

BEFORE THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

AIR QUALITY BOARD

In the Matter of: Approval Order—
Modification to Add a Baghouse, to Allow
Alternative Fuel Usage and to Incorporate
Work Practice Standards
Denison Mines (USA) Corporation
White Mesa Mill
Project Number: N011205
DAQE-AN0112050018-11

Request for Agency Action

March 31, 2011

REQUEST FOR AGENCY ACTION

Pursuant to Utah Code §§ 63G-4-201(1)(b), (3) and Utah Admin. Code R307-103, the Ute Mountain Ute Tribe (“Tribe”) hereby files its Request for Agency Action with Reginald D. Olsen, Acting Executive Secretary of the Utah Air Quality Board (“Board”). The Tribe seeks review of the March 2, 2011 decision by the Utah Division of Air Quality and the Executive Secretary (collectively “DAQ”) to issue an Approval Order granting a Modification to Add a Baghouse, to Allow Alternative Fuel Usage and to Incorporate Work Practice Standards (“March Approval Order” or “Approval Order”) to Denison Mines (USA) Corp. (“Denison”) for the operation of the White Mesa Uranium Mill near Blanding, Utah (“Mill”). As set forth in Section IV, *infra*, and in accordance with Utah Admin. Code R307-103-6(3), the Tribe is a proper party with standing to request commencement of and participation in the requested formal adjudicative proceeding.

I. PERMIT NUMBER AND DATE OF MAILING

The Tribe contests the Approval Order signed on March 2, 2011 by M. Cheryl Heying, Executive Secretary of the Utah Air Quality Board, to authorize the requested Modification to Add a Baghouse, to Allow Alternative Fuel Usage and to Incorporate Work Practice Standards (DAQE-AN0112050018-11) (Project Number N011205-0018). This Request for Agency Action is timely submitted to DAQ on March 31, 2011. Utah Admin. Code R307-103-3(3).

II. STATEMENT OF LEGAL AUTHORITY AND JURISDICTION

The Tribe brings this Request for Agency Action pursuant to Utah Admin. Code R307-103-3(1). Utah Code §§ 63G-4-201(1)(b), (3)(a) specifies the content of this Request for Agency Action.

III. STATEMENT OF FACTS AND REASONS

A. STATEMENT OF FACTS

The White Mesa Uranium Mill is located in southeastern Utah, approximately six miles south of Blanding and three miles north of the White Mesa community of the Ute Mountain Ute Tribe. The Mill was constructed in 1979 to process ores and alternate feed materials into U_3O_8 , which is sold to power companies for further processing and, eventually, for use in power plants. The Mill is now owned and operated by Denison Mines (USA) Corp.

One of Denison's important environmental compliance responsibilities at the Mill is to minimize fugitive dust, which travels from ore storage areas and stockpiles of ores and alternative feed materials at the Mill and which can disperse radioactive and other hazardous air pollutants. Fugitive dust at the Mill is regulated by the DAQ under the Mill's air approval order. The Tribe, through its Environmental Programs Department ("EPD"), has periodically observed and reported fugitive dust events at the Mill. For example, in June of 2007, Tribal EPD staff observed, photographed, and reported to DAQ a dust event on the ore storage area at the Mill. *See also* September 4, 2007 letter to DAQ noting the Tribe's concern over the human health threat of the fugitive dust event. The Tribe has also worked in cooperation with the United States Environmental Protection Agency to assist the United States Geologic Survey with a Scientific Investigations Report ("USGS Report") concerning environmental conditions around White Mesa and the Mill. This USGS Report, which is currently in draft form, provides scientific data indicating that radioactive material has migrated off site from the fugitive dust sources at the Mill.

