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BEFORE THE UTAH WATER QUALITY BOARD

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In the Matter of

PR Spring Tar Sands Project, Ground Water  
Discharge Permit-by-Rule

No. WQ PR-11-001

**JOINT PREHEARING STATEMENT  
AND ORDER**

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U S Oil Sands Inc. (“USOS”), the Executive Secretary of the Water Quality Board (“Executive Secretary”) and Living Rivers (collectively “the Parties”) respectfully submit this Joint Prehearing Statement and Order regarding the hearing set in this matter for May 16 and 17, 2012.

**I. STANDARD OF REVIEW.**

The standard of review in this proceeding is whether, based on the record as a whole, the Executive Secretary erroneously interpreted or applied the law or made a determination of fact that is not supported by substantial evidence when viewed in light of the whole record. *See Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 14, 226 P.3d 719.

## **II. CONDUCT OF PROCEEDINGS.**

1. The proceeding will be governed by the administrative procedures outlined in Utah Admin. Code R305-6.

2. The Executive Secretary will present his case first, Living Rivers will present its case second, and USOS will present its case third. Each party will be allocated approximately 3.5 hours, which will be tracked by a timekeeper provided by the Department of Environmental Quality.

3. Exhibits, stipulated and objected-to, shall be provided to the ALJ on May 9, 2012. Objections also shall be filed on May 9, 2012. With respect to each objection, the ALJ shall either sustain the objection (in which case, the objected-to exhibit shall not be admitted), or overrule the objection (in which case the objected-to exhibit shall be received in evidence).

4. Documents in the Initial Record shall be designated IR A through IR L. Exhibits already marked during the recorded testimony of William Johnson and Ed Handl shall retain the designations (Exhibits 1-20) used during the recorded testimony. Additional exhibits offered by the Executive Secretary shall be numbered, starting with ES 100; additional exhibits offered by Living Rivers shall be numbered, starting with LR 200; and additional exhibits offered by USOS shall be numbered, starting with USOS 300.

5. The written and recorded testimony of William Johnson and Ed Handl is not hearsay and is admissible in evidence, except for the specific portions for which a party has filed a written objection on or before May 9, 2012. With respect to those portions, the ALJ shall either sustain the objections (in which case, the objected-to portions shall be stricken), or overrule the objections (in which case the objected-to portions shall be received in evidence along with the rest of the testimony). This testimony will be provided to the ALJ in written, transcript, and video formats on or before May 9, 2012.

### **III. STIPULATED ADMISSIONS OF FACT.**

1. On February 8, 2011, US Oil Sand (formerly known as Earth Energy Resources, Inc. or EER) (“USOS”) submitted a letter to DWQ regarding certain proposed modifications to its proposed tar sands mining process since USOS had received an permit-by-rule determination from DWQ in 2008.

2. The proposed operation for the PR Spring Tar Sands Project consists of open-pit mining of tar sands; extraction of bitumen using d-limonene; and storage of processed sands, processed fines and waste rock in the mine and two additional storage areas totaling 70 acres in size.

3. As a tar sands mining operation, the PR Spring Project will operate under a Notice of Intention for a Large Mining Permit (NOI M040090) required by the Utah Mined Land Reclamation Act (40-8-13) and approved by the Utah Division of Oil, Gas and Mining (“DOG M”).

4. Under Utah Admin. Code R647-4-109, the NOI must include “a general narrative description identifying ... [p]rojected impacts to surface and groundwater systems ... [and] actions which are proposed to mitigate [those] impacts.”

5. DWQ’s records show that the Ground Water Protection Section of the Utah Division of Water Quality was first contacted by USOS regarding the proposed PR Spring Project in October 2005.

6. On February 21, 2008, JBR Environmental Consultants, Inc. (“JBR”), on behalf of USOS submitted to DWQ a Ground Water Discharge Permit by Rule Demonstration (“Demonstration”). The Demonstration was provided to support USOS’s request to DWQ for a determination that the PR Spring operation be considered as a permitted-by-rule facility under Utah Ground Water Protection Rules (Utah Admin. Code R317-6).

7. DWQ accepted the Demonstration as USOS's permit-by-rule application.
8. The USOS Demonstration requested a determination by DWQ that the proposed project meets the criteria to be permitted-by-rule under Utah Admin. Code R317-6-6.2(1) and R317-6-6.2(25).
9. In a letter dated March 4, 2008, DWQ communicated to USOS that the PR Spring Project should have a *de minimis* potential effect on ground water quality and qualifies for permit-by-rule status under Utah Admin. Code R317-6-6.2(25).
10. The March 4, 2008 determination included four factors cited by DWQ in support of the permit by rule determination and language that "[i]f any of these factors change because of changes in your operation or from additional knowledge of site conditions, this permit-by-rule determination may not apply and you should inform the DWQ of the changes."
11. Living Rivers did not contest the March 4, 2008 permit-by-rule Determination within 30 days of its issuance.
12. On February 8, 2011, USOS submitted a letter to DWQ outlining several proposed modifications and asking DWQ to confirm that none of the changes affected its permit-by-rule status.
13. Between February 8, 2011 and February 15, 2011, DWQ conducted its review of the modifications.
14. On February 15, 2011, DWQ informed USOS by letter that it had considered the modifications and had determined "the proposed changes to the mining and bitumen extraction process do not change the March 4, 2008 permit-by-rule determination for having a *de minimis* potential effect on ground water quality and the project still qualifies for permit-by-rule under Utah Admin. Code R317-6-6.2.A(25)."



