

APRIL 01 2022

**SECRETARY, BOARD OF
OIL, GAS & MINING**

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

IN THE MATTER OF
CORRESPONDENCE RECEIVED
FROM THE PUBLIC REQUESTING
AN EMERGENCY ORDER BE
ISSUED PROHIBITING A CERTAIN
SMALL MINE OR A MORATORIUM
BE ISSUED ON SMALL AND
LARGE MINE APPLICATIONS

**ORDER DENYING REQUESTS
FOR ISSUANCE OF AN
EMERGENCY ORDER**

Docket No. 2022-009

Cause No. S9999999

Following the Board of Oil, Gas & Mining’s (“Board”) regularly scheduled March 23, 2022 Public Hearing, the Board received numerous generalized submissions from members of the public requesting either an emergency order preventing further mining in Parley’s Canyon, Utah¹ or a moratorium be placed on all small and/or large mine applications (“Emergency Requests”). The majority of the Emergency Requests took the form of letters and emails. While these Emergency Requests vary in terms of specificity, numerous submissions contained the same general request for relief:

I am writing to request that you issue an emergency order according to the requirements and procedures of the Title 63G, Chapter 4, administrative procedures act in relation to the proposed Tree Farm LLC mining operation.

See e.g., Denise Morgan Request, dated March 24, 2022.

¹ Apart from the broader request for a mining application moratorium, the Board interprets the requests received for issuance of an emergency order to be tied exclusively to the Tree Farm, LLC (“Tree Farm”) mining application(s) and or planned mining operations.

Similarly, the Board received requests asking for a moratorium on all small and large mine applications:

I am asking you today, pursuant to Utah Code Ann. § 40-6-10(2), to issue an emergency order for a SMA and LMO moratorium. Doing so will allow the public, companies, cities, and counties an opportunity to engage with the Division and Board under new policies and rules to vet, evaluate, and mitigate the impacts of small and large mining operations, especially in Class 1 and 2 counties.

See e.g., Andrew W. Smith Request, dated March 23, 2022.

The concerns expressed by the citizens submitting Emergency Requests centered on the following concerns relating to mining operations: air quality, fugitive dust, water use, increased heavy truck traffic, fire hazards, impacts on wildlife and aesthetics. The Board and/or the Division of Oil, Gas & Mining (“Division”) received approximately thirty-one (31) Emergency Requests following the March 2022 Public Hearing. It is the purpose and intent of this Order to address all of the Emergency Requests received by the Board and Division following the March 23, 2022 Public Hearing.

Board Filing Requirements

Per the Board’s administrative rules, proceedings are to be commenced through the filing of either a “Notice of Agency Action” if an administrative matter is initiated by the Board or Division, or a “Request for Agency Action” if an administrative matter is commenced by an affected party. *See Utah Admin. Code. R.641-104-100.120-122.* The exception to these pleading requirements is for “Emergency Orders” permitted under Utah. Admin. Code. R.641-109-400. The Board’s “Emergency Orders” rule provides:

Notwithstanding the other provisions of these regulations, the Director of the Division or any member of the Board is authorized to issue an emergency order without notice or hearing, in accordance with the applicable statute. The emergency order will remain in effect no longer than until the next regular meeting of the Board, or such shorter period of time as will be prescribed by statute.

Utah Admin. Code R. 641-109-400.

There are several statutes within the Utah Mined Land Reclamation Act that discuss emergency orders. *See* Utah Code Ann. §§ 40-8-4(9) (definition); 40-8-6 (power to issue). Both statutes indicate the Board has the authority to issue emergency orders “according to the requirements and provisions of Title 63G, Chapter 4, Administrative Procedures Act.” Utah Code Ann. § 40-8-6(3).

Although many Emergency Requests do not cite to any statutory authority, numerous Emergency Requests contain the statutory reference to “Title 63G, Chapter 4, Administrative Procedures Act,” while others refer to Utah Code Ann. § 40-6-10(2) as the basis for the requests. Accordingly, for the limited purpose of timely responding, the Board considers each of the Emergency Requests to be properly filed.²

Statutory Basis for Issuance of an Emergency Order

The Utah Administrative Procedures Act (“UAPA”) authorizes the issuance of an emergency order under the following specified conditions:

An agency may issue an order on an emergency basis without complying with the requirements of this chapter if:

(a) the facts known by the agency or presented to the agency show that an immediate and significant danger to the public health, safety, or welfare exists; and

² Utah Code Ann. § 40-6-10(2) and Utah Admin. Code R. 641-109-400 do not specify any filing requirements for requests for issuance of emergency orders. Even if there were specified requirements, the Board can waive strict compliance with its administrative rules. Utah Admin. Code R. 641-100-400 (deviation from rules).

(b) the threat requires immediate action by the agency.

Utah Code Ann. § 63G-4-502(1)

Although UAPA does not contain a definition for “immediate and significant danger,” the Board has consistently referred to the following definitions within the Utah Mined Land Reclamation Act as guidance when confronted with situations requiring the issuance of an emergency order:

“Imminent danger to the health and safety of the public” means the existence of a condition or practice, or a violation of a permit requirement or other requirement of this chapter in a mining operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before the condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose himself or herself to the danger during the time necessary for abatement.

