

**BEFORE THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

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In the Matter of: Stipulation and Consent Order, Docket No. UGW12-04, Regarding Approval and Stipulations for the Energy Fuels Resources (USA) Inc. May 7, 2012 *Corrective Action Plan for Nitrate, White Mesa Mill*  
Energy Fuels Resources (USA) Inc.  
White Mesa Mill  
Docket No. UGW12-04

REQUEST FOR AGENCY ACTION

January 11, 2013

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**REQUEST FOR AGENCY ACTION**

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Pursuant to Utah Code § 63G-4-201(3)(a), Utah Code § 19-1-301 and alternatively Utah Code § 19-1-301.5, and Utah Admin. Code R305-6-407 and R305-6-411, the Ute Mountain Ute Tribe (“Tribe”) hereby files its Request for Agency Action with Rusty Lundberg in his capacities as Director of the Division of Radiation Control and Co-Executive Secretary of the Utah Water Quality Board (“Director”). The Tribe seeks review of the December 12, 2012 decision of the Director approving the May 7, 2012 Corrective Action Plan for Nitrate (“Nitrate CAP”) at the White Mesa Uranium Mill located near Blanding, Utah under Utah Admin. Code R317-6-6.15 (“Decision”), as set forth in Stipulation and Consent Order, Docket Number UGW12-04 issued to Energy Fuels Resources (USA) Inc. (“EFR”) dated December 12, 2012.

**I. AGENCY’S FILE NUMBER AND DATE OF MAILING**

The Tribe contests the Decision, signed by the Director of DRC on December 12, 2012, approving the Nitrate CAP at the White Mesa Uranium Mill (“WMM”) located near Blanding, Utah. The Tribe’s Request for Agency Action also specifically contests the responses to the Tribe’s public comments contained in the Public Participation Summary for Stipulation and Consent Order, Docket No. UGW12-04. This Request for Agency Action is timely submitted to Rusty Lundberg in his capacities as Director of the Division of Radiation Control and Co-Executive Secretary for the Utah Water Quality Board, on January 11, 2013. Utah Admin. Code R305-6-109(4)(c)(ii).

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## **II. STATEMENT OF LEGAL AUTHORITY AND JURISDICTION**

The Tribe brings this Request for Agency Action pursuant to Utah Code § 19-1-301 and alternatively Utah Code § 19-1-301.5,<sup>1</sup> and Utah Admin. Code R305-6, R-305-6-202, R305-6-407, R305-6-411. Utah Code § 63G-4-201(3)(a) and Utah Admin. Code R305-6-202(4) specify the content of this Request for Agency Action. The Tribe has complied with Utah Code §§ 19-1-301.5(4), (7)(c)(ii)(C)<sup>2</sup> and Utah Admin. Code R305-6-105(2)(a) by providing public comments in Docket No. UGW12-04, and has complied with R-305-6-205 by filing a separate Petition to Intervene in this action.

## **III. STATEMENT OF FACTS AND REASONS**

### **A. STATEMENT OF FACTS**

#### **1. TRIBAL BACKGROUND AND INTEREST IN THE WMM FACILITY**

The Ute Mountain Ute Tribe is a federally-recognized Indian tribe with lands located in southwestern Colorado, northwestern New Mexico, and southeast Utah. There are two Tribal communities on the Ute Mountain Ute Reservation: Towaoc, in southwestern Colorado, and White Mesa, which is located in Utah within three miles of the WMM facility. The lands comprising the White Mesa community are held in trust for the Tribe and for other individual Tribal member owners. The Tribe has jurisdiction (as a federally-recognized tribal government) over Tribally-owned lands, Tribal member-owned lands, and members of the Ute Mountain Ute Tribe who live in the White Mesa community. Under the Tribe's Constitution, the Tribal Council is responsible for, among other things, the management and protection of Tribal lands and for the protection of public peace, safety, and welfare.

Ute Mountain Ute Tribal Members ("UMU Tribal Members") have lived on and around White Mesa for centuries and intend to do so forever. The Tribal community of White Mesa depends on groundwater resources buried deep in the Navajo (deep confined) aquifer for its municipal (domestic) needs. UMU Tribal members also make use of the perched (shallow) aquifer near the WMM facility and near the White Mesa community. Uses of the perched (shallow) aquifer include direct uses for drinking and ceremonial use, as well as indirect uses through livestock watering and the harvesting of wildlife and plants. Because Tribal uses of the Navajo aquifer and the perched aquifer are downgradient of the WMM facility, the Tribe has a strong interest in maintaining the long-term quality of these resources and preventing short-term users like EFR from polluting these sources.

The Tribe has serious concerns about the manner in which the WMM is currently operated and regulated. The Tribe has long expressed concern that the WMM operations (in

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<sup>1</sup> Review is sought under Utah Code § 19-1-301 as a non-permit review adjudicative proceeding; however, insofar as the Decision approving the Nitrate CAP constitutes a Permit Order under Utah Code §§ 19-1-301.5(d) and (e) as "approval" of a "plan," the Tribe alternatively seeks review of the Decision as a permit review adjudicative proceeding under Utah Code § 19-1-301 and § 19-1-301.5.

