Joro Walker, USB #6676
Charles R. Dubuc, USB #12079
WESTERN RESOURCE ADVOCATES
Attorney for Petitioners
150 South 600 East, Ste 2A
Salt Lake City, Utah 84102
Telephone: 801.487.9911
Email: jwalker@westernresources.org
rdubuc@westernresrouces.org

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

Living Rivers,	:	
	:	
Petitioner,	:	
	:	**RESPONSE TO THE DIVISION**
vs.	:	**OF OIL, GAS AND MINING'S AND**
	:	**RED LEAF'S PRE-HEARING**
	:	**BRIEFINGS**
	:	
Division of Oil, Gas and Mining,	:	
	:	**Docket No. 2012-017**
Respondent,	:	
	:	**Cause No. M/047/0103**
Red Leaf Resources, Inc.,	:	
	:	
Respondent-Intervenor	:	

Living Rivers respectfully submits this Response to the Division of Oil, Gas and Mining's (Division) and Red Leaf Resources, Inc.'s (Red Leaf) Pre-Hearing Briefings (Division Brief and Red Leaf Brief) submitted in this matter on June 11, 2012.

INTRODUCTION

In its Pre-Hearing Brief, the Division argues that the rules that it must abide by are so generally written, and the discretion that the agency is entitled to is so broad, that, in essence, the Division should be allowed to do more or less what it pleases when it comes to reviewing a

Notice of Intention (NOI) to conduct mining.[1] To be sure, the Division's Large Mining regulations are very generally written – too much so. However, as the Division suggests in its Pre-Hearing Brief, *see* Division Brief at 4, the Board should not grant any deference to the agency's conclusions of law – to include the cursory manner it has adopted for an NOI. In this case, because the agency approved an NOI that it did not properly review, Living Rivers asks the Board to overturn the Division's decision to approve Red Leaf's NOI.

To be sure, the agency is entitled to a reasonable amount of deference – but only when it applies its technical expertise to a given fact situation. When, as here, the agency lacks the technical expertise necessary to critically analyze the engineering details of a capsule design that is intended to contain 1.7 million tons of spent mining wastes, the Division's decision to ignore its lack of expertise and forego any analysis prior to approving the NOI is an abuse of discretion. Again, because the agency approved an NOI that it did not properly review due to a

[1] This assertion by the Division violates the law as articulated by the United States Supreme Court. For example, in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, the Court held that administrative agencies cannot push the boundaries of their power beyond that which was granted by the legislature, unless clearly authorized to do so. 531 U.S. 159, 172 (2001) ("[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result"). In other words, legislators "do[] not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id.* at 172–73. Similarly, the Court noted, "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011) (J. Scalia, concurring); *see also Christopher v. SmithKline Beecham Corp.*, 2012 WL 2196779, at *9 (U.S. June 18, 2012) (holding that the "practice of deferring to an agency's interpretation of its own ambiguous regulations . . . creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit, thereby frustrating the notice and predictability purposes of rulemaking." (internal quotations omitted) (internal alternations omitted). Finally, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

demonstrable lack of technical expertise, Living Rivers asks the Board to overturn the Division's decision to approve Red Leaf's NOI.

STANDARD OF REVIEW

In their Pre-Hearing briefings, both Red Leaf and Living Rivers agree that the proper standard of review in this proceeding is based on principles derived from case law interpreting the Utah Administrative Procedures Act (UAPA). Although Living Rivers provided a comprehensive review of the applicable law in its Pre-Hearing Briefing, generally speaking, in applying the provisions of Utah Code Ann. § 63G-4-403(4) to the Division's decision to approve Red Leaf's NOI, the Board must decide if the Division acted rationally or reasonably in light of the entire record before the agency. *See Sierra Club v. Air Quality Board*, 2009 UT 76 ¶ ¶ 13-14. Although it disagrees with Red Leaf and Living Rivers regarding the proper standard of review, the Division also cites to *Sierra Club* for the same general principle. *See* Division Brief at 5 (citing same).

However, the Division now erroneously asks this Board to deviate from the *Sierra Club* standard to instead apply the standard of review applicable under the federal Surface Mining Control and Reclamation Act (SMCRA). Insofar as the Division's decision is a final agency action governed by state law rather than federal law, and governed by UAPA rather than SMCRA, the Board should apply the standard of review established by Utah's appellate jurisprudence.

ARGUMENT

A number of the issues put forth by Red Leaf in its pre-hearing briefing were either raised in Living Rivers' Pre-Hearing Briefing, or will be facts or arguments that Living Rivers will develop at the hearing. For that reason, those issues will not be addressed in this response.

However, in an attempt to clarify the issues raised in this appeal, Living Rivers offers the following question and answer discussion in response to other aspects of the pre-hearing briefings submitted by Red Leaf and the Division.

