BEFORE THE
UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:
Weber County C&D Class VI Landfill
Solid Waste Permit #1101

February 4, 2013
Administrative Law Judge
Connie S. Nakahara

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

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

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

On January 10, 2013, the Utah Solid and Hazardous Waste Control Board ("Board") considered the October 25, 2012, Memorandum and Recommended Order
The Board ordered the appointed Administrative Law Judge to revise the Original Memorandum and Recommended Order and resubmit a memorandum and recommend order to "uphold the Executive Secretary’s decision to issue the Class VI permit and to hold the Class IVb permit dormant and postpone revocation pending final resolution of the challenge to the Class VI permit." The Board approved the remaining portions of the Original Memorandum and Recommended Order.

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

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

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

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

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

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

2Id. at 4.
I. Procedural Requirements.

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

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

5Counterpoint amended RFAA #2. See Counterpoint Construction Company’s Amended Requests for Intervention and Agency Action on the Utah Division of Solid and Hazardous Waste’s Facility Approval to Begin Commercial Operations (“Amended RFAA #2”) (August 9, 2011) attached as Exhibit D to Counterpoint Construction Company's Response to Respondent's Motion to Dismiss our RFAA #3, our Status as a Party in this Proceeding, Consolidation with Existing Proceedings, and Counterpoint’s Alternative Motions for Leave to Amend our RFAA #2 (August 9, 2011). RFAA #1 amended Counterpoint’s request for agency action filed March 1, 2011.
addresses the four motions for summary judgment filed by the parties - Counterpoint filed one, Respondents jointly filed three. It is recommended that the Board reach summary judgment decisions in a manner that resolves Petitioner Counterpoint’s requests for agency action.\(^6\) This proceeding was conducted as a formal adjudicative proceeding in accordance with Title 63G, Chapter 4, Utah Administrative Procedures Act.

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

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

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

In considering this Second Memorandum and Recommended Order, the Board

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

\(^7\)It is the intent to correct the word processing, “auto-correct” typos, i.e., © corrected to read (c); (I) corrected to read (i). Also, citations were corrected.
may:

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

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

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

II. Relevant Documents.

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

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6 Renumbered paragraphs include: Part VII.A., Findings of Fact ¶¶ 11, 13 through 28; Part VII.B., Conclusions of Law ¶¶ 17 through 20.
Memorandum and Recommended Order. An electronic copy of the agency record as of October 25, 2012, was attached to the hard copy of Original Memorandum and Recommended Order. The Board Tr. for Commercial Permit and the Board's Remand are attached to this memorandum.

III. Legal Standard.

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

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

9Utah Code Ann. § 63G-4-102(4)(b); see also Utah Admin. Code R305-6-215(4)(b).

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


raise no material questions of fact.¹³

IV.  Background.

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

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

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

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

¹⁶Material Fact ¶ 24; RFAA #1 at 2.

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

¹⁸Material Fact ¶¶ 5, 22 (JSF ¶¶ 9, 39).
Later Weber County and Moulding submitted an application for a Class VI,¹⁹ commercial nonhazardous solid waste permit for their existing noncommercial Landfill.²⁰ Notwithstanding that the Noncommercial Permit was still in effect, on March 1, 2011, the Executive Secretary issued, to Weber County and Moulding, a Class VI permit ("Commercial Permit") for the Weber County Landfill.²¹ On March 28, 2011, the Executive Secretary authorized commercial operations at the Weber County Landfill.²² Thereafter, Counterpoint filed two requests for agency action.²³

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

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

²⁰ Material Fact ¶ 6 (JSF ¶ 10).

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

²² Material Fact ¶ 18 (JSF ¶ 30).

²³ See RFAA #1; Amended RFAA #2.
Management Act.\textsuperscript{24}

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

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

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

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

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

1-2. Joint Stipulation of Undisputed Facts ¶¶ 2 and 3 are incorporated by reference as material facts ¶¶ 1 and 2, respectively.

3. Joint Stipulation of Undisputed Facts ¶ 5 is incorporated by reference as material fact ¶ 3.

4-8. Joint Stipulation of Undisputed Facts ¶¶ 8 though and 12 are incorporated by reference as material facts ¶¶ 4 through 8, respectively.

9-10. Joint Stipulation of Undisputed Facts ¶¶ 15 and 16 are incorporated by reference as material facts ¶¶ 9 and 10, respectively.

11-12. Joint Stipulation of Undisputed Facts ¶¶ 18 and 19 are incorporated by reference as material facts ¶¶ 11 and 12, respectively.


14-16. Joint Stipulation of Undisputed Facts ¶¶ 23 through 25 are incorporated by reference as material facts ¶¶ 14 through 16, respectively.

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

28 Id.

29 Id.

30 Id.

31 Id.

32 Id.

33 Id.

34 Id.
17. Joint Stipulation of Undisputed Facts ¶28 is incorporated by reference as material fact ¶17.\footnote{id.}

18-20. Joint Stipulation of Undisputed Facts ¶¶30 through 32 are incorporated by reference as material fact ¶¶18 through 20, respectively.\footnote{id.}

21-23. Joint Stipulation of Undisputed Facts ¶¶38 through 40 are incorporated by reference as material facts ¶¶21 through 23, respectively.\footnote{id.}

24. On November 9, 2009, Counterpoint filed a request for agency action challenging the Class IVb, noncommercial nonhazardous solid waste permit issued for the Weber County Landfill.\footnote{Memorandum and Recommended Order in the Matter of Weber County C&D Class IVb Landfill, Solid Waste Permit #0901 ("ALJ's Noncommercial Permit Recommended Order") (April 6, 2011) at 1.}

25. Pursuant to the directions of the three Weber County Commissioners, the Weber County Director of Solid Waste prepared, signed and filed an application for a Class VI landfill.\footnote{Exhibit A, Affidavit of Gary C. Laird (January 30, 2012), Exhibit B, Affidavit of Craig L. Dearden (January 30, 2012), Exhibit C, Affidavit of Jan M. Zogmaister (January 30, 2012), and Exhibit D, Affidavit of Kenneth A. Bischoff (January 31, 2012) attached to Respondents' Commercial Approval SJ Memo.}

26. On May 12, 2011, in the matter of the Weber County C&D Class IVb Landfill, the Board unanimously approved the finding of fact that the Weber County Landfill is a nonprofit facility.\footnote{Utah Solid and Hazardous Waste Control Board Transcript in the Matter of the Weber County C&D Class IVb Landfill Solid Waste Permit ("Board Tr. for Noncommercial Permit") attached as Exhibit E to Respondents' Commercial Approval SJ Memo (May 12, 2011) at 89.}

27. On May 12, 2011, the Board determined that "[t]he Weber County Landfill is a noncommercial nonhazardous solid waste facility when it
accepts waste generated within the boundaries of Weber County.\textsuperscript{41}

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

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

29. On May 12, 2011, the Board determined that “for waste generated outside the boundaries of Weber County, the permit condition limiting the landfill to receiving only waste generated ‘solely under contract with a local government meets the statutory requirement for an exclusion [from being classified as a commercial facility], pursuant to Utah Code Ann. § 19-6-102(3)(b)(iii).”\textsuperscript{43}

30. On June 20, 2011, subject to the ordered modification of a permit condition, the Board upheld the Executive Secretary’s decision to grant Weber County and Moulding a noncommercial nonhazardous solid waste permit (Noncommercial Permit) to construct and operate the Weber County C&D, Class IVb Landfill. The Board also ordered that Counterpoint’s request for agency action regarding the Noncommercial Permit was resolved and dismissed the adjudicative proceeding.\textsuperscript{44}

31-32. Joint Stipulation of Undisputed Facts ¶¶ 34 and 35 are incorporated by reference as material facts ¶¶ 31 and 32, respectively.\textsuperscript{45}

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

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

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

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

\textsuperscript{45}JSF at ¶¶ 34, 35.
33. When seeking to change the type of permit for a solid waste landfill, the Board recognized the value in holding one permit in abeyance until the other permit is final and no longer subject to appeal.  

VI. Analysis.

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

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

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

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

47 Material Fact at ¶ 9 (JSF ¶ 15).

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

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

The solid waste rules provide that:

(a) Each permit application shall provide:

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

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

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

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

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

50 Counterpoint's SJ at 15.
Counterpoint. 51

2. The Provisions of R315-310-3(2) and 3(3) Apply to the Application for the Commercial Permit.

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

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

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

51 Respondents' Due Process SJ Memo at ¶ 20-23.
52 Respondents' Due Process SJ Memo at ¶ 20.
53 Respondents' Due Process SJ Memo at ¶ 20.
54 Funk v. Utah State Tax Comm'n, 839 P.2d 818, 820 (Utah 1992) (stating the title or caption of a statute can guide interpretation only if the text of the statute is ambiguous).
55 UTAH ADMIN. CODE R315-310-3(2).
must send an interested party letter, however, the section caption - “for a New Facility or a Facility Seeking an Expansion” provides no clarification in identifying the intended persons. As subsection -3(2)(a) is not ambiguous and the section caption does not aide in interpreting subsection -3(2)(b), the heading for section R315-310-3 cannot constrain the text of R315-310-3(2).


