
BEFORE THE
UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:

Weber County C&D Class IVb Landfill
Solid Waste Permit #0901

April 6, 2011

Administrative Law Judge
Connie S. Nakahara

MEMORANDUM AND RECOMMENDED ORDER

(Recommending Denial of Counterpoint Construction Company's Motion for Summary Judgment; Granting the Executive Secretary's Motion for Summary Judgment; Granting, in part, Denying, in Part, Moulding & Sons Landfill, LLC's Motion for Summary Judgment, Joined by Weber County)

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On October 19, 2009, the Executive Secretary of the Utah Solid and Hazardous Waste Control Board ("Executive Secretary") granted Weber County, as owner, and Moulding & Sons Landfill, LLC ("Moulding"), as operator, a noncommercial, nonhazardous, solid waste permit to construct and operate the Weber County, construction and demolition debris ("C&D") Class IVb Landfill. Counterpoint Construction Company ("Counterpoint"), by letter dated November 9, 2009, filed a *Request for Intervention, Request for Agency Action, and Request for a Stay of the Order of the Executive Secretary* seeking to declare the Weber County Landfill a commercial landfill and to revoke the permit for failing to meet Utah Code Ann. § 19-6-108(3)(b), -(10).¹ Counterpoint was granted standing to intervene in this proceeding and was admitted as a party.²

¹Counterpoint's *Request for a Stay of the Order of the Executive Secretary* was denied. See *Memorandum and Order (Ruling on Request for Stay and Order of Further Proceedings)* (May 26, 2010).

²See *Memorandum and Order (Ruling on Standing and Order of Further Proceedings)* (February 17, 2010).

Respondents Moulding and the Executive Secretary moved separately for summary judgment.³ Weber County joined Moulding's motion for summary judgment.⁴ Counterpoint also moved for partial summary judgment.⁵

Based on the discussion below, it is RECOMMENDED that the Utah Solid and Hazardous Waste Control Board:

DENY Counterpoint's partial motion for summary judgment;

GRANT the Executive Secretary's motion for summary judgment;

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

AFFIRM the Executive Secretary's permit decision and DISMISS Counterpoint's *Request for Agency Action* and this adjudicative

³See Moulding's *Motion for Summary Judgment* ("Moulding's Motion for Summary Judgment") (October 8, 2010); Moulding's *Memorandum in Support of Motion for Summary Judgment* ("Moulding's Summary Judgment Memorandum") (October 8, 2010); Executive Secretary's *Motion for Summary Judgment* (October 8, 2010); Executive Secretary's *Memorandum in Support of Summary Judgment* ("Executive Secretary's Summary Judgment Memorandum") (October 8, 2010).

⁴Joint Memorandum of Weber County and Moulding & Sons Landfill, LLC in Support of (1) the Executive Secretary's Motion for Summary Judgment and (2) the Executive Secretary's Supplemental Memorandum in Opposition to Counterpoint's Motion to Amend and Weber County's Memorandum in Support of Moulding's Motion for Summary Judgment ("Weber County's Support of Moulding's Motion for Summary Judgment") ("Weber County's Memorandum in Support of Moulding's Motion for Summary Judgment") (October 20, 2010). Weber County and Moulding also joined and supported the Executive Secretary's Motion for Summary Judgment and the Executive Secretary's Summary Judgment Memorandum. *Id.* The Executive Secretary also joined and supported Moulding's Motion for Summary Judgment and Moulding's Summary Judgment Memorandum. Executive Secretary's Memorandum in Support of Moulding & Sons Landfill, LLC's Motion for Summary Judgment (October 22, 2010).

⁵Counterpoint Construction's First Motion for Partial Summary Judgment, on the Issue of Facility Compliance with Utah Code Ann. § 19-6-102(3)(b)(iii), with Supporting Memorandum and Statement of Facts ("Counterpoint's Summary Judgment Motion") (October 8, 2010).

proceeding after the Executive Secretary modifies the permit as recommended because the issues raised in Counterpoint's request for agency action will be resolved.

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, on behalf of the Utah Solid and Hazardous Waste Control Board ("Board") regarding Counterpoint's *Request for Agency Action*.⁶ This *Memorandum and Recommended Order* is the culmination of a formal adjudicative proceeding conducted in accordance with Title 63G, Chapter 4, Utah Administrative Procedures Act.⁷ Consistent with Utah Code Ann. § 19-1-301(6)(a)(iii), this *Memorandum and Recommended Order* includes:

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

In considering this *Memorandum and Recommended Order*, the Board may:

- (i) approve, approve with modification, or disapprove [the ALJ's] proposed dispositive action⁸; or

⁶See Letter from Amanda Smith to Connie Nakahara, Appointment as ALJ (November 16, 2009).

⁷Pursuant to UTAH ADMIN. CODE R317-9-4(1), this proceeding was conducted as a formal proceeding.

⁸The ALJ's 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) board takes following an adjudicative proceeding on a request for agency action; and (b) is subject to judicial review under Section 63G-4-403").

(ii) return the proposed dispositive action to the [ALJ] for further action as directed.⁹

II. Relevant Documents.

The adjudicative record consists of the initial request for agency action, all motions and memoranda filed by the Petitioner and Respondents, all memoranda and orders issued by the ALJ, and this *Memorandum and Recommended Order*. An electronic copy of the adjudicative record is attached to the hard copy of this *Memorandum and Recommended Order*.

III. Legal Standard.

At issue in this proceeding are separate motions for summary judgment filed by Respondents Executive Secretary and Moulding (joined by Weber County), and a partial motion for summary judgment 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 56.¹⁰ 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."¹¹ The facts and inferences from those facts

⁹UTAH CODE ANN. § 19-1-301(6)(b).

¹⁰UTAH CODE ANN. § 63G-4-102(4)(b).

¹¹*Overstock.com, Inc. v. Smartbargains, Inc.*, 2008 UT 55, ¶ 12, 192 P.3d 858 (quoting Utah R. Civ. P. 56(c)).

must be viewed in “the light most favorable” to the nonmoving party.¹²

A party opposing a summary judgment motion “has the burden of disputing the motion with material facts.”¹³ Additionally, “bare contentions, unsupported by any specifications of facts in support thereof, raise no material questions of fact.”¹⁴

IV. Background.

On October 19, 2009, the Executive Secretary issued a class IVb nonhazardous solid waste permit to Weber County, as owner, and Moulding, as operator, for the Weber County C&D Landfill.¹⁵ A class IVb landfill is a noncommercial landfill permitted to receive twenty (20) tons or less of waste per day of only construction and demolition waste, yard waste, inert waste and under certain conditions, waste tires, materials derived from waste tires, and petroleum-contaminated soils.¹⁶

The Executive Secretary determined that the Weber County landfill is a noncommercial landfill because: 1) the landfill operates as a “not for profit” landfill

¹²*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)).

¹³*Overstock.com, Inc.*, 2008 UT 55, ¶ 16.

¹⁴*Id.* at ¶ 12 (quoting *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984)).

¹⁵Material Facts at ¶ 11 (incorporating by reference *Joint Stipulation of Undisputed Facts* (“*Undisputed Facts*”) (October 8, 2010) at ¶ 14).

