BEFORE THE EXECUTIVE DIRECTOR
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the matter of: **ENERGYSOLUTIONS, LLC** **GROUNDWATER QUALITY DISCHARGE PERMIT No. UGW450005** **NOTICE OF VIOLATION AND COMPLIANCE ORDER** **Docket No. UGW14-04**	**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT** January 4, 2016 Administrative Law Judge Bret F. Randall

This matter is before me pursuant to appointment by the Executive Director of the Utah Department of Environmental Quality dated October 16, 2014. The appointment charges me to conduct an enforcement review adjudicative proceeding in this matter in accordance with Utah Code Ann., § 19-1-301 and Utah Admin. Code R305-7-301.

Currently pending before me are cross motions for summary judgment. The parties have submitted comprehensive briefing, including supplemental briefing at my request. Oral argument was held on December 16, 2015. Ashley A. Peck and Jennifer S. Horne appeared on behalf of Petitioner, Energy*Solutions*. Connie S. Nakahara appeared on behalf of Respondent, Director of the Utah Division of Radiation Control ("DRC").

I find and conclude that because there are no genuine issues of material fact in dispute, summary judgment is warranted pursuant to Utah Admin. Code R305-7-312(6) and Rule 56 of

the Utah Rules of Civil Procedure. Following is my proposed Memorandum Decision and Order on Cross Motions for Summary Judgment.

I. INTRODUCTION

Energy*Solutions* operates a commercial landfill near Clive, Utah that is licensed to dispose of low level radioactive waste, uranium mill tailings, and mixed waste (the "Clive Facility"). At present, waste is placed in three active embankments. A fourth embankment was closed in 2005.[1] Because of the nature of its operations, the Clive Facility is subject to various regulatory licenses and permits, including a Groundwater Discharge Permit (the "Permit") managed by the DRC under the Utah Water Quality Act, Utah Code Ann. Title 19, Chapter 5, and associated groundwater regulations (Utah Admin Code R317-6-1 *et seq.*). Because groundwater at the Clive Facility is naturally saline, it is classified under the law as Class IV. The Permit applies site-specific groundwater protection levels to protect human health and the environment that are consistent with the groundwater classification.[2] The Permit also provides specific protection levels for specific types of pollutant parameters (referred to here as the "Protection Levels"). The specific Protection Levels are documented in several tables in Part I.C of the Permit.[3]

The Permit requires Energy*Solutions* to conduct periodic sampling of more than 50 compliance monitoring wells located throughout the Clive Facility to demonstrate compliance with the Protection Levels.[4] Energy*Solutions* must also monitor compliance wells for additional constituents that are not subject to specific Protection Levels, including General Inorganic

[1] *See* Doc. No. 8 (IR000294).
[2] *See* UAC R317-6-4.7.
[3] Doc. No. 7 (IR000209-215).
[4] *Id.*, Part I.F.1 ("Compliance Monitoring Wells") (IR000243); Part I.F.5.c.ii ("Protection Level Parameters") (IR000248).

Parameters: chloride, sulfate, carbonate, bicarbonate, sodium, potassium, magnesium, calcium, bromide, iron, and total anions and cations.[5] For ease of reference, I will refer to these as the "Supplemental Constituents."

The Clive Facility employs a series of evaporation ponds that are used to collect, store, and dispose of (through evaporation) operational wastewater and stormwater from operational areas where surface water may come into contact with waste.[6] These manmade evaporation ponds are engineered ponds lined with low-density polyethylene and are subject to Best Available Technology or "BAT" standards applicable to surface and waste water.[7]

The Permit requires, among other things, that, on an annual basis, Energy*Solutions* "collect water quality samples from fluids stored in the approved evaporation ponds" and "[a]nalyze said water samples for all ground water quality protection level parameters defined in Part I.F.5.c.2., above, including a complete gamma spectroscopic analysis."[8] The Permit further provides that "[s]ampling and analysis at all evaporation ponds shall comply with the currently approved Water Monitoring Quality Assurance Plan" (generally referred to here as the "QAP.")[9]

The Permit also requires Energy*Solutions* to submit to the DRC a groundwater monitoring report, by March 1st of each year, for all of the monitoring required in Part I.F of the Permit for the previous calendar year.[10]

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[5] *Id.*
[6] *Id.*, Part I.F.13 (IR000251–252).
[7] *See* Doc. No. 7, Parts I.E.7 (IR000231) (outlining BAT requirements for wastewater), and 14 (IR000236) (outlining BAT requirements for wastewater); 24 (IR000254) (outlining BAT monitoring requirements, including written records of stormwater removal and discharge location).
[8] *Id.*, Part I.F.13.c (IR000252).
[9] *Id.*
[10] *Id.*, Part I.H (IR000260).

In February of 2014, Energy*Solutions* submitted to the DRC its annual groundwater report for calendar year 2013 (the "2013 Report").[11] The 2013 Report, Section 2.3, discloses the following facts:

> One of the two coolers containing pond samples arrived at TAD [testing lab] three days late because of a shipping error. Some of the analyses were past holding times and/or were outside of temperature requirements. For this reason, the 1997, 2000, MW, and NW Ponds were resampled on June 24, 2013. The 1997, 2000, and MW Ponds required resampling for inorganics (anions and TDS) and cyanide. The NW Pond required resampling for inorganics only. By the time of resampling, the 1995 Pond was dry, and therefore, inorganic analyses were performed on the June 5, 2013 sample, and results were qualified (Section 3.4).[12]

Section 3.4 of the 2013 Report provides additional disclosure, as follows:

> Total alkalinity, bicarbonate, carbonate, and total dissolved solids (TDS) from the P3-95 pond sample (TAD package 280-43108-2) were qualified as estimated ("J") because of analysis outside holding times. As discussed in Section 2.3, the pond was dry when resampling was attempted. Therefore, Energy*Solutions* instructed TAD to perform the analyses using the original sample volume, which had arrived at TAD late due to a shipping error.[13]

After evaluating the 2013 Report, the DRC did not accept this disclosure as being adequate to satisfy Energy*Solutions*' obligation in the Permit to provide analytical data as to the Supplemental Constituents for the P3-95 Pond for the calendar year 2013. On April 16, 2014, the DRC issued Energy*Solutions* a Notice of Violation and Compliance Order ("NOV") that is the subject matter of these proceedings.[14] The cover letter to the NOV explains:

> [Energy*Solutions*] violated Part I.F.13.c of the Permit for failing to analyze all annual P3-95 Evaporation Pond samples in conformance with the currently approved QAP. Specifically:
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> > 1. Samples collected for the P3-95 Pond (collected on June 6, 2013 and received by Test America Denver on June 10, 2013) were outside of QAP preservation

[11] *See* Doc. No. 7 (IR000290) through Doc No. 14 (IR002878), inclusive.
[12] *See* Doc. No. 7 at 7 (IR000298).
[13] *See* Doc. No. 7 at 15 (IR000306).
[14] *See* Doc. No. 16 (IR003141).

