
BEFORE THE
UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:

Weber County C&D Class VI Landfill
Solid Waste Permit #1101

February 4, 2013

Administrative Law Judge
Connie S. Nakahara

SECOND MEMORANDUM AND RECOMMENDED ORDER
(Pursuant to Board's Remand)

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Petitioner Counterpoint Construction Company ("Counterpoint") initiated this proceeding when it filed two requests for agency action challenging the Weber County Class VI, commercial nonhazardous solid waste landfill permit. The Executive Secretary of the Utah Solid and Hazardous Waste Control Board ("Executive Secretary") issued the permit to Weber County, as owner, and Moulding & Sons Landfill, LLC ("Moulding"), as operator. Counterpoint was granted standing to intervene in this proceeding to raise claims in its requests for agency action. The Executive Secretary, Weber County, and Moulding are each separate Respondents in this proceeding.

Counterpoint moved for summary judgment regarding a majority of the issues raised in its requests for agency action. The three Respondents jointly moved for summary judgment on all admitted claims raised by Counterpoint.

On January 10, 2013, the Utah Solid and Hazardous Waste Control Board ("Board") considered the October 25, 2012, *Memorandum and Recommended Order*

(*Recommending the Board Grant, in part, and Deny, in part, Petitioner Counterpoint Construction Company's Motion for Summary Judgment; Grant, in part, Deny, in part, Respondents' Motions for Summary Judgment*) ("*Original Memorandum and Recommended Order*"). The Board ordered the appointed Administrative Law Judge to revise the *Original Memorandum and Recommended Order* and resubmit a memorandum and recommend order to "uphold the Executive Secretary's decision to issue the Class VI permit and to hold the Class IVb permit dormant and postpone revocation pending final resolution of the challenge to the Class VI permit."¹ The Board approved the remaining portions of the *Original Memorandum and Recommended Order*.²

Based on the *Board's Remand* and the discussion below, it is RECOMMENDED that the Board:

GRANT, in part, and DENY, in part, Counterpoint's motion for summary judgment;

GRANT, in part, and DENY, in part, Respondents' motions for summary judgment;

AFFIRM the Class VI, commercial nonhazardous solid waste landfill permit for the Weber County Landfill; and

DISMISS Counterpoint's Requests for Agency Action and this adjudicative proceeding as the issues raised therein shall be resolved.

¹Order Returning Dispositive Action to Administrative Law Judge ("*Board's Remand*") (January 24, 2013) attached as Exhibit 2 at 5.

²*Id.* at 4.

I. Procedural Requirements.

Pursuant to UTAH CODE ANN. § 19-1-202(1)(f), the Executive Director of the Utah Department of Environmental Quality appointed Connie Nakahara as the Administrative Law Judge to conduct an adjudicative proceeding,³ on behalf of the Board⁴ regarding *Counterpoint Construction Company's Amended Request for Intervention and Requests for Agency Action on the Utah Division of Solid and Hazardous Waste's Solid Waste Permit No. 1101 ("RFAA #1")* dated March 14, 2011, and *Counterpoint Construction Company's Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations ("RFAA #2")* dated March 31, 2011.⁵ This *Second Memorandum and Recommended Order*

³See Letter from Amanda Smith to Connie Nakahara (April 20, 2011) (appointing Connie Nakahara as Administrative Law Judge on behalf of the Board regarding requests for agency action dated March 9, 2011, and March 31, 2011, and amended request for agency action dated March 14, 2011); Letter from Amanda Smith to Connie Nakahara (July 12, 2011) (appointing Connie Nakahara as Administrative Law Judge on behalf of the Board regarding request for agency action dated June 13, 2011).

⁴Pursuant to UTAH CODE ANN. §§ 19-1-301(6) and 19-6-104(1)(c)(iii), jurisdiction before the Board attached on April 21, 2011, when the appointed administrative law judge issued *Order (Notice of Further Proceeding and Order)* (April 21, 2011). In this matter, the Board shall retain jurisdiction over this case until it is resolved or dismissed notwithstanding that statutory changes to UTAH CODE ANN. §§ 19-1-301 and 19-6-104, effective May 8, 2012, eliminated the Board's jurisdiction to review challenges to permits. See *National Park and Conservation Ass'n v. Board of State Lands*, 869 P.2d 909, 912 (Utah 1993) (overturned on other grounds) (rehearing denied) (stating "[o]nce a court has acquired jurisdiction of a case, jurisdiction is not extinguished by subsequent legislative action," citing *Industrial Comm'n v. Agee*, 56 Utah 63, 189 P. 414 (1920)).

⁵Counterpoint amended RFAA #2. See *Counterpoint Construction Company's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations ("Amended RFAA #2")* (August 9, 2011) attached as Exhibit D to *Counterpoint Construction Company's Response to Respondent's Motion to Dismiss our RFAA #3, our Status as a Party in this Proceeding, Consolidation with Existing Proceedings, and Counterpoint's Alternative Motions for Leave to Amend our RFAA #2* (August 9, 2011). RFAA #1 amended Counterpoint's request for agency action filed March 1, 2011.

addresses the four motions for summary judgment filed by the parties - Counterpoint filed one, Respondents jointly filed three. It is recommended that the Board reach summary judgment decisions in a manner that resolves Petitioner Counterpoint's requests for agency action.⁶ This proceeding was conducted as a formal adjudicative proceeding in accordance with Title 63G, Chapter 4, Utah Administrative Procedures Act.

Consistent with UTAH CODE ANN. § 19-1-301(6)(a)(iii), this *Second Memorandum and Recommended Order* includes:

- (A) written findings of fact;
- (B) written conclusions of law; and
- (C) a recommended order.

This *Second Memorandum and Recommended Order* addresses all issues raised in the requests for agency action and the motions for summary judgement. For the convenience of the Board, those portions of the *Original Memorandum and Recommended Order* initially approved by the Board are incorporated into this *Second Memorandum and Recommended Order* verbatim.⁷

In considering this *Second Memorandum and Recommended Order*, the Board

⁶This *Second Memorandum and Recommended Order* is a proposed dispositive action and the "dispositive action" is the final action the Board takes on this appeal. See UTAH CODE ANN. § 19-1-301(1) ("dispositive action" is "a final agency action that: (a) a board takes following an adjudicative proceeding on a request for agency action; and (b) is subject to judicial review under section 63G-4-403").

⁷It is the intent to correct the word processing, "auto-correct" typos, i.e., © corrected to read (c); (l) corrected to read (i). Also, citations were corrected.

may:

- (i) approve, approve with modification, or disapprove [the ALJ's] proposed dispositive action; or
- (ii) return the proposed dispositive action to the [ALJ] for further action as directed.

The Board may consider only the new portions of the *Second Memorandum and Recommended Order* or this recommendation in its entirety. The revised portions include Part I. Part II. Part V., Material Facts ¶¶ 31 through 33; Part VI.D., in its entirety; Part VII.A., Findings of Fact ¶¶ 9, 10, 12, 18, 26, 31, 32; Part VII.B., Conclusions of Law ¶¶ 14, 15, 16, 18 through 21; portions of Part VII.C., Recommended Order; and Part VII.D., Additional Recommendation.⁸

II. Relevant Documents.

The agency record consists of the initial requests for agency action, all motions and memoranda filed by the Petitioner and Respondents, all memoranda and orders issued by the ALJ, the Initial Record submitted by the Executive Secretary, the *Original Memorandum and Recommended Order*, the Board's January 10, 2013, Transcript for the *Hearing in the Matter of Weber County C&D Class VI Landfill Solid Waste Permit #1101, Request for Agency Action ALJ Memorandum and Recommended Order* ("Board Tr. for Commercial Permit"), the *Board's Remand* and this *Second*

⁸Renumbered paragraphs include: Part VII.A., Findings of Fact ¶¶ 11, 13 through 28; Part VII.B., Conclusions of Law ¶¶ 17 through 20.

Memorandum and Recommended Order. An electronic copy of the agency record as of October 25, 2012, was attached to the hard copy of *Original Memorandum and Recommended Order*. The *Board Tr. for Commercial Permit* and the *Board's Remand* are attached to this memorandum.

III. Legal Standard.

At issue in this proceeding are separate motions for summary judgment, three jointly filed by Respondents and one filed by Petitioner Counterpoint. A presiding officer may grant a timely motion for summary judgment in an adjudicative proceeding if the moving party meets the requirements specified in Utah Rules of Civil Procedure, Rule 56.⁹ Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”¹⁰ The facts and inferences from those facts must be viewed in “the light most favorable” to the nonmoving party.¹¹

A party opposing a summary judgment motion “has the burden of disputing the motion with material facts.”¹² A party cannot rely on unsupported bare contentions that

⁹UTAH CODE ANN. § 63G-4-102(4)(b); see also UTAH ADMIN. CODE R305-6-215(4)(b).

¹⁰*Overstock.com, Inc. v. Smartbargains, Inc.*, 2008 UT 55, ¶ 12, 192 P.3d 858 (quoting Utah R. Civ. P. 56(c)).

¹¹*W.M. Barnes Co. v. Sohio Natural Res. Co.*, 627 P.2d 56, 59 (Utah 1981) (citations omitted); see also *Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (citing *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (additional citations omitted)).

¹²*Overstock.com, Inc.*, 2008 UT 55, ¶ 16.

raise no material questions of fact.¹³

IV. Background.

On October 19, 2009, the Executive Secretary issued a Class IVb, noncommercial nonhazardous solid waste landfill¹⁴ permit (“Noncommercial Permit”) to Weber County, as owner, and Moulding, as operator (collectively “Permittees” or “Applicants”).¹⁵ Counterpoint, who owns property adjacent to the Weber County Landfill, challenged the issuance of the Noncommercial Permit.¹⁶ In a separate adjudicatory proceeding for the Noncommercial Permit, this Board upheld the Noncommercial Permit as modified pursuant to the Board’s order.¹⁷ Concurrent with the Noncommercial Permit adjudicatory proceeding, the Weber County Landfill was constructed and operated under the approval granted in the Noncommercial Permit.¹⁸

¹³*Id.* at ¶ 12 (citing *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984)).

¹⁴A Class IV Landfill is a noncommercial nonhazardous solid waste landfill that receives an annual average of twenty (20) tons of waste per day or less or demonstrates it receives no waste from a conditionally exempt small quantity generator and may only dispose construction/demolition (“C&D”) waste, yard waste, inert waste, or other waste not applicable in this matter. UTAH ADMIN. CODE R315-301-2(10), R315-305-3(2).

¹⁵Material Fact ¶ 4 (*Joint Stipulation of Undisputed Facts* (“JSF”) ¶ 8).

¹⁶Material Fact ¶ 24; *RFAA #1* at 2.

¹⁷Material Fact ¶ 30. Respondents’ *Memorandum in Support of Motion for Summary Judgment Regarding Counterpoint’s Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste’s Facility Approval to Begin Commercial Operations (RFAA #2)* (“*Respondents’ Commercial Approval SJ Memo*”) (February 3, 2012) at 11 (citing Board Noncommercial Permit Order (June 20, 2011) at 4).

¹⁸Material Fact ¶¶ 5, 22 (*JSF* ¶¶ 9, 39).

Later Weber County and Moulding submitted an application for a Class VI,¹⁹ commercial nonhazardous solid waste permit for their existing noncommercial Landfill.²⁰ Notwithstanding that the Noncommercial Permit was still in effect, on March 1, 2011, the Executive Secretary issued, to Weber County and Moulding, a Class VI permit (“Commercial Permit”) for the Weber County Landfill.²¹ On March 28, 2011, the Executive Secretary authorized commercial operations at the Weber County Landfill.²² Thereafter, Counterpoint filed two requests for agency action.²³

In its requests for agency action, Counterpoint contests the Executive Secretary’s issuance of the Commercial Permit for the Weber County Landfill and his granting of approval to begin commercial operations. Counterpoint’s claims are based on: 1) the alleged failure to notify Counterpoint of the intent to apply for the Commercial Permit, the issuance of a draft Commercial Permit, and of an opportunity to file comments; 2) the alleged failure to follow procedural requirements to approve the Commercial Permit; 3) issuance of both a Commercial Permit and a Noncommercial Permit for the same landfill; and 4) the alleged failure to comply with the Solid Waste

¹⁹ A “Class VI Landfill” is a commercial nonhazardous solid waste landfill that may only dispose C&D waste, yard waste, inert waste, or other waste not applicable in this matter. UTAH ADMIN. CODE R315-301-2(12).

²⁰Material Fact ¶¶ 6 (*JSF* ¶ 10).

²¹Material Fact ¶¶ 14, 21 (*JSF* ¶¶ 23, 38).

²²Material Fact ¶ 18 (*JSF* ¶ 30).

²³See *RFAA #1; Amended RFAA #2*.

Management Act.²⁴

Counterpoint filed a motion for summary judgment seeking a favorable ruling regarding allegations it filed in its requests for agency action.²⁵ Respondents also jointly filed motions for summary judgment seeking a ruling on all claims raised in Counterpoint's requests for agency action.²⁶ The parties' cross motions for summary judgment are addressed below in this memorandum and recommended order.

²⁴See *RFAA #1; Amended RFAA #2*. Counterpoint was granted standing to intervene in this proceeding for the claims raised in *RFAA #1 and Amended RFAA #2* except with respect to the claim that failure to require payment of filing and review fees is prejudicial. *Memorandum and Order (Granting, in part, Denying, in part, Standing to Intervene)* (June 16, 2011) ("Order"); *Order (Granting Petitioner's Motion for Leave to Amend Second Request for Agency Action)* (September 29, 2011) ("Order").

²⁵See *Counterpoint Construction's Motion for Summary Judgment and Motion for Suggestion of Mootness, with Supporting Memorandum, Statement of Facts, and Table of Authorities ("Counterpoint's SJ")* (February 3, 2012).

²⁶*Respondents' Motion for Summary Judgment Regarding Notice to Counterpoint of Class VI Permit, Review of Counterpoint's Public Comment, and Significance of Checked "Modification" Box on Permit Application* (February 3, 2012); *Respondents' Memorandum in Support of Motion for Summary Judgment Regarding Notice to Counterpoint of Class VI Permit, Review of Counterpoint's Public Comment, and Significance of Checked "Modification" Box on Permit Application ("Respondents' Due Process SJ Memo")* (February 3, 2012); *Respondents' Motion for Summary Judgment Concerning the Solid Waste Management Act* (February 3, 2012); *Respondents' Memorandum in Support of Their Motion for Summary Judgment Concerning the Solid Waste Management Act ("Respondents' SWMA SJ Memo")* (February 3, 2012); *Respondents' Joint Motion for Summary Judgment Regarding Counterpoint's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations (RFAA #2)* (February 3, 2012); *Memorandum in Support of Motion for Summary Judgment Regarding Counterpoint's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations (RFAA #2) ("Respondents' Commercial Approval SJ Memo")* (February 3, 2012). The parties filed responses and replies. See *Respondents' Memorandum in Opposition to Counterpoint's Motion for Summary Judgment and Motion for Suggestion of Mootness ("Respondents' SJ Opposition")* (February 21, 2012); *Counterpoint Construction's Response to Respondents' Three Motions for Summary Judgment ("Counterpoint's Response")* (February 21, 2012); *Counterpoint Construction's Memorandum in Reply to Respondents' Memorandum in Opposition to Counterpoint's Motion for Summary Judgment and Motion for Suggestion of Mootness ("Counterpoint's Reply")* (February 28, 2012); *Joint Reply in Support of Respondents' Three Motions for Summary Judgment ("Respondents' Reply")* (February 29, 2012).

V. Material Facts.

The parties filed *Joint Stipulation of Undisputed Facts*.²⁷ Based on the record in this matter, the undisputed material facts relied upon herein are as follows:

- 1-2. *Joint Stipulation of Undisputed Facts* ¶¶ 2 and 3 are incorporated by reference as material facts ¶¶ 1 and 2, respectively.²⁸
3. *Joint Stipulation of Undisputed Facts* ¶ 5 is incorporated by reference as material fact ¶ 3.²⁹
- 4-8. *Joint Stipulation of Undisputed Facts* ¶¶ 8 through and 12 are incorporated by reference as material facts ¶¶ 4 through 8, respectively.³⁰
- 9-10. *Joint Stipulation of Undisputed Facts* ¶¶ 15 and 16 are incorporated by reference as material facts ¶¶ 9 and 10, respectively.³¹
- 11-12. *Joint Stipulation of Undisputed Facts* ¶¶ 18 and 19 are incorporated by reference as material facts ¶¶ 11 and 12, respectively.³²
13. *Joint Stipulation of Undisputed Facts* ¶ 21 is incorporated by reference as material fact ¶ 13.³³
- 14-16. *Joint Stipulation of Undisputed Facts* ¶¶ 23 through 25 are incorporated by reference as material facts ¶¶ 14 through 16, respectively.³⁴

²⁷*Joint Stipulation of Undisputed Facts* ("JSF") (January 10, 2012) attached as Exhibit A to *Respondents' Due Process SJ Memo* attached hereto as Exhibit 1.

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

17. *Joint Stipulation of Undisputed Facts* ¶ 28 is incorporated by reference as material fact ¶ 17.³⁵
- 18-20. *Joint Stipulation of Undisputed Facts* ¶¶ 30 through 32 are incorporated by reference as material fact ¶¶ 18 through 20, respectively.³⁶
- 21-23. *Joint Stipulation of Undisputed Facts* ¶¶ 38 through 40 are incorporated by reference as material facts ¶¶ 21 through 23, respectively.³⁷
24. On November 9, 2009, Counterpoint filed a request for agency action challenging the Class IVb, noncommercial nonhazardous solid waste permit issued for the Weber County Landfill.³⁸
25. Pursuant to the directions of the three Weber County Commissioners, the Weber County Director of Solid Waste prepared, signed and filed an application for a Class VI landfill.³⁹
26. On May 12, 2011, in the matter of the Weber County C&D Class IVb Landfill, the Board unanimously approved the finding of fact that the Weber County Landfill is a nonprofit facility.⁴⁰
27. On May 12, 2011, the Board determined that “[t]he Weber County Landfill is a noncommercial nonhazardous solid waste facility when it

³⁵*Id.*

³⁶*Id.*

³⁷*Id.*

³⁸*Memorandum and Recommended Order in the Matter of Weber County C&D Class IVb Landfill, Solid Waste Permit #0901 (“ALJ’s Noncommercial Permit Recommended Order”)* (April 6, 2011) at 1.

³⁹Exhibit A, *Affidavit of Gary C. Laird* (January 30, 2012), Exhibit B, *Affidavit of Craig L. Dearden* (January 30, 2012), Exhibit C, *Affidavit of Jan M. Zogmaister* (January 30, 2012), and Exhibit D, *Affidavit of Kenneth A. Bischoff* (January 31, 2012) attached to *Respondents’ Commercial Approval SJ Memo*.

⁴⁰Utah Solid and Hazardous Waste Control Board Transcript in the Matter of the Weber County C&D Class IVb Landfill Solid Waste Permit (“Board Tr. for Noncommercial Permit”) attached as Exhibit E to *Respondents’ Commercial Approval SJ Memo* (May 12, 2011) at 89).

accepts waste generated within the boundaries of Weber County.”⁴¹

28. On May 12, 2011, the Board ordered that a Noncommercial Permit condition read:

Only waste generated within Weber County, or waste generated within the boundaries of a local government received under contract with that local government within Utah, may be accepted for disposal. . . .⁴²

29. On May 12, 2011, the Board determined that “for waste generated outside the boundaries of Weber County, the permit condition limiting the landfill to receiving only waste generated ‘solely under contract with a local government meets the statutory requirement for an exclusion [from being classified as a commercial facility], pursuant to Utah Code Ann. § 19-6-102(3)(b)(iii).”⁴³
30. On June 20, 2011, subject to the ordered modification of a permit condition, the Board upheld the Executive Secretary’s decision to grant Weber County and Moulding a noncommercial nonhazardous solid waste permit (Noncommercial Permit) to construct and operate the Weber County C&D, Class IVb Landfill. The Board also ordered that Counterpoint’s request for agency action regarding the Noncommercial Permit was resolved and dismissed the adjudicative proceeding.⁴⁴
- 31-32. *Joint Stipulation of Undisputed Facts* ¶¶ 34 and 35 are incorporated by reference as material facts ¶¶ 31 and 32, respectively.⁴⁵

⁴¹See *Utah Solid and Hazardous Waste Control Board Order in the Matter of Weber County C&D Class IVb Solid Waste Landfill, Permit #0901 (Noncommercial Permit Board Order)* (June 20, 2011) at 4 (accepting, approving and adopting Conclusion of Law ¶ 10 of the ALJ’s *Noncommercial Permit Recommended Order*).

⁴²*Noncommercial Permit Board Order* at 4 (accepting, approving, and adopting *Recommended Order* in ALJ’s *Noncommercial Permit Recommended Order* at 34).

⁴³See *Noncommercial Permit Board Order* at 4 (accepting, approving and adopting ALJ’s *Noncommercial Permit Recommended Order* at 33-34).

⁴⁴*Noncommercial Permit Board Order* at 4 (accepting, approving and adopting ALJ’s *Noncommercial Permit Recommended Order* at 34).

⁴⁵JSF at ¶¶ 34, 35.

33. When seeking to change the type of permit for a solid waste landfill, the Board recognized the value in holding one permit in abeyance until the other permit is final and no longer subject to appeal.⁴⁶

VI. Analysis.

In its requests for agency action, Counterpoint raised five major issues.

Counterpoint contends that the Executive Secretary 1) failed to comply with applicable public participation requirements specified in the solid waste rules, 2) improperly issued a commercial permit to a nonprofit facility, 3) failed to comply with statutory requirements for the approval of commercial facilities, 4) improperly issued both a commercial and noncommercial permit to the same facility, and 5) failed to comply with the Solid Waste Management Act. The motions for summary judgment to grant or deny Counterpoint's request for agency action claims are addressed below.

- A. Any Failure by Respondents to Notify Counterpoint Regarding the Application, the Draft Permit, or the Public Comment Period Resulted in Harmless Error.

Neither the Executive Secretary nor Weber County nor Moulding notified Counterpoint regarding the application, the issuance of the draft permit or the public comment period for the Commercial Permit.⁴⁷ Consequently, as a result of Respondents' lack of notification, Counterpoint alleges that it was denied its right to due process, pursuant to UTAH ADMIN. CODE R315-310-3(2).⁴⁸ Respondents adamantly

⁴⁶*Board Tr. for Commercial Permit* at 105-106 (Mr. Ellertson).

⁴⁷Material Fact at ¶ 9 (JSF ¶ 15).

⁴⁸*RFAA #1* at 4-5 (citing UTAH ADMIN. CODE R315-310-3(2)(a) and (b)); *Counterpoint's SJ* at 13.

disagree.

1. R315-310-3(2) Public Participation Requirements.

The solid waste rules provide that:

(a) Each permit application shall provide:

(i) the name and address of all owners of property within 1,000 feet of the proposed solid waste facility; and

(ii) documentation that a notice of intent to apply for a permit for a solid waste facility has been sent to all property owners identified in Subsection R315-310-3(3)(a)(i);

...

(b) The Executive Secretary shall send a letter to each person identified in Subsection R315-310-3(3)(a)(i) and (iii) requesting that they reply, in writing, if they desire their name to be placed on an interested party list to receive further public information concerning the proposed facility.⁴⁹

Pursuant to R315-310-3(2), Counterpoint maintains that the submission of a new commercial permit application for the Weber County Landfill 1) required Weber County and Moulding to notify Counterpoint, as a person who owns property within 1,000 feet of the landfill, of their intent to apply for a commercial permit and 2) required the Executive Secretary to notify Counterpoint of the opportunity to be placed on an interested party list to receive further public information about the proposed landfill.⁵⁰ In that the Commercial Permit application was submitted for an existing landfill, Respondents argue that R315-310-3(2) imposes no obligation on Respondents to notify

⁴⁹UTAH ADMIN. CODE R315-310-3(2).

⁵⁰*Counterpoint's SJ* at 15.

Counterpoint.⁵¹

2. The Provisions of R315-310-3(2) and 3(3) Apply to the Application for the Commercial Permit.
 - a. The Section R315-310-3 Heading, “for a New Facility or a Facility Seeking an Expansion,” Does Not Control the Section Requirements as the Language in R315-310-3(2)(a) is not Ambiguous and the Caption Fails to Clarify the Intent of R315-310-3(2)(b).

Respondents maintain that the Commercial Permit application is for an existing facility not a “new facility or a facility seeking expansion.”⁵² Respondents argue that the heading to section R315-310-3, which reads, “General Contents of a Permit Application for a New Facility or a Facility Seeking Expansion,” limits the applicability of subsection R315-310-3(2) (“subsection -3(2)”) to permit applications for new facilities or facilities seeking an expansion and not for the existing Weber County Landfill.⁵³ When interpreting a rule, the Utah Supreme Court held that the heading or title to a rule cannot be read to limit or constrain the text that follows the heading unless the text is ambiguous.⁵⁴

The provisions of subsection -3(2)(a) clearly apply to “each permit application.”⁵⁵ Subsection -3(2)(b) is ambiguous as to the “person[s]” that the Executive Secretary

⁵¹*Respondents’ Due Process SJ Memo* at ¶¶ 20-23.

⁵²*Respondents’ Due Process SJ Memo* at ¶ 20.

⁵³*Respondents’ Due Process SJ Memo* at ¶ 20.

⁵⁴*Funk v. Utah State Tax Comm’n*, 839 P.2d 818, 820 (Utah 1992) (stating the title or caption of a statute can guide interpretation only if the text of the statute is ambiguous).

⁵⁵UTAH ADMIN. CODE R315-310-3(2).

must send an interested party letter, however, the section caption - “for a New Facility or a Facility Seeking an Expansion” provides no clarification in identifying the intended persons. As subsection -3(2)(a) is not ambiguous and the section caption does not aide in interpreting subsection -3(2)(b), the heading for section R315-310-3 cannot constrain the text of R315-310-3(2).

- b. Provisions of UTAH ADMIN. CODE R315-310-3(2)(a) Apply to “Each Application.”

Section R315-310-3 includes three subsections, -3(1), -3(2), “Public Participation Requirements,” and -3(3), “Special Requirements for a Commercial Solid Waste Disposal Facility.”⁵⁶ Notably, each of the three subsections within section -3 describe the applicability of its provisions using different terms. Subsection -3(1) specifically states that “[e]ach permit application for a new facility or a facility seeking expansion” must include the information described in that subsection whereas neither subsection -3(2) nor subsection -3(3) specifically limit its provisions to only new or laterally expanding facilities.⁵⁷ Moreover, subsection -3(2)(a) applies to “each permit application.”⁵⁸

⁵⁶See generally, UTAH ADMIN. CODE R315-310-3.

⁵⁷*Id.*

⁵⁸UTAH ADMIN. CODE R315-310-3(2) (stating “[e]ach permit application shall provide” the information specified in the subsection) (emphasis added). Respondents also maintain that subsection -3(2) applies only to a “proposed facility” not for the existing Weber County Landfill. *Respondents’ Reply* at ¶ 42. Once Weber County and Moulding filed the Commercial Permit application, notwithstanding that the Landfill was in existence at the time and continued to operate under its Noncommercial Permit, the Landfill became a “proposed” commercial facility. The term “proposed facility” does not exclude the application of R315-310-3(2) to the Commercial Permit application.

c. The Commercial Permit Imposes Identical Requirements to R315-310-3(3)(b) Provisions.

UTAH CODE ANN. § 19-6-108(3)(c), UTAH ADMIN. CODE R315-310-3(3)(b) and Commercial Permit, Condition I.A., each require the Permittees to provide the Executive Secretary documentation that the local government, the legislature and governor approved the commercial facility.⁵⁹ In that the regulatory authority for Condition I.A. appears to be established in both UTAH CODE ANN. § 19-6-108(3)(c) and UTAH ADMIN. CODE R315-310-3(3)(b), it would be arbitrary, and therefore unreasonable if the Executive Secretary determined that subsection -3(2) but not subsection -3(3) is limited to a new or laterally expanding facility.

Counterpoint understandably assumed that Condition 1.A. is based, in part, on the regulatory requirements of UTAH ADMIN. CODE R315-310-3(3)(b); thus, Counterpoint submits that subsection -3(3)(c), which requires compliance with subsection -3(2)(b), must also be applicable.⁶⁰ Respondents assert that the Executive Secretary's interpretation of the applicability of subsections -3(2) and -3(3) do not conflict in that R315-310-3 does not pertain to the existing Landfill and that the permit requirement to

⁵⁹Condition I.A. states "[t]he landfill may not begin operations as a commercial landfill until the Executive Secretary has received documentation that the Permittees have received approval from the local government, the Utah State Legislature, and the Governor of Utah. Prior to the start of operations as a commercial landfill, the Permittee (*sic*) shall receive written approval from the Executive Secretary to accept waste." Material Fact at ¶ 15 (JSF at ¶ 24).

⁶⁰*Counterpoint's SJ Motion* at 15-16. Subsection -3(3)(c) prohibits construction of the facility until the requirements of subsection R315-310-3(2)(b) are met. UTAH ADMIN. CODE R315-310-3(3)(c). Subsection -3(2)(b) requires the Executive Secretary to offer to place individuals on an interested party list to receive further public information regarding the proposed facility. UTAH ADMIN. CODE R315-310-3(2)(b); see *supra* Part VI.A.1 for rule language. Note that Respondents proclaim that the citation references in UTAH ADMIN. CODE R315-310-3(3)(c) and (d) are also incorrect. *Respondents' Reply* at n.6.

obtain legislative and gubernatorial approval is solely based in UTAH CODE ANN. § 19-6-108(3)(c) not UTAH ADMIN. CODE R315-310-3(3)(b).⁶¹

(1) UTAH CODE ANN. § 19-6-108(3)(c)(i).

UTAH CODE ANN. § 19-6-108(3)(c)(i) provides that:

No person may construct [a commercial nonhazardous solid waste disposal] facility . . . until the person receives: (A) local government approval; . . . (B) approval from the Legislature; and (C) . . . approval from the governor.⁶²

(2) UTAH ADMIN. CODE R315-310-3(3).

Subsection -3(3) mandates additional approvals for a commercial landfill must be obtained from the local government, the legislature and the governor as required by UTAH CODE ANN. § 19-6-108(3)(c). Specifically, UTAH ADMIN. CODE R315-310-3(3), “Special Requirements for a Commercial Solid Waste Disposal Facility,” provides:

(b) Subsequent to the issuance of a solid waste permit by the Executive Secretary, a commercial nonhazardous solid waste disposal facility shall meet the requirements of Subsection 19-6-108(3)(c) and provide documentation to the Executive Secretary that the solid waste disposal facility is *approved by the local government, the Legislature, and the governor.*

(c) Construction of the solid waste disposal facility may not begin until the requirements of R315-310-3(2)(b) are met and approval to begin construction has been granted. . . .⁶³

Notably, subsection -3(3) is the only solid waste rule that addresses the statutory

⁶¹Respondents’ Reply at ¶ 39.

⁶²UTAH CODE ANN. § 19-6-108(3)(c)(i).

⁶³UTAH ADMIN. CODE R315-310-3(3) (emphasis added).

mandate for commercial nonhazardous solid waste facilities to obtain legislative and gubernatorial approval. The Executive Secretary's regulatory interpretation was arbitrary when he indiscriminately determined to rely solely on section 19-6-108(3)(c)(i) to impose commercial facility requirements on the existing commercial Weber County Landfill whereas, presumably, he would rely on both section 19-6-108(3)(c)(i) and subsection -3(3) for new commercial facilities. As section 19-6-108(3)(c)(i) does not limit the required additional authorizations for commercial facilities to new facilities or facilities seeking an expansion, Respondents' assertions are unpersuasive.

3. The Provisions of R315-310-3(2) are Unclear Whether Counterpoint is Entitled to Individual Notice Regarding the Weber County Landfill Commercial Permit Application.
 - a. Subsections R315-310-3(2)(a)(ii) and (b) Reference Nonexistent Subsections.