The current Mill air approval order modification process started on May 28, 2008 when DAQ conducted an inspection at the Mill and issued a Compliance Advisory to Denison for two violations of its air approval order: operation of an unapproved baghouse and not maintaining the four percent moisture content required for front-end loading operations. *See* Denison's Addendum to Notice of Intent to Amend Approval Order, "Background" (June 22, 2010). On November 3, 2008, Denison and DAQ entered into a settlement agreement, and on January 31, 2009, Denison submitted documents requesting to modify its Approval Order to include the "bucking area" baghouse and implementing new Work Practice Standards for fugitive dust control. *Id.* On April 7, 2010, Denison again requested a modification to its Approval Order by submitting to DAQ a Notification of Soda Ash Baghouse Replacement-In-Kind requesting permission to replace an existing dry soda ash silo bin baghouse with an equivalent baghouse. On May 10, 2010, the DAQ issued an approval order determining that the proposed replacement-in-kind met the criteria found in R307-401-11. On June 22, 2010, Denison submitted an addendum to its Notice of Intent to Amend Approval Order requesting an upgrade to the existing baghouse and again submitting new Work Practice Standards for fugitive dust control. On September 23, 2010, DAQ issued a new Intent to Approve: Approval Order Modification to Add a Baghouse, to Allow Alternative Fuel Usage, and to Incorporate Work Standards.

On October 29, 2010 the Tribe submitted extensive comments regarding the DAQ's September 23, 2010 Intent to Approve. This first set of comments expressed the Tribe's

concerns with the fugitive dust provisions of the Intent to Approve, contained photographic evidence of fugitive dust events, and notified DAQ of the USGS Report. On November 11, 2010, the Tribe submitted a second set of supplemental data and comments to DAQ. This second set of comments addressed the USGS Report draft findings regarding off-site migration of radioactive materials, provided initial data from the USGS Report, and outlined five issues to be addressed in the Approval Order.

On March 2, 2011, M. Cheryl Heying, Executive Secretary of the Utah Air Quality Board, signed Denison's Approval Order. No changes were made to the section of the Approval Order addressing "Roads & Fugitive Dust," and the Approval Order contained no discussion or incorporation of Denison's proposed Work Practice Standards. On March 7, 2011, DAQ emailed the Memorandum regarding Response to Comments (Dated February 24, 2011) ("February 24 Memo") to the Tribe. The Memo contained two terse responses to the Tribe's comments that only partially addressed the issues raised by the Tribe. *See* Comments and Responses 9 and 10 in February 24 Memo.

B. STATEMENT OF REASONS

As set forth below, UDAQ's approval of the March Approval Order fails to comply with the Clean Air Act, the Utah Air Conservation Act, and the Utah Administrative Code. The Tribe hereby incorporates and references the comments dated October 29, 2010 and November 11, 2010. In addition to, and in clarification of those comments, the Tribe sets forth the reasons for its Request for Agency Action below.

1. The March Approval Order Failed to Address One of the Three Requested Approval Order Modifications (Work Practice Standards for Control of Fugitive Dust).

In its January 31, 2009 submission and in its June 22, 2010 Addendum to Notice of Intent to Amend Approval Order, Denison submitted to DAQ draft Work Practice Standards for Control of Fugitive Dust (applicable to the ore storage location). Both the September 23, 2010 Intent to Approve and the March Approval Order are titled to include three modifications: (1) a modification to add a baghouse; (2) a modification to allow alternative fuel usage; and (3) a modification to incorporate work practice standards. However, neither the September 23, 2010 Intent to Approve nor the March Approval Order contains any analysis of, reference to, or incorporation of the submitted Work Practice Standards. Similarly, the February 24 Memo did not refer to the submitted Work Practice Standards or any analysis of the Approval Order's fugitive dust provisions when responding to the Tribe's comments regarding concerns about Denison's fugitive dust management and the USGS Report's evidence of off-site migration of radioactive material.