15. On March 16, 2011, within 30 days of the DWQ's February 15, 2011 Letter to USOS, Living Rivers filed the subject Request for Agency Action/Petition to Intervene ("RFAA").

16. During the summer of 2011, USOS drilled 180 core holes in the area of the project.

#### **IV. AGREED APPLICABLE PROPOSITIONS OF LAW.**

1. Applicable ground water protection rules at Utah Admin. Code R 317-6, include a provision that "the following facilities are considered to be permitted by rule and are not required to obtain a discharge permit under R317-6-6.1 or comply with R317-6-6.3 through R317-6-6.7, R317-6-6.9 through R317-6-6.11, R317-6-6.13, R317-6-6.16, R317-6-6.17 and R317-6-6.18: ... 25. facilities and modifications thereto which the Executive Secretary determines after a review of the application will have a *de minimis* actual or potential effect on ground water quality." Utah Admin. Code R317-6-6.2(A)(25).

2. Utah Admin. Code R317-6-1.19 defines "ground water" as "subsurface water in the zone of saturation including perched groundwater."

3. Living Rivers, as the petitioner, carries the burden of proof. *See Milne Truck Lines, Inc. v. Public Service Commission of Utah*, 720 P.2d 1373, 1379 (Utah 1986). The standard of proof in this administrative hearing is a preponderance of the evidence, and "requires the proponent of a contested fact to demonstrate that its existence is more likely than not." *Harken v. Southwest Corp. v. Board of Oil, Gas and Mining*, 920 P.2d 1176, 1182 (Utah 1996).

4. Living Rivers contends, and the other parties do not dispute, that the appellate standard set forth in the Administrative Procedures Act, Utah Code Ann. § 63G-4-403(4)(d), (g), (h), should be applied in this matter, and that standard allows relief to a party if the agency "erroneously interpreted or applied the law," based an action "upon a determination of fact ...

that is not supported by substantial evidence when viewed in light of the whole record before the court,” or is “otherwise arbitrary or capricious.” *See also Sierra Club v. Air Quality Bd.*, 2009 UT 76, ¶ 14; 226 P.3d 719.

## V. FACTUAL ISSUES PRESENTED.<sup>1</sup>

The factual issue presented for decision in this matter, based on the standard of review articulated above, is whether the Executive Secretary’s *de minimis* finding pursuant to Utah Admin. Code R317-6-6.2A(25) is supported by substantial evidence. This issue turns on the following two, factual sub-issues:

1. Whether the record as it will exist before the Water Quality Board shows that ground water, as that term is defined in statutes and regulations, exists in the project area?<sup>2</sup>
2. If such ground water exists, does USOS’s proposed operation present a greater than *de minimis* risk of effecting the quality of that ground water?

The parties agree that if the answer to either of these questions is “no,” then the Executive Secretary’s decision has a reasonable basis and must be allowed to stand.<sup>3</sup>

## VI. CONTESTED ISSUES OF LAW.

1. Whether, in determining under Utah Admin. Code R317-6-6.2(A)(25) that the PR Spring facility and operations will have no more than a *de minimis* actual or potential effect on ground water quality, the Executive Secretary erroneously interpreted or applied the law.

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<sup>1</sup> In response to its understanding of this Tribunal's request, Living Rivers has prepared a more detailed outline of the Factual Issues Presented. USOS and DWQ have not agreed to include this outline in the Joint Statement. Therefore, Living Rivers will provide that outline under separate cover.

<sup>2</sup> Living Rivers believes that this statement of the relevant factual issue is inaccurate. USOS and the Executive Secretary do not agree to the modification Living Rivers has suggested to restate this issue more precisely. Therefore, Living Rivers will provide what it believes is a more accurate statement of this issue under separate cover.

<sup>3</sup> USOS does not waive its argument, articulated in its Motion to Dismiss, Motion for a More Clear Statement, and Motion to Exclude Issues and for Judgment as a Matter of Law, that Living Rivers’ Request for Agency Action challenges decisions made by the Executive Secretary on March 4, 2008, and is an untimely appeal of the March 4, 2008 determinations that the PR Spring mine qualified for permit-by-rule status because it would have a *de minimis* potential effect on groundwater quality.

2. Has Living Rivers shown that it is entitled to its requested relief?

DATED this 9th day of May, 2012.

WESTERN RESOURCE ADVOCATES

UTAH ATTORNEY GENERAL'S OFFICE

*Signed by Permission to Filing Attorney*

*/s/ Rob Dubuc*

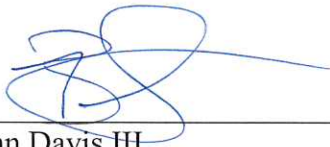
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SO ORDERED:

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Honorable Sandra K. Allen  
Administrative Law Judge

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of May, 2012, a true and correct copy of the foregoing **JOINT PREHEARING STATEMENT AND ORDER** was served via e-mail, as follows:

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