
BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of: U.S. Oil Sands PR Spring Mine, Mine Expansion and Ground Water Discharge Permit-by-Rule

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION ON MOTIONS TO DISMISS

February 18, 2016

Richard K. Rathbun,
Administrative Law Judge

Under authority of Utah Code Ann. §§ 19-1-301 and 19-1-301.5, the Executive Director appointed the undersigned as Administrative Law Judge (ALJ) to conduct the adjudicative proceeding and to submit to the Executive Director a proposed dispositive action pursuant to Utah Code Ann. §§ 19-1-301.5 and -301 and Utah Admin. Code R 305-7-201 *et seq.* Now before me are the motions, filed by the Director and U.S. Oil Sands (“USOS”), seeking dismissal of the two Requests for Agency Action (RAA) filed by Living Rivers on or about February 17, 2015.

Each RAA contains fifty-three paragraphs of text, plus section headings, and refers to exhibits identified as Exhibits A through O. The two RAAs contain identical factual allegations and requests for relief, incorporating the same exhibits, and varying only in their respective paragraphs 1, 5 and 6, where different statutory and administrative rule citations appear. It thus appears that the two RAAs were filed in the alternative.

According to Living Rivers’ descriptions in paragraphs 1, 5 and 6 of each RAA, one RAA was filed pursuant to Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R305-7-203, authorities governing a “permit review adjudicative proceeding.” The other RAA was filed

pursuant to Utah Code Ann. § 19-1-301 and Utah Admin. Code R305-7-303, authorities governing adjudicative proceedings that are not permit review adjudicative proceedings.

After briefing by the parties, oral argument was held on September 2, 2015 at the DEQ building in Salt Lake City. Upon consideration of the pleadings and exhibits, initial administrative record and the arguments of counsel, I submit the following Findings of Fact, Conclusions of Law and Recommended Decision to the Executive Director. For the reasons set forth below, I recommend that the motions to dismiss be granted, dismissing the two RAAs with prejudice and terminating these administrative proceedings.

FINDINGS OF FACT

For purposes of ruling on the motions to dismiss, I accept as true the factual allegations in the RAAs, and consider all reasonable inferences to be drawn from those facts in a light most favorable to Living Rivers. The following facts are pertinent to this Recommended Decision (with Initial Record citations in parentheses):

1. On February 22, 2008, JBR Environmental Consultants (“JBR”), on behalf of USOS’s predecessor, Earth Energy Resources, Inc. (“Earth Energy”), submitted information to the Director, under cover of a February 21, 2008 letter with the subject line: “PR Spring Mine, Request for Permit-by-Rule Determination.” The information was entitled the company’s Ground Water Discharge Permit-by-Rule Demonstration, and addressed a variety of topics, including environmental setting, operation description, demonstration of permit-by-rule conformance, potential for contaminant release, characteristics of residual materials, and hydrogeologic setting. (RAA Exhibit C, Permit-by-Rule Demonstration, at pp. 1-13)

2. The proposed operation was described as a tar sands mining and processing operation, located in Uintah and Grand Counties, State of Utah, which would “initially disturb

approximately 200 acres of land that Earth Energy has leased from Utah State [sic] Institutional Trust Lands Administration (SITLA).” (RAA Exhibit C, Permit-by-Rule Demonstration, at p.1) This included an initial phase open pit mine of 62 acres, an adjacent processing facility covering approximately 15 acres, two overburden/interburden disposal sites of approximately 25 acres each, and other disturbed areas for material stockpiles, roads and other facilities. (*Id.* at pp. 4-5 and Figure 2)

3. On March 4, 2008, the Director determined that USOS’s PR Spring Mine qualified for permit-by-rule status under Utah Admin. Code R317-6-6.2(A)(25) because the “mining and bitumen extraction operation should have a *de minimis* potential effect on ground water quality.” (RAA Exhibit D, March 4, 2008 letter from Director to USOS, at p. 2)

4. The Director’s March 4, 2008 letter identified “several relevant factors” in his determination, listing them in these four numbered paragraphs:

1. Based on Material Safety Data Sheets and other information that you sent to DWQ in January 2007, the reagent to be used for bitumen extraction is generally non-toxic and volatile, and most of it will be recovered and recycled in the extraction process. (Because the extraction process is proprietary at this time, this reagent will not be identified in public documents.)