The record created by the DAQ in support of the issuance of the Approval Order fails to explain the basis of DAQ's decision not to modify the fugitive dust emissions provisions of the Approval Order (and in particular, why DAQ did not incorporate the Work Practice Standards). The February 24 Memo (which contains inaccurate and confusing statements as to the content of the Approval Order's fugitive dust provisions and which fails to address evidence in the USGS

Report of off-site migration of radioactive particles, *see* Sections 2-5, *infra*) suggests some confusion on DAQ's part about the March Approval Order's fugitive dust control requirements. Taken together, the record created by DAQ in support of the Approval Order suggests that the DAQ had insufficient data in front of it to make a reasonable and informed decision regarding necessary and appropriate Approval Order provisions to address fugitive dust emissions. To be complete, the Approval Order must address stockpile moisture content and work practice standards for control of fugitive dust. Accordingly, the Board should rescind the Approval Order or remand it to DAQ for proper consideration and incorporation of work practice standards for control of fugitive dust.

2. The March Approval Order's Fugitive Dust Provisions Are Insufficient to Minimize Fugitive Dust and Protect the Tribe, Tribal Resources, and Tribal Members from Migrating, Radioactive Dust.

Section II.B.4 of the March Approval Order (Roads & Fugitive Dust) is insufficient to minimize fugitive dust, as required by R307-205-5, R307-205-7(2), and R307-205-8(2). The 11 provisions set out in Section II.B.4 do set important fugitive dust emissions limits for the Mill's roads, storage piles, front-end loading operations, and tailings retention and mill areas. The Approval Order contains a general requirement for Denison to comply with applicable requirements of R307-205, but Section II.B.4 does not specify what the applicable requirements are and contains no work practice standards, monitoring requirements, or other measures that ensure compliance with the applicable fugitive dust emissions limits. Instead, Section II.B.4 gives Denison significant discretion (and little direction) on how to comply with the Approval Order's fugitive dust emissions limitations. *See, e.g.*, Section II.B.4.b ("Visible emissions determinations from traffic sources shall use procedures *similar to* Method 9); Section II.B.4.c ("Treatment shall be *of sufficient frequency and quantity* to maintain the surface material in a damp/moist condition"); Section II.B.4.d ("Any section of paved road under the owner/operator's jurisdiction shall be periodically swept or sprayed clean *as dry conditions warrant* or as determined necessary by the Executive Secretary"); Sections II.B.4.f, j, k (all requiring spraying "*as dry conditions warrant* or as determined by the Executive Secretary") (emphasis added). Section II.B.4 leaves the rest of the fugitive dust regulation, management, and monitoring to the discretion of the Executive Secretary. *See* provisions cited above (giving Executive Secretary discretion to require spraying); *see also* II.B.4.h ("The moisture content shall be tested *if directed* by the Executive Secretary *using a test method approved by the Executive Secretary.*") (emphasis added).

The historical lack of on-site DAQ presence and the historical lack of fugitive dust monitoring data make it difficult for an outside entity like the Tribe to determine how effective Denison and DAQ have been at implementing the Approval Order's fugitive dust emissions limits in the past. However, Denison's documented fugitive dust violation in May of 2008, the other fugitive dust events described in the Tribe's comments, and the USGS Report data showing off-site migration of radioactive dust demonstrate that the Approval Order's flexible implementation and monitoring requirements are not sufficient to either: (a) meet the fugitive dust emissions limits set forth in Section II.B.4; or (b) minimize migration of radioactive and hazardous fugitive dust from the Mill. *See also* February 24 Memo, Response to Comment 10 (acknowledging that "particulate in the air below 20% opacity may migrate," but failing to

address how DAQ minimizes the migration of radioactive or other hazardous dust at the Mill). Accordingly, the Board should rescind the March Approval Order or remand it to DAQ for proper consideration and incorporation of work practice standards for minimization of fugitive dust (as required by Utah Admin. Code R307-205).