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

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

57Id.

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

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

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

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

60Counterpoint’s SJ Motion at 15-16. Subsection -3(3)(c) prohibits construction of the facility until the requirements of subsection R315-310-3(2)(b) are met. UTAH ADMIN. CODE R315-310-3(3)(c). Subsection -3(2)(b) requires the Executive Secretary to offer to place individuals on an interested party list to receive further public information regarding the proposed facility. UTAH ADMIN. CODE R315-310-3(2)(b); see supra Part VI.A.1 for rule language. Note that Respondents proclaim that the citation references in UTAH ADMIN. CODE R315-310-3(3)(c) and (d) are also incorrect. Respondents’ Reply at n.6.
obtain legislative and gubernatorial approval is solely based in UTAH CODE ANN. § 19-6-108(3)(c) not UTAH ADMIN. CODE R315-310-3(3)(b).  

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

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

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

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

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

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

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

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

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61 Respondents' Reply at ¶ 39.

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

63 UTAH ADMIN. CODE R315-310-3(3) (emphasis added).
mandate for commercial nonhazardous solid waste facilities to obtain legislative and gubernatorial approval. The Executive Secretary’s regulatory interpretation was arbitrary when he indiscriminately determined to rely solely on section 19-6-108(3)(c)(i) to impose commercial facility requirements on the existing commercial Weber County Landfill whereas, presumably, he would rely on both section 19-6-108(3)(c)(i) and subsection -3(3) for new commercial facilities. As section 19-6-108(3)(c)(i) does not limit the required additional authorizations for commercial facilities to new facilities or facilities seeking an expansion, Respondents’ assertions are unpersuasive.

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

a. Subsections R315-310-3(2)(a)(ii) and (b) Reference Nonexistent Subsections.

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

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

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

65See UTAH ADMIN. CODE R315-310-3(2)(a)(ii).
Respondents' motion for a summary judgment ruling that Counterpoint was not entitled to individual notice of the Commercial Permit and Counterpoint's motion that the reference in UTAH ADMIN. CODE R315-310-3(2)(b) to Subsection R315-310-3(3)(a)(i) and (iii) be revised are both DENIED.


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

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

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66 Respondents' Due Process SJ Memo at ¶ 35.

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

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

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

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

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

Respondents acknowledge that through the 2009 notification letters or otherwise,

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

69Material Fact ¶ 7 (JSF ¶ 11).

70UTAH ADMIN. CODE R315-310-3-(2)(a)(ii).
they did not notify Counterpoint of Weber County and Moulding’s intent to apply for the Commercial Permit. They did not notify Counterpoint of Weber County and Moulding’s intent to apply for the Commercial Permit. Thus, the 2009 notification letters do not meet the intent of the rule to notify property owners of the intent to apply for the Commercial Permit.

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

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

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

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71 Material Fact ¶ 12.

72 RFAA #1 at 5-6; Counterpoint’s SJ at 13-15 (noting the Executive Secretary notified the interested party list regarding the public comment period for the draft Noncommercial Permit).
5. Any Alleged Failure to Notify Counterpoint Regarding the Commercial Permit Application, Draft and Comment Period Was Harmless Error.

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

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

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

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

\textsuperscript{74}Crookston v. Fire Ins. Exchange, 817 P.2d 789, 796-97 (Utah 1991) (citing State v. Knight, 734 P.2d 913 (Utah 1987)).
prejudiced by Respondents’ alleged failure to notify Counterpoint.\textsuperscript{75} Accordingly, any alleged failure by the Executive Secretary to notify Counterpoint or to require Weber County and Moulding to notify Counterpoint results in harmless error.

\begin{enumerate}
\item \textbf{Counterpoint Learned of the Draft Commercial Permit.}

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

\item \textbf{Counterpoint Failed to Address how an Additional Twenty-Nine Days to File Comments Would Have Changed the Outcome of This Proceeding.}

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

\textsuperscript{75}\textit{Mountain Fuel Supply Co.}, 861 P.2d at 423 (stating “the aggrieved party must be able to demonstrate how the agency’s action has prejudiced it”).

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

\textsuperscript{77}See RFAA #1; Amended RFAA #2.

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

\textsuperscript{79}\textit{Overstock.com, Inc.}, 2008 UT 55, ¶ 12 (stating a party cannot rely on unsupported bare contentions) (additional citations omitted).
Counterpoint Failed to Assert it Could Have Raised Additional Claims Beyond those Already Raised in its Requests for Agency Action.

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

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

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

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

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

\(^{80}\)See Utah Admin. Code R315-302-3; R315-305-1, -2, -4, -5; R315-308; R315-309; R315-310-1, -2, -4, -5).

\(^{81}\)See Utah Code Ann. § 19-6-108(11).

\(^{82}\)Utah Code Ann. § 19-6-108(3)(c)(i); Utah Admin. Code R315-310-3(3)(b).
additional statutory requirements for commercial facilities. Counterpoint has not questioned whether the Weber County Landfill is beneficial or necessary pursuant to UTAH CODE ANN. § 19-6-108(11). Furthermore, Counterpoint makes no claim that had it been notified it could have challenged whether the Landfill is beneficial and necessary. Thus, notwithstanding any failure to notify Counterpoint, this Recommended Order shall address each of Counterpoint's alleged claims. Moreover, Counterpoint failed to allege that had it been notified, it would have raised other claims that would have a reasonable probability to change the outcome of this proceeding.

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

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

Therefore, any alleged failure of the Executive Secretary or Weber County and Moulding to notify Counterpoint would result in harmless error. Accordingly, Counterpoint's request for rulings on summary judgment are DENIED as outside the scope of this proceeding insofar as it requested a ruling that 1) "[a]n interested party list, once created, is intended to persist until the closing of the facility" and 2) the Executive
Secretary failed to notify Counterpoint as an interested party for the Noncommercial Permit. Also, as the rules are unclear regarding which property owners should be notified, 1) Counterpoint's request for rulings on summary judgment are DENIED insofar as a) it asserts the Executive Secretary or Weber County and Moulding failed to notify Counterpoint as a property owner within 1,000 feet of the Weber County Landfill, and b) it seeks to revoke the Commercial Permit, and 2) Respondents' request for summary judgment is DENIED insofar as it seeks a ruling that Counterpoint was not entitled to individual written notice of the Commercial Permit application.

6. Additional Board Recommendation.

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

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

Counterpoint seeks summary judgment rulings 1) affirming its claim that a commercial permit may only be issued to a for profit facility and 2) that the Commercial Permit must be revoked because it was issued to the "nonprofit" Weber County
Landfill. Respondents disagree. In their cross motion for summary judgment, Respondents argue that Counterpoint’s claims in its Amended RFAA #2 fail as a matter of law and Respondents generically “move for summary judgment regarding the claims asserted in [Amended RFAA #2].”

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

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

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

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

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

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

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

87 Counterpoint’s SJ at 7,11 (Counterpoint’s Material Fact ¶ 61 (citing Board Tr. for Noncommercial Permit at 89) attached as Exhibit E to Respondents’ Commercial Approval SJ Memo. Respondents object to Counterpoint Material Fact ¶ 61 but agree that Counterpoint’s proffered statement of fact is accurate. Respondents’ Opposition to Counterpoint’s SJ at 4.
accepts waste generated outside its jurisdiction.\textsuperscript{88} Counterpoint subsequently argues the Commercial Permit was improperly issued for the nonprofit Weber County Landfill.

\begin{itemize}
  \item [a.] The Board's Finding of Fact that the Weber County Landfill Operates as a Nonprofit Facility Under the Noncommercial Permit is Not Relevant to This Proceeding.
\end{itemize}

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

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

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

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

\textsuperscript{89}Material Fact ¶ 26.

\textsuperscript{90}Material Fact ¶ 28.

\textsuperscript{91}See generally Board Noncommercial Permit Order, Board Tr. for Noncommercial Permit at 87 (Board Chairman stating "[w]hat's in front of us is whether or not a valid permit was issued to a not-for-profit organization").
County or 2) C&D waste generated within the boundaries of a Utah local government received under contract with that local government. Adherence to the Noncommercial Permit provision restricting the receipt of waste allows the Landfill to operate as a noncommercial facility.92

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

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

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

92Material Fact ¶¶ 27, 29.

93Material Fact ¶ 16 (JSF ¶ 25).

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

95Counterpoint's SJ at 12 (citing UTAH CODE ANN. § 19-6-503(1)).
Management Act "allows discretionary access without the imposition of commercial fees." 96

The Solid Waste Management Act provides:

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

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

This statute clearly states that a public entity may conduct those activities subject to the powers and rules of the Department of Environmental Quality, which includes applicable permitting provisions specified in UTAH CODE ANN. §§ 19-6-101 to -123.98

The statutory provision is discretionary and, therefore, does not mandate that a public entity conduct the listed activities such as handling waste generated outside of its jurisdiction.