Question 1: Must the Division of Oil, Gas and Mining serve in the primary oversight capacity of all mining activities in the state of Utah?

Answer 1: Yes. Within the provisions of the Utah Mined Land Reclamation Act (the Act), the legislature clearly requires the Division to serve in that capacity.

Living Rivers is not requesting that the Division go beyond its statutory mandate as set forth in the Act. It is clear, for instance, that DWQ is the agency directly responsible for the protection of ground water quality in the area of the mine pursuant to the Utah Ground Water Quality Protection regulations. However, it is equally clear that the Division is the state agency directly responsible for ensuring that the legislative purposes of the Act are fulfilled as the agency primarily responsible for oversight of all mining activities in the state.

The Act requires the Division to regulate mining in order to "minimize undesirable effects on the surroundings" and "prevent conditions detrimental to the general safety and welfare of the citizens of the state and to provide for the subsequent use of the lands affected." Utah Code Ann. § 40-8-2(2). Accordingly, the Act notes that a principal objective of mined land reclamation is "to minimize or prevent present and future on-site or off-site environmental degradation caused by mining operations to the ecologic and hydrologic regimes and to meet other pertinent state and federal regulations regarding air and water quality standards and health and safety criteria." Utah Code Ann. § 40-8-12(2).

As the agency directly responsible for implementing provisions of the Act, the Division fulfills its duties in a number of ways. Specific to the issue presented here, the agency is charged with the obligation to review NOIs and authorized to approve such NOIs if they meet the provisions of Utah Admin. Code § 40-8-13. *See id*. at § 40-8-4(3)(a) (an approved NOI is one that has been approved by the Division under the provisions of § 40-8-13); *see also id*. at § 40-8-13 (outlining the various provisions that the Division must consider in order "to *properly* evaluate the notice") (emphasis supplied). [2]

Question 2: Is the Division allowed to completely defer to the Division of Water Quality's (DWQ) technical assessment of Red Leaf's proposal to construct mining facilities designed to contain 200 million tons of spent shale wastes?

Answer 2: No. Section 40-8-22 of the Act specifically prohibits the Division from delegating its powers, responsibility or authority conferred by the legislature to any other agency. Throughout this proceeding, Red Leaf and the Division have consistently stated that it is entirely proper for the Division to rely completely on DWQ's analysis of the technical details of Red

[2] In *Milne Truck Lines v. Public Service Commission*, the Utah Supreme Court explained what an administrative agency must do to properly evaluate information provided to it. The court held, "[i]t is also essential that the [agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. *The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency*. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual conclusions ... are reached." 720 P.2d 1373, 1378 (Utah 1986) (emphasis supplied). Absent such detailed findings, a court "cannot perform its duty of reviewing the [agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action." *Id.*

Leaf's capsule design. However, section 40-8-22 of the Act specifically prohibits such delegation of responsibility and authority.

As Mr. Baker admits in his affidavit, prior to approving an NOI the Division is required to "assess the efficacy of the information provided and whether an NOI satisfies the mining rules." *See* Baker Affidavit at 3. To accomplish this, the Division is obligated to undertake whatever inquiries, inspections or examinations are necessary to *properly* evaluate the NOI. Utah Code Ann. § 40-8-13(4)(a) (emphasis added). Furthermore, the Division also admits that "[w]hen reviewing the NOI the division is under an obligation to follow the rules as written, assume the validity of the rules, and review all applications with the same level of scrutiny and care." Division Brief at 14. However, this recognition of the Division's responsibilities to "assess the efficacy of the information provided" and "review all applications with the same level of scrutiny and care," as well as its statutory requirement to properly evaluate the NOI, is in direct conflict with Mr. Baker's statement indicating that the Division operates under the assumption that all information contained in an NOI is "accurate and true." Division Brief at 13; Baker Affidavit at ¶ 22. After all, if the information provided is assumed to be "accurate and true," why bother reviewing it at all?

The Division argues that the Act supports Mr. Baker's "accurate and true" assumption. Division Brief at 13. But the Utah Supreme Court has stated, "[c]ourts are not required to adopt the construction [administrative agencies] have placed on a legislative Act." *Union Pacific R.R. Co. v. State Tax Commission*, 426 P.2d 231, 233 (Utah 1967). An "administrative interpretation out of harmony and contrary to the express provisions of a statute cannot be given weight." *Id.* The Act requires the Division to *properly* evaluate the NOI, Utah Code Ann. §40-8-13, and Mr. Baker's "accurate and true" assumption directly contradicts that directive. The Utah Court of

Appeals noted that if the administrative agency's interpretation is "reasonable and consistent with the overall design and purpose of" a governing statute, the court will adopt that interpretation. *Nelson v. Betit*, 937 P.2d 1298, 1306 (Utah Ct. App 1997). However, because Mr. Baker's assumption is neither reasonable nor consistent with the overall design and purpose of the Act, it should be set aside.