3. The March 2 Approval Order Does Not Contain BACT for Fugitive Dust Control.

The March Approval Order does not contain BACT to control fugitive dust emissions from the Mill. Utah Admin. Code R-307-401-8(1)(a) states that the Executive Secretary will issue an approval order if, among other things, “the degree of pollution control for emissions, *to include fugitive dust emissions and fugitive dust*, is at least best available control technology.” (emphasis added). The March Approval Order and the Agency record in support of it, including the February 24 Memo, do not include a BACT analysis for fugitive dust emissions or otherwise indicate whether or how DAQ determined that the provisions in the Approval Order met BACT for fugitive dust emissions and fugitive dust.¹

As explained above, the Approval Order’s flexible implementation and monitoring requirements have not prevented uranium and vanadium-laden particles from migrating off-site. Moreover, the current fugitive dust control provisions fall far below other BACT provisions and industry standards for controlling dust at facilities handling the same or similar materials as those handled at the White Mesa Mill. *See, e.g.*, Moab Project Site Fugitive Dust Control Plan (March 2002), http://www.gjem.energy.gov/moab/documents/moab_fugitive_dust.pdf (fugitive dust plan for former uranium processing facility), attached as Exhibit 1; Crescent Junction Project Site Fugitive Dust Control Plan (July 2006), http://www.gjem.energy.gov/moab/documents/Crescent_Junction/fugitive_dust.pdf (fugitive dust plan for Utah facility with mill tailings and contaminated material repository), attached as Exhibit 2.² *See also* Denison’s submitted Work Practice Standards (requiring the initiation of dust control measures upon observation of opacity in excess of ten percent and requiring daily opacity recordings, but still failing to require installation of sprinkler systems, robust monitoring and reporting systems, and other dust control methods present in the Crescent Junction and Moab plans), attached as Exhibit 3.³ Accordingly, the Board should rescind the March Approval Order or remand it to DAQ for proper BACT

¹ The DAQ draft source plan review section “Review of Best Available Control Technology” contains BACT review of the baghouse control, but no BACT review for the incorporation of Work Practice Standards.

² Both the Moab and Crescent Junction plans are required under Utah Admin. Code R307-309. Both plans divide the relevant facility into high potential, moderate potential, and low potential source areas and apply specific and appropriate dust control measures to each type of area. Dust control measures include: water trucks, installed sprinkler systems, vegetative cover, soil conditioners, surfactant, magnesium/calcium chloride, and gravel. *See* Table 1 in each Plan. Each Plan also requires extensive environmental air monitoring, including meteorological monitoring systems that provide wind speed and wind direction data for triggering dust control measures. *See* Section Crescent Junction Plan Section 1.6, Moab Plan Section 1.5.

³ Note here that Denison’s submitted two-page Work Practice Standards is rather limited. A comprehensive set of work practice standards for all fugitive dust management at the Mill would likely require more robust analysis of the facility and dust control procedures.

analysis and inclusion of BACT in the Approval Order (as required by Utah Admin. Code R-307-401-8(1)(a)).

4. The February 24 Memo Failed to Adequately Address the Tribe's Comments.

The February 24 Memo failed to adequately address the Tribe's comments regarding fugitive dust monitoring and control at the Mill. February 24 Memo at 3, Comment 9. The DAQ response to Comment 9 only addressed the fixed schedule for monitoring, and simply stated, "To require a fixed schedule without regard to weather or material conditions could have detrimental effects (such as water being applied during freezing conditions)." *Id.* The DAQ did not address other Tribal comments such as that the Approval Order should require Denison to install a water spray or other watering system and that DAQ should collect and publish watering records for the Mill.⁴

The DAQ's response to Comment 10 both failed to respond to Tribal concerns and contained inaccurate and confusing statements. February 24 Memo at 5, Comment 10. The Memo's response to Tribal concerns about proper implementation of the four percent moisture requirement was to (incorrectly) state, "The 4% moisture content of the ore is no longer a condition of this approval order." *Id.* The February 24 Memo also stated that the method of determining compliance with the 20 percent opacity requirement was in the March Approval Order (which, as discussed above, is also incorrect, as the measurement methods in II.B.4 invariably leave compliance to the discretion of Denison or the Executive Secretary⁵). The rest of the Response to Comment 10 pleaded lack of authority to regulate (*see* Section 5, *infra*) and addressed the USGS Report data by stating, "particulate in the air below 20% opacity may migrate." Accordingly, the Board should, at a minimum, remand the March Approval Order to DAQ for proper analysis and response to the Tribe's comments and the evidence of off-site migration of radioactive particles presented in the USGS Report.

