

**BEFORE THE UTAH DEPARTMENT OF
ENVIRONMENTAL QUALITY AIR QUALITY BOARD**

In the matter of:

**Denison Mines (USA) Corporation
La Sal Mines, La Sal, Utah (14151)**

Compliance with 40 C.F.R., Part 61
Subpart A, Sections 61.07 and 61.08,
and Subpart B

**MEMORANDUM AND
RECOMMENDED ORDER TO DISMISS
URANIUM WATCH AND LIVING
RIVERS' REQUEST FOR AGENCY
ACTION AND SUPPLEMENTS**

February 8, 2012

Administrative Law Judge
Sandra K. Allen

At issue are motions to dismiss and a proposed dispositive action. This matter is being decided on the memoranda filed by the parties and on oral argument to the Administrative Law Judge (ALJ), and without an evidentiary hearing.

INSTRUCTIONS

Pursuant to Utah Code Ann. Section 19-1-301(6)(a)(iii), an ALJ shall submit to the Board a proposed dispositive action, including written findings of fact, written conclusions of law, and a recommended order. The Board may approve, approve with modification, or disapprove the proposed dispositive action, or may return the proposed dispositive action to the ALJ for further action as directed. Utah Code Ann. §19-1-301 (6)(b).

BACKGROUND

On January 27, 2010, Denison Mines (USA) Corporation (Denison) submitted a notification letter to the Executive Secretary stating its intent to construct seven additional vent holes at its mine in La Sal, Utah. On February 17, 2010, the Executive Secretary issued a letter to Denison stating that Denison's January 27, 2010, letter complied with the notification and reporting requirements of 40 C.F.R. § 61.07. On November 4, 2010, Uranium Watch and Living

Rivers (Petitioners) filed a Request for Agency Action to obtain an order directing the Executive Secretary to reconsider the February 17, 2010, approval letter. Petitioners supplemented their Request for Agency Action on March 7, 2011, March 23, 2011, and on April 7, 2011 (collectively, "Supplements"). The Executive Secretary and Petitioners engaged in settlement discussions at various times until Petitioners asserted their interest in moving on to an adjudicative proceeding, and an ALJ was appointed.

In the *Notice of Further Proceedings and First Prehearing Order*, the ALJ identified issues that might require dismissal of Petitioners' Request for Agency Action and Supplements, and instructed the parties to attend a pre-hearing conference. Following discussions at the pre-hearing conference, the ALJ issued a *Second Pre-hearing Order* that directed the Executive Secretary and Denison to file motions to dismiss. The *Second Pre-hearing Order* also directed the Petitioners to file memorandums in opposition, and the Executive Secretary and Denison to file replies. The parties filed the memorandums ordered. A hearing was held on January 10, 2012. Christian Stephens represented the Executive Secretary, Michael Zody and Jacob Santini represented Denison, and Sarah Fields represented the Petitioners. Additional attendees are identified in the transcript.

An index of the adjudicatory record (Index) is attached. This *Memorandum and Recommended Order to Dismiss Uranium Watch and Living River's Request for Agency Action and Supplements* is a proposed dispositive action based upon the Petitioners' Request for Agency Action and Supplements (Index Doc. List Nos. 1-4), the aforementioned motions to dismiss and memorandums (Index Doc. List Nos. 12-17), and the parties' arguments at the hearing (Transcript, Index Doc. No. not assigned, last item).

PROPOSED DISPOSITIVE ACTION

The ALJ recommends that the Board grant the motions to dismiss filed by the Executive Secretary and by Denison based on the memorandums filed by the parties, and the arguments presented at the hearing and the Petitioners' Request for Agency Action and Supplements.

MEMORANDUM

OVERVIEW OF APPLICABLE PROCEDURE

The Board's adjudicative proceedings are governed by (1) the Utah Administrative Procedures Act (UAPA), Title 63G, Chapter 4 Utah Code Ann.; (2) the administrative rules adopted pursuant to the Environmental Quality Code and the Utah Air Conservation Act; and, (3) the Utah Rules of Civil Procedure where UAPA and applicable administrative rules are silent. Utah Code Ann. §19-1-301(2)(b). The issuance of an order under the Air Conservation Act is initially exempt from UAPA, but subsequent agency and judicial review of those orders, to the extent available under applicable law, are subject to UAPA. Utah Code §§ 63G-4-102(2)(k), 63G-4-201(3)(a). UAPA requires a request for agency action seeking review of an initial determination to be filed with the agency within the time period prescribed by the agency's rules. Utah Code § 63G-4-201(4).