2. Bitumen extraction will be done using tanks and equipment at the processing facility located at the mine site, and no impoundments or process water ponds are planned. Most of the water used in the process will be recovered and recycled.

3. Processed tailings will not be free-draining and will have moisture content in the 10 to 20 percent range. The tailings will not contain any added constituents that are not present naturally in the rock, other than trace amounts of the reagent used for bitumen extraction. Analysis of processed tailings using the Synthetic Precipitation Leachate Procedure indicates that leachate derived from the tailings by natural precipitation would have non-detectable levels of volatile and semi-volatile organic compounds. Unprocessed tar sands and processed tailings were analyzed using the Toxicity Characteristic Leaching Procedure (TCLP) with an extraction process that uses a much lower pH than is likely to occur at the mine site. Analytical results indicate that TCLP metals would not be leached from the tailings at detectable levels except for barium, which was detected at levels below the Utah ground water quality standard of 2.0

milligrams per liter (Table 1 of UAC 317-6). Based on these data, the tailings will be disposed by backfilling into the mine pit.

4. The uppermost geologic formations at the site are the Parachute Creek and Douglas Creek Members of the Green River Formation, which consist of fluvial-deltaic and lacustrine-deltaic deposits of claystone, siltstone, fine-grained sandstone, and limestone. The Parachute Creek Member outcrops over most of the Earth Energy lease and is the 0 to 50-foot thick overburden above the tar sands deposits of the Douglas Creek Member. Shallow ground water at the site is not part of a regional aquifer but occurs in localized laterally discontinuous perched sandstone lenses of the Douglas Creek Member. Exploration drilling did not encounter ground water within 150 feet of the land surface. Based on records from the Division of Oil, Gas, and Mining, the closest major aquifer is the Mesa Verde Formation, which occurs approximately 2000 feet below ground surface in the area of the proposed mine. The topography of the project area is characterized by mesas incised by deep, narrow canyons, and limited shallow ground water discharges as springs in the canyon bottoms. There are no springs in the Earth Energy leased area and the nearest spring is PR Spring located slightly less than a mile east of the project site.

(RAA Exhibit D, March 4, 2008 letter from Director to USOS, at pp. 1-2)

5. Immediately following the four numbered paragraphs quoted above, the Director's March 4, 2008 letter contained the following "re-opener" provision:

Considering the factors described above, the proposed mining and bitumen extraction operation should have a *de minimis* potential effect on ground water quality and qualifies for permit-by-rule status under UAC R317-6-6.2A(25). If 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. If future project knowledge or experience indicates that ground water quality is threatened by this operation, the Executive Secretary may require that you apply for a ground water discharge permit in accordance with UAC R317-6-6.2C.

(RAA Exhibit D, March 4, 2008 letter from Director to USOS, at p. 2)

6. On February 8, 2011, USOS sent a letter to the Director "to identify some changes" in the project made subsequent to the Director's March 4, 2008 letter confirming Permit-by-Rule status. These included: (1) removal of the stabilizer component from the cleaning emulsion used for bitumen extraction; (2) a change in the equipment used for de-watering sand and fines remaining after bitumen extraction; (3) a change in size of overburden/interburden storage areas

from two areas of approximately 25 acres each to a final design of two areas of 36 and 34 acres, respectively, with “more detail on the sequencing of mining and backfilling;” and (4) that during initial operations, “the pit opening will not be sufficiently large to accept processed sands and fines, so some of the tailings will be placed in the overburden/interburden storage areas,” rather than backfilled directly into the pit, as originally described (at p. 6) in the USOS February 21, 2008 request for Permit-by-Rule Determination. (RAA Exhibit E, February 8, 2011 letter from USOS to Director, at pp. 2, 3)

7. On February 15, 2011, the Director sent a letter to USOS, noting that his staff had reviewed the information submitted by USOS on February 8, 2011 “regarding planned changes to the PR Spring Tar Sands Project since DWQ’s original ground water discharge permit-by-rule determination . . . issued on March 4, 2008,” and concluding that “the proposed changes to the mining and bitumen extraction project 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 UAC R317-6-6.2A(25).” (RAA Exhibit F, February 15, 2011 letter from Director to USOS, at pp. 1, 2)

8. The Director’s February 15, 2011 letter included the same “reopener” language that appeared in the initial March 4, 2008 permit-by-rule determination, as follows:

If 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. If future project knowledge or experience indicates that ground water quality is threatened by this operation, the Executive Secretary may require that you apply for a ground water discharge permit in accordance with UAC R317-6-6.2C.