Subsection R317-310-3(2)(b) directs the Executive Secretary to notify persons identified in subsections R315-310-3(3)(a)(i) and (iii).⁶⁴ Applicants are similarly required to notify property owners identified in subsection R315-310-3(3)(a)(i).⁶⁵ Nevertheless, the rules do not include subsections R315-310-3(3)(a)(i) and (iii). Thus, subsection -3(2) references incorrect subsections and, therefore, is inherently inconsistent.

While it may be reasonable to assume that the rule intended to reference R315-310-3(2)(a)(i) and (iii), the rule as written is unclear. Because it cannot be definitively determined whether Respondents had an obligation to notify Counterpoint,

⁶⁴ See UTAH ADMIN. CODE R315-310-3(2)(b).

⁶⁵ See UTAH ADMIN. CODE R315-310-3(2)(a)(ii).

Respondents' motion for a summary judgment ruling that Counterpoint was not entitled to individual notice of the Commercial Permit and Counterpoint's motion that the reference in UTAH ADMIN. CODE R315-310-3(2)(b) to Subsection R315-310-3(3)(a)(i) and (iii) be revised are both DENIED.

- b. Subsection R315-310-3(3)(c) Mandates Compliance with Subsection R315-310-3(2)(b) Prior to Construction of a Commercial Facility.

Counterpoint also maintains that the Executive Secretary failed to offer to place Counterpoint on an interested party list to receive further public information regarding the application for the proposed Weber County Commercial Permit pursuant to UTAH ADMIN. CODE R315-310-3(3)(c). Respondents claim the Commercial Permit need not comply with section R315-310-3(3).⁶⁶ Respondents further assert that the citations in subsections R315-310-3(3)(c) incorrectly reference subsection R315-310-3(2)(b) instead of R315-310-3(3)(b).⁶⁷ Beyond a bare proclamation and several other incorrect citations in the same section, Respondents provide no support for their claim.

The plain meaning of the language in subsection -3(3)(c) states that construction of a commercial solid waste disposal facility may not begin until the Executive Secretary sends a letter providing persons the opportunity to be placed on an interested party list in accordance with R315-310-3(2)(b). Notwithstanding that the Executive Secretary must send interested party letters, as discussed earlier, it is unclear who is the intended

⁶⁶*Respondents' Due Process SJ Memo* at ¶ 35.

⁶⁷*Id.* at n.6. Respondents maintain that subsection R315-310-3(3)(d) also incorrectly references R315-310-3(2)(a)-(c) instead of R315-310-3(3)(a)-(c). *Id.*

recipient of the interested party letters.

4. Weber County and Moulding Must Notify Property Owners of Their Intent to Apply for the Commercial Permit.

Counterpoint asserts that to meet the requirements of R315-310-3(2)(a)(i) and (iii) for the Commercial Permit application, Weber County and Moulding relied upon previous public participation documentation for the Noncommercial Permit application to demonstrate that they notified property owners about the landfill.⁶⁸

a. Weber County and Moulding Cannot Rely on Documentation that They Notified Property Owners of the Noncommercial Permit Application.

In the Commercial Permit Application, Weber County and Moulding submitted copies of the 2009 notification letters for the Noncommercial Permit application as documentation that property owners were notified.⁶⁹ The rule clearly requires each application to document that a “notice of intent to apply for a permit” has been sent to property owners.⁷⁰ As discussed above, the rules are unclear regarding the property owners to be notified.

Respondents acknowledge that through the 2009 notification letters or otherwise,

⁶⁸RFAA #1 at 3-4. Weber County and Moulding state in the Commercial Permit application that “[c]opies of all letters provided to the surrounding property owners at the time of the original [] permit application . . .” are included in the application for the Commercial Permit. *Joint Response of Executive Secretary, Weber County, and Moulding & Sons Landfill LLC to: Counterpoint Construction Company’s Amended Request for Intervention and Requests for Agency Action on the Utah Division of Solid and Hazardous Waste’s Solid Waste Permit No. 1101 and Counterpoint Construction Company’s Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste’s Facility Approval to Begin Commercial Operations (“Respondents’ Response to RFAA #1”)* (July 18, 2011) at ¶ 12.

⁶⁹Material Fact ¶ 7 (JSF ¶ 11).

⁷⁰UTAH ADMIN. CODE R315-310-3-(2)(a)(ii).

they did not notify Counterpoint of Weber County and Moulding's intent to apply for the Commercial Permit.⁷¹ Thus, the 2009 notification letters do not meet the intent of the rule to notify property owners of the intent to apply for the Commercial Permit.

- b. Whether the Executive Secretary had an Obligation to Notify Counterpoint as a Noncommercial Permit Interested Party is Outside the Scope of This Proceeding.

Counterpoint argues that if Weber County and Moulding are allowed to rely on the notification letters for the Noncommercial Permit, then the Executive Secretary must also be required to notify the interested party list for the Noncommercial Permit regarding further public information for the Commercial Permit. Counterpoint's claim is MOOT in that the basis for Counterpoint's argument, allowing Weber County and Moulding to rely on the previous Noncommercial Permit notice of intent documentation, would be impermissible.⁷²

Additionally, Counterpoint's motion for a ruling that the Noncommercial Permit interested party list is intended to endure until the landfill is closed is outside the scope of this proceeding for the Commercial Permit and is, therefore, DENIED.

⁷¹Material Fact ¶ 12.

⁷²RFAA #1 at 5-6; *Counterpoint's SJ* at 13-15 (noting the Executive Secretary notified the interested party list regarding the public comment period for the draft Noncommercial Permit).

5. Any Alleged Failure to Notify Counterpoint Regarding the Commercial Permit Application, Draft and Comment Period Was Harmless Error.

It is unfortunate that the Executive Secretary, knowing Counterpoint's interest in the Landfill, did not consider it appropriate to notify Counterpoint regardless of any mandate by rule. Instead, in their memorandum Respondents have unsuccessfully attempted to navigate a circuitous statutory and regulatory path to defend their decision to not notify Counterpoint. However, due to the improper citations in the applicable rules, it is impossible to ascertain with certainty who is entitled to notification of a permit application. Subsequently, it is unclear whether Respondents sustain a regulatory obligation to notify Counterpoint regarding the application for the Commercial Permit.

The courts have held that relief can be granted only if the Respondents' alleged failure to notify Counterpoint resulted in Counterpoint being "substantially prejudiced" or that the alleged error was not harmless.⁷³ An alleged error is harmful if it had a reasonable probability of affecting the outcome of this case.⁷⁴

Counterpoint was independently able to learn about the draft Commercial Permit, to file comments and to challenge the Commercial Permit. Additionally, Counterpoint makes no claim and fails to demonstrate that it was substantially

⁷³*Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 423 (Utah 1993) (citing UTAH CODE ANN. § 63-46b-16(4) (1997) (renumbered as 63G-4-403(4) and stating a party has been substantially prejudiced if the alleged error was not harmless); see also *WWC Holding Co., Inc. v. Public Serv. Comm'n of Utah*, 2002 UT 23, ¶ 7, 44 P.3d 714. See also UTAH CODE ANN. § 63G-4-403(4)(d).

⁷⁴*Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 796-97 (Utah 1991) (citing *State v. Knight*, 734 P.2d 913 (Utah 1987)).

prejudiced by Respondents' alleged failure to notify Counterpoint.⁷⁵ Accordingly, any alleged failure by the Executive Secretary to notify Counterpoint or to require Weber County and Moulding to notify Counterpoint results in harmless error.

a. Counterpoint Learned of the Draft Commercial Permit.

Notwithstanding the lack of individual notification, Counterpoint became aware of the draft Commercial Permit on the last day of the public comment period and filed a comment.⁷⁶ Counterpoint also subsequently challenged the Commercial Permit.⁷⁷

b. Counterpoint Failed to Address how an Additional Twenty-Nine Days to File Comments Would Have Changed the Outcome of This Proceeding.

Counterpoint asserts it should have had an additional twenty-nine (29) days to file comments. However, Counterpoint failed to request an extension of the public comment period.⁷⁸ Importantly, Counterpoint failed to address how an additional twenty-nine (29) days to provide comments would have lead to comments that have a reasonable probability of altering the outcome of this proceeding.⁷⁹

⁷⁵*Mountain Fuel Supply Co.*, 861 P.2d at 423 (stating "the aggrieved party must be able to demonstrate how the agency's action has prejudiced it").

⁷⁶The public comment period ended on February 28, 2011, the same day that Counterpoint filed a public comment concerning the draft Commercial Permit. Material Fact ¶¶ 10, 13 (*JSF* ¶¶ 18, 21).

⁷⁷See *RFAA #1; Amended RFAA #2*.

⁷⁸Material Fact ¶ 13 (*JSF* ¶ 21) (Counterpoint filed a single comment stating it was not properly notified; Counterpoint did not request an extension of time of the public comment period).

⁷⁹*Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (stating a party cannot rely on unsupported bare contentions) (additional citations omitted).

c. Counterpoint Failed to Assert it Could Have Raised Additional Claims Beyond those Already Raised in its Requests for Agency Action.

(1) Counterpoint Cannot Challenge the Performance Standards for the Commercial Permit.

The performance standards, the groundwater monitoring requirements, the operational requirements and the closure and post closure requirements for both a Class IVb landfill and a Class VI landfill are identical.⁸⁰ Accordingly, Counterpoint could not challenge any permit conditions that address performance standards, groundwater monitoring, operations, or closure and post closure in this proceeding as any challenges should have been raised initially when the Noncommercial Permit was issued.

(2) Additional Requirements for a Commercial Class VI Landfill Approval.

As well as meeting the same requirements for noncommercial nonhazardous solid waste landfills, the Executive Secretary must also find that a commercial class VI landfill is beneficial and necessary.⁸¹ And in addition to the Executive Secretary's approval, the local government, the governor and the legislature must also approve a commercial facility.⁸²

In its request for agency action, Counterpoint has challenged whether the Executive Secretary adequately authorized the Commercial Permit pursuant to the

⁸⁰See UTAH ADMIN. CODE R315-302-3; R315-305-1, -2, -4, -5; R315-308; R315-309; R315-310-1, -2, -4, -5).

⁸¹See UTAH CODE ANN. § 19-6-108(11).

⁸²UTAH CODE ANN. § 19-6-108(3)(c)(i); UTAH ADMIN. CODE R315-310-3(3)(b).

additional statutory requirements for commercial facilities. Counterpoint has not questioned whether the Weber County Landfill is beneficial or necessary pursuant to UTAH CODE ANN. § 19-6-108(11). Furthermore, Counterpoint makes no claim that had it been notified it could have challenged whether the Landfill is beneficial and necessary. Thus, notwithstanding any failure to notify Counterpoint, this *Recommended Order* shall address each of Counterpoint's alleged claims. Moreover, Counterpoint failed to allege that had it been notified, it would have raised other claims that would have a reasonable probability to change the outcome of this proceeding.

d. Any Alleged Failure of Respondents to Notify Counterpoint Results in Harmless Error.

No party has raised any genuine issues of material fact regarding Respondents' obligation to notify Counterpoint. Moreover, the record is devoid of any claim or demonstration that Respondents' alleged failure to notify substantially prejudiced Counterpoint. Thus, when considering the facts in the light most favorable to Counterpoint, there is no reasonable probability that the outcome of this proceeding would be altered if the Respondents had notified Counterpoint regarding the application, draft permit and comment period for the Commercial Permit.

Therefore, any alleged failure of the Executive Secretary or Weber County and Moulding to notify Counterpoint would result in harmless error. Accordingly, Counterpoint's request for rulings on summary judgment are DENIED as outside the scope of this proceeding insofar as it requested a ruling that 1) "[a]n interested party list, once created, is intended to persist until the closing of the facility" and 2) the Executive

Secretary failed to notify Counterpoint as an interested party for the Noncommercial Permit. Also, as the rules are unclear regarding which property owners should be notified, 1) Counterpoint's request for rulings on summary judgment are DENIED insofar as a) it asserts the Executive Secretary or Weber County and Moulding failed to notify Counterpoint as a property owner within 1,000 feet of the Weber County Landfill, and b) it seeks to revoke the Commercial Permit, and 2) Respondents' request for summary judgment is DENIED insofar as it seeks a ruling that Counterpoint was not entitled to individual written notice of the Commercial Permit application.

6. Additional Board Recommendation.

As discussed above, UTAH ADMIN. CODE R315-310-3(2) contains incorrect citations. Respondents also claim subsection -3(3) includes incorrect citations. As a result of the incorrect citations, the scope and intent of R315-310-3 is unclear. Therefore, pursuant to its separate rulemaking authority, UTAH CODE ANN. § 19-6-105, in an action outside the jurisdiction of this proceeding, it is recommend that the Board order the Executive Secretary to correct the citations referenced in UTAH ADMIN. CODE R315-310-3.

B. Counterpoint's Claim That a Commercial Permit Cannot Be Issued to a Nonprofit Facility Fails as a Matter of Law.

Counterpoint seeks summary judgment rulings 1) affirming its claim that a commercial permit may only be issued to a for profit facility and 2) that the Commercial Permit must be revoked because it was issued to the "nonprofit" Weber County

Landfill.⁸³ Respondents disagree.⁸⁴ In their cross motion for summary judgment, Respondents argue that Counterpoint's claims in its *Amended RFAA #2* fail as a matter of law and Respondents generically "move for summary judgment regarding the claims asserted in [*Amended RFAA #2*]."⁸⁵

1. Counterpoint Fails to Show that the Weber County Landfill is a Nonprofit Facility When Operating Under the Commercial Permit.

Counterpoint asserts that this Board declared the Weber County Landfill is a nonprofit facility.⁸⁶ To support its argument, Counterpoint proffers a disputed material fact that on May 12, 2011, in the adjudicatory proceeding for the Noncommercial Permit, this Board "unanimously made an affirmative 'finding of fact that (the Landfill) is a nonprofit facility.'"⁸⁷

Counterpoint further submits that the Weber County Landfill is "inherently not for profit" because the facility performs a legitimate government service even when it

⁸³*Counterpoint's SJ* at 11-12 (seeking a judgment for its claim stated in *Amended RFAA #2* at 2, 7).

⁸⁴Respondents argue that if "a government entity accepts waste from outside its jurisdiction, for more than the cost of service, and not pursuant to a contract with a local government, that landfill would . . . be considered to be operating for profit." *Respondents' Opposition to Counterpoint's SJ* at 5.

⁸⁵*Respondents' Commercial Approval SJ Memo* at 6-7; *Respondents' Commercial Approval SJ* at 1-2.

⁸⁶*Amended RFAA #2* at 7; *Counterpoint's SJ* at 11.

⁸⁷*Counterpoint's SJ* at 7, 11 (Counterpoint's Material Fact ¶ 61 (citing *Board Tr. for Noncommercial Permit* at 89) attached as Exhibit E to *Respondents' Commercial Approval SJ Memo*. Respondents object to Counterpoint Material Fact ¶ 61 but agree that Counterpoint's proffered statement of fact is accurate. *Respondents' Opposition to Counterpoint's SJ* at 4.

accepts waste generated outside its jurisdiction.⁸⁸ Counterpoint subsequently argues the Commercial Permit was improperly issued for the nonprofit Weber County Landfill.

- a. The Board's Finding of Fact that the Weber County Landfill Operates as a Nonprofit Facility Under the Noncommercial Permit is Not Relevant to This Proceeding.

In the adjudicatory proceeding for the Noncommercial Permit, the Board unanimously approved a finding of fact that the Weber County Landfill is a nonprofit facility in the matter of the Noncommercial Permit.⁸⁹ The Board then upheld the issuance of the Noncommercial Permit but ordered that the Noncommercial Permit be modified to state:

Only waste generated within Weber County, or waste generated within the boundaries of a local government received under contract with that local government within Utah, may be accepted for disposal. . . .⁹⁰

The Board's ruling, its findings of fact, and conclusions of law were based upon the Noncommercial Permit issued by the Executive Secretary.⁹¹ Thus, the Board's findings in the Noncommercial Permit proceeding are constrained by the terms of the Noncommercial Permit which authorized the Weber County Landfill to operate as a noncommercial facility that may only receive 1) C&D waste generated within Weber

⁸⁸*Counterpoint's SJ* at 12 (citing UTAH CODE ANN. § 19-6-503 that a public entity may provide a solid waste facility to handle waste outside its jurisdiction); *see also Counterpoint's Response to SJ* at 7.

⁸⁹Material Fact ¶¶ 26.

⁹⁰Material Fact ¶¶ 28.

⁹¹*See generally Board Noncommercial Permit Order*, Board Tr. for Noncommercial Permit at 87 (Board Chairman stating "[w]hat's in front of us is whether or not a valid permit was issued to a not-for-profit organization").

County or 2) C&D waste generated within the boundaries of a Utah local government received under contract with that local government. Adherence to the Noncommercial Permit provision restricting the receipt of waste allows the Landfill to operate as a noncommercial facility.⁹²

In the instant proceeding, unlike the Noncommercial Permit, the Commercial Permit allows the Weber County Landfill to receive C&D waste that is generated anywhere.⁹³ Therefore, the Board's finding that the Weber County Landfill is a nonprofit facility when it operates under the waste receipt restrictions placed in the Noncommercial Permit is not relevant to this proceeding where the Weber County Landfill operations are authorized by the Commercial Permit.⁹⁴

- b. Provisions Under the Solid Waste Management Act Do Not Affect Whether Solid Waste Management Facilities are Not for Profit Facilities.

Counterpoint further argues that because the Solid Waste Management Act allows a government facility to handle solid waste generated outside its jurisdiction that the facility performs a legitimate government service and, thus, such a facility is inherently a not for profit facility.⁹⁵ Counterpoint also asserts that the Solid Waste

⁹²Material Fact ¶¶ 27, 29.

⁹³Material Fact ¶ 16 (JSF ¶ 25).

⁹⁴In the motion unanimously passed by the Board that addressed the issuance of the Noncommercial Permit, the motion, rendered by Mr. Brehm, specifically stated that the Class VI permit was not relevant to their decision on the Class IV permit. Board Tr. for Noncommercial Permit at 90-92.

⁹⁵*Counterpoint's SJ* at 12 (citing UTAH CODE ANN. § 19-6-503(1)).

Management Act “allows discretionary access without the imposition of commercial fees.”⁹⁶

The Solid Waste Management Act provides:

Subject to the powers and rules of the department . . . a governing body of a public entity **may**:

. . .
(b) provide a solid waste management facility to adequately handle solid waste generated . . . within or without its jurisdiction; . . .⁹⁷

This statute clearly states that a public entity *may* conduct those activities subject to the powers and rules of the Department of Environmental Quality, which includes applicable permitting provisions specified in UTAH CODE ANN. §§ 19-6-101 to -123.⁹⁸ The statutory provision is discretionary and, therefore, does not mandate that a public entity conduct the listed activities such as handling waste generated outside of its jurisdiction.

A public entity, such as Weber County, provides no government service for its residents when it provides a service for individuals outside its own jurisdiction. Therefore, when a public entity handles waste outside of its jurisdiction it may be a legitimate government activity but as it provides no service to its residents it is, therefore, not “inherently nonprofit.” Counterpoint raises no other material facts to support its claim that the Weber County Landfill is a nonprofit facility. Counterpoint has

⁹⁶*Id.*

⁹⁷UTAH CODE ANN. § 19-6-503(1) (emphasis added).

⁹⁸ See also *Respondents’ Reply SJ* at ¶ 11.

failed to meet its burden to show that a government solid waste management facility is “inherently nonprofit” even when it receives waste from outside of its jurisdiction.

Therefore, Counterpoint’s claim that the Weber County Landfill is a nonprofit facility is not supported by the provisions of UTAH CODE ANN. § 19-6-503(1).

2. It is Reasonable for the Executive Secretary to Issue a Commercial Class VI Nonhazardous Solid Waste Disposal Permit to Any Facility Regardless of its For Profit or Not For Profit Status.

Respondents argue that “[b]y applying for a commercial permit, the applicant is acknowledging that its facility is commercial and for profit as those terms are used in [UTAH CODE ANN. § 19-6-102(3)(a)],” thus, contrary to Counterpoint’s position, the Respondents contend that any applicant, including Weber County and Moulding, who wants a commercial permit and meets the requirements for a commercial permit, may have a commercial permit.⁹⁹

Counterpoint asserts that a commercial facility is a for profit facility that is not excluded under UTAH CODE ANN. § 19-6-102(3)(b).¹⁰⁰ The Solid and Hazardous Waste Act defines a commercial nonhazardous solid waste disposal facility as a “facility that receives, for profit, nonhazardous solid waste for . . . disposal.”¹⁰¹ The Act provides no

⁹⁹*Respondents’ Reply to SJ* at ¶¶ 9, 10.

¹⁰⁰*Counterpoint’s SJ* at 11.

¹⁰¹UTAH CODE ANN. § 19-6-102(3)(a). The Act additionally provides three exemptions to being classified as a commercial nonhazardous solid waste facility. See UTAH CODE ANN. § 19-6-102(3)(b).

definition for a noncommercial nonhazardous solid waste facility.¹⁰² Also, there is no statutory prohibition restraining the Executive Secretary from issuing a commercial permit to any individual whether the facility operates as a for profit or not for profit facility.

a. Permit Requirements for Nonhazardous C&D Solid Waste Landfills.

The Executive Secretary must authorize the disposal of nonhazardous C&D solid waste in any landfill whether the landfill is a noncommercial or a commercial landfill.¹⁰³ Additionally, as discussed above, both noncommercial and commercial C&D landfills must meet the same performance standards, the same groundwater monitoring requirements, the same general and operation requirements and the same closure and post closure requirements.¹⁰⁴

b. Additional Commercial Permit Requirements.

In addition to meeting the same permitting criteria for a noncommercial facility, the Executive Secretary must make additional findings that the commercial nonhazardous solid waste facility is beneficial and necessary.¹⁰⁵ The local government,

¹⁰²See generally UTAH CODE ANN. § 19-6-102.

¹⁰³ Material Fact ¶ 2 (*JSF* ¶ 3); UTAH CODE ANN. § 19-6-108(3)(a)(i); UTAH ADMIN. CODE R315-301-5(1).

¹⁰⁴See UTAH ADMIN. CODE R315-302-3; R315-305-1, -2, -4, -5; R315-308; R315-309; R315-310-1, -2, -4, -5; see also *supra* Part VI.A.5.c.

¹⁰⁵See UTAH CODE ANN. § 19-6-108(11).

the governor and the legislature must also authorize any commercial facility.¹⁰⁶

Thus, anyone who desires a commercial permit, including a not for profit facility, must demonstrate it meets additional criteria and must obtain additional approvals. Also, in that the legislature must authorize any commercial facility, the legislature would continue to control whether any not for profit facility is permitted as a commercial facility.¹⁰⁷ Beyond claims that the Weber County Landfill is a nonprofit facility, Counterpoint fails to support its assertion that a nonprofit facility may not operate pursuant to a commercial permit. Therefore, when considering the facts in the light most favorable to Counterpoint,¹⁰⁸ the Executive Secretary's issuance of a commercial permit for the Weber County Landfill, regardless of whether the facility is operated as a not for profit facility, is found to be reasonable and not contrary to law.

First, Counterpoint failed to support its claim that the Weber County Landfill is a nonprofit facility when it operates pursuant to the Commercial Permit. Additionally, it is reasonable for the Executive Secretary to issue a commercial permit to anyone who meets commercial permitting requirements notwithstanding the for profit status of the facility. Accordingly, Counterpoint's motion for summary judgment is DENIED in so far as it seeks a ruling 1) that a commercial permit may only be issued to a for profit facility and 2) that the Commercial Permit must be revoked because it was issued to the

¹⁰⁶UTAH CODE ANN. § 19-6-108(3)(c)(i).

¹⁰⁷Counterpoint acknowledges that the legislature intended "to have some degree of knowledge and control over the development of commercial landfills in the [state]." *Counterpoint's SJ* at 18.

¹⁰⁸*W.M. Barnes Co.*, 627 P.2d at 59 (additional citations omitted).

“nonprofit” Weber County Landfill. Respondents’ motion for summary judgment is GRANTED in so far as they seek a ruling that Counterpoint’s *Amended RFAA #2* cause of action fails as a matter of law in that it claims the Board’s finding that the Weber County Landfill is a nonprofit facility in the Noncommercial Permit proceeding mandates that the Commercial Permit is revoked.

C. Counterpoint’s Claim that Weber County Failed to Properly Authorize the Landfill Fails as a Matter of Law.

Based on the UTAH CODE ANN. § 19-6-108(3)(c)(i) requirements that the local government approve the facility prior to the Executive Secretary’s issuance of a commercial permit, Counterpoint asserts that Weber County failed to pass a resolution authorizing the commercial operation of the Weber County Landfill prior to the required approvals from the Executive Secretary, the legislature and the governor.¹⁰⁹ Contrary to Counterpoint’s assertions, Respondents submit that Weber County granted approval of its own landfill, the Weber County Landfill, when it filed its Commercial Permit application for a commercial Class VI landfill.¹¹⁰ Respondents seek a summary judgment ruling that Weber County properly authorized the commercial Weber County Landfill prior to the Executive Secretary’s issuance of the Commercial Permit as required by UTAH CODE ANN. § 19-6-108(3)(c)(i).¹¹¹

Section 19-6-108(3)(c)(i) states that no person may construct any facility listed

¹⁰⁹*Amended RFAA #2* at 2-5.

¹¹⁰*Respondents’ Commercial Approval SJ Memo* at 7-8.

¹¹¹*Respondents’ Commercial Approval SJ Memo* at 6-7.

under Subsection (3)(c)(ii)¹¹² until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a),¹¹³ approval by the governor and the Legislature.¹¹⁴

The Commercial Permit application was signed by the Weber County Director of Solid Waste pursuant to the directions of each of the three Weber County Commissioners.¹¹⁵ Counterpoint does not challenge the signed affidavits provided by the Weber County Commissioners.¹¹⁶ Moreover, the statute does not define how local approval shall be demonstrated. In this matter there are no material facts in dispute.

The Executive Secretary's determination is reasonable in that Weber County, as the local government, approved the commercial Weber County Landfill by submitting an application to the Executive Secretary signed by the Weber County Director of Solid Waste under the direction of the Weber County Commission. Accordingly, Respondents' motion for summary judgment is GRANTED insofar as it seeks a ruling that Weber County approved the Weber County Landfill prior to the issuance of the Commercial Permit as required by UTAH CODE ANN. § 19-6-108(3)(c)(i).

¹¹²Subsection (3)(c)(ii) facilities are commercial nonhazardous solid or hazardous waste treatment or disposal facilities. UTAH CODE ANN. § 19-6-108(3)(c)(ii).

¹¹³The subsection (3)(a) approval is approval from the Executive Secretary for a operation plan for that facility. UTAH CODE ANN. § 19-6-108(3)(a)(i).

¹¹⁴UTAH CODE ANN. § 19-6-108(3)(c)(i).

¹¹⁵Material Facts ¶¶ 3, 25 (JSF ¶ 5).

¹¹⁶See *Counterpoint's Response* at 15.

- D. The Weber County Landfill May Simultaneously Retain a Dormant Noncommercial Nonhazardous Solid Waste Permit and an Active Commercial Nonhazardous Solid Waste Permit.

Counterpoint alleges that the Weber County Landfill cannot simultaneously retain both the Noncommercial Permit and the Commercial Permit because the two permits contain conflicting permit conditions.¹¹⁷ Counterpoint, thus, seeks a summary judgment ruling that the Noncommercial Permit is either moot or void.¹¹⁸

1. The Executive Secretary has Issued Two Nonhazardous Solid Waste Permits for the Same Weber County Landfill.

On October 19, 2009, the Executive Secretary issued the Noncommercial Permit for the Weber County Landfill.¹¹⁹ The Noncommercial Permit was not revoked, when on March 1, 2011, the Executive Secretary also issued the Commercial Permit for the same Weber County Landfill.¹²⁰ The Executive Secretary has issued two nonhazardous solid waste permits for the same landfill.¹²¹

On June 20, 2011, in the matter of the Noncommercial Permit, this Board upheld

¹¹⁷*Counterpoint's SJ* at 22.

¹¹⁸*Id.* at 22-25. In its motion for summary judgment, Counterpoint also seeks enforcement of the Noncommercial Permit, which is outside the scope of this proceeding. See *Counterpoint's SJ* at 23.

¹¹⁹Material Fact ¶ 4 (*JSF* ¶ 8).

¹²⁰Material Fact ¶¶ 14, 21 (*JSF* at ¶¶ 23, 38).

¹²¹During its deliberation in the matter of the Noncommercial Permit, Board members questioned how a landfill could be classified as both a commercial and a noncommercial landfill. *Board Tr. Noncommercial Permit* at 16 (Dr. Dupont), 65-66 (Mr. Riding). The Board decided to address the issuance of two permits at a later date. *Id.* at 90-91 (Mr. Brehm). The record is devoid of any evidence that the Board has since addressed the issue of two permits.

the issuance of the Noncommercial Permit.¹²² Counterpoint did not appeal this Board's denial of its request for reconsideration of the Board's June 20, 2011, decision to uphold the issuance of the Noncommercial Permit.¹²³ Accordingly, the Noncommercial Permit is a final permit.

On March 1, 2011, the Executive Secretary issued the Commercial Permit.¹²⁴ On March 28, 2011, the Executive Secretary authorized the Weber County Landfill to operate as a Class VI commercial landfill.¹²⁵ Counterpoint was granted standing to challenge the issuance of the Commercial Permit.¹²⁶

UTAH ADMIN. CODE R315-12-2.2(b) provides that "[a]n initial order or notice shall become final in 30 days if not contested as described in R315-12-3."¹²⁷ As this matter addresses Counterpoint's challenge to the Commercial Permit, the Commercial Permit is not a final permit.

2. The Commercial Permit and the Noncommercial Permit Contain Conflicting Waste Acceptance Provisions.

Under the terms of the Noncommercial Permit, the Landfill may only accept C&D waste that is either generated within Weber County or generated within the boundaries

¹²²Material Fact ¶¶ 30.

¹²³Material Facts ¶¶ 31, 32 (*JSF* at ¶¶ 34, 35).

¹²⁴Material Fact ¶ 14 (*JSF* at ¶ 23).

¹²⁵Material Fact ¶ 18 (*JSF* at ¶ 30).

¹²⁶See *Memorandum and Order* (June 16, 2011); *Order* (September 29, 2011).

¹²⁷UTAH ADMIN. CODE R315-12-2.2(b) (2010). (Rule in effect when Counterpoint filed *RFAA #1* and Amended *RFAA #2*.)

of a local government pursuant to an agreement with Weber County.¹²⁸ The Noncommercial Permit limited the waste acceptance provisions to exempt the Weber County Landfill from a commercial facility classification pursuant to UTAH CODE ANN. § 19-6-102(3)(b)(iii). As the Weber County Landfill is classified as a commercial facility under the Commercial Permit, the Commercial Permit places no limitations as to where acceptable C&D waste is generated.¹²⁹ Consequently, compliance with waste acceptance criteria under the Commercial Permit could, nevertheless, simultaneously allow violation of the waste acceptance limitations in the Noncommercial Permit. Board members stated that two final permits for the Weber County Landfill would be improper as the Noncommercial Permit and Commercial Permit provisions would conflict.¹³⁰

3. A Landfill Cannot Retain Two Simultaneous Classifications.

Additionally, the Solid and Hazardous Waste Act and the rules include no provisions that allow a landfill to hold two simultaneous classifications.¹³¹ By definition, the rules clearly distinguish between a Class IV (noncommercial C&D landfill) and a

¹²⁸Material Fact ¶ 28.

¹²⁹Material Fact ¶ 16 (*JSF* ¶ 25).

¹³⁰*Board Tr. for Commercial Permit* at 82, 92 (Mr. Mickelson, Mr. Murray, and Mr. Riding; Mr. Murray stating “[w]e can’t have two permits active and trying to be enforced at the same time, because one permit is less restrictive . . .”).