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

96 Id.

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

98 See also Respondents' Reply SJ at ¶ 11.
failed to meet its burden to show that a government solid waste management facility is “inherently nonprofit” even when it receives waste from outside of its jurisdiction. Therefore, Counterpoint’s claim that the Weber County Landfill is a nonprofit facility is not supported by the provisions of UTAH CODE ANN. § 19-6-503(1).

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

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

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

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99 Respondents’ Reply to SJ at ¶¶ 9, 10.
100 Counterpoint’s SJ at 11.
101 UTAH CODE ANN. § 19-6-102(3)(a). The Act additionally provides three exemptions to being classified as a commercial nonhazardous solid waste facility. See UTAH CODE ANN. § 19-6-102(3)(b).
definition for a noncommercial nonhazardous solid waste facility. Also, there is no statutory prohibition restraining the Executive Secretary from issuing a commercial permit to any individual whether the facility operates as a for profit or not for profit facility.

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

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

b. Additional Commercial Permit Requirements.

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

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102 See generally Utah Code Ann. § 19-6-102.

103 Material Fact ¶ 2 (JSF ¶ 3); Utah Code Ann. § 19-6-108(3)(a)(i); Utah Admin. Code R315-301-5(1).

104 See Utah Admin. Code R315-302-3; R315-305-1, -2, -4, -5; R315-308; R315-309; R315-310-1, -2, -4, -5; see also supra Part VI.A.5.c.

105 See Utah Code Ann. § 19-6-108(11).
the governor and the legislature must also authorize any commercial facility.106

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

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

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

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

108 W.M. Barnes Co., 627 P.2d at 59 (additional citations omitted).
“nonprofit” Weber County Landfill. Respondents’ motion for summary judgment is
GRANTED in so far as they seek a ruling that Counterpoint’s Amended RFAA #2 cause
of action fails as a matter of law in that it claims the Board’s finding that the Weber
County Landfill is a nonprofit facility in the Noncommercial Permit proceeding mandates
that the Commercial Permit is revoked.

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

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

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

109Amended RFAA #2 at 2-5.
110Respondents’ Commercial Approval SJ Memo at 7-8.
111Respondents’ Commercial Approval SJ Memo at 6-7.
under Subsection (3)(c)(ii)\textsuperscript{112} until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a),\textsuperscript{113} approval by the governor and the Legislature.\textsuperscript{114}

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

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

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

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

\textsuperscript{114}UTAH CODE ANN. § 19-6-108(3)(c)(i).

\textsuperscript{115}Material Facts ¶ 3, 25 (JSF ¶ 5).

\textsuperscript{116}See Counterpoint's Response at 15.
D. The Weber County Landfill May Simultaneously Retain a Dormant Noncommercial Nonhazardous Solid Waste Permit and an Active Commercial Nonhazardous Solid Waste Permit.

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

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

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

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

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117 Counterpoint's SJ at 22.
118 Id. at 22-25. In its motion for summary judgment, Counterpoint also seeks enforcement of the Noncommercial Permit, which is outside the scope of this proceeding. See Counterpoint's SJ at 23.
119 Material Fact ¶ 4 (JSF ¶ 8).
120 Material Fact ¶¶ 14, 21 (JSF at ¶¶ 23, 38).
121 During its deliberation in the matter of the Noncommercial Permit, Board members questioned how a landfill could be classified as both a commercial and a noncommercial landfill. Board Tr. Noncommercial Permit at 16 (Dr. Dupont), 65-66 (Mr. Riding). The Board decided to address the issuance of two permits at a later date. Id. at 90-91 (Mr. Brehm). The record is devoid of any evidence that the Board has since addressed the issue of two permits.
the issuance of the Noncommercial Permit.\textsuperscript{122} Counterpoint did not appeal this Board’s denial of its request for reconsideration of the Board’s June 20, 2011, decision to uphold the issuance of the Noncommercial Permit.\textsuperscript{123} Accordingly, the Noncommercial Permit is a final permit.

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

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


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

\textsuperscript{122}Material Fact ¶ 30.

\textsuperscript{123}Material Facts ¶¶ 31, 32 (JSF at ¶¶ 34, 35).

\textsuperscript{124}Material Fact ¶ 14 (JSF at ¶ 23).

\textsuperscript{125}Material Fact ¶ 18 (JSF at ¶ 30).

\textsuperscript{126}See Memorandum and Order (June 16, 2011); Order (September 29, 2011).

\textsuperscript{127}UTAH ADMIN. CODE R315-12-2.2(b) (2010). (Rule in effect when Counterpoint filed RFAA #1 and Amended RFAA #2.)
of a local government pursuant to an agreement with Weber County.\textsuperscript{128} The
Noncommercial Permit limited the waste acceptance provisions to exempt the Weber
County Landfill from a commercial facility classification pursuant to UTAH CODE ANN. §
19-6-102(3)(b)(iii). As the Weber County Landfill is classified as a commercial facility
under the Commercial Permit, the Commercial Permit places no limitations as to where
acceptable C&D waste is generated.\textsuperscript{129} Consequently, compliance with waste
acceptance criteria under the Commercial Permit could, nevertheless, simultaneously
allow violation of the waste acceptance limitations in the Noncommercial Permit. Board
members stated that two final permits for the Weber County Landfill would be improper
as the Noncommercial Permit and Commercial Permit provisions would conflict.\textsuperscript{130}

3. A Landfill Cannot Retain Two Simultaneous Classifications.

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

\textsuperscript{128}Material Fact ¶ 28.

\textsuperscript{129}Material Fact ¶ 16 (JSF ¶ 25).

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

\textsuperscript{131}See e.g. UTAH ADMIN. CODE R315-310-1(4) (provisions to allow landfills to change
classifications or subclassifications). Counterpoint also asserts that HCR 018 allows a single landfill
classification as it granted approval to "change" landfill classifications not to add an additional
classification. Amended RFAA #2 at 3.
Class VI (commercial C&D landfill).\footnote{UTAH ADMIN. CODE R315-301-2(10), -2(12). The rules also provide definitions for a Class I, II, III, and V landfill. See R315-301-2(7) to - 2(9), - 2(11).}

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

Respondents’ cross motion for summary judgment seeks a ruling that Counterpoint has no standing to challenge the Noncommercial Permit because the Noncommercial Permit does not affect Counterpoint’s interests.\footnote{Respondents’ Commercial Approval Memo SJ at 16.} Notwithstanding whether Counterpoint has standing to unilaterally challenge the Noncommercial Permit, Counterpoint may challenge the validity of the Commercial Permit where that permit authorizes the Permittees to violate the existing Noncommercial Permit.\footnote{Counterpoint emphasized that there is a “reasonable probability that future injury exists” in that the Executive Secretary has stated that he will make the Noncommercial Permit the “operative permit” if the Commercial Permit is revoked. Counterpoint SJ Response at 21-22 (quoting Respondents’ Commercial Approval SJ at 14). Nevertheless, in this proceeding there is no need to consider whether Counterpoint has standing to challenge the Noncommercial Permit.}

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

Respondents cite no legal authority, however, they assert that the Executive Secretary has discretion to hold one permit “dormant.”\footnote{Respondents’ Commercial Approval SJ Memo at 15.} Respondents argue that postponing termination of the Noncommercial Permit until after the resolution of Counterpoint’s challenge to the Commercial Permit “protects the parties from unnecessary risks and costs, preserves administrative and judicial resources, prevents
potential additional unnecessary and frivolous appeals by Counterpoint, and allows Weber County to continue to offer its residents and businesses C&D disposal services ... in the event the [Commercial Permit] is stayed or invalidated." The Board unanimously agreed that the “Executive Secretary has the discretion, when a new permit has been applied for, to hold the existing permit in abeyance and allow the applicant to operate under the permit that has been challenged until such time as the permit becomes final and nonappealable, at which time the original permit must be terminated with 30 days.”


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

136/Id.

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

In this proceeding, the Board has jurisdiction to act only in the matter of the Commercial Permit. As the Board’s jurisdiction in the Noncommercial Proceeding terminated thirty (30) days following its denial of Counterpoint’s Request for Reconsideration of the Utah Solid and Hazardous Waste Control Board Order of June 20, 2011 (June 29, 2011), the Board has no authority to order the termination of the Noncommercial Permit. Order Denying Request for Reconsideration (July 7, 2011). To support the Board’s determination that the Executive Secretary’s decision to hold the Noncommercial Permit in abeyance, the Board may, however, order the Executive Secretary provide documentation that the Noncommercial Permit shall be terminated if the Commercial Permit becomes final and is no longer subject to judicial review.
using enforcement discretion to hold a permit dormant.\textsuperscript{138} Thus, the Board determined that the Executive Secretary has "plenary authority to administer and discretion to enforce the solid waste program as long as his decisions are not arbitrary and capricious."\textsuperscript{139}

b. Reasonable Basis.