(RAA Exhibit F, February 15, 2011 letter from Director to USOS, at p. 2)

9. On March 16, 2011 Living Rivers filed an RAA and Petition to Intervene challenging the Director's February 15, 2011 letter addressing the project's permit-by-rule status. (RAA ¶ 14)

10. After an administrative hearing on the merits, the Utah Water Quality Board issued an order on November 1, 2012, affirming the Director's 2011 decision and denying the relief sought by Living Rivers in its 2011 RAA. (RAA ¶ 15)

11. Living Rivers timely filed a petition for review of the board's order to the Utah Court of Appeals. That court then certified the appeal to the Utah Supreme Court, which on June 24, 2014 issued the opinion in *Living Rivers v. U.S. Oil Sands, Inc.*, 344 P.3d 568, 2014 UT 25 (2014)

12. In September, 2013 Dr. William Johnson of the University of Utah, Department of Geology and Geophysics, met with the Director and staff to discuss a report he co-authored, entitled "Hydrochemical Data from Perennial Springs in the PR Spring Area of the Southern Uintah Basin, July 2013." (RAA ¶ 19; RAA Exhibit G, Sept. 20, 2013 letter from Director to Dr. Johnson (1 p.) and Johnson report (approx. 17 pp.))

13. In follow-up to the September, 2013 meeting, the Director wrote a letter to Dr. Johnson, stating:

My staff appreciated the opportunity to meet with you and Ms. Millington last week to discuss your report entitled "Hydrochemical Data from Perennial Springs in the PR Spring Area of the Southern Uintah Basin, July 2013." The Division of Water Quality appreciates your input and concern for protecting waters of the state. Your report will be given due consideration in the Division's continued review of information characterizing the water resources of this region of the state.

(RAA Exhibit G, Sept. 20, 2013 letter from Director to Dr. Johnson)

14. On January 29, 2014, Dr. Johnson submitted to the Director a copy of a manuscript he co-authored, entitled "Hydrogeochemistry of Perennial Springs on the Tavaputs Plateau,

Utah, USA: Significance to Tar Sand Mining, Processing, and Disposal on Adjacent Ridges.” (RAA ¶ 20, RAA Exhibit H)

15. On November 21, 2014, USOS submitted a “Notice of Intention to Revise Large Mining Operations” (NOI) to the Utah Division of Oil Gas and Mining (DOGM). The USOS cover letter to DOGM stated that the NOI’s purpose was “to accommodate planned changes in mine pit footprints and sequencing, which allow us to greatly reduce our overburden / interburden storage areas and facilitate concurrent reclamation.” The total planned disturbance area for full Phase 1 development was stated in the NOI as 316.2 acres, of which Pits 1, 2 and 3 would comprise 235.5 acres. (RAA Exhibit L, November 21, 2014 letter, USOS to DOGM; November 2014 NOI, p. 17)

16. On January 13, 2015, Living Rivers, through counsel, sent an email to Daniel Hall, of the Director’s staff, stating: “Dan: US Oil Sands submitted what appears to be a significant revision of its NOI to DOGM in late November that would triple the size of their mine pits. Has the company submitted an application with you that corresponds to that change? Thanks.” (RAA Exhibit M; USOS motion to dismiss Exhibit E)

17. On January 15, 2015, Daniel Hall responded to Living Rivers’ January 13th email, in pertinent part, with: “We are aware that US Oil Sands has submitted revisions to its mine permit for DOGM. DWQ has not required an application because the changes in configuration of the mine pits are within the original footprint and do not constitute a change in the operation which would change any of the permit by rule factors.” (RAA Exhibit M; USOS motion to dismiss Exhibit E)

18. On February 17, 2015, Living Rivers filed the two RAAs that are the subjects of the instant administrative proceedings by hand delivering copies to the Director and the Administrative Proceedings Records Officer.

CONCLUSIONS OF LAW

Introduction

Living Rivers has filed two RAAs, citing different authorities for each. It is therefore necessary to distinguish between the two RAAs in the following analysis because their authorities may differ in citation and text with regard to legal principles to be applied. According to Living Rivers' descriptions in paragraphs 1, 5 and 6 of one RAA, it was filed pursuant to Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R305-7-203. These authorities govern a "permit review adjudicative proceeding." *See* Utah Code Ann. § 19-1-301.5(2) and Utah Admin. Code R305-7-201. This RAA will therefore be referred to as the "§ 301.5 RAA," or at times as the "permit review RAA," if necessary for clarity and context.