<sup>2</sup> See footnote 1, *supra*.

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particular, management practices that have allowed continued contamination of surface resources, groundwater resources, and surface water resources) pose serious threats to the health of the land and the natural and cultural resources within and around the Tribe's White Mesa community and to the health and welfare of its Tribal members and their future generations.

Since 2010, the Tribe has more actively engaged the State of Utah and the divisions of the Utah Department of Environmental Quality in government-to-government consultation regarding Tribal concerns about the WMM operations. Prior to filing its public comments in the UGW12-04 docket, the Tribe filed public comments during every recent renewal of the WMM's permits (including the WMM's Air Quality Approval Order, Groundwater Discharge Permit, and Radioactive Materials License). The December 16, 2011 comments on the WMM's proposed Radioactive Materials License renewal contained extensive comments on groundwater contamination at the WMM facility and included an exhibit from an industry expert detailing concerns about the integrity of the liners in Tailings Cells 1, 2, and 3. *See* Exhibit A (Comments Regarding Denison Mines (USA) Corp. Radioactive Materials License Renewal DRC-045 [hereinafter "December 2011 RML Comments"]).

## 2. FACTUAL BACKGROUND ON THE NITRATE CORRECTIVE ACTION PLAN DOCKET NO. UGW12-04

The relevant factual background of the UGW12-04 docket is outlined in the September 30, 2011 Stipulated Consent Agreement between Denison Mines (USA) Corp ("DUSA") and the Utah Water Quality Board ("DRC"<sup>3</sup>) and the December 12, 2012 Nitrate CAP. In 2009, the Executive Secretary of the Water Quality Board ordered DUSA to submit a contaminant investigation report ("CIR") "to among other things, characterize the source(s), physical extent, transfer mechanisms and characteristics" of the nitrate/nitrite/chloride groundwater contamination plume at the WMM facility. On December 30, 2009, DUSA submitted a CIR for DRC review. In October of 2010, DRC notified DUSA that the CIR was incomplete. Between October of 2010 and September of 2011, DRC and DUSA entered into three tolling agreements as DUSA continued to produce deficient plans for the CIR. During these tolling agreements, DUSA and DRC agreed that DUSA would develop a Plan and Schedule composed of at least four, and possibly five phases of study.

On August 1 and 2 of 2011, DUSA submitted preliminary laboratory results from the first phase of the CIR to DRC. On August 18, 2011, DUSA submitted a revised work plan to DRC for phases 2-5 of the CIR study. On August 25, 2011, DRC issued a letter advising that:

- 1) per review of the Phase 2-5 Work Plan, Revision 2.0, the EXECUTIVE SECRETARY has determined it evident that a finalized Plan and Schedule, that meets the satisfaction of the EXECUTIVE SECRETARY, and which would allow the preparation of a replacement SCA, is not possible at this time;

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<sup>3</sup> In Docket UGW12-04, the Director of the Division of Radiation Control acts as the Executive Secretary of the Utah Water Quality Board. The Tribe's references to "DRC" in this Request for Agency Action are to the Director of DRC acting as the Secretary of the Utah Water Quality Board.

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- 2) based on the identified deficiencies in the Phase 2-5 Work Plan, Revision 2.0, the development of a replacement SCA for continued contaminant investigation activities is not supported, and
- 3) based on the August 1, 2011 DUSA preliminary results of Phases 1A through 1C, it appears that it will be extremely difficult for DUSA to demonstrate that the White Mesa Mill Site has not caused at least part of the contamination found in the nitrate and chloride plume(s) beneath the Mill.

On August 29, 2011, DUSA and DRC held a meeting to discuss the August 25, 2011 DRC findings. DUSA and DRC then agreed, among other things, that “it has not been possible to date to determine the source(s), cause(s), attribution, magnitudes of contribution, and proportion(s) of the local nitrate and chloride in groundwater, and [DRC] thereby cannot eliminate Mill activities as a potential cause, either in full or in part, of the contamination.” DRC determined that a corrective action plan (“CAP”) was required to address the nitrate/nitrite/chloride contamination at the WMM, and DUSA agreed to begin work on a CAP for the nitrate/nitrite/chloride plume. DUSA also agreed that work on the CIR would cease, which meant that, aside from the preliminary laboratory results from the first phase of the CIR, DUSA was not required to perform any additional work identifying the source of the nitrate/nitrite/chloride plume.

On November 29, 2011, DUSA submitted a CAP to DRC for review. After correspondence from DRC and two revisions of the CAP, the DRC published the CAP for public comment.

### 3. FACTUAL BACKGROUND ON TRIBAL INTERACTION WITH THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY DIVISIONS, PUBLIC COMMENTS, AND THE PUBLIC PARTICIPATION SUMMARY

On December 16, 2011, the Tribe submitted public comments to DRC concerning the Radioactive Materials License Renewal DRC-045. *See* Exhibit A. These comments contained an extensive section covering concerns about groundwater at the WMM facility and specifically raised concerns about groundwater contamination caused by leakage of radioactive material from Tailings Cells 1, 2, and 3 (which all still rely on liners installed more than 30 years ago during construction of the facility). *See* Exhibit A, December 2011 RML Comments §§ III(A), III(C)(1), IV.