¹⁶Material Facts at ¶ 10 (incorporating by reference *Undisputed Facts* at ¶ 10 (citing UTAH ADMIN. CODE R315-305-3)). The landfill is not allowed to accept dead animals. Material Facts at ¶ 15 (incorporating by reference *Undisputed Facts* at ¶ 18). A class IVb landfill may receive more than twenty (20) tons per day if it demonstrates that no waste from a conditionally exempt small quantity generator of hazardous waste is accepted. Material Facts at ¶ 10 (incorporating by reference *Undisputed Facts* at ¶ 10).

when it accepts waste generated anywhere within its own county; and 2) pursuant to Utah Code Ann. § 19-6-102(3)(b)(iii), the landfill is noncommercial if it accepts C&D waste, generated outside of the county, solely under contract with a local government within the state to dispose of nonhazardous solid waste generated within the boundaries of the local government.¹⁷

Counterpoint, in its *Request for Agency Action*, disagreed that the landfill is noncommercial, alleging that the Weber County C&D Landfill “is ‘commercial’ within the meaning of Section 19-6-102(3) of the Environmental Quality Code” because:

1) the Executive Secretary has not reviewed “the mechanisms that qualify a private or government facility as ‘non-profit’ or ‘solely under contract with a local government’ as required by the Attorney General’s Memorandum of August 8, 2002;” and

2) Weber County authorized Moulding to operate the landfill in return for a fee per-ton royalty.¹⁸

A. Executive Secretary’s Motion for Summary Judgment.

The Executive Secretary’s motion for summary judgment addresses designating a facility as noncommercial under the Solid and Hazardous Waste Act. The Executive Secretary seeks 1) a determination that the Solid Waste Management Act, Utah Code Ann. § 19-6-501, *et seq.*, is not applicable in determining whether the Weber County C&D Landfill is a commercial facility; 2) a determination that “the term ‘boundaries’ as used in [§] 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act [] means

¹⁷*Executive Secretary’s Response to Counterpoint Construction’s First Motion for Partial Summary Judgment, on the Issue of Facility Compliance with Utah Code Ann. § 19-6-102(3)(b)(iii)* (“Executive Secretary’s Response”) (October 22, 2010) at ¶¶ 18, 26-28.

¹⁸*Counterpoint’s Request for Agency Action* at 2, 4.

'geographic boundaries,' and that [§] 19-6-502(2) of the [Solid Waste Management Act] is [not applicable] to understanding the meaning of 'boundaries' in [§] 19-6-102(3)(b)(iii);" and 3) a determination that to be classified as a noncommercial facility, the Weber County Landfill need not have contracts with local governments within the boundaries of Weber County pursuant to section 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act.¹⁹

B. Moulding's Motion for Summary Judgment, Joined by Weber County.

Respondent Moulding moved for summary judgment seeking a ruling that 1) the Weber County Landfill permit issued by the Executive Secretary "properly satisfies relevant statutory requirements by requiring that the Landfill operate as a non-commercial facility"; 2) the permit "does not violate the provisions of the Solid and Hazardous Waste Management Act;" 3) the "definition of 'jurisdiction' found in the Solid Waste Management Act is not applicable to the determination of whether a landfill is non-commercial under the Solid and Hazardous Waste Act;" and 4) "each of Counterpoint's arguments fail as a matter of law."²⁰

C. Counterpoint's Motion for Partial Summary Judgment.

Counterpoint argues that if Utah Code Ann. § 19-6-102(3)(b)(iii) is used to classify a facility as "noncommercial," then section 19-6-102(3)(b)(iii) is the exclusive means by which that classification can be made and any additional statutory provision

¹⁹*Executive Secretary's Motion for Summary Judgment* at 1.

²⁰*Moulding's Motion for Summary Judgment* at 1.

may not be relied upon.²¹

V. Material Facts.

The parties filed *Joint Stipulation of Undisputed Facts*.²² Based on the record, the material facts are as follows:

1-22. Joint Stipulation of Undisputed Facts, ¶¶ 1-10, 14-18, 20-26 are incorporated by reference as material facts 1 through 22.²³

23. Weber County is authorized to “provide a service . . . that is reasonably related to the safety, health, . . . and welfare” of its residents.²⁴ As a county, Weber County may provide government services such as waste disposal.²⁵ Weber County determined that a C&D landfill is a necessary service to be provided by the County.²⁶

24. Disposal fees are established in the operating agreement between Weber County and Moulding.²⁷ Weber County must approve any changes to the disposal fees.²⁸

25. In 1990, the Legislature amended the Solid and Hazardous Waste Act to

²¹*Counterpoint’s Summary Judgment Motion* at 2.

²²*Joint Stipulation of Undisputed Facts* (“*Undisputed Facts*”) (October 8, 2010).

²³Attached as Exhibit 1.

²⁴UTAH CODE ANN. § 17-50-302.

²⁵UTAH CODE ANN. § 17-34-1(1)(b).

²⁶*Weber County’s Response to the Request for Agency Action, Exhibit A, Affidavit of Gary Laird* (“*Laird Affidavit*”) (April 8, 2010) at ¶ 11.

²⁷*Moulding’s Summary Judgment Memorandum* at 20.

²⁸*Id.*

add the definition of a commercial nonhazardous solid waste facility and three statutory exclusions that excluded a facility from being classified as a commercial nonhazardous waste facility.²⁹

VI. Analysis.

Counterpoint's *Request for Agency Action* challenges the Executive Secretary's determination that the Weber County landfill is a noncommercial facility. The crux of the issues raised on summary judgment relate to the following two statutory definitions regarding what is and what is not a commercial nonhazardous solid waste facility:

"Commercial nonhazardous solid waste . . . facility" means a facility that receives, for profit, nonhazardous solid waste for treatment, storage, or disposal.

Utah Code Ann. § 19-6-102(3)(a).

"Commercial nonhazardous solid waste . . . facility" does not include a facility that . . . (iii) is solely under contract with a local government within the state to dispose of nonhazardous solid waste generated within the boundaries of the local government.

Utah Code Ann. § 19-6-102(3)(b). This statutory exclusion will be referred to as the "102(3)(b)(iii) exclusion."

Relying on the above two statutory definitions, the Executive Secretary classified the Weber County Landfill as a noncommercial landfill because: 1) the landfill operates as a "not for profit" landfill when it accepts C&D waste generated anywhere within Weber County; and 2) the permit mandates that the landfill meet the 102(3)(b)(iii)

²⁹*Executive Secretary's Summary Judgment Memorandum* at ¶¶ 17, 18 (citing UTAH CODE ANN. §§ 19-6-102(3), -108(3)(c)).

exclusion if it accepts C&D waste generated outside of Weber County.³⁰ The Executive Secretary issued the permit with the following condition:

Only waste generated within Weber County or received under contract with a local government within Utah may be accepted for disposal. All such contracts must be reviewed and approved by the Executive Secretary prior to accepting waste under the contract.³¹

Counterpoint disagrees that the operation of the landfill will be noncommercial under the terms of the permit. In its *Request for Agency Action*, Counterpoint alleges that the Weber County C&D Landfill “is ‘commercial’ within the meaning of Section 19-6-102(3)” because:

1) the Executive Secretary has not reviewed “the mechanisms that qualify a private or government facility as ‘non-profit’ or ‘solely under contract with a local government;’” and

2) the landfill is a commercial facility because Weber County authorized a private entity, Moulding & Sons Landfill, LLC, to operate the landfill in return for a fee per-ton royalty.³²

A. The 102(3)(b)(iii) Exclusion.

Counterpoint argues the “legislature limited the facility [that relies upon the 102(3)(b)(iii) exclusion] to only one method of compliance” because the statute requires a facility to be “solely” under contract with a local government.³³ Counterpoint maintains that if Weber County wishes to rely on the 102(3)(b)(iii) exclusion to classify its landfill

³⁰*Executive Secretary’s Response* at ¶¶ 9, 18, 26-28.

³¹Material Facts at ¶¶ 18, 22; *Moulding’s Summary Judgment Memorandum* at ¶ 32.

³²*Counterpoint’s Request for Agency Action* at 2, 4.