Red Leaf consistently takes the position that its obligation is merely to satisfy the bare minimum requirements imposed by regulation. To this end, Red Leaf states that the NOI was "written to track the applicable sections of the Minerals Program rules which govern the NOI/LMO application and approval process." Red Leaf Brief at 7. It is especially important for the Division to critically evaluate a mining application that provides minimal information to track with the regulatory requirements.[3] Red Leaf relies upon several documents as evidence that the capsule design will function as intended, but upon careful review it is apparent that those documents simply contain self-serving technical conclusions with no supporting detail.

For instance, Red Leaf states that it "confirmed in correspondence to the Division that this design will be further assured by RLR's proposed monitoring plan" and that it "agreed to adhere to all reclamation requirements and revegetation requirements as indicated in the NOI/LMO and reclamation contract." Red Leaf Brief at 13. For these propositions, Red Leaf cites to a two-page letter from Dr. Laura Nelson, who serves as Red Leaf's Vice-President for Energy and Environmental Development. However, no details about the monitoring plan are provided – this letter simply contains conclusory statements that the Division apparently assumed were "accurate and true." In addition, Red Leaf refers to Appendix R (Letter re BAS

[3] It is especially important that the Division properly review the information provided in the NOI because any decision by the Division approving the NOI "bind[s] the Division," Utah Admin. Code R647-4-101.3, and once approved an NOI "remains valid for the life of the mining operation." Utah Code Ann. § 40-8-16(1); *see also* Utah Admin. Code R647-4-102.

Analysis), a one-page letter from its consultant that presents only conclusions regarding its laboratory testing of the BAS system with no supporting data or detail.

The "accurate and true" assumption conflicts with the Division's acknowledgment that its discretion must be exercised in a reasonable manner. Division Brief at 11. There is nothing reasonable about reviewing mine applications under an "accurate and true" assumption. To the degree that such an assumption accurately reflects the Division's operational approach with respect to mining applications, the agency's interpretation of law governing the review of NOIs is entitled to no deference. Division Brief at 15.

Setting the "accurate and true" assumption aside, the agency declares that it accomplishes its review of an NOI "by utilizing the technical knowledge of individual Division employees with the requisite education and technical knowledge of individual Division employees with the requisite education and technical training who have experience applying that education and training to specific factual situations." Division Brief at 11. However, of "the two Division staff primarily responsible for reviewing the NOI," Mr. Munson's degree is in watershed management, and Ms. Heppler's undergraduate degree is in geology. Division Brief at 12. Mr. Baker, their supervisor, has an undergraduate degree in biology and a master's degree in range ecology. Baker Affidavit at ¶ 5.

In its Motion in Limine, Red Leaf spends a great deal of effort challenging the credentials of Living Rivers' technical expert, professional engineer James Kuipers. Red Leaf claims that the company's proposal is so technically complex that even an expert with over 30 years' experience as a mining engineer, and who has worked with containment systems composed of material similar in nature to the proposed capsules, is not qualified to offer an opinion on this project. While misguided, Red Leaf's motion does make a valid point – meaningful review of

Red Leaf's capsule design requires a trained professional engineer experienced in materials similar to those proposed in the NOI. The Division, however, had no such credentialed individual review the highly technical aspects of the NOI.

The Division notes that the agency is under an obligation to review all applications with the same level of scrutiny and care, Division Brief at 14, but such a task is impossible if the agency does not have personnel qualified to review the design of a containment system. In this case the Division has made the decision to rely on the technical expertise and judgment of DWQ in order to fulfill its statutory obligation to properly review the NOI. However, the Division is not playing an active role in DWQ's review process as contemplated by the Act, and DWQ's review process cannot serve as a basis for the Division's decision to approve Red Leaf's NOI because the Division's approval has already been issued. Instead, the Division has abdicated all responsibility for review of the technical details of the capsule design, resulting in an unlawful delegation of its powers, responsibility and authority under the Act in violation of Utah Code Ann. § 40-8-22(2).

Question 3: Instead of completely deferring to DWQ's judgment, should the Division have invoked the provisions of its Memorandum of Understanding (MOU) with DWQ in order to obtain the technical expertise the Division needs to properly assess Red Leaf's proposal?

Answer 3: Yes. The Act specifically authorizes the Division to enter into cooperative agreements "in the furtherance of the purposes of the act," but only to the extent that the Division's actions do "not result in any delegation of powers, responsibilities, or authority conferred upon the board or division by this act." Utah Code Ann. § 40-8-22.

