
BEFORE THE UTAH WATER QUALITY BOARD
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of

PR Spring Tar Sands Project, Ground Water
Discharge Permit-by-Rule,
No. WQ PR-11-001

ORDER DENYING EARTH ENERGY
RESOURCES' AND EXECUTIVE
SECRETARY'S MOTIONS TO DISMISS

November 9, 2011

Earth Energy Resources and the Executive Secretary have filed similar motions to dismiss based on Living Rivers' alleged untimely challenge to a March 4, 2008 determination ("2008 Order") by the Division of Water Quality ("DWQ"). More specifically, Earth Energy Resources and the Executive Secretary have alleged that Living Rivers' challenges to the four bases for the original 2008 Order should not be heard in the current proceeding, which challenges a February 15, 2011 Order ("2011 Order") that Earth Energy Resources' project, as modified, would have a *de minimis* impact on groundwater under Utah Admin. Code R317-6-6.2(A)(25). Because there are questions of fact that cannot be resolved in the context of a motion to dismiss, the Motions to Dismiss are denied.

A. Summary of Allegations and Arguments

Living Rivers has, in its (Corrected) Request for Agency Action/Petition to Intervene ("RFAA"), made a number of factual allegations that it claims would bear on Water Quality's determination that a proposed facility or modification "will have a *de minimis* actual or potential effect on ground water quality," and on whether the facility is therefore permitted by rule under Utah Admin. Code R317-6-6. Living Rivers has alleged, for example, that the reagent that will be used by Earth Energy is toxic, contrary to the Division's assumption; that the amounts of

reagent that will be retained in the tailings will be greater than the “trace” amounts assumed by the Division; that reagent will drain from the tailings as a result of a combination of greater amounts of reagent that will be retained in the tailings, and a greater impact from precipitation than was assumed; that groundwaters have been inadequately characterized and inventoried; and that chemical analyses relied upon by the permittee were inadequate.

Earth Energy Resources and the Executive Secretary have both argued that each basis for Living Rivers’ challenge was addressed and settled in the 2008 Order, that the 30 day statute of limitations for challenging a permit applies, and that the issues therefore cannot now be raised by Living Rivers.

B. Standard of Review for Motion to Dismiss

When reviewing a motion to dismiss, the tribunal is required to assume that the factual allegations in the request for agency action are true and draw all reasonable inferences in the light most favorable to the petitioner. Whipple v. American Fork Irrigation Co., 910 P.2d 1218, 1219 (Utah 1996). If the facts asserted provide no legal basis for recovery, a motion to dismiss must be granted. Osguthorpe v. Wolf Mt. Resorts, 2010 UT 29, ¶ 20.

C. Standard of Review for Challenge Pursuant to a Request for Agency Action

To understand this Order, it is helpful to understand the nature of the review following a request for agency action. It was the intention of the Utah Legislature in passing Utah Administrative Procedures Act (“UAPA”) to provide all persons appearing before the agency with an opportunity to have trial-type procedures to resolve questions of fact. This was evident from the specific and significant procedural requirements for formal proceedings in UAPA (Utah

Code Ann. §§ 63G-4-204 to 208) and from the requirement that an informal proceeding that did not provide those procedures would be reviewed *de novo* in district court. See Utah Code Ann. § 63G-4-402(1)(a).

Initial orders of the Executive Secretary are exempt from UAPA under Utah Code Ann. § 63G-4-102(2)(k):

(2) This chapter does not govern . . . (k) the issuance of a notice of violation or order under . . . Title 19, Chapter 5, Water Quality Act . . . , except that this chapter governs an agency action commenced by a person authorized by law to contest the validity or correctness of the notice or order

There is nothing in this provision to indicate that the Legislature intended that UAPA be used differently for persons challenging a decision under the Water Quality Act than it would for persons before other agencies that did not have an exemption for initial decisions. It is therefore necessary to infer that persons who are challenging a decision under the Water Quality Act do retain the right to trial-type procedures for resolving questions of fact – including facts not considered by the initial decisionmaker – and that any challenge must therefore be conducted as a *de novo* proceeding.¹

D. Analysis

As discussed in Part B above, I am required for purposes of this motion to accept as true the allegations made by Living Rivers.