The second RAA (also according to its paragraphs 1, 5 and 6) was filed pursuant to Utah Code Ann. § 19-1-301 and Utah Admin. Code R305-7-303. These authorities govern "adjudicative proceedings that are not permit review adjudicative proceedings as defined in Section 19-1-301.5." *See* Utah Code Ann. § 19-1-301(2). This RAA will therefore be referred to as the "§ 301 RAA," or at times as the "non-permit-review RAA," if necessary for clarity and context.

Legal Standards on Motion(s) to Dismiss

The Utah Administrative Code encourages parties in a permit-review administrative proceeding to file dispositive motions "when appropriate," including "motions . . . prepared in accordance with requirements of Rule 12 . . . of the Utah Rules of Civil Procedure." *See* Utah

Admin. Code R305-7-312(6). For a non-permit-review administrative proceeding, in which the Utah Administrative Procedures Act (“UAPA”) applies, that statute likewise allows dismissal of an RAA “if the requirements of Rule 12(b) . . . of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.” See Utah Code Ann. § 63G-4-102(4)(b). In either case, the same standards apply.

Rule 12(b) contemplates dismissal on such grounds as lack of subject matter jurisdiction, or the failure (of an RAA) to state a claim upon which relief can be granted. In considering the motions to dismiss, I must accept the factual allegations in both RAAs as true, and consider all reasonable inferences to be drawn from those facts in a light most favorable to the claimant, Living Rivers. *Prows v. State*, 822 P.2d 764 (Utah 1991). An RAA should be dismissed for failure to state a claim if it clearly appears that Living Rivers can prove no set of facts in support of the claim that would entitle it to relief. *Colman v. Utah State Land Board*, 795 P. 2d 622 (Utah 1990).

Analysis: Reasons for Recommended Decision

1. Failure to State a Claim Upon Which Relief Can Be Granted; Absence of Jurisdiction

Both USOS and the Director bring motions to dismiss on grounds that Living Rivers has alleged no action or omission by the Director which gives rise to a cause of action under the facts alleged and authorities cited in either the § 301.5 RAA or § 301 RAA. I agree, and recommend dismissal of both RAAs on grounds that they fail to state a claim on which relief can be granted and this tribunal therefore lacks jurisdiction to proceed.

According to Living Rivers’ description in its paragraphs 1, 5 and 6, the § 301.5 RAA was filed pursuant to Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R305-7-203. These authorities govern a “permit review adjudicative proceeding,” which the statute defines as one

“to resolve a challenge to a permit order” issued by the Director. Utah Code Ann. § 301.5(1)(f). Both USOS and the Director argue persuasively that there is no “permit order” here to challenge.

In this case, a permit by rule (PBR) had already been in place for the USOS project since at least March 4, 2008, when the Director determined and acknowledged in a letter that the project qualified for that status. Under Utah’s Ground Water Protection Rules, a full twenty-five categories of facilities are listed which “are considered to be permitted by rule and are not required to obtain a discharge permit under R317-6-6.1.” Utah Admin. Code R317-6-6.2. These include activities as varied as lawn watering and application of agricultural chemicals and facilities ranging from animal feeding operations, produced water pits and coal mining operations. Some are regulated by other state agencies (such as DOGM, for the latter two in the preceding sentence), and most enjoy their status by simple operation of law, without requirement of an application.

The USOS facility, however, since 2008 has qualified for PBR status in a category which did require an application, as one of those “facilities and modifications thereto which the Director 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(25). The Director reviewed the USOS application (RAA Exhibit C, Permit-by-Rule Demonstration) and made his determination that the project would have a “de minimis actual or potential effect of ground water quality.” (RAA Exhibit D, March 4, 2008 letter from Director to USOS).