³³*Counterpoint’s Summary Judgment Motion* at 7.

as noncommercial, all waste received at the landfill must be pursuant to a contract with a local government, including the local governments within Weber County and Weber County itself.³⁴ In sum, Counterpoint argues Weber County may only demonstrate it meets the 102(3)(b)(iii) exclusion if the exclusion is applied to all waste the landfill receives, whether generated within or outside of Weber County.³⁵

1. A 102(3)(b)(iii) Exclusion is Only Necessary if the Facility is a For Profit, Commercial Facility.

Counterpoint submits that because Weber County relies upon the 102(3)(b)(iii) exclusion for waste generated outside of Weber County, and the 102(3)(b)(iii) exclusion requires a noncommercial facility to be "solely" under contract with a local government, Weber County cannot rely on a different statutory provision than the 102(3)(b)(iii) exclusion to demonstrate that it is a noncommercial facility for waste generated within Weber County.³⁶ However, a statutory provision excluding a facility from being classified as a commercial facility is necessary only if the facility is first deemed to be a commercial facility (because it either receives waste for profit or it does not demonstrate

³⁴Counterpoint's Summary Judgment Motion at 6-8.

³⁵Counterpoint Construction's Response to the Executive Secretary's Motion for Summary Judgment and Moulding & Sons Landfill, LLC's Motion for Summary Judgment, Both with Supporting Memorandum ("Counterpoint's Response") (October 22, 2010) at 16; see also, Counterpoint's Motion for Summary Judgment at 6-8; Counterpoint Construction's Reply Memorandum to the Executive Secretary's Response to Counterpoint Construction's First Motion for Partial Summary Judgment, on the Issue of Facility Compliance with Utah Code Ann. § 19-6-102(3)(b)(iii), and Weber County and Moulding and (sic) Sons Landfill LLC's Joint Memorandum in Opposition to Counterpoint's Motion for Summary Judgment ("Counterpoint's Reply") (October 29, 2010) at 4-5.

³⁶Counterpoint's Summary Judgment Motion at 6-8.

the facility is “not for profit”).³⁷

It is appropriate to first determine whether a facility is a for profit, commercial facility, as defined in § 19-6-102(3)(a), before applying the 102(3)(b)(iii) exclusion.³⁸ Or if, as determined by the Executive Secretary, the Weber County Landfill, in fact, operates as a “not for profit” facility when it receives waste generated within Weber County, then the 102(3)(b)(iii) exclusion is not applicable to waste generated within Weber County.

Moreover, contrary to Counterpoint’s claims, the term “solely,” in the 102(3)(b)(iii) exclusion, does not mean that “contracts with a local government” are the sole or only method by which the facility demonstrates it is a noncommercial facility. Rather, in this case as the Executive Secretary argues, the term “solely” means that if the Weber County Landfill desires to remain classified as noncommercial, the facility “is not to enter into waste disposal contracts with entities other than local governments for waste generated outside the geographic boundaries of the local government.”³⁹

2. The Weber County Landfill is a “Not for Profit”, Noncommercial Facility When It Disposes of Waste Generated Within Weber County.

The Executive Secretary determined that “a government-owned landfill, including the Weber County Landfill, that receives waste generated within its geographic

³⁷UTAH CODE ANN. § 19-6-102(3)(a); see also *Moulding’s Summary Judgment Memorandum* at 17.

³⁸See *Executive Secretary’s Response* at ¶¶ 8, 11; *Moulding’s Summary Judgment Memorandum* at 10, 17; *Counterpoint’s Response* at 15; *Joint Memorandum in Opposition to Counterpoint’s Motion for Summary Judgment (“Moulding’s Response”)* (October 22, 2010) at 7.

³⁹*Executive Secretary’s Response* at ¶ 24, n.8.

boundaries is not operating for profit and therefore is not a commercial facility under Utah Code Ann. § 19-6-102(3)(a).⁴⁰ Counterpoint counters that the landfill is for profit because “ownership alone is not determinative of whether a facility is commercial or noncommercial” given that the Executive Secretary had previously stated that the “Solid and Hazardous Waste Act [] refers to and regulates the facility itself, rather than the entity which owns or operates the facility (UCA § 19-8-102(3)).”⁴¹ Counterpoint further argues the landfill is a for profit facility because 1) it cannot be assumed that a government owned facility is “not for profit” if it is operated by a private entity; 2) Moulding, as operator, is not organized as a “not for profit” business; and 3) Respondents have not proffered any evidence that the Executive Secretary conducted a “first line” profit analysis to determine the profit or “not for profit” status of the landfill operation.⁴²

- a. The Weber County Landfill is a “Not for Profit” Facility if It Provides a Government Service to Its Residents.

The Executive Secretary maintains that a government owned landfill does not operate for profit when it disposes of waste generated within its boundaries because counties exist, “not for profit”, but “for such purposes as providing for the safety, health,

⁴⁰*Executive Secretary’s Response* at ¶ 6.

⁴¹*Counterpoint’s Reply* at 3 (*quoting* Letter from Dennis R. Downs to LeGrand W. Bitter (October 22, 1993)) (emphasis omitted).

⁴²*Counterpoint’s Reply* at 3-4. Counterpoint does not seek a determination whether the landfill operates as a for profit facility. *Counterpoint’s Motion for Summary Judgment* at 1; *Counterpoint’s Reply* at 3. However, to support its summary judgment motion and to oppose Respondents’ summary judgment motions, Counterpoint must raise sufficient material facts, including those material facts opposing whether the landfill operates as a “not for profit” facility. See *supra*, Section III, Legal Standard.

and welfare of county inhabitants, including waste . . . disposal.”⁴³ Respondent Moulding submits that when the Weber County Landfill accepts waste from within its boundaries, “it is providing a necessary governmental service to its citizens, and in so doing, is not acting as a commercial entity.”⁴⁴

Counterpoint agrees that a “government entity is not operating for profit if it receives only waste from within its jurisdiction.”⁴⁵ However, Counterpoint maintains that Weber County is “neither operating the [f]acility nor receiving waste only from within its jurisdiction.”⁴⁶ The Executive Secretary submits that a county need not operate its facility to remain “not for profit”, and a county is free to hire a contractor to perform a government service under any agreed upon terms and compensation.⁴⁷ The Executive Secretary also argues that the amount charged for disposal of waste generated within Weber County is irrelevant because a county is free to charge any amount and free to distribute any revenue as it determines appropriate to provide government services for its residents.⁴⁸

⁴³*Executive Secretary’s Response* at ¶ 9 (citing UTAH CODE ANN. §§ 17-50-302, 17-34-1).

⁴⁴*Moulding’s Summary Judgment Memorandum* at 12-13; *Moulding’s Response* at 7.

⁴⁵*Counterpoint’s Response* at 19.

⁴⁶*Id.*

⁴⁷Raymond Wixom (Tr. Jan. 19, 2011, at 12-13).

⁴⁸Raymond Wixom (Tr. Jan. 19, 2011, at 11). Note that Weber County clarified that the County cannot use fees to supplant taxes so the disposal tipping fee flows back into solid waste operations, including to reimburse expenditures to purchase the landfill property. *Laird Affidavit* at ¶ 14; see also Dave Wilson (Tr. Jan. 19, 2011, at 28).

Weber County, as a county in the State of Utah, may “provide a service . . . that is reasonably related to the safety, health, . . . and welfare” of their residents” such as providing a facility for waste disposal.⁴⁹ Weber County determined that a C&D landfill is a necessary service that should be provided by the County.⁵⁰ The Commissioners purchased the landfill property and developed the Weber County landfill to serve its residents.⁵¹ Rather than operate the landfill itself, Weber County entered into a contract with Moulding & Sons Landfill, LLC, a for profit, limited liability company, to operate the Weber County C&D Landfill.⁵²

Counterpoint’s argument that the landfill ownership is not determinative of the commercial nature of the facility misses the point. Regardless of who operates the landfill, Weber County or Moulding, the essential factor in this case is that the Weber County Landfill provides a government service to the residents of Weber County.