The Utah Department of Environmental Quality recently revised and consolidated the administrative rules governing adjudicative procedures into a single set of administrative rules. See Utah Admin. Code Rule 305-6, effective on August 31, 2011. However, a controversy is typically determined on the basis of the statutory or administrative law as it existed at the time of the occurrence. Utah Chapter of the Sierra Club v. Air Quality Board, 226 P.3d 719, 729 (Utah 2009). Utah Admin. Code R307-103 was in effect at the time of the February 17, 2010, approval letter, as well as when the Petitioners filed their Request for Agency Action and Supplements.

Therefore, the rule applicable to this matter is former Rule 307-103 Utah Admin. Code (as in effect from April 12, 2001 – August 29, 2011).

The Rules of Civil Procedure apply where UAPA and applicable administrative rules are silent. Utah Code Ann. §19-1-301(2)(b). Rule 12(b) of the Utah Rules of Civil Procedure applies to motions to dismiss. A motion to dismiss is appropriately granted under Rule 12(b) when the allegations, even if true, fail to state a claim for which relief may be granted. See Whipple v. American Fork Irrigation Company, 910 P.2d 1218, 1219 (Utah 1996). A motion to dismiss focuses only on “the sufficiency of the pleadings, not the underlying merits of the case.” Alvarez v. Galetka, 933 P.2d 987, 989 (Utah 1997).

DISCUSSION

1. The Request for Agency Action and Supplements must be dismissed because they are untimely.

The Petitioners’ Request for Agency Action and Supplements are untimely. Rule 307-103-3(3) requires a request for agency action to be filed within 30 days of the issuance of the initial order to be effective. Rule 307-103-3(3) provides: “A request for agency action made to contest an initial order. . . shall, to be timely, be received for filing within 30 days of the issuance of the initial order. . . .” The Petitioners’ request for agency action dated November 4, 2010, seeks to contest a decision by the Executive Secretary issued on February 17, 2010, in an approval letter. The Petitioners’ Request for Agency Action and Supplements are well beyond the 30 day deadline. Therefore, the Petitioners’ Request for Agency Action and Supplements were not timely filed to contest the February 17, 2010, approval letter.

An untimely request for agency action (including supplements) must be dismissed. Rule 307-103-2(c) provides: “Failure to timely contest an initial order . . . waives any right of

administrative contest, reconsideration, review, or judicial appeal.” Consequently, it follows that the Petitioners’ untimely Request for Agency Action and Supplements must be dismissed.

At the pre-hearing conference, the ALJ asked whether Rule 307-103-14 would give the ALJ discretion to retroactively extend the deadline for Petitioners to file their Request for Agency Action. The Executive Secretary and Denison addressed the question in their memorandums, arguing that Rule 307-103-14 does not give discretion to the ALJ to extend the deadline. The Petitioners did not address the question.

Rule 307-103-14(1) states that the rules may be modified for good cause, and subsection (2) states that the “presiding officer may approve extensions of any time limits established by this rule. . . .” However, Rule 307-103-2(2)(c) explicitly requires a petitioner to file a request for agency action to contest an initial order within 30 days of issuance and the consequence of failing to timely contest an initial order is that the petitioner “waives any right of administrative contest, reconsideration, review, or judicial appeal.” Rule 307-103-2(2)(c). Therefore, when placed in context, Rule 307-103-14 allows the ALJ to extend procedural time limits that arise after an adjudicative proceeding is timely initiated, not to extend the time period to initiate the adjudicative proceeding.

2. The Supplements must also be dismissed.

The Petitioners argue in their memorandum that the Petitioners’ Supplements should stand on their own to require the Executive Secretary to take enforcement action against Denison. The Petitioners filed a *Supplement to November 4, 2010, Request for Agency Action*, dated March 7, 2011, (First Supplement). The First Supplement focuses on monthly compliance reports submitted to the Division of Air Quality (DAQ) about a year after the Executive Secretary issued the February 17, 2010, approval letter. The Petitioners argue that the DAQ’s

evaluations are “agency actions . . . subject to request for agency action.” The Petitioners provide Exhibits 19 and 20 to their memorandum to support their argument. Exhibits 19 and 20 are DAQ staff memorandums to the file that indicate in part: “Status: In compliance.” The staff memorandums are not initial orders as defined by Rule 307-103-1(2). The First Supplement also requests the DAQ to restrict the information that Denison relies on to certain monitoring stations and locations, and also requests that the DAQ perform certain indoor monitoring at public buildings. The First Supplement appears to be a request for the DAQ to take enforcement action against Denison.