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

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

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

\textsuperscript{138}See generally \textsc{Utah Code Annotated, Title 19, Chapter 6, Part 1; Utah Admin. Code R315.}

\textsuperscript{139}Board’s Remand at 4.

\textsuperscript{140}Board Tr. for Commercial Permit at 105-106 (Mr. Ellerton).

\textsuperscript{141}Board’s Remand at 4; see also Board Tr. for Commercial Permit at 98-99 (Mr. Murray stating "if there is a reasonable basis that the Division can indicate why they are holding the permit dormant and it’s effectively communicated to the parties affected by it, then I don’t think it’s arbitrary or an abuse of discretion;" Dr. Dupont agreed).
the operations are conducted pursuant to a single permit.\textsuperscript{142} Thus, it is unclear whether the Executive Secretary’s decision to hold the Noncommercial Permit dormant is documented and available to the public.\textsuperscript{143} It is, therefore, recommended that the Board order the Executive Secretary to confirm that he has documentation specifying that the Weber County Landfill is to operate pursuant to the Commercial Permit and that the Noncommercial Permit is being held in abeyance until the pending decision regarding the Commercial Permit is final and no longer subject to judicial review pursuant to \textsc{Utah Code Ann.} \textsection{63G-4-403}.

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

\textsuperscript{142} Id. at 14.

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

\textsuperscript{144} Board Remand at 4.

\textsuperscript{145} Counterpoint also argues that the Noncommercial Permit became moot when the “[G]overnor and [L]egislature approved or signed” House Concurrent Resolution [“H.C.R.”] 018 that “granted approval to change classification from a Class IVb noncommercial nonhazardous solid waste facility to a Class VI commercial, nonhazardous solid waste facility.” Counterpoint’s SJ at 22-24 (quoting HCR 018 (2011))
E. The Noncommercial Permit Authorized the Construction of the Weber County Landfill.

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

Section 19-6-108(3)(c)(i) states no person may construct any facility listed under Subsection (3)(c)(ii) until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a), (italics omitted)). Counterpoint claims that the approval of HCR 018 changed the factual basis for the Noncommercial Permit, thereby rendering the Noncommercial Permit moot. Id. (citing e.g., Richards v. Baum, 914 P.2d 719, 720 (Utah 1996); Salt Lake County v. Holliday Water Company, 2010 UT 45 at ¶15; State v. Laycock, 2009 UT 53, 214 P.3d 104; Cedar Mountain Environmental, Inc., v. Toole (sic) County, 2009 UT 48 at ¶26). House Concurrent Resolution 018 did not change the factual basis of the Noncommercial Permit but instead H.C.R. 018 “allows” the Weber County Landfill to change classification to a “Class VI commercial nonhazardous solid waste landfill.” See Concurrent Resolution Approving Solid Waste Facility Classification Change, H.C.R. 18, 2011 General Session attached as Exhibit K to Counterpoint’s SJ Memo.

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

147Respondents’ Commercial Approval SJ at 1-2.


149The subsection (3)(a) approval is approval from the Executive Secretary for a operation plan for that facility. UTAH CODE ANN. § 19-6-108(3)(a)(i).
approval by the governor and the Legislature.\textsuperscript{150}

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

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

The Solid and Hazardous Waste Act does not specifically address the circumstances in the instant case where an existing noncommercial landfill is newly permitted to operate as a commercial landfill. In the absence of a specific statutory provision prohibiting the reclassification of a noncommercial facility to a commercial facility, to find that an existing noncommercial landfill may never operate as a commercial landfill would indeed be unreasonable. Therefore, the Executive\textsuperscript{155}

\textsuperscript{150}UTAH CODE ANN. § 19-6-108(3)(c)(i).
\textsuperscript{151}Counterpoint's SJ at 18.
\textsuperscript{152}Material Fact ¶ 22 (JSF ¶ 39).
\textsuperscript{153}Material Fact ¶¶ 6, 21 (JSF ¶¶ 10, 38).
\textsuperscript{154}Material Fact ¶ 15 (JSF ¶ 24).
Secretary's preclusion of commercial operation pending a final permit and section 19-6-108(3)(c)(i) approvals is reasonable. Additionally, where a noncommercial landfill is already constructed, section 19-6-108(3)(c)(i) would prohibit any additional construction or physical modifications necessary for a commercial landfill until authorized by the local government, the Executive Secretary, the legislature and the governor.

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

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

Accordingly, Respondents' motion for summary judgment is GRANTED and

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

\textsuperscript{156}See generally H.C.R. 018.

\textsuperscript{157}Material Fact ¶ 15.
Counterpoint's motion for summary judgment is DENIED insofar as Counterpoint alleges the Commercial Permit should be invalidated because the Weber County Landfill was constructed prior to receiving section 19-6-108(3)(c)(i) authorizations.

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

Counterpoint alleges that pursuant to the Solid Waste Management Act, the Department of Environmental Quality is obligated to promulgate rules that govern the management of solid waste by public entities. Counterpoint claims that the Division failed to promulgate and administer rules to restrict landfills from accepting waste generated in another jurisdiction to allow government entities to manage their own waste pursuant to UTAH ADMIN. CODE § 19-6-503. In addition, Counterpoint claims waste generated within the City of Ogden was illegally disposed at the Weber County Landfill. Counterpoint seeks a summary judgment ruling ordering the Executive Secretary to promulgate rules to carry out his obligation under the Solid Waste Management Act. Arguing that Counterpoint's claims concerning the Solid Waste Management Act fail, Respondents seek a summary judgment ruling that 1) the Solid

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158 Counterpoint's SJ at 19-20.
159 RFAA #1 at 8.
160 Counterpoint's SJ at 21.
161 id. at 22.
Waste Management Act does not govern or affect the issuance of the Commercial Permit, 2) this proceeding is not the proper forum to address the Department of Environmental Quality's ("DEQ") alleged failure to conduct rulemaking, and 3) Counterpoint lacks standing with respect to the receipt of waste generated in the City of Ogden.162 Counterpoint opposes Respondents' SWMA SJ Memo.163 Respondents also oppose Counterpoint's motion for summary judgment regarding the Solid Waste Management Act.164

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

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

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

162 Respondents' SWMA SJ Memo at 11.

163 See Counterpoint's SJ at 6-10.

164 Respondents' Opposition to SJ at 8.

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

166 See Order of the Executive Director of the Utah Department of Environmental Quality (Remand to ALJ with Directions on Determining Whether There is a Basis to Grant Friends Standing to Intervene) in the Matter of South Davis Sewer District, North and South Treatment Plants ("Remand in the Matter of South Davis") (March 29, 2011) at 11-12; see also Tribune Co. v. F.C.C., 133 F.3d 61, 68 (D.C. Cir. 1998) (stating an "agency is bound by its substantive rules unless [] amended or rescinded"); see also UTAH CODE ANN. § 63G-4-102(2)(a).
outside the scope of this proceeding.\textsuperscript{167} If it so desires, Counterpoint may separately petition for rulemaking pursuant to the Utah Administrative Rulemaking Act, \textit{UTAH CODE ANN.} § 63G-3-601.

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

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

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

G. Miscellaneous Claims.

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

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

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

\textsuperscript{168}\textit{Remand in the Matter of South Davis} at 10-12.
permit application as required by UTAH ADMIN. CODE R315-310-1(4).\textsuperscript{169} Respondents submit, notwithstanding that Weber County and Moulding checked the “modification box” on the application, that the Commercial Permit application was reviewed as an application for a new permit.\textsuperscript{170}

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

2. Counterpoint’s Comments Were Adequately Considered.

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

\textsuperscript{169}RFAA \#1 at 3.

\textsuperscript{170}Respondents’ Reply at ¶ 45.

\textsuperscript{171}Counterpoint Response at 14.

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

\textsuperscript{173}RFAA \#1 at 9.
about the proposed Commercial Permit application. Respondents assert the Executive Secretary had sufficient time to determine that Counterpoint's comment "failed to state a legal basis to deny the [Commercial Permit]." Counterpoint failed to respond to Respondents' motion for summary judgment or assert why one day was inadequate to consider it's comment. Counterpoint failed to support its bare contention. Accordingly, Respondents' motion for summary judgment is GRANTED insofar as it seeks a ruling that Counterpoint failed to demonstrate that the Executive Secretary did not adequately consider Counterpoint's comment.

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

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

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174Material Fact ¶ 13 (JSF ¶ 21).

175Respondents' Due Process SJ Memo at ¶ 30.

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

177RFAA #1 at 2.

178Id. at 9.

179Respondents' Due Process SJ Memo at 11.
Whether the Permittees could seek legislative and gubernatorial approval is a question of law. Section R315-12-2.2(b) provides:

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

In accordance with the rule, a permit, or an initial order, a permit must be challenged within thirty (30) days after issuance of the permit or the permit becomes final. Although a timely filed request for agency action preserves the ability to challenge a permit, a request for agency action does not stay the permit or initial order. If Counterpoint desired a stay, it should have requested a stay pursuant to **UTAH ADMIN. CODE** R315-12-8 (2010). Counterpoint did not seek to stay the Commercial Permit.