As owner, Weber County retains control of the landfill and has a financial and administrative interest in providing a C&D landfill for its residents.⁵³ For example, Weber County set the disposal fees at the landfill and must approve any fee changes.⁵⁴

⁴⁹Material Facts at ¶¶ 3, 23 (*incorporating by reference Undisputed Facts at ¶ 3*).

⁵⁰Material Facts at ¶ 23; *see also* Dave Wilson (Tr. Jan. 19, 2011, at 27, 30, 57).

⁵¹Material Facts at ¶¶ 8, 23 (*incorporating by reference Undisputed Facts at ¶ 8*); *see also* Dave Wilson (Tr. Jan. 19, 2011, at 27, 30, 57).

⁵²Material Facts at ¶¶ 5, 6, 7 (*incorporating by reference Undisputed Facts at ¶¶ 5, 6, 7*).

⁵³Material Facts at ¶ 8 (*incorporating by reference Undisputed Facts at ¶ 8*); *see also* Dave Wilson (Tr. Jan. 19, 2011, at 57).

⁵⁴Material Facts at ¶ 24; *see also Laird Affidavit at ¶ 15*, Dave Wilson (Tr. Jan. 19, 2011, at 26).

Thus, the Weber County Landfill is not operating for profit when it receives waste generated within the boundaries of Weber County because Weber County developed the landfill to provide a government service for County residents.⁵⁵

Furthermore, it is reasonable for Weber County, or any local government, to contract with a private entity under agreed upon terms to provide a government service, such as a C&D landfill, for its residents. It makes no difference that Moulding is not organized as a nonprofit entity because the landfill, as operated by Moulding, provides a governmental service for Weber County residents. It is also reasonable that a government may set its fees as it determines necessary for its government services. Finally, evidence regarding the profitability of the landfill is not necessary to determine whether the landfill is a for profit facility because the landfill provides a government service to the residents of Weber County. Therefore, the Executive Secretary need not conduct a profit analysis.

- b. Issues Related to the Noncommercial Status of the Landfill When it Receives Waste Generated in Weber County.
 - i. The Permit Condition Limiting the Landfill to Receiving Waste Generated Within the County Meets the Noncommercial Facility Definition for Waste Generated Within the County.

In its motion for summary judgment, Moulding seeks a ruling that the permit issued by the Executive Secretary “satisfies relevant statutory requirements by requiring

⁵⁵As suggested by Moulding, finding that a government service does not operate for profit is consistent with Utah commercial law. *Moulding’s Summary Judgment Memorandum* at 12, n.6 (citing UTAH CODE ANN. § 13-37-102(2)(b) defining that a “[c]ommercial entity’ does not include . . . a government entity [or] an entity providing services on behalf of a government entity;” UTAH CODE ANN. § 13-42-102(12) defining “[p]ersons’ means . . . commercial entity . . . [but does] not include a . . . government”).

that the Landfill operate as a non-commercial facility.”⁵⁶ The permit contained the following condition addressing the noncommercial status of the facility:

Only waste generated within Weber County or received under contract with a local government within Utah may be accepted for disposal . . .⁵⁷

The Weber County Landfill operates as a “not for profit” facility because it provides a governmental service to residents of Weber County when it accepts waste generated within the borders of Weber County. Therefore, the portion of the permit condition limiting the landfill to receiving “[o]nly waste generated in Weber County” meets the definition of a noncommercial facility for waste generated within Weber County.

- ii. The Executive Secretary Reviewed Appropriate Mechanisms to Determine the Weber County Landfill is a “Not for Profit” Facility When it Receives Waste Generated Within Weber County.

Moulding further seeks a summary judgment ruling that “each of Counterpoint’s arguments fail as a matter of law.”⁵⁸ Counterpoint’s *Request for Agency Action* alleges that 1) the Executive Secretary has not reviewed “the mechanisms that qualify a private or government facility as ‘non-profit’ . . .;” and 2) because Weber County authorized a private entity, Moulding & Sons Landfill, LLC, to operate the landfill in return for a fee per ton royalty the landfill is a commercial facility.⁵⁹ Section VI.A.2.a., above, determined that regardless of whether Moulding, a private entity, operates the landfill,

⁵⁶*Moulding’s Motion for Summary Judgment* at 1.

⁵⁷Material Facts at ¶ 15 (incorporating by reference *Undisputed Facts* at ¶ 18); see also *Moulding’s Summary Judgment Memorandum* at ¶ 32.

⁵⁸*Moulding’s Motion for Summary Judgment* at 1.

⁵⁹*Counterpoint’s Request for Agency Action* at 2, 4.

the Weber County Landfill is classified as a “not for profit” facility because it provides a government service to County residents when it receives and disposes waste generated within the County. Thus, for waste generated within Weber County, Counterpoint’s arguments fail as a matter of law because the Executive Secretary has reviewed appropriate mechanisms to determine that the landfill, operated by Moulding, operates as a “not for profit” facility.

3. Application of the 102(3)(b)(iii) Exclusion to Waste Generated Outside Weber County.

The remaining issues raised in the motions for summary judgment relate to the application of the 102(3)(b)(iii) exclusion to waste generated outside of Weber County. In his motion for summary judgment, the Executive Secretary seeks a determination that 1) the Solid Waste Management Act is not applicable in classifying the Weber County C&D Landfill as a commercial or noncommercial facility under the Solid and Hazardous Waste Act; and 2) “the term ‘boundaries’ as used in [§] 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act [] means ‘geographic boundaries,’ and that [§] 19-6-502(2) of the [Solid Waste Management Act] is [not applicable] to understanding the meaning of ‘boundaries’ in [§] 19-6-102(3)(b)(iii).⁶⁰ Counterpoint submits that the phrase “within the boundaries of the local government,” as used in the 102(3)(b)(iii) exclusion (referring to “waste generated within the boundaries of the local government”), is equivalent to the phrase “within the jurisdiction of the local government.”⁶¹

⁶⁰*Executive Secretary’s Motion for Summary Judgment* at 1.

⁶¹*See Counterpoint’s Response* at 12; *Executive Secretary’s Summary Judgment Memorandum* at ¶ 2.

a. Applicability of the Solid Waste Management Act.

Counterpoint argues that the Solid and Hazardous Waste Act and the Solid Waste Management Act are “inextricably linked” and, thus, concludes that the definitions in the Solid Waste Management Act are applicable to the Solid and Hazardous Waste Act.⁶² Counterpoint postulates that the term “within the boundaries of local government” “should be interpreted to mean ‘within the jurisdiction of local government’ as ‘jurisdiction’ is defined in the Solid Waste Management Act.”⁶³ Otherwise says Counterpoint, sections 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act and 19-6-502(2) of the Solid Waste Management Act would be in conflict if “boundaries” and “jurisdiction” are not read synonymously.⁶⁴ Respondents disagree.⁶⁵

In 1981, the Legislature promulgated both the Solid and Hazardous Waste Act and the Solid Waste Management Act as two distinct acts.⁶⁶ The Hazardous and Solid Waste Act authorizes the Executive Secretary to issue nonhazardous solid waste permits and outlines the requirements necessary to obtain a nonhazardous solid waste

⁶²*Counterpoint’s Response* at 9-10.

⁶³*Executive Secretary’s Summary Judgment Memorandum* at ¶ 2 (quoting *Counterpoint Construction’s Reply to Responses from Moulding, Weber County, and the Executive Secretary Regarding Counterpoint’s Request for Stay and Request for Agency Action* (May 17, 2010) at 11-12).

⁶⁴*Id.*

⁶⁵*Executive Secretary’s Summary Judgment Memorandum* at ¶ 3; *Moulding’s Summary Judgment Memorandum* at 15-18.