> requirements for the following analytes: Bromide, Fluoride, Chloride, Nitrate, Sulfate, Nitrate/Nitrite, Bicarbonate, Carbonate, and Total Dissolved Solids. The cooler samples were received by the laboratory with a temperature of20.8° C. The QAP requires a temperature of 4° C for all inorganic and organic samples.
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> 2. Samples collected for the P3-95 Pond were outside of holding times for Bicarbonate, Carbonate, and Total Dissolved Solids.[15]

Energy*Solutions* argues that it submitted "qualified" or estimated data for the above-referenced analytes, as it is allowed to do under certain provisions in the QAP. The DRC disagrees, arguing that the QAP does not allow Energy*Solutions* to submit qualified data or, in the alternative, even if the QAP allowed Energy*Solutions* to submit estimated or qualified data for the constituents at issue, Energy*Solutions* failed to satisfy the level of disclosure necessary to qualify this data.

This matter requires the resolution of two issues: (1) does the QAP provide Energy*Solutions* with the right to submit qualified data as to the P3-95 pond in satisfaction of its obligations under the Permit; and (2) if so, did Energy*Solutions* comply with the conditions and requirements relating to the use of qualified data?

For the reasons explained more fully below, I find and conclude that, even viewing the evidence in the light most favorable to Energy*Solutions*, the company failed to comply with the clear and unambiguous conditions and requirements in the Permit relating to the use of qualified data. As a result, the DRC was under no obligation to accept the qualified data in satisfaction of Permit requirements. Moreover, the DRC refused to accept the qualified data, a decision that falls within the DRC's discretion under the circumstances presented here. Thus, the DRC has proven the existence of a violation of the Permit for the reasons stated in the NOV. The

[15] *Id.* at IR003144.

remaining arguments and issues raised by Energy*Solutions* in these proceedings go to potential mitigation of the civil penalty, not to the question of whether a violation has been proven under strict liability. Summary judgment is warranted in favor of the DRC as to the fact of a violation.

II. STANDARDS OF REVIEW

A. Summary Judgment

A presiding officer may grant a timely motion for summary judgment in an adjudicative proceeding if the moving party meets the requirements specified in Rule 56, Utah Rules of Civil Procedure.[16] Summary judgment is warranted where "the pleadings . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law,"[17] when viewing the facts and making all reasonable inferences in "the light most favorable" to the nonmoving party.[18] In this matter, I find and conclude, that there are no genuine issues of material fact; as a result, summary judgment is warranted based on this record.

B. Administrative Law Judge – Executive Director

This proceeding is governed, in part, by the Utah Administrative Procedures Act or the UAPA.[19] Under the UAPA, an agency decision may be overturned if "the agency . . . erroneously interpreted or applied the law"[20] where an agency's general interpretation of law is reviewed for correctness, "granting little or no deference to the agency's determination."[21] On

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[16] Utah Code Ann. § 63G=4-102(4)(b); Utah Admin. Code R305-7-312(6).
[17] *Overstock, Inc. v. Smartbargains, Inc.*, 2008 UT 55, ¶ 12 (citing *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983).
[18] *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.
[19] Utah Code Ann. § 19-1-301(3)(b).
[20] Utah Code Ann. § 63G-4-403(4)(d).
[21] *See Utah Chapter of the Sierra Club v. Bd. Of Oil, Gas and Mining*, 2012 UT 73, ¶ 9.

the other hand, to the extent that an agency's decision is "based upon a determination of fact," it may be overturned only where that determination "is not supported by substantial evidence when viewed in light of the whole record before the court."[22] In other words, an agency's factual findings will be given "great deference" and a reviewing court will "only set them aside when they are unsupported by substantial evidence."[23] For the reasons discussed more fully below, this matter primarily involves the application of law to the Permit and therefore little or no deference is afforded to the DRC. However, the data quality exemption upon which Energy*Solutions* relies by its terms requires the application of "professional judgment" in technical areas. In that respect, the DRC's refusal to accept qualified data in satisfaction of the data submission requirements of the Permit is entitled to deference.

III. FINDINGS OF FACT

Based on my independent review of the Administrative Record submitted in these proceedings, the following material facts are undisputed and I hereby submit them as required by my appointment and by the Utah Code:

1. Energy*Solutions* operates a commercial landfill in Tooele County, near Clive, Utah, that is licensed for the land disposal of low level radioactive waste, uranium mill tailings, and mixed waste (the "Clive Facility").[24]
2. The Clive Facility is divided into five primary operational areas, defined as: (1) the low-activity radioactive waste cell (closed in 2005); (2) the Class A Cell; (3) the Class A

[22] Utah Code Ann. § 63G-4-403(4)(g).
[23] *Sierra Club*, 2012 UT 73, ¶ 11 (citing Utah Code Ann. §§ 63G-4-403(4)(g)).
[24] *See* Doc. No. 8 (IR000294).

North Cell; (4) the 11.e(2) Cell; and (5) the RCRA Mixed Waste Cell. Permit and legal compliance at each area is overseen by one or several regulatory agencies.[25]

3. The Clive Facility is subject to a certain Ground Water Quality Discharge Permit, UGW450005 (the "Permit").[26] The version of the Permit at issue in these proceedings was valid from November 26, 2012 through June 8, 2013.[27]
4. While the Permit is issued in the name of the Utah Division of Water Quality, the DRC is responsible for regulatory oversight of the Permit.[28]
5. The Permit is issued pursuant to the Utah Water Quality Act, Utah Code Ann. § 19-5-101 *et seq.* (the "Act") and the associated groundwater quality protection regulations codified at Utah Admin. Code ("UAC") Chapter R317-6. A groundwater discharge permit is required for facilities that "discharge or would probably result in a discharge of pollutants that may move directly or indirectly into ground water."[29] Such permits are intended to ensure the protection of groundwater quality through the application of the "best available technology to minimize the discharge of any pollutant . . . ."[30]
6. The Permit does not directly authorize pollutant discharges to groundwater but instead requires the application of best available technology or "BAT" to prevent the discharge of pollutants to groundwater.[31] Thus, the Permit generally requires Energy*Solutions* to properly construct and operate waste management facilities that protect groundwater

[25] *See* Doc. No. 6 at IR000122.
[26] *See* Doc. No. 7 at IR000204.
[27] *Id.*
[28] *Id*.
[29] UAC R317-6-6.4(A).
[30] UAC R317-6-6.4(A)(3).
[31] Here, examples of BAT requirements include "the use of earthen materials in both the bottom liner and final cover[]" meeting certain engineering specifications; limits on the volume and characteristics of wastes, and other best management practices, sometimes referred to as BMPs. *See* Doc. No. 7 at IR000215; IR000228; IR000232-234.

beneath the Clive Facility and to monitor a network of more than 50 compliance monitoring wells located throughout the embankment areas for comparison to Protection Levels (defined below).[32]

7. The Permit applies site-specific groundwater protection levels to protect human health and the environment that are consistent with the groundwater classification at the Clive Facility.[33] The Permit also provides specific protection levels for specific types of pollutant parameters (referred to here as the "Protection Levels"). The specific Protection Levels are documented in several tables in Part I.C of the Permit.[34]
8. The Permit also requires Energy*Solutions* to monitor compliance wells for additional constituents that are not subject to specific Protection Levels, including General Inorganic Parameters: chloride, sulfate, carbonate, bicarbonate, sodium, potassium, magnesium, calcium, bromide, iron, and total anions and cations.[35] For ease of reference, I will refer to these as the "Supplemental Constituents."
9. The BAT required under the Permit includes the requirement to collect and contain stormwater that may have come into contact with wastes at the Clive Facility.[36] Energy*Solutions* must therefore pump and remove contact stormwater from the waste disposal cell areas and place in into one of five manmade evaporation ponds[37] that are used to collect, store, and dispose of (through evaporation) operational wastewater and stormwater from operational areas where surface water may come into contact with