On March 15, 2012, Tribal staff and staff from several divisions of the Utah Department of Environmental Quality met in Salt Lake City, Utah to discuss Tribal concerns about operation of the WMM facility. At that meeting, there was significant discussion about the Tribe’s concerns about the integrity of the liners in Tailings Cells 1, 2, and 3 and about the Tribe’s concerns regarding DRC’s failure to take appropriate regulatory action when faced with multiple contaminant plumes and increasing contaminant trends in the monitoring well network that indicate leakage from the Tailings Cells. The Tribe and DRC also discussed concerns about the deep supply well WW-2, which creates a vector or pathway for contamination to travel between the shallow (perched) aquifer and the Navajo (deep confined) aquifer.

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On April 23, 2012, the Tribe sent an additional letter to DRC to provide DRC the Tribe's continued concerns with groundwater contamination issues discussed at the March 15, 2012 meeting. *See* Exhibit B (Letter from Scott Clow to Rusty Lundberg Re: Follow Up on Groundwater Issues; Denison Mines (USA) Corp. Radioactive Materials License Renewal DRC-045 [hereinafter "April 2012 Letter"]). This letter explained the Tribe's dismay that, when faced with DUSA violating a groundwater permit provision requiring a well casing analysis of the deep supply well WW-2 (which provides a contamination pathway from the contaminated perched (shallow) aquifer to the Tribe's drinking water supply), instead of finding DUSA in violation of the permit, DRC used what is termed "enforcement discretion" to relieve DUSA of the well casing study. This letter also reiterated the Tribe's concerns with excessive levels of indicator parameters in southern monitoring wells that are downgradient of the WMM facility and close to the White Mesa community.

On July 16, 2012, the DRC published the Draft Stipulation and Consent Order, Docket UGW12-04 for public hearing and comment. On August 17, 2012, the Tribe submitted its public comments in this docket. *See* Exhibit C (Comments Regarding Denison Mines (USA) Corp., White Mesa Uranium Mill Corrective Action Plan, UGW12-04 [hereinafter "August 2012 Nitrate CAP Comments"]).

On September 13, 2012, the DRC issued an email notice to the Radiation Issues listserve noting that DRC had posted "additional reports regarding the White Mesa Mill facility." Among the new reports posted that day were reports that, in July of 2012, DRC had approved in a transfer of the WMM facility licenses and permits from DUSA to EFR. The September 13, 2012 posting also included the first notification of the July 12, 2012 Stipulated Consent Agreement UGW12-03, which addresses decreasing pH trends and out of compliance parameters for cadmium, manganese, selenium, thallium, uranium, TDS, sulfate, and fluoride in the same general location as the nitrate/nitrite/chloride plume and in the same general location as another groundwater contamination plume containing chloroform.<sup>4</sup> *See* Exhibit D (Stipulated Consent Agreement, Docket No. UGW12-03). On October 4, 2012, the Tribe sent a letter to DRC responding to the new documents contained in the September 13, 2012 DRC posting. *See* Exhibit E (Letter from Scott Clow to Rusty Lundberg Re: Transfer Action and New Groundwater Enforcement Action UGW12-03, White Mesa Uranium Mill [hereinafter "October 2012 Letter"]). Section B of this letter addressed the UGW12-03 docket. The Tribe expressed its inability to understand why DRC failed to inform the Tribe or the public of the new groundwater contamination issue (which began as early as May of 2011) prior to soliciting comments on the UGW12-04 docket. The Tribe also noted that overlapping spatial location of the multiple contamination plumes and the combination of constituents in the plumes was an even stronger indication of Tailings Cell leakage, and demanded that DRC consolidate the

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<sup>4</sup> The UGW12-03 docket notes that the monitoring data contains evidence of consecutive exceedances of nitrate, nitrite, chloride, chloroform, and dichloromethane, but states that exceedances of those parameters is covered by the 1999 chloroform corrective action plan UGW20-01 and the UGW12-04 nitrate investigation. *See* Stipulated Consent Agreement, Docket No. UGW12-03, Attachment A, Plan and Time Schedule Under Part I.G.4(d) for Violations of Part I.G.2 for Constituents in the First, Second, Third, and Fourth Quarters of 2010 and First Quarter of 2011 at p. 5.

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UGW12-04 (nitrate/nitrite/chloride contamination) and UGW20-01 (chloroform contamination) corrective action plans with the new UGW12-03 stipulation and consent agreement.

On December 12, 2012, the Director issued his approval of the final and executed Nitrate CAP. On December 17, 2012, DRC posted the Nitrate CAP and the Public Participation Summary for Stipulation and Consent Order, Docket No. UGW12-04 (“Public Participation Summary”).