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

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\(^{180}\)**UTAH ADMIN. CODE** R315-12-2.2(b) (2010). (Rule in effect when Counterpoint filed **RFAA #1** and Amended **RFAA #2**.)
VII. Findings of Fact and Conclusions of Law.

A. Findings of Fact.

Findings of Fact are as follows:

Background.

1. Pursuant to his authority granted in UTAH CODE ANN. § 19-6-108, on October 19, 2009, the Executive Secretary of the Solid and Hazardous Waste Control Board ("Executive Secretary") issued a Class IVb, noncommercial nonhazardous solid waste permit ("Noncommercial Permit") to Weber County, as owner, and Moulding & Sons Landfill, LLC ("Moulding"), as operator, of the proposed Weber County Landfill. 181 The Noncommercial Permit authorized Weber County and Moulding to construct and operate a noncommercial nonhazardous solid waste, construction/demolition debris ("C&D") landfill. 182

2. On November 9, 2009, Petitioner Counterpoint Construction Company ("Counterpoint") filed a request for agency action challenging the issuance of the Class IVb, Noncommercial Permit. 183 In a separate adjudicatory proceeding, Counterpoint was granted standing to intervene to raise issues concerning the Noncommercial Permit. 184

3. On January 18, 2011, Weber County and Moulding filed an application for a Class VI, commercial nonhazardous solid waste permit ("Commercial Permit") for the existing Weber County Landfill that was initially constructed and operated pursuant to the Class IVb, Noncommercial Permit. 185 The Weber County Director of Solid Waste prepared, signed and filed the application for the Weber County, Class VI, Commercial Permit under the direction of the

181 Material Fact ¶¶ 2, 4.
182 Material Fact ¶ 5.
183 Material Fact ¶ 24.
184 Material Fact ¶ 30.
185 Material Fact ¶¶ 6, 22.
three Weber County Commissioners. The "Modification" box was checked on the application.

4. The application for the Weber County Landfill, Class VI Commercial Permit included copies of 2009 letters notifying property owners of the intent to apply for a landfill permit. The Executive Secretary did not create "an interested party list" for the Weber County, Class VI Commercial Permit application.

5. The draft Weber County Landfill Class VI, Commercial Permit was subject to a public comment period between January 28 and February 28, 2011.

6. Neither the Executive Secretary nor Weber County nor Moulding notified Counterpoint regarding the application or public comment period for the Weber County Landfill Class VI, Commercial Permit. On February 28, 2011, the last day of the public comment period, Counterpoint filed a single comment stating it had not been properly notified regarding the Class VI Commercial Permit application.

7. On March 1, 2011, the Executive Secretary issued the Class VI Commercial Permit for the existing Weber County Landfill. Subject to limitations on the type of waste it can accept, the Commercial Permit allows the Weber County Landfill to accept wastes from anywhere. The Noncommercial Permit was in effect

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186Material Fact ¶¶ 3, 25.
187Material Fact ¶ 23.
188Material Fact ¶ 7.
189Material Fact ¶ 8.
190Material Fact ¶ 11.
191Material Fact ¶ 8.
192Material Fact ¶¶ 11, 13; Respondents Due Process SJ Memo at ¶¶ 13, 29.
193Material Fact ¶¶ 14, 22.
194Material Fact ¶ 16.
at the time that the Commercial Permit was issued and neither
permit has been revoked.195

8. Commercial Permit Condition I.A. required Weber County and
Moulding to obtain approvals from the local government, the Utah
State Legislature and the Governor of Utah prior to the start of
operations as a commercial landfill.196 The Governor and the
Legislature authorized the Weber County Landfill to change its
classification from a Class IVb, noncommercial nonhazardous solid
waste landfill to a Class VI, commercial nonhazardous solid waste
landfill.197 On March 28, 2011, the Executive Secretary granted
approval for the Weber County Landfill to operate pursuant to its
Class VI Commercial Permit.198

9. Petitioner Counterpoint filed two amended requests for agency
action challenging the Executive Secretary’s issuance of the
Commercial Permit and the Executive Secretary’s written approval
to begin commercial operations at the Weber County Landfill.199
Counterpoint was granted standing to challenge the Executive
Secretary’s issuance of the Commercial Permit.200

10. UTAH ADMIN. CODE R315-12-2.2(b) provides that “[a]n initial order or
notice shall become final in 30 days if not contested as described in
R315-12-3.”201

11. On April 6, 2011, in the separate adjudicatory proceeding for the
Noncommercial Permit, the administrative law judge transmitted a
Memorandum and Recommended Order (“Noncommercial Permit
Memorandum and Recommended Order”) to the Utah Solid and

195Material Fact ¶ 21.
196Material Fact ¶ 15.
197Material Fact ¶ 17.
198Material Fact ¶ 18.
199RFAA #1; Amended RFAA #2.
200See Memorandum and Order (June 16, 2011); Order (September 29, 2011).
201UTAH ADMIN. CODE R315-12-2.2(b) (2010).
Hazardous Waste Control Board ("Board") for their consideration.  

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

Need to Notify Counterpoint.

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

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

15. The section caption for R315-310-3 provides no clarification to which “persons” should receive the subsection R315-310-3(2)(b) letters.212

16. At the time when Weber County and Moulding filed an application for a commercial permit, the Weber County Landfill became a “proposed” commercial landfill.213

17. Both Class IVb noncommercial and Class VI commercial landfills must meet identical performance standards, operating requirements, and closure/post closure requirements.214 Therefore, as the Weber County Landfill was initially permitted and constructed under the Noncommercial Permit, in this proceeding for the Commercial Permit, Counterpoint cannot challenge the performance standards, operating requirements, or closure/post closure requirements.215

18. An applicant for a Class VI commercial landfill must also 1) demonstrate its commercial nonhazardous solid waste facility is beneficial and necessary, and 2) receive approval from the Executive Secretary, the local government, the governor and the

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

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

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

212 See Part VI.A.2.a.(1).

213 See Part VI.A.2.b.

214 See Part V.A.4.b.

215 Id.
19. Counterpoint learned about the draft Commercial Permit and filed a comment on the last day of the public comment period. In this proceeding, Counterpoint has challenged whether the Executive Secretary adequately authorized the Commercial Permit pursuant to the additional statutory requirements for commercial facilities. Counterpoint has failed to alleged that it could have raised additional concerns that would have a reasonable probability to change the outcome of this proceeding. Counterpoint has not claimed the Weber County Landfill is not beneficial or necessary.

20. Therefore, based on Counterpoint's assertions, there is no reasonable probability that any alleged failure to notify Counterpoint pursuant to UTAH ADMIN. CODE R315-310-3(2) would affect the outcome of this proceeding.

Nonprofit Facility Under the Noncommercial Permit.

21. On May 12, 2011, in the separate adjudicatory proceeding for the Noncommercial Permit, the Board:

a) unanimously approved the finding of fact that the Weber County Landfill is a nonprofit facility;

b) ordered the modification of a permit condition to allow the Weber County Landfill to only accept waste generated in Weber County or waste generated within the boundaries of a local government under contract with that local government; and

c) determined that the Weber County Landfill is noncommercial when it accepts waste generated within the

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

217 Material Fact ¶ 13.

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

219 Id.

220 Id.

221 See Part V.A.4.
boundaries of the County or waste generated outside the boundaries of Weber County solely under contract with that local government.222

22. The Solid Waste Management Act grants a public entity the discretion to provide a solid waste management facility to handle solid waste generated outside its jurisdiction.223 A discretionary grant of authority does not in itself provide a government service to the residents of Weber County, and, therefore the ability to receive waste from outside the jurisdiction is not an inherently nonprofit government service.224 Counterpoint raises no material facts to demonstrate the Weber County Landfill is a nonprofit facility.225

23. There are no applicable statutory or regulatory provisions that prohibit the Executive Secretary from issuing a commercial nonhazardous solid waste permit to any facility that meets the applicable requirements.226 Any facility issued a commercial permit must meet all applicable permitting requirements for a commercial nonhazardous solid waste facility.227 The legislature and governor control whether a commercial permit is approved regardless of whether the facility is a for profit or not for profit facility.228

Two Simultaneous Landfill Permits.

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

222Material Facts ¶¶ 26, 27, 28, 29.
223UTAH CODE ANN. § 19-6-503.
224Part VI.B.1.
225Id.
226Part VI.B.2.
227Id.
228Id.
229See Findings of Fact ¶ 7.
has been revoked. The Commercial Permit allows the landfill to accept waste generated anywhere, whereas, the Noncommercial Permit restricts the acceptance of waste to waste generated in Weber County or within the boundaries of a local government pursuant to an agreement. The waste acceptance provisions in the Commercial Permit could allow the violation of the waste restriction provision in the Noncommercial Permit.

25. The solid waste rules contemplate that a facility may change classifications, including from a noncommercial to a commercial facility. By issuing both the Class IV Noncommercial Permit and the Class VI Commercial Permit, the Executive Secretary has simultaneously classified the landfill as both a Class IV and a Class VI landfill.