The Petitioner filed a *Second Supplement to November 4, 2010, Request for Agency Action*, dated March 23, 2011, (Second Supplement). The Second Supplement alleges that Denison failed to comply with certain monitoring requirements in 40 C.F.R. Part 61, Subpart B, Section 61.23. The Second Supplement also requests that Denison provide documentation of its compliance and that the DAQ evaluate the effectiveness of Denison’s quality assurance program. The Second Supplement appears to be a request for the DAQ to take enforcement action against Denison.

The Petitioners filed a *Third Supplement to November 4, 2010, Request for Agency Action*, dated April 7, 2011, (Third Supplement). The Third Supplement alleges that Denison should have obtained approval from the DAQ to operate certain vents and has not done so. The Third Supplement requests the DAQ to order Denison to cease operation of the vents that have not been approved for operation, and to order Denison to provide technical information and to submit an application. The Third Supplement also requests the DAQ to consider particular information in reviewing the application. The Third Supplement also requests the DAQ to deny applications until certain determinations have been made or until certain information has been

provided. The Third Supplement also requests the DAQ to penalize Denison. The Third Supplement appears to be a request for the DAQ to take enforcement action against Denison.

The Air Conservation Act does not authorize Petitioners to use an adjudicative proceeding to compel the Executive Secretary to commence an enforcement action. The Air Conservation Act gives enforcement discretion to the Executive Secretary. Utah Code § 19-2-107(2)(g). The Air Conservation Act does not give a private party the right to initiate a notice of violation or order against a regulated party. Therefore, the Petitioners cannot rely upon the Air Conservation Act to support a request for agency action to compel the Executive Secretary to take enforcement action. See Nielson v. Division of Peace Officer Standards and Training, 851 P.2d 1201, 1203 (Utah 1993). When there is no legal basis for the remedy sought, a motion to dismiss is appropriate. See Osguthorpe v. Wolf Mountain Resorts, 232 P.2d 999, 1006 (Utah, 2010) (Court may dismiss an action that fails to state a claim for which relief may be granted).

RECOMMENDED CONCLUSIONS OF FACT

There are no recommended conclusions of fact because, for the purpose of ruling on a motion to dismiss, the focus is on the sufficiency of the pleadings, not the underlying merits of the case. Alvarez v. Galetka, 933 P.2d 987, 989 (Utah 1997).

RECOMMENDED CONCLUSIONS OF LAW

1. Where an initial agency determination is not governed by UAPA, but subsequent agency and judicial review of those determinations are subject to UAPA, a request for agency action must be filed within the time prescribed by the agency's rules.
2. The DAQ's rule applicable to the timeliness of Petitioners' Request for Agency Action and Supplements is Rule 307-103-3(3)(as in effect from April 12, 2001 –

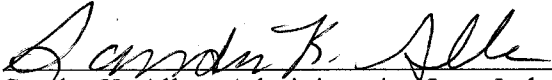
August 29, 2011), which allows thirty days from the date of issuance to contest an initial order.

3. The discretionary extension of deadlines under Rule 307-103-14 (as in effect from April 12, 2001 – August 29, 2011) is limited to deadlines that arise after an adjudicative proceeding is timely initiated.
4. The Petitioners' Request for Agency Action and Supplements to contest the Executive Secretary's February 17, 2010, approval letter were not filed within thirty days of issuance, so they are untimely and must be dismissed.
5. The Petitioners cannot compel the Executive Secretary to take enforcement action against Denison through a request for agency action, so even if the facts alleged in the Petitioners' Supplements are presumed true, the Supplements fail to state a claim for which relief may be granted and must be dismissed.

RECOMMENDED ORDER

The ALJ recommends the following order: "The motions to dismiss filed by the Executive Secretary and by Denison are granted and the Petitioners' Request for Agency Action and Supplements are dismissed with prejudice."