The Public Participation Summary contained responses to the Tribe’s August 2012 Nitrate CAP Comments, including responses to the Tribe’s substantive comments on the UGW12-04 corrective action plan (DRC Responses 3-19), one response to the Tribe’s reiteration of concern about the well casing testing for the deep supply well WW-2 (DRC Response 1), and one response that appears to address the sections of the December 2011 RML Comments describing Tribal concerns about the long-term protection of groundwater near the WMM facility (DRC Response 2). In these Public Participation Summary responses, DRC for the first time offered clear conclusions and determinations that: (1) elevated concentrations of metals and uranium in southern, downgradient wells are not due to Tailings Cell leakage (DRC Response 2); (2) Tailings Cells 1, 2, and 3 and Roberts Pond have been eliminated as a source of the nitrate/nitrite/chloride contamination at issue in UGW12-04 (DRC Responses 3, 12, 15); (3) there is no indication that a continuing source of the nitrate/nitrite/chloride contamination is present, and the plume concentrations of nitrate and chloride do not appear to be increasing with time (DRC Response 3); and (4) DRC believes the Phase II pumping may be the most effective long term treatment solution to remediate the plume to Utah Ground Water Standards for nitrate (DRC Response 5).

As the Tribe will demonstrate below in its Statement of Reasons, these new conclusions and determinations are at odds with prior DRC (and DUSA/EFR) statements and studies regarding the Tailings Cells as potential sources of contamination. These new conclusions and determinations rely heavily on dated and inconclusive studies and data, while at the same time failing to cite or reconcile other data (such as the data collected regarding the UGW20-01 chloroform plume) and more recent data (such as the data contained in the UGW12-03 docket and data collected during recent repair work on Tailings Cell 1<sup>5</sup>) that would preclude any reasonable person from making the determinations eliminating the Tailings Cells as sources of the spatially-overlapping, multi-contaminant plume. DRC’s response also misconstrues or misrepresents studies and data collected by DRC, and at times presents clearly erroneous statements of fact. Because the Public Participation Summary is both non-responsive to important Tribal comments and displays that the design of the Nitrate CAP relies on DRC determinations on Tailings Cell leakage that are not supported by substantial evidence, that are arbitrary and capricious, and that are beyond the tolerable limits of reason, the Tribe now contests both the Decision approving the final Nitrate CAP and the entire Public Participation Summary.

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<sup>5</sup> See DMT Performance Standards Monitoring Report and Cell 4A BAT Performance Standards Monitoring Report for the 2<sup>nd</sup> Quarter of 2012 (August 22, 2012) [hereinafter “DMT Report”]. Page 427 of Appendix 5 (Repair Photographs) is attached as Exhibit G.

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## **B. STATEMENT OF REASONS**

As set forth below, the approval of the Nitrate CAP fails to meet the Utah Water Quality Act and the Utah Water Quality Standards regulations. DRC has also issued determinations in the Public Participation Summary (and in support of the Nitrate CAP) that are not supported by substantial evidence when viewed in light of the whole record, that are arbitrary and capricious, and that are beyond the tolerable limits of reason.

The Tribe hereby incorporates and references the December 2011 RML Comments, the April 2012 Letter, the August 2012 Nitrate CAP comments, and the October 2012 Letter. In addition to, and in clarification of those comments and correspondence, the Tribe sets forth the reasons for its Request for Agency Action below.

### **1. THE NITRATE CAP FAILS TO MEET THE REQUIREMENTS OF UTAH ADMIN. CODE R317-6 ET SEQ.**

In its December 2011 RML Comments, the August 2012 Nitrate CAP Comments, and the April 2012 and October 2012 Letters, the Tribe has provided DRC (and now provides again in Exhibits A, B, C, and E) a detailed analysis of its concerns with groundwater contamination at the WMM facility. The August 2012 Nitrate CAP comments provided detailed arguments that the proposed stipulation and Nitrate CAP (draft Nitrate CAP) failed to meet the requirements of the Utah Water Quality Standards regulations, including:

- The Tribe asserted that the draft Nitrate CAP improperly removed EFR's responsibility to identify the source of the nitrate/nitrite/chloride contaminant plume under Utah Admin. Code R317-6-6.15(D)(1)(b)(5).
- The Tribe asserted that the draft Nitrate CAP failed to protect public or Tribal Member health and the environment, as required by Utah Admin. Code R317-6-6.15(E)(2). This assertion contained three separate assertions of failure to protect public health and the environment, which included analysis of:
  - The draft Nitrate CAP's failure to require EFR to investigate Tailings Cells 1, 2, and 3 and the Roberts Pond Area as sources of the nitrate/nitrite/chloride plume.
  - The draft Nitrate CAP's failure to require EFR to provide for costs for Phase III of the CAP and other phases or Corrective Action Plans needed for full remediation of groundwater contamination at the WMM facility.
  - The draft Nitrate CAP's failure to adequately address downgradient uses.
- The Tribe asserted that the draft Nitrate CAP failed to produce a permanent effect as required by Utah Admin. Code R317-6-6.15(E)(4).

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- The Tribe asserted that the draft Nitrate CAP failed to meet Corrective Action Concentration Limits specified in Utah Admin. Code R317-6-6.15(F).

Because the Tribe incorporates the August 2012 Nitrate CAP comments by reference here, and has attached those comments as Exhibit C, the Tribe will not reiterate each regulatory deficiency here. Instead, the Tribe will briefly cover the main discrepancy between the Tribe's August 2012 Nitrate CAP Comments and DRC's Public Participation Summary responses that provides the basis for the Tribe's continued assertion that the final Nitrate CAP is still insufficient under the Utah Water Quality Standards Regulations, Utah Admin. Code R317-6 *et. seq.* for the reasons stated in the August 2012 Nitrate CAP Comments.