⁶⁶*See Executive Secretary’s Summary Judgment Memorandum* at ¶¶ 17, 21. The Solid and Hazardous Waste Act was first codified as Utah Code Ann. § 26-14-2(2). *Id.* at ¶ 17. The Solid Waste Management Act was first codified as Utah Code Ann. § 26-32-1 et seq. *Id.* at ¶ 21.

permit. The Solid Waste Management Act designates solid waste management powers and duties to public entities, including a county, a municipality, etc.⁶⁷

The Executive Secretary states that in 1990, to “insure that commercial solid waste . . . sites could not be built without the approval of the Legislature and Governor,” the Legislature amended the Solid and Hazardous Waste Act to include the definition of a “commercial nonhazardous solid waste . . . disposal facility.”⁶⁸ The Executive Secretary also notes that the 1990 amendment included the 102(3)(b)(iii) exclusion, which excluded facilities from being classified as a commercial nonhazardous solid waste facility.⁶⁹

The Solid Waste Management Act places no restrictions or limitations on the Executive Secretary’s authority to issue a nonhazardous solid waste permit, nor does the act address the classification of a commercial nonhazardous solid waste facility as defined by the Solid and Hazardous Waste Act.⁷⁰ Additionally, both acts each include a separate “[d]efinition” section that explicitly states definitions of various terms are “[a]s

⁶⁷UTAH CODE ANN. § 19-6-503; see also *Executive Secretary’s Summary Judgment Memorandum* at ¶ 19; UTAH CODE ANN. §§ 19-6-502(5), -503; *Executive Secretary’s Summary Judgment Memorandum* at ¶ 22; see also *Moulding’s Summary Judgment Memorandum* at 15.

⁶⁸*Executive Secretary’s Summary Judgment Memorandum* at ¶¶ 17, 18 (citing Deposition of Fred Nelson (“*Nelson Depo.*”) (August 4, 2010)) at 20, 30; UTAH CODE ANN. §§ 19-6-102(3), -108(3)(c); see also *Counterpoint’s Response* at 15 (stating the statute provided “legislative visibility and control of the for profit facilities”).

⁶⁹Material Facts at ¶ 25; *Executive Secretary’s Summary Judgment Memorandum* at ¶¶ 17, 18 (citing *Nelson Depo.* at 20, 30; UTAH CODE ANN. §§ 19-6-102(3), -108(3)(c)).

⁷⁰See UTAH CODE ANNOTATED, Title 19, Chapter 6, Part 5; *Executive Secretary’s Summary Judgment Memorandum* at ¶¶ 24, 28; *Moulding’s Summary Judgment Memorandum* at 16.

used in this part.”⁷¹ Accordingly, definitions in Chapter 6, Part 1 are to be used in the Solid and Hazardous Waste Act and definitions in Chapter 6, Part 5 are to be used in the Solid Waste Management Act. Definitions in the Solid Waste Management Act have no bearing on the provisions in the Solid and Hazardous Waste Act.

b. The Plain Meaning of the Term “Boundaries.”

The parties dispute the meaning of the term “boundaries” used in the 103(3)(b)(iii) exclusion in the Solid and Hazardous Waste Act, (referring to “waste generated within the boundaries of the local government”).⁷² The Utah Supreme Court has long held that when interpreting statutory language terms should be given “their usual and accepted meanings.”⁷³ The Court “look[s] to the plain meaning of the statute first and go[es] no further unless it is ambiguous.”⁷⁴ The Court also assumes that “the legislature used each [statutory] term advisedly and in accordance with its ordinary

⁷¹See UTAH CODE ANN. §§ 19-6-102, -502.

⁷²UTAH CODE ANN. § 19-6-102(3)(a). The dispute regarding the meaning of “boundaries” arose when the Executive Secretary interchanged the term “boundaries” with “jurisdiction” when discussing the statutory exclusion. See *Executive Secretary’s Response to Counterpoint Construction Company’s Request for Agency Action* (April 19, 2010) at 21. The Executive Secretary has since clarified that when he used the term “jurisdiction” in place of the term “boundaries” he intended a meaning equivalent to “geographical boundaries” and not to “jurisdiction” as defined in the Solid Waste Management Act. *Executive Secretary’s Summary Judgment Memorandum* at ¶ 36, n.5.

⁷³*Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1045 (Utah 1991) (citing *Utah County v. Orem City*, 699 P.2d 707, 708 (Utah 1985); see also *Peay v. Board of Educ. of Provo City Sch.*, 377 P.2d 490, 492 (Utah 1962)).

⁷⁴*Housing Auth. of the County of Salt Lake v. Snyder*, 2002 UT 28, ¶ 10, 44 P.3d 724 (citing *State v. Ostler*, 2001 UT 68, ¶ 7, 31 P.3d 528).

meaning.”⁷⁵

Counterpoint agrees that the plain meaning of the statute should prevail, unless the plain meaning “works an absurd result”, which Counterpoint claims here.⁷⁶

Counterpoint stresses that the Court also found an “exception to the plain meaning rules arise with [the] duty to read and interpret statutory provisions in harmony with other provisions in the same statute and with other related statutes.”⁷⁷

The Solid and Hazardous Waste Act does not specifically define the term “boundaries” as used in the 102(3)(b)(iii) exclusion.⁷⁸ Counterpoint agrees that “[i]n the absence of a specific definition, ‘boundaries’ as used in subsection § 19-6-102(3)(b)(iii) can have no other meaning than the meaning set forth in dictionaries or as commonly used” such as “‘geographic boundaries,’ ‘territorial boundaries,’ ‘metes and bounds’ or something similar.”⁷⁹ To support its argument, Counterpoint turns to the Solid Waste Management Act to posit that the term “boundaries” as used in the 102(b)(3)(iii) exclusion “cannot supersede the meaning of ‘jurisdiction’” in the Solid Waste Management Act, § 19-6-502(2) because each political entity has a “right to manage

⁷⁵*State v. Martinez*, 2002 UT 80, ¶ 8, 52 P.3d 1276 (citing *State ex. rel. Div. of Forestry v. Tooele County*, 2002 UT 8, ¶ 10, 44 P.3d 680).

⁷⁶*Counterpoint’s Response* at 12 (quoting *State of Utah v. Second District Juvenile, Ogden Dep’t*, 2007 UT 54, ¶ 11 (internal cites omitted)).

⁷⁷*Counterpoint’s Response* at 12 (quoting *State of Utah v. Edgar Jeffries*, 2009 UT 57, ¶ 8, 217 P.3D 265 (internal cites omitted)).

⁷⁸See generally, UTAH CODE ANN. § 19-6-102(3)(b)(iii).

⁷⁹*Counterpoint’s Response* at 12.

the waste within its own jurisdiction” which the county cannot supercede.⁸⁰

Counterpoint then asserts that reading the 102(3)(b)(iii) exclusion term “boundaries” synonymously with “geographical boundaries” leads to an absurd result because allowing Weber County to accept all waste generated within its geographical boundaries absent an agreement is tantamount to allowing Weber County to assume control over waste management of another jurisdiction.⁸¹

Notwithstanding that Counterpoint accurately states that “[t]he legislature’s use of the term ‘boundaries’ in the [102(3)(b)(iii) exclusion] cannot expand the jurisdictional authority of a county,” Counterpoint is wrong. Weber County is not expanding its jurisdictional authority to control solid waste by making a landfill available for use by local governments.⁸² Entering into a contract with a local government, such as “County A,” to dispose of waste generated within “County A’s” boundaries would not usurp the authority of a municipality within “County A” to control the solid waste within the municipality’s jurisdiction.⁸³ A contract between the facility and “County A” would grant

⁸⁰*Id.* at 11-13 (citing UTAH CODE ANN. §§ 17-34-1, 10-8-2(1)(b)(I), 10-1-103).

⁸¹See *Counterpoint’s Response* at 12-13.

⁸²*Id.* at 13.