According to the Initial Record, there was no formal administrative challenge to the Director’s March 4, 2008 determination. However, the procedural history recounted in the RAA (at ¶¶ 13, 14) indicates that Living Rivers filed an RAA (in March, 2011) in response to a February 15, 2011 letter from the Director, again addressing PBR status. This resulted in formal

administrative proceedings, including an evidentiary hearing, along with an order of the Water Quality Board and an opinion by the Utah Supreme Court. (RAA ¶¶ 13-18)

As Living Rivers points out, an email from DWQ employee Daniel Hall dated January 15, 2015 confirms that the Director’s staff was then “aware that US Oil Sands has submitted revisions to its mine permit for DOGM” in the form of the November 21, 2014 Notice of Intention to Revise Large Mining Operations (“NOI”). (RAA Exhibit L). Living Rivers argues that the actions of the Director’s staff in reviewing information presented in the NOI to the Utah Division of Oil Gas and Mining (“DOG M”) amounted to a “permitting process” which should have been open to the public for participation and comment, and further that the staff’s actions (including Mr. Hall’s January 15, 2015 email) constituted a “permit order” subject to challenge under § 19-1-301.5 and R305-7-203. I find no support for these arguments in the plain language of the statute and administrative rule.

The statute defines a permit order as “an order issued by a director” that:

- (A) approves a permit;
- (B) renews a permit;
- (C) denies a permit;
- (D) modifies or amends a permit; or
- (E) revokes and reissues a permit.

-Utah Code Ann. § 19-1-301.5(1)(e)(i)(A-E). The administrative rule sets forth procedural requirements for contesting a permit order via RAA, including the RAA’s contents, etc., and the condition that, in order to be timely, an RAA must be filed “within 30 days of the date the Permit Order being challenged was issued.” Utah Admin. Code R305-7-203(5).

A review of the plain language of the statute and administrative rule dictates dismissal of the § 301.5 RAA. Staff review of the USOS submittal to DOGM (the Nov. 21, 2014 NOI) cannot reasonably be viewed as “issuing” an order as contemplated by R305-7-203(5). And

since the permit by rule (PBR) had been in place since at least the time of the Director's March 4, 2008 letter determination of "de minimis" impacts on ground water, neither staff review of the NOI nor Mr. Hall's confirming email "approved, renewed, denied, modified or amended, or revoked and reissued" the PBR.

Mr. Hall's email merely confirmed that the staff had reviewed the NOI submitted to DOGM, and that PBR status was unchanged because the NOI described no changes in the operation "which would change any of the permit by rule factors." (RAA Exhibit M; USOS motion to dismiss Exhibit E) As set forth in detail above (Findings of Fact ¶ 4), the Director's March 4, 2008 letter listed the "relevant factors" considered by the Director in his 2008 PBR determination, including in summary: (1) use of a non-toxic reagent; (2) extraction to be done in tanks, with no use of impoundments or process water ponds; (3) tailings not free-draining and will have moisture content in the 10 to 20 percent range; and (4) features of ground water at the site, regional or major aquifer(s), springs or other ground water resources as described supported PBR status because the operation should have a *de minimus* potential effect on ground water.

The NOI submitted to DOGM (RAA Exhibit L) described "planned changes in mine pit footprints and sequencing," as well as an increase in the total planned area for full phase 1 development to 316.2 acres, of which pits 1, 2 and 3 would comprise 235.5 acres. (*See also* Finding of Fact ¶ 15). As stated in Mr. Hall's January 15, 2015 email to Living Rivers, none of these changes impacted or invoked the "relevant factors" identified by the Director in his March 4, 2008 PBR determination.

PBR status remained in place, as it had since 2008 (and even through the 2011 challenge), and nothing in the statute or administrative rule can be read to create a cause of action for Living Rivers under these circumstances. There was no issuance of a "permit order" as

is necessary for a challenge under the plain language of R305-7-203(5) and § 19-1-301.5, and the § 301.5 RAA therefore fails to state a claim upon which relief can be granted.

The §301 RAA was filed pursuant to Utah Code Ann. § 19-1-301 and Utah Admin. Code R305-7-303. (*See* RAA ¶¶ 1, 5 and 6). The cited statute “governs adjudicative proceedings that are not permit review adjudicative proceedings as defined in Section 19-1-301.5,” but does not otherwise describe or define the nature of proceedings allowed. *See* Utah Code Ann. § 19-1-301(2). It does state, however, that the “procedures for an adjudicative proceeding” shall be governed by Title 19 of the Utah Code, UAPA, and rules adopted by the department.