26. The Executive Secretary shall document that the Noncommercial Permit is being held in abeyance pending the resolution of Counterpoint’s requests for agency action regarding the Commercial Permit and that the Weber County Landfill is operating pursuant to the Commercial Permit. The public may become aware that the Noncommercial Permit is being held in abeyance and the Weber County Landfill is operated pursuant to the Commercial Permit through access to the Executive Secretary’s documentation.

Construction of the Weber County Landfill.

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

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230 Id.

231 Id. ¶¶ 7, 8, 20.

232 See Part VI.D.2.

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

234 See Part VI.D.2.

235 Id.

236 See Findings of Fact ¶¶ 1, 3.
Weber County and Moulding filed an application for a commercial permit for the previously constructed Weber County Landfill. The local government, in addition to the Executive Secretary, the legislature and the governor, must approve a commercial facility prior to construction.

28. The Solid and Hazardous Waste Act does not address the commercial permit approval process for an existing noncommercial facility. The Executive Secretary barred operation as a commercial landfill prior to legislative and gubernatorial approval.

29. Any additional construction or physical modification necessary for the operation of a commercial landfill would be prohibited until appropriate approvals are obtained under the plain meaning of the phrase "no person may construct any [commercial] facility."

Miscellaneous.

30. Counterpoint failed to support 1) that the application for the Commercial Permit failed to meet all applicable requirements as a result of marking the "modification" box on the application; and 2) that the Executive Secretary failed to adequately consider Counterpoint's public comment regarding the draft Commercial Permit.

31. Neither the Utah Solid and Hazardous Waste Act, the Solid Waste Management and Permitting Rules, nor other statutory nor regulatory provisions prohibit the Executive Secretary from using enforcement discretion to hold a permit in abeyance that was

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237 Id. ¶ 3.


239 See generally Utah Code Ann. § 19-6-108.

240 See Findings of Fact ¶ 8.

241 See Part VI.E.

242 Part VI.G.1. and 2.
32. When a permitted solid waste facility seeks another permit to change permit classifications and when one permit is challenged, the Board recognized the value in holding a permit in abeyance until the challenged permit is no longer subject to judicial review.

B. Conclusions of Law.

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

1. There are no genuine issues of material facts in dispute.

2. The text in subsection R315-310-3(2)(a) is not ambiguous and the section caption fails to clarify subsection R315-310-3(2)(b); therefore, the UTAH ADMIN. CODE R315-310-3 section caption does not control subsection R315-310-3(2). The provisions of UTAH ADMIN. CODE R315-310-3(2) are not restricted to permit applications for a new facility or a facility seeking an expansion.

3. Solid waste rules, UTAH ADMIN. CODE R315-310-3(2)(a)(ii), require Weber County and Moulding, as applicants, to document the notification of property owners regarding their intent to apply for the Commercial Permit. Also, UTAH ADMIN. CODE R315-310-3(2)(b) requires the Executive Secretary to inquire whether individuals desire to be placed on an interested party list.

4. The term "proposed landfill" does not exclude the application of UTAH ADMIN. CODE R315-310-3(2) to the Commercial Permit application.

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

244 See Part VI.D.5.b.

245 Part VI.A.2.a.(1).

246 Part VI.A.3.

247 Id.

248 Part VI.A.2.b.
5. As the rules provide incorrect citations, the property owners referenced in subsection R315-310-3(2)(a)(ii) and the persons referenced in R315-310-3(2)(b) cannot be ascertained. Therefore, the rules lack clarity as to whether UTAH ADMIN. CODE R315-310-3(2)(a)(ii) and R315-310-3(2)(b) require Respondents to notify Counterpoint as a "property owner" or a "person." 249

6. The Executive Secretary's interpretation that the commercial Weber County Landfill is not subject to the provisions in UTAH ADMIN. CODE R315-310-3(3) is arbitrary and unreasonable. 250 The commercial Weber County Landfill is subject to the provisions of both UTAH CODE ANN. § 19-6-108(3) and UTAH ADMIN. CODE R315-310-3(3). 251

7. In that letters failed to notify "property owners" of their intent to apply for the Commercial Permit, it is impermissible for Weber County and Moulding to rely on the 2009 notification letters for the Noncommercial Permit application to demonstrate compliance with UTAH ADMIN. CODE R315-310-3(2)(a)(ii) for the Commercial Permit application. 252

8. As Counterpoint was not substantially prejudiced, any alleged failure of the Executive Secretary or Weber County and Moulding to notify Counterpoint, pursuant to UTAH ADMIN. CODE R315-310-3(2) regarding the Commercial Permit Application is harmless error. 253

9. The Board's finding of fact, in the Matter of the Noncommercial Permit, that the Weber County Landfill is a nonprofit facility when it operates under the waste receipt restrictions placed in the Noncommercial Permit is not relevant to this proceeding where the Weber County Landfill operations are authorized by the Commercial Permit. 254

249 Part VI.A.2.c.
250 Id.
251 Part VI.A.2.c.
252 Part VI.A.4.a.
253 Part VI.A.5.
254 Part VI.B.1.a.
10. A solid waste management facility of a public entity, such as the Weber County Landfill, does not become a nonprofit facility solely because UTAH CODE ANN. § 19-6-503 provides the discretionary ability to dispose solid waste generated outside the entity’s jurisdiction.255

11. Notwithstanding whether the facility is a not for profit or a for profit facility, the issuance of a commercial nonhazardous solid waste permit for any facility that meets all applicable statutory and regulatory requirements is not contrary to law.256

12. It is reasonable for the Executive Secretary to determine that the filing of a commercial permit application signed by the Weber County Director of Solid Waste satisfies the requirement to obtain "local government approval" in UTAH CODE ANN. § 19-6-108(3)(c)(i) when the application was submitted pursuant to the directions of each of the three Weber County Commissioners.257

13. In that UTAH ADMIN. CODE R315-301-2(10) and (12) individually define a Class IV landfill and a Class VI landfill; and R315-310-1(4) allows a landfill to change classification; a nonhazardous solid waste landfill cannot be simultaneously classified as both a Class IV landfill and a Class VI landfill.258

14. Two final permits with conflicting permit conditions cannot be issued to the same facility.259

15. The Noncommercial Permit is a final permit, no longer subject to judicial review pursuant to UTAH CODE ANN. § 63G-4-403.260

16. UTAH ADMIN. CODE R315-12-2.2(b) provides that an “initial order ... shall

255Part VI.B.1.
256Part VI.B.2.
257Part VI.C.
258Part VI.D.
259Part VI.D.2.
260Part VI.D.1.
become final in 30 days if not contested as described in R315-12-2.2(c). As Counterpoint has been granted standing to challenge the Commercial Permit; the Commercial Permit is not a final permit.262

17. Claims arising from the enforcement of the Class IVb noncommercial nonhazardous waste permit are outside the scope of this proceeding.263

18. The Board held that the Executive Secretary has “plenary authority to administer and discretion to enforce the solid waste program as long as his decisions are not arbitrary and capricious.”264

19. The Board determined that it is reasonable, and not arbitrary nor capricious, for the Executive Secretary to hold the Noncommercial Permit in abeyance until such time that the decision whether to uphold the issuance of the Commercial Permit is final and no longer subject to judicial review, pursuant to UTAH CODE ANN. § 63G-4-403, if 1) the Permittees are aware which permit is dormant and which permit is the operable permit and 2) the information regarding which permits are dormant and operable is available to the public.265

20. The Board concluded that the “Executive Secretary has the discretion, when a new permit has been applied for, to hold the existing permit in abeyance and allow the applicant to operate under the permit that has been challenged until such time as the permit becomes final and nonappealable, at which time the original permit must be terminated within 30 days.”266

21. Upon confirmation from the Executive Secretary that he has documentation available to the Permittees and the public that the Weber County Landfill is operating pursuant to the Commercial Permit and the Noncommercial Permit is being held in abeyance pending a final decision

261 UTAH ADMIN. CODE R315-12-2.2(b).
262 Id.
263 Id.
264 Board's Remand at 4.
265 Part VI.D.5.b.
266 Board Tr. for Commercial Permit at 108-109.
no longer subject to judicial review, pursuant to UTAH CODE ANN. § 63G-4-403, regarding the issuance of the Commercial Permit, the Board concluded that the Executive Secretary's decisions 1) to issue two concurrent permits and 2) to hold the Noncommercial Permit in abeyance with the intent to terminate the Noncommercial Permit if the Commercial Permit becomes final and no longer subject to judicial review is reasonable, and therefore not arbitrary nor capricious.\(^{267}\)

22. When the existing Weber County noncommercial landfill was converted to a commercial landfill, the Executive Secretary's interpretation of UTAH CODE ANN. § 19-6-108(3)(c)(i) is reasonable in that the Commercial Permit did not authorize commercial operations until the Executive Secretary received documentation that the legislature and governor approved the commercial landfill.\(^{268}\)

23. The relief requested by Counterpoint seeks to order the Executive Secretary to promulgate rules pursuant to his obligation under the Solid Waste Management Act, and is, therefore, outside the scope of this adjudicatory proceeding governed by the Utah Administrative Procedures Act in UTAH CODE ANN. § 63G-4-102(2)(a).\(^{269}\)

24. Relief requested by Counterpoint seeks enforcement of a municipal ordinance of Ogden City, and is, therefore, outside the scope of this adjudicatory proceeding.\(^{270}\)

25. A stay of the Commercial Permit was not requested nor granted, thus, there is no administrative barrier to Weber County and Moulding seeking legislative and gubernatorial approval of the commercial Weber County Landfill pursuant to UTAH CODE ANN. § 19-6-108(3).