**a. Because the Mandatory Phases of the Nitrate CAP do not Contain Source Investigation, Source Remediation, or Any Work Beyond a Near Term Pumping Regime, the Nitrate CAP Fails to Meet the Basic Requirements of Utah Admin. Code R317-6 *et. seq.***

In August of 2012, the Tribe's underlying concern about the draft Nitrate CAP was that it failed to require EFR to study, locate, or remediate the source of the co-located nitrate/nitrite/chloride contamination. The Tribe was concerned that DRC's only mandatory source control requirement was the Phase I remediation of the Ammonia Sulfate Crystal Tanks, which (as DRC has not disputed) cannot be the source of the co-located nitrate and chloride.<sup>6</sup> The Tribe was particularly concerned that DRC did not require any investigation of Tailings Cells 1, 2, and 3 as potential sources for the co-located contamination, despite the fact that the initial CIR studies had identified the Tailings Cells as potential sources of the contamination and despite arguments and reports submitted by the Tribe to DRC demonstrating significant concerns about the liner integrity of the more-than-30-year-old liners.

Because the draft Nitrate CAP did not require EFR to develop any plans beyond the Phase I Ammonia Sulfate Crystal Tank clean up and the Phase II "near term" groundwater pumping for at least five years, and because the draft Nitrate CAP only required EFR to provide a surety estimate for the initial two phases of work, the Tribe expressed significant concern that, unless Phase III of the Nitrate CAP was modified to include source investigation of the Tailings Cells, and unless DRC revised the CAP to require EFR to conduct the Phase III investigation simultaneously with the near-term Phases I and II, the Nitrate CAP would not result in a full cleanup of the source of the nitrate/nitrite/chloride plume and would not properly protect public health and the environment as required in the Utah Water Quality Standards regulations.

The final Nitrate CAP approved in December of 2012 contains the same deficiencies as the draft Nitrate CAP. DRC has still failed to require EFR to develop any plans for source control, and DRC is now explicitly refusing to require EFR to undertake any additional analysis

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<sup>6</sup> The Tribe notes here that the Ammonia Sulfate Crystal Tanks also cannot explain the co-location of the nitrate/nitrite/chloride plume with the decreasing pH trends and multi-contaminant exceedances identified in the UGW12-03 docket.



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of the Tailings Cells as potential sources of the contamination (without any additional data<sup>7</sup> eliminating the Tailings Cells as the source of the contaminant plume). DRC has also refused to require EFR to include any additional bonding or surety to cover work beyond Phases I and II. DRC refused to make any of the revisions demanded by the Tribe in the August 2012 Nitrate CAP Comments. Accordingly, for the same reasons stated in the December 2011 RML Comments, the August 2012 Nitrate CAP Comments, and the April 2012 and October 2012 Letters, the Tribe again asserts that the final Nitrate CAP fails to meet the basic requirements of Utah Admin. Code R317-6 *et. seq.*

2. THE RESPONSES TO THE TRIBE'S PUBLIC COMMENTS (CONTAINED IN THE PUBLIC PARTICIPATION SUMMARY) FAIL TO ADEQUATELY ADDRESS THE TRIBE'S COMMENTS AND CONTAIN AGENCY DETERMINATIONS THAT ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE ARBITRARY AND CAPRICIOUS, AND ARE BEYOND THE TOLERABLE LIMITS OF REASON

In the Public Participation Summary, the DRC offered responses to both substantive comments on the Nitrate CAP and to issues mentioned in the section on Tribal Background and Concern with Groundwater Contamination at the WMM facility. Despite the length of DRC's responses to the Tribe's public comments, DRC failed to adequately address the Tribe's comments, and instead provided DRC's rationale for making pre-comment decisions regarding the Nitrate CAP. DRC also announced for the first time several important determinations regarding the nature of the nitrate/nitrite/chloride plume and regarding the Tailings Cells as potential sources of the spatially overlapping, multi-contaminant groundwater contamination plume at the WMM facility. The Tribe now requests that DEQ: (1) reverse the DRC's Public Participation Summary responses to the Tribe's comments and require DRC to address the Tribe's concerns; and (2) remand the Nitrate CAP to DRC for amendments described in Section IV below.

**a. The Response to the Tribe's Public Comments Did Not Adequately Address the Tribe's Comments**

In the Public Participation Summary, the DRC offered responses to both substantive comments on the Nitrate CAP and to issues mentioned in the section on Tribal Background and Concern with Groundwater Contamination at the WMM facility. In these responses, DRC offered DRC's rationale for making various determinations regarding groundwater contamination at the facility, but DRC consistently failed to address the substance of the Tribe's comments. For example, in response to extensive Tribal comments about concerns about the co-location of nitrate and chloride in the contamination plume (and concerns that the only source cleanup required by Phase I of the Nitrate CAP was for the Ammonia Sulfate Crystal Tanks, which is a source that cannot not explain the co-location of the two "indicator" parameters),

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<sup>7</sup> DRC has more recent data, including, but not limited to, the data related to the UGW12-03 docket and the DMT Report, that shows spatially-overlapping contamination plumes containing chloroform, dichloromethane, nitrate, nitrite, chloride, cadmium, manganese, selenium, thallium, uranium, TDS, sulfate, and fluoride and photographic and other evidence of severe degradation in the Tailings Cell 1 liner.