The cited administrative rule authorizes the filing of an RAA to contest “a Notice of Violation or an Initial Order.” *See* Utah Admin. Code R305-7-303(1). The rule is contained in Part 3 of Utah Admin. Code R305-7, whose scope and purpose are stated as “procedures to be used in adjudicative proceedings that are not permit review adjudicative proceedings, as authorized by Section 19-1-301,” noting that “[f]or the most part, proceedings under Part 3 of this Rule will be enforcement proceedings and proceedings to terminate permits.” *See* Utah Admin. Code R305-7-301. The only proceedings authorized to be brought under Utah Code Ann. § 19-1-301, therefore fall into these four categories: (1) proceedings to contest a Notice of Violation; (2) those contesting an Initial Order; (3) enforcement proceedings; and (4) proceedings to terminate permits. Even assuming, as I must, that all of Living Rivers’ factual averments are true, I cannot fit the Director’s alleged actions in this case into any one of the four categories of allowable challenges.

Utah Admin. Code R305-7-102 defines “Notice of Violation” (“NOV”) as “a notice of violation issued by the Director that is exempt from the requirements of UAPA under Section 63G-4-102(2)(k).” (The UAPA section exempts the Director from having to comply with

UAPA’s procedural steps in issuing any NOV authorized by the Water Quality Act.) The Utah Water Quality Act, Utah Code Ann. Title 19, Chapter 5 authorizes the Director to issue an NOV for “a violation of this chapter or any order of the director or the board.” None of the actions or omissions of the Director as alleged by Living Rivers in its § 301 RAA fall within that definition.

Utah Admin. Code R305-7-102 defines “Initial Order” as “an order that is not a Permit Order, that is issued by the Director and that is the final step in the portion of a proceeding that is exempt from the requirements of UAPA as provided in Section 63G-4-102(2)(k).”(The UAPA section exempts the Director from having to comply with UAPA’s procedural steps in issuing any order authorized by the Water Quality Act.) None of the actions or omissions of the Director as alleged by Living Rivers in its § 301 RAA fall within that definition.

With regard to enforcement proceedings, the Water Quality Act authorizes the Director to “enforce rules made by the board through the issuance of orders.” Utah Code Ann. § 19-5-106(2)(d). None of the actions or omissions of the Director as alleged by Living Rivers in its § 301 RAA can be read to equal the issuance of an order to enforce water quality rules. Nor can they plausibly be called a proceeding to terminate a permit. As a result, none of the four categories of proceedings clearly authorized for actions under Utah Code Ann. § 19-1-301 are invoked by Living Rivers’ § 301 RAA.

Living Rivers has not presented any arguments or factual characterizations supporting a finding that the Director’s actions or omissions fell within one of the four categories discussed above. Instead, Living Rivers argues that, should this tribunal determine that the Director’s actions did not constitute the issuance of a permit order, then “the Director’s authorization of the Oil Sands mine expansion is necessarily ‘a dispositive action other than a Permit Order’ subject to administrative review pursuant to Utah Code § 19-1-301 and R305-7-303.” (Living Rivers’

opposition memo at p. 2). The quoted language of “a dispositive action other than a Permit Order” is not a legal standard or authorization that I can confirm in my reading of the parties’ pleadings and cited authorities, nor does it appear within the statute or rule cited in Living Rivers’ argument quoted above. I therefore conclude that there was no action or omission by the Director as is necessary for a challenge under the plain language of § 19-1-301 or R305-7-301 or -303. The § 301 RAA therefore fails to state a claim upon which relief can be granted.

The § 301 RAA also cites as authority the “Commencement of Adjudicative Proceedings” section of the Utah Admin. Procedures Act, Utah Code Ann. § 63G-4-201(1)(b) and -201(3). That section requires, in part, that adjudicative proceedings must be commenced by “a request for agency action, if proceedings are commenced by persons other than the agency,” and outlines the basic contents of an RAA. It’s important to note, however, that section -201(3) acknowledges the legal restriction of such an action to one “[w]here the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings.” Nothing in this quoted language provides an independent basis for a third party such as Living Rivers to initiate an adjudicative proceeding.