[32] *Id.*, Part I.F.1 at IR000243 (Discussing Compliance Monitoring Wells and providing, in part, that "Ground water monitoring wells used as compliance monitoring points shall meet the following requirements . . . .").
[33] *See* UAC R317-6-4.7.
[34] Doc. No. 7 (IR000209-215).
[35] *Id.*
[36] Doc. No. 7 at IR000231, 235, 236.
[37] *Id.* at IR000236.

waste.[38] These evaporation ponds are engineered ponds lined with low-density polyethylene.[39]

10. Compliance with BAT requirements is measured by, among other things, periodic inspections of pond water levels as compared to performance criteria, measurements of leak detection systems, and maintenance of written records of inspections.[40]

11. The Permit Conditions, Parts I.D.12 and I.E.14 authorize Energy*Solutions* to operate a specific evaporation pond called the "1995" pond and also referred to as the P3-95 Pond.[41] This pond will be referred to here as the "P3-95 Pond."

12. The Permit requires, among other things, that, on an annual basis, Energy*Solutions* "collect water quality samples from fluids stored in the approved evaporation ponds" and "[a]nalyze said water samples for all ground water quality protection level parameters defined in Part I.F.5.c.2., above, including a complete gamma spectroscopic analysis."[42] These analytes include Supplemental Constituents of bromide, fluoride, chloride, nitrate, nitrate/nitrite, sulfate, bicarbonate, carbonate, and total dissolved solids.[43]

13. The Permit further provides that "[s]ampling and analysis at all evaporation ponds shall comply with the currently approved Water Monitoring Quality Assurance Plan," attached to the Permit as Appendix B and referred to here as the "QAP."[44]

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[38] Doc. No. 7, Parts I.E.7 (IR000231); I.E.14 (IR000236); and I.F.13 (IR000251–252).
[39] *See* Doc. No. 7, Parts I.E.7 (IR000231) (outlining BAT requirements for wastewater), and 14 (IR000236) (outlining BAT requirements for wastewater); 24 (IR000254) (outlining BAT monitoring requirements, including written records of stormwater removal and discharge location).
[40] *Id.* at IR000251.
[41] *See* Doc. No. 7 at IR000223 and at IR000236-237.
[42] *Id.*, Part I.F.13.c (IR000252).
[43] *Id.*, Part I.F.12.(c) (IR000252) (parameters defined in Part I.F.5.c.2 (IR000249)).
[44] *Id.*, Part I.F.13(c) (IR000252). The QAP is included in the record as Doc. No. 6 (IR000116) and is dated as of its last revision in 2011.

14. The QAP provides guidelines related to sampling procedures and methods,[45] including, among other things, minimum temperature and maximum holding time requirements for samples for Supplemental Constituents, at Table B.4-2[46] and in Attachment A, Table A6-c.[47] The QAP also describes the data quality objectives for all sample collection under the Permit, as well as the quality control methods, personnel responsibilities and sample handling and custody procedures.[48] The data quality objectives are qualitative and quantitative statements that specify the data quality necessary to support specific decisions or regulatory actions.[49] They set numeric limits in order to determine whether data is sufficient for its intended use and to describe how the data will be used to meet the needs of the project.[50]

15. The QAP specifies that water quality samples will be analyzed for bromide using EPA Method 300.0; for chloride using Standard Method SM 4500-CL-E; for fluorine using Standard Method SM 4500-F-C; for nitrate/nitrite using EPA Method 353; for sulfate using Standard Method SM 4500-SO4-E; for bicarbonate and for carbonate using Standard Method SM 2320 B; and for total dissolved solids using Standard Method MS 2540 C.[51]

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[45] *See* Doc. No. 6 at IR000148-149; IR000157-159.
[46] Doc. No. 6 at IR000157.
[47] QAP Attachment A, Table A6-c, was apparently omitted from the version of the QAP provided in the initial record but was provided by the DRC as Exhibit 1 to its Memorandum in Support of Motion for Summary Judgment (June 26, 2015). Table A6-c is not dispositive to any issues in this case and is included here for purposes of foundation.
[48] *See* Doc. No. 6 at IR000128-129.
[49] *Id.* at IR000128.
[50] *Id.*
[51] Table A6-c.

16. Under the QAP, samples analyzed for bromide, chloride, fluoride, nitrate/nitrite, sulfate, total dissolved solids, bicarbonate and carbonate must be preserved at a temperature of 4° C.[52]

17. The sample holding times for total dissolved solids, bicarbonate and carbonate is seven days from sample collection to the time that the lab undertakes the analysis.[53]

18. The Permit requires Energy*Solutions* to submit to the DRC a groundwater monitoring report, by March 1st of each year, for all of the monitoring required in Part I.F of the Permit for the previous calendar year.[54]

19. In February of 2014, Energy*Solutions* submitted to the DRC, for its review and approval, Energy*Solutions*' annual groundwater report for calendar year 2013 (the "2013 Report").[55]

20. The 2013 Report, Section 2.3, discloses the following facts:

> One of the two coolers containing pond samples arrived at TAD [testing lab] three days late because of a shipping error. Some of the analyses were past holding times and/or were outside of temperature requirements. For this reason, the 1997, 2000, MW, and NW Ponds were resampled on June 24, 2013. The 1997, 2000, and MW Ponds required resampling for inorganics (anions and TDS) and cyanide. The NW Pond required resampling for inorganics only. By the time of resampling, the 1995 Pond was dry, and therefore, inorganic analyses were performed on the June 5, 2013 sample, and results were qualified (Section 3.4).[56]

21. Section 3.4 of the 2013 Report provides additional disclosure, as follows:

> Total alkalinity, bicarbonate, carbonate, and total dissolved solids (TDS) from the P3-95 pond sample (TAD package 280-43108-2) were qualified as estimated ("J") because of analysis outside holding times. As discussed in Section 2.3, the pond was dry when resampling was attempted. Therefore, Energy*Solutions* instructed

[52] Doc. No. 6, Table B.4-2, at IR000157.
[53] *Id.*
[54] Doc. No. 7, Part I.H, at IR000260.
[55] *See* Doc. No. 8 (IR000290) through Doc No. 14 (IR002878), inclusive.
[56] *See* Doc. No. 8 at IR000298.

TAD to perform the analyses using the original sample volume, which had arrived at TAD late due to a shipping error.[57]

22. As a result of the foregoing sample issues, Energy*Solutions* had the P3-95 Pond samples analyzed for total alkalinity (bicarbonate and carbonate) on June 27, 2013, exceeding the seven day holding time using Standard Method SM 2320B.[58] Energy*Solutions* also had the P3-95 Pond samples analyzed for total dissolved solids on June 25, 2013, exceeding the allowable seven day holding time using Standard Method SM 2540C.[59]

23. The 2013 Report identified that the P3-95 Pond samples for total alkalinity, bicarbonate, carbonate and total dissolved solids were qualified as estimated of missed sample holding times, albeit without complete disclosure of the material facts relating to such qualification.[60]

24. While the 2013 Report noted that some of the pond samples "were outside temperature requirements," Energy*Solutions* did not indicate that any of the sample results were qualified as estimated ("J") based on the failure to meet the maximum temperature requirements.[61]

25. At no time prior to the submission of the 2013 Report did Energy*Solutions* notify the DRC about the data validation issues discussed above or seek authorization or guidance about resampling or whether it would be acceptable to submit qualified data under all of the circumstances presented. Energy*Solutions* acted unilaterally in its attempt to submit qualified data from the P3-95 Pond for 2013.