⁸³Given the recommended finding that a statutory exclusion is unnecessary for waste generated within Weber County, this issue is moot with respect to municipalities or local governments within Weber County. See *supra*, section VI.A.2. See also *Executive Secretary’s Reply to Counterpoint Construction’s Response to Motions for Summary Judgment of Executive Secretary, Moulding & Sons Landfill, LLC* (“*Executive Secretary’s Reply*”) (October 29, 2010) at ¶¶ 42-46; *Moulding’s and Weber County’s Joint Reply in Support of Motion for Summary Judgment* (“*Moulding’s Reply*”) (October 29, 2010) at 5. On November 2, 2010, Counterpoint filed *Counterpoint Construction’s Motion to Strike, with Supporting Memorandum* (“*Counterpoint’s Motion to Strike*”) seeking to strike any portion of *Moulding’s Reply* “that is reflective of Weber County’s position.” *Counterpoint’s Motion to Strike* at 1. Weber County joined in *Moulding’s*

County A residents access to the facility under agreed upon terms. That same contract could not be enforced against other entities who are not parties to that contract. For example, if a county entered into a contract with the facility without the consent of a municipality within its boundaries, that municipality would not be a party to the contract. Thus, that contract could not mandate a local government who is not a party to a contract use a particular facility nor would the contract control the solid waste disposal within a jurisdiction who is not party to the contract.

Moreover, the statutory exclusion does not dictate how municipalities govern the management of solid waste within their jurisdiction. Anyone within the geographic boundaries of a local government who contracts with the facility “may” but is not required to dispose of waste at the contract facility.⁸⁴ Giving the term “boundaries” a plain or common meaning, such as “borders” or “geographical boundaries,” will not cause the 102(3)(b)(iii) exclusion to conflict with the Solid Waste Management Act. Nor will reading the term “boundaries” as “geographical boundaries” lead to an absurd result or render provisions in the Solid and Waste Management Act superfluous or inoperative.

c. Issues Related to the Noncommercial Status of the Landfill if it Receives Waste Generated Outside of Weber County.

i. Applicable Mechanisms that Demonstrate a Facility Meets the Terms of a

Motion for Summary Judgment and Moulding’s Summary Judgment Memorandum. See generally Weber County’s Memorandum in Support of Moulding’s Motion for Summary Judgment. Weber County’s Support of Moulding’s Motion for Summary Judgment. As it joined Moulding in its motion, Weber County properly filed its reply jointly with Moulding. Moreover, Counterpoint failed to identify what it specifically moved to strike. Accordingly, Counterpoint’s Motion to Strike is DENIED.

⁸⁴Executive Secretary’s Response at ¶ 22.

102(3)(b)(iii) Exclusion.

The permit requires that the “landfill can only accept C&D waste if that waste is . . . generated outside of Weber County but received pursuant to a contract between the County and another local government within Utah.”⁸⁵ However, Counterpoint asserts that review of a contract between Weber County and a local government “is a condition precedent to Permit approval” and that contract review must occur “as part of the plan approval process.”⁸⁶

It is reasonable to expect that, prior to issuing a permit, the Executive Secretary would review any existing contracts to determine whether the contracts meet the intent of the 102(3)(b)(iii) exclusion. However, at the time the permit was issued, Weber County had not entered into any contracts with local governments to take waste generated outside of the County.⁸⁷ The Executive Secretary did not review any contracts because none existed. Instead, the Executive Secretary issued a permit with a permit condition allowing the facility to accept waste generated outside of Weber County only if the waste is received “under contract with a local government within Utah.”⁸⁸ The permit mandates that “[a]ll such contracts [with a local government for disposal of waste generated outside the boundaries of Weber County] must be [reviewed and] approved by the Executive Secretary prior to [the landfill] accepting

⁸⁵*Moulding’s Response* at 6.

⁸⁶*Counterpoint’s Request for Agency Action* at 2-3.

⁸⁷Material Facts at ¶ 22 (incorporating by reference *Undisputed Facts* at ¶ 26); *Moulding’s Summary Judgment Memorandum* at 19; *Moulding’s Response* at 6.

⁸⁸Material Facts at ¶¶ 16, 18 (incorporating by reference *Undisputed Facts* at ¶¶ 20, 22); see *Moulding’s Summary Judgment Memorandum* at ¶ 32.

waste under the contract.”⁸⁹

Counterpoint, relying on a memorandum authored by an assistant attorney general (“*Assistant AG Memo*”), insists that contract review must occur before permit issuance.⁹⁰ Counterpoint claims that at the time the permit was issued, the Executive Secretary had not reviewed “mechanisms that qualify a private or governmental facility as ‘solely under contract with a local government.’”⁹¹ The Solid and Hazardous Waste Act is silent regarding whether “contracts with a local government” must be reviewed prior to issuance of a noncommercial facility permit or whether contracts must be in place prior to receipt of waste.⁹² Notwithstanding whether the advice in the memorandum is pertinent or not, the *Assistant AG Memo* is not law nor is it binding on the Executive Secretary.⁹³ Moreover, beyond a general reliance on the non-binding *Assistant AG Memo*, Counterpoint has failed to demonstrate that contract review is in fact a condition precedent to permit approval. Accordingly, it is reasonable for the Executive Secretary: 1) to issue the permit to allow the Weber County Landfill to receive waste generated within Weber County; and 2) in the absence of any contracts

⁸⁹Material Facts at ¶ 18 (*incorporating by reference Undisputed Facts at ¶ 22*); see *Moulding’s Summary Judgment Memorandum at ¶ 32*.

⁹⁰*Counterpoint’s Request for Agency Action at 2-3*; see *Executive Secretary’s Summary Judgment Memorandum, Exhibit B, Memorandum to Dennis Downs, Executive Secretary from Fred Nelson, Assistant Attorney General, Regarding Approval by Legislature and Governor for Commercial Nonhazardous Solid Waste Treatment or Disposal Facilities (“Assistant AG Memo”) (August 8, 2002)*.

⁹¹*Counterpoint’s Request for Agency Action at 2*.

⁹²See UTAH CODE ANNOTATED SECTION 19, PART 6.

⁹³See *Executive Secretary’s Response to Agency Action at ¶ 69*.

to review, use a permit condition to require prior approval by the Executive Secretary for any future contracts with local governments for the receipt of waste generated outside the boundaries of Weber County.⁹⁴

ii. Landfill Receipts as Contracts.

Counterpoint's Motion for Summary Judgment raised the issue whether landfill receipts qualify as a "contract" under the 102(3)(b)(iii) exclusion.⁹⁵ Based on the analysis in Section VI.A, contracts with local governments are not necessary for waste generated within the boundaries of Weber County. No contracts with local governments for the disposal of waste generated outside of Weber County were in existence at the time *Counterpoint's Motion for Summary Judgment* was filed.⁹⁶ Moreover, Respondents have not relied upon landfill receipts to meet the statutory intent to contract with local governments. Thus, the issue is not relevant to this current proceeding.

iii. The Permit Condition Limiting the Landfill's Receipt of Waste Generated Outside the Boundaries of Weber County Fails to Satisfy the Statutory Requirement.

Moulding seeks a ruling on summary judgment that the permit issued by the Executive Secretary "satisfies relevant statutory requirements by requiring that the

⁹⁴This analysis determined that the permit does not meet the specific terms of the 102(3)(b)(iii) exclusion. However, it is recommended that the Board order the Executive Secretary to modify the permit condition to conform to the statute. See VI.A.3.c.iii.

⁹⁵*Counterpoint's Summary Judgment Motion* at 9. Moulding issues landfill receipts for each load received at the landfill.

⁹⁶Material Facts at ¶ 22 (incorporating by reference *Undisputed Facts* at ¶ 26); *Executive Secretary's Response* at ¶ 18.