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DRC described the results of the initial (and inconclusive) Phase I CIR investigation. DRC then used the Ammonia Sulfate Crystal Tank cleanup requirement to state that there is currently no justification for additional source investigation in the Nitrate CAP. DRC did not, however, explain how the Nitrate CAP ensured that the source of the *co-located* nitrate and chloride would be permanently remediated by EFR or how DRC was addressing the spatially overlapping, multi-contaminant plume evidenced in the UGW12-03 stipulation. DRC consistently used this type of explanatory, and yet substantively non-responsive, approach to address every important Tribal concern listed in the August 2012 Nitrate CAP Comments.

**b. The Responses to the Tribe's Public Comments Contain Agency Determinations that are Not Supported by Substantial Evidence, that are Arbitrary and Capricious, and that are Beyond the Tolerable Limits of Reason**

In the Public Comment Summary, DRC for the first time issued several conclusions and determinations about groundwater contamination at the WMM facility. These conclusions and determinations include, but are not limited to, DRC's assertions that: (1) elevated metal and uranium concentrations in downgradient wells are not being caused by Tailings Cell leakage (DRC Response 2); (2) Tailings Cells 1, 2, and 3 and Roberts Pond have been eliminated as sources of the nitrate/nitrite/chloride contamination at issue in UGW12-04 (DRC Responses 3, 12, 15); (3) there is no indication that a continuing source of the nitrate/nitrite/chloride contamination is present, and the plume concentrations of nitrate and chloride do not appear to be increasing with time (DRC Response 3); and (4) DRC believes the Phase II pumping may be the most effective long term treatment solution to remediate the plume to Utah Ground Water Standards for nitrate (DRC Response 5). The responses supporting these conclusions contained factual statements that are clearly erroneous and which contradict prior statements and conclusions from DRC and EFR. Some of the responses also improperly relied on dated and inconclusive studies, and did not address the more recent monitoring information, remediation reports, and contamination events that, when viewed as a whole, could never lead a reasonable person to the conclusions supported by DRC. Because these determinations have appeared for the first time in the Public Participation Summary, and because the determinations are the underpinnings of DRC's conscious decision not to require EFR to investigate the Tailings Cells or Roberts Pond as sources of the multi-plume contamination or to test the integrity of the Tailings Cell liners, the Tribe asserts that the conclusions drawn in the DRC's responses, as well as the deficiencies identified in the Nitrate CAP relying on those conclusions, are: (1) not supported by substantial evidence, viewing the record as a whole; (2) arbitrary and capricious; and (3) beyond the tolerable limits of reason.

**i. The Responses Contain Agency Determinations that Are Not Supported by Substantial Evidence, Viewing the Record as a Whole**

The four determinations or conclusions outlined in the paragraph above are not supported by substantial evidence, viewing the record as a whole. Some of the determinations are simply incorrect statements of fact. As an example, in DRC Response 3, DRC stated, "There is no indication that a continuing source is present. The plume concentrations of nitrate and chloride do not appear to be increasing over time." However, the most recent Groundwater Monitoring

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Report and the Stipulated Consent Agreement for UGW12-03 have both documented consecutive exceedances of nitrate, nitrite, and chloride in the groundwater monitoring system, which means that EFR has presented, and DRC has reviewed, recent reports that clearly show increasing levels of nitrate and chloride in the WMM facility's monitoring wells. A more extensive list of the factual inaccuracies contained in the Public Participation Summary is attached as Exhibit F.

The DRC's determinations regarding Tailings Cell leakage improperly relied on dated and inconclusive studies, while at the same time ignoring more recent data that undercuts the DRC conclusions. Here, for example, the DRC relied heavily on the University of Utah Study, EFR's December 2009 Nitrate Contaminant Investigation Report, and the 2008 Tischler report to support determinations that Tailings Cells 1, 2, and 3 and the Roberts Pond were not the source of the nitrate and chloride contamination. To begin, none of these studies cited by DRC made the specific finding or determination ruling out the Tailings Cells or the Roberts Pond as the source of the contamination, and in fact, some of the studies explicitly included the Tailings Cells and the Roberts Pond as potential sources. In addition, none of these studies cited by DRC support a dispositive decision by DRC in December of 2012 that the Tailings Cells were not the source of the nitrate and chloride contamination. The University of Utah Study was published in 2008, before DRC ordered EFR to conduct extensive work to investigate the source of the nitrate and chloride contamination. As described in the Statement of Facts, the 2008 reports and the December 30, 2009 Nitrate Contaminant Investigation report were submitted to DRC in the initial stages of formulating the CIR for the nitrate/nitrite/chloride plume. EFR never finalized the design for or performed Phases 2-5 of the CIR, which would have required significant additional phases of study to try to rule out or determine the source of the contamination plume. Moreover, EFR has never performed an analysis of the Tailings Cells themselves to evaluate leakage or integrity of the Tailings Cell liners. The only definitive findings from these studies were that: (1) additional study and monitoring would be required to make a determination about Tailings Cell leakage or the source of the nitrate/nitrite/chloride contaminant plume; and (2) DRC could not "eliminate Mill activities as a potential cause, either in full or in part, of the contamination."