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[57] *See* Doc. No. 8 at IR000306.
[58] *Id.* at IR001913, IR001916.
[59] *Id.*
[60] *Id.* at IR000306; IR001912; IR001916.
[61] *Id.*at IR000298; IR000306; IR0001908-1915.

26. After evaluating the 2013 Report, the DRC did not accept this disclosure as being adequate to satisfy Energy*Solutions*' obligation in the Permit to provide analytical data as to the Supplemental Constituents for the P3-95 Pond for the calendar year 2013.[62] On April 16, 2014, the DRC issued Energy*Solutions* a Notice of Violation and Compliance Order ("NOV") that is the subject matter of these proceedings.[63] The cover letter to the NOV explains:

> [Energy*Solutions*] violated Part I.F.13.c of the Permit for failing to analyze all annual P3-95 Evaporation Pond samples in conformance with the currently approved QAP. Specifically:
>
> > 1. Samples collected for the P3-95 Pond (collected on June 6, 2013 and received by Test America Denver on June 10, 2013) were outside of QAP preservation requirements for the following analytes: Bromide, Fluoride, Chloride, Nitrate, Sulfate, Nitrate/Nitrite, Bicarbonate, Carbonate, and Total Dissolved Solids. The cooler samples were received by the laboratory with a temperature of 20.8° C. The QAP requires a temperature of 4° C for all inorganic and organic samples.
> >
> > 2. Samples collected for the P3-95 Pond were outside of holding times for Bicarbonate, Carbonate, and Total Dissolved Solids.[64]

27. The NOV speaks for itself and is incorporated herein by this reference.[65]

28. Based on the findings of fact set forth in the NOV, the DRC found that Energy*Solutions* "is in violation of the following":

> 1. Failure to analyze the P3-95 Pond samples within holding times for

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[62] In support of its motion for summary judgment, Energy*Solutions* submitted the Sobocinski Declaration. This declaration is six pages long and consists of 23 separately numbered paragraphs. All of the facts set forth in the Sobocinski Declaration were known to Energy*Solutions* in 2013. However, the Energy*Solutions* did not disclose any of these facts to the DRC in 2013. Only the facts disclosed in the 2013 Report were known to the DRC at the time that it issued the NOV in 2014. Rather than establishing its compliance with the Permit and the QAP, the Sobocinski Declaration proves the extent to which Energy*Solutions* failed to disclose material facts to the DRC in 2013 as required by the Permit and by the QAP. In fact, the NOV and compliance order required Energy*Solutions* to submit a root cause analysis as well as disclosure as to corrective steps. Doc. No. 16 at IR003148. The NOV resulted in the disclosure of additional facts relating to this matter. *See* Doc. No. 17 (IR003150-55).

[63] *See* Doc. No. 16 (IR003141).

[64] *Id.* at IR003144.

[65] *See* Doc. No. 16 at IR003146-3149.

Bicarbonate, Carbonate and Total Dissolved Solids. This is a violation of Part I.F.5.13.c of the Permit.

2. Failure to provide sample preservation for P3-95 Pond samples of Bromide, Fluoride, Chloride, Nitrate, Sulfate, Nitrate/Nitrite, Bicarbonate, Carbonate, and Total Dissolved Solids. This is a violation of Part I.F.5.13 of the Permit, and Parts B.4- and Table B.4-2 of the Facility Quality Assurance Plan.[66]

29. Several provisions of the QAP acknowledge the possibility of data qualification in the event that samples exceed holding times or preservation requirements, or both. QAP Section B.9 describes the general purpose of holding times and provides that "[h]olding times for each analytical method are listed in Table B.4-2 . . . . Analytical data for those samples whose holding times were exceeded will be considered quantitatively questionable (possibly biased low) and will be qualified in accordance with EPA guidance to indicate the data that are estimated."[67] The QAP provides further that "[t]he data reviewer will conduct a systematic review of the data for compliance with the QC criteria established in the [QAP] and will identify any data omissions or data that do not meet the quality control criteria."[68] The QAP provides further that "[d]ecisions to repeat sample collection or analysis will be made by the DCP based on the extent of the data deficiencies and their importance in the overall context to the project."[69] The DCP refers to the Director of Data Compliance and Permitting ("DCP") as defined in the QAP—in this case as Energy*Solutions*.

30. The QAP also specifies criteria that should be applied when qualifying data. It requires that "[a]ll definitive data will be validated and qualified based on the results of the QC

[66] *Id.* at IR003147.
[67] Doc. No. 6 at IR000176.
[68] Doc. No. 6 at IR000185.
[69] *Id.*

sample analysis and the basic principles for data validation outlined in the USEPA Contract Laboratory Program National Functional Guidelines for Organic and Inorganic Data Review (EPA, 1994)"[70] (the "EPA Functional Guidelines"). The introductory section to the EPA Functional Guidelines provides in part:

> at times, there may be a need to use data which do not meet all contract requirements and technical criteria. Use of these data does not constitute either a new requirement standard or full acceptance of the data. Any decision to utilize data for which performance criteria have not been met is strictly to facilitate the progress of projects requiring the availability of the data. A contract laboratory submitting data which are out of specification may be required to rerun or resubmit data, even if the previously submitted data have been utilized due to program needs. Data which do not meet specified requirements are never fully acceptable. The only exception to this requirement is in the area of requirements for individual sample analysis, if the nature of the sample itself limits the attainment of specifications, appropriate allowances must be made.[71]

31. The EPA Functional Guidelines contain several references to the use of professional discretion. For example, the guidelines address holding times and state that if there are problems with the samples, "the integrity of the sample may have been compromised and professional judgment should be used to evaluate the effect of the problem on sample results."[72]

32. Notwithstanding the foregoing references, the right to use qualified data is neither absolute nor unilateral. Under the Permit Section III.A, entitled "Duty to Comply," the following provision is found: "The Permittee shall give advance notice to the Director of the Water Quality Board of *any* planned changes in the permitted facility or *activity which may result in noncompliance with permit requirements*."[73] The QAP also

[70] *Id.*
[71] Doc. No. 20 at IR003158-59.
[72] Doc. No. 1 at IR0000010-11.
[73] Doc. No. 6 at IR000274 (emphasis added).

provides, under the heading "**DATA VALIDATION CORRECTIVE ACTION**," in part, as follows:

> Corrective action *may be* initiated during data validation or data assessment. Potential corrective actions may include requesting re-sampling by the field team or reinjection/reanalysis of samples by the laboratory.
>
> These actions are *dependent* upon the ability to mobilize the field team, how critical the data are to the project [data quality objectives], or whether the samples are will within holding time criteria. When the data validator identifies a corrective action situation, the DCP will be notified and will have final *responsibility for contacting the appropriate State agencies* and for authorizing the implementation of the corrective action, including re-sampling. *All corrective actions will be documented by the DCP*.[74]

