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

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**In the Matter of:**

**U.S. Magnesium, LLC  
UDAQ Notice of Violation and Order to  
Comply January 8, 2019**

**Docket No. 2018122701**

**ORDER ADOPTING RECOMMENDED  
DECISION AND DISMISSING  
ADJUDICATIVE PROCEEDINGS  
WITHOUT PREJUDICE**

April 27, 2020

Lucy Jenkins, Administrative Law Judge  
L. Scott Baird, Executive Director

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**BACKGROUND**

On February 7, 2019, U.S. Magnesium, LLC, (“USM”) filed a Request for Agency Action to contest the Notice of Violation and Order (“NOVO”) issued by the Director of the Utah Division of Air Quality (“UDAQ”) on January 8, 2019. On September 12, 2019, I appointed an Administrative Law Judge (“ALJ”) to conduct an administrative adjudicative proceeding in the matter pursuant to Utah Code § 19-1-301 and Utah Admin. Code r. 305-7-301 *et seq.*

Pursuant to Utah Code § 19-1-301, on December 12, 2019, the ALJ submitted a Recommended Order in Response to Director’s Motion for Voluntary Dismissal Without Prejudice (“Recommended Order”) in the above-captioned adjudicatory proceeding.

When the ALJ submits a proposed dispositive action to the Executive Director, the Executive Director may: (1) approve, approve with modifications, or disapprove a proposed dispositive action; or (2) return the proposed dispositive action to the ALJ for further action as directed. Utah Code § 19-1-301(7)(b). I have reviewed the Recommended Order. I have also

reviewed the comments on the Recommended Order filed on December 27, 2019, by USM, and the response to comments filed on January 6, 2020, by UDAQ.

### **CONSIDERATION OF USM's COMMENTS**

USM's Comment No. 1: USM argues that Utah Admin. Code r. 305-7-302 only allows a notice of violation and order to be "rescinded, vacated, or otherwise terminated." USM Comments, p. 3. USM argues that dismissing UDAQ's NOVO without prejudice does not terminate it, but rather moves it to another jurisdiction. *Id.* I disagree. A dismissal of UDAQ's NOVO without prejudice "otherwise terminate[s]" the order, as contemplated by the rule. If UDAQ chooses to pursue an action in district court, that litigation is a separate action, but it does not revive the NOVO. See Utah Code § 19-2-110 and § 19-2-115 through 116 (which allows UDAQ to pursue compliance by either issuing a NOVO or filing a complaint in district court, which are two separate actions under the statute). Further, USM argues that the afore-mentioned rule cannot "take away" its "statutory right to invoke the agency's jurisdiction." *Id.* I agree that a rule cannot take away a statutory right. However, in this case, dismissal of the NOVO does not cause USM to lose its statutory right to contest an order and invoke the agency's jurisdiction. Instead, that right is moot once the NOVO is dismissed. USM still has the right to contest future agency orders, or to defend itself against UDAQ's allegations in district court.

USM's Comment No. 2: USM argues that Rule 41(a)(2) of the Utah Rules of Civil Procedure can only be used by USM as the party who filed the Request for Agency Action, and not by UDAQ, who issued the initial NOVO. USM's Comments, p. 3. This argument was fully considered by the ALJ in her Recommended Order on pages 3-4, and I agree with her assertion that UDAQ's NOVO is analogous to a complaint, and that USM's Request for Agency Action is analogous to an answer, and therefore, UDAQ is entitled to use Rule 41(a)(2) to request

dismissal of its NOVO. USM also argues that my directive in appointing an ALJ to conduct this adjudicative proceeding negates the possibility of dismissing the UDAQ's NOVO. I am not persuaded by this argument, as the ALJ has met my directive by entertaining a motion, response, and reply, conducting a hearing, and submitting a Recommended Order. USM's argument appears to suggest that no administrative adjudicative proceeding may ever be dismissed or otherwise brought to a conclusion short of a full trial, which is clearly not contemplated by the rules. Utah Admin. Code r. 305-7-312(6) encourages parties "to file dispositive motions, such as a Motion for Judgment on the Pleadings, a Motion to Dismiss, or a Motion for Summary Judgment." Dismissal of an adjudicatory proceeding is contemplated in the rules and does not indicate that a matter was not fully litigated in the administrative setting.

USM's Comment No. 3: USM argues that it has been prejudiced by having to respond to the initial NOVO by filing a Request for Agency Action and responding to UDAQ's Director's 15-day compliance letter requirement. I find that the ALJ carefully considered the four-factor test used to determine prejudice under a Rule 41(a)(2) dismissal, and found that USM will not suffer prejudice by the dismissal of UDAQ's NOVO without prejudice. I agree with her conclusions, noting again that this proceeding was in its beginning stages prior to discovery, and I find that USM will not suffer prejudice as contemplated by Rule 41(a)(2) and interpreting case law due to the dismissal of UDAQ's NOVO.

### **ORDER**

Based on my review of the adjudicatory record and Utah Code § 19-1-301, I hereby adopt the Recommended Order in full and ORDER:

1. The NOVO issued to USM by the Director of UDAQ on January 8, 2019, is hereby DISMISSED without prejudice; and,

2. The Request for Agency Action filed by USM on February 7, 2019, is hereby DISMISSED as moot, thereby terminating this administrative adjudicative proceeding.

**NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW**

Judicial review of this final order may be sought in the Utah Court of Appeals in accordance with Sections 63G-4-401, 63G-4-403, and 63G-4-405 of the Utah Code by filing a proper petition within thirty (30) days after the date of this order.

DATED this 27<sup>th</sup> day of April 2020.

  
L. Scott Baird (Apr 27, 2020)

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L. Scott Baird, Executive Director  
Utah Department of Environmental Quality

## CERTIFICATE OF SERVICE

I hereby certify that on this 27<sup>th</sup> day of April, 2020, I served by e-mail a true and correct copy of the **ORDER ADOPTING RECOMMENDED DECISION AND DISMISSING ADJUDICATIVE PROCEEDINGS WITHOUT PREJUDICE** on the following:

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