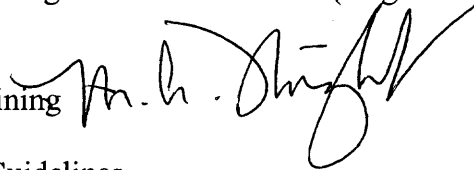


10/06/05

Memorandum

TO: Mining Program Managers (MPM) (Pam Grubaugh-Littig, Daron Haddock, Wayne Hedberg, Mark Mesch, Susan White) and Mining Program Guideline Files (Angela Nance, Joelle Burns, Connie Jo Garcia)

FROM: Mary Ann Wright, Associate Director, Mining



RE: Mandated Review and Revision of Program Guidelines

This memo is written as a follow-up to 1) the memorandum from Jared Hawkins, Law Clerk, to Steve Alder, dated June 3, 2004 and copied to each of you on August 23, 2004 (attached) and 2) as a follow up to numerous prior discussions at MPM meetings.

In that 6/4/04 memo, Mr. Hawkins outlines the changes to the Utah Administrative Procedures Act made by the Utah Legislature in 2003, and the implications to the Mining Programs' Guidelines. The direction regarding the legislative change is essentially this: **If a guideline is being used as a rule, it must go through the rulemaking process. If a guideline is not to be used as a rule, then it must be revised to be strictly advisory.** Thus, you, as the Mining Program Managers, are currently reviewing and revising each of your respective programs guidelines.

At this time, I realize that some guidelines are done, some are in progress, and some have not been started. However, **in the interim until all guidelines are revised to comply with the 2003 amendments to UAPA, each Guideline must reflect its review/revision status.** If you have questions, please let me know. Thank you for taking care of this action.

cc: Steve Alder
John Baza
PIC
Vickie Southwick

Attachment: Hawkins memo dated 6/3/04

P:\GROUPS\MINES\WP\Memos\guideline memo.doc

orig → Mary Ann [6/3/04]
(new)

MEMORANDUM

TO: Steve Alder, Assistant Attorney General, Natural Resources Division
FROM: Jared Hawkins, Clerk, Natural Resources Division
RE: Implications of Amendments to the Rulemaking Provisions of the Utah Administrative Procedure Act
DATE: June 3, 2004¹

Copy to:
Jan Wayne
Dana
Susan
Archie
8/20/04
8/23/04

Utah agencies have rulemaking authority pursuant to the provisions of the Utah Administrative Procedure Act (UAPA), Utah Code Annotated § 63-46a-1 et seq. (1997 & Supp. 2003). In addition to other rulemaking required by Utah law, UAPA requires agencies to “make rules when an agency action: (a) authorizes, requires, or prohibits an action; (b) provides or prohibits a material benefit; (c) applies to a class of persons or another agency; and (d) is explicitly or implicitly authorized by statute[;]” or “when an agency issues a written interpretation of a state or federal legal mandate.” Utah Code Ann. § 63-46a-3(2), (3). This past year, the Utah State Legislature changed the definition of what can be considered and enforced as an administrative rule. As this change may affect the enforceability and appropriateness of some of the guidelines and policies issued by Utah agencies, this Memorandum will present the changes made in the law and then discuss what UAPA now requires of Utah agencies.

Prior to May 5, 2003, the provisions of UAPA defined a “rule” as follows:

- (16) (a) “Rule” means an agency's written statement that:
 - (i) is explicitly or implicitly required by state or federal statute or other applicable law;
 - (ii) has the effect of law;
 - (iii) implements or interprets a state or federal legal mandate; and
 - (iv) applies to a class of persons or another agency.
- (b) “Rule” includes the amendment or repeal of an existing rule.
- (c) “Rule” does not mean:
 - (i) orders;
 - (ii) unenforceable policies;

¹ Minor changes were made from the May 25, 2004, Memorandum discussing the same topic.

- (iii) internal management polices of the agency that do not restrict the legal rights of a class of persons or another agency;
- (iv) the governor's executive orders or proclamations;
- (v) opinions issued by the attorney general's office;
- (vi) declaratory rulings issued by the agency according to Section 63-46b-21 except as required by Section 63-46a-3; or
- (vii) rulings by an agency in adjudicative proceedings, except as required by Subsection 63-46a-3(6).

Utah Code Ann. § 63-46a-2 (1997). Before May 5, 2003, UAPA defined “policy” as follows:

- (13) (a) “Policy” means a statement applying to persons or agencies that:
 - (i) broadly prescribes a future course of action, guidelines, principles, or procedures; or
 - (ii) prescribes the internal management of an agency.
- (b) A policy is a rule if it conforms to the definition of a rule.

Utah Code Ann. § 63-46a-2(13) (1997).

However, Utah Laws 2003, chapter 197, § 1, completely deleted the definition for “policy” as listed above and amended the definition of “rule” to read:²

- (16) (a) “Rule” means an agency's written statement that:
 - (i) is explicitly or implicitly required by state or federal statute or other applicable law;
 - ~~(ii) has the effect of law;~~
 - ~~[(iii)]~~ (ii) implements or interprets a state or federal legal mandate; and
 - ~~[(iv)]~~ (iii) applies to a class of persons or another agency.
- (b) “Rule” includes the amendment or repeal of an existing rule.
- (c) “Rule” does not mean:
 - (i) orders;
 - ~~[(ii) unenforceable polices;]~~
 - ~~[(iii) internal management polices of the agency]~~
 - (ii) an agency's written statement that applies only to internal management and that ~~[dø]~~ does not restrict the legal rights of a public class of persons or another agency;
 - ~~[(iv)]~~ (iii) the governor's executive orders or proclamations;
 - ~~[(v)]~~ (iv) opinions issued by the attorney general's office;
 - ~~[(vi)]~~ (v) declaratory rulings issued by the agency according to Section 63-46b-21 except as required by Section 63-46a-3; ~~[ø]~~
 - ~~[(vii)]~~ (vi) rulings by an agency in adjudicative proceedings, except as required by Subsection 63-46a-3(6)~~[-];~~ or
 - (vii) an agency written statement that is in violation of any state or federal law.