¹³¹See e.g. UTAH ADMIN. CODE R315-310-1(4) (provisions to allow landfills to change classifications or subclassifications). Counterpoint also asserts that HCR 018 allows a single landfill classification as it granted approval to “change” landfill classifications not to add an additional classification. *Amended RFAA #2* at 3.

Class VI (commercial C&D landfill).¹³²

4. Counterpoint May Challenge Whether Two Permits With Conflicting Provisions May be Issued to the Same Facility.

Respondents' cross motion for summary judgment seeks a ruling that Counterpoint has no standing to challenge the Noncommercial Permit because the Noncommercial Permit does not affect Counterpoint's interests.¹³³ Notwithstanding whether Counterpoint has standing to unilaterally challenge the Noncommercial Permit, Counterpoint may challenge the validity of the Commercial Permit where that permit authorizes the Permittees to violate the existing Noncommercial Permit.¹³⁴

5. The Board Found the Executive Secretary has the Discretion to Hold the Noncommercial Permit Dormant.

Respondents cite no legal authority, however, they assert that the Executive Secretary has discretion to hold one permit "dormant."¹³⁵ Respondents argue that postponing termination of the Noncommercial Permit until after the resolution of Counterpoint's challenge to the Commercial Permit "protects the parties from unnecessary risks and costs, preserves administrative and judicial resources, prevents

¹³²UTAH ADMIN. CODE R315-301-2(10), -2(12). The rules also provide definitions for a Class I, II, III, and V landfill. See R315-301-2(7) to - 2(9), - 2(11).

¹³³*Respondents' Commercial Approval Memo SJ* at 16.

¹³⁴Counterpoint emphasized that there is a "reasonable probability that future injury exists" in that the Executive Secretary has stated that he will make the Noncommercial Permit the "operative permit" if the Commercial Permit is revoked. *Counterpoint SJ Response* at 21-22 (quoting *Respondents' Commercial Approval SJ* at 14). Nevertheless, in this proceeding there is no need to consider whether Counterpoint has standing to challenge the Noncommercial Permit.

¹³⁵*Respondents' Commercial Approval SJ Memo* at 15.

potential additional unnecessary and frivolous appeals by Counterpoint, and allows Weber County to continue to offer its residents and businesses C&D disposal services ... in the event the [Commercial Permit] is stayed or invalidated.”¹³⁶ The Board unanimously agreed that the “Executive Secretary has the discretion, when a new permit has been applied for, to hold the existing permit in abeyance and allow the applicant to operate under the permit that has been challenged until such time as the permit becomes final and nonappealable, at which time the original permit must be terminated with 30 days.”¹³⁷

a. Not Prohibited by Statute.

Neither the Utah Solid and Hazardous Waste Act nor the Solid Waste Management and Permitting Rules expressly prohibit the Executive Secretary from

¹³⁶ *Id.*

¹³⁷ *Board Tr. for Commercial Permit* at 108-109; see also 78-80, 83, 92-93 (Mr. Ellertson stated “if it doesn’t say they can’t do it and if, in fact, they are operating only under the Class VI . . . , the other one is being held in abeyance, it seems to make a lot of sense to me;” Mr. Riding stated “it makes sense to allow [a dormant permit if the other permit is challenged];” Mr. Mickelson agreed; Mr. Coombs stated he believes “we have to allow some latitude in the judgment-making until [laws that address this situation] can be amended;” Dr. Dupont stated “[a]s long as it’s not an issue with public health and safety, it seems that the Executive Director should have discretion;” Mr. Murray stated “[t]his just seems appropriate to me that we allow the Director some discretion . . .”).

In this proceeding, the Board has jurisdiction to act only in the matter of the Commercial Permit. As the Board’s jurisdiction in the Noncommercial Proceeding terminated thirty (30) days following its denial of Counterpoint’s *Request for Reconsideration of the Utah Solid and Hazardous Waste Control Board Order of June 20, 2011* (June 29, 2011), the Board has no authority to order the termination of the Noncommercial Permit. *Order Denying Request for Reconsideration* (July 7, 2011). To support the Board’s determination that the Executive Secretary’s decision to hold the Noncommercial Permit in abeyance, the Board may, however, order the Executive Secretary provide documentation that the Noncommercial Permit shall be terminated if the Commercial Permit becomes final and is no longer subject to judicial review.

using enforcement discretion to hold a permit dormant.¹³⁸ Thus, the Board determined that the Executive Secretary has “plenary authority to administer and discretion to enforce the solid waste program as long as his decisions are not arbitrary and capricious.”¹³⁹

b. Reasonable Basis.

The Board recognized the value in holding a permit in abeyance until the second permit is final and no longer subject to appeal.¹⁴⁰ The Board further found that it is reasonable, and therefore not arbitrary or capricious, for the Executive Secretary to hold the Noncommercial Permit dormant until such time that the a decision regarding the issuance of the Commercial Permit is final and no longer subject to judicial review if 1) the Permittees understand which permit is held dormant and 2) information regarding which permit is held dormant is available to the public.¹⁴¹

c. The Executive Secretary's Decision to Hold the Noncommercial Permit Dormant Must be Communicated to the Permittees and the Executive Secretary's Decision Must be Available to the Public.

Although Respondents claim that “[i]n no event will the Landfill be operating under two separate permits . . .,” Respondents have provided no documentation that

¹³⁸See generally UTAH CODE ANNOTATED, TITLE 19, CHAPTER 6, PART 1; UTAH ADMIN. CODE R315.

¹³⁹Board's Remand at 4.

¹⁴⁰Board Tr. for Commercial Permit at 105-106 (Mr. Ellertson).

¹⁴¹Board's Remand at 4; see also Board Tr. for Commercial Permit at 98-99 (Mr. Murray stating “if there is a reasonable basis that the Division can indicate why they are holding the permit dormant and it's effectively communicated to the parties affected by it, then I don't think it's arbitrary or an abuse of discretion;” Dr. Dupont agreed).

the operations are conducted pursuant to a single permit.¹⁴² Thus, it is unclear whether the Executive Secretary's decision to hold the Noncommercial Permit dormant is documented and available to the public.¹⁴³ It is, therefore, recommended that the Board order the Executive Secretary to confirm that he has documentation specifying that the Weber County Landfill is to operate pursuant to the Commercial Permit and that the Noncommercial Permit is being held in abeyance until the pending decision regarding the Commercial Permit is final and no longer subject to judicial review pursuant to UTAH CODE ANN. § 63G-4-403.

The Board found "that the Executive Secretary acted reasonably and within his authority in holding dormant and postponing revocation of the [Noncommercial Permit] pending final disposition of the challenge to the [Commercial Permit]."¹⁴⁴ Accordingly, Respondents' request for a summary judgment ruling that Counterpoint's claim fails as a matter of law is GRANTED regarding Counterpoint's claim that the Weber County Landfill cannot be concurrently issued two permits with conflicting permit requirements in that the Noncommercial Permit is being held in abeyance.¹⁴⁵

¹⁴²*Id.* at 14.

¹⁴³On March 28, 2011, the Director (Executive Secretary) authorized the Weber County C&D Landfill to "operate as a Class VI commercial landfill." Letter from Scott T. Anderson, Director, Division of Solid and Hazardous Waste, to Gary C. Laird, Director of Solid Waste, Weber County, and Randy Moulding (March 28, 2011). This letter did not mention the Noncommercial Permit; see *also* Material Fact 18.

¹⁴⁴*Board Remand* at 4.

¹⁴⁵Counterpoint also argues that the Noncommercial Permit became moot when the "[G]overnor and [L]egislature approved or signed" House Concurrent Resolution ["H.C.R."] 018 that "granted approval to change classification from a Class IVb noncommercial nonhazardous solid waste facility to a Class VI commercial, nonhazardous solid waste facility." *Counterpoint's SJ* at 22-24 (*quoting* HCR 018 (2011))

E. The Noncommercial Permit Authorized the Construction of the Weber County Landfill.

Pursuant to UTAH CODE ANN. § 19-6-108(3)(c)(i), a commercial nonhazardous waste disposal facility may not be constructed until approved by the local government, the Executive Secretary, the governor and the legislature. Relying on this condition precedent, Counterpoint argues that the Commercial Permit must be invalidated because the Weber County Landfill was constructed prior to receiving section 19-6-108(3)(c)(i) authorizations.¹⁴⁶ Respondents oppose Counterpoint's position and seek a summary judgment ruling.¹⁴⁷

Section 19-6-108(3)(c)(i) states no person may construct any facility listed under Subsection (3)(c)(ii)¹⁴⁸ until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a),¹⁴⁹

(italics omitted)). Counterpoint claims that the approval of HCR 018 changed the factual basis for the Noncommercial Permit, thereby rendering the Noncommercial Permit moot. *Id.* (citing *e.g.*, *Richards v. Baum*, 914 P.2d 719, 720 (Utah 1996); *Salt Lake County v. Holliday Water Company*, 2010 UT 45 at ¶ 15; *State v. Laycock*, 2009 UT 53, 214 P.3d 104; *Cedar Mountain Environmental, Inc., v. Toole (sic) County*, 2009 UT 48 at ¶ 26). House Concurrent Resolution 018 did not change the factual basis of the Noncommercial Permit but instead H.C.R. 018 "allows" the Weber County Landfill to change classification to a "Class VI commercial nonhazardous solid waste landfill." See *Concurrent Resolution Approving Solid Waste Facility Classification Change*, H.C.R. 18, 2011 General Session attached as Exhibit K to Counterpoint's SJ Memo.

¹⁴⁶Counterpoint's SJ at 18-19 (quoting UTAH CODE ANN. § 19-6-108(3)(c)(i)).

¹⁴⁷Respondents' Commercial Approval SJ at 1-2.

¹⁴⁸Subsection (3)(c)(ii) facilities includes a "commercial nonhazardous solid waste disposal facility." UTAH CODE ANN. § 19-6-108(3)(c)(ii)(A).

¹⁴⁹The subsection (3)(a) approval is approval from the Executive Secretary for a operation plan for that facility. UTAH CODE ANN. § 19-6-108(3)(a)(i).

approval by the governor and the Legislature.¹⁵⁰

Counterpoint accurately argues that section 19-6-108(3)(c)(i) clearly prohibits construction of a commercial facility prior to legislative and gubernatorial approval of a commercial landfill.¹⁵¹ However, the Weber County Landfill was not constructed as a commercial landfill but was initially constructed as a noncommercial landfill authorized by the Noncommercial Permit.¹⁵²

Subsequent to the construction of the Landfill under the Noncommercial Permit, Weber County and Moulding sought to reclassify the noncommercial landfill to a commercial landfill by filing a commercial permit application.¹⁵³ The Executive Secretary prohibited operation of the Landfill as a commercial landfill pending a final permit and 19-6-108(3)(c)(i) approvals.¹⁵⁴

The Solid and Hazardous Waste Act does not specifically address the circumstances in the instant case where an existing noncommercial landfill is newly permitted to operate as a commercial landfill. In the absence of a specific statutory provision prohibiting the reclassification of a noncommercial facility to a commercial facility, to find that an existing noncommercial landfill may never operate as a commercial landfill would indeed be unreasonable. Therefore, the Executive

¹⁵⁰UTAH CODE ANN. § 19-6-108(3)(c)(i).

¹⁵¹*Counterpoint's SJ* at 18.

¹⁵²Material Fact ¶ 22 (*JSF* ¶ 39).

¹⁵³Material Fact ¶¶ 6, 21 (*JSF* ¶¶ 10, 38).

¹⁵⁴Material Fact ¶ 15 (*JSF* ¶ 24).

Secretary's preclusion of commercial operation pending a final permit and section 19-6-108(3)(c)(i) approvals is reasonable. Additionally, where a noncommercial landfill is already constructed, section 19-6-108(3)(c)(i) would prohibit any additional construction or physical modifications necessary for a commercial landfill until authorized by the local government, the Executive Secretary, the legislature and the governor.

Moreover, the Solid Waste rules allow a change in classification of a landfill from one class to another class if all requirements for the new class are met and a new permit is obtained.¹⁵⁵ Importantly, the legislature's intent is assured because the legislature must authorize any commercial solid waste permit. If the legislature did not intend to allow an existing noncommercial landfill to convert to a commercial landfill then the legislature could have simply refused to authorize the commercial operations of the Weber County Landfill.¹⁵⁶

When a noncommercial landfill is converted to a commercial landfill, the Executive Secretary's application of UTAH CODE ANN. § 19-6-108(3)(c)(i) is reasonable in that the Landfill is not authorized to operate as a commercial landfill until the Executive Secretary received "approval from the local government, the Utah State Legislature, and the Governor of Utah."¹⁵⁷

Accordingly, Respondents' motion for summary judgment is GRANTED and

¹⁵⁵See UTAH ADMIN. CODE R315-310-1(4) (providing that a landfill may not change classification until it meets all requirements for the desired class, including obtaining a new permit).

¹⁵⁶See generally *H.C.R. 018*.

¹⁵⁷Material Fact ¶ 15.

Counterpoint's motion for summary judgment is DENIED insofar as Counterpoint alleges the Commercial Permit should be invalidated because the Weber County Landfill was constructed prior to receiving section 19-6-108(3)(c)(i) authorizations.

- F. Counterpoint's Claim that the Executive Secretary or the Department of Environmental Quality Must Promulgate Rules Pursuant to the Solid Waste Management Act and that Waste Was Illegally Disposed in the Landfill are Both Outside the Scope of this Proceeding.

Counterpoint alleges that pursuant to the Solid Waste Management Act, the Department of Environmental Quality is obligated to promulgate rules that govern the management of solid waste by public entities.¹⁵⁸ Counterpoint claims that the Division failed to promulgate and administer rules to restrict landfills from accepting waste generated in another jurisdiction to allow government entities to manage their own waste pursuant to UTAH ADMIN. CODE § 19-6-503.¹⁵⁹ In addition, Counterpoint claims waste generated within the City of Ogden was illegally disposed at the Weber County Landfill.¹⁶⁰ Counterpoint seeks a summary judgment ruling ordering the Executive Secretary to promulgate rules to carry out his obligation under the Solid Waste Management Act.¹⁶¹ Arguing that Counterpoint's claims concerning the Solid Waste Management Act fail, Respondents seek a summary judgment ruling that 1) the Solid

¹⁵⁸*Counterpoint's SJ* at 19-20.

¹⁵⁹*RFAA #1* at 8.

¹⁶⁰*Counterpoint's SJ* at 21.

¹⁶¹*Id.* at 22.

Waste Management Act does not govern or affect the issuance of the Commercial Permit, 2) this proceeding is not the proper forum to address the Department of Environmental Quality's ("DEQ") alleged failure to conduct rulemaking, and 3) Counterpoint lacks standing with respect to the receipt of waste generated in the City of Ogden.¹⁶² Counterpoint opposes *Respondents' SWMA SJ Memo*.¹⁶³ Respondents also oppose Counterpoint's motion for summary judgment regarding the Solid Waste Management Act.¹⁶⁴

1. Counterpoint's Requested Relief to Order Rulemaking is Outside the Scope of This Proceeding.

This adjudicatory proceeding is governed by the Utah Administrative Procedures Act and is not the proper forum to request rulemaking.¹⁶⁵ The Board lacks the authority to make, revoke, or change rules as part of a permit adjudication. Therefore, a claim that is redressible only through rulemaking is not within the scope of this adjudication.¹⁶⁶

Counterpoint's request to order the Executive Secretary or DEQ to conduct rulemaking pursuant to their obligations under the Solid Waste Management Act is

¹⁶²*Respondents' SWMA SJ Memo* at 11.

¹⁶³*See Counterpoint's SJ* at 6-10.

¹⁶⁴*Respondents' Opposition to SJ* at 8.

¹⁶⁵*See* UTAH CODE ANN. § 63G-4-102(2)(a) (the Utah Administrative Procedures Act does not govern rulemaking).

¹⁶⁶*See Order of the Executive Director of the Utah Department of Environmental Quality (Remand to ALJ with Directions on Determining Whether There is a Basis to Grant Friends Standing to Intervene) in the Matter of South Davis Sewer District, North and South Treatment Plants ("Remand in the Matter of South Davis")* (March 29, 2011) at 11-12; *see also Tribune Co. v. F.C.C.*, 133 F.3d 61, 68 (D.C. Cir. 1998) (stating an "agency is bound by its substantive rules unless [] amended or rescinded"); *see also* UTAH CODE ANN. § 63G-4-102(2)(a).

outside the scope of this proceeding.¹⁶⁷ If it so desires, Counterpoint may separately petition for rulemaking pursuant to the Utah Administrative Rulemaking Act, UTAH CODE ANN. § 63G-3-601.

2. Enforcement of a Municipal Ordinance is Outside the Scope of this Permit Proceeding.

Counterpoint's claims that waste was illegally received at the Weber County Landfill is a request for enforcement and outside the scope of this proceeding.¹⁶⁸ Regardless of whether Counterpoint has standing, Counterpoint seeks to enforce a municipal standard.

Counterpoint's claims regarding the Solid Waste Management Act are outside the scope of this proceeding, thus, Respondents' motion for summary judgment is MOOT and need not be addressed.

G. Miscellaneous Claims.

1. Marking the "Modification Box" Had No Substantive Impact on the Review of the Commercial Permit Application.

Counterpoint asserts that the Commercial Permit must be revoked because the Commercial Permit application was treated as a permit modification not as a new

¹⁶⁷Counterpoint's attempt to distinguish its claim fails to establish a redressible claim in this proceeding. Counterpoint clarifies that its claim challenges whether, not how, the Executive Secretary promulgated rules as allegedly required by the Solid Waste Management Act. *Counterpoint's Response to SJ* at 9 (Counterpoint concurs that the Administrative Procedures Act, which governs this proceeding, does not govern the procedure for making rules or judicial review of the procedure or rules and states it "does not seek judicial review of either the Division's procedures or its rules in this forum"). Counterpoint's attempt to clarify its position fails to supplement its argument. Any request for rulemaking is outside the scope of this proceeding. See UTAH CODE ANN. § 63G-3-601 (Petition for Rulemaking); *Remand in the Matter of South Davis* at 10-12.

¹⁶⁸*Remand in the Matter of South Davis* at 10-12.

permit application as required by UTAH ADMIN. CODE R315-310-1(4).¹⁶⁹ Respondents submit, notwithstanding that Weber County and Moulding checked the “modification box” on the application, that the Commercial Permit application was reviewed as an application for a new permit.¹⁷⁰

Beyond continuing to argue that the Applicant’s marked the “modification box” on the permit application, Counterpoint has failed to even allege that the Commercial Permit application failed to demonstrate it meets all requirements for a Class VI landfill.¹⁷¹ Finding no genuine issue of material fact,¹⁷² Respondents’ motion for summary judgment is GRANTED in that Counterpoint failed to demonstrate that marking the “modification box” on the Commercial Permit application resulted in a Commercial Permit that failed to meet applicable requirements for a new permit.

2. Counterpoint’s Comments Were Adequately Considered.

Counterpoint’s claim that the Executive Secretary did not adequately consider Counterpoint’s comment before the Executive Secretary approved the Commercial Permit.¹⁷³ In its comment, Counterpoint argues that it had not been properly notified

¹⁶⁹RFAA #1 at 3.

¹⁷⁰Respondents’ Reply at ¶ 45.

¹⁷¹Counterpoint Response at 14.

¹⁷²See *Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (stating a party cannot rely on unsupported bare contentions that raise no material fact).

¹⁷³RFAA #1 at 9.

about the proposed Commercial Permit application.¹⁷⁴ Respondents assert the Executive Secretary had sufficient time to determine that Counterpoint's comment "failed to state a legal basis to deny the [Commercial Permit]."¹⁷⁵ Counterpoint failed to respond to Respondents' motion for summary judgment or assert why one day was inadequate to consider its comment.¹⁷⁶ Counterpoint failed to support its bare contention. Accordingly, Respondents' motion for summary judgment is GRANTED insofar as it seeks a ruling that Counterpoint failed to demonstrate that the Executive Secretary did not adequately consider Counterpoint's comment.

3. Counterpoint's Requests for Agency Action Do Not Prohibit Weber County From Seeking Legislative and Gubernatorial Approval.

Counterpoint asserts that UTAH ADMIN. CODE R315-12-2.2(b) prohibits the Executive Secretary from finalizing a permit if a request for agency action has been filed.¹⁷⁷ Counterpoint then asserts that because the Commercial Permit was not final, the legislature and governor could not consider approving the Commercial Permit.¹⁷⁸ Respondents argue the Commercial Permit was properly submitted to the legislature.¹⁷⁹

¹⁷⁴Material Fact ¶ 13 (*JSF* ¶ 21).

¹⁷⁵*Respondents' Due Process SJ Memo* at ¶ 30.

¹⁷⁶See *Overstock.com, Inc.*, 2008 UT 55, ¶¶ 12-16 (stating an opposing party to a summary judgment motion must dispute the motion with material facts and a party cannot rely on unsupported bare contentions.)

¹⁷⁷*RFAA #1* at 2.

¹⁷⁸*Id.* at 9.

¹⁷⁹*Respondents' Due Process SJ Memo* at 11.

Whether the Permittees could seek legislative and gubernatorial approval is a question of law. Section R315-12-2.2(b) provides:

An initial order or notice shall become final in 30 days if not contested as described in R315-12-3. Failure to contest an initial order or notice waives any right of administrative review or judicial appeal.¹⁸⁰

In accordance with the rule, a permit, or an initial order, a permit must be challenged within thirty (30) days after issuance of the permit or the permit becomes final.

Although a timely filed request for agency action preserves the ability to challenge a permit, a request for agency action does not stay the permit or initial order. If Counterpoint desired a stay, it should have requested a stay pursuant to UTAH ADMIN. CODE R315-12-8 (2010). Counterpoint did not seek to stay the Commercial Permit.

As a stay of the Commercial Permit approval was not sought nor granted, Weber County and Moulding had no administrative barrier to seeking legislative and gubernatorial approval for the commercial Weber County Landfill. Accordingly, Respondents' motion for summary judgment is GRANTED insofar as it seeks a ruling that Counterpoint's requests for agency action bar the legislature and governor from considering the approval of the Commercial Permit.

¹⁸⁰UTAH ADMIN. CODE R315-12-2.2(b) (2010). (Rule in effect when Counterpoint filed *RFAA #1* and Amended *RFAA #2*.)

VII. Findings of Fact and Conclusions of Law.

A. Findings of Fact.

Findings of Fact are as follows:

Background.

1. Pursuant to his authority granted in UTAH CODE ANN. § 19-6-108, on October 19, 2009, the Executive Secretary of the Solid and Hazardous Waste Control Board (“Executive Secretary”) issued a Class IVb, noncommercial nonhazardous solid waste permit (“Noncommercial Permit”) to Weber County, as owner, and Moulding & Sons Landfill, LLC (“Moulding”), as operator, of the proposed Weber County Landfill.¹⁸¹ The Noncommercial Permit authorized Weber County and Moulding to construct and operate a noncommercial nonhazardous solid waste, construction/demolition debris (“C&D”) landfill.¹⁸²
2. On November 9, 2009, Petitioner Counterpoint Construction Company (“Counterpoint”) filed a request for agency action challenging the issuance of the Class IVb, Noncommercial Permit.¹⁸³ In a separate adjudicatory proceeding, Counterpoint was granted standing to intervene to raise issues concerning the Noncommercial Permit.¹⁸⁴
3. On January 18, 2011, Weber County and Moulding filed an application for a Class VI, commercial nonhazardous solid waste permit (“Commercial Permit”) for the existing Weber County Landfill that was initially constructed and operated pursuant to the Class IVb, Noncommercial Permit.¹⁸⁵ The Weber County Director of Solid Waste prepared, signed and filed the application for the Weber County, Class VI, Commercial Permit under the direction of the

¹⁸¹Material Fact ¶¶ 2, 4.

¹⁸²Material Fact ¶ 5.

¹⁸³Material Fact ¶ 24.

¹⁸⁴Material Fact ¶ 30.

¹⁸⁵Material Fact ¶¶ 6, 22.

three Weber County Commissioners.¹⁸⁶ The “Modification” box was checked on the application.¹⁸⁷

4. The application for the Weber County Landfill, Class VI Commercial Permit included copies of 2009 letters notifying property owners of the intent to apply for a landfill permit.¹⁸⁸ The Executive Secretary did not create “an interested party list” for the Weber County, Class VI Commercial Permit application.¹⁸⁹
5. The draft Weber County Landfill Class VI, Commercial Permit was subject to a public comment period between January 28 and February 28, 2011.¹⁹⁰
6. Neither the Executive Secretary nor Weber County nor Moulding notified Counterpoint regarding the application or public comment period for the Weber County Landfill Class VI, Commercial Permit.¹⁹¹ On February 28, 2011, the last day of the public comment period, Counterpoint filed a single comment stating it had not been properly notified regarding the Class VI Commercial Permit application.¹⁹²
7. On March 1, 2011, the Executive Secretary issued the Class VI Commercial Permit for the existing Weber County Landfill.¹⁹³ Subject to limitations on the type of waste it can accept, the Commercial Permit allows the Weber County Landfill to accept wastes from anywhere.¹⁹⁴ The Noncommercial Permit was in effect

¹⁸⁶Material Fact ¶¶ 3, 25.

¹⁸⁷Material Fact ¶ 23.

¹⁸⁸Material Fact ¶ 7.

¹⁸⁹Material Fact ¶ 8.

¹⁹⁰Material Fact ¶ 11.

¹⁹¹Material Fact ¶ 8.

¹⁹²Material Fact ¶¶ 11, 13; *Respondents Due Process SJ Memo* at ¶¶ 13, 29.

¹⁹³Material Fact ¶¶ 14, 22.

¹⁹⁴Material Fact ¶ 16.

at the time that the Commercial Permit was issued and neither permit has been revoked.¹⁹⁵

8. Commercial Permit Condition I.A. required Weber County and Moulding to obtain approvals from the local government, the Utah State Legislature and the Governor of Utah prior to the start of operations as a commercial landfill.¹⁹⁶ The Governor and the Legislature authorized the Weber County Landfill to change its classification from a Class IVb, noncommercial nonhazardous solid waste landfill to a Class VI, commercial nonhazardous solid waste landfill.¹⁹⁷ On March 28, 2011, the Executive Secretary granted approval for the Weber County Landfill to operate pursuant to its Class VI Commercial Permit.¹⁹⁸
9. Petitioner Counterpoint filed two amended requests for agency action challenging the Executive Secretary's issuance of the Commercial Permit and the Executive Secretary's written approval to begin commercial operations at the Weber County Landfill.¹⁹⁹ Counterpoint was granted standing to challenge the Executive Secretary's issuance of the Commercial Permit.²⁰⁰
10. UTAH ADMIN. CODE R315-12-2.2(b) provides that "[a]n initial order or notice shall become final in 30 days if not contested as described in R315-12-3."²⁰¹
11. On April 6, 2011, in the separate adjudicatory proceeding for the Noncommercial Permit, the administrative law judge transmitted a *Memorandum and Recommended Order* ("Noncommercial Permit Memorandum and Recommended Order") to the Utah Solid and

¹⁹⁵Material Fact ¶ 21.

¹⁹⁶Material Fact ¶ 15.

¹⁹⁷Material Fact ¶ 17.

¹⁹⁸Material Fact ¶ 18.

¹⁹⁹RFAA #1; Amended RFAA #2.

²⁰⁰See *Memorandum and Order* (June 16, 2011); *Order* (September 29, 2011).

²⁰¹UTAH ADMIN. CODE R315-12-2.2(b) (2010).

Hazardous Waste Control Board (“Board”) for their consideration.²⁰²

12. Pursuant to an order issued on June 20, 2011, in the separate adjudicatory proceeding for the Noncommercial Permit, the Board: a) upheld the issuance of the Noncommercial Permit; and b) with an ordered modification, accepted, approved, and adopted the *Noncommercial Permit Memorandum and Recommended Order*.²⁰³ Counterpoint did not appeal the Board’s denial of Counterpoint’s request to the Board to reconsider its decision to uphold the issuance of the Noncommercial Permit.²⁰⁴

Need to Notify Counterpoint.

13. The rules governing permits for nonhazardous solid waste facilities provide requirements for public participation in subsection R315-310-3(2) of UTAH ADMIN. CODE. Notwithstanding that the section caption for R315-310-3 reads “General Contents of a Permit Application for a New Facility or a Facility Seeking Expansion,” each of the three subsections under R315-310-3 distinctly describes the type of permit application that each subsection addresses.²⁰⁵ Unlike subsection R315-310-3(1), the provisions of subsection R315-310-3(2) are not expressly limited to a new facility or a facility seeking an expansion.²⁰⁶ Subsection R315-310-3(2)(a) applies to “[e]ach permit application.”²⁰⁷ Therefore, the rule is not ambiguous regarding which permit applications must comply with subsection R315-310-3(2).²⁰⁸
14. UTAH ADMIN. CODE R315-310-3(2)(a)(ii) requires each application to

²⁰²Material Fact ¶ 19; see generally, ALJ’s *Noncommercial Permit Memorandum and Recommended Order*.

²⁰³Material Fact ¶ 30.

²⁰⁴Material Facts ¶¶ 31, 32.

²⁰⁵UTAH ADMIN. CODE R315-310-3; see *infra* Part VI.A.2.a.(2).

²⁰⁶See Part VI.A.2.a.(2).

²⁰⁷UTAH ADMIN. CODE R315-310-3(2)(a).

²⁰⁸See Part VI.A.2.a.(1).

document the notification of “property owners” identified in subsection R315-310-3(3)(a)(i).²⁰⁹ UTAH ADMIN. CODE R315-310-3(2)(b) requires the distribution of a letter to “persons” identified in subsections R315-310-3(3)(a)(i) and (iii).²¹⁰ Subsections R315-310-3(2)(a)(ii) and R315-310-3(2)(b) reference incorrect citations as subsections R315-310-3(3)(a)(i) and (iii) are not found in UTAH ADMIN. CODE.²¹¹

15. The section caption for R315-310-3 provides no clarification to which “persons” should receive the subsection R315-310-3(2)(b) letters.²¹²
16. At the time when Weber County and Moulding filed an application for a commercial permit, the Weber County Landfill became a “proposed” commercial landfill.²¹³
17. Both Class IVb noncommercial and Class VI commercial landfills must meet identical performance standards, operating requirements, and closure/post closure requirements.²¹⁴ Therefore, as the Weber County Landfill was initially permitted and constructed under the Noncommercial Permit, in this proceeding for the Commercial Permit, Counterpoint cannot challenge the performance standards, operating requirements, or closure/post closure requirements.²¹⁵
18. An applicant for a Class VI commercial landfill must also 1) demonstrate its commercial nonhazardous solid waste facility is beneficial and necessary, and 2) receive approval from the Executive Secretary, the local government, the governor and the

²⁰⁹ See UTAH ADMIN. CODE R315-310-3(2)(a)(ii).

²¹⁰ See UTAH ADMIN. CODE R315-310-3(2)(b).

²¹¹ See UTAH ADMIN. CODE R315-310-3(3).

²¹² See Part VI.A.2.a.(1).

²¹³ See Part VI.A.2.b.

²¹⁴ See Part V.A.4.b.

²¹⁵ *Id.*

legislature.²¹⁶

19. Counterpoint learned about the draft Commercial Permit and filed a comment on the last day of the public comment period.²¹⁷ In this proceeding, Counterpoint has challenged whether the Executive Secretary adequately authorized the Commercial Permit pursuant to the additional statutory requirements for commercial facilities.²¹⁸ Counterpoint has failed to alleged that it could have raised additional concerns that would have a reasonable probability to change the outcome of this proceeding.²¹⁹ Counterpoint has not claimed the Weber County Landfill is not beneficial or necessary.²²⁰
20. Therefore, based on Counterpoint's assertions, there is no reasonable probability that any alleged failure to notify Counterpoint pursuant to UTAH ADMIN. CODE R315-310-3(2) would affect the outcome of this proceeding.²²¹

Nonprofit Facility Under the Noncommercial Permit.