Landfill operate as a non-commercial facility” pursuant to the 102(3)(b)(iii) exclusion for waste generated outside of Weber County.⁹⁷ Section 19-6-102(3)(b)(iii) states:

‘Commercial nonhazardous solid waste . . . disposal facility’ does not include a facility that:

is solely under contract with a local government within the state to dispose of nonhazardous solid waste generated within the boundaries of the local government.⁹⁸

The permit contained the following condition addressing the noncommercial status of the facility:

Only waste generated within Weber County or received under contract with a local government within Utah may be accepted for disposal . . .⁹⁹

The portion of the permit condition that states: “or received under contract with a local government within Utah” does not restrict the waste to being generated only “within the boundaries of the local government” under contract. The permit condition fails to satisfy the provisions of the 102(3)(b)(iii) exclusion. Nevertheless, whether the permit condition conforms to the statute is a conclusion of law. Therefore, an evidentiary hearing on this matter would not benefit the Board in making a decision. Instead, the Board may rewrite the permit condition to conform to the statute.

B. Miscellaneous Issues.

1. Whether the Permit Violates the Solid and Hazardous Waste Act.

Moulding also seeks a ruling that “the Permit does not violate the provisions of the

⁹⁷*Moulding’s Motion for Summary Judgment* at 1.

⁹⁸UTAH CODE ANN. § 19-6-102(3)(b)(iii).

⁹⁹*Moulding’s Summary Judgment Memorandum* at ¶ 32.

Solid Waste Management Act.”¹⁰⁰ As Moulding does not point to any specific provision of the Solid Waste Management Act, this portion of Moulding’s motion is overbroad. Moreover, Moulding is essentially requesting an advisory opinion. Though state courts (and this forum) “are not constrained by the case or controversy requirements [of] the federal constitution,” *Olson v. Salt Lake Sch. Dist.*, 724 P.2d 960, 962 n.1 (Utah 1986), they are not forums for rendering advisory opinions, *Baird v. State*, 574 P.2d 713, 715 (Utah 1978).

2. Counterpoint’s Motion for Leave to Amend its Request for Agency Action.

On September 28, 2010, Counterpoint filed *Counterpoint Construction’s Motion for Leave of the Court to Amend its Request for Agency Action, with Supporting Memorandum* (“*Counterpoint’s Motion to Amend*”).¹⁰¹ In its motion, Counterpoint seeks to address whether the term “boundaries” in the 102(3)(b)(iii) exclusion is synonymous with the term “jurisdiction” as defined in the Solid Waste Management Act.¹⁰² As the issue is addressed in this *Memorandum and Recommended Order, Counterpoint’s Motion to Amend* is MOOT.

VII. Findings of Fact and Conclusions of Law.

A. Findings of Fact.

¹⁰⁰*Moulding’s Motion for Summary Judgment* at 1.

¹⁰¹In response, Respondents filed *Joint Memorandum of Moulding & Sons Landfill, Weber County, and the Executive Secretary in Opposition to Counterpoint Construction’s Motion for Leave of Court to Amend its Request for Agency Action* (October 14, 2010).

¹⁰²*Counterpoint’s Motion to Amend* at 3-4. Counterpoint raises additional issues not relevant to whether the Weber County Landfill is a commercial or noncommercial facility. *Id.* at 4-7.

Paragraphs one (1) through twenty-five (25), Section V, Material Facts, *supra*, are incorporated as findings of fact one (1) through twenty-five (25). Additional findings of fact are as follows:

26. Weber County provides a government service to its residents when it accepts C&D waste generated within the boundaries of Weber County for disposal. Part VI.A.2.

27. The Executive Secretary reviewed appropriate mechanisms that qualify a facility as "not for profit" for waste generated within Weber County. Part VI.A.2.

28. The Legislature used the term "boundaries" not "jurisdiction" when it described a facility that is not included as a commercial facility in Utah Code Annotated § 19-1-102(3)(b)(iii). Part VI.A.3.

29. The Executive Secretary did not review the mechanisms that qualify a facility as under contract with a local government. Part VI.A.3.

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. A facility that accepts nonhazardous solid waste and operates as a "not for profit" facility is classified as a noncommercial facility. Part VI.A.1.
3. Pursuant to section 19-6-102(3)(b)(iii), a noncommercial facility is 1) a commercial, for profit facility, or a facility that does not demonstrate it is "not for profit", and 2) is solely under contract with a Utah local government to dispose of nonhazardous solid waste generated with the boundaries of the local government. Part VI.A.

4. The Solid and Hazardous Waste Act does not limit a facility to relying on a single statutory provision to demonstrate the facility is a noncommercial, nonhazardous solid waste facility. Part VI.A.1.

5. The statutory exclusion of a facility from being classified as a commercial facility, Utah Code Ann. § 19-6-102(3)(b)(iii), is only necessary if that facility is first classified as a for profit facility. Part VI.A.1.

6. Weber County may contract with a private entity to provide a government service. Part VI.A.2.

7. A profit analysis is not necessary to determine the profit status of the Weber County Landfill if the Landfill provides a government service. Part VI.A.2.

8. The Weber County Landfill operates as a "not for profit" facility because it provides a governmental service to the residents of Weber County when it accepts waste generated within the boundaries of Weber County. Part VI.A.2.

9. The Weber County Landfill, as a "not for profit" facility, need not contract with local governments within Weber County to remain classified as a noncommercial facility. Part VI.A.2.

10. Weber County Landfill is a noncommercial, nonhazardous solid waste facility when it accepts waste generated within the boundaries of Weber County. Part VI.A.2.

11. Whether the Weber County Landfill receipts meet the statutory intent to "contract with a local government" is not relevant in this proceeding. Part VI.A.3.

12. Giving the term "boundaries," as used in Utah Code Ann. § 19-6-102(3)(b)(iii), of the Solid and Hazardous Waste Act, a plain or common meaning such as "geographical boundaries" does not conflict with the Solid Waste Management Act

nor lead to an absurd result. Part VI.A.3.

13. The Executive Secretary need not review any mechanisms that qualify a facility as “solely under contract with a local government” prior to permit issuance because: a) no contracts existed at the time of permit issuance; and b) a permit condition requires the Executive Secretary review and approve all contracts with a local government for the disposal of waste generated outside of the boundaries of Weber County prior to the receipt of any waste generated within Weber County. Part VI.A.3.d.

C. Recommended Order.

It is RECOMMENDED the Utah Solid and Hazardous Waste Control Board issue 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 First Motion for Partial Summary Judgment, on the Issue of Facility Compliance with Utah Code Ann. § 19-6-102(3)(b)(iii), with Supporting Memorandum and Statement of Facts* is DENIED, in part, insofar as it asserts that if Utah Code Ann. § 19-6-102(3)(b)(iii) is relied upon in any manner to classify the landfill as “noncommercial” then only section 19-6-102(3)(b)(iii) may be relied upon to classify the landfill for all waste received whether generated within or outside of Weber County;

ORDERED that the *Executive Secretary's Motion for Summary Judgment* is GRANTED, in part, insofar as it asserts that to be classified as a noncommercial facility, the Weber County Landfill need not have contracts with local governments within the boundaries of Weber County pursuant to section 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act;

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is GRANTED, in part, insofar as it asserts that Counterpoint Construction Company's argument fails as a matter of law because the Weber County Landfill is a noncommercial facility notwithstanding that Weber County contracted with a private entity, Moulding & Sons Landfill, LLC, to operate the landfill in return for a fee per-ton royalty;

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is GRANTED, in part, insofar as it asserts that Counterpoint Construction Company's arguments fail as a matter of law because the Executive Secretary of the Solid and Hazardous Waste Control Board has reviewed appropriate mechanisms that qualify the landfill facility as a "not for profit" facility;

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is GRANTED, in part, insofar as it asserts that for waste generated in Weber County, the permit condition limiting the landfill to receiving only waste generated within Weber County meets the requirement for a noncommercial facility under the Solid and Hazardous Waste Act;