² New language is underlined, while deleted language is struck out.

Laws 2003, chapter 197, § 1, also enacted Utah Code Annotated § 63-46a-3.5 to read:

(1) An agency's written statement is a rule if it conforms to the definition of a rule under Section 63-46a-2, but the written statement is not enforceable unless it is made as a rule in accordance with the requirements of this chapter.

(2) An agency's written statement that is made as a rule in accordance with the requirements of this chapter is enforceable and has the effect of law.

While the amendment to UAPA made by the 2003 legislature (specifically the deletion of the definition of policy from 63-46a-2) may at first glance seem to suggest that the legislature intended to keep agencies from issuing policies, other provisions of UAPA and statements made on the floor of the House of Representatives suggest otherwise. First, while the 2003 Legislature deleted the definition of “policy” from UAPA, UAPA still states that rulemaking is not required when: agency actions apply only to internal agency management; standardized agency manuals only apply to internal fiscal or administrative details of governmental entities supervised by statute; or agencies issue policy or other statements that are only advisory, informative, or descriptive, and do not conform to the requirements of Subsections (2) and (3) of § 63-46a-3. Utah Code Ann. § 63-46a-3(4). This provision of UAPA clearly allows Utah’s agencies to issue policy statements in certain situations.

Second, statements made on the floor of the House of Representatives in discussing the proposed UAPA amendments (Senate Bill 30) indicate that the Utah State Legislature (or at least the House of Representatives) likely did not intend to do away with policymaking within Utah agencies.³ For example, Representative David Ure, speaking in support of the Bill, stated in effect that the legislature did not intend to interfere with interior agency policies or interior

³ One must recognize that while legislative history can be useful in determining the intent of the legislature in passing a law, statements made by members of the legislature do not always necessarily represent the true intent of the legislature. Thus, while there is not a way of definitively determining whether the following statements articulate the true intent of the legislature, they do provide helpful insight as to what at least some of the representatives thought the proposed Bill was intended to change or accomplish.

management decisions in passing Senate Bill 30, but rather wanted to establish that when an agency issues a rule that appears to be a rule and acts like a rule, it must be taken through the appropriate procedures to become enforceable as a rule. Representative Merlynn Newbold agreed, stating that the Bill was intended to clarify what is a rule, what needs to go through the proper procedure, and what is enforceable. She then added that if a statement issued by an agency “affects the general public, then it is a rule and it needs to go through the [proper] procedure.” Floor Debate, House of Representatives, Utah State Legislature, 2003 General Session (March 5, 2003), at <http://www.le.state.ut.us/house/Recordings/2003GS/2003day45.htm> (click on “SB 30” link).

In summary, the amendments to UAPA clarify what agency actions constitute rules and in doing so, limit when an agency can issue policy statements or guidelines, but do not entirely prohibit agency policies or guidelines. UAPA still allows agencies to establish and follow policies that only apply to internal agency management (and that do not restrict the legal rights of a public class of persons or another agency) (§ 63-46a-2(16)(c)(ii)), only apply to internal fiscal or administrative details of governmental entities supervised by statute (§ 63-46a-3(4)(b)), or that are only advisory, informative, or descriptive in nature (§ 63-46a-3(4)(c)). However, those policies cannot “act like rules,” without being issued according to rulemaking procedures.

“Acting like a rule” includes when:

- (a) An agency’s written statement is “explicitly or implicitly required by applicable law[,] implements or interprets a state or federal legal mandate[,] and applies to a class of persons or another agency” (Utah Code Ann. § 63-46a-2(16)(a));
- (b) an agency’s actions: authorize, require, or prohibit an action; provide or prohibit a material benefit; apply to a public class of persons or another agency; and are explicitly or implicitly authorized by statute (Utah Code Ann. § 63-46a-3(2)); or
- (c) “an agency issues a written interpretation of a state or federal legal mandate” (Utah Code Ann. § 63-46a-3(3)).

While these limitations on policies and guidelines may increase the burdens placed on agencies in their efforts to carry out their statutory duties, the new provisions of UAPA adhere to important policy considerations. For example, UAPA sets forth a specific rulemaking procedure (requiring the publishing of the text and analysis of any proposed rules, public comment, and legislative oversight (*see e.g.* Utah Code Ann. §§ 63-46a-4, 11, 11.5 (1997 & Supp. 2003)), which is not typically followed when issuing guidelines and policies. As many rules can have a substantial affect on the citizens of the state, these rulemaking procedures provide citizens with an opportunity to be heard and protect their interests in the formation of administrative rules. The same protective procedures are not typically required in making policies and guidelines because policies and guidelines theoretically affect the general public less because they should only (theoretically) assist and guide agencies in the implementation of statutes and rules and should not be mandatory in nature. Policies that *require* specific actions (rather than suggest certain actions) and are adhered to strictly, in essence become rules without having had to pass through the protective procedures provided for rules. This approach to policy making benefits agencies (by allowing an agency to avoid the burdensome and lengthy rulemaking process) but removes the legislature and the people from the process. The 2003 changes to UAPA clarified that for a statement to be enforced like a rule (and to be allowed to substantially affect the public like other rules), it would have to be promulgated according to required rulemaking procedures.