In its misplaced reliance on the University of Utah Study and the CIR reports, DRC has failed to consider more recent data that strongly suggests that the spatially-overlapping, multi-contaminant plume is related to Tailings Cell leakage. In addition to the expert's report submitted by the Tribe with the December 2011 RML Comments,<sup>8</sup> the record in front of DRC in December of 2012 included updated monitoring results showing increasing levels of nitrate, nitrite, chloride, and other indicator parameters in the monitoring system, the spatially overlapping constituent exceedances described in the UGW12-03 SCA, and the DMT Report (which details and provides photographic evidence of significant degradation of the Tailings Cell 1 liner). This all demonstrates that DRC is making important decisions—such as the decision to definitively rule out all action associated with investigating the Tailings Cells as the source of the

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<sup>8</sup> In the December 2011 RML Comments, the Tribe submitted the RRD International Corp. report as an exhibit supporting comments on the concern about the high probability of liner degradation and failure of Tailings Cells 1, 2, and 3 and comments on the reclamation and surety plans for the WMM facility. See Exhibit H to the December 2011 RML Comments, Exhibit A.

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multi-contaminant, spatially overlapping groundwater plumes—based on dated and inconclusive studies, and without considering additional information that undercuts its conclusions regarding the Tailings Cells. Accordingly, the determinations contained in the Public Participation Summary, and the provisions of the Nitrate CAP that rely on such determinations, should be reversed because the DRC's determinations are not supported by substantial evidence when the record is reviewed as a whole.

ii. The Responses Contain Agency Determinations that are Arbitrary and Capricious

The four determinations or conclusions outlined in Section III(B)(2)(b), *supra* are also arbitrary and capricious. First, as described in Section III(B)(2)(b)(i), *supra*, the factual underpinnings of many of the determinations are clearly erroneous. Second, also as described in Section III(B)(2)(b)(i), *supra*, DRC has misplaced its reliance on dated and inconclusive studies, while at the same time ignoring significant recent data suggesting that a source like the Tailings Cells is causing the multi-contaminant groundwater plumes.

Many of the DRC determinations also clearly disagree with previous DRC statements issued in groundwater enforcement action documents. For example, in January of 2012, the DRC issued comments on the draft Nitrate CAP that EFR's language stating the "absence of significant continuing sources of nitrate to the perched water" was unsubstantiated. DRC Review Comments, Nitrate Corrective Action Plan for the White Mesa Mill Site dated November 30, 2011 (Under Cover Letter Dated November 29, 2011), ¶ 22 (January 19, 2012). In the Public Participation Summary, however, the DRC appears to base several conclusions, at least in part, on its new and conflicting conclusion that "there is no indication that a continuing source [of the nitrate contamination] is present." *See* DRC Responses 3, 4, 7. Similarly, the DRC determination that the Phase II pumping "may be the most effective long term treatment solution" contradicts earlier DRC statements describing the Phase II pumping as "near term" work on the nitrate contamination plume.

The DRC determinations on the Tailings Cells also contradict earlier statements by both DRC and DUSA regarding the potential sources of the nitrate/nitrite/chloride contamination plume. After the publication of the University of Utah Study, and during the development of the CIR, DRC consistently required DUSA to investigate the Tailings Cells as potential sources of the nitrate/nitrite/chloride plume. *See, e.g.*, DRC Notice of Additional Required Action (October 5, 2010). As late as August 18, 2011, DUSA listed the Tailings Cells as potential sources of the nitrate contamination. Denison Mines USA Corp. White Mesa Nitrate Investigation Phase 2-5 Work Plan Rev. 2.0 (August 18, 2011).

In September of 2011, as DRC transitioned the EFR work on UWG12-04 from the CIR to the development of the CAP, the DRC and EFR clearly stated that the initial contaminant investigation work had not identified the source of the nitrate/nitrite/chloride plume, but that DRC could not eliminate the WMM as the cause of the contamination. In 2012, without any additional studies or evidence to support a determination that the Tailings Cells cannot be the cause of groundwater contamination at the WMM facility, and with ample recent evidence suggesting that a source like the Tailings Cells is causing the increasingly complex groundwater

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contamination at the WMM facility, DRC has suddenly determined that the additional monitoring and source assessment work demanded by the Tribe is unnecessary because DRC has determined the Tailings Cells are not causing any of the groundwater contamination events identified at the WMM facility. This reversal in the DRC analysis, along with the incorrect factual underpinnings and DRC's new reliance on dated and inconclusive studies instead of recent monitoring results and contamination trends, demonstrates that DEQ should reverse the DRC's determinations in the Public Participation Summary and the provisions of the Nitrate CAP that rely on such determinations because the DRC's determinations are arbitrary and capricious.