ORDERED that the *Executive Secretary's Motion for Summary Judgment* is GRANTED, in part, insofar as he asserts that the Solid Waste Management Act, Utah Code Ann. § 19-6-501, *et seq.*, does not apply when determining whether the Weber County C&D Landfill is a commercial facility under the Solid and Hazardous Waste Control Act;

ORDERED that the *Executive Secretary's Motion for Summary Judgment* and Moulding & Sons Landfill, LLC's *Motion for Summary Judgment* are GRANTED, in part, insofar as they assert that the term "boundaries" as used in Utah Code Ann. § 19-6-102(3)(b)(iii) of the Solid and Hazardous Waste Act means "geographic boundaries," and that the Solid Waste Management Act is not applicable to understanding the meaning of "boundaries;"

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is GRANTED, in part, insofar as it asserts that Counterpoint Construction Company's argument fails as a matter of law because the Executive Secretary of the Solid and Hazardous Waste Control Board need not review the mechanisms that qualify a facility as "solely under contract with a local government" prior to permit issuance;

ORDERED that *Counterpoint Construction's First Motion for Partial Summary Judgment, on the Issue of Facility Compliance with Utah Code Ann. § 19-6-102(3)(b)(iii), with Supporting Memorandum and Statement of Facts* is DENIED, in part, insofar as it seeks a determination whether the landfill receipts meet the statutory intent to "contract with a local government;"

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is DENIED, in part, insofar as it asserts, 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, pursuant to Utah Code Ann. § 19-6-102(3)(b)(iii);

ORDERED that the Executive Secretary of the Solid and Hazardous Waste Control Board modify the permit condition as follows so that the permit condition meets the statutory requirement for an exclusion pursuant to Utah Code Ann. § 19-6-102(3)(b)(iii):

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. All such contracts must be reviewed and approved by the Executive Secretary prior to accepting waste under the contract.

ORDERED that Moulding & Sons Landfill, LLC's *Motion for Summary Judgment*, is DENIED, in part, insofar as it seeks a determination whether the permit does not violate the provisions of the Solid Waste Management Act with respect to all issues not addressed in other portions of this ORDER; and it is

FURTHER ORDERED, when the Executive Secretary of the Solid and Hazardous Waste Control Board modifies the permit as ordered above, Counterpoint Construction Company's Request for Agency Action is resolved; thus, this adjudicative proceeding in the Matter of Weber County C&D Class IVb Solid Waste Permit #0901 is DISMISSED.

DATED this 6th day of April, 2011.



Connie S. Nakahara
Administrative Law Judge
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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April, 2011, I caused a copy of the foregoing MEMORANDUM AND RECOMMENDED ORDER (Recommending Denial of Counterpoint Construction Company's Motion for Summary Judgment; Granting the Executive Secretary's Motion for Summary Judgment; Granting, in part, Denying, in Part, Moulding & Sons Landfill, LLC's Motion for Summary Judgment, Joined by Weber County) to be mailed by electronic mail and by United States Mail, postage prepaid, to the following (unless otherwise stated):

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Connie S. Nakahara

EXHIBIT 1

BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:

Weber County C&D Class IVb Landfill
Solid Waste Permit #0901

**JOINT STIPULATION OF
UNDISPUTED FACTS**

Administrative Law Judge
Connie S. Nakahara

Pursuant to the Administrative Law Judge's Order (Amended Schedule & Cancellation of Status Conference) dated August 13, 2010, 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. The Executive Secretary of the Utah Solid and Hazardous Waste Control Board is appointed pursuant to Utah Code Annotated 19-6-107.
2. The Executive Secretary is responsible to issue permits for nonhazardous solid waste facilities pursuant to Utah Code Ann. 19-6-108.
3. 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 Utah Code Ann. Title 17, Chapter 50.

4. Weber County is a local government.
5. Moulding and Sons Landfill, LLC (Moulding) is a Limited Liability Company organized under the Utah Revised Limited Liability Company Act, Utah Code Ann. 48-2c-101, *et seq.*
6. Moulding is not organized as a nonprofit entity.
7. Weber County and Moulding contracted on December 23, 2008 for Moulding to operate a Construction and Demolition Debris Landfill known as the Weber County C&D Landfill.
8. Weber County owns the land where the Landfill is located.
9. On January 22, 2009, Weber County and Moulding applied to the Executive Secretary for a Class IVb permit.
10. A Class IV Landfill is described in Utah Administrative Code R315-301-2(10) as a non-commercial landfill permitted to receive for disposal only construction and demolition waste, yard waste, inert waste, and, under certain conditions, dead animals, waste tires and materials derived from waste tires, and petroleum-contaminated soils. A Class IVb Landfill is described in Utah Administrative Code R315-305-3 as a Class IV Landfill that receives 20 tons or less of waste per day or demonstrates that no waste from a conditionally exempt small quantity generator of hazardous waste is accepted.
11. The Executive Secretary submitted a draft permit for the proposed Landfill to public comment and began the public comment period on July 12, 2009.

12. At the request of Counterpoint representatives, the comment period was extended to August 25, 2009.
13. The Executive Secretary received public comments concerning the draft permit, including comments from representatives of Counterpoint.
14. The Executive Secretary issued Permit Number 0901 on October 19, 2009 to Weber County as owner and Moulding as operator for the Weber County C&D Landfill.
15. The Executive Secretary did not consider the Utah Solid Waste Management Act, Utah Code Ann. 19-5-501, *et seq.*, in drafting and issuing the Permit.
16. The permit authorizes the Permittees to construct and operate a non-commercial construction and demolition debris landfill.
17. The Executive Secretary's letter of October 19, 2009, transmitting the Permit to Gary Laird and Randy Moulding, says that all contracts must be between Weber County or its agent and the disposer.
18. The permit language authorizes the Landfill to accept for disposal "only waste generated within Weber County or received under contract with a local government within Utah." The Landfill is not allowed to accept dead animals.
19. The Landfill is not permitted to receive waste for recycling or as fuel under Utah Code Ann. 19-6-102(3)(b)(i) or (ii).
20. The Permit allows the Landfill to accept waste that is generated within the boundaries of Weber County, regardless of the identity of the generator of the waste.

This includes such generators as private entities, municipalities, service districts for disposal of solid waste, agencies of the State of Utah, and agencies of the Federal Government,

21. The Landfill has accepted and continues to accept waste that is generated within the boundaries of Weber County, including waste that originated within unincorporated Weber County, within the boundaries of municipalities inside Weber County, within the portion of Hill Air Force base located inside the boundaries of Weber County, and within state owned facilities, such as state owned universities, located inside the boundaries of Weber County.

22. The Permit provides that "All such contracts [with local governments] must be approved by the Executive Secretary prior to accepting waste under the contract."

23. Persons and entities that dispose of waste at the landfill sign and receive a document in the form of the document attached as Exhibit A to this Stipulation of Facts.

24. Counterpoint timely filed a Request for Agency Action on November 9, 2009 challenging the issuance of this permit.

25. The Executive Secretary issued his approval for the Weber County C&D Landfill to begin operations on February 10, 2010.

26. As of August 1, 2010, Weber County had executed no contracts with local governments on behalf of the Landfill.

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 8th day of October, 2010



Brice N. Penrod, President
Counterpoint Construction Company

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R. Stephen Marshall
Douglas A. Taggart
Michael S. Malmbourg
Attorneys for the Moulding Parties

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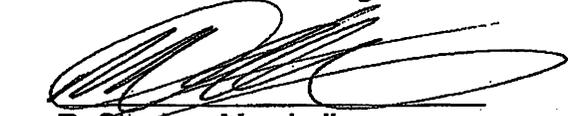
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Michael S. Malmbourg
Attorneys for the Moulding Parties

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of October, 2010, 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):

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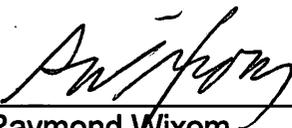
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