5. The February 24 Memo Incorrectly Limited DAQ's Authority to Minimize Fugitive Dust and to Require Proper Monitoring of Fugitive Dust.

In the February 24 Memo, DAQ incorrectly stated that it lacked jurisdiction or authority to implement several measures to minimize or control fugitive dust at the Mill. *See* Response to Comment 10 (DAQ has no jurisdiction to require water, soil, or vegetation sampling; DAQ has no authority to allow for external review; and "DAQ does not have the authority to monitor or modify a source's daily operations beyond compliance with the terms of the approval order."). DAQ does have broad authority in R-307-205 to work with owners and operators to design effective fugitive dust control measures. Moreover, DAQ has authority to require Denison to perform continuous and systematic monitoring of fugitive dust, and in this particular case, can do

⁴ The Tribe reiterates its comments here. The Tribe is particularly concerned that the Mill's current watering system (a watering truck) cannot adequately apply water to all radioactive, fugitive dust sources and that the watering truck itself is a source of fugitive dust events.

⁵ The Tribe reiterates its concern that neither entity is taking measures to ensure continuous compliance with either the 20 percent opacity or the four percent moisture content requirements. *See* October 29, 2010 Comments.

so as a condition of the Approval Order and can even do so under the existing authority given to the Executive Secretary in the Approval Order. *See* Section 2, *supra*. Accordingly, if the Board remands the March Approval Order to DAQ for proper consideration and incorporation of work practice standards for minimization of fugitive dust (as required by Utah Admin. Code R307-205), the Board should direct the DAQ to exercise its full authority over fugitive dust to minimize the off-site migration of radioactive and other hazardous pollutants.

6. The Tribe reserves the right to supplement its Reasons for Request and this Request upon the receipt of new information.

IV. STATEMENT OF PARTY STATUS AND STANDING

A. STATEMENT OF PARTY STATUS

The Tribe is a proper party to request commencement of and participation in the requested formal adjudicative proceeding. The Tribe meets all requirements for party status and is entitled to: (1) the grant of party status; (2) commencement of a formal adjudicative proceeding; and (3) participation as a full party in the requested formal adjudicative proceeding. Utah Admin. Code R307-103-6(d).

B. STATEMENT OF STANDING

1. Introduction

Utah Admin. Code R307-103-3(2) requires the Tribe to “specify in writing sufficient facts to allow the board to determine whether the person has standing under R307-103-6(3) to bring the requested action.” Under Utah Admin Code R307-103(6)(3), standing in front of the DAQ board is to be evaluated using applicable Utah case law. Under applicable Utah case law, there are two means by which a plaintiff may establish standing: the “traditional test” and the “alternative test.” *Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 967 (Utah 2006). The Tribe has standing under both the traditional and alternative tests.

2. Traditional Standing—Distinct and Palpable Injury

Under the “traditional” or “distinct and palpable injury” test, an entity bringing a request for agency action must assert: (1) the entity has been or will be adversely affected by the challenged actions; (2) there is a causal relationship between the injury and the relief requested; and (3) the relief requested is substantially likely to redress the injury caused. *See id.* (citing *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)). In this Request, the Tribe can meet all three parts of the traditional standing test.

a. Injury

Under the traditional standing test, a petitioning party must allege a “distinct and palpable injury” that gives the party a personal stake in the outcome of the legal dispute. *See City of Grantsville v. Redev. Agency of Tooele City*, 223 P.3d 461, 466 (Utah 2010) (citing *Sierra Club*,

148 P.3d 960). Here, DAQ's issuance of the March Approval Order containing inadequate and illegal fugitive dust management provisions threatens a distinct and palpable injury to Tribal lands, the Tribal government, and to Tribal members who dwell, work, hunt, and derive their sustenance and livelihood from Tribal and public lands located adjacent to the White Mesa Mill.

