Comply January 8, 2019
Docket No. 2018122701**

**RECOMMENDED ORDER IN
RESPONSE TO DIRECTOR'S MOTION
FOR VOLUNTARY DISMISSAL
WITHOUT PREJUDICE**

December 12, 2019

Lucy B. Jenkins
Administrative Law Judge

U.S. Magnesium LLC (USM), filed a Request for Agency Action dated February 7, 2019, to contest the Notice of Violation and Order to Comply issued by the Director of the Utah Division of Air Quality (Director or UDAQ) on January 8, 2019 (NOV). UDAQ filed the Director's Request to Appoint Administrative Law Judge on September 5, 2019 and on September 12, 2019, the Utah Department of Environmental Quality appointed the Administrative Law Judge (ALJ) to preside over an administrative adjudicative proceeding.

The Director filed a Motion for Voluntary Dismissal of Notice of Violation Without Prejudice (Director's Motion for Voluntary Dismissal) on September 20, 2019. The Parties submitted briefs on the Director's Motion. A hearing on the Director's Motion was held on November 12, 2019. At the hearing, USM was represented by its counsel, Michael A. Zody and the Director was represented by its counsel, Christian C. Stephens and Marina V. Thomas.

Pursuant to Utah Code Ann. § 19-1-301(7), the ALJ is charged with issuing a recommended order to the Executive Director for all dispositive actions. If granted, the

Director's Motion for Voluntary Dismissal of Notice of Violation would result in a dismissal of the NOV, which is deemed to be a dispositive action.

ANALYSIS

The Director filed the Motion for Voluntary Dismissal of Notice of Violation Without Prejudice under Utah Code Ann. § 19-1-301(3)(b)(iv) and Utah Administrative Code R305-7-112. The Director seeks to voluntarily dismiss the NOV so that it can file the same claims in the Third District Court where the Director currently has two related enforcement cases pending against USM.

USM asserts that it commenced this administrative proceeding and invoked the jurisdiction of this forum by filing the Request for Agency Action (RFAA), that USM has the right to this administrative proceeding and that the Director does not have the authority to request dismissal of the NOV. However, Utah Administrative Code R305-7-302 allows a notice of violation, even if contested, to be rescinded, vacated or otherwise terminated:

Unless otherwise stated, an Initial Order or a Notice of Violation is effective upon issuance and, even if it is contested, remains effective unless a stay is issued or the Initial Order or a Notice of Violation is rescinded, vacated or otherwise terminated. (emphasis added).

This Rule authorizes the Director to rescind the NOV or to request that the NOV be vacated or otherwise terminated.

This is an enforcement adjudicative proceeding under Utah Code § 19-1-301 which provides that this adjudicative proceeding is governed by: the Utah Administrative Procedure Act (Utah Code §§ 63G-4-101-601), Utah Code Ann. § 19-1-301 and the Utah Administrative Code R305-7 (collectively the "Enforcement Administrative Proceeding Statutes and Rules").

Utah Administrative Code R305-7-114(3) addresses the procedure for a motion for dismissal filed by the Director or other party to the adjudicative proceeding for failure to prosecute by the party seeking relief. However, this rule does not address the procedure for a motion by the Director to voluntarily dismiss the NOV. In the absence of a procedure established under the Enforcement Administrative Proceeding Statutes and Rules, the Utah Rules of Civil Procedure apply. *See* Utah Code Ann. § 19-1-301(3)(b)(iv). Also, Utah Administrative Code R305-7-112 states that “In the event there are situations for which procedures are not prescribed by this Rule, the ALJ shall, for a specific case, identify analogous procedure or other procedures that will apply.”

Rule 41(a) of the Utah Rules of Civil Procedure governs the voluntary dismissal of actions by the plaintiff or by court order. USM asserts that Rule 41(a) does not authorize the Director to file a motion to voluntarily dismiss because USM, not the Director, is the party analogous to a plaintiff. USM asserts it is like a plaintiff because as the party seeking relief, USM is responsible for prosecuting the administrative proceeding and only USM has the authority to voluntarily dismiss.