iii. The DRC Responses are Beyond the Tolerable Limits of Reason

The four determinations or conclusions outlined in Section III(B)(2)(b), *supra* are beyond the tolerable limits of reason. As explained in Sections III(B)(2)(b)(i)-(ii), *supra*, the DRC's responses rely on clearly erroneous factual underpinnings, the DRC's determinations rely on dated and inconclusive studies while ignoring significant recent data suggesting that a source like the Tailings Cells is causing the spatially-overlapping, multi-contaminant groundwater plumes, and in making these determinations, and the DRC has contradicted its own prior findings and analysis without any new evidence to support the reversal in position. In short, DRC is taking a strong position that the Tailings Cells are not the cause of any of the increasing, spatially overlapping, multi-contaminant groundwater plumes, even though there is strong evidence suggesting that the liners in Tailings Cells 1, 2, and 3 are severely degraded, even though EFR has never conducted studies directly on the Tailings Cells to evaluate liner integrity or leakage under the cells, even though DRC cannot identify the source of the multi-contaminant plumes, even though the multi-contaminant plumes contain increasing levels of many "primary" or "smoking gun" indicators of Tailings Cell leakage, and even though the mix of contaminants in the multi-contaminant plumes strongly suggests a contaminant source like the Tailings Cells. No reasonable person could draw DRC's conclusions when presented with the entire record available to DRC. The DRC's determinations in the Public Participation Summary and the provisions of the Nitrate CAP that rely on such determinations should be reversed and vacated.

3. THE TRIBE RESERVES THE RIGHT TO SUPPLEMENT ITS REASONS FOR REQUEST AND THIS REQUEST FOR AGENCY ACTION UPON THE RECEIPT OF NEW INFORMATION

**IV. REQUEST FOR RELIEF**

Based on the above, the Tribe respectfully requests that: (1) the determinations listed in Section III(B)(2)(b), *supra* and the responses to the Tribe's public comments contained in the Public Participation Summary be reversed and vacated; and (2) the approval of the Nitrate CAP be reversed and remanded to DRC with instructions that DRC amend or supplement the Nitrate CAP to address identification and control of all sources of the groundwater contamination at WMM. Specifically, the Tribe requests that the instructions direct DRC to:

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- (a) Incorporate the elements identified in the UGW20-01 and UGW 12-03 actions, which would require EFR to investigate common sources of the spatially-overlapping, multi-contaminant plumes;
- (b) Require EFR to perform a new contamination investigation evaluating Tailings Cells 1, 2, and 3 and the Roberts Pond area as the source of the nitrate/chloride and other contaminant plumes;
- (c) Require that, if EFR is not able to rule out Tailings Cells 1, 2, and 3 as sources through direct testing of the Tailings Cell liners (or drilling beneath the liners to test the unsaturated zone), that EFR must immediately begin concurrent reclamation of Tailings Cells 1, 2, and 3 (as further described in the December 2011 RML Comments);
- (d) Require EFR to perform Phase III (including the contamination investigation of Tailings Cells 1, 2, and 3 and the Roberts Pond area as sources of the contaminant plumes) concurrently with Phases I and II of the CAP;
- (e) As part of the investigation of Tailings Cell 1, 2, and 3 and the Roberts Pond area, and as part of Phase II of the CAP, require EFR to expand the monitoring program to include everything required in Table 2 of EFR's groundwater permit;
- (f) Clarify that EFR may only place the contaminated groundwater from the Phase II pumping into cells like Tailings Cell 4a or 4b that contain modern liner technology and more advanced leak detection systems;
- (g) Reinstate the well integrity testing requirements (removed on February 13, 2012) on deep supply well WW-2 to require EFR to remove a potential contamination pathway from the plume or contamination source(s) to the Tribal drinking water aquifer;
- (h) Designate MW-20 and MW-22 as point of compliance wells to evaluate downgradient movement of contamination to the south end of the WMM property; and
- (i) Require EFR to provide a surety estimate that covers all phases of the CAP (including the contamination investigation of Tailings Cells 1, 2, and 3 and the Roberts Pond area as the source and all future remediation work on active sources).

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Dated: January 11, 2013



H. Michael Keller  
Special Counsel  
Ute Mountain Ute Tribe  
Utah Bar # 1784

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Celene Hawkins  
Associate General Counsel  
Ute Mountain Ute Tribe

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### **CERTIFICATE OF SERVICE**

The undersigned caused the foregoing Request for Agency Action to be emailed today to:

Rusty Lundberg  
Executive Secretary  
Water Quality Board/Radiation Division  
[rlundberg@utah.gov](mailto:rlundberg@utah.gov)

Administrative Proceedings Records Officer  
[DEQAPRO@utah.gov](mailto:DEQAPRO@utah.gov)

Jo Ann Tischler  
Energy Fuels (USA) Inc.  
[JTischler@energyfuels.com](mailto:JTischler@energyfuels.com)

Because the email submission contains large exhibits, and due to inclement weather on the date of filing, the undersigned also caused the foregoing Request for Agency Action to be hand delivered (electronic format) to:

Administrative Proceedings Records Officer  
Environment Division  
Utah Attorney General's Office  
160 East 300 South  
5<sup>th</sup> Floor  
Salt Lake City, Utah 84111

Dated this 11<sup>th</sup> day of January, 2013

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Celene Hawkins