Finally, the QAP also sets as a data quality objective, a goal of 95 percent completeness, but also requires that "*DRC approval will be required for any completeness objective less than 100 percent.*"[75]

33. Energy*Solutions* did not provide the DRC with any notice during 2013 of the sample preservation and holding time problems at issue in these proceedings nor did it seek any guidance from the DRC about data validation corrective action, as provided in the QAP, which may have included further resampling or the potential us of qualified data when approved by the DRC. Energy*Solutions*' first, limited disclosure of these problems came in February of 2014 in the 2013 Report.[76] Additional facts were disclosed for the first

[74] Doc. No. 6 at IR000200 (emphasis added).
[75] *Id.* at IR000132 (emphasis added). The proposed use of qualified data here would count against the completeness objective as defined in the QAP.
[76] At oral argument, counsel for Energy*Solutions* suggested that the only disclosure problem with the 2013 Report was the omission of a "J" flag in connection with the sample preservation requirements (temperature) showing that the data was estimated. I disagree that this was the only problem with Energy*Solutions*' failure to communicate with the DRC. The provisions of the Permit and QAP cited in Finding of Fact No. ___ establish that Energy*Solutions* had the duty to notify DRC in June of 2013 regarding the sample preservation and holding time problems before making any attempt to submit qualified data. The requirements to provide timely communication to the DRC, including for sample preservation and holding time problems, further supports the interests of regulatory certainty counsel mentioned at oral argument. The NOV at issue here may have been avoided had Energy*Solutions* complied

time in Energy*Solutions*' Response to Notice of Violation and Request for Agency Action that triggered these proceedings.[77] Energy*Solutions*' first complete disclosure of all of the material, relevant facts supporting its submission of qualified data for the P3-95 Pond was made with the filing of the Sobocinski Declaration in these proceedings, in July of 2015.

IV. ANALYSIS

A. Strict Liability for Violation of Clear and Unambiguous Permit Provisions

A threshold legal issue here involves the liability standard for the NOV. The parties agree and I find and conclude that Energy*Solutions*' compliance with the Permit is subject to a strict liability standard. The Utah Code provides that [a]ny person who violates [the Water Quality Act], or any permit, rule, or order adopted under it, upon a showing that the violation occurred, is subject in a civil proceeding to a civil penalty . . . ."[78] Similarly, Part III.A of the Permit provides, in part: "The permittee must comply with all conditions of this Permit. Any permit noncompliance constitutes a violation of the [Utah Water Quality] Act and is grounds for enforcement action; permit termination, revocation and reissuance or modification; or denial of a permit renewal application."[79]

While there does not appear to be any Utah case law on point, the conclusion that the Permit violation at issue here is subject to strict liability finds support under the Clean Water Act or CWA, the federal counterpart to the Utah Water Quality Act. The CWA imposes strict

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with its duty to provide timely communications to the DRC. It was not the responsibility of the DRC to "pick up the phone and call" Energy*Solutions* in the spring of 2014 to address data quality questions from the 2013 Report. By then, the opportunity to implement data validation corrective action for 2013 that was acceptable to the DRC had lapsed.

[77] Doc. No. 17 (IR003150-55).

[78] Utah Code Ann. § 19-5-115(2).

[79] Doc. No. 7 at IR000274.

liability for permit violations: "If a discharge permit holder fails to comply with any condition of its permit, the permit holder violates the [authorizing act]."[80] This holding is based on language in the CWA to the effect that compliance with conditions in a permit is tied to compliance with the CWA itself, similar to the provision in the Utah Code cited above.[81] Much of the evidence in the record before me relates to mitigating factors that relate to the mitigation of the civil penalty, not to the question of whether a violation occurred and thus will not be considered.[82]

But the fact that strict liability applies to violations of the Permit does not end the inquiry. A companion rule to strict liability is the idea that a permittee can only be held to comply with the clear and unambiguous provisions of the regulation or permit in question. When "violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express."[83] Thus, "[t]he responsibility to promulgate clear and unambiguous standards is on the [agency]. The test is not what [the agency] might possibly have intended, but what [was] said. If the language is faulty, the [agency] had the means and obligation to amend."[84]

In this matter, because a violation of the Permit constitutes a violation of the Water Quality Act, and because the Permit (and QAP) are drafted by and subject to revision by the DRC, the "clear and unambiguous" standard applies here. The "clear and unambiguous" requirement supports due process by informing the permittee of the specific performance

[80] *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 179 F.3d 107, 109 (4th Cir. 1999).
[81] *Compare* 33 U.S.C. §§ 1342(k) – 1344(p) with Utah Code Ann. § 19-5-115(2).
[82] Examples of evidence that goes to mitigation of the civil penalty include: (1) the fact that the P3-95 Pond was dry in June of 2013 when resampling was attempted; (2) the technical arguments relating to the actual validity of the samples and the potential use of the qualified data that was submitted; and (3) the argument that the qualified pond data had no effect on DRC's ability to measure Permit compliance.
[83] *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982) (internal quotation omitted).
[84] *Marshall v. Anaconda Co.*, 596 F.2d 370, 377 n. 6 (9th Cir.1979) (internal quotation omitted).

requirements necessary to avoid strict liability. Thus, the DRC's reliance on policies underlying the Permit cannot be treated as a substitute for the agency's duty to employ clear and definitive language.

Based on the strict liability standards set forth above, the only question before me in these proceedings is whether the DRC has proven that a violation of the Permit has occurred. To make this determination, I must answer two questions: (1) what does the Permit clearly and unambiguously require Energy*Solutions* to do; and (2) did Energy*Solutions* comply with the clear and unambiguous requirements of the Permit?

B. <u>The Right to Submit Qualified Data is Neither Absolute Nor Unilateral</u>

The Permit, Part I.F.13(c) places the burden to properly collect and analyze water quality samples on Energy*Solutions* as the holder of the Permit.[85] The clear and unambiguous provisions of the Permit require that annual samples from the P3-95 Pond meet the sample preservation and holding time requirements set forth in Table B.4-2 of the QAP.[86] The requirements set forth in Table B.4-2 establish a general rule. Had the 2013 samples for the P3-95 Pond met the criteria set forth in the table, there would have been no potential violation of the Permit. Energy*Solutions*' failure to meet the general rule—the sample preservation and holding time requirements—is not in dispute. Rather, in this matter, Energy*Solutions* seeks to fall under an exemption to the general rule, in reliance on other provisions of the QAP that, it argues, provides Energy*Solutions* with the right to submit qualified data for 2013 for the P3-95 Pond.

[85] *See* Doc. No. 7 at IR000252 (providing that, "on an annual basis, the Permittee shall . . .[c]ollect water quality samples from fluids stored in the approved evaporation ponds . . . .").
[86] *See* Doc. No. 6 at IR000157-158.

While Energy*Solutions* always has the burden to comply with the requirements of the Permit, this burden is even more stringent when it comes to the application of an exemption to a general rule of law: "[T]he burden of proof is on the party seeking to invoke the benefits of an exemption to a general rule of law."[87] Because a violation of any condition of the Permit constitutes a violation of the Utah Water Quality Act, the Permit has the effect of a general rule of law.