DATED this 8th day of February, 2012.



Sandra K. Allen, Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February, 2012, I caused a copy of the foregoing "Memorandum and Recommended Order to Dismiss Uranium Watch and Living River's Request for Agency Action and Supplements" to be filed/served by electronic mail (unless otherwise indicated) to the following:

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Shane R. Bekkemellom, Administrative Secretary

In the Matter of:

**Denison Mines (USA) Corporation La Sal Mines (14151)
Compliance with 40 C.F.R. Part 61 Subpart A, Sections 61.07 & 61.08, & Subpart B**

**ADJUDICATORY RECORD
Updated as of February 6, 2012**

Abbreviations used:

- DEQ is the Department of Environmental Quality
- LR is Living Rivers
- WRA is Western Resource Advocates
- UW is Uranium Watch
- ALJ is the Administrative Law Judge
- AQ is the Division of Air Quality
- ExSec is the Executive Secretary
- ExDir is the Executive Director
- DM is Denison Mines (USA) Corporation La Sal Mines
- PBL is Parsons Behle & Latimer

| Doc. List No. | Record Description | Date | Added to Record By | Record page |
|----------------------|--|-------------|---------------------------|--------------------|
| 1 | Request for Agency Action with Exhibits A-H | 11/04/10 | UW/LR | |
| 2 | Supplement to November 4, 2010, Request for Agency Action | 03/07/11 | UW/LR | |
| 3 | Second Supplement to November 4, 2010, Request for Agency Action | 03/23/11 | UW/LR | |
| 4 | Third Supplement to November 4, 2010, Request for Agency Action | 04/07/11 | UW/LR | |
| 5 | Letter to Sandra K. Allen, Assistant Attorney General, from Amanda Smith, Executive Director, DEQ, re appointment as administrative law judge with attachments: Conflict Screen Internal Measures form; ALJ Questionnaire form | 07/12/11 | ExDir | |
| 6 | Entry of Appearance of Mike Zody and Jacob Santini [via electronic mail notice] for Denison Mines [USA] Corp | 07/28/11 | PBL/DM | |

| Doc. List No. | Record Description | Date | Added to Record By | Record page |
|----------------------|--|-------------|---------------------------|--------------------|
| 7 | Completed ALJ Questionnaire form | 08/04/11 | ALJ | |
| 8 | Notice of Further Proceedings and First Prehearing Order | 08/31/11 | ALJ | |
| 9 | Email to ALJ from Sarah Fields re Uranium Watch and Living Rivers intent to participate in scheduling conference via conference call | 09/13/11 | UW | |
| 10 | Email response from ALJ to Sarah Fields re telephonic participation in scheduling conference | 09/13/11 | ALJ | |
| 11 | Second Prehearing Order | 09/29/11 | ALJ | |
| 12 | Executive Secretary's Motion to Dismiss UW and LR's Request for Agency Action and Supplements | 10/31/11 | ExSec | |
| 13 | Denison Mines (USA) Corporation's Motion to Dismiss: Jurisdiction to Hear Petitioner's Request for Agency Action | 10/31/11 | PBL/DM | |
| 14 | Response to Executive Secretary's Motion to Dismiss Uranium Watch and Living Rivers' Request for Agency Action and Supplements | 11/22/11 | UW/LR | |
| 15 | Response to Denison Mines (USA) Corporation's Motion to Dismiss: Jurisdiction to Hear Petitioners' Request for Agency Action | 11/22/11 | UW/LR | |
| 16 | Executive Secretary's Reply to UW and LR's Memorandum in Opposition to Motion to Dismiss Request for Agency Action and Supplements | 12/01/11 | ExSec | |
| 17 | Denison Mines (USA) Corp.'s Reply Memorandum in Support of Its Motion to Dismiss | 12/02/11 | PBL/DM | |
| 18 | Notice of Hearing on Motion to Dismiss and Order to Executive Secretary to Arrange Recording | 12/19/11 | ALJ | |
| 19 | Email notice from Living Rivers re Unable to Attend Hearing | 01/09/12 | LR | |
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| Doc. List No. | Record Description | Date | Added to Record By | Record page |
|------------------------------|---|-------------|-----------------------------------|------------------------|
| | Transcript: Denison Mines [USA] Corporation LaSal Mines Administrative Hearing January 10, 2012 | 01/10/12 | ALJ | |