The Tribal community of White Mesa is located within three miles of the Mill. 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. The Tribe can adequately represent both the distinct Tribal interests and the interests of Tribal members in the requested formal adjudication.

The Tribe has long expressed its concern that the fugitive dust management practices of Denison at the Mill (and in particular, management practices that have allowed the off-site migration of radioactive dust) may impact the long-term health of its land, its natural and cultural resources, and Tribal members. The Tribe submitted comments to DAQ on the Mill's approval order on October 29, 2010 and November 11, 2010. DAQ's approval of the March Approval Order without imposing meaningful regulation that would halt the known off-site migration of harmful, radioactive dust poses a serious and long-term threat of injury to the Tribe's landowner and governmental interests and to the health of Tribal members, lands, and resources.

b. Redressibility and Causation

DAQ is charged with denying or approving the Approval Order and with ensuring that Denison's management practices at the Mill do not violate applicable federal and state air quality laws. The Tribe's injuries imminently result from the DAQ's failure to include proper mechanisms to regulate radioactive fugitive dust emissions in the March Approval Order, and thus, a causal connection exists between the DAQ's approval of the Approval Order and the Tribe's injuries. The Tribe seeks a revocation of the March Approval Order and/or a remand to the agency for further analysis. The requested relief will redress the Tribe's injuries.

3. Alternative Standing

Under the alternative standing test, an entity requesting agency action must establish: (1) that it is the appropriate party to raise the issue in the dispute; and (2) that the issues the party seeks to raise are of "sufficient public importance." *Sierra Club*, 148 P.3d at 972-73. Here, the Tribe is the appropriate party to raise the issue in the dispute because it is responsible for protecting Tribal and Tribal member-owned land resources and because it is responsible for the health and welfare of its members. In addition, the Tribe believes that it is the only party willing and able to bring a Request for Agency Action on the issues raised in this Request, and the Tribe has both the interest and the expertise necessary to investigate and review all legal and factual questions relating to the fugitive dust provisions of the Approval Order. *See id.* at 974.

The issues the Tribe raises in this Request are of great public importance. Inadequate fugitive dust management practices and the off-site migration of radioactive dust pose a serious public health threat to both Tribal members and to members of other local communities surrounding the White Mesa Mill. The environmental legacy of the fugitive dust management practices will also impact the land, natural resources, and economic development activities of surrounding communities for generations. As such, the Tribe has proper alternative standing to resolve this important matter in front of the Board.

V. REQUEST FOR RELIEF

Based on the above, the Tribe respectfully requests that the Board rescind the March Approval Order and/or remand the Approval Order to DAQ with instructions that the agency: (1) acknowledge jurisdiction and responsibility for regulating and monitoring fugitive dust at the Mill; (2) review the USGS Report and any other available data concerning off-site migration of radioactive and hazardous air pollutants; (3) undertake a BACT analysis for fugitive dust control and revise the Approval Order to require BACT; and (4) undertake or require the proper analysis to revise the Approval Order fugitive dust provisions to require appropriate work practice standards that provide continuous monitoring, management, and control of radioactive and other hazardous dust at the Mill.

Dated: March 31, 2011



Scott Clow
Environmental Programs Director
Ute Mountain Ute Tribe
P.O. Box
Towaoc, CO 81334
sclow@utemountain.org
970-564-5432

Certificate of Service

The foregoing Request for Agency Action was hand delivered today to:

Reginald D. Olsen
Acting Executive Secretary
Air Quality Board
Division of Air Quality
P.O. Box 144820
195 North 1950 West
Fourth Floor
Salt Lake City, Utah 84116

Christian C. Stephens
Assistant Attorney General
Utah Division of Air Quality
195 North 1950 West
Fourth Floor
Salt Lake City, Utah 84116

Copies were mailed to:

Jo Ann Tischler
Denison Mines (USA) Corp.
Independence Plaza
1050 17th Street, Suite 950
Denver, CO 80265

Dated this 31st day of March, 2011.