A third party such as Living Rivers, then, cannot invoke adjudicative proceedings unless specifically authorized by statute and applicable administrative rules. As the Director points out (Director’s motion to dismiss, p. 7), the Utah Environmental Quality Code (Utah Code Ann. Title 19) provides no citizen’s suit remedy for claims addressing the permit-by-rule held by USOS. And as USOS reminds us (USOS reply memo, p. 8), it is well-established that all state agency powers are derived from statute, and an agency can only exercise those powers that are expressly granted or clearly implied as necessary to the discharge of its duties. *Williams v. Public Service Commission of Utah*, 754 P2d 41, 50 (Utah 1988), citing *Basin Flying Service v.*

Public Service Commission, 531 P. 2d 1303, 1305 (Utah 1975). To go forward with Living Rivers' two RAAs would violate those principles, since none of its claims fall within the bounds of those authorized by Utah statutes and administrative rules.

This case demonstrates how there is good reason that administrative challenges are limited to those authorized by statute and state rules. If a permit issued by the Director could be challenged every time agency staff reviewed information related to the permitted project, or whenever a staff member confirmed by email or other communication the status of a permit (as done here by Mr. Hall via email), third party challenges could overwhelm the agency. And as pointed out by the Utah Supreme Court in an opinion generated by the long history of contention between Living Rivers and USOS, such challenges are limited so that permit holders can rely on permit status for project development and costs without fear of starting from square one several years down the road. *Living Rivers v. U.S. Oil Sands, Inc.*, 2014 UT 25, 344 P.3d 568 (Utah 2014)

The PBR status in this case has never changed since March of 2008, and while the "reopener" provision imposes obligations upon USOS to bring to the Director's attention any change in circumstances that might change the PBR determination under the relevant factors identified by the Director, any changes are left to the discretion of the Director, and not a third party challenger such as Living Rivers.

As stated in the "reopener" provision appearing in the Director's March 4, 2008 and February 15, 2011 letters to USOS (RAA Exhibits D and F), and as codified at Utah Admin. Code R317-6-6.2C, the Director retains authority to require a water quality permit application from USOS, should the company identify new information impacting the PBR factors. New information could even come from a third party, and in this case the Director has received one or

more of the groundwater-related studies now proffered as exhibits to the two RAAs. (*See* Findings of Fact 12 and 14, referring to reports by Dr. William Johnson of July, 2013 and January 29, 2014)

It is the Director's duty to protect water quality, including ground water near the USOS facility, but that duty falls solely within the Director's discretion, except in those limited circumstances where third party challenges are allowed by statute. Living Rivers argues (Opposition Memo, p. 2) that the Director's actions amounted to an "authorization of the Oil Sands mine expansion," but the Director has no such authority. Certain features of the design and operation of a mine may of course be regulated by DOGM, but certainly not by the Division of Water Quality. (*See* Utah Code Ann. § 19-5-106)

2. Collateral Attack on PBR not allowed

The two RAAs in this matter are not the first challenge by Living Rivers to the USOS project and its permit-by-rule. While the Director's PBR determination letter of March 4, 2008 went unchallenged in the immediate period thereafter, Living Rivers later filed an RAA in response to a letter from the Director issued on February 15, 2011. In that letter, the Director informed the company that changes to the operation described by USOS on February 8, 2011 did not alter his earlier PBR determination. (*See* RAA ¶¶ 13-18 and Exhibits referenced).

After formal administrative proceedings, including an evidentiary hearing, the Utah Water Quality Board issued an order, denying relief to Living Rivers. The matter ultimately went to the Utah Supreme Court, which issued its instructive opinion in *Living Rivers v. U.S. Oil Sands, Inc.*, 2014 UT 25, 344 P.3d 568 (Utah 2014).

The Court described the history of the project to that date, noting that since there was no timely challenge to the 2008 decision, "the original permit was final and not subject to further

challenge on its merits.” (*Id.* at ¶ 2). The Court pointed out that the Director (referred to in the opinion as the “Executive Secretary” of the Division of Water Quality) in 2008 made several important determinations, including “factual findings as to the amount of water at the site and its connection (or lack thereof) to other ground water, regional aquifers, etc.” (*Id.* at ¶ 22) In further describing this fourth of the “relevant factors” considered by the Director in his 2008 PBR determination, the court said: “the Secretary found that there was only a limited amount of shallow, localized ground water at the site that is not part of a regional aquifer system.” (*Id.* at ¶ 7).

As directed by the Supreme Court, “if the substance of the petition is a collateral attack on the 2008 permit by rule, then it matters not whether Living Rivers has formally sought to tie its challenge to the 2011 modification decision.” The Court found that the petition for review was indeed directed to the Director’s 2008 PBR determination, and dismissed the petition as untimely, since no challenge had been brought within thirty days of the March 4, 2008 determination as required by UAPA and administrative rules. .