Utah Code Ann. § 40-8-4(12)(a)-(b).

Factual and Legal Analysis

Applying these statutes and regulations to the issues at bar, the Board determines the record does not contain sufficient factual allegations warranting the issuance of an emergency order. First, although a final order has not been issued, the Division and Tree Farm’s “Stipulated Motion to Dismiss Request for Agency Action for Mootness” (“Stipulation”) was granted by the Board at the March 23, 2022 Public Meeting. The Stipulation provided for the following actions to occur:

(1) Tree Farm will no longer challenge the denial of the NOI-SMO; (2) Tree Farm will withdraw its previously filed NOI-LMO; (3) Tree Farm will refile a notice of intention to commence small mining operations to be timely reviewed by the Division; (4) Tree Farm will not file a notice of intention to commence large mining operations simultaneously with the filing of the

new notice of intention to commence small mining operations; and (5) Tree Farm reserves the right to file a new notice of intention to commence large mining operations at a future date, prior to enlarging small mining operations beyond twenty acres, and with sufficient lead time to allow the Division to timely review the new notice of intention to commence large mining operations.

See Stipulation, p. 2.

Since the Emergency Requests are tied exclusively to the Tree Farm's planned mining operations, and per the Stipulation, Tree Farm has withdrawn its mining applications, there are no actual mining operations being conducted by Tree Farm. Accordingly, there is no conduct to cease or abate through issuance of an emergency order.³

Further, related to the ripeness issue, there is not a sufficient showing of imminence required for issuance of an emergency order. As specified in the Emergency Requests, the concerns expressed are principally centered on future and, at present, speculative impacts which would only occur after all applicable State and local permits are obtained. Accordingly, the record does not support a finding by the Board of "immediate and significant danger" necessary to justify the issuance of an emergency order.

Finally, with respect to any request for a moratorium on small and large mine applications, the Board does not have the statutory authority to issue such broad ranging relief. Rather, per Board rule, emergency orders are intended to be

³ The Utah Supreme Court has explained the general premise of the ripeness doctrine on multiple occasions: "[t]his Court will not issue advisory opinions or examine a controversy that has not yet sharpened into an actual or imminent clash of legal rights and obligations between the parties thereto. Where there exists no more than a difference of opinion regarding the hypothetical application of a piece of legislation to a situation in which the parties might, at some future time, find themselves, the question is unripe for adjudication. *State v. Ortiz*, 1999 UT 84, ¶ 3, 987 P.2d 39, ¶ 3 (citation and internal quotes omitted); *See also Bodell Construction Co. v. Robbins*, 2009 UT 52, 215 P.3d 933.

temporary. *See* R641-109-400 (“ . . . [t]he emergency order will remain in effect no longer than until the next regular meeting of the Board, or such shorter period of time as will be prescribed by statute.”) In addition, if an emergency order were to issue, “. . . the agency shall: limit its order to require only the action necessary to prevent or avoid the danger to the public health, safety, or welfare.” Utah Code Ann. § 63G-4-502(2)(a).

Based on the applicable statute and rule, as with any form of injunctive relief, emergency orders issued from the Board are considered extraordinary remedies that should be sparingly issued and narrowly tailored. Under the current record, there is not a sufficient factual basis warranting the relief requested. Moreover, the Board lacks jurisdiction to issue a statewide moratorium on all mining applications.⁴

Order

Having reviewed each of the Emergency Requests, the Board finds and determines that each of the Emergency Requests are hereby **DENIED**. As was mentioned during the March 23, 2022 Public Hearing, concerned citizens will have the opportunity to object and/or comment to Tree Farm’s refiled application(s) once they are submitted.

Despite denying the Emergency Request, the Board would like to take this opportunity to specifically address the concerned members of the public. The Board would like to first thank each of the citizens who provided public comment and who submitted Emergency Requests pertaining to mining operations being conducted in

⁴ Not only does the Board lack the authority to issue a moratorium, such a drastic action likely may also create immediate exposure to the State of Utah based on anticipated regulatory takings claims that would certainly be asserted by negatively affected third-party operators.

Parley's Canyon. Robust and multi-faceted dialogue translates into well-informed decision making.

To that end, the Board respectfully reminds the public that the Board intends on providing additional guidance on these issues in the forthcoming written Order granting the Stipulation and denying the Division's Motion for Policy Guidance. To be clear, the Board can only operate under the powers and duties set forth in statute. With that in mind, the Board intends on clarifying the public health and safety protections currently available under existing statute to hopefully address, to the best of the Board's ability, the legitimate concerns raised by the public in relation to any future mining and potential environmental impacts in Parley's Canyon.

ENTERED this 1st day of April, 2022.

**STATE OF UTAH
BOARD OF OIL, GAS AND MINING**



Chris D. Hansen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2022, I caused a true and correct copy of the foregoing **ORDER DENYING REQUESTS FOR ISSUANCE OF AN EMERGENCY ORDER** for **Docket No. 2022-009 Cause No. S9999999** to be mailed to the following:

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