21. On May 12, 2011, in the separate adjudicatory proceeding for the Noncommercial Permit, the Board:
 - a) unanimously approved the finding of fact that the Weber County Landfill is a nonprofit facility;
 - b) ordered the modification of a permit condition to allow the Weber County Landfill to only accept waste generated in Weber County or waste generated within the boundaries of a local government under contract with that local government; and
 - c) determined that the Weber County Landfill is noncommercial when it accepts waste generated within the

²¹⁶UTAH CODE ANN. §§ 19-6-108(3)(c)(i), -(11); UTAH ADMIN. CODE R315-310-3(3)(b).

²¹⁷Material Fact ¶ 13.

²¹⁸See Part VI.A.4.b; see also *Amended RFAA #2*.

²¹⁹*Id.*

²²⁰*Id.*

²²¹See Part V.A.4.

boundaries of the County or waste generated outside the boundaries of Weber County solely under contract with that local government.²²²

22. The Solid Waste Management Act grants a public entity the discretion to provide a solid waste management facility to handle solid waste generated outside its jurisdiction.²²³ A discretionary grant of authority does not in itself provide a government service to the residents of Weber County, and, therefore the ability to receive waste from outside the jurisdiction is not an inherently nonprofit government service.²²⁴ Counterpoint raises no material facts to demonstrate the Weber County Landfill is a nonprofit facility.²²⁵
23. There are no applicable statutory or regulatory provisions that prohibit the Executive Secretary from issuing a commercial nonhazardous solid waste permit to any facility that meets the applicable requirements.²²⁶ Any facility issued a commercial permit must meet all applicable permitting requirements for a commercial nonhazardous solid waste facility.²²⁷ The legislature and governor control whether a commercial permit is approved regardless of whether the facility is a for profit or not for profit facility.²²⁸

Two Simultaneous Landfill Permits.

24. The Executive Secretary issued the Noncommercial Permit and the Commercial Permit for the Weber County Landfill.²²⁹ Neither permit

²²²Material Facts ¶¶ 26, 27, 28, 29.

²²³UTAH CODE ANN. § 19-6-503.

²²⁴Part VI.B.1.

²²⁵*Id.*

²²⁶Part VI.B.2.

²²⁷*Id.*

²²⁸*Id.*

²²⁹See Findings of Fact ¶ 7.

has been revoked.²³⁰ The Commercial Permit allows the landfill to accept waste generated anywhere, whereas, the Noncommercial Permit restricts the acceptance of waste to waste generated in Weber County or within the boundaries of a local government pursuant to an agreement.²³¹ The waste acceptance provisions in the Commercial Permit could allow the violation of the waste restriction provision in the Noncommercial Permit.²³²

25. The solid waste rules contemplate that a facility may change classifications, including from a noncommercial to a commercial facility.²³³ By issuing both the Class IV Noncommercial Permit and the Class VI Commercial Permit, the Executive Secretary has simultaneously classified the landfill as both a Class IV and a Class VI landfill.²³⁴
26. The Executive Secretary shall document that the Noncommercial Permit is being held in abeyance pending the resolution of Counterpoint's requests for agency action regarding the Commercial Permit and that the Weber County Landfill is operating pursuant to the Commercial Permit. The public may become aware that the Noncommercial Permit is being held in abeyance and the Weber County Landfill is operated pursuant to the Commercial Permit through access to the Executive Secretary's documentation.²³⁵

Construction of the Weber County Landfill.

27. The Weber County Landfill was initially constructed as a noncommercial facility pursuant to the Noncommercial Permit.²³⁶

²³⁰*Id.*

²³¹*Id.* ¶¶ 7, 8, 20.

²³²See Part VI.D.2.

²³³See Part VI.D.2. (citing UTAH ADMIN. CODE R315-310-1(4)).

²³⁴See Part VI.D.2.

²³⁵*Id.*

²³⁶See Findings of Fact ¶¶ 1, 3.

Weber County and Moulding filed an application for a commercial permit for the previously constructed Weber County Landfill.²³⁷ The local government, in addition to the Executive Secretary, the legislature and the governor, must approve a commercial facility prior to construction.²³⁸

28. The Solid and Hazardous Waste Act does not address the commercial permit approval process for an existing noncommercial facility.²³⁹ The Executive Secretary barred operation as a commercial landfill prior to legislative and gubernatorial approval.²⁴⁰
29. Any additional construction or physical modification necessary for the operation of a commercial landfill would be prohibited until appropriate approvals are obtained under the plain meaning of the phrase “no person may construct any [commercial] facility.”²⁴¹

Miscellaneous.

30. Counterpoint failed to support 1) that the application for the Commercial Permit failed to meet all applicable requirements as a result of marking the “modification” box on the application; and 2) that the Executive Secretary failed to adequately consider Counterpoint’s public comment regarding the draft Commercial Permit.²⁴²
31. Neither the Utah Solid and Hazardous Waste Act, the Solid Waste Management and Permitting Rules, nor other statutory nor regulatory provisions prohibit the Executive Secretary from using enforcement discretion to hold a permit in abeyance that was

²³⁷*Id.* ¶ 3.

²³⁸UTAH CODE ANN. § 19-6-108(3)(c)(i).

²³⁹See *generally* UTAH CODE ANN. § 19-6-108.

²⁴⁰See Findings of Fact ¶ 8.

²⁴¹See Part VI.E.

²⁴²Part VI.G.1. and 2.

issued pursuant to UTAH CODE ANN. § 19-6-108.²⁴³

32. When a permitted solid waste facility seeks another permit to change permit classifications and when one permit is challenged, the Board recognized the value in holding a permit in abeyance until the challenged permit is no longer subject to judicial review.²⁴⁴

B. Conclusions of Law.

Based on the Analysis in Part VI, *supra*, the RECOMMENDED conclusions of law are as follows:

1. There are no genuine issues of material facts in dispute.
2. The text in subsection R315-310-3(2)(a) is not ambiguous and the section caption fails to clarify subsection R315-310-3(2)(b); therefore, the UTAH ADMIN. CODE R315-310-3 section caption does not control subsection R315-310-3(2).²⁴⁵ The provisions of UTAH ADMIN. CODE R315-310-3(2) are not restricted to permit applications for a new facility or a facility seeking an expansion.
3. Solid waste rules, UTAH ADMIN. CODE R315-310-3(2)(a)(ii), require Weber County and Moulding, as applicants, to document the notification of property owners regarding their intent to apply for the Commercial Permit.²⁴⁶ Also, UTAH ADMIN. CODE R315-310-3(2)(b) requires the Executive Secretary to inquire whether individuals desire to be placed on an interested party list.²⁴⁷
4. The term "proposed landfill" does not exclude the application of UTAH ADMIN. CODE R315-310-3(2) to the Commercial Permit application.²⁴⁸

²⁴³ See generally UTAH CODE ANNOTATED, TITLE 19, CHAPTER 6, PART 1; UTAH ADMIN. CODE R315.

²⁴⁴ See Part VI.D.5.b.

²⁴⁵ Part VI.A.2.a.(1).

²⁴⁶ Part VI.A.3.

²⁴⁷ *Id.*

²⁴⁸ Part VI.A.2.b.

5. As the rules provide incorrect citations, the property owners referenced in subsection R315-310-3(2)(a)(ii) and the persons referenced in R315-310-3(2)(b) cannot be ascertained. Therefore, the rules lack clarity as to whether UTAH ADMIN. CODE R315-310-3(2)(a)(ii) and R315-310-3(2)(b) require Respondents to notify Counterpoint as a “property owner” or a “person.”²⁴⁹
6. The Executive Secretary’s interpretation that the commercial Weber County Landfill is not subject to the provisions in UTAH ADMIN. CODE R315-310-3(3) is arbitrary and unreasonable.²⁵⁰ The commercial Weber County Landfill is subject to the provisions of both UTAH CODE ANN. § 19-6-108(3) and UTAH ADMIN. CODE R315-310-3(3).²⁵¹
7. In that letters failed to notify “property owners” of their intent to apply for the Commercial Permit, it is impermissible for Weber County and Moulding to rely on the 2009 notification letters for the Noncommercial Permit application to demonstrate compliance with UTAH ADMIN. CODE R315-310-3(2)(a)(ii) for the Commercial Permit application.²⁵²
8. As Counterpoint was not substantially prejudiced, any alleged failure of the Executive Secretary or Weber County and Moulding to notify Counterpoint, pursuant to UTAH ADMIN. CODE R315-310-3(2) regarding the Commercial Permit Application is harmless error.²⁵³
9. The Board’s finding of fact, in the Matter of the Noncommercial Permit, that the Weber County Landfill is a nonprofit facility when it operates under the waste receipt restrictions placed in the Noncommercial Permit is not relevant to this proceeding where the Weber County Landfill operations are authorized by the Commercial Permit.²⁵⁴

²⁴⁹Part VI.A.2.c.

²⁵⁰*Id.*

²⁵¹Part VI.A.2.c.

²⁵²Part VI.A.4.a.

²⁵³Part VI.A.5.

²⁵⁴Part VI.B.1.a.

10. A solid waste management facility of a public entity, such as the Weber County Landfill, does not become a nonprofit facility solely because UTAH CODE ANN. § 19-6-503 provides the discretionary ability to dispose solid waste generated outside the entity's jurisdiction.²⁵⁵
11. Notwithstanding whether the facility is a not for profit or a for profit facility, the issuance of a commercial nonhazardous solid waste permit for any facility that meets all applicable statutory and regulatory requirements is not contrary to law.²⁵⁶
12. It is reasonable for the Executive Secretary to determine that the filing of a commercial permit application signed by the Weber County Director of Solid Waste satisfies the requirement to obtain "local government approval" in UTAH CODE ANN. § 19-6-108(3)(c)(i) when the application was submitted pursuant to the directions of each of the three Weber County Commissioners.²⁵⁷
13. In that UTAH ADMIN. CODE R315-301-2(10) and (12) individually define a Class IV landfill and a Class VI landfill; and R315-310-1(4) allows a landfill to change classification; a nonhazardous solid waste landfill cannot be simultaneously classified as both a Class IV landfill and a Class VI landfill.²⁵⁸
14. Two final permits with conflicting permit conditions cannot be issued to the same facility.²⁵⁹
15. The Noncommercial Permit is a final permit, no longer subject to judicial review pursuant to UTAH CODE ANN. § 63G-4-403.²⁶⁰
16. UTAH ADMIN. CODE R315-12-2.2(b) provides that an "initial order ... shall

²⁵⁵Part VI.B.1.

²⁵⁶Part VI.B.2.

²⁵⁷Part VI.C.

²⁵⁸Part VI.D.

²⁵⁹Part VI.D.2.

²⁶⁰Part VI.D.1.

become final in 30 days if not contested as described in R315-12-3."²⁶¹
As Counterpoint has been granted standing to challenge the Commercial Permit; the Commercial Permit is not a final permit.²⁶²

17. Claims arising from the enforcement of the Class IVb noncommercial nonhazardous waste permit are outside the scope of this proceeding.²⁶³
18. The Board held that the Executive Secretary has "plenary authority to administer and discretion to enforce the solid waste program as long as his decisions are not arbitrary and capricious."²⁶⁴
19. The Board determined that it is reasonable, and not arbitrary nor capricious, for the Executive Secretary to hold the Noncommercial Permit in abeyance until such time that the decision whether to uphold the issuance of the Commercial Permit is final and no longer subject to judicial review, pursuant to UTAH CODE ANN. § 63G-4-403, if 1) the Permittees are aware which permit is dormant and which permit is the operable permit and 2) the information regarding which permits are dormant and operable is available to the public.²⁶⁵
20. The Board concluded that the "Executive Secretary has the discretion, when a new permit has been applied for, to hold the existing permit in abeyance and allow the applicant to operate under the permit that has been challenged until such time as the permit becomes final and nonappealable, at which time the original permit must be terminated within 30 days."²⁶⁶
21. Upon confirmation from the Executive Secretary that he has documentation available to the Permittees and the public that the Weber County Landfill is operating pursuant to the Commercial Permit and the Noncommercial Permit is being held in abeyance pending a final decision

²⁶¹UTAH ADMIN. CODE R315-12-2.2(b).

²⁶²*Id.*

²⁶³*Id.*

²⁶⁴*Board's Remand at 4.*

²⁶⁵Part VI.D.5.b.

²⁶⁶Board Tr. for Commercial Permit at 108-109.

no longer subject to judicial review, pursuant to UTAH CODE ANN. § 63G-4-403, regarding the issuance of the Commercial Permit, the Board concluded that the Executive Secretary's decisions 1) to issue two concurrent permits and 2) to hold the Noncommercial Permit in abeyance with the intent to terminate the Noncommercial Permit if the Commercial Permit becomes final and no longer subject to judicial review is reasonable, and therefore not arbitrary nor capricious.²⁶⁷

22. When the existing Weber County noncommercial landfill was converted to a commercial landfill, the Executive Secretary's interpretation of UTAH CODE ANN. § 19-6-108(3)(c)(i) is reasonable in that the Commercial Permit did not authorize commercial operations until the Executive Secretary received documentation that the legislature and governor approved the commercial landfill.²⁶⁸
23. The relief requested by Counterpoint seeks to order the Executive Secretary to promulgate rules pursuant to his obligation under the Solid Waste Management Act, and is, therefore, outside the scope of this adjudicatory proceeding governed by the Utah Administrative Procedures Act in UTAH CODE ANN. § 63G-4-102(2)(a).²⁶⁹
24. Relief requested by Counterpoint seeks enforcement of a municipal ordinance of Ogden City, and is, therefore, outside the scope of this adjudicatory proceeding.²⁷⁰
25. A stay of the Commercial Permit was not requested nor granted, thus, there is no administrative barrier to Weber County and Moulding seeking legislative and gubernatorial approval of the commercial Weber County Landfill pursuant to UTAH CODE ANN. § 19-6-108(3).

C. Recommended Order.

It is RECOMMENDED the Utah Solid and Hazardous Waste Control Board issue

²⁶⁷ *Id.*

²⁶⁸ See Part VI.E.

²⁶⁹ See Part VI.F.

²⁷⁰ *Id.*

the following order:

Based on the memoranda filed in this proceeding and the foregoing analysis, the findings of fact, and the conclusions of law;

It is ORDERED that *Counterpoint Construction's Motion for Summary Judgment and Motion for Suggestion of Mootness, with Supporting Memorandum, Statement of Facts, and Table of Authorities* dated February 3, 2012, is DENIED insofar as it seeks rulings:

- 1) that the Executive Secretary's failure to notify Counterpoint constitutes a denial of its rights as an interested party;
- 2) that the citations in UTAH ADMIN. CODE R315-310-3(2)(b) must be revised;
- 3) whether the Executive Secretary failed to comply with UTAH ADMIN. CODE R315-310-3(3);
- 4) that an interested party list created pursuant to UTAH ADMIN. CODE R315-310-3(2)(b) persists until the facility closes;
- 5) that the Weber County C&D Landfill is not "for profit;"
- 6) that government-owned nonhazardous solid waste facilities are inherently noncommercial;
- 7) that the Weber County Landfill was improperly constructed prior to approvals pursuant to UTAH CODE ANN. § 19-6-108(3)(c);
- 8) that the Executive Secretary or the Department of Environmental Quality must promulgate rules pursuant to the Solid Waste Management Act;
- 9) that the Weber County Landfill illegally accepted wastes generated within the boundaries of the City of Ogden;
- 10) that the Weber County Class IVb Landfill permit must be enforced;
- 11) that the Weber County Class IVb Landfill permit is moot and void;
and

12) that the Class VI commercial nonhazardous solid waste permit ("Commercial Permit") should be invalidated; and it is

ORDERED that *Counterpoint Construction's Motion for Summary Judgment and Motion for Suggestion of Mootness, with Supporting Memorandum, Statement of Facts, and Table of Authorities* dated February 3, 2012, is GRANTED, in part, insofar as it seeks rulings:

1) that UTAH ADMIN. CODE R315-310-3(3) applies to the Weber County Class VI Landfill; and

2) that the Weber County Landfill cannot be simultaneously classified as both a Class VI commercial landfill and a Class IVb noncommercial landfill; and it is

ORDERED that the joint motion of Respondents the Executive Secretary of the Utah Solid and Hazardous Waste Control Board ("Executive Secretary"), Weber County and Moulding & Sons, LLC's, captioned *Respondents' Motion for Summary Judgment Regarding Notice to Counterpoint of Class VI Permit, Review of Counterpoint's Public Comment, and Significance of Checked "Modification" Box on Permit Application*, dated February 3, 2012, is DENIED insofar as it seeks rulings that Counterpoint was not entitled to individual written notice of the pending Weber County Class VI Landfill permit application; and it is

ORDERED that the joint motion of Respondents the Executive Secretary, Weber County and Moulding & Sons, LLC's, captioned *Respondents' Motion for Summary Judgment Regarding Notice to Counterpoint of Class VI Permit, Review of Counterpoint's Public Comment, and Significance of Checked "Modification" Box on Permit Application*, dated February 3, 2012, is GRANTED insofar as it seeks rulings:

1) whether Counterpoint was entitled to individual notice as a member of the interested party list for the Weber County Class IVb permit application in that the claim is outside the scope of this proceeding;

2) that the Executive Secretary considered the public comment filed by Counterpoint during the public comment period;

3) that the requests for agency action filed by Counterpoint do not prevent the legislature and governor from approving the Weber County Class VI permit;

- 4) that the Executive Secretary reviewed the Commercial Permit application as an application for a new permit;
- 5) that the Executive Secretary may concurrently issue both the Class IVb noncommercial Weber County Landfill permit and the Class VI commercial Weber County Landfill permit to the same landfill if both permits are not final permits; and
- 6) that the Executive Secretary has authority to postpone revocation of a conflicting permit and hold a permit dormant if a) the issuance of one permit is subject to a challenge, b) one permit is held in abeyance, c) the Executive Secretary has informed the Permittees which permit the Landfill is authorized to operate under, d) the public has access to the Executive Secretary's decision, and e) the dormant permit will be terminated within thirty (30) days of the challenged permit becoming final and no longer subject to judicial review ; and and it is

ORDERED that Respondents the Executive Secretary, Weber County and Moulding & Sons, LLC's joint *Motion for Summary Judgment Regarding Counterpoint's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations (RFAA #2)*, dated February 3, 2012, is DENIED insofar as it seeks a ruling that Counterpoint Construction Company lacks standing to challenge the Executive Secretary's decision to hold the Class IVb Weber County Landfill permit dormant; and it is

ORDERED that Respondents the Executive Secretary, Weber County and Moulding & Sons, LLC's joint *Motion for Summary Judgment Regarding Counterpoint's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations (RFAA #2)*, dated February 3, 2012, is GRANTED insofar as it seeks rulings:

- 1) that Weber County approved the Class VI Weber County Landfill as required by UTAH CODE ANN. § 19-6-108(3);
- 2) that construction of the Weber County Landfill did not violate UTAH CODE ANN. § 19-6-108(3)(c); and
- 3) that the finding of the Utah Solid and Hazardous Control Board that the Weber County Landfill is a nonprofit facility if operated pursuant to the Class IVb Weber County Landfill permit is not relevant to this

proceeding; and it is

ORDERED that the joint motion of Respondents the Executive Secretary, Weber County and Moulding & Sons, LLC's, captioned *Respondents' Motion for Summary Judgment Concerning the Solid Waste Management Act*, dated February 3, 2012, is GRANTED; and it is

ORDERED that, within fifteen (15) days of the conclusion of the Board's hearing to consider the Administrative Law Judge's *Second Memorandum and Recommended Order* in this matter, as conditions precedent to the Board's determination that the Executive Secretary's action to issue two permits to the Weber County Landfill is reasonable, the Executive Secretary shall provide to the Utah Solid and Hazardous Waste Control Board documentation that 1) the Weber County Landfill is to operate pursuant to the Class VI commercial nonhazardous solid waste permit, #1101, 2) the Class IVb noncommercial nonhazardous solid waste permit, #0901 is being held in abeyance, and 3) the Executive Secretary shall terminate the Class IVb noncommercial nonhazardous solid waste permit, #0901 within thirty (30) days of any final decision upholding the issuance of the Class VI commercial nonhazardous solid waste permit, #1101, that is not subject to judicial review pursuant to UTAH CODE ANN. § 63G-4-403; and it is

ORDERED that, within fifteen (15) days of the conclusion of the Board's hearing to consider the Administrative Law Judge's *Second Memorandum and Recommended Order* in this matter, the Executive Secretary shall provide to the Utah Solid and Hazardous Waste Control Board certification that the public has access to the documentation required in the preceding paragraph; and it is

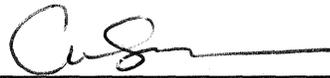
ORDERED that the Weber County Class VI commercial nonhazardous solid waste permit #1101 is AFFIRMED subject to the Solid and Hazardous Waste Control Board receiving the documentation and certifications described in the two preceding paragraphs; and it is

FURTHER ORDERED that this matter regarding the claims raised in *Counterpoint Construction Company's Amended Request for Intervention and Requests for Agency Action on the Utah Division of Solid and Hazardous Waste's Solid Waste Permit No. 1101*, dated March 14, 2011, and *Counterpoint Construction Company's Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste's Facility Approval to Begin Commercial Operations*, dated August 9, 2011, are RESOLVED and this case in the Matter of Weber County C&D Class VI Solid Waste Permit #1101 is HEREBY DISMISSED.

D. Additional Recommendation.

It is FURTHER RECOMMENDED, in an action outside the jurisdiction in this matter, pursuant to its separate rulemaking authority UTAH CODE ANN. § 19-6-105, the Utah Solid and Hazardous Waste Control Board ORDER the Executive Secretary to correct the citations referenced in UTAH ADMIN. CODE R315-310-3(2) and -3(3).²⁷¹

DATED this 4th day of February, 2013.



Connie S. Nakahara
Administrative Law Judge
PO Box 140873
Salt Lake City, UT 84114-0873
cnakahara@utah.gov

²⁷¹ See Part VII.A. Note, although not determined in this *Second Memorandum and Recommended Order*, Respondents claim subsection -3(3) includes incorrect citations.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2013, I caused a copy of the foregoing *Second Memorandum and Recommended Order (Pursuant to Board Remand)* to be delivered by electronic mail:

Administrative Proceedings Record
Officer
DEQAPRO@utah.gov

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Counsel for Moulding & Sons Landfill,
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craiganderson@utah.gov



Connie S. Nakahara

EXHIBIT 1

BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:

**Weber County C&D Class VI Landfill
Solid Waste Permit #1101**

**JOINT STIPULATION OF
UNDISPUTED FACTS**

January 10, 2012

**Administrative Law Judge
Connie S. Nakahara**

Pursuant to the Administrative Law Judge's Order (Order and Fifth Notice of Further Proceedings) dated November 21, 2011, the parties to the above captioned pleading, Counterpoint Construction Company ("Counterpoint"), the Executive Secretary of the Solid and Hazardous Waste Control Board ("Executive Secretary"), Weber County, and Moulding and Sons Landfill, LLC ("Moulding"), by and through undersigned counsel, hereby jointly submit this Joint Stipulation of Undisputed Facts.

The parties stipulate and agree to the following undisputed facts:

1. Moulding and Sons Landfill, LLC, is a limited liability company organized under the Utah Revised Limited Liability Company Act, Utah Code Annotated 48-2c-101, *et seq.*
2. The Executive Secretary of the Utah Solid and Hazardous Waste Control Board is appointed pursuant to Utah Code Annotated §19-6-107.
3. The Executive Secretary is responsible to issue permits for nonhazardous solid waste facilities pursuant to Utah Code Annotated §19-6-108.

4. Weber County is a county of the State of Utah as denoted in Article XI Section 1 of the Constitution of the State of Utah with the powers granted under, among other statutes, Utah Code Annotated Title 17, Chapter 50.

5. On January 22, 2009, when Weber County filed a Class IVb (non-commercial) Permit application for a C&D landfill with the Utah Division of Solid and Hazardous Waste, members of the County Commission were Kenneth Bischoff, Craig Dearden and Jan Zogmaister.

6. On May 1, 2009 the Executive Secretary of the Solid and Hazardous Waste Control Board sent a letter to Counterpoint with respect to the Class IVb Permit application, which provided as follows:

... As an owner of property within 1,000 feet of the proposed solid waste facility your name may be placed on an interested party list to receive further public information regarding the proposed facility, as allowed by R315-310-3(2)(b) of the Utah Administrative Code. If you wish to have your name put on this list, please respond to this letter in writing or by email (rbohn@utah.gov) by June 8, 2009 indicating your desire to do so.

7. On May 28, 2009, Counterpoint responded and became an “interested party” under R315-310-3(2)(b) to receive further public information regarding the proposed facility.

8. On October 19, 2009, the Executive Secretary issued Weber County and Moulding a permit for the Weber County C&D Class IVb (non-commercial) Landfill.

9. The Class IVb Permit authorizes the Permittees to construct and operate a non-commercial construction and demolition debris landfill.

10. On January 18, 2011, Weber County and Moulding filed an application for a Class VI (commercial) permit for the Weber County C&D Landfill with the Utah Division of Solid and Hazardous Waste.

11. Under the heading, “Documentation that a notice of intent to apply for a permit has been sent to all property owners listed above (R315-310-3(2)(ii))” on Page V-2 of the Class VI Permit Application, the applicants stated:

Copies of all letters provided to the surrounding property owners at the time of the original permit application submitted in January 2009 are included in Exhibit D.

12. The 2009 letters referred to on Page V-2 of the Class VI Permit Application did not notify Counterpoint of the 2011 Class VI Application.
13. On January 3, 2011, Kerry Gibson replaced Kenneth Bischoff as a Weber County Commissioner.
14. On January 18, 2011, Counterpoint owned property located within 1000' of the Landfill.
15. Neither Weber County, nor Moulding, nor the Division directly notified Counterpoint of the Class VI Permit Application or the public comment period for that application.
16. The Division did not create an interested party list for the Class VI permit application.
17. Notice of the Public Comment Period for the proposed Class VI Landfill was published in the Standard Examiner, a local newspaper serving Weber County and other areas, on January 28, 2011. Notice of the Public Comment Period was also placed on the Division's web site.
18. The Public Comment Period for the proposed Class VI Landfill was held between January 28, 2011 and February 28, 2011.
19. On February 24, 2011 State Representative Brad Dee introduced H.C.R. 018 (House Concurrent Resolution Approving Solid Waste Facility Classification Change) to the Utah House of Representatives for first reading.

20. No one timely requested a Public Hearing for the proposed Class VI Landfill, and none was held.

21. On February 28, 2011 Counterpoint filed a Public Comment with the Division. Counterpoint's Comment complained that it had not been properly notified of the proposed Class VI Permit application.

22. On March 1, 2011, at a regular county commission meeting, Brice Penrod asked the commission if the commission had adopted a resolution similar to HCR 18. David Wilson, legal counsel to the commission, stated that a resolution was not required.

23. On March 1, 2011, the Executive Secretary issued Weber County and Moulding a permit for the Weber County C&D Class VI (commercial) Landfill.

24. The Permit, at I.A., General Operation, states: This Permit is for the operation of a Class VI Landfill as defined by UAC R315-301-2(12). The landfill may not begin operations as a commercial landfill until the Executive Secretary has received documentation that the Permittees have received approval from the local government, the Utah State Legislature, and the Governor of Utah. Prior to the start of operations as a commercial landfill, the Permittee shall receive written approval from the Executive Secretary to accept waste.

25. Subject to limitations on the types of waste it can accept, the Weber County C&D Class VI Landfill can accept legal wastes from anywhere.

26. The Landfill, pursuant to the Class VI Permit, has accepted, and continues to accept, C&D waste originating within the boundaries of the City of Ogden, as well as appropriate C&D waste originating from other areas of the state.

27. On March 16, 2011, Counterpoint sent a letter to the Executive Secretary stating that it was "apparent that Counterpoint has been removed from the interested party list for the Landfill Facility." The letter requested the Executive Secretary to "please place us once again on the List." On March 28, 2011, the Executive Secretary responded, saying "[i]nterested party lists

do not exist for existing solid waste facilities. Such lists are created only for proposed new or expanding facilities and used only during the initial permitting process.”

28. On March 22, the Governor and Legislature granted Weber County and Moulding approval to “change classification from a Class IVb noncommercial, nonhazardous solid waste facility to a Class VI commercial, nonhazardous solid waste facility known as the Weber County C&D Landfill located in Weber County, Utah.”

29. Pursuant to the direction of the Executive Secretary, on March 24, 2011, Weber County Commission Chair Jan Zogmaister sent a letter to the Executive Secretary notifying him that the legislature and the governor had approved the legislation granting the Class VI permit and that the legislation had been signed by Governor Herbert.

30. By letter dated March 28, 2011, the Executive Secretary issued his written approval for the Facility to accept waste. The approval stated: With approval of HCR018 by the Legislature and signing by Governor Herbert on March 22, 2011, the Weber County C&D Landfill is fully authorized to operate as a Class VI commercial landfill.

31. On April 6, 2011, the ALJ issued a Memorandum and Recommended Order to the Utah Solid and Hazardous Waste Control Board relative to Counterpoint’s challenge to the Class IVb Permit. The Recommended Order recommended denial of Counterpoint’s Motion for Summary Judgment; granted the Executive Secretary’s Motion for Summary Judgment; and granted, in part, and denied, in part, Moulding’s Motion for Summary Judgment, which was joined by Weber County.

32. A hearing on the ALJ’s Memorandum and Recommended Order was held on May 12, 2011 before the Utah Solid and Hazardous Waste Control Board. The Board adopted the ALJ’s Recommended Order with minor clarifications. On June 20, 2011, the Board issued a written order adopting the Recommended Order.

33. On June 30, 2011, the Division received Counterpoint’s June 29, 2011 Request for Reconsideration of the Class IVb Permit decision.

34. On July 7, 2011, the Board denied Counterpoint's Request for Reconsideration.
35. Counterpoint did not appeal the Board's decision.
36. Neither the Solid and Hazardous Waste Control Board nor the Department of Environmental Quality has promulgated rules relative to the Solid Waste Management Act.
37. Kerry Gibson was not a commissioner at the time Weber County filed its application for the Class VI Permit, but he was advised of the application at some point after he became a commissioner, and he was supportive of the application.
38. Neither the Class IVb Permit nor the Class VI Permit has been revoked by the Executive Secretary. At the Executive Secretary's direction, the Landfill is currently operating under the Class VI Permit, and Weber County and Moulding are paying the fees applicable under the Class VI Permit.
39. The Weber County C&D Landfill was initially constructed and operated pursuant to the Class IVb Permit. This construction occurred before the approval by the Executive Secretary, the Legislature, and the Governor, of the Class VI Permit.
40. The Weber County Class VI C&D Landfill permit application was submitted with the "Modification" box checked on the application form.

SIGNATURES ON FOLLOWING PAGE:

Parties' signatures to this Joint Stipulation of Undisputed Facts may be in multiple counterparts, may be photocopies or equivalents of original signatures, and may be transmitted by facsimile or electronic mail.

RESPECTFULLY SUBMITTED this 10 day of January, 2012

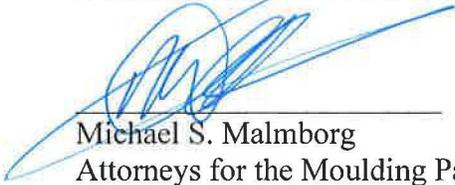
Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

Raymond D. Wixom
Assistant Attorney General
Attorney for the Executive Secretary

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR



Michael S. Malmborg
Attorneys for the Moulding Parties

Parties' signatures to this Joint Stipulation of Undisputed Facts may be in multiple counterparts, may be photocopies or equivalents of original signatures, and may be transmitted by facsimile or electronic mail.