It is necessary for the purposes of this analysis to ask whether the Executive Secretary would have the authority in the context of a modification to take action based on facts as alleged

¹ This result is further corroborated by the observation that, if this proceeding were handled informally, it would be subject to *de novo* review in district court as provided in Utah Code Ann. § 63G-4-402(1)(a).

by Living Rivers, and, if so, whether there is any authority for distinguishing between matters that may be raised by the Executive Secretary and those that may be raised by Living Rivers.

The statute of limitations cases cited by Earth Energy Resources relate to tort, contract and real property cases. No authority has been cited for the proposition that statutes of limitations apply in regulatory situations, to permit modifications. The distinction is important because regulated entities are under an ongoing obligation to be in compliance with standards that govern their conduct. *See, e.g.*, Utah Admin. Code R317-6-6.19 and Utah Code Ann. § 19-5-115. A regulatory approval represents the agency's best judgment about whether a regulated entity has demonstrated that a proposed project will be in compliance with regulatory standards. The agency's approval does not mean that determination is locked into place, however. If the agency has information that a permittee is not in compliance with regulatory standards it may choose to address the non-compliance through enforcement proceedings. *See* Utah Code Ann. § 19-5-115. It may also exercise its prosecutorial discretion and choose not bring enforcement proceedings. *See, e.g., Nielson v. Division of Peace Officer Standards and Training*, 851 P.2d 1201, 1203-04.

There is no similar discretion for an agency conducting a permitting action, whether it is an application for an original permit or a modification. The agency's job is to consider whether there is sufficient information on the record to determine that a permittee will meet standards. It is required to consider all pertinent information and craft its determination in response. An appellate court will review the agency's decision based on a review of the record as a whole under Utah Code Ann. § 63G-4-403(4)(g), so an agency making the decision in the first instance would obviously also be expected to address the entirety of the evidence presented. There is

nothing in the statute, rules or case law that provides an exception for information that could have been considered during a previous stage of permitting; neither Earth Energy Resources nor the Executive Secretary have provided authority for the application of statutes of limitations in the regulatory context in a manner that would overcome this fundamental principle of administrative law.

It is clear, then, that the Executive Secretary would have authority to consider new information in a modification proceeding.² The next question is whether a third party intervenor has the ability to raise the question if the Executive Secretary does not do so.

For an enforcement action, the answer is no. Because of the importance of allowing agencies the authority to prioritize their enforcement resources, their prosecutorial discretion is generally protected and third parties are not given a role to play in enforcement. *See, e.g., Nielson*, 851 P.2d 1201, 1203-04. *See also* Utah Code Ann. §§ 63G-4-102(8) and 63G-4-201(3), and Utah Admin. Code R305-6-116.

There is no parallel principle of law that would prevent a third party from raising new information pertinent to a determination during a permitting proceeding, however. Affected third parties are authorized to bring a challenge to permitting decisions, and there is nothing in UAPA or in DEQ's procedural rules that is equivalent to enforcement provisions cited above that would limit the ability of a third party doing so to raise issues that were not considered by the Executive

² The statute of limitations argument made by Earth Energy Resources and the Executive Secretary would apply equally to the Executive Secretary and would prevent him from considering new information when presented with a modification. He would be required to approve a modification even in the face of evidence that the permittee did not meet regulatory standards. That necessary corollary to the statutes of limitations arguments is not supported by the pertinent statute, rules or case law. It also has significant public policy implications.

Secretary.

The final question that must be answered, then, is whether new information presented is pertinent to a proposed modification. Neither the Executive Secretary nor a third party may use the occasion of a modification to an incinerator burner, for example, to revisit issues related to site security. In some cases, the relationship between the modification sought and the new information presented may be more difficult to determine, and may require the exercise of professional judgment, e.g., whether permitting a new waste feeding system will require consideration of new information that a permitted incinerator may not meet chemical destruction standards.