In recognition of the fact that the Division has limited resources to fulfill its obligations under the Act, the Utah legislature authorized the agency to enter into agreements similar to the MOU to help supplement the Division's resources with those of other government agencies. Utah Code Ann. § 40-8-22. To that end, the legislature authorized the commitment of funds for this purpose as long as that expenditure is approved by the Board. *Id*.

In this case, the Division should have acknowledged that it does not have the technical expertise necessary to properly review Red Leaf's NOI, and it should have invoked the provisions of the MOU to help fill that gap in an active, meaningful way. What the Division did instead, however, was simply renounce any intention of analyzing Red Leaf's capsule design and rely on DWQ's technical assessment of the proposal in order to fulfill its statutory and regulatory obligations. This it may not lawfully do.

Question 4: After invoking the provisions of its MOU with DWQ, must the Division defer final approval of a company's NOI pending the completion of DWQ's assessment of the proposal in order to fulfill its obligations under the Utah Mined Land Reclamation Act?

Answer 4: Yes. Because the Division is not allowed to delegate any of its powers, responsibility or authority under the Act to another agency when invoking the MOU, the Division may not assume that DWQ will assess the technical details of Red Leaf's capsule design to the degree required by the Act. The Division must therefore stay its consideration of the NOI until DWQ has completed its assessment and the Division has a reasonable opportunity to use that assessment to inform its decision on the application.

While it is true that the Division may exercise some discretion in carrying out its duties under the Act, the agency may not do so in a manner that violates a specific provision of the Act

that prohibits it from delegating its authority to another agency. The Division's technical analyses are entitled to a reasonable amount of deference, but such deference is not warranted when the agency performs no technical analysis because it lacks the necessary expertise.

Question 5: Was the Division's authority limited to approving the entirety of Red Leaf's proposal, or could the Division have exercised its discretion to require Red Leaf to take a scaled approach to its development?

Answer 5: The Division had both the obligation and the necessary discretion to require Red Leaf to take a less ambitious, more practical scaled approach to its proposal. In its Pre-Hearing Briefing, the Division admits that "while the permit is for the entirety of the final project, the NOI contemplates a scaled build out over time where the operator and the Division can learn from each stage and adjust the permit accordingly." Division Brief at 12. Because the Division admits that "the practical reality" is that such as scaled approach will be necessary, the Division's decision to approve a comprehensive project that will admittedly require amendments was arbitrary and capricious.

Question 6: Is the Division allowed to exclude the public from participating in future proceedings related to adjustments to the permit?

Answer 6: Because the Division admits that there are likely to be significant adjustments to the permit over time, it is entirely improper for the Division to deny members of the public the opportunity to comment on those adjustments as they occur. As Mr. Alder noted in the informal conference in this matter, whether the public is allowed to participate in any possible changes to Red Leaf's permit is completely subject to the Division's discretion in classifying those changes.

See Informal Conference Transcript at 80, Lines 1-6. If the Division classifies a change as a "revision" pursuant to R647-4-118(2), public notice and comment would be required. However, if the Division classifies a change as an "amendment," pursuant to R647-4-119, public notice and comment would not be necessary. *See also, id.*

The Division's practice in this regard is the very essence of arbitrary and capricious decision making. The agency's well-known but apparently unwritten rule of thumb is the so-called 50/50 rule. Specifically, the Division classifies a proposed change as a "revision" only if it either (a) exceeds 50% of the total land disturbance of the original permit, or (b) results in a 50% increase in the amount of funds required for reclamation surety, or (c) both. In this case, the "practical" changes that the Division anticipates would not qualify as a revision under this criteria. Therefore, while acknowledging that there will necessarily be changes to the project over time (and perhaps technically significant ones), by failing to require a phased construction process and approving this entire permit submitted by Red Leaf, the Division is deliberately attempting to exclude public participation on any future decisions regarding the project.

Respectfully submitted this 20th of June, 2012.

ROB DUBUC
JORO WALKER
Attorneys for Living Rivers

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2012, I served a true and correct copy of this Response to the Division of Oil, Gas and Mining's and Red Leaf's Pre-Hearing Briefings by email and via first-class mail to Julie Ann Carter, Secretary to the Board of Oil, Gas and Mining,

Julie Ann Carter
Utah Oil, Gas and Mining
1594 W North Temple, Ste 1210
PO Box 145801
Salt Lake City, UT 84114
juliecarter@utah.gov

and to each of the following persons via email:

Dana Dean
Associate Director of Mining
Division of Oil, Gas & Mining
1594 West North Temple, Ste 1210
Salt Lake City, UT 84116
danadean@utah.gov

Denise A. Dragoo
Snell & Wilmer, LLP
15 West South Temple, Ste 1200
Salt Lake City, UT 84101
ddragoo@swlaw.com

Steven Alder
Utah Assistant Attorney General
1594 West North Temple
Salt Lake City, UT 84114
stevealder@utah.gov

ROB DUBUC