RESPECTFULLY SUBMITTED this ____ day of January, 2012



Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

Raymond D. Wixon
Assistant Attorney General
Attorney for the Executive Secretary

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties

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Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL



Raymond D. Wixom
Assistant Attorney General
Attorney for the Executive Secretary

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

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Attorneys for the Moulding Parties

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RESPECTFULLY SUBMITTED this ___ day of January, 2012

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Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

Raymond D. Wixom
Assistant Attorney General
Attorney for the Executive Secretary



David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of January, 2012, I caused a copy of the forgoing **JOINT STIPULATION OF UNDISPUTED FACTS** to be mailed by United States Mail, postage prepaid, to the following (unless otherwise stated):

Connie S. Nakahara (X) Email
Administrative Law Judge () U.S. Mail, Postage Prepaid
Utah Attorney General's Office () Inter-Office Mail
Environment Division () Hand Delivered
PO Box 140873 () Overnight Mail
Salt Lake City, UT 84114-0873 () Facsimile
cnakahara@utah.gov

Administrative Proceedings Records (X) Email
Officer
DEQAPRO@utah.gov

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glaird@co.weber.ut.us () Facsimile

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- Facsimile



EXHIBIT 2

BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

IN THE MATTER OF:

January 24, 2013

Weber County C & D Class VI Landfill
Solid Waste Permit # 1101

ORDER RETURNING DISPOSITIVE ACTION TO ADMINISTRATIVE LAW JUDGE

On March 1, 2011, the Executive Secretary of the Utah Solid and Hazardous Waste Control Board ("Executive Secretary") issued to Weber County as owner and Moulding & Sons Landfill, LLC ("Moulding") as operator, a Class VI commercial permit for the existing Weber County landfill that had been operating under a Class IVb permit. Counterpoint Construction Company ("Counterpoint" or "Petitioner") filed requests for intervention and agency action on March 14, 2011 and on March 31, 2011 to challenge the permit. Counterpoint was granted standing to intervene in this proceeding and was admitted as a party.

The Executive Director of the Department of Environmental Quality appointed Connie S. Nakahara to act as an administrative law judge for the Solid and Hazardous Waste Control Board to conduct an adjudicative proceeding in accordance with Utah Code Ann. § 19-1-301, and to submit to the Board a proposed dispositive action, including any necessary findings of fact, conclusions of law and a recommended order. Respondents, Executive Secretary, Moulding and Weber County (collectively, "Respondents") jointly filed three motions for summary judgment. Counterpoint filed one motion for summary judgment. On October 25, 2012, Judge Nakahara submitted a *Memorandum and Recommended Order* to the Board.

On Thursday, January 10, 2013, at a regularly scheduled meeting, the Board considered the *Memorandum and Recommended Order*. The Executive Secretary was represented by assistant attorney

general Raymond D. Wixom. Counterpoint was represented by its president, Brice Penrod. Weber County was represented by attorney David C. Wilson. Moulding was represented by attorney, Michael S. Malmborg. The Board was represented by assistant attorney general Sandra K. Allen. Board members present were: Kevin Murray, Jeff Coombs, Ryan Dupont, Larry Ellertson, Brad Mertz, Brett Mickelson, and Dennis Riding. Board member Dwayne Woolley was initially present but had to leave before voting, as he stated before oral comments commenced.

Prior to the meeting, Board members received a copy of Judge Nakahara's *Memorandum and Recommended Order*, a compact disk containing the administrative record of the proceeding before the Administrative Law Judge, and *Respondents' Comments on October 25, 2012 Memorandum and Recommended Order of Connie S. Nakahara, Administrative Law Judge, dated November 7, 2012* ("*Respondents' Comments*"). The Petitioner chose not to submit written comments. At the meeting, the Board also heard oral comments presented by the Petitioner and the Respondents.

The *Memorandum and Recommended Order* proposed that the Board uphold the Executive Secretary's decision to grant the Class VI permit and deny Petitioner's Request for Agency Action on the condition that the Executive Secretary terminate the Class IVb permit. The *Memorandum and Recommended Order* also recommended that the Board await notification from the Executive Secretary that the Class IVb permit has been terminated and if notice is not received, order the Executive Secretary to effectively terminate the Class VI permit. The *Memorandum and Recommended Order* reasoned that the Executive Secretary lacks authority to hold the Class IVb permit dormant until the challenge to the Class VI permit is final. The *Memorandum and Recommended Order* also reasoned that the two permits have different requirements so the permittees are unable to comply with both and therefore both can not exist at the same time, and the Executive Secretary cannot lawfully issue one permit that allows violation of another.

The Respondents commented that the Executive Secretary has enforcement discretion to hold a permit dormant and there is nothing in statute or rule that prohibits him from doing so. The Respondents commented that the Executive Secretary believed he was justified in allowing the continued existence of the Class IVb during the adjudication on the Class VI permit because if the Class VI permit was struck, the Executive Secretary did not want to make Weber County and Moulding shut down and start over with a new application for a Class IVb permit. Furthermore, the Respondents commented that the substantive, health and safety based requirements of both permits are the same; the only difference in the permits is the areas from which the waste may be received.

Counterpoint concurred that the only difference between the permits is the source of the waste, but contended that the Executive Secretary should have held the Class VI permit in abeyance instead of the Class IVb, because that action would not have created a potential for violation of the Class IVb permit which is essentially a subset of the Class VI permit. Weber County commented in response that the Executive Secretary allowed them to choose which permit would be enforced and Weber County requested enforcement of the Class VI permit because the tipping fees are less and people are encouraged to use the facility instead of illegally dumping their waste.

Counterpoint also commented that the Class VI permit should be revoked because the Respondents did not provide proper notice. Moulding commented that Judge Nakahara carefully considered this issue and found that Counterpoint filed a comment in the proceeding and additionally had a year and a half during the adjudication to raise substantive comments and disagreements about the permit but failed to do so. Therefore, since over the last year and a half Counterpoint has had no substantive objections to add to the comment it initially filed, the error in notice was a harmless, procedural error, according to Moulding.

After review of the *Memorandum and Recommended Order* and accompanying record, and after review of the *Respondents' Written Comments* and hearing oral comments from all of the parties, and

after questioning the parties, the Board unanimously found that the Executive Secretary had properly granted Weber County and Moulding a commercial, nonhazardous, solid waste C&D Class VI permit to operate the Weber County landfill. The Board also unanimously found that the Executive Secretary acted reasonably and within his authority in holding dormant and postponing revocation of the Class IVb permit pending final disposition of the challenge to the Class VI permit.

The Board concluded that the Executive Secretary has plenary authority to administer and discretion to enforce the solid waste program as long as his decisions are not arbitrary and capricious. In the absence of applicable law expressly prohibiting the Executive Secretary from holding one permit dormant while the challenge to the second permit proceeds and in the absence of risks to public health and safety, the Board found that the Executive Secretary's decision to hold the Class IVb permit dormant pending the outcome of the challenge to the Class VI permit was reasonable and within the ambit of his administrative authority and enforcement discretion. The Board also determined that a decision to postpone revocation of a permit upon issuance of another permit is reasonable if the Executive Secretary and the permittees know which permit the Executive Secretary will hold dormant and which permit the Executive Secretary will enforce and the information is available to the public. The Board concluded that until the Executive Secretary's decision to issue the Class VI permit is final and no longer subject to appeal, the Executive Secretary may postpone revocation and hold the Class IVb permit dormant.

The Board determined that the dispositive action should be returned to the Administrative Law Judge with directions to submit to the Board a memorandum and recommended order revised as necessary to uphold the Executive Secretary's decision to hold the Class IVb permit dormant and postpone termination pending final resolution of the challenge to the Class VI permit. The Board approved the *Memorandum and Order* in other respects and did not make a determination that any

other provisions should be revised. In particular, the Board approved of the Administrative Law Judge's recommendation to uphold the Executive Secretary's decision to issue the Class VI permit.

The Board determined that the dispositive action should be finalized at the regularly scheduled February 14, 2013, Board meeting.¹ Therefore, the Board requested that the Administrative Law Judge, if possible, resubmit the revised memorandum and recommended order on or about February 4, 2013, which is the typical time frame necessary for the Board to take action at the February 14, 2013 Board meeting.

The Board scheduled a special Board meeting on January 24, 2013, to consider this *Order Returning Dispositive Action to Administrative Law Judge*. Board members present for this action were: Kevin Murray, Jeff Coombs, Ryan Dupont, Larry Ellertson, Brad Mertz, Brett Mickelson, Kory Coleman, Brian Brower and Dwayne Woolley. The Board was represented by Sandra K. Allen, assistant attorney general. The Board unanimously approved this *Order Returning Dispositive Action to Administrative Law Judge*.

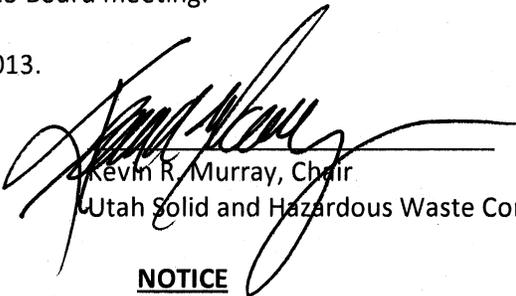
ORDER

The Board orders the proposed dispositive action be returned to the Administrative Law Judge with directions to revise and resubmit to the Board on or about February 4, 2012, a memorandum and recommended order to uphold the Executive Secretary's decision to issue the Class VI permit and to hold the Class IVb permit dormant and postpone revocation pending final resolution of the challenge to the Class VI permit, and thereafter if the Class VI permit survives all appeals and becomes final, the original Class IVb permit must be terminated within thirty days after the Class VI permit becomes final and no longer subject to appeal.

¹ The Board made this determination in order to complete the proceeding prior to March, 2013, when the Board is scheduled to be reorganized. The reorganization will affect the Board's membership and size.

The Board will allow written comments to the revised memorandum and order in accordance with Utah Admin. Code R. 305-6-215(b), but orders that the time for filing written comments and the length be shortened. Therefore, the parties *may* file written comments to the revised memorandum and order with the Board on or before February 11, 2013, not to exceed three pages.² Written comments shall cite to the specific parts of the record that support the comments. Parties are *not* required to file written comments. To file written comments with the Board, a party should send the comments to board counsel, the Executive Secretary and the Administrative Proceedings Records Officer. The service information for board counsel is included in the attached Certificate of Service. In addition, a party should serve its comments on the other parties in this matter. Finally, regardless of whether written comments are filed with the Board, parties may provide oral comments up to five minutes each (Weber County and Moulding combined) at the February 14, 2013 Board meeting following the same order and procedure as the January 10, 2013 Board meeting.

Dated this 24th day of January, 2013.



Kevin R. Murray, Chair
Utah Solid and Hazardous Waste Control Board

NOTICE

The *Order Returning Dispositive Action to Administrative Law Judge* is not the final order in this matter. The Board anticipates that a final order will be issued following the Board's review and action on

² The reasons for the shortened time and length for comments include the Board's desire to make a final decision before it is reorganized, the parties' previous opportunities to provide oral and written comments, and the desire to control unduly repetitious comments.

the revised *Memorandum and Recommended Order* on February 14, 2013. The parties will have the right to petition for judicial review of the Board's final order in this matter.

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of January, 2013, I caused a copy of the *Order Returning Dispositive Action to Administrative Law Judge* to be sent by electronic mail to the following:

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DEQAPRO@utah.gov

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Raymond Wixom
Assistant Attorney General
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EXHIBIT 3

HEARING IN THE MATTER OF

WEBER COUNTY C&D CLASS VI LANDFILL SOLID WASTE PERMIT
#1101, REQUEST FOR AGENCY ACTION
ALJ MEMORANDUM AND RECOMMENDED ORDER

January 10, 2013 * 1:55 p.m.

BOARD MEMBERS

Kevin Murray, Chair
Dwayne Woolley
Dennis Riding
Jeff Coombs, MPH, LEHS
Brent Everett
Scott T. Anderson
Brad Mertz
Brett Mickelson
R. Ryan Dupont, Ph.D.
Larry A. Ellertson

Location: Utah Department of Environmental Quality
195 N. 1950 W., Board Room 1015
Salt Lake City, Utah

Reporter: Dawn M. Perry, CSR
Notary Public in and for the State of Utah

A P P E A R A N C E S**FOR COUNTERPOINT CONSTRUCTION:**

Brice Penrod, President
1598 N. Hill Field Road
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bnpenrod@gmail.com

FOR MOULDING & SONS LANDFILL:

Michael S. Malmborg
Attorney at Law
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(801) 415-3500 (fax)
mmalmborg@djplaw.com

FOR THE EXECUTIVE SECRETARY:

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Assistant Attorney General
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(801) 366-0292 (fax)
rwixom@utah.gov

FOR WEBER COUNTY:

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Attorney at Law
Weber County Attorney's Office
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(801) 399-8304 (fax)
dwilson@co.weber.ut.us

1 **FOR THE BOARD:**

2 **Sandra K. Allen**
3 Solid and Hazardous Waste Control Board
4 Utah Attorney General's Office
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6 P.O. Box 140873
7 Salt Lake City, Utah 84114-0873
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P R O C E E D I N G S

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3 MR. MURRAY: All right. We are ready to
4 reconvene the meeting. We are at agenda item number
5 six, Weber County C&D Class VI Landfill Solid Waste
6 Permit 1101 and Request for Agency Action.

7 There is an ALJ Memorandum and Recommended
8 Order that's been sent to everyone. I think it's
9 been a few weeks ago now, which is a good thing,
10 because it's a lot of reading.

11 And before we begin, we have Sandra Allen,
12 who is the Board's counsel. And Sandra is going to
13 kind of give us an overview of the procedure, remind
14 everyone what we are doing.

15 In particular, we have a procedure we are
16 going to follow today. Also, I want to remind
17 everybody, this is an adjudicative hearing and the
18 decision has to be based on the material that's
19 presented in this record, not new material.

20 So, Sandra, do you want to go over that?

21 MS. ALLEN: (Indistinguishable).

22 MR. MURRAY: Yeah, please.

23 MS. ALLEN: The parties and their
24 representatives in this proceeding are the Executive
25 Secretary, represented by Assistant Attorney General

1 Raymond Wixom; Counterpoint Construction Company,
2 represented by Brice Penrod; Weber County,
3 represented by David Wilson; and Moulding & Sons
4 Landfill, represented by Michael Malmborg.

5 And the board members have -- and the
6 board members have received a copy of the
7 administrative law judge's memorandum and recommended
8 order dated October 25th, 2012. In addition, the
9 board members have received a compact disk of the
10 administrative record of the proceeding before the
11 administrative law judge, and have also received
12 respondents' comments on October 25, 2012, Memorandum
13 and Recommended Order of Connie S. Nakahara,
14 Administrative Law Judge, dated November 7, 2012.

15 The respondents are the Director, Weber
16 County and Moulding, and the petitioner is
17 Counterpoint. The petitioner chose not to submit
18 written comments.

19 The ALJ issued the Memorandum and
20 Recommended Order following consideration of separate
21 motions for summary judgment.

22 Summary judgment is appropriate when there
23 is no genuine issue of material fact and the moving
24 party is entitled to judgment as a matter of law.

25 So, in this matter the parties have

1 stipulated to certain facts and the administrative
2 law judge accepted that -- those stipulated facts.
3 And then the parties made arguments about how the law
4 should apply to those facts and made a recommended
5 order based on her interpretation of the law.

6 And so what you're being asked to do is to
7 review the rest -- review her memorandum and to
8 consider the record and to determine whether you want
9 to adopt the facts, the stipulated facts, the
10 conclusions of law and her recommended order.

11 The purpose of this agenda item is for the
12 Board to hear oral argument from the parties and to
13 determine whether to approve, approve with
14 modification or disapprove the ALJ's Memorandum and
15 Recommended Order or to remand the matter back to the
16 administrative law judge for further action as
17 directed by the Board.

18 Emphasis should be put on the fact that
19 this is an adjudicative proceeding. As such, only
20 the parties will be allowed to address the Board, and
21 the board members may ask questions of any party but
22 will not take any comments from any members of the
23 public.

24 The Board's performing a judicial function
25 and must rely solely on the record and oral argument

1 in arriving at a decision.

2 The parties may refer to evidence in the
3 record and may give legal arguments in response to
4 the Board's questions.

5 The parties have already been advised of
6 the procedure today. And the Board has also received
7 memorandums setting forth the procedure. The parties
8 will have 15 minutes, as timed by the staff, to
9 address the Board.

10 For Weber County and Moulding the 15
11 minutes is combined. The order of presentation is as
12 follows. Mr. Wixom for the Director; Mr. Penrod for
13 Counterpoint and Mr. Wilson for Weber County
14 and/or -- well, I guess it will be Mr. Wilson for
15 Weber County and then Mr. Malmborg for Moulding.

16 At the end of each presentation the Board
17 may ask the presenting party questions. The
18 question/answer period does not count against the
19 parties' allotted 15 minutes.

20 The Board may pose additional comments to
21 the parties -- or additional questions to the parties
22 at the end of the presentations. And then the Board
23 will deliberate and make a decision.

24 Or if further time is required and you are
25 not ready to make a decision at this meeting, then

1 the Board may table the matter for consideration and
2 decision at a future meeting.

3 Following oral argument there will be
4 discussion among board members. And following the
5 discussion the chair will entertain motions. And
6 following Board action, counsel for the Board will
7 draft an order memorializing the Board's decision and
8 the parties' procedural rights.

9 And a note to the board members. When
10 making a motion, specify in the motion whether you
11 want to approve or disapprove all or only a part of
12 the administrative law judge's Memorandum and
13 Recommended Order and, if applicable, identify the
14 relevant parts.

15 If you wish, you can adopt the
16 administrative law judge's Memorandum and Recommended
17 Order exactly as it was proposed. If you want to
18 modify it, then you should make your modifications as
19 specific as possible in your motions.

20 After the Board votes on the proposed
21 modifications -- I submitted -- I had mailed to each
22 of you kind of different types of motions that you
23 could present and entertain, depending on what you
24 decide to do in this matter. If you wanted to direct
25 the administrative law judge to make changes and

1 resubmit a modified memorandum and recommended order,
2 you may also do that.

3 MR. MURRAY: Okay. Thank you, Sandra.

4 Mr. Woolley had a comment that he wanted
5 to make before we proceed.

6 MR. WOOLLEY: Just for the record is I --
7 I serve on the Solid Waste Association of North
8 America, which is normally called SWANA. It's a --
9 represents many landfills and garbage entities
10 throughout the United States and other countries. I
11 serve on that Board of Directors for the -- for the
12 state chapter with Mr. Laird from Weber County.
13 That, in my mind, does not constitute a conflict but
14 it is a fact.

15 Also, I am the general manager of a
16 landfill operating in -- in Salt Lake County, so I do
17 have interest in landfill issues.

18 And I guess the last thing, and for the
19 record, I do have a conflict; I will be leaving, if
20 we are not done, at 2:45.

21 MR. MURRAY: Okay.

22 Anyone have any concerns?

23 MS. ALLEN: I would just like to clarify
24 that Mr. Woolley is specifying he has a conflict in
25 the time, not that he has a conflict of interest in

1 hearing this matter.

2 MR. MURRAY: Good point. Okay.

3 One other comment, just so I can remind
4 everyone. We have had some technical issues with the
5 microphone. If you touch it or grab it, it's going
6 to fall apart. So it's been set to be in perfect
7 position. Anybody touches it gets a strike.

8 With that, Mr. Wixom, you may proceed.

9 It will come from Arlene.

10 MR. WIXOM: Mr. Chairman, Members of the
11 Board. The Weber County Class VI C&D landfill permit
12 was properly applied for, properly issued, properly
13 approved by the legislature and the governor, and the
14 Board should uphold it today.

15 There are two issues with Judge Nakahara's
16 Memorandum and Recommended Order that the Executive
17 Secretary especially wants to address today. These
18 issues have to do with his authority to administer
19 his program and with the discretion that he needs and
20 believes that he has to administer the program.

21 First, the Executive Secretary made a
22 decision at the time that he issued the Class VI
23 permit to not terminate the original Class IVb
24 permit. He believes that he had the discretion and
25 the authority to refrain from terminating the first

1 permit.

2 The second matter is what the Board should
3 do with Judge Nakahara's recommendation as to how to
4 finally dispose of the Class IVb permit.

5 As I mentioned, the Executive Secretary
6 thinks that he can leave the Class IVb permit in
7 existence while the adjudication on the Class VI
8 permit takes place. He believes that this is
9 appropriate in these circumstances because the Weber
10 County landfill has been subject to adjudication and
11 challenge for over three years. He's faced with a
12 matter that he's got a permit -- two permittees,
13 Weber County and Moulding, that applied for -- for
14 the initial Class IVb noncommercial permit.

15 They decided that they wanted to convert
16 their facility to a commercial, that is, Class VI
17 permit, and they'd like to be able to remain in
18 operation while the challenges to the permits go on.
19 The first permit was challenged. That one has been
20 completed. The second one is now subject to
21 challenge.

22 When a facility with an existing permit
23 receives a permit of a different class, there are two
24 logical approaches to how you can terminate the first
25 permit.

1 One of those approaches would be to say
2 that the first permit terminates by operation of law.
3 That means it automatically terminates when some
4 event takes place. For example, when a landfill -- a
5 solid waste landfill receives a permit, the permit
6 itself says that the permit will terminate in ten
7 years, unless the permittee makes a timely request
8 for a renewal permit. If there is no request, at the
9 end of ten years the permit ends. The Executive
10 Secretary doesn't have to do anything; the permittee
11 doesn't have to do anything; the permit ends.

12 The other approach, the second
13 alternative, is that to terminate that first permit
14 something has to happen. The Executive Secretary has
15 to do something. Neither the Solid and Hazardous
16 Waste Act nor the solid waste rules specify when an
17 existing permit, that is being replaced by a new
18 permit of a different class, is to terminate.

19 If the permit were to terminate
20 automatically by operation of law, one would expect
21 that the Solid and Hazardous Waste Act, the rules or
22 the permit itself would say so. There is no such
23 statement in the case of this permit of the Weber
24 County Class IVb permit or the Class VI permit.

25 It's difficult to infer some time that

1 would be appropriate to say that, well, by operation
2 of law this permit terminated. For example, the
3 Executive Secretary issued the permit, the Class VI
4 permit, but the Class IV permit could not terminate
5 at the time that he issued it because the Class VI
6 permit still had to go to the legislature and the
7 governor for approval.

8 So one would be puzzled -- troubled to
9 find some sort of automatic termination by operation
10 of law. If Judge Nakahara had believed that the
11 first permit terminated by operation of law, she
12 would have said so. And she probably would have
13 identified in her memorandum what event she thought
14 terminated that first permit. Her findings and
15 conclusions would have probably said that there was
16 no permit for the Executive Secretary to refrain from
17 terminating. She would have said it was simply gone,
18 it had ceased to exist.

19 Assuming that the permit didn't terminate
20 automatically and that there had to be some event
21 take place to terminate that first permit, it's
22 reasonable to assume that the Executive Secretary had
23 to take some action, for example, writing a letter to
24 the permittee saying, "Your first permit is
25 terminated."

1 If that action -- if the Executive
2 Secretary has to take some action, the implication is
3 that he has at least some level of discretion in when
4 to do it. If it doesn't happen automatically, he's
5 got to decide when and how to do it. If he has some
6 discretion and if no standard is set out to say what
7 that discretion is, we would presume that the
8 discretion he has is what is reasonable under the
9 circumstances.

10 Now, under most circumstances the
11 Executive Secretary is not interested in having two
12 permits in existence. Under most circumstances he
13 would probably say that's unreasonable. Under this
14 circumstance he's concluded that it's reasonable and
15 appropriate and within his authority to leave that
16 Class IV permit in existence while the Class VI
17 permit is argued and eventually its validity is
18 determined.

19 In this case the Executive Secretary, in
20 consultation with Weber County and Moulding, decided
21 that it was appropriate to leave the Class VI permit
22 in existence. If he had not done so, if he had
23 terminated the -- the Class IV permit and if, despite
24 the weaknesses that the respondents perceived in
25 Counterpoint's case, Counterpoint were to have --

1 were to prevail, the Class VI permit would cease to
2 exist. And without a Class IV permit, Weber County's
3 landfill would have to cease operations. To return
4 to operation in the shortest possible time, Weber
5 County would have to apply for a new permit, probably
6 a new Class IVb permit.

7 Counterpoint might challenge that permit.
8 If Weber County wanted to actually operate a
9 commercial permit, it would have to again apply for a
10 Class VI permit and go through the process of seeking
11 approval from the legislature and the governor.
12 Counterpoint might well challenge the Class VI
13 permit.

14 To avoid these unreasonable risks, the
15 Executive Secretary, as I said, has refrained from
16 terminating the Class IV permit. As a result, right
17 now we have a Class IVb permit that is final and we
18 have a Class VI permit that is effective but it is
19 not final. It doesn't become final until all of
20 these adjudications are complete. Mr. Malmborg may
21 discuss this matter further in his presentation.

22 The Executive Secretary has directed
23 Weber County and Moulding to operate the landfill in
24 accordance with the Class VI permit and its
25 requirements. He has exercised his enforcement

1 discretion to not enforce Class IVb permit conditions
2 that might be inconsistent with the conditions of the
3 Class VI permit. As I said, neither the Executive
4 Secretary nor the permittees desire to have two
5 permits. As soon as the Class VI permit is final,
6 the Executive Secretary will terminate the Class IVb
7 permit.

8 Judge Nakahara thinks that it is
9 unreasonable and inappropriate for the Executive
10 Secretary to issue two permits when they contain
11 conflicting waste provisions.

12 Now, to be clear, the provisions that are
13 in conflict are these. The Class IVb permit limits
14 the landfill to taking wastes generated within the
15 boundaries of Weber County or pursuant to contracts
16 with local governments. Those of you who
17 participated in the first adjudication may remember
18 that issue. Those of you for whom this is new, you
19 don't want to spend any more time thinking about that
20 than you have to.

21 Under the Class VI permit the Weber County
22 landfill can take waste from anywhere. There are no
23 differences in operating conditions. The landfill
24 can take construction and demolition debris waste.
25 They have to handle it the same way, whether they are

1 operating under a Class IV permit or a Class VI
2 permit.

3 As I said, the Executive Secretary has
4 discretion, enforcement discretion, to decide how he
5 will enforce the permit conditions. He's not free to
6 ignore the conditions of a permit, he's not free to
7 allow a permittee to ignore them, but, of necessity,
8 he has the ability to decide when and how to enforce
9 them.

10 How much time do I have?

11 MR. BEKKEMELLOM: Four minutes.

12 MR. WIXOM: The Executive Secretary, in
13 consultation with the permittees, could have made
14 another choice. He could have decided to require the
15 permittees to operate under the Class IVb permit
16 while the Class B -- Class VI permit was being
17 challenged. He could have decided to do that. They
18 would have then been restricted in the waste that
19 they could take. That would have been work -- would
20 have worked. But under those circumstances you would
21 still have two permits; you'd have one final permit,
22 one permit that was, you might say, held in abeyance
23 or dormant. Under those circumstances, though it
24 would have been the commercial permit, the Class VI
25 permit, the permit that the permittees actually

1 desire to operate under, they could have done it that
2 way.

3 What, I ask rhetorically, is the practical
4 difference between deciding to allow the facility to
5 operate under the Class VI permit or to operate under
6 the Class IV permit? Had the Executive Secretary
7 decided to require that the Class IV permit be
8 complied with, we don't know whether Counterpoint
9 would have determined to challenge that decision or
10 not.

11 Judge Nakahara notes that there is no
12 provision in the Solid and Hazardous Waste Act that
13 allows a landfill to hold two simultaneous permits.

14 The Executive Secretary notes that there
15 is also no provision that says that they can't.

16 Judge Nakahara said that it is
17 inappropriate for the Executive Secretary to hold a
18 permit dormant. Dormant is simply a shorthand way of
19 saying that the Executive Secretary has discretion to
20 say, "Follow the Class VI permit and I'm not going to
21 enforce contradictory conditions in the Class IVb
22 permit."

23 The Executive Secretary did not
24 arbitrarily or capriciously determine which permit or
25 which permit conditions to hold dormant or to

1 enforce, nor did he abuse his discretion. Weber
2 County has the right to convert its facility to a
3 commercial landfill if it wants to and if it meets
4 the requirements for doing so. And it's appropriate
5 for the Executive Secretary, when they meet those
6 requirements, to allow them to operate under the
7 permit that they want to operate under.

8 To resolve the two permits problem,
9 Judge Nakahara recommended that the Board await a
10 notification from the Executive Secretary that the
11 Class IVb permit had been terminated. And if the
12 Board didn't get that notice, that the Board should
13 effectively terminate the Class VI permit.

14 The problem with this approach is that
15 within 30 days the Executive Secretary and the
16 permittees will not know whether the Board's decision
17 in this case is final. So the recommendation is that
18 rather than using the language that the
19 administrative law judge has proposed, that the Board
20 direct the Executive Secretary to inform the Board
21 within 30 days after the Class VI permit becomes
22 final that he has terminated the Class IVb permit.

23 If Counterpoint doesn't appeal the Board's
24 decision, assuming, of course, that the Board decides
25 in favor of the respondents rather than

1 Counterpoint -- if the Board -- if Counterpoint
2 doesn't challenge the Board's appeal -- pardon my
3 tongue -- if the Board [sic] doesn't challenge the
4 Board's decision to the Court of Appeals, that would
5 mean that within 60 days the Executive Secretary
6 would report back to the Board that he had terminated
7 the Class IVb permit. Otherwise, that would occur 30
8 days after the Court of Appeals makes its final
9 decision.

10 MR. MURRAY: Mr. Wixom, I have a question
11 that I'll ask the Board. And it's obviously not the
12 position of the Board, I'm asking this just from a
13 Kevin Murray standpoint.

14 I kind of see four issues here. We have
15 conflicting permits, which you've talked about.

16 So the next question is which one of them
17 applies during operation.

18 Our third issue. If for some reason the
19 Class VI permit is struck -- we want to allow these
20 people to stay in business and not have to shut down
21 and start over again; I understand that. I also
22 understand we don't want to get in a situation where
23 someone could tie up a permit through endless
24 litigation and delays and have people not be able to
25 operate.

1 When the Director made the decision to
2 hold the Class IVb permit in abeyance, if you will,
3 and he made the decision that it was going to allow
4 them to operate under the Class VI, and we were going
5 to follow the Class VI procedures and standards and
6 allow them to take the commercial waste, was that --
7 was that decision communicated anywhere in writing so
8 that someone could tell that we are operating under
9 the Class VI permit, the IVb is being held in
10 abeyance until the adjudication finishes?

11 I guess my question is, did he -- did the
12 Director just decide this or was it communicated some
13 way so that the -- I'm thinking about it from two
14 standpoints. Number one, I don't think we want to
15 get in a situation where we've got the regulated
16 community with two conflicting permits and them not
17 sure which one they are operating under. And I think
18 the general public would probably want to know which
19 one is being applied as well. So my question is, how
20 was it communicated?

21 MR. WIXOM: The Executive Secretary wrote
22 a letter to the permittees, to Weber County and to
23 Moulding, after the legislature and the governor had
24 approved of the landfill permit and after a
25 representative of Weber County had informed the

1 Executive Secretary that all of the statutory
2 requirements for approvals had been completed.

3 In that letter the Executive Secretary
4 told the permittees that they were to operate under
5 the Class VI permit. I do not recall if the
6 Executive Secretary communicated in writing that he
7 was -- that they were not to operate under the
8 Class IVb permit.

9 And as to how the public would be aware of
10 it, I don't believe that there -- that there was any
11 public notice of this decision. The public would
12 have to review the files of the Division to know that
13 that letter directing operation under the Class VI
14 permit had been sent to the permittees.

15 MR. MURRAY: But that letter would be in
16 the file.

17 MR. WIXOM: Yes.

18 MR. MURRAY: And probably in this huge
19 record.

20 MR. WIXOM: It's probably in the huge
21 record.

22 MR. MURRAY: All right. Any other -- any
23 questions that you want to ask Mr. Wixom?

24 Mr. Woolley.

25 MR. WOOLLEY: The question -- you

1 mentioned the ten-year renewal. It used to be a
2 five-year renewal so is this one -- the new permit
3 was requested on the old five-year plan or the new
4 ten-year plan?