C. Recommended Order.

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

\(^{267}\)Id.\(^{268}\)\(^{269}\)\(^{270}\)Id.
the following order:

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

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

1) that the Executive Secretary's failure to notify Counterpoint constitutes a denial of its rights as an interested party;

2) that the citations in UTAH ADMIN. CODE R315-310-3(2)(b) must be revised;

3) whether the Executive Secretary failed to comply with UTAH ADMIN. CODE R315-310-3(3);

4) that an interested party list created pursuant to UTAH ADMIN. CODE R315-310-3(2)(b) persists until the facility closes;

5) that the Weber County C&D Landfill is not "for profit;"

6) that government-owned nonhazardous solid waste facilities are inherently noncommercial;

7) that the Weber County Landfill was improperly constructed prior to approvals pursuant to UTAH CODE ANN. § 19-6-108(3)(c);

8) that the Executive Secretary or the Department of Environmental Quality must promulgate rules pursuant to the Solid Waste Management Act;

9) that the Weber County Landfill illegally accepted wastes generated within the boundaries of the City of Ogden;

10) that the Weber County Class IVb Landfill permit must be enforced;

11) that the Weber County Class IVb Landfill permit is moot and void; and
12) that the Class VI commercial nonhazardous solid waste permit ("Commercial Permit") should be invalidated; and it is

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

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

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

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

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

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

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

3) that the requests for agency action filed by Counterpoint do not prevent the legislature and governor from approving the Weber County Class VI permit;
4) that the Executive Secretary reviewed the Commercial Permit application as an application for a new permit;

5) that the Executive Secretary may concurrently issue both the Class IVb noncommercial Weber County Landfill permit and the Class VI commercial Weber County Landfill permit to the same landfill if both permits are not final permits; and

6) that the Executive Secretary has authority to postpone revocation of a conflicting permit and hold a permit dormant if a) the issuance of one permit is subject to a challenge, b) one permit is held in abeyance, c) the Executive Secretary has informed the Permittees which permit the Landfill is authorized to operate under, d) the public has access to the Executive Secretary's decision, and e) the dormant permit will be terminated within thirty (30) days of the challenged permit becoming final and no longer subject to judicial review; and and it is

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

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

1) that Weber County approved the Class VI Weber County Landfill as required by UTAH CODE ANN. § 19-6-108(3);

2) that construction of the Weber County Landfill did not violate UTAH CODE ANN. § 19-6-108(3)(c); and

3) that the finding of the Utah Solid and Hazardous Control Board that the Weber County Landfill is a nonprofit facility if operated pursuant to the Class IVb Weber County Landfill permit is not relevant to this
proceeding; and it is

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

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

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

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

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

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

DATED this 4\textsuperscript{th} day of February, 2013.

\[\text{Connie S. Nakahara}\]
Administrative Law Judge
PO Box 140873
Salt Lake City, UT 84114-0873
cnakahara@utah.gov

\textsuperscript{271} See Part VII.A. Note, although not determined in this Second Memorandum and Recommended Order, Respondents claim subsection -3(3) includes incorrect citations.
CERTIFICATE OF SERVICE

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

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Connie S. Nakahara

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EXHIBIT 1
BEFORE THE UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:
Weber County C&D Class VI Landfill
Solid Waste Permit #1101

JOINT STIPULATION OF
UNDISPUTED FACTS

January 10, 2012

Administrative Law Judge
Connie S. Nakahara

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

The parties stipulate and agree to the following undisputed facts:

1. Moulding and Sons Landfill, LLC, is a limited liability company organized under the Utah Revised Limited Liability Company Act, Utah Code Annotated 48-2c-101, et seq.

2. The Executive Secretary of the Utah Solid and Hazardous Waste Control Board is appointed pursuant to Utah Code Annotated §19-6-107.

3. The Executive Secretary is responsible to issue permits for nonhazardous solid waste facilities pursuant to Utah Code Annotated §19-6-108.
4. Weber County is a county of the State of Utah as denoted in Article XI Section 1 of the Constitution of the State of Utah with the powers granted under, among other statutes, Utah Code Annotated Title 17, Chapter 50.

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

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

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

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

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

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

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

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

   2
Copies of all letters provided to the surrounding property owners at the
time of the original permit application submitted in January 2009 are
included in Exhibit D.

12. The 2009 letters referred to on Page V-2 of the Class VI Permit Application did
not notify Counterpoint of the 2011 Class VI Application.

Commissioner.

14. On January 18, 2011, Counterpoint owned property located within 1000' of the
Landfill.

15. Neither Weber County, nor Moulding, nor the Division directly notified
Counterpoint of the Class VI Permit Application or the public comment period for that
application.

16. The Division did not create an interested party list for the Class VI permit
application.

17. Notice of the Public Comment Period for the proposed Class VI Landfill was
published in the Standard Examiner, a local newspaper serving Weber County and other areas,
on January 28, 2011. Notice of the Public Comment Period was also placed on the Division’s
web site.

18. The Public Comment Period for the proposed Class VI Landfill was held between

19. On February 24, 2011 State Representative Brad Dee introduced H.C.R. 018
(House Concurrent Resolution Approving Solid Waste Facility Classification Change) to the
Utah House of Representatives for first reading.
20. No one timely requested a Public Hearing for the proposed Class VI Landfill, and none was held.

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

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

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

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

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

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

27. On March 16, 2011, Counterpoint sent a letter to the Executive Secretary stating that it was “apparent that Counterpoint has been removed from the interested party list for the Landfill Facility.” The letter requested the Executive Secretary to “please place us once again on the List.” On March 28, 2011, the Executive Secretary responded, saying “[i]nterested party lists
do not exist for existing solid waste facilities. Such lists are created only for proposed new or expanding facilities and used only during the initial permitting process.”

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

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

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

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

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

33. On June 30, 2011, the Division received Counterpoint’s June 29, 2011 Request for Reconsideration of the Class IVb Permit decision.
34. On July 7, 2011, the Board denied Counterpoint’s Request for Reconsideration.

35. Counterpoint did not appeal the Board’s decision.

36. Neither the Solid and Hazardous Waste Control Board nor the Department of Environmental Quality has promulgated rules relative to the Solid Waste Management Act.

37. Kerry Gibson was not a commissioner at the time Weber County filed its application for the Class VI Permit, but he was advised of the application at some point after he became a commissioner, and he was supportive of the application.

38. Neither the Class IVb Permit nor the Class VI Permit has been revoked by the Executive Secretary. At the Executive Secretary’s direction, the Landfill is currently operating under the Class VI Permit, and Weber County and Moulding are paying the fees applicable under the Class VI Permit.

39. The Weber County C&D Landfill was initially constructed and operated pursuant to the Class IVb Permit. This construction occurred before the approval by the Executive Secretary, the Legislature, and the Governor, of the Class VI Permit.

40. The Weber County Class VI C&D Landfill permit application was submitted with the “Modification” box checked on the application form.

SIGNATURES ON FOLLOWING PAGE:
Parties’ signatures to this Joint Stipulation of Undisputed Facts may be in multiple counterparts, may be photocopies or equivalents of original signatures, and may be transmitted by facsimile or electronic mail.

RESPECTFULLY SUBMITTED this \( \frac{1}{0} \) day of January, 2012

Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

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

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties
Parties' signatures to this Joint Stipulation of Undisputed Facts may be in multiple counterparts, may be photocopies or equivalents of original signatures, and may be transmitted by facsimile or electronic mail.

RESPECTFULLY SUBMITTED this ___ day of January, 2017

Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

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

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties
Parties' signatures to this Joint Stipulation of Undisputed Facts may be in multiple counterparts, may be photocopies or equivalents of original signatures, and may be transmitted by facsimile or electronic mail.