In this case, all of the new information alleged relates to factors that were identified by the Division in its 2008 Order as relevant to its *de minimis* determination. Although the relationship between the new information alleged and the ability of the permittee to meet regulatory standards is a question of fact to be determined at the hearing, it is difficult to see how the new information would not be found to be relevant.

Earth Energy Resources has argued that it is important to recognize the principles behind statutes of limitations in this instance because failure to do so will jeopardize the investment they have made based on the initial approval. That argument must fail for two reasons. First, as described above, it is consistent with the principle that a permittee must comply with relevant standards at all times. Second, it assumes that it will be prevented from undertaking its project in the event new information is allowed to be considered. The consequence of a failure to meet the *de minimis* standard is not a disapproval of the project; the consequence is that the facility will require a ground water discharge permit.

E. Living Rivers' Notice Argument

Because the administrative law judge is not the final agency decisionmaker in this matter, and because these questions may come up during review by the final decisionmaker, it is also appropriate to address Living Rivers' argument that it should be allowed to challenge the 2008 Order directly.

Living Rivers has argued in the alternative that it should be allowed to challenge the 2008 decision because of an alleged lack of notice. This argument must be rejected first because Living Rivers did not challenge the 2008 decision in its RFAA. In addition, in light of the clear requirement that a challenge must be brought within 30 days of issuance – *see* UAPA, Utah Code Ann. § 63G-2-201(4) and Utah Admin. Code R317-9-3(3) – Living Rivers bears a significant burden to demonstrate that it is not appropriate to enforce that requirement. Although Living Rivers has made an argument based in equitability, it has not cited any authority that demonstrates that either the permittee or the executive secretary had any duty to notify Living Rivers of the 2008 decision, and it has not cited any authority that demonstrates that equitable tolling applies to toll deadlines under environmental permit statutes. That burden is even greater given the negative inference created by the many notice requirements in the DEQ statutes and rules and the lack of any statutory or regulatory notice requirement for this decision. *See, e.g.*, Utah Code Ann. §§ 19-5-108(2) and 19-5-110(3), and Utah Admin. Code R317-2-3.5(e) and R317-6-6.5. There are costs and benefits associated with imposing significant additional notice requirements for the many determinations that are made by DEQ decisionmakers. Those costs

and benefits should be weighed in a forum other than an adjudication. The Board cannot, in the absence of legal authority and based only on policy arguments, impose new procedural requirements for permitting.

Order

For the reasons stated above, Earth Energy Resources' and the Executive Secretary's Motions to Dismiss are denied. Because this is not a final determination of any party's claim, and is therefore not a "dispositive action" under Utah Code Ann. § 19-1-301, I am not forwarding it to the Board for its review.

Dated this 9th day of November, 2011.



Laura Lockhart
Administrative Law Judge
LLockhart@Utah.Gov

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2011, I caused a copy of the forgoing "Order Denying Earth Energy Resources' and Executive Secretary's Motions to Dismiss" to be e-mailed as indicated to the following:

Walter L. Baker, PE
Executive Secretary
Water Quality Board
195 North 1950 West
PO Box 144870
Salt Lake City, Utah 84114-4870
(via email at wbaker@utah.gov)

Paul McConkie
Assistant Attorney General
PO Box 140873
160 East 300 South
Salt Lake City, Utah 84114-0873
(via email at pmcconkie@utah.gov)
Counsel for the Executive Secretary

DEQ Administrative Proceedings Records
Officer
160 East 300 South, 5th Floor
Salt Lake City UT 84111
(via email at DEQAPRO@utah.gov)

Joro Walker
Charles R. Dubuc, Jr.
Western Resource Advocates
150 South 600 East, Suite 2A
Salt Lake City, Utah 84102
(via email at jwalker@westernresources.org
and rdubuc@westernresources.org)
Counsel for Living Rivers

Christopher R. Hogle
A. John Davis
M. Benjamin Machlis
Holland & Hart
222 South Main Street, Suite 2200
Salt Lake City, Utah 84101
(via email at crhogle@hollandhart.com,
ajdavis@hollandhart.com,
mbmachlis@hollandhart.com)
Counsel for Earth Energy
Resources, Inc.



Laura Lockhart
Administrative Law Judge
LLockhart@Utah.Gov