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BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

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IN THE MATTER OF:

January 24, 2013

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

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**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.<sup>1</sup> 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**

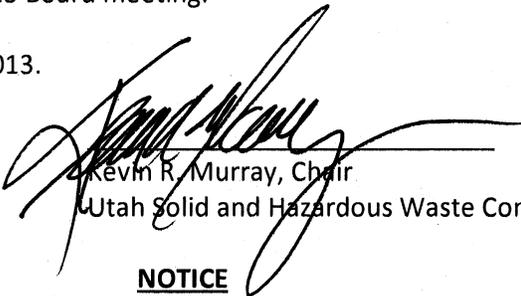
The Board orders the proposed dispositive action be returned to the Administrative Law Judge with directions to revise and resubmit to the Board on or about February 4, 2012, a memorandum and recommended order to uphold the Executive Secretary's decision to issue the Class VI permit and to hold the Class 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.

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<sup>1</sup> 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.<sup>2</sup> 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 24<sup>th</sup> 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

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<sup>2</sup> 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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