Utah Administrative Code R305-7-303 states “A Notice of Violation or an Initial Order may be contested by filing and serving a written Request for Agency Action....” Utah Administrative Code R305-7-306 prescribes the proceedings after a RFAA is filed, and states at subsection (2) that no response to an RFAA is required, but the Director may elect to file a response. Utah Administrative Code R305-7-309(7)(g) states that the Adjudicatory Record consists of all documents filed or issued in the proceeding beginning with the contested Notice of Violation (and/or Initial Order), followed by the RFAA. Further, Utah Administrative Code R305-7-302 allows a notice of violation, even if contested, to be rescinded, vacated or otherwise

terminated. These rules indicate that the RFAA is triggered by and responds to the NOV and that the NOV is like a complaint and the RFAA is like an answer, and that the Director is like a plaintiff and USM is like a defendant.

As there is no procedure for voluntary dismissals by the Director under the Enforcement Administrative Proceeding Statutes and Rules, and Rule 41(a) is the Rule of Civil Procedure most analogous to this proceeding, I conclude that the procedure set forth in Rule 41(a) applies to the Director's Voluntary Motion to Dismiss.

Rule 41(a)(1) allows the plaintiff to dismiss an action without a court order if the plaintiff files a notice of dismissal before the opposing party serves an answer or a motion for summary judgment or by stipulation signed by the parties. USM filed a RFAA before the Director filed its Motion for Voluntary Dismissal. The Director requested that USM stipulate to a dismissal, but USM would not stipulate to a dismissal. *See* Director's Motion for Voluntary Dismissal, p. 5 n.

1. The Director's Motion for Voluntary Dismissal is therefore governed by Rule 41(a)(2):

Rule 41(a)(2) By Court Order. Except as provided in paragraph (a)(1), an action may be dismissed at the plaintiff's request by court order only on terms the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication by the court. Unless the order states otherwise, a dismissal under this paragraph is without prejudice.

Under Utah Rule of Civil Procedure 41 and Utah Administrative Code R305-7-112, the ALJ may recommend dismissal of the NOV on the terms and conditions that the ALJ deems proper. The ALJ will use the four factor test from the Tenth Circuit Court and adopted by the Utah courts to determine whether the nov-moving party will suffer legal prejudice from a

dismissal: “the opposing party’s effort and expense in preparing for trial, excessive delay and lack of diligence on the part of the movant, insufficient explanation for the need for a dismissal, and the present stage of the litigation.”¹The following is an analysis of these factors.

The opposing party’s effort and expense in preparing for trial. USM asserts in its RFAA that it has taken all necessary steps to achieve compliance and that it delivered a Notification of Compliance on January 28, 2019. USM asserted during the hearing and that it expended resources to achieve compliance and send the Notification of Compliance. However, USM is required to be in compliance with its Title V Operating Permit and pertinent regulations, notwithstanding the Order. USM asserts that dismissal would prejudice USM “because the proceedings are more efficient and less costly than proceeding in District Court”. However, USM does not offer any details, and appears to be referring to efficiency and costs in future proceedings, as opposed to efforts and expense in preparing for trial to date.

Excessive delay and lack of diligence on the part of the movant. The Director requested appointment of an ALJ on September 5, 2019, and then filed the Motion for Voluntary Dismissal on September 20, 2019, eight days after the ALJ was appointed (on September 12, 2019). USM asserts that the Director should have made its decision to file its claims in Third District Court before it issued the NOV. However, the Director has authority to rescind, vacate or otherwise terminate the NOV. As the Director took the initiative to request appointment of an ALJ and then filed the Motion for Voluntary Dismissal only eight days after the ALJ was appointed, I see no excessive delay or lack of diligence by the Director.