So the dispositive question here is whether Energy*Solutions* complied with the Permit requirements regarding the use of qualified data. While the QAP does provide for the potential use of qualified data under certain circumstances, I find and conclude that, even viewing the evidence in the light most favorable to the company, Energy*Solutions* failed to comply with the Permit requirements relating to the use of qualified data for several reasons.

First, the right to use qualified data, as described in the Permit is not absolute. The Permit provides that qualified data *may* be used under certain circumstances. *See* Findings of Fact Nos. 29-32. There is nothing in the language of the Permit or associated documents suggesting that a permittee enjoys an absolute right to use qualified data. To the contrary, according to the EPA's guidance, the use of qualified data "does not constitute . . . full acceptance of the data."[88] The DRC's acceptance of qualified data is a matter of its independent professional judgment as may be mutually agreed between the permittee and the regulatory staff. This conclusion is clear and unambiguous when considering the Permit as a whole.

[87] *Ekotek Site PRP Committee v. Self*, 881 F. Supp. 1516, 1524 (D. Utah 1995) (discussing the application of the petroleum exclusion under the federal CERCLA statute).
[88] Doc. No. 20 at IR003158.

Second, based on the clear and unambiguous provisions of the Permit (and QAP), the use of qualified data requires the timely communication of the facts and circumstances relating to the data problems with, and the direct involvement of, state regulators. These specific provisions are outlined in Finding of Fact No. 32. Of these provisions, the one most relevant to the present matter is the discussion about Data Validation Corrective Action, found at IR000200. It provides, in part, that the DCP (in this case, Energy*Solutions*) "will have final responsibility for contacting appropriate State agencies and for authorizing the implementation of the corrective action, including re-sampling." As set forth in the Sobocinski Declaration, Energy*Solutions* acted unilaterally in all of the decisions regarding the P3-95 Pond sampling for 2013. As the DCP, Energy*Solutions* took no responsibility for contacting the DRC in 2013. As a result, the DRC was not aware of any data validation issues until February of 2014, and even then Energy*Solutions* failed to disclose many material facts relating to the sample and data issues.[89] Because the DRC was not aware of the issues with the samples, it was not able to provide oversight and guidance about the potential use of qualified data or the potential resampling of the P3-95 pond in the event that water became available in the pond between June and the end of the 2013 calendar year. By the time the 2013 report was submitted, it was too late to involve the DRC in decisions regarding data validation corrective action.

Third, the question of whether or not to accept qualified data in this instance is a matter of professional judgment. In these proceedings, Energy*Solutions*' arguments assume that the

[89] Compare the Sobocinski Decl. with the 2013 Report. All of the facts set forth in the Sobocinski Decl. were known to Energy*Solutions* in 2013 and should have been fully disclosed to the DRC at that time in accordance with the Permit and QAP. Energy*Solutions* did not disclose all of the material facts until it moved for summary judgment in these proceedings. Timely compliance with the communication requirements in the Permit and the QAP would have also resolved Energy*Solutions*' reasonable need for regulatory certainty as to whether the DRC would accept the use of qualified data under the circumstances presented in 2013 for the P3-95 Pond.

professional judgment described in the QAP and EPA guidance refers to Energy*Solutions*' sole professional judgment. This argument is not well taken. The clear and unambiguous provisions of the Permit and the QAP demonstrate that the DRC's professional judgment was also necessary to guide decisions regarding data validation corrective action and the use of qualified data. When the QAP and EPA guidance refer to professional judgment, they clearly mean the shared professional judgment of the permittee's representative (the DCP) and the DRC.

Finally, because the provisions relating to the use of qualified data involve the exercise of professional judgment, in issuing the NOV, the DRC necessarily employed its professional judgment in this instance to reject the qualified data proffered by Energy*Solutions*. The DRC clearly found that the attempt to use qualified data in satisfaction of the Permit requirements for 2013 was not adequate to satisfy the Permit.[90] This conclusion is based, in part, on the lack of timely information disclosure in the 2013 Report as discussed above.[91] At the time that the DRC issued the NOV, the only information available to it was that presented in the 2013 Report. In any event, because the DRC's rejection of the qualified data necessarily involves the DRC's use of its professional judgment as to technical areas that are within the DRC's regulatory role, I decline to second guess the exercise of that professional judgment.

C. Summary Judgment Against Energy*Solutions* is Warranted

Energy*Solutions* makes a number of arguments as to why summary judgment should not be entered against it in these proceedings. To assist the Executive Director in his independent evaluation of this matter, I will address these arguments in turn. The following analysis

[90] *See* Doc. No. 20 (IR003158-62).
[91] *Id.* at IR003159 (explaining that the 2013 Report failed to report as qualified data samples that failed to meet the sample preservation requirements).

considers the evidence in the light most favorable to Energy*Solutions*, as is required under Rule 56.

1. Whether the Holding Times and Sample Preservation Criteria Are Absolute Permit Requirements.

Energy*Solutions*' core argument in these proceedings is that the Sample Packaging Procedures at QAP Part B.4-14, and Table B.4-2, which list the respective preservation requirements and holding times, are not absolute requirements of the Permit.[92] In support of its argument, Energy*Solutions* points to selected provisions in the QAP that discuss the use of qualified data. This argument should be rejected.

While the QAP does provide for the potential use of qualified data, this option is not absolute nor does the use of qualified data fall within the sole discretion of Energy*Solutions*. *See* Section IV.B., above. According to the QAP, the DRC must be timely informed of any data collection or preservation issues and must be involved in any decision to implement corrective action or to use qualified data. Because Energy*Solutions* did not comply with the requirements and conditions relating to the use of qualified data under the facts presented here, its compliance with the Permit falls within the general rule of the QAP relating to holding times and sample preservation criteria. It is undisputed that Energy*Solutions* failed to comply with these requirements and, as a result, this failure is subject to strict liability.

[92] *See* Energy*Solutions*' Memorandum in Support of Motion for Summary Judgment ("ES SJ Memo") at 17-22; Energy*Solutions*' Response in Opposition to DRC Motion for Summary Judgment ("ES Opposition Memo") at 5-8; Energy*Solutions*' Reply in Support of Its Motion for Summary Judgment ("ES Reply Memo") at 2-4.

2. Whether the DRC Must Prove that The Validity of the Samples Was in Fact Compromised or that the Results Are Invalid.

Energy*Solutions* also argues that there is no evidence that the qualified data is, in fact, invalid, only that "holding time or temperature exceedances *could have* compromised the validity of the samples . . . ."[93] This argument is misplaced and should be rejected.

Under strict liability and the burdens of proof outlined above, there is no requirement that the DRC prove that the qualified samples were compromised or that the data was, in fact, invalid. The very purpose of the standard tests is to set the base rule for quality assurance. While the qualified data may have been accurate notwithstanding the failure to comply with the QAP, it is hard to imagine how the DRC would go about trying to make that kind of a showing, especially in light of the lack of data and information disclosed to the DRC regarding the situation. Energy*Solutions'* argument would shift the burden of proof to the DRC. Under the applicable burdens of proof, this is not warranted.