5 Does that make sense?

6 MR. WIXOM: It does make sense. And what
7 you have said, Mr. Woolley, is correct. For years
8 solid waste permits were issued for five years. Now
9 they are issued for ten years. And this one, to my
10 recollection, was -- both the Class IV and the
11 Class VI were issued for ten-year periods.

12 MR. WOOLLEY: Okay.

13 MR. MURRAY: Any other questions at this
14 time for Mr. Wixom?

15 No? All right. Thank you.

16 Mr. Penrod, for Counterpoint.

17 MR. PENROD: I am Brice Penrod. I am
18 president of Counterpoint Construction Company.

19 Let me address first the last issue that
20 Mr. Wixom brought up, the two permits which are in
21 force and how do you enforce it.

22 In my view, the Executive Secretary erred
23 when he made the Class VI permit operational over the
24 Class IVb permit.

25 Had he made the Class IVb permit

1 operational, he could have enforced both permits
2 simultaneously.

3 As it happens now, you have one permit
4 which is not enforced. It was a valid permit. I
5 would -- this Board needs to decide whether that is
6 an acceptable practice, because I assure you that had
7 he made the IVb permit operational during this entire
8 time, the Class VI permit would have equally been
9 operational.

10 In 1991 the Environmental Quality Code was
11 enacted. It created the Division of Solid and
12 Hazardous Waste to administer in 1961 the Solid and
13 Hazardous Waste Act; 1962, the Hazardous Waste
14 Facility Siting Act; and 1965, Solid Waste Management
15 Act.

16 On the first two this Board has done a
17 reasonable job in promulgating rules to meet your
18 mandate.

19 On the third you have done nothing at all.
20 And explicit -- and implicit requirements exist
21 within the act, rule-making. That act is the Solid
22 Waste Management Act.

23 I suggest 20 years is far too long to
24 begin the process of promulgating rules.
25 Accordingly, I move this Board to begin the process

1 of promulgating rules relevant to the administration
2 of the Solid Waste Management Act.

3 The second issue. The judge agrees with
4 us that the Executive Secretary must send
5 interested-party letters to certain property owners
6 but did not. Due to a typographical error, however,
7 the citation substitutes a two for a three. And that
8 causes the citation to reference nonexistent
9 sections. This should not be allowed to stand, as
10 the error is obvious.

11 I know from personal experience that
12 Dennis Downs was able to make the correction and
13 issue these letters to properly notice within a
14 thousand feet.

15 I join the judge in requesting that this
16 Board make appropriate corrections to the rules in
17 this regard. The judge's conclusions at -- of law at
18 two seven should stand.

19 The judge has held that any failure to
20 notify us was harmless error. It was not. The
21 principal reason that we filed our request for agency
22 action was because we were aggrieved as a result of
23 not being notified by anyone about the intent to
24 apply for a commercial permit. No one notified us;
25 not the Division, not Weber County, not Moulding.

1 This, despite nearly constant communications on the
2 previous proceeding.

3 The cost of this proceeding alone takes it
4 well beyond harmless error. The judge's conclusion
5 of law at eight should be modified to change
6 "harmless error" to read "not harmless error."

7 The judge has stated that it is reasonable
8 for the Executive Secretary to initiate a commercial
9 permit to any applicant regardless of profit or
10 status. She does this through the application of
11 some very simply logic. She says that even though a
12 commercial facility is, by definition, one that is
13 for profit, it may also include one that is not for
14 profit, because that is not prohibited by statute.

15 Section 19-6-102 definition states at
16 (3)(a), "Commercial nonhazardous solid waste
17 treatment storage -- or disposal facility." It means
18 a facility that receives, for profit, nonhazardous
19 solid waste for treatment, storage or disposal.

20 The judge's interpretation allows the
21 definition to include its exact opposite. If you buy
22 into this, consider its implications on the second
23 part of the same definition. Section B of that same
24 section says, "Commercial does not include a facility
25 that receives waste for recycling," which, by this

1 measurement of logic, will now -- can now mean does
2 not receive waste for recycling.

3 And, next, "Receives waste to be used as a
4 fuel," which can now be meant to receive waste to not
5 be used as fuel and so forth. That means if -- for
6 any for-profit landfill now means -- I'm sorry. This
7 means that any for-profit landfill that now meets
8 exemptions by definition can now -- and that's been
9 the end of funding from these sources, because all
10 that remains go away under that line of logic.

11 Accordingly, I move that this Board modify
12 conclusions of law at 11 to say that a commercial
13 facility is for-profit unless otherwise attempted.

14 Additionally, I move this Board to void
15 the commercial permit at this time because no one
16 attempted to notify any property owners of the intent
17 to file for the commercial permit. This is a sure
18 violation of the intent of your public participation
19 rules.

20 Thank you.

21 MR. MURRAY: Mr. Penrod, I want to make
22 sure I understand a couple of your points.

23 MR. PENROD: Yes, sir.

24 MR. MURRAY: You're saying both permits
25 could have been in force at the same time.

1 MR. PENROD: Yes.

2 MR. MURRAY: How -- how does that work?
3 Because both permits allow different classes of
4 waste, so how do we enforce both permits?

5 MR. PENROD: They both allow the same
6 class of waste. The sole distinction between the
7 permits is the source of the waste.

8 MR. MURRAY: That's what I mean. So if we
9 take -- if the source of the waste that's available
10 to a Class VI permit is accepted, does that not
11 violate the IVb permit?

12 MR. PENROD: Correct. What that means is
13 if the IV -- if the IVb permit was held to be
14 operational, all the waste acceptable under the IVb
15 permit also fall into the category of the Class VI
16 permit.

17 MR. MURRAY: But don't those conflict --
18 that conflicts. The IVb permit doesn't allow waste
19 to come from the same locations that a Class VI
20 permit does. So you've got a conflict if we try to
21 enforce both of them.

22 MR. PENROD: Correct. Sub -- the Class
23 IVb permit sources is a subset of the Class --

24 MR. MURRAY: I understand that, but I'm
25 not understanding how you enforce both of them

1 because it puts -- the Class IVb is a subset of VI
2 so --

3 MR. PENROD: Right.

4 MR. MURRAY: -- if I enforce both of them
5 I'm accepting -- I'm accepting material under VI that
6 I can't under IVb, so the IVb permit is being
7 violated.

8 MR. PENROD: In order -- had he made the
9 IVb permit operational, the Class VI permit would not
10 have been violated.

11 MR. MURRAY: The Class VI wouldn't but the
12 IVb would, because the VI is allowing waste to come
13 in that can't come under the IVb.

14 MR. PENROD: Again, had he made the IVb
15 permit operational, the Class VI permit would not
16 have been violated. Because he made the Class VI
17 permit operational, the Class IVb was not -- was
18 violated.

19 MR. MURRAY: Okay. Any other questions?
20 I guess I have -- well, I do have one other.

21 MR. PENROD: Yes, sir.

22 MR. MURRAY: In regards to your
23 profit/nonprofit argument. Are you suggesting that
24 municipalities can't have enterprise divisions
25 because most cities do have enterprise divisions who

1 do have an objective to make a profit, to raise money
2 for operations of those divisions.

3 MR. PENROD: I'm -- what I am saying is
4 that that really is irrelevant. You folks have
5 already determined that the landfill was operating
6 not for profit in our last meeting. What I am
7 suggesting is that -- is that only for-profit
8 facilities can be commercial.

9 MR. MURRAY: Okay.

10 Mr. Dupont?

11 MR. DUPONT: Yeah.

12 So state for me again what you see as the
13 difference between the IV and the VI permits.
14 Because I just heard you say one thing that just
15 contradicts what you just said right there. Is there
16 anything within the leg -- within the rules that
17 would differentiate a Class IV and a Class VI based
18 on profit or not?

19 MR. PENROD: To my mind, the sole
20 distinction between --

21 MR. DUPONT: What do the rules say about
22 that, about the distinction between the -- does it
23 say anything about profit or does it say something
24 about the source of the waste that they can accept?

25 MR. PENROD: No, it doesn't say anything

1 about the source. It's only whether it's for-profit
2 or not-for-profit.

3 MR. DUPONT: All right. That's not what
4 you said --

5 MR. PENROD: No, I said the permit itself,
6 the permits, not the rules but the permits themselves
7 have different requirements. Under the IVb permit
8 the requirement is that they accept waste only from
9 Weber County or under -- under an agreement.

10 MR. DUPONT: The jurisdiction of the
11 owners.

12 MR. PENROD: With other --

13 MR. DUPONT: Yeah.

14 MR. PENROD: -- counties or --

15 MR. DUPONT: Do the rules say anything
16 about profit or not profit?

17 MR. PENROD: The rules say that --
18 commercial facilities for profit.

19 MR. DUPONT: Is that -- is that correct?

20 MR. PENROD: Yes.

21 MR. DUPONT: We'll have to check that
22 because I -- I --

23 MR. MURRAY: Let's -- can I -- can I
24 interject, Dr. Dupont, because when we -- when we
25 determined before that they were nonprofit, it was

1 because of the material they were selected. They
2 qualified as a nonprofit facility under the act
3 because of limitations they were willing to accept on
4 the nature of the waste that they bring.

5 We are changing the -- they are changing
6 their desire to bring waste into here by accepting
7 material that a nonprofit can't accept under a IVb
8 but can under a VI.

9 MR. DUPONT: VI.

10 MR. MURRAY: So I'm not seeing the profit/
11 nonprofit distinction important because the VI allows
12 it to bring material -- that's my whole point with
13 regard to we can't have both permits out there at the
14 same time because they conflict, because the VI --
15 the VI allows them to become a for-profit
16 organization by accepting waste they could not
17 otherwise accept under the nonprofit categorization
18 before.

19 I guess I'm not following you. I'm sorry.

20 MR. DUPONT: Well -- I mean, I thought the
21 permits were -- were designed to restrict the source
22 of waste coming into a facility rather than whether
23 that -- I mean, if I'm a private landfill could I
24 not -- I guess I'm not able to get a Class IV permit;
25 is that correct?

1 MR. MURRAY: You can, you just can only
2 accept waste from --

3 MR. MICKELSON: The district.

4 MR. MURRAY: -- the district or with
5 governments.

6 MR. DUPONT: And if I'm a -- if I'm a
7 municipal government, can I get -- I mean, I would
8 qualify for a Class VI if I accepted waste from out
9 of my jurisdiction so -- I mean, I don't see a
10 profit -- I mean, it's not like saying a private
11 enterprise can only get a Class VI. That's not the
12 -- the rules don't say that, do they, anywhere?

13 MR. MURRAY: That's my understanding but,
14 again, that's why --

15 MR. DUPONT: I'm not asking the --

16 MR. MURRAY: -- I'm looking at enterprise
17 organization, because we have a lot of
18 municipalities, for example, on the waterfront who
19 charge service fees for the purpose of making a
20 profit.

21 Mr. Woolley, you had a comment?

22 MR. WOOLLEY: And maybe -- not to muddy
23 the water but I think there's -- in my mind there is
24 a difference between the operating entity and the
25 entity itself. I think we have -- the LDS Church,

1 for example, is a nonprofit company but they own
2 profit businesses.

3 MR. DUPONT: Yeah.

4 MR. WOOLLEY: And -- you know, and they
5 treat that business as a business that's for-profit
6 but they -- you know, the owning entity is a
7 nonprofit company. And I think maybe we have the
8 same type of thing here, is, you know, Weber County
9 is nonprofit, but the landfill wants to be a
10 commercial enterprise and so they've applied for a
11 commercial enterprise -- you know, that's what -- the
12 statute allows that. Does that -- that's what I'm
13 seeing and I -- it makes sense.

14 MR. DUPONT: I'm not seeing a conflict in
15 the permits and the profit/nonprofit designation.
16 I'm just wondering --

17 MR. WOOLLEY: And so I don't either
18 because we are talking, one is the operating entity
19 and the other one is, you know, the actual --

20 MR. DUPONT: Owner.

21 MR. WOOLLEY: -- the owner.

22 MR. MURRAY: Okay. Other questions that
23 you want to pose at this time? Other questions?

24 Okay. Thanks, Mr. Penrod.

25 Mr. Wilson for Weber County.

1 MR. MALMBORG: Well, Mr. Mike Malmborg.

2 MR. MURRAY: I'm sorry, Mr. Malmborg.

3 MR. MALMBORG: If that's all right.

4 MR. MURRAY: You bet. I -- who -- yes.

5 For Moulding or for Weber County?

6 MR. MALMBORG: Mike Malmborg. I'm on
7 behalf of Moulding & Sons Landfill, LLC.

8 I didn't bump it.

9 MR. MURRAY: Okay.

10 MR. MALMBORG: Moulding & Sons is the
11 operator on behalf -- operates the landfill on behalf
12 of Weber County.

13 Judge Nakahara's proposed order represents
14 her careful review of this matter over the last year
15 and a half. I think that her order is -- is -- it is
16 careful, it's -- it's correct and -- with one
17 exception, which we -- that we discussed about the
18 termination of the noncommercial permit. But she's
19 carefully reviewed this and -- and gone into great
20 detail on it, and we agree with -- with her
21 assessments and would ask that her order be adopted
22 with the -- with the exception about the termination
23 of the noncommercial permit.

24 Prior to this matter, the commercial
25 permit, there was a long-litigated issue on the

1 noncommercial permit. Weber County got a
2 noncommercial permit and Counterpoint contested that.
3 This Board determined that the noncommercial permit
4 was validly issued and that Counterpoint's assertions
5 were wrong.

6 Counterpoint mistake -- it confuses the
7 matter by saying you determined that the landfill was
8 not-for-profit. That's not right. This Board
9 determined that the noncommercial permit was validly
10 issued.

11 When the commercial permit was issued,
12 Counterpoint's position is that as soon as the
13 commercial permit is issued, the noncommercial permit
14 needs to be immediately terminated.

15 The problem with that is, as Mr. Wixom
16 indicated, when you have a noncommercial -- or a
17 commercial permit that's issued to a -- the holder of
18 a noncommercial permit operating a landfill, if you
19 immediately have to terminate that existing
20 noncommercial permit before the commercial permit's
21 even finally determined to be valid and someone like
22 Counterpoint comes along and challenges that, you are
23 left in an awkward situation where you don't yet know
24 whether your commercial permit is even going to be
25 valid and final and upheld. And they are demanding

1 that the long-litigated and finally determined by
2 this Board valid noncommercial permit, they say that
3 needs to be immediately revoked.

4 Well, the problem is if this Board
5 ultimately determines, well, the commercial permit is
6 invalid, well, then the County and Moulding need to
7 go back and reapply for the noncommercial permit,
8 which could then be challenged, which would then lead
9 to another year and a half of going down the road of
10 litigation.

11 We agree that the -- there is nothing in
12 the code that indicates that the two permits can't
13 co-exist at the same time. The -- we agree that the
14 Director should have the discretion to -- to -- we
15 are not talking about two final permits, and they are
16 not enforcing both.

17 We disagree that -- Counterpoint's
18 position is apparently that both could have been
19 enforced. Their apparent position is that only waste
20 from within Weber County can be accepted and that
21 won't violate the commercial permit, but the fees,
22 the additional fees that are associated with the
23 commercial permit will need to be paid and, you know,
24 the -- the detrimental side to both permits are going
25 to be enforced.

1 It's just not reasonable. And there is
2 nothing -- most importantly, there is nothing that
3 would direct that that's a requirement. They can't
4 point to anything.

5 Again, we would just request that
6 following this -- Judge Nakahara has asked, as
7 proposed, that this Board direct that after it issues
8 its decision adopting -- regarding the proposed
9 order, that the Executive Secretary terminate within
10 30 days the -- the commercial permit. We are fine
11 with the termination of the commercial permit, but 30
12 days is not the appropriate time to do it from --
13 from the decision of this -- this Board.

14 The appropriate time to terminate that is
15 within 30 days of the permit becoming final. And
16 that will happen in one -- if this Board makes its
17 determination, Counterpoint has 20 days to file a
18 request to reconsider. If they don't, then this
19 Board's decision becomes final and then they have 30
20 days to file an appeal.

21 If they don't file an appeal, then the
22 permit becomes final, the commercial permit is final
23 and there is no reason anymore to have this
24 noncommercial permit and it can be terminated within
25 30 days of that.

1 If Counterpoint files an appeal, well,
2 then, the Court of Appeals is going to have to
3 determine whether or not Judge Nakahara's decision
4 and the Board adopting that decision was properly
5 made. And if it were to uphold the decision, then at
6 that point the commercial permit would be final and
7 within 30 days of that I don't think that the
8 respondents would have any problem with the
9 noncommercial permit being terminated. It just
10 doesn't make sense to terminate the noncommercial
11 permit when we are still trying to find out whether
12 this commercial permit is valid. And it creates a
13 real potential endless cycle of challenges and --
14 which, unfortunately, for the last three years we've
15 already kind of been stuck in. But the judge's
16 decision is -- is well thought out.

17 I will just address briefly; Counterpoint
18 talked about the notice. The judge carefully looked
19 at this issue and determined Counterpoint did have --
20 Counterpoint knew and filed a comment. They filed a
21 comment in the proceeding and the judge looked at
22 that comment and said, "You know what? In your
23 comment and in this entire year and a half
24 proceeding, Counterpoint, you have not made one
25 substantive comment or disagreement about the permit,

1 the commercial permit. The only thing you've said is
2 we didn't give notice. But you did file a comment so
3 you obviously knew about it."

4 And the judge was correct that it's
5 harmless error if they have -- they didn't have
6 anything substantive to add over the course of a year
7 and a half and they did file their comment. So, you
8 know, their complaint about some procedural notice
9 error is just -- is just harmless.

10 So we would ask that this Board adopt
11 Judge Nakahara's proposed order with the exception,
12 to clarify, that the noncommercial permit be
13 terminated within 30 days of this order becoming
14 final.

15 Thank you.

16 Do you have any questions for me?

17 MR. MURRAY: Any questions?

18 MR. MALMBORG: No?

19 MR. MURRAY: Okay. Thank you.

20 MR. MALMBORG: Thank you.

21 MR. MURRAY: Okay.

22 MR. WILSON: Do I have any time,

23 Mr. Chair?

24 MR. MURRAY: Yeah, I believe you do.

25 Is there time left?

1 MR. BEKKEMELLOM: Yes.

2 MR. MURRAY: Yes. Please.

3 MR. BEKKEMELLOM: Eight minutes left.

4 MR. WILSON: Eight minutes.

5 MR. MURRAY: Will you please state your
6 name and who you are representing?

7 MR. WILSON: David Wilson for Weber
8 County.

9 And on a personal note, if you saw me, I
10 had teeth before but I can't articulate clearly; I'm
11 in the middle of a transplant, two of them, so I've
12 taken them out so I could speak clearly to the Board.

13 And I'm not supposed to touch that. You
14 say it's placed perfectly, but it may depend on your
15 height.

16 MR. MURRAY: Arlene, I'll let you defend
17 that.

18 MR. WILSON: In any event, I think the
19 things that need to be said have been said so I'm
20 going to briefly give you a one- or two-minute
21 history of the landfill in Weber County, the C&D
22 Landfill. And I know C&D landfills are probably not
23 high on your radar with the -- more things you have
24 that have more gravity for you to administer and deal
25 with.

1 Weber County lost Mr. Moulding -- used to
2 run a private landfill. Am I echoing? He closed
3 that landfill because he -- he had filled it as high
4 as his permit would allow. It -- we didn't have one
5 for a couple years. Mr. Laird, our director of -- of
6 solid waste was looking for a spot.

7 In any event, Mr. Moulding owned some
8 ground adjacent to Counterpoint Construction and
9 Mr. Penrod, they own ground out there as well, and we
10 negotiated an agreement for Mr. Moulding to operate
11 the landfill, the County would purchase and own the
12 landfill.

13 The County would prefer -- I had three
14 commissioners at the time -- still do -- they've
15 changed -- but they have a great interest in -- in
16 privatizing things if they can. The only reason the
17 County got into this process was, with no competition
18 they were a little concerned that the customers of
19 the C&D landfill might be gouged. I better clarify.
20 Mr. Moulding had no history of that, but, still, if
21 you don't have any competition, that's a concern, and
22 the only reason the County Commission entered into
23 this agreement.

24 They applied for it, the first class for,
25 January 22nd, 2009. We began operations on

1 October 19th of 2009.

2 Counterpoint filed an action to challenge
3 that, as has been mentioned, and this Board made a
4 final determination from which Counterpoint did not
5 appeal.

6 However -- and I want to say this as
7 kindly as I can. Mr. Penrod is tenacious and I think
8 he was well-meaning and -- well, at least sincere in
9 his belief that when we had the Class IV permit he
10 initially believed we could only accept waste from
11 the unincorporated area of Weber County. And when
12 certain people brought waste to there, he would
13 videotape them and challenge them. And, in fact, I
14 had a couple of city attorneys tell me that they were
15 called and told it was illegal for them to bring
16 waste to Weber County.

17 I said, "No. I understand that
18 Counterpoint believes that. They filed that but that
19 is not true."

20 That was the genesis, really, of Weber
21 County going to a commercial permit. That and Davis
22 County had asked if they could bring waste. We had
23 negotiated a contract for them to have C&D waste
24 brought to us because they did not have a C&D
25 landfill at the time.

1 Of course you know the history of that.
2 It was challenged and we are before you today
3 hopefully for a final decision, pending an appeal,
4 which is -- I guess it depends on which way it goes,
5 maybe either party will appeal.

6 The Commission wanted to have that because
7 it benefits the citizens and others of Weber County
8 and others in this way. The C&D landfill was about a
9 third less tipping fee than a regular tran -- our
10 transfer station. Our transfer station handles a
11 little over 200,000 tons of waste per year. And I
12 think last year Mr. Laird indicated to me that C&D
13 landfills had about 19,000 tons of waste. Because
14 it's less deposited there, people are more willing to
15 take it than dump it in a drain ditch or in an empty
16 field or something. So that's one reason the County
17 wants that.

18 The other reason is if they take it
19 directly there, it saves them money over bringing it
20 to our transfer station. So that's the reasons for
21 the County wanting to enter into that.

22 I think we've discussed at length the
23 profit/nonprofit. I won't comment on that.

24 I will restate, not to beat a dead horse,
25 but our only quibble with -- and it's not really a

1 quibble, a clarification with Judge Nakahara's
2 decision. And my editorial comment is you are very
3 lucky to have her. I don't want to get myself in
4 trouble with local district judges, but she does an
5 excellent job of evaluating all the issues and
6 reasoning on her decisions.

7 We asked the Executive Secretary not to
8 terminate the Class IV for the reasons that have been
9 stated. We wanted to be able to rely on that and go
10 back to that if for some reason Counterpoint was
11 successful in challenging the Class VI permit.
12 Otherwise, we get in that cycle again, depending on
13 how tenacious Counterpoint wants to be, of starting
14 this process over and over again. And, frankly,
15 everything that has been challenged is procedural.
16 Nothing substantive. There weren't any health and
17 safety issues. And the Class IV and Class VI have
18 the same regulations regarding groundwater and
19 those -- so -- my commissioners don't want to do
20 anything bad to Weber County. They live there. Some
21 of them have grand -- children and grandchildren
22 there. That's the reason we do these things.

23 So, in the end, we would ask just what has
24 been stated by both Mr. Wixom and Mr. Malmborg, and
25 that is, you leave the Class IV dormant until we have

1 a final decision from either an appellate court or
2 that appellate time has ran, no matter who appeals,
3 and so that we don't have to jump through those hoops
4 again if for some reason the Class VI is invalidated.

5 I will echo the words of Mr. Wixom. We
6 think we properly applied for the Class VI permit.
7 We think the Executive Secretary issued it properly
8 and the legislature certainly approved it.

9 With that, I would answer any questions
10 you may have.

11 MR. MURRAY: Do you have any questions for
12 Mr. Wilson?

13 All right. Thank you.

14 Okay. Board discussion. Let me remind
15 you of a couple of things that -- that Sandra
16 mentioned to us before.

17 Please remember that this is an
18 adjudicative proceeding. The parties who have
19 addressed the Board have given us oral comment on an
20 administrative record. We are performing a judicial
21 function here and must rely solely on the record and
22 oral argument in arriving at a decision.

23 We have several options. We can -- I'm
24 looking, Sandra, for the fancy language. But
25 basically we can accept the ALJ's decision as is, we

1 can accept it with modifications, we can do something
2 different or we can tell her to try again.

3 So with that, let me open it up to Board
4 discussion.

5 I'm sorry.

6 MS. ALLEN: The respondents also filed
7 written comments.

8 MR. MURRAY: That's -- that's -- yes. I'm
9 sorry, I'm lumping that into the administrative
10 record.

11 MS. ALLEN: Okay.

12 MR. MURRAY: I'm sorry. There are
13 comments that were filed as well that can be taken
14 into consideration.

15 Any comments? Thoughts? Questions? It's
16 the quietest I've seen this Board in months.

17 Dennis.

18 MR. RIDING: I have a question,
19 Mr. Chairman. And I don't know if this is
20 appropriate under the adjudicative proceedings or
21 not. But I don't do a lot of landfill work so I
22 wonder, is it common for a landfill to hold two
23 permits at the same time or is this pretty -- a
24 unique circumstance?

25 MR. MURRAY: I'm not sure who to have

1 answer that.

2 MR. DUPONT: Woolley would have been able
3 to deal with that.

4 MR. MICKELSON: Well, I can potentially
5 deal with that as well. I've permitted a number of
6 facilities.

7 It's not normal for one facility, if you
8 were to go get a Class I that you would change that.
9 So changing a facility is less normal than just
10 straightforward getting a permit in hand and
11 operating under that.

12 I don't know if that helps at all.

13 MR. RIDING: So in this case maybe there
14 was a thought of a contingency plan having one --

15 MR. MICKELSON: It appears in this case
16 that Weber -- and, again, I'm speaking just in
17 generalities. It appears that they wanted to be able
18 to cost-effectively perhaps serve their citizens
19 by -- by getting additional waste out of the
20 district, and part of that could have been by
21 servicing Davis County.

22 MR. MURRAY: Mr. Wilson, could we call you
23 back up again, because you addressed this and
24 maybe we -- what was the reason that you went from
25 the IVb to the VI application?

1 MR. WILSON: I didn't speak clearly, did
2 I?

3 It was generally that some of our
4 customers coming out there felt somewhat harassed as
5 they were videotaped by Counterpoint and such, and he
6 would challenge where that waste came from.

7 It's an overall problem, my editorial
8 comment, that I think this Board needs to consider.
9 We have signs at C&D landfill when we are a Class IV
10 that says we can only accept waste from Weber County.
11 Okay.

12 And I've had the discussion with
13 Mr. Penrod as he challenged that and I said, "Brice,
14 what do you want me to do? Do we administer a lie
15 detector test," because sometimes he would believe
16 they were outside of Weber County. And that happens
17 when you can have a license plate somewhere else but
18 they may be doing work within Weber County. It's
19 still Weber County waste.

20 So it's difficult to -- to say that any
21 waste that comes there comes there from Weber County.
22 But in order to end that question and in order to
23 facilitate an easier way to get it from other
24 counties if they wanted to bring it, the Commission
25 determined they would move forward and request a

1 Class VI permit.

2 MR. MURRAY: Okay. Thank you.

3 Does that help, Dennis?

4 MR. RIDING: Yeah.

5 MR. MURRAY: Mr. Ellertson.

6 MR. ELLERTSON: May I seek to clarify in
7 my own mind?

8 MR. MURRAY: Sure.

9 MR. ELLERTSON: So that the question seems
10 to be, if I'm understanding it, the -- allowing the
11 Class IV permit to remain not invalid or not -- or
12 still open while the VI permit is in the process of
13 getting final approval and that there was some
14 decision made on the part of the Secretary to allow
15 them to operate under the VI while it was in the
16 approval process and leave the IV open.

17 Is that the essence of what...

18 MR. MURRAY: I think so, but I think the
19 position of the -- of the Division is that the VI is
20 effective, it just hasn't become final because it's
21 in the process of this appeal.

22 Is that correct, Mr. Wixom? Is that your
23 position?

24 MR. WIXOM: That is correct.

25 MR. ELLERTSON: And that's what I'm --

1 okay. So may I continue to clarify that?

2 MR. MURRAY: Please.

3 MR. ELLERTSON: So the VI was accepted by
4 the legislature and the governor and it was appealed.
5 So while it's in the legal process, it can't be
6 considered finalized.

7 MR. WIXOM: Yes, Mr. Ellertson. For --
8 there -- we use a lot of words that have a common and
9 ordinary meaning but that in the context of
10 administrative law have a special meaning.

11 MR. ELLERTSON: Okay.

12 MR. WIXOM: When the Executive Secretary
13 or, in the future, the Director issues a permit, he
14 has issued an administrative order, he has taken an
15 administrative action. The public has an opportunity
16 to challenge that decision.

17 MR. ELLERTSON: For that 20-day or
18 whatever it was --

19 MR. WIXOM: Yeah. We'll call it 30 days.

20 MR. ELLERTSON: -- period. Thirty days,
21 okay.

22 MR. WIXOM: The order, the permit, becomes
23 effective as soon as the Executive Secretary issues
24 it.

25 MR. ELLERTSON: Okay.

1 MR. WIXOM: Under some circumstances it
2 might be stayed, but that's not relevant to our
3 discussion here. So the permit is effective but it
4 is not final until 30 days pass.

5 If someone brings a challenge, an
6 administrative challenge to the permit, the permit
7 remains not final --

8 MR. ELLERTSON: Okay.

9 MR. WIXOM: -- until that administrative
10 challenge is completed and until either the
11 challenger's opportunity to take the challenge to the
12 Court of Appeals has ended or the challenger has
13 taken it to the Court of Appeals and the Court of
14 Appeals has made a decision.

15 MR. ELLERTSON: Okay. Thank you.

16 MR. MALMBORG: And, if I may,
17 Mr. Ellertson, the administrative law judge does have
18 the option. As Mr. Wixom said, the permit is
19 effective.

20 MR. MURRAY: I'm sorry, you are going to
21 have to come to the mike, please.

22 MR. ELLERTSON: Just don't touch it.

23 MR. MURRAY: Mr. Penrod, we'll give you a
24 chance --

25 MR. MALMBORG: The permit is -- the permit

1 is effective. The administrative law judge has an
2 opportunity if -- in certain circumstances to stay
3 the effectiveness and to say, "Until we figure this
4 out, you can't use it."

5 In this situation Judge Nakahara looked at
6 it and said it's not appropriate to stay this, it is
7 appropriate to have it remain effective during the...

8 MR. ELLERTSON: Thank you for that, sir.

9 MR. MURRAY: Mr. Penrod, is there anything
10 you would like to say on this issue?

11 MR. PENROD: No, sir.

12 MR. MURRAY: No? Okay.

13 MR. ELLERTSON: Thank you.

14 MR. MURRAY: Does that help?

15 Let me clarify, though. This issue has
16 obviously been discussed by all the parties and it is
17 an issue before us, but there are basically, what, 28
18 conclusions of fact and -- I don't know -- I'm losing
19 my number -- an equivalent number of conclusions of
20 law in the order that we are being asked to either
21 adopt, amend, reject or send back. So this is only
22 one issue. This is one conclusion of law that has
23 just been raised that the parties disagree with so --
24 actually, before the Board in this entire order.

25 Other discussion?

1 MR. ELLERTSON: But to that, the others
2 have not been questioned, just this one?

3 MR. MURRAY: Mr. Penrod had some changes
4 he requested.

5 MR. ELLERTSON: In -- in some of the
6 other?

7 MR. MURRAY: Yes. I guess on this issue,
8 while we are talking about it, in my mind I see some
9 problem with conflicting permits but that problem
10 basically is which one applies. So as long as
11 there's some way for the -- if the Director is going
12 to exercise discretion and decide to put one on hold,
13 whatever the word is that the proceeding is using, I
14 think that's got to be clearly communicated, because
15 I would hate to see us in a situation where we have
16 got a party with two permits that conflict and they
17 are not sure which one is enforceable and that we are
18 not sure which one is enforceable. So I think if we
19 are going to allow a situation like this that that's
20 my only concern.