It is clear from a reading of the RAAs and their exhibits that Living Rivers is continuing to try to challenge the ground water findings which were the important fourth “relevant factor” in the Director’s 2008 PBR determination. Living Rivers acknowledges as much, where it argues that it “centers its RAAs” on two new documents, including a hydrogeologic report and a report stating results of tests run on processed tailings from the mine site. (Living Rivers opposition memo at p. 8, citing RAA ¶¶ 39-45 and exhibits referenced therein). The hydrogeologic study would be used by Living Rivers to challenge the 2008 factual determination regarding ground water at the site, which would be barred as a collateral attack on the Director’s 2008 decision. Living Rivers expresses concerns about the expanded mine footprint, pit sites and waste tailings

disposal plan, but these features are regulated by DOGM, not the Director, and were not part of the “relevant factors” listed by the Director in his March, 2008 PBR determination. The claims asserted and relief sought in Living Rivers’ RAAs hinge on the presence or absence of ground water, and guidance from the Utah Supreme Court directs that the RAAs must be dismissed as an untimely collateral attack on the Director’s 2008 PBR determination, barring this tribunal from exercising jurisdiction.

3. Timeliness of Filing the RAAs

The parties have also briefed the issue of whether the RAAs were filed within the thirty-day period dictated by Utah Code Ann. §§ 19-1-301.5(6)(b) and Utah Admin. Code R305-7-203(5) and -303(5). Since I have found in the preceding sections that no permit order, NOV or other challengeable action of the Director took place, it is an unnecessary exercise, if not impossible, to make a finding of whether (and when) facts giving rise to a cause of action arose and were known by Living Rivers, sufficient to start the thirty-day period. Application of the doctrine of equitable tolling is likewise difficult to determine on the Initial Record now before me. I therefore decline to make a recommendation to the Executive Director on this issue, reserving it for further briefing and factual development by the parties (including a full Administrative Record) if the RAAs are not dismissed pursuant to my recommendations in sections 1 and 2 above.

4. Living Rivers’ Constitutional Arguments

In its opposition memo, Living Rivers raises arguments under the Utah and United States constitutions, in an attempt to force this tribunal to allow the RAAs to go forward so as to “protect its interests in waters of the state.” These arguments are misplaced and must be rejected. Living Rivers has no property interest in the waters of the state of Utah, which are

public property, but are not vested in any individual or organization. *In Re Uintah Basin*, 2006 UT 19, ¶ 34.

By statute, the Utah Legislature has set forth the criteria and Executive Director's authority for conducting administrative proceedings and the rule-making authority of the Water Quality Board. Constitutional provisions addressing due process, open courts and separation of powers do not guarantee Living Rivers the right to itself determine when and under what circumstances it may choose to invoke the state of Utah's administrative adjudicative processes.

The Utah Administrative Procedures Act, the Environmental Quality Code, and the Utah Administrative Code govern proceedings before the department's Executive Director. Utah Code Ann. §§ 19-1-301 and -301.5 set forth criteria for participation in administrative hearings, and the Environmental Quality Code authorizes rule-making by the Department and various boards, including the Water Quality Board, for the outlining of procedures. The Utah Legislature, not the Director, has determined access to state administrative proceedings, and Living Rivers has cited no authorities to the contrary.

RECOMMENDED DECISION

For the foregoing reasons, I recommend that the Executive Secretary grant the motions to dismiss filed herein by USOS and the Director, dismissing both RAAs with prejudice and terminating these administrative proceedings.

NOTICE OF OPPORTUNITY TO COMMENT

Parties may file comments to this Recommended Decision with the Executive Director of the Department of Environmental Quality within ten business days of issuance of this Recommended Decision in accordance with the requirements of Utah Admin. Code R 305-7-213(4) and -316(1). Comments shall not exceed 15 pages. A party may file a response to

another party's comments, not to exceed five pages, within five business days of the date of the service of the comments.

DATED this 18th day of February, 2016.

/s/ Richard K. Rathbun _____
Richard K. Rathbun
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2016, a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED DECISION ON MOTIONS TO DISMISS was sent by electronic mail to the following:

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/s/ Richard K. Rathbun