As explained more fully in Section IV.A., above, Energy*Solutions* has the burden of proving its compliance with the Permit. This is so in part because the requirements of the Permit become elements of the Water Quality Act. The QAP is incorporated into the Permit. The QAP at Part B.4-14, and Table B.4-2 lists the clear and unambiguous preservation requirements and holding times for samples. Energy*Solutions* understood these requirements and knew that during its 2013 sampling event, it failed to meet these criteria.[94] While Energy*Solutions* may have acted in good faith in attempting to qualify these data, there is no good faith defense to strict liability for violations of the Permit. I find and conclude that under the Utah Water Quality Act, as under

[93] ES Opposition Memo at 8-9 (emphasis in original); *see also* ES Reply Memo at 5-7.
[94] *See* Sobocinski Decl. ¶¶ 10-23.

the Clean Water Act, while proof of "good faith efforts to comply with applicable requirements" as well as the "seriousness of the violation," should be considered in connection with the civil penalty, such evidence is irrelevant to the legal question of whether a permit violation has been proven.[95] Energy*Solutions*' argument here goes to the seriousness of the violation,[96] not to the legal question of whether a violation of the Permit has been proven.

Because there is no basis to conclude that the DRC must prove that the qualified data was in fact compromised or that the results were in fact invalid in order to prove that a violation occurred, Energy*Solutions*' argument should be rejected.

3. Applicability of EPA's NPDES Guidelines.

Another collateral (and non-dispositive) argument mentioned in the briefing relates to EPA's sampling guidelines under an analogous program to the Utah groundwater protection program at issue in the Permit. In its opening memorandum, the DRC cites draft EPA guidance regarding compliance monitoring under the National Pollution Discharge Elimination System ("NPDES") for point source discharges to surface water.[97] The DRC's argument is that the draft EPA guidelines underscore the importance of compliance with applicable sample preservation and holding time requirements, which should be applied to groundwater permits in Utah. Energy*Solutions* discusses at some length a number of reasons that the DRC's argument on this

[95] *See Public Interest Research Group of New Jersey v. ELF Atochem North America, Inc.*, 817 F.Supp. 1164, 1179 (D.N.J. 1993).

[96] The administrative record suggests that the DRC understands that the Permit violation here is not serious. The Order in the NOV requires (1) compliance with the law and the Permit; and (2) a report to the DRC that includes the following items: (a) the root cause of the noncompliance; (b) corrective steps taken or to be taken to prevent re-occurrence of the noncompliance; and (3) date when compliance was or will be achieved. Doc. No. 16 at IR003148. No civil penalty was assessed. Moreover, after further consideration of the facts, the DRC reaffirmed its position that a violation occurred but offered to "close out" the NOV without further action. *See* Doc. No. 20 at IR003158-60. Notwithstanding this observation, the penalty associated with the NOV is not before me, only the legal question as to whether the DRC has proven that a violation occurred.

[97] Director of Radiation Control's Memorandum in Support of Motion for Summary Judgment ("DRC SJ Brief") at ¶ 61 and Exhibit 2 attached thereto.

point should be rejected.[98] While Energy*Solutions* raises some valid points here, I find and conclude that this entire line of argument is irrelevant and immaterial to the question of whether the DRC has proven that Energy*Solutions* violated the Permit. If anything, the authorities cited by Energy*Solutions* on this point actually support the recommended order here because under the EPA program, a variance from the EPA Regional Administrator is required before qualified data may be used.[99] No EPA permittee under the NPDES program enjoys the right to use qualified data without pre-approval from the EPA. As a result, Energy*Solutions*' argument here is inapposite and should not foreclose summary judgment against it.

4. Energy*Solutions* is Not "Mandating Acceptance of All Qualified Data."

In its opening memorandum, the DRC argues that if adopted here as Energy*Solutions* desires, the exception (regarding qualified data) will swallow the general rule (specifying sample preservation and holding time procedures).[100] This result, the DRC continues, would lead to unnecessary administrative burdens and uncertainty. Thus, the DRC's argument concludes, it is reasonable for the DRC to require all permittees to comply with the technical procedures and requirements regarding sample collection, preservation, and holding times.[101]

In response, Energy*Solutions* clarifies its position that data validation and qualification is not automatic, "but rather that the QAP granted it the ability to apply professional discretion in

[98] ES Opposition Memo at 10-12.
[99] Under the EPA guidelines about NPDES samples cited by Energy*Solutions*, sample holding times may be exceeded "only if" the permittee can prove that the specific analytes "are stable for the longer time" and if the permittee "*has received a variance from the [EPA] Regional Administrator*" under the applicable federal regulation. *See* ES Opposition Memo at 12 (emphasis added). The requirement for a variance from the EPA Regional Administrator before qualified data may be used is almost identical to the requirements of the Permit and the QAP at issue here. *See* Finding of Fact No. 32.
[100] DRC SJ Memo at ¶ 69.
[101] *Id.*

deciding whether, under the circumstances, the data were valid."[102] This argument is not well taken and should be rejected.

While the QAP does provide for the use of qualified data under certain circumstances, the clear and unambiguous provisions of the Permit and the QAP show that the data corrective action process is the shared responsibility of Energy*Solutions* and the DRC. The QAP does not delegate to Energy*Solutions*, alone, the unilateral professional discretion to make final decisions about the use of qualified data. Under the QAP, Energy*Solutions* had the duty to notify the DRC of the sample preservation and holding time issues in 2013 in order to trigger the data corrective action process or in the event that it failed to achieve the 100 percent completeness objective.[103] Moreover, the Permit requires timely notice to the DRC if there is any reason that a violation of the Permit may occur.[104] Reading the Permit and the QAP as a whole, it is clear that Energy*Solutions* had no absolute right to act unilaterally in its attempt to use qualified data here. Thus, its argument above should be rejected.

5. <u>The DRC's Position Creates Significant Uncertainty as to What is and What is Not Allowed under the Permit.</u>

Energy*Solutions* contends that adopting the DRC's legal position here would create significant uncertainty as to how it is to comply with the Permit and would negate "the express provisions of the QAP recognizing that data outside of hold and preservation can be qualified . . . ."[105] Continuing, Energy*Solutions* contends that "a new standard would be imported into the

[102] ES Opposition Memo at 13.
[103] *See* Finding of Fact No. 32.
[104] *Id.*
[105] ES Reply Memo at 7.

QAP that did not before, and would provide no predictable guidance for the DRC's subjective determination."[106] These arguments should be rejected.

The clear and unambiguous provisions of the Permit and QAP require the involvement of the DRC in any attempt to use qualified data or to implement the anticipated data corrective action process. These requirements are neither new nor unreasonable. The EPA imposes similar requirements when it comes to holing time exceedances under the NPDES program—advance approval from the EPA to use samples that exceed the holding time requirements.

Moreover and perhaps ever most important, the Permit and QAP requirements for timely communication and involvement of the regulators in fact promote the interests of compliance and enforcement certainty. Had Energy*Solutions* informed the DRC in June of 2013 of its sample collection problems, the DRC certainly would have worked with EnergySolutions to implement reasonable corrective actions, which may have included the use of qualified data just as Energy*Solutions* attempted to do here unilaterally. Corrective actions also could have included waiting until the fall or winter of 2013 to collect a water sample from the P3-95 Pond, albeit subject to the qualification that this sample would have been comprised primarily of surface precipitation and not contact surface water. But because Energy*Solutions* acted unilaterally, the DRC was never provided the opportunity to exercise its independent professional judgment to implement timely corrective action that was acceptable to the DRC. It was Energy*Solutions*' unilateral action that created compliance and enforcement uncertainty, not the Permit or the NOV. Thus, affirmation of the NOV here in fact promotes the interests of compliance and enforcement certainty.