21 I can see the reason why you would leave
22 one permit in place while the other one is being
23 challenged, because if the challenge is effective and
24 we vacated the other one, then we are sending
25 somebody back to start all over again and that

1 perpet -- that could potentially create a situation
2 where parties could prevent activity in ad infinitum,
3 because you would just continue to appeal and hold it
4 in Court of Appeals forever.

5 MR. ELLERTSON: Yeah. Does -- does
6 statute deal with it in any other way by saying, if
7 you move forward with it under appeal and you
8 eliminate the one where you deactivate it, that it --
9 if the other one holds up and it isn't given the VI,
10 then the IV automatically comes back? I'm assuming
11 that's not in there.

12 MR. MURRAY: My understanding is the
13 statute is silent, which is, I think, part of their
14 argument. It doesn't say you can do it, it doesn't
15 say you can't do it. It's silent on -- on the issue.

16 Any others?

17 MR. DUPONT: I'm looking at some of the
18 comments. There are some issues about -- about our
19 acting on statements from the judge regarding the
20 lawfulness of the Director's discretion, you know, in
21 allowing the two permits and basically allowing one
22 to be dormant. But we seem to -- that we have to
23 make some clarification on that as well, I believe.
24 Is that correct? I mean, we have to do something to
25 either agree or disagree with that.

1 MR. MURRAY: You know, in order to -- are
2 you looking specifically at one of the findings?

3 MR. DUPONT: Yeah, the finding that
4 basically says that the Executive Secretary doesn't
5 have -- it's unlawful for the Executive Secretary to
6 delay termination of that one permit.

7 MR. MURRAY: Which number are you looking
8 at?

9 MR. DUPONT: I'm looking at -- actually,
10 this is on page five of -- let's see which document
11 it is. It's number 11 on page five, the Memorandum,
12 Solid Waste Permit dot SKA2. It's an electronic
13 version. It comes from Sandra, dated November 20th,
14 2012.

15 MS. ALLEN: That would be -- are you
16 looking at --

17 MR. DUPONT: I'm looking at your
18 memorandum to us that -- it's from Raymond and the
19 Weber County's attorney and Stephen Marshall.

20 MS. ALLEN: So my memorandum is a cover
21 memorandum that presents to you the comments.

22 MR. DUPONT: That's dated November 7th,
23 that came.

24 MS. ALLEN: Yeah, so that's the -- the
25 comments are something that the -- either party was

1 able to file to say how they thought the
2 administrative law judge got it right or did not.

3 MR. DUPONT: But my understanding is we
4 have to make decisions on these --

5 MS. ALLEN: Yes.

6 MR. DUPONT: -- as well as other
7 specific...

8 MS. ALLEN: Yes. In particular, what
9 you'll be doing is -- the findings of fact and
10 conclusions of law start at page 44. And the
11 conclusion -- that's in the -- the finding -- the
12 conclusions -- the findings of fact start at page 44.
13 The conclusions of law start at page 52. And the
14 recommended order starts at page 55. And the written
15 comments specify particular items that they think
16 should be changed.

17 And then Mr. Penrod addressed certain --
18 orally he addressed certain other paragraphs that he
19 thought should be changed.

20 And so what you need to do is look at the
21 findings of fact and determine whether there are any
22 of those that -- that you think need to be modified.

23 MR. DUPONT: Okay.

24 MS. ALLEN: And look at the conclusions of
25 law to see if they need to be modified. And the same

1 with the order.

2 If you think it's all good, then you can
3 adopt the whole thing the way it is. If you think
4 something needs to be modified, you can send it back
5 to the administrative law judge and ask the
6 modifications to be made. Or you can make motions
7 here to indicate specifically how you want what the
8 administrative law judge wrote to be changed.

9 MR. MURRAY: One option we have here,
10 folks, we can go through these findings of fact and
11 conclusions of law one at a time and see whether
12 everybody is comfortable with them. That might be
13 what we need to do here.

14 MR. COOMBS: Might have to do that to be
15 clear.

16 MR. MURRAY: So shall we do that? Let's
17 start with the first one, then, because -- let me
18 note, too, Sandra, just as a general issue. My copy
19 is full of typos. Every time there is a paren C it's
20 showing up as a copyright sign. I don't know whether
21 that's that way on everybody's but when we have them
22 finalize this, that should be corrected.

23 Okay. Page 44 is where the findings of
24 fact begin. The first one is, "Pursuant to his
25 authority granted in Utah Code Annotated 19-6-108, on

1 October 19th, 2009, the Executive Secretary of the
2 Solid and Hazardous Waste Control Board issued a
3 Class IVb, noncommercial, nonhazardous waste permit
4 to Weber County, as owner, and Moulding & Sons
5 Landfill, LLC, as operator of the proposed Weber
6 County landfill. The noncommercial permit authorized
7 Weber County and Moulding to construct and operate a
8 noncommercial, nonhazardous solid waste construction/
9 demolition debris (C&D) landfill."

10 Does anyone have any discussion or issues
11 with that finding?

12 MR. MICKELSON: No.

13 MR. MURRAY: Okay. The second one, "On
14 November 2nd [sic], 2009, petitioner, Counterpoint
15 Construction Company (Counterpoint) filed a request
16 for agency action challenging the issuance of the
17 Class IVb noncommercial permit. In a separate
18 adjudicatory proceeding Counterpoint was granted
19 standing to intervene to raise issues concerning the
20 noncommercial permit."

21 Any issues with that one?

22 UNIDENTIFIED SPEAKER: No.

23 MR. MURRAY: Okay. "On January 18th,
24 2011, Weber County and Moulding filed an application
25 for a

1 Class VI commercial nonhazardous solid waste permit
2 (commercial permit) for the existing Weber County
3 landfill that was initially constructed and operated
4 pursuant to the Class IVb noncommercial permit. The
5 Weber County Director of Solid Waste prepared, signed
6 and filed the application for the Weber County
7 Class VI commercial permit under the direction of the
8 three Weber County commissioners. The
9 modification -- the, quote, modification, closed
10 quote, box was checked on the application."

11 Any issues with that?

12 Four. "The application for the Weber
13 County landfill Class VI commercial permit included
14 copies of 2009 letters notifying property owners of
15 the intent to apply for a landfill permit. The
16 Executive Secretary did not create, quote, an
17 interested party, close quote -- excuse me -- an
18 interested party list, close quote, for the Weber
19 County Class VI commercial permit application."

20 Any issues or discussion with that one?
21 Pardon?

22 MR. ELLERTSON: Is that dealing with the
23 issue of notice?

24 MR. MURRAY: Yes.

25 MR. ELLERTSON: And the first sentence

1 will you --

2 MR. MURRAY: It says, "The application for
3 the Weber County landfill Class VI commercial permit
4 included copies of 2009 letters notifying property
5 owners of the intent to apply for a landfill permit.
6 The Executive Secretary did not create, quote, an
7 interested party list, closed quote, for the Weber
8 County Class VI commercial permit application."

9 MR. ELLERTSON: So we have the letter but
10 we don't know where they went to? Is that what
11 that's contending?

12 MS. ALLEN: The parties stipulated to that
13 fact.

14 MR. MURRAY: The parties stipulated to
15 this fact. I'm sorry.

16 UNIDENTIFIED SPEAKER: The property
17 owners. They went to the property owners.

18 MS. ALLEN: I was just noting that
19 these -- the parties stipulated to -- to fact number
20 four.

21 MR. MURRAY: I think the bottom line is a
22 list wasn't generated and formal notice was not
23 given, is what this is getting to.

24 MR. ELLERTSON: Regarding stipulation,
25 though, that's what I'm wondering.

1 MR. MURRAY: Oh.

2 MS. ALLEN: Oh. In making -- in granting
3 a motion for summary judgment the parties stipulated
4 to certain material facts, and those are attached as
5 an exhibit to Judge Nakahara's recommended order, and
6 this is one of the facts that the parties stipulated
7 to.

8 MR. ELLERTSON: All right. Thank you.

9 MS. ALLEN: There are just a couple of
10 these in the comments from the respondents, which is
11 the Executive Secretary, Moulding and Weber County,
12 where they had some comments on the facts, and that
13 would be on fact 15 and fact 23 they had issues with.

14 MR. ELLERTSON: Okay.

15 MS. ALLEN: According to their written
16 comments.

17 MR. ELLERTSON: Thank you.

18 MR. MURRAY: Okay. Based on the fact that
19 they are stipulated, one option here is to not go
20 through all of these, is just go to --

21 UNIDENTIFIED SPEAKER: Just 25 and 23.

22 MS. ALLEN: 15 and 23.

23 MR. MURRAY: 15 and 23?

24 UNIDENTIFIED SPEAKER: Good idea.

25 MR. MURRAY: Okay. Fifteen. "At the time

1 when Weber County and Moulding filed an application
2 for a commercial permit, the Weber County landfill
3 became a, quote, proposed, close quote, commercial
4 landfill."

5 MR. COOMBS: And can we hear what the
6 comments were on that?

7 MR. MURRAY: I don't have my comment
8 letter, Sandy; do you?

9 Give us a sec.

10 MS. ALLEN: This is the comment letter
11 but...

12 MR. MURRAY: Wait a minute, Michael.
13 These are your comments. Can you direct us to what
14 comment was involved with number 15?

15 MS. ALLEN: I think they requested that it
16 to be stricken.

17 MR. MURRAY: You so -- so I'm going to ask
18 for it be stricken.

19 MR. WIXOM: If you look at the
20 respondents' comments, paragraph 23, that one deals
21 with Judge Nakahara's finding of fact 15.

22 MR. MURRAY: Okay. It says, "The
23 respondents disagree with Judge Nakahara's finding of
24 fact number 15, page 48 of her Memorandum and
25 Recommended Order to the extent it is a finding that

1 the Class VI permit application made the Weber County
2 landfill a proposed facility."

3 Because your position is it was -- the
4 permit became effective but not final so it wasn't a
5 proposed facility, it was -- I won't put words in
6 your mouth.

7 MR. WIXOM: I would be happy to tell the
8 Board what our position is, if that's what the Board
9 asks me to do.

10 MR. MURRAY: Please.

11 MR. WIXOM: Other parties might need to
12 comment after that.

13 The Executive Secretary's position is that
14 with regard to R315-310-3, subparagraphs two and
15 three, that the notice Counterpoint has complained
16 that it did not receive is applicable only to
17 proposed facilities. And the proposed facilities are
18 those that don't have permits and they are not
19 constructed.

20 The Executive Secretary's position is that
21 the Weber County landfill came into existence
22 pursuant to the Class IVb permit. It was authorized
23 under that permit. It was constructed under that
24 permit. It operated for a couple of years before it
25 converted to the Class VI category. And the

1 Executive Secretary's position is that a landfill is
2 a landfill. If it exists, the neighbors know it's
3 there and that there's no need to be giving neighbors
4 notice when the Class IV facility converts to a
5 Class VI facility.

6 The purpose of the rule is to tell the
7 neighbors, "You are about to have a new neighbor."
8 Everybody knew, once that landfill was there, that
9 they had a landfill for a neighbor and the Executive
10 Secretary's position is that they didn't -- there was
11 no need to give new notice saying, "Well, by the way,
12 your existing neighbor wants to change its
13 classification."

14 MR. MALMBORG: I would also note -- and
15 Sandra might be able to --

16 MR. MURRAY: Will you -- hold off until
17 you get up there.

18 MR. MALMBORG: All right.

19 This also is not, in my view, a finding of
20 fact; it's a conclusion of law, and so that may be a
21 more simple way and maybe Sandra can address that for
22 you. It seems to me that she is making a conclusion
23 of law there, which is not appropriate for a finding
24 of fact.

25 MS. ALLEN: I guess what I would wonder

1 about is, as the parties address item 15, I think it
2 would be helpful if you would propose to the Board
3 what you want them to do with number 15 on page 48,
4 which is under Judge Nakahara's findings of fact.

5 MR. MURRAY: I -- that would be helpful.
6 And I think we need to let Mr. Penrod address this,
7 if he has any comments on number 15.

8 Mr. Wixom, what would you propose? Since
9 you are objecting to it, what do you want us to do
10 with it?

11 MR. WIXOM: I propose that you strike it.
12 I think Mr. Moulding -- Malmborg is correct, that it
13 is a conclusion of law and not a finding of fact and
14 it is an incorrect conclusion of law.

15 MR. MURRAY: This relates to the
16 discussion earlier in her order over the title of
17 Section 315, 310 versus some of the provisions inside
18 of it, I think.

19 Michael, what -- what's your request?

20 MR. MALMBORG: My request would be the
21 same. I think it could be stricken.

22 MR. MURRAY: Mr. Wilson?

23 MR. WILSON: Yes, sir, please.

24 MR. MURRAY: Mr. Penrod?

25 MR. PENROD: My recollection is that -- is

1 that we had stipulated to the fact but I'm not --
2 can't get through them all here yet so go ahead.

3 MR. MURRAY: Okay.

4 Okay. Mr. Dupont.

5 MR. DUPONT: I think I would -- I would
6 support the idea that it's a finding of law, not a
7 fact, but I don't think I would support striking it.

8 MR. MURRAY: Okay. And your reason?

9 MR. DUPONT: Well, I think the -- I think
10 when there is a change in permit or purpose of the
11 land -- however you want to call it, classification
12 of a landfill -- I think people should be -- be
13 notified of that. So I -- I don't think it should be
14 struck completely.

15 MR. MURRAY: Okay.

16 MR. DUPONT: If that's what happened and
17 the proposal was to have it change its status, then,
18 you know, it -- I'm not sure --

19 MR. COOMBS: I agree with Mr. Dupont on
20 that, that point of -- well...

21 MR. MURRAY: I think I agree too. If we
22 are going to change the status of it, I think people
23 want to know.

24 UNIDENTIFIED SPEAKER: Want to know, yeah.

25 MR. MERTZ: Number 15 is not necessarily

1 talking about the notice portion of it, though.

2 MR. DUPONT: I think it's a definition of
3 what -- so it's basically -- the proposed commercial
4 landfill, that's -- there is some contention about
5 what that -- what that means, but it seems like
6 that's a finding the judge made and it should be in
7 the finding of law.

8 MR. MURRAY: I actually found this section
9 of the order very confusing to read, but this finding
10 is coming out of her discussion regarding the issue
11 of portions of the statute referencing a section that
12 didn't exist, and also looking at the title of the
13 section versus what paragraphs two and three did.
14 But -- so I do think it relates to the notice issue.
15 And I think it's whether or not there is a trigger to
16 the notice issue.

17 Okay.

18 MR. DUPONT: So can we -- could we suggest
19 that that be moved and --

20 MR. MURRAY: As a conclusion?

21 MR. DUPONT: (Nods head.)

22 MR. MURRAY: Certainly.

23 I'm thinking the best way to do this is
24 make a list of these at the moment, because we are
25 going to have to entertain these by motion. But I

1 think I would rather discuss what they all are so
2 that we can have a comprehensive motion. Okay.
3 So --

4 MS. ALLEN: I think that's going to be --

5 MR. RIDING: Do we all agree that it
6 should be moved? Or do you want to vote on them
7 individually or is there --

8 MR. MURRAY: Let's vote on them all
9 together. Let's go through them all. But if we
10 could -- is there other discussion?

11 Do you think it should be moved, Dennis,
12 or do you --

13 MR. RIDING: I -- I agree with Mr. Dupont,
14 too. I think it does deserve to be kept and that --
15 but I agree with -- with counsel for the landfill,
16 that it sounds more like a conclusion of law to me,
17 not being a lawyer, but it sounds like that. So if
18 it walks like a duck and quacks like a duck...

19 MR. MURRAY: Okay. Any other discussion?
20 Mr. Mertz?

21 MR. MERTZ: No.

22 MURRAY: Okay. All right. Okay. Number
23 15. Which is the next one which that is not --

24 MS. ALLEN: Number 23 was the next one.
25 Fact number 23 I believe was the next one in the

1 written comments.

2 MR. MURRAY: Okay.

3 MS. ALLEN: You know, I'm not sure how we
4 want to address Mr. Penrod's. He had particular
5 paragraph numbers.

6 MR. MURRAY: My plan was, when we finish
7 this, I'll ask Mr. Penrod which ones that -- by
8 number and then we'll go back to those.

9 MS. ALLEN: Okay.

10 MR. MURRAY: Okay, 23. "The Executive
11 Secretary issued the noncommercial permit and the
12 commercial permit for the Weber landfill. Neither
13 permit has been revoked. The commercial permit
14 allows the landfill to accept waste generated
15 anywhere, whereas the noncommercial permit restricts
16 the acceptance of waste to waste generated in Weber
17 County or within the boundaries of a local government
18 pursuant to an agreement. The waste acceptance
19 provisions in the commercial permit could allow the
20 violation of the waste restriction provision in the
21 noncommercial permit."

22 Michael.

23 MR. MALMBORG: This -- this may save a
24 little bit of time. And everyone else can correct me
25 if I'm wrong.

1 I don't think there is any issue with all
2 of this statement except the last sentence starting,
3 "The waste acceptance provisions." I believe
4 everything prior to that is stipulated.

5 MR. MURRAY: And what's your issue with
6 the waste acceptance provisions?

7 Matter of interpretation to you?

8 MS. ALLEN: I think they wanted -- I think
9 that they wanted to strike that last sentence.

10 MR. MALMBORG: I think that's right. It's
11 a conclusion of law and we think it's incorrect. We
12 don't agree that it -- that it causes the violation
13 of the noncommercial permit.

14 MS. ALLEN: So right here?

15 MR. MURRAY: Yeah, I see what they want to
16 do. I guess I don't understand why you think it's
17 incorrect. That's our whole discussion going into
18 this. I thought -- I think it is correct. If you
19 have a commercial permit, you could violate the
20 noncommercial permit if they were both effective,
21 because the noncommercial permit won't allow you to
22 receive the same waste as the commercial permit.

23 So why -- what am I missing? I'm missing
24 something if that's incorrect.

25 MR. WIXOM: I believe, if I recall what we

1 meant when we wrote the comment, that the thought was
2 that because the Class IVb permit is not the one that
3 the Executive Secretary is enforcing. When the
4 permittee is complying with the Class VI permit, it's
5 not violating the Class IV permit. And then --

6 MR. DUPONT: So what you are saying, as
7 the Executive Secretary's enforcing the situation,
8 there is not a conflict.

9 MR. WIXOM: Correct.

10 MR. MURRAY: Yes.

11 MR. DUPONT: There could be.

12 MR. MURRAY: But there could be.

13 MR. RIDING: That's the word, is "could,"
14 could allow.

15 MR. DUPONT: Yeah, could.

16 MR. MURRAY: I think I'd rather it stay,
17 gentlemen.

18 MR. RIDING: Do you think it's a
19 conclusion of law?

20 MS. ALLEN: You know, I think that's an
21 interesting question. I think that between whether
22 it's a conclusion of fact or a conclusion of law
23 is -- they are so intermixed that it's very difficult
24 to disentangle those two and I think that -- that if
25 the administrative law judge proposes it in a certain

1 way, that you can accept it that way.

2 If you feel that you're not comfortable
3 with it, then as the Board you can, you know, ask
4 that it be moved to a different section of the order.
5 But I don't think you need to spend a lot of time,
6 you know, worrying about which part it goes in.

7 MR. MURRAY: I think she means this as a
8 fact. I think she's just -- she is using this as a
9 basis upon which she is going to reach her
10 conclusions of law, and one of her issues is there
11 could be conflicting elements of the permits, the way
12 I'm reading it.

13 MR. COOMBS: I agree with that.

14 MR. MURRAY: Any other discussion on that?
15 Let's set that one aside too.

16 Okay. Sandra, what is the next one?

17 MS. ALLEN: Okay. The next one is
18 conclusion of law number 13 at page 54.

19 MR. MURRAY: Which reads, "In that Utah
20 Administrative Code R315-301-2(10) and (12)
21 individually define a Class IV landfill and a
22 Class VI landfill, and R315-13 -- or, excuse me --
23 R315-310-1(4) allows a landfill to change
24 classification; a nonhazardous solid waste landfill
25 cannot be simultaneously classified as both a

1 Class IV landfill and a Class VI landfill."

2 And what's the comment?

3 MR. DUPONT: That seems more like a
4 statement of fact.

5 MS. ALLEN: They want --

6 MR. RIDING: Well, if it is, in fact, a
7 fact, do the rules support that position?

8 MS. ALLEN: I think the comment on that
9 one is that they didn't believe that the Executive
10 Secretary had to terminate one before they issued
11 another in the face of an administrative challenge.
12 So I believe in their comment that they were
13 proposing to rewrite that.

14 MR. DUPONT: That statement doesn't say
15 what is inferred by -- it doesn't say anything
16 about...

17 MR. MURRAY: Mr. Wixom?

18 MR. WIXOM: Yes, sir.

19 MR. MURRAY: What -- what are you asking
20 us to do with number 13?

21 MR. WIXOM: I read this as the judge
22 making a conclusion that a landfill can't have two
23 classifications.

24 MR. DUPONT: (Yeah, so could that be a
25 fact?

1 MR. WIXOM: It could be a fact, but I
2 think she's making it a legal -- that legally there
3 can't be two.

4 MR. RIDING: I don't know if it's the same
5 thing as saying it can't be yellow and orange at the
6 same time. Maybe it's something else.

7 MR. WIXOM: In the respondents' comments
8 we dealt with conclusions of law 13, 15, 16 and 54
9 together, and we disagreed with those conclusions to
10 the extent that they -- that they state that the
11 Executive Secretary has to terminate one permit and
12 (indistinguishable) issues another.

13 I don't know how to both hold my machine
14 and making the...

15 MR. DUPONT: Thirteen doesn't say that,
16 though, does it?

17 MR. MURRAY: But I think she's -- but I
18 think you have to read 13, 14, 15, 16 and 17
19 together. This is the issue of whether or not a
20 permit can be held. This is the whole issue of
21 whether or not we can have two permits in place with
22 one dormant until the other becomes final.

23 MR. COOMBS: That's the big one.

24 MR. DUPONT: But 13 doesn't say that.
25 Thirteen just says that you can't classify a landfill

1 as two things.

2 MR. MURRAY: Yes.

3 MR. DUPONT: That's all -- that's all it
4 says. Is that...

5 MR. WIXOM: I'm trying to flip between too
6 many documents here.

7 MR. DUPONT: Well, 13 is right...

8 And that's a totally different issue than,
9 for example, 15 which --

10 MR. MURRAY: Right.

11 MR. DUPONT: -- yeah, which is something I
12 do have an issue with.

13 MR. MURRAY: Well --

14 MR. WIXOM: We actually talked about --

15 MR. MURRAY: I'm sorry. Raymond, go
16 ahead. I didn't allow you to finish.

17 MR. WIXOM: We object to the
18 administrative law judge's determination that a
19 land -- a solid -- nonhazardous solid waste landfill
20 cannot be simultaneously classified as both a
21 Class IV and a Class VI. And it's -- it's -- it's a
22 lawyer's effort to be cautious to say, since we have
23 words on a page that I might interpret one way and
24 others might interpret some other way, we are not
25 care -- we are not comfortable with what Judge

1 Nakahara has said there because, as is obvious, we
2 think you can have two permits extant at the same
3 time, and the language that Judge Nakahara has in
4 paragraph 13 says you can't. I don't know how to
5 explain it any better than that.

6 MR. DUPONT: It doesn't say anything about
7 permits, it just says classification. Does that
8 infer permitting?

9 MR. WIXOM: Well, yes. Under the rules,
10 the solid waste management rules, landfills are
11 divided into different classifications and they get
12 permitted according to whatever classification they
13 are. So, yes, when you say that a permit is a
14 particular class, you are saying it has a permit of
15 that class.

16 MR. DUPONT: Okay.

17 MS. ALLEN: (Indistinguishable).

18 MR. MURRAY: I will. I have an idea.
19 Sorry. We seem like we -- I'm a little flustered
20 here. We have not ever had one that's had this many
21 findings that we are dealing with. I suggest -- or
22 let me suggest to the Board; let's reach a conclusion
23 with regard to this issue that we've spent discussing
24 all day and then when we reach whatever conclusion it
25 is, let's just send this back to Judge Nakahara and

1 say, "Rewrite this consistent with this ruling,"
2 rather than us going through each one of these with
3 regard to this particular issue.

4 Are you -- is everyone on board with that?

5 Then let's reach a conclusion on whether
6 or not the Executive Director has discretion to hold
7 one permit dormant, which is the word that's being
8 used here, while the other permit is subject to
9 appeal or challenge.

10 MR. RIDING: I guess from what I heard
11 earlier when we were talking about this question,
12 normally a landfill starts out with a permit that
13 they are ultimately going to have and they don't
14 request changes as they go along. And so if that's
15 the case, then you wouldn't have this conflict. But
16 I don't know how often this happens. If it happens
17 often enough, then it's worth consideration.

18 MR. ELLERTSON: It seems --

19 MR. MURRAY: Mr. Ellertson, go ahead.

20 MR. ELLERTSON: It seems that if it
21 doesn't say they can't do it and if, in fact, they
22 are operating only under the Class VI at this point
23 in time, the other one is being held in abeyance, it
24 seems to make a lot of sense to me. And if we are
25 looking for some consensus on saying that's what we

1 are directing in saying that we believe that that
2 should be able to be done, I would say that.

3 MR. MURRAY: Mr. Dupont.

4 MR. DUPONT: My biggest concern in all of
5 this is number 15, which really, you know,
6 essentially called unlawful the action of the
7 Executive Director in holding one of the permits in
8 abeyance. And -- and it seems to me we need to make
9 a decision on that and then everything else seems --
10 would come out -- out of that decision.

11 Do we want to give the Executive Secretary
12 that ability, that flexibility, for whatever reason,
13 justifiable reason?

14 MR. RIDING: As a practical consideration
15 of situations where -- where you need to have a
16 landfill and there is the risk that it will be
17 challenged, and I'm sensitive to that. I think it
18 makes sense to allow for that kind of consideration.

19 MR. MICKELSON: I agree.

20 MR. COOMBS: And I think that, you know,
21 in an ideal world, laws would address all situations.
22 But where that's just never going to happen, I
23 believe we have to allow some latitude in the
24 judgment-making until those laws can be amended.

25 MR. MURRAY: Mr. Dupont, you didn't go to

1 a conclusion, you just raised it as an issue for you.
2 What is your thought?

3 MR. DUPONT: As long as it's not an issue
4 with public health and safety, it seems that the
5 Executive Director should have discretion, I think.
6 I mean, it's his or her job to run this place the
7 best way they see fit according to the laws. And if
8 there is no, you know, specific rule that says they
9 can't do something, they -- I mean, we can kind of
10 demand of them to use their discretion. So I -- I
11 guess I want to just have a verification that
12 according to the -- the judge's, I guess, annotation
13 to this 19-6-108, she is thinking that he didn't have
14 authority to do that. IS -- what does -- what does
15 that code section say? Can we get some help on that?
16 Because she had referred to code 19-6-108 as her...

17 MR. ELLERTSON: As the gospel.

18 MR. DUPONT: Right. As her reason for
19 making that statement.

20 Can we get some help in interpreting that?

21 MS. ALLEN: 19-6-108?

22 MR. DUPONT: It says 19-6-108.

23 UNIDENTIFIED SPEAKER: That's in her
24 order. It's 6D in her order.

25 MR. DUPONT: Does that say Executive

1 Director or is --

2 MR. MURRAY: I think it's silent. I think
3 that's her point, is it's silent and it doesn't say
4 he has authority. I think that the Division's
5 position is it doesn't say that he does not.

6 MR. DUPONT: But what does 19-6-108...

7 MR. MURRAY: Say?

8 MR. DUPONT: Yeah.

9 MS. ALLEN: It is several pages.

10 MR. DUPONT: Dealing with -- what's
11 Section 19?

12 MR. MERTZ: It deals with new nonhazardous
13 solid or hazardous waste operation plans for a
14 facility or site. Administrative and legislative
15 approval required. Exemptions, time periods,
16 information.

17 MR. ELLERTSON: What was the first line of
18 that, Brad?

19 MR. MERTZ: New nonhazardous solid or
20 hazardous waste operation plans for a facility or a
21 site.

22 MR. MURRAY: Just so you guys know, we
23 punted on this last time.

24 THE REPORTER: I didn't hear his comment.

25 MR. DUPONT: I don't think I wanted you to

1 hear that.

2 It just deals with administrative
3 requirements for these facilities, is what I...

4 MR. ELLERTSON: Is what you said.

5 MR. DUPONT: Yeah.

6 MR. MURRAY: The way I read the order,
7 she's come to this conclusion based on 13, that a
8 landfill cannot retain two simultaneous
9 classifications. And by definition, since there is a
10 Class IV and a Class VI, it would be a contradiction
11 to the rules to have two permits held at the same
12 time. I believe that's her reason.

13 MR. ELLERTSON: But if you have one held
14 in abeyance, you hold two or one?

15 MR. MICKELSON: Would it -- would it be
16 fair to say that it would not be appropriate to have
17 two final permits?

18 MR. MURRAY: I believe that would be
19 correct.

20 MR. MICKELSON: So maybe that's the
21 distinction, final permit.

22 MR. RIDING: Because in those cases, those
23 final permits would conflict in some provision or
24 other.

25 MR. MICKELSON: So once the -- the Class

1 VI permit became final, that would be the act that
2 would terminate the IVb?

3 MR. MURRAY: I think this almost has to be
4 the rule because you've got to allow people to
5 operate. We can't take the position that the first
6 permit has now expired or extinguished and the second
7 permit is subject to appeal so you can't operate. We
8 got to have -- we got to have the ability for people
9 to be able to operate.

10 At the same time, I understand the need
11 for the public to be able to have their due process
12 and be able to make whatever challenges they want to
13 make. This just seems appropriate to me that we
14 allow the Director some discretion to...

15 MR. RIDING: And they kind of support one
16 another, actually, if you think about it, if you are
17 going to let people know about it. Then -- then the
18 provision for that is that the existing permit could
19 remain in place until that whole process works itself
20 through.

21 So I think that they support one another.
22 I think that if you are going to have one, you should
23 have the other. If you are going to have public
24 notice, you should make a provision for the
25 possibility of the permit that's in place remaining

1 so until the final disposition is determined.

2 MR. DUPONT: That's not the case here.
3 It's the new permit that they are operating under,
4 not the existing one.

5 MR. ELLERTSON: Well, but it could be
6 either way because, in essence, the new permit --

7 MR. RIDING: I think the issue that I
8 heard with regard to the new permit was that there
9 were cost elements associated with having a new
10 permit and so they were trying to support that new
11 permit while they were trying to get it through,
12 collecting the fees that were associated with it --
13 that would be associated with it.

14 MR. MURRAY: Well, part of the key here,
15 too, in my mind, is the discretion has to be
16 exercised in a reasonable fashion. I'd probably
17 be -- I probably would be thinking something
18 different as to which one should be in abeyance if we
19 had some substantive issue that was the focus of a
20 real challenge.

21 MR. ELLERTSON: And that's the question
22 that's been formulating in my mind. Does the
23 secretary have the ability to say, "We are in this
24 process and we were headed toward allowing the new
25 permit, therefore, we are going to say we can operate

1 under that permit while the other -- while it's being
2 challenged or not"?

3 And if they can do that, then it seems
4 like, you know, that it's all right.

5 Now, if they can't do that, then -- then
6 it should be the other direction. But I thought I
7 was hearing that we felt like that -- that they had
8 that authority, to allow the new permit to be
9 operated under during that period of contest.

10 MR. MURRAY: Well, I think that's the
11 discussion, do they have authority or do they not. I
12 think the point is that 315-01 is silent. 315 --
13 whatever -- I'm sorry, I mixed up where we are,
14 Sandra. 19-6-108 is silent as to how that would act
15 in this situation. It doesn't say that he has
16 discretion, it does not say that he does not. So we
17 have both parties arguing.