Insufficient explanation for the need for a dismissal. The Director wishes to dismiss the NOV without prejudice and re-file the same claims in the Third District Court where two other

¹ *Ohlander v. Larson*, 114 F.3d 1531 (10th Cir. 1997); *H & H Network Services, Inc. v. Unicity Intern., Inc.*, 2014 UT App 73, ¶5, 323 P. 3d 1025; *Keystone Ins. Agency, LLC v. Inside Ins., LLC*, 2019 Utah 20, ¶25, 445 P.3d 434.

similar, consolidated enforcement actions against USM are pending. The Director asserts that this third enforcement action against USM would be more efficiently handled at the district court level with the other two consolidated enforcement action. This sufficiently explains the need for the dismissal.

The present stage of the litigation. This administrative proceeding is at an early stage. After the Director issued the NOV on January 8, 2019, USM filed the RFAA on February 7, 2019. The Director filed the Motion for Voluntary Dismissal on September 20, 2019, followed by briefing by the parties and a hearing for oral arguments on November 12, 2019. No discovery or other further proceedings have taken place.

There are two enforcement cases filed by the Director against USM pending in the Third District Court.² These two cases were recently consolidated. Ruling and Order, *Utah v. U.S. Magnesium*, No. 170301376 (Third Dist. Ct. Nov. 4, 2019). The Director requests dismissal of this administrative proceeding to facilitate the filing of a civil action on the same grounds in state district court and seeking consolidation of all three cases. The Director asserts that the three cases have common questions of law and fact and would be most efficiently handled by the Third District Court along with the two pending cases and that a civil court action would address both the merits of the violations and any associated civil penalties or injunctive relief.

USM asserts that the it is prejudiced because the Director is “forum shopping after the judicial waters have been tested” stating that the first related case was filed on September 1, 2017 and was pending at the time the Director filed the NOV in the current proceeding against USM on January 8, 2019. USM argues that the Director’s reasons for dismissal existed in January, 2019 and that the Director could have made the choice then to file the action with the

² *Utah v. U.S. Magnesium*, No. 170301376 (Third Dist. Ct. Sept. 1, 2017); *Utah v. U.S. Magnesium*, No. 190301196 (Third Dist. Ct. July 17, 2018).

state district court instead of issuing the NOV. As the other two cases are pending and unresolved, and this enforcement proceeding is at an early stage, the ALJ does not find USM's argument of forum shopping to be persuasive.

USM requests that if the Director's Motion to Dismiss is granted that the dismissal be with prejudice. The ALJ finds that USM will not suffer legal prejudice sufficient to merit a dismissal with prejudice. The ALJ concludes that any prejudice suffered by USM caused by a dismissal is outweighed by the judicial economy of handling three related enforcement cases by the Third District Court.

Based on Rule of Civil Procedure 41 and Utah Administrative Code R307-7-112, I conclude that it is proper to grant the Director's Motion for Voluntary Dismissal of Notice of Violation Without Prejudice and dismiss the Notice of Violation and Order.

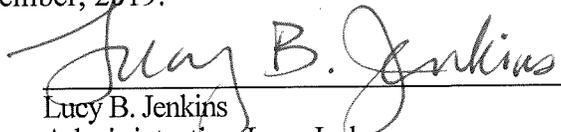
RECOMMENDED ORDER

Based on the foregoing analysis, I recommend that the Executive Director grant the Director's Motion For Voluntary Dismissal of Notice of Violation Without Prejudice, and dismiss the Notice of Violation and Order, without prejudice. A dismissal will resolve this proceeding by vacating the Notice of Violation and Order.

NOTICE OF OPPORTUNITY TO COMMENT

Parties may file comments to the Recommended Order with the Executive Director of the Utah Department of Environmental Quality within ten business days of service of this Recommended Decision in accordance with the requirements of Utah Administrative Code R305-7-213(6). Comments shall not exceed 15 pages. A party may file a response to the other party's comments, not to exceed five pages, within five business days of the date of the service of the comments.

DATED this 12th day of December, 2019.



Lucy B. Jenkins
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 2019, a true and correct copy of the foregoing **RECOMMENDED ORDER IN RESPONSE TO DIRECTOR'S MOTION FOR VOLUNTARY DISMISSAL WITHOUT PREJUDICE** was sent by electronic mail to the following:

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