[106] *Id.* at 8.

6. Impossibility of Data Re-Collection During 2013.

Finally, Energy*Solutions* argues that if the DRC's legal position is accepted, summary judgment cannot be entered against it because "the NOV apparently relies on facts that are disputed."[107] This assertion is based on the DRC's references in its briefing to the effect that "Energy*Solutions* could have collected another sample and chose not to do so."[108] For the following reasons I find that this argument is misplaced and should be rejected.

Under strict liability analysis, the DRC's burden of proof is not high. All the DRC need show is (a) what clear and unambiguous standard applies; and (2) the fact that Energy*Solutions* failed to meet the standard. As discussed above, the DRC has met this burden of proof to show that a violation occurred. There is no requirement that the DRC prove that taking a sample from the P3-95 Pond in 2013 was possible. This is simply not an element of proof, a conclusion even Energy*Solutions* appears to concede. Energy*Solutions* acknowledges that the DRC's legal position in these proceedings and the NOV itself are not based on a requirement that the DRC prove that collection of a sample during 2013 was possible.[109]

Second, the facts relating to the question of whether it was possible to re-sample the P3-95 Pond in 2013 go to a potential good faith or equitable defense, not to the legal question of whether a violation of the Permit has been proven. Equitable defenses do not negate the fact of a violation. Since the penalty is not before me, I need not consider the evidence relating to this defense.

[107] ES Opposition Memo at 13.
[108] *Id.* and n.48 (citing references to arguments in the DRC SJ Memo).
[109] ES Opposition Memo at 13.

Third, even if the issue were properly before me, Energy*Solutions* misconstrues what the Permit requires. Energy*Solutions*' argument here is based on the assumption that the Permit requires it to sample *contact* surface water that is discharged into the P3-95 Pond—that a sample of surface precipitation water would not have been sufficient to satisfy the requirements of the Permit.[110] Yet Energy*Solutions* readily admits that precipitation water was present in the P3-95 Pond subsequent to the June 2013 sampling event and before the end of 2013.[111] But the Permit does not require that only contact water from Pond P3-95 be sampled. The Permit simply provides that annually, Energy*Solutions* shall "[c]ollect water quality samples from fluids stored in the approved evaporation ponds." Any water present in the lined evaporation pond would apparently qualify as water being "stored" in the pond. Due to the potential evapo-concentration of minerals and contaminants in the P3-95 Pond, even non-contact stormwater would potentially pose a risk of discharge to ground water. While a single sample from the P3-95 Pond at a different time from the other times may impact its value, the Permit does not require that all of the evaporation ponds be sampled at the same time. All of these technical considerations underscore the reasonableness of the requirement in the QAP to involve the DRC in all questions involving data validation corrective action. In any event, Energy*Solutions*' arguments regarding impossibility assume too much and should be rejected on that basis.

Fourth and finally, even if this issue were properly before me, the evidence demonstrates that an equitable defense based on impossibility is not reasonably available to Energy*Solutions* here: It was in fact possible during 2013 for Energy*Solutions* to take samples from the P3-95

[110] *Id.* at 14-15.
[111] "the only water that could have been collected from the P3-95 Pond after the June 5th sampling event was precipitation that fell directly into the pond and would not be representative of the contact water meant to be sampled under the Permit." *Id.* at 15.

Pond for both contact and storm water from the P3-95 Pond. Energy*Solutions*' arguments and evidence say nothing about the period of time prior to June 5, 2013. Even assuming that a sample of contact water was required, because of its daily monitoring of water levels, Energy*Solutions* knew or should have known that pond levels were dropping quickly in 2013. Therefore, the annual sampling event could have been scheduled earlier in the year. Moreover, as discussed above, Energy*Solutions* readily admits that the P3-95 Pond did have standing water that could have been sampled prior to the end of 2013. Based on the evidence of record, Energy*Solutions* cannot establish that it was impossible for it to comply with the Permit requirement to take one water quality sample from the P3-95 Pond during calendar year 2013, where the sample was managed in accordance with preservation and holding time requirements.

Based on the foregoing, Energy*Solutions*' arguments regarding its proffered impossibility defense should be rejected for purposes of reaching the question of whether the DRC has proven that a violation of the Permit occurred, under applicable strict liability analysis. However, this evidence should be considered in connection with the penalty associated with the violation.

V. CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and analysis above, I hereby propose that the Executive Director enter the following Conclusions of Law:

1. Jurisdiction in this enforcement review adjudicative proceeding is proper in accordance with Utah Code Ann., § 19-1-301 and Utah Admin. Code R305-7-301.
2. There are no genuine issues of material fact that would prevent the granting of summary judgment in favor of the DRC and against Energy*Solutions*.

3. The Permit is subject to strict liability for compliance with its clear and unambiguous provisions.
4. The DRC has proven that Energy*Solutions* violated its Permit for the reasons stated in the NOV.
5. While the Permit does provide for the potential use of qualified data under certain circumstances, the right to use qualified data is neither absolute nor unconditional.
6. Energy*Solutions* failed to comply with the clear and unambiguous conditions and requirements relating to the use of qualified data in connection with its 2013 data for the P3-95 Pond. More specifically, Energy*Solutions* failed to involve the DRC in decisions relating to data validation corrective action that it attempted to apply unilaterally. Therefore, the DRC was under no obligation to accept the qualified data. *See* Finding of Fact. No. 32.
7. In issuing the NOV, the DRC necessarily exercised its technical discretion in rejecting the qualified data proffered by Energy*Solutions*. That exercise of technical judgment was not unreasonable under applicable standards of review. While it may appear reasonable to use the qualified data for the reasons set forth in the Sobocinski Declaration, many of the material facts disclosed there were not provided to the DRC prior to its issuance of the NOV and in any event, it is not my role to second guess the DRC's decision that the qualified data was of insufficient quality or reliability to satisfy the requirements of the Permit.

VI. RECOMMENDED ORDER

Based on the foregoing, I recommend that the DRC's motion for summary judgment be granted and that Energy*Solutions*' motion for summary judgment be denied. As a result, the RFAA should be dismissed and the NOV should be affirmed.

DATED this 4th day of January, 2016.

/s/ Bret F. Randall
BRET F. RANDALL
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of January, 2016, a true and correct copy of the foregoing **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND MEMORANDUM DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT** was served by e-mail upon the following:

Administrative Proceedings
Records Officer
Utah Department of
Environmental Quality
DEQAPRO@utah.gov

Ashley A. Peck
Jennifer S. Horne
Holland & Hart, L.L.P.
AAPeck@hollandhart.com
jshorne@hollandandhart.com

Connie Nakahara
Assistant Attorney General
160 E. 300 South
P.O. Box 140873
Salt Lake City, UT 84114-0873
cnakahara@utah.gov

/s/ Bret F. Randall
BRET F. RANDALL
Administrative Law Judge