18 We've got the judge saying because it
19 doesn't say you can, he does not, and we've got the
20 Division saying because it is silent doesn't say we
21 can't, we can.

22 And I think within a lot of areas of
23 environmental law there is various amounts of
24 discretion that's given to the regulatory agency to
25 act, and I think the question before us is, is that

1 discretion broad enough to cover the Director's
2 action -- the Division's actions in this particular
3 situation.

4 Sit down.

5 MR. MALMBORG: Okay.

6 MR. RIDING: Mr. Chairman, is there
7 anything to challenge if they don't allow that permit
8 to go into effect? If they are not actually
9 operating is it -- is there something to challenge at
10 that point? If you're a concerned party and -- and
11 nothing has happened in an operational sense, can you
12 challenge? Can you challenge the proposed situation
13 or does it have to be something that's actually
14 happening?

15 MR. MURRAY: I'm not sure I follow you,
16 Dennis.

17 MR. RIDING: If DEQ had not allowed them
18 to operate as a Class VI landfill while that permit
19 was in the process of being finalized, would there
20 have been anything to challenge from the standpoint
21 of Counterpoint if -- if there hadn't been any
22 activities that were consistent with the Class VI
23 landfill going on?

24 Does that make sense?

25 MR. MURRAY: I'm not sure if Counterpoint

1 did challenge.

2 MR. RIDING: They did challenge because
3 there were Class VI activities going on.

4 MR. MURRAY: Well, I don't think we've
5 challenged any substantive issues or substantive
6 activities. My read of this is all procedural.

7 MR. RIDING: So it was -- so it was
8 strictly a procedural challenge?

9 MR. MURRAY: I'm sorry. Michael, you
10 had a -- you wanted to make a comment?

11 MR. MALMBORG: Well, I think it went to
12 what Mr. Ellertson was -- and if he wants to speak
13 after, that's fine. I just wanted -- I think what
14 you are saying is can they operate under a -- under a
15 permit that's being appealed, and the answer is yes.

16 For example, in this, when the
17 noncommercial permit was being appealed for a year
18 and a half, the administrative law judge looked at
19 the issue on a motion to stay, at the enforcement of
20 the permit, and the administrative law judge said
21 it's not appropriate to stay the enforcement of that
22 permit. And during that year-and-a-half process the
23 landfill operated appropriately under the
24 noncommercial permit. That's happened again in here
25 where the commercial permit has not been stayed and

1 they have operated under that commercial permit.

2 MR. MURRAY: Does that help, Dennis, with
3 the question you had?

4 MR. RIDING: I think so, uh-huh.

5 MR. ELLERTSON: It did help me.

6 MR. MURRAY: It helped you, Mr. Ellertson?

7 MR. WIXOM: May the record reflect that
8 Brice Penrod for Counterpoint has left the room?

9 MR. MURRAY: Thank you.

10 MR. MERTZ: Quick question. What is the
11 time period typically -- is there a typical period
12 between a new application for a new permit? Is it
13 such that they need to be operating under the new
14 permit or is there a period of time, depending on how
15 long the appeals process takes, that they need to be
16 operating under that new permit to not be affected
17 financially? Does that make sense? What's the time
18 period typically between finally get -- get approval
19 of a new permit, I guess is what I'm asking.

20 MR. MURRAY: I don't know the answer to
21 that. We have a lot of DEQ people. Can someone
22 address that issue?

23 Mr. Verbica? Don?

24 MR. VERBICA: What was that question you
25 are looking for?

1 MR. MURRAY: I think the question is
2 what's the average time in a permit cycle between the
3 time someone files and a permit's issued.

4 UNIDENTIFIED SPEAKER: Go to the mike.

5 MR. MURRAY: Come up to the microphone
6 and --

7 UNIDENTIFIED SPEAKER: This is a Salt Lake
8 issue.

9 MR. MURRAY: I'm sorry, I didn't see you
10 sitting over there.

11 MR. BOHN: Ralph Bohn, the Salt Lake
12 section manager for the Division of Solid and
13 Hazardous Waste.

14 You -- the time period between the
15 application and the issuance of the permit, that --
16 it's at least 60 days; 30 days public comment period
17 and about 30 days to review. It could be anything
18 much longer than that, depending on how much time it
19 takes for us to review and to get the comments, get
20 the permit application complete and correct. It
21 could be anywhere from six months to two years.

22 MR. MICKELSON: Depending on the number of
23 comments you get from the public and --

24 MR. BOHN: Yeah, yeah. And then we have a
25 public comment period and then we have to respond to

1 comments, and that can take anywhere from days to
2 months.

3 MR. MERTZ: So is that why the decision is
4 made, hey, you can operate under that new permit even
5 though it hasn't been approved yet, because of that
6 time process, for the most part?

7 MR. BOHN: Do you want me to answer?

8 MR. MURRAY: Let me let our attorney
9 answer that question.

10 MR. WIXOM: Before I answer that question
11 I would like to say, I have a paranoia about a
12 record. Not enough paranoia to refrain from using
13 words like paranoia but perhaps the -- counsel for
14 the Board, the Board chair could say something about
15 what it means when the Board calls someone from the
16 audience to provide information.

17 I would argue as an advocate that those
18 materials are not matters of evidence before the
19 Board; they are information that the Board just wants
20 some clarification on. I don't know a better label
21 to put on them than that.

22 Now, what was the question again?

23 MR. MERTZ: The question is -- and I
24 appreciate, even though it's helping me understand
25 the situation as far as what we are talking about,

1 even though I realize it's not related to the details
2 of this case, but the question is, is the permit --
3 permittee allowed to operate under the guise of the
4 new permit because of the time process that it may
5 take to receive the finalization of that permit?

6 MR. WIXOM: If I understand the question,
7 the answer is no. A permittee doesn't get to operate
8 under a permit until the permit is issued. And it's
9 the fact that the permit is issued that allows him to
10 operate.

11 Again, when the Executive Sec -- the
12 Director issues a permit, he's issued an
13 administrative order. Unless he puts some other
14 effective date in that order, it takes effect
15 immediately.

16 As it has been mentioned, it could
17 theoretically be stayed, but if it's not stayed, the
18 permittee can begin operating under that permit,
19 notwithstanding the fact that somebody brings an
20 administrative challenge against it.

21 If, for example, this were a circumstance
22 where we didn't have two permits, we have somebody --
23 Weber County, the first time it applied for a permit,
24 it applied for the permit. The permit was issued.
25 Counterpoint challenged. The permittee was able to

1 operate the permit for a considerable period of time
2 even though Counterpoint had an ongoing challenge.

3 Does that answer the question?

4 MR. MERTZ: (Nods head.)

5 MR. MURRAY: Well, let's try to get to a
6 decision here.

7 In my mind, it doesn't make any sense.
8 Counterpoint's position, in my mind, does not make
9 any sense. We can't have two permits active and
10 trying to be enforced at the same time, because one
11 permit is less restrictive -- or is more restrictive
12 than the other.

13 So we either have a situation where the
14 Division's got to vacate one and award another one,
15 or we've got to have a situation where the Director
16 has the ability to hold one permit in abeyance
17 pending the appeal process on the second one.

18 I'm okay -- and I think the next point
19 here is the rules are silent. So this is an issue
20 where we've got to decide whether or not it's in the
21 reasonable discretion of the Director to do it based
22 upon the notion that the rules don't prohibit it and
23 the rules don't allow it.

24 In my mind there are a number of areas of
25 environmental law where the Director has certain

1 discretion to act, and I'm okay with him having that
2 discretion here as long as there is a formal way to
3 communicate which one is being enforced so that we
4 don't have miscommunication with the regulated public
5 or with the public in general so that that area is
6 clear. So that's my view.

7 MR. RIDING: I agree with that.

8 MR. ELLERTSON: How do you want to proceed
9 to -- to address that? Are we prepared to take
10 action on that specific item now or --

11 MR. DUPONT: Is that -- that is the -- I
12 mean, that's the issue with -- with --

13 MR. MURRAY: It's the issue with 15, 16
14 and 17, I think. I mean, what I propose we do with
15 that issue is we -- if everyone agrees with that,
16 then we -- then whatever motion we make needs to
17 send -- I would suggest we send this back to Judge
18 Nakahara and say, "Rewrite the opinion consistent
19 with this position."

20 MR. ELLERTSON: And are you ready for a
21 motion to try and do that at this point or are we
22 still --

23 MR. MURRAY: Do we have other issues that
24 are --

25 MR. MERTZ: We did address notice as well,

1 public notice.

2 MR. MURRAY: Right. I think she did too.
3 I think she concluded that notice was required; it
4 was simply that in this particular instance there was
5 no harm, because even though the notice wasn't
6 complied with, Counterpoint became aware of it and
7 was able to react.

8 MS. ALLEN: I think the ones that she
9 had -- that there were comments on, that you have
10 addressed those. And this is the final remaining one
11 that you wanted to possibly direct Judge Nakahara to
12 change. So your motion would be something along the
13 lines of -- you'd only have to provide her with
14 direction on a single issue, since you are not
15 directing her to change her -- her position on
16 anything else but this.

17 MR. MURRAY: Okay.

18 MR. MICKELSON: So basically would you be
19 addressing item 15 where it says the Executive -- the
20 Executive Secretary has no authority, changing that
21 to the Executive Secretary has authority? Would it
22 be something as simple as that? Is that what
23 you're...

24 MS. ALLEN: I think that in the comments
25 they actually proposed specific language and so there

1 are some -- some differences there. I think that
2 they had proposed in their comments that when an
3 administrative challenge is pending concerning an
4 initial noncommercial permit -- and they made it very
5 specific to that -- that specific issue. So the
6 question is, is whether the Board wants to make it
7 specific as to that issue alone or formulate a motion
8 that provides greater discretion to be applicable in
9 a greater variety of circumstances.

10 MR. ELLERTSON: Are you looking at D on
11 page two of those?

12 MS. ALLEN: I was actually -- I was
13 actually just looking at my notes.

14 MR. ELLERTSON: I can read it if --

15 MR. MURRAY: Please read it.

16 MR. ELLERTSON: "Conclusion of law number
17 15 at page 54 of Judge Nakahara's October 25, 2012,
18 Memorandum and Recommendation Order is stricken and
19 revised to state, 'The Executive Secretary has
20 authority to hold a permit dormant and allow a
21 landfill to operate under the commercial permit until
22 the administrative challenges are resolved.'"

23 MS. ALLEN: It would be -- no, I was
24 looking in the -- in the notes that I had of examples
25 of different kinds of motions you could do on the

1 January 10th item that I sent to you. It's where it
2 says, "I move the Board to modify Administrative Law
3 Judge Connie S. Nakahara's memorandum as follows:
4 Conclusion of law 13 at page 54 is stricken and
5 revised to state."

6 Do you see where that is?

7 MR. ELLERTSON: It's the one below the one
8 I was reading, I believe.

9 MR. MURRAY: Well, my concern with doing
10 it that way is we are going to need to go through
11 each one of these, then. I would prefer that we
12 would -- well...

13 MS. ALLEN: Yeah.

14 MR. MURRAY: My preference -- I mean, I'm
15 not -- I'm just one member of this Board. I would
16 prefer that we take a position and say, "Modify the
17 order to be consistent with the notion that" --

18 MR. ELLERTSON: This concept.

19 MR. MURRAY: Yeah, to be consistent with
20 this concept.

21 MR. ELLERTSON: I'll be glad to try
22 something.

23 MR. DUPONT: Is there any way -- are we
24 not able to talk to the judge? Is that not
25 appropriate? If I was her, I wouldn't want to hear

1 from a bunch of us. I mean --

2 MS. ALLEN: Well --

3 MR. DUPONT: I'm not a lawyer.

4 MS. ALLEN: The concept is that her order
5 would -- and her memorandum is clear enough that
6 third parties can understand --

7 MR. DUPONT: Sure.

8 MS. ALLEN: -- not third parties but that
9 you can understand it, the public can understand it.

10 MR. DUPONT: But they are very different
11 than our understanding of the issue.

12 For example, on number 16 she talks --
13 calls it arbitrary and abuse of discretion. I mean,
14 that's a fairly strong statement compared to what we
15 are talking about.

16 MS. ALLEN: That's kind of a legal
17 standard but --

18 MR. DUPONT: It's still a fairly strong --
19 to me it seems like a fairly strong legal statement.

20 MS. ALLEN: It -- kind of at the end of
21 the day there will be a transcript and then there
22 will be minutes and there will still be an order from
23 this Board that you can look at it and see if it's
24 clear enough to her what you want her to change.

25 And if you follow what Kevin is proposing

1 then you'd order -- that you're -- you would
2 encapture that concept that in a circumstance where
3 there are two permits that have been issued, because
4 one is on appeal and you want to let one lie dormant
5 until the matter is finally settled, because you
6 don't want your permittee to be without a permit,
7 that you embrace that concept and you want her to
8 rewrite her opinion to also embrace that concept and
9 allow it.

10 MR. DUPONT: Does she have an option of
11 not agreeing with that?

12 MS. ALLEN: Of -- pardon me?

13 MR. DUPONT: Not agreeing with our
14 recommendation to her?

15 MS. ALLEN: No, she doesn't.

16 MR. DUPONT: Oh, okay. Oh. That's
17 interesting.

18 MR. ELLERTSON: Here is your chance.

19 MR. MURRAY: And, see, my point on the
20 issue of it's arbitrary and an abuse of discretion,
21 I'm saying that to make it not arbitrary, in my mind,
22 if there is a reasonable basis that the Division can
23 indicate why they are holding the permit dormant and
24 it's effectively communicated to the parties affected
25 by it, then I don't think it's arbitrary or an abuse

1 of discretion.

2 MR. DUPONT: I agree.

3 MR. MURRAY: And I think on the issue of
4 permitted by law, I think the law is silent on it so
5 I don't think we can say it's not permitted.

6 MR. ELLERTSON: I agree with that.

7 MR. DUPONT: But we are not called to --

8 MR. COOMBS: But what you are saying is --
9 what I'm trying to understand, Kevin, is -- is to do
10 that in a -- in a motion in a general way rather than
11 going through each individual finding. And I agree
12 with that, I think we -- we put the motion in such a
13 way that it captures the concept as you have
14 described it and then let the administrative law
15 judge reformulate that -- that in the way that we are
16 trying -- that we are hoping that -- you know, we are
17 trying to get her to do that.

18 MR. DUPONT: And that she feels
19 comfortable with as well.

20 MR. MURRAY: So I guess the question is,
21 is this the only issue that we disagree with and are
22 we otherwise willing to tell her we are fine with her
23 order.

24 MR. DUPONT: There is a -- on page 56
25 there is some issues about classification -- let's

1 see. Not allowing classification VI and IVb. So
2 she's basically granted that -- that statement that
3 you cannot have a simultaneous classification for
4 both classes. That's in the middle of page 56. So
5 that would be consistent with --

6 MR. ELLERTSON: That's the same issue.

7 MR. MURRAY: I mean, I agree with that.
8 You can't have both of them, and I think what we are
9 saying, though, is by holding one in --

10 MR. DUPONT: That wouldn't be the case,
11 then, for this.

12 MR. MURRAY: Right.

13 MR. DUPONT: Okay.

14 MR. MURRAY: I think what we are saying is
15 the Division Director is saying, "We are holding this
16 one aside. We are not classifying it as
17 noncommercial, we are classifying it as commercial."
18 So it is a commercial solid waste facility. If
19 something happens with this --

20 MR. DUPONT: We want them to -- allowed --
21 allowed to be able to go back to that noncommercial
22 status.

23 MR. MURRAY: Right. Right. Yes.

24 MR. DUPONT: And then the only other thing
25 I have on my notes here is on page 58, that issue

1 that was been brought up a number of times with the
2 30-day termination, you know, to suggest we -- that's
3 30 days termination after the permit.

4 MR. MURRAY: Final. I agree. Yeah, that
5 makes a lot of sense to me.

6 MR. DUPONT: And that's, again, sort of
7 consistent with this idea.

8 MR. MURRAY: Terminate the permit once
9 the -- 30 days after the second one becoming final.
10 I think that makes a lot of sense. That has to have
11 been the intent of the rule. I mean -- in my mind
12 anyway.

13 MS. ALLEN: Final and nonappealable.

14 MR. MURRAY: Yes. When it becomes final
15 and nonappealable, at that point you vacate the
16 other.

17 Okay. I believe we've addressed all of
18 Mr. Penrod's comments. He's removed himself from the
19 room so we can't ask him.

20 Is there anything in any of your notes
21 that he raised that we have not discussed? Anyone?

22 We don't have the benefit of written
23 comments from him so we can't go through written
24 comments. And we now don't have the benefit of
25 asking him whether there is anything we have failed

1 to address so...

2 I guess this other issue that he did raise
3 was the nonprofit/for-profit, but I think that's been
4 adequately dealt with.

5 Mr. Wixom, you look like you would like to
6 say something.

7 MR. WIXOM: Would the Board entertain a
8 suggestion?

9 MR. MURRAY: Certainly.

10 And I do agree with your prior comment,
11 when we call somebody to clarify something internally
12 for us, I don't know that that needs to be part of
13 the record.

14 Go ahead.

15 MR. WIXOM: Counsel for the Executive
16 Secretary mentioned and counsel for Moulding
17 mentioned and at least one board member mentioned the
18 idea that there is a distinction between a final
19 permit and a permit that is not final.

20 When you look at paragraph 13 that we had
21 up there a minute ago, the Board might think that
22 there is some value in dealing with the concept of
23 final versus nonfinal permit.

24 MR. MURRAY: If I follow your question, I
25 think we are agreeing that there is a difference

1 between a permit that becomes final and nonappealable
2 and something less than that status. Is that -- am I
3 summarizing what everybody is saying correctly?

4 MR. RIDING: Yes. I think that's true.
5 And we are here in terms of the time frames and the
6 requirements to be observed that way, that once the
7 time frame has elapsed it becomes -- it becomes
8 final, if it hasn't been challenged, so I think there
9 is a clear distinction.

10 MR. MURRAY: Okay.

11 Brett, you have --

12 MR. MICKELSON: No, that's -- that's what
13 I was trying to articulate earlier.

14 MR. MURRAY: Okay.

15 Mr. Dupont, you okay with that?

16 MR. DUPONT: Yes.

17 MR. MURRAY: Mr. Ellertson?

18 MR. ELLERTSON: Yes.

19 MR. MURRAY: Mr. Mertz?

20 MR. MERTZ: Yes.

21 MR. MURRAY: Okay. Mr. Coombs?

22 All right. Then are there any other
23 issues that we need to discuss? If not, I would
24 entertain a motion, if anybody is so inclined.

25 UNIDENTIFIED SPEAKER: Brett has got one

1 written down over here. Maybe.

2 MR. MURRAY: No motion?

3 MR. ELLERTSON: Oh, no, there is going to
4 be one.

5 MR. MURRAY: There is going to be one? We
6 are working on it? Okay.

7 MR. ELLERTSON: Assuming that this could
8 be a group effort if we try and make this motion.

9 MR. MURRAY: I'm perfectly fine with that.

10 MR. DUPONT: And we can have more than
11 one --

12 MR. MURRAY: Am I going to get in trouble
13 if we don't Roberts' Rules of Order this?

14 MS. ALLEN: I think you are fine.

15 MR. MURRAY: Okay. Let's go ahead.

16 MR. ELLERTSON: Well, I would offer a
17 motion that we provide the following information to
18 the administrative law judge in terms of what our
19 intent would be that -- did somebody say something or
20 was that me bumping something? That --

21 MR. MURRAY: Can I -- I think in the
22 preface of the motion we need to say we accept the
23 order or in part request the following modification.

24 MR. ELLERTSON: Okay. That would be the
25 front part of the motion.

1 MS. ALLEN: And you would also want to say
2 that you move the Board to return the proposed
3 dispositive motion to the administrative law judge
4 with the following directions. Please do the
5 following. List them.

6 MR. ELLERTSON: Okay, that.

7 MS. ALLEN: And that's -- that's partially
8 written on page four of a -- of a potential motion
9 that you might make.

10 MR. ELLERTSON: Which -- which one are
11 you --

12 MS. ALLEN: I'm looking at C on page four.

13 MR. ELLERTSON: And just that I move the
14 Board return the proposed dispositive action to the
15 administrative law judge with directions to revise
16 and resubmit to the Board findings of facts,
17 conclusions of law and a recommendation order in
18 conformity with the modifications adopted by the
19 Board as follows or to include?

20 MS. ALLEN: Yes, but with the following
21 direction.

22 MR. ELLERTSON: Okay, with the following
23 direction. That we alter it, with the understanding
24 that we are recognizing the value in there being an
25 opportunity to -- and you used some wording -- I'm

1 going to say to hold in abeyance a permit while
2 the --

3 UNIDENTIFIED SPEAKER: An existing permit.

4 MR. ELLERTSON: What's the term that you
5 were using? While...

6 MS. ALLEN: Until the other permit is
7 final and nonappealable.

8 MR. ELLERTSON: While the action -- what
9 are we -- while the new permit is being challenged?
10 I'm not saying that very well.

11 MS. ALLEN: That's correct.

12 MR. ELLERTSON: While the new permit is
13 being challenged, and yet that permit is being
14 allowed to operate under that the -- that the
15 original permit be held in abeyance until such time
16 as the other one is final. And that at the time that
17 it becomes final, that then there would be a 30-day
18 period within which the Executive Secretary would
19 have to declare the original permit as no longer
20 valid.

21 MR. MERTZ: Terminated.

22 MR. ELLERTSON: Or terminated. That's the
23 better word.

24 MR. MURRAY: Okay. There is a motion on
25 the table. Is there a second?

1 MR. ELLERTSON: Fix it to make it better.

2 MR. MURRAY: Or do you want to make some
3 modifications to it?

4 MR. MICKELSON: I think that maybe some
5 modifications to where it states that the Executive
6 Secretary has the ability in the interim time in
7 these permits to hold one permit so that we are
8 actually saying that the Executive Secretary does
9 have the ability or the authority to -- to conduct
10 that action while one permit is being finalized. So
11 however we would articulate that.

12 MS. ALLEN: To hold one permit in -- to
13 hold the IVb permit in abeyance until the --

14 MR. ELLERTSON: Do we want to be specific
15 and talk about those? That would be great. Yeah.

16 MS. ALLEN: Until the Class VI permit is
17 finalized and nonappealable or a decision is made?
18 And all appeals are concluded.

19 MR. ELLERTSON: Until the Class VI is
20 final and no longer appealable and nonappealable.

21 MR. MURRAY: Okay. Let me try and restate
22 that.

23 So we are moving -- move the Board to
24 return the proposed dispositive action to the
25 administrative law judge with directions to revise

1 and resubmit to the Board findings of facts,
2 conclusions of law and a recommended order consistent
3 with the following. That the Executive Director has
4 discretion --

5 MR. WIXOM: Executive Secretary.

6 MR. MURRAY: Sorry. Executive Secretary
7 has the discretion, when a new permit has been
8 applied for, to hold the existing permit in abeyance
9 and allow the applicant to operate under the permit
10 that has been challenged until such time as the
11 permit becomes final and nonappealable, at which time
12 the original permit must be terminated within 30
13 days.

14 MR. MICKELSON: Yes.

15 MR. MURRAY: Is that accurate?

16 MR. MICKELSON: Yes.

17 MR. MURRAY: Okay.

18 MR. ELLERTSON: Somebody second it?

19 MR. MURRAY: Is there a second?

20 MR. MICKELSON: I'll second that.

21 MR. MURRAY: Okay. Is there any
22 discussion?

23 Okay. Go ahead.

24 MS. ALLEN: I was going to say the
25 followup motion would be in all other respects you

1 accept her proposal, her recommended order.

2 MR. MURRAY: Okay. Is there discussion on
3 that motion? If there is no discussion, I'll call
4 for a vote.

5 All in favor?

6 (Board members indicate aye.)

7 MR. MURRAY: Any opposed?

8 Okay. And then in terms of the rest of
9 the order is there a motion?

10 MR. ELLERTSON: And that would be to
11 accept the remaining portions of the order as stated?

12 MR. DUPONT: There were a couple --

13 MS. ALLEN: Accept and approve.

14 MR. DUPONT: Weren't there a couple --
15 weren't there a couple of findings of fact that were
16 suggested to be moved so we should deal with those.
17 It's where we started this whole thing.

18 MR. MURRAY: That's 15.

19 MR. COOMBS: I thought we agreed that --
20 not to strike 15 or amend it. So that would be
21 accepting it as written.

22 MR. ELLERTSON: Well, there was some
23 discussion about moving it to a conclusion of law or
24 a finding of law as opposed to a conclusion of fact
25 or whatever the terms are.

1 MR. MURRAY: I don't feel strongly about
2 this. I think some of these things read like
3 conclusions of law or findings of fact, but she is
4 using them one way or another to support a conclusion
5 that she is reaching. So I don't have strong
6 feelings about that. But I'm happy to entertain a
7 motion if one of you want to make it.

8 MR. MERTZ: Well, 15 totally contradicts
9 her motion we just made.

10 MR. MURRAY: Well, she is going to have to
11 rewrite the decision.

12 MR. ELLERTSON: The motion dealt with the
13 broad discussion.

14 MR. MURRAY: And the way we've made this
15 motion, it's got to come back to us for
16 reconsideration anyway. So we are going to be able
17 to read a second time if something appears
18 inconsistent...

19 MR. DUPONT: And you were talking about
20 the conclusion of law 15. The finding of fact 15 has
21 to do with it becoming a proposed commercial
22 landfill. And I don't think anybody had an issue
23 with that. So maybe we should just leave it.

24 MR. MURRAY: Okay. Then I'll entertain a
25 motion with regard to the rest of the order.

1 MR. DUPONT: I'll move that we support the
2 rest of the administrative law judge's order as
3 written.

4 MR. MURRAY: Okay. Motion by Mr. Dupont.
5 Is there a second?

6 MR. COOMBS: I'll second it.

7 MR. MURRAY: Second by Mr. Coombs.

8 Any discussion?

9 All in favor?

10 (Board members indicate aye).

11 MR. MURRAY: Opposed?

12 All right.

13 MS. ALLEN: All right. Then I have a
14 question for the Board. I will -- Board counsel will
15 review the record and prepare an appropriate order
16 based on the members' comments and votes. And in
17 this instance I thought that I would go ahead and
18 prepare the order and put it -- ask you to put it on
19 an agenda either next month or the following month so
20 that you can see what the order is and compare
21 your -- the minutes and the transcript and see if
22 that's how you want to do it.

23 Is that -- does that sound acceptable to
24 you?

25 MR. DUPONT: And then from there it goes

1 back to the --

2 MS. ALLEN: And then after that it would
3 -- yeah, after you approve it and it's final in your
4 mind, then it goes back to the administrative law
5 judge to take action and then she'll resubmit
6 something to you.

7 MR. MURRAY: Yes, that sounds fine with
8 me.

9 We may have a logistical issue. Does this
10 Board not reorganize in March? Is that correct? We
11 could be in a situation that by the time we get the
12 decision back from her, it's a different board.

13 MR. DUPONT: That's what all of the
14 documentation is for.

15 MR. MURRAY: Okay.

16 MR. ELLERTSON: Yeah, but is there a
17 way -- is there a way to act more quickly on it?

18 MR. MICKELSON: Can you electronically
19 distribute that as an information packet?

20 MS. ALLEN: Well, the alternative would be
21 that I -- I could prepare the order and submit it to
22 the Board chair, who is the presiding officer who
23 would be reviewing it and saying this is not -- we
24 are returning it.

25 MR. MURRAY: I don't want to do that. I

1 would like to have everyone's comments so...

2 MS. ALLEN: So I don't know if --

3 MR. MURRAY: Well, are -- do we -- is
4 February our last meeting or March our last meeting?

5 MR. WIXOM: February.

6 MR. MURRAY: February. Okay.

7 Mr. Wixom.

8 MR. WIXOM: The Board could determine to
9 have additional meetings. Those meetings could, with
10 proper notice, be electronic.

11 MS. ALLEN: That is correct.

12 MR. MURRAY: Maybe that's what we --

13 MR. MICKELSON: If that's possible, I
14 think that's what we should -- that would be best.

15 MR. MURRAY: Yeah, let's do it that way.
16 Okay. We'll proceed that direction.

17 MR. ELLERTSON: So do we want to set
18 times?

19 MR. MURRAY: Why don't we --

20 MS. ALLEN: It still has to be noticed up
21 so if you would note what your calendars are, you
22 want to do that, then...

23 MR. MURRAY: How long do you think we
24 need, Sandra, for you to do that?

25 MS. ALLEN: Probably a week, maybe.

1 Could we...

2 MR. MURRAY: Would it be possible to --
3 something on the 24th?

4 MR. ELLERTSON: I'm good.

5 MR. MURRAY: Can we do an electronic
6 meeting on the 24th?

7 MR. ELLERTSON: Yes. What time?

8 MR. MURRAY: Let's do whatever we need to
9 do to notice an electronic meeting on the 24th, with
10 the idea that by that point we will have a proposed
11 motion in circulation. Not motion...

12 MS. ALLEN: Order.

13 MR. MURRAY: Order that we can discuss.

14 MR. ELLERTSON: When do we think the order
15 will be ready?

16 MS. ALLEN: When will the transcript be
17 ready?

18 THE REPORTER: In a week.

19 MS. ALLEN: So we will probably need a
20 couple of days after we get the transcript to look at
21 the transcript and then prepare the order.

22 MR. MURRAY: The 24th is two weeks from
23 today.

24 MS. ALLEN: That would be fine.

25 MR. MURRAY: So that should work?

1 MR. ELLERTSON: My challenge is finding a
2 time during the day that we are going to do that.
3 I'm saying, what time do you --

4 MR. MICKELSON: What time do you have
5 open?

6 MR. ELLERTSON: Probably after 3:00.

7 MR. MURRAY: I'm fine with that. 3:00.

8 MR. DUPONT: Yes. I don't have to travel,
9 right? I'll just sit in my office?

10 MR. MURRAY: Yeah, you -- just a phone
11 call.

12 MR. DUPONT: (Indistinguishable).

13 MR. MURRAY: All right. Then our next
14 meeting will be an electronic meeting at 3:00 on the
15 24th of January.

16 MR. DUPONT: And you will send out
17 notification to remind us?

18 UNIDENTIFIED SPEAKER: Yes, sir.

19 MR. MURRAY: Mike.

20 MR. MALMBORG: If I may. If you are
21 hoping to have Judge Nak -- review Judge Nakahara's
22 revised order by February, okay.

23 MS. ALLEN: Oh.

24 MR. MALMBORG: Then I was going to say, if
25 you are hoping to review it by February, you may want

1 to instruct Sandra or give some direction in your
2 motion regarding that timeline.

3 MS. ALLEN: All right. Do you want to put
4 that in the motion, that you request Judge Nakahara
5 that you want -- do you want to request -- set forth
6 in the motion to request Judge Nakahara to provide
7 you with the revised dispositive action by a given
8 date?

9 MR. ELLERTSON: Is February 1st
10 reasonable?

11 MS. ALLEN: I don't know if it's
12 reasonable but --

13 MR. MICKELSON: So...

14 MR. MURRAY: That only gives her a week.
15 I think --

16 MS. ALLEN: No.

17 MR. MURRAY: I think if we do that, we
18 have to say prior to February 14th.

19 MR. ELLERTSON: Well, we don't meet till
20 the 14th, right?

21 MR. MURRAY: Yeah. Our official meeting
22 -- our next scheduled board meeting is February 14th,
23 so I think we would request that she return it to us
24 before the 14th of February.

25 MS. ALLEN: Okay.

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MR. MURRAY: Okay. Any other issues,
comments?

We are adjourned.

(Hearing concluded at 4:12 p.m.)

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REPORTER'S HEARING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

I, Dawn M. Perry, Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said proceeding was taken down by me in stenotype on January 10, 2013, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 17th day of January, 2013.

Dawn M. Perry, CSR
Notary Public
Residing in Salt Lake County