RESPECTFULLY SUBMITTED this ___ day of January, 2012

Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
ATTORNEY GENERAL

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

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties
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RESPECTFULLY SUBMITTED this ____ day of January, 2012

Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURLEFF
ATTORNEY GENERAL

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

David C. Wilson
Chief Civil Deputy
Attorney for Weber County

DURHAM JONES & PINEGAR

Michael S. Malmborg
Attorneys for the Moulding Parties
CERTIFICATE OF SERVICE

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

Connie S. Nakahara
Administrative Law Judge
Utah Attorney General's Office
Environment Division
PO Box 140873
Salt Lake City, UT 84114-0873
cnakahara@utah.gov

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( ) Inter-Office Mail
( ) Hand Delivered
( ) Overnight Mail
( ) Facsimile

Administrative Proceedings Records Officer
DEQAPRO@utah.gov

Gary C. Laird, Solid Waste Director
Weber County
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Randy Moulding
Moulding & Sons Landfill, LLC
Stephen R. Marshall
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(Signed)
EXHIBIT 2
ORDER RETURNING DISPOSITIVE ACTION TO ADMINISTRATIVE LAW JUDGE

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

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

On Thursday, January 10, 2013, at a regularly scheduled meeting, the Board considered the Memorandum and Recommended Order. The Executive Secretary was represented by assistant attorney
general Raymond D. Wixom. Counterpoint was represented by its president, Brice Penrod. Weber County was represented by attorney David C. Wilson. Moulding was represented by attorney, Michael S. Malmborg. The Board was represented by assistant attorney general Sandra K. Allen. Board members present were: Kevin Murray, Jeff Coombs, Ryan Dupont, Larry Ellertson, Brad Mertz, Brett Mickelson, and Dennis Riding. Board member Dwayne Woolley was initially present but had to leave before voting, as he stated before oral comments commenced.

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

The Memorandum and Recommended Order proposed that the Board uphold the Executive Secretary's decision to grant the Class VI permit and deny Petitioner's Request for Agency Action on the condition that the Executive Secretary terminate the Class IVb permit. The Memorandum and Recommended Order also recommended that the Board await notification from the Executive Secretary that the Class IVb permit has been terminated and if notice is not received, order the Executive Secretary to effectively terminate the Class VI permit. The Memorandum and Recommended Order reasoned that the Executive Secretary lacks authority to hold the Class IVb permit dormant until the challenge to the Class VI permit is final. The Memorandum and Recommended Order also reasoned that the two permits have different requirements so the permittees are unable to comply with both and therefore both can not exist at the same time, and the Executive Secretary cannot lawfully issue one permit that allows violation of another.
The Respondents commented that the Executive Secretary has enforcement discretion to hold a permit dormant and there is nothing in statute or rule that prohibits him from doing so. The Respondents commented that the Executive Secretary believed he was justified in allowing the continued existence of the Class IVb during the adjudication on the Class VI permit because if the Class VI permit was struck, the Executive Secretary did not want to make Weber County and Moulding shut down and start over with a new application for a Class IVb permit. Furthermore, the Respondents commented that the substantive, health and safety based requirements of both permits are the same; the only difference in the permits is the areas from which the waste may be received.

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

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

After review of the Memorandum and Recommended Order and accompanying record, and after review of the Respondents' Written Comments and hearing oral comments from all of the parties, and
after questioning the parties, the Board unanimously found that the Executive Secretary had properly granted Weber County and Moulding a commercial, nonhazardous, solid waste C&D Class VI permit to operate the Weber County landfill. The Board also unanimously found that the Executive Secretary acted reasonably and within his authority in holding dormant and postponing revocation of the Class IVb permit pending final disposition of the challenge to the Class VI permit.

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

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

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

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

ORDER

The Board orders the proposed dispositive action be returned to the Administrative Law Judge with directions to revise and resubmit to the Board on or about February 4, 2013, a memorandum and recommended order to uphold the Executive Secretary's decision to issue the Class VI permit and to hold the Class IVb permit dormant and postpone revocation pending final resolution of the challenge to the Class VI permit, and thereafter if the Class VI permit survives all appeals and becomes final, the original Class IVb permit must be terminated within thirty days after the Class VI permit becomes final and no longer subject to appeal.

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

Dated this 24th day of January, 2013.

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

NOTICE

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

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2 The reasons for the shortened time and length for comments include the Board's desire to make a final decision before it is reorganized, the parties' previous opportunities to provide oral and written comments, and the desire to control unduly repetitious comments.
the revised *Memorandum and Recommended Order* on February 14, 2013. The parties will have the right to petition for judicial review of the Board’s final order in this matter.

**CERTIFICATE OF SERVICE**

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

Administrative Proceedings Record Officer  
DEQAPRO@utah.gov

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glaird@co.weber.ut.us

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HEARING IN THE MATTER OF

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

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

BOARD MEMBERS

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

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

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

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skallen@utah.gov
Mr. Murray: All right. We are ready to reconvene the meeting. We are at agenda item number six, Weber County C&D Class VI Landfill Solid Waste Permit 1101 and Request for Agency Action.

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

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

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

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

Ms. Allen: (Indistinguishable).

Mr. Murray: Yeah, please.

Ms. Allen: The parties and their representatives in this proceeding are the Executive Secretary, represented by Assistant Attorney General
Raymond Wixom; Counterpoint Construction Company, represented by Brice Penrod; Weber County, represented by David Wilson; and Moulding & Sons Landfill, represented by Michael Malmborg.

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

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

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

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

So, in this matter the parties have
stipulated to certain facts and the administrative
law judge accepted that -- those stipulated facts.
And then the parties made arguments about how the law
should apply to those facts and made a recommended
order based on her interpretation of the law.

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

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

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

The Board's performing a judicial function
and must rely solely on the record and oral argument
in arriving at a decision.

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

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

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

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

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

Or if further time is required and you are not ready to make a decision at this meeting, then
the Board may table the matter for consideration and
decision at a future meeting.

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

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

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

After the Board votes on the proposed
modifications -- I submitted -- I had mailed to each
of you kind of different types of motions that you
could present and entertain, depending on what you
decide to do in this matter. If you wanted to direct
the administrative law judge to make changes and
resubmit a modified memorandum and recommended order, you may also do that.

MR. MURRAY: Okay. Thank you, Sandra.

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

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

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

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

MR. MURRAY: Okay.

Anyone have any concerns?

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

    MR. MURRAY:  Good point. Okay.

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

    With that, Mr. Wixom, you may proceed.

    It will come from Arlene.

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

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

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

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

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

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

When a facility with an existing permit receives a permit of a different class, there are two logical approaches to how you can terminate the first permit.
One of those approaches would be to say that the first permit terminates by operation of law. That means it automatically terminates when some event takes place. For example, when a landfill -- a solid waste landfill receives a permit, the permit itself says that the permit will terminate in ten years, unless the permittee makes a timely request for a renewal permit. If there is no request, at the end of ten years the permit ends. The Executive Secretary doesn't have to do anything; the permittee doesn't have to do anything; the permit ends.

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

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

It's difficult to infer some time that
would be appropriate to say that, well, by operation of law this permit terminated. For example, the Executive Secretary issued the permit, the Class VI permit, but the Class IV permit could not terminate at the time that he issued it because the Class VI permit still had to go to the legislature and the governor for approval.

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

Assuming that the permit didn't terminate automatically and that there had to be some event take place to terminate that first permit, it's reasonable to assume that the Executive Secretary had to take some action, for example, writing a letter to the permittee saying, "Your first permit is terminated."
If that action -- if the Executive Secretary has to take some action, the implication is that he has at least some level of discretion in when to do it. If it doesn't happen automatically, he's got to decide when and how to do it. If he has some discretion and if no standard is set out to say what that discretion is, we would presume that the discretion he has is what is reasonable under the circumstances.

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

In this case the Executive Secretary, in consultation with Weber County and Moulding, decided that it was appropriate to leave the Class VI permit in existence. If he had not done so, if he had terminated the -- the Class IV permit and if, despite the weaknesses that the respondents perceived in Counterpoint's case, Counterpoint were to have --
were to prevail, the Class VI permit would cease to exist. And without a Class IV permit, Weber County's landfill would have to cease operations. To return to operation in the shortest possible time, Weber County would have to apply for a new permit, probably a new Class IVb permit.

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

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

The Executive Secretary has directed Weber County and Moulding to operate the landfill in accordance with the Class VI permit and its requirements. He has exercised his enforcement
discretion to not enforce Class IVb permit conditions that might be inconsistent with the conditions of the Class VI permit. As I said, neither the Executive Secretary nor the permittees desire to have two permits. As soon as the Class VI permit is final, the Executive Secretary will terminate the Class IVb permit.

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

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

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

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

How much time do I have?
MR. BEKKEMELLOM: Four minutes.
MR. WIXOM: The Executive Secretary, in
consultation with the permittees, could have made
another choice. He could have decided to require the
permittees to operate under the Class IVb permit
while the Class B -- Class VI permit was being
challenged. He could have decided to do that. They
would have then been restricted in the waste that
they could take. That would have been work -- would
have worked. But under those circumstances you would
still have two permits; you'd have one final permit,
one permit that was, you might say, held in abeyance
or dormant. Under those circumstances, though it
would have been the commercial permit, the Class VI
permit, the permit that the permittees actually
desire to operate under, they could have done it that way.

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

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

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

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

The Executive Secretary did not arbitrarily or capriciously determine which permit or which permit conditions to hold dormant or to
enforce, nor did he abuse his discretion. Weber County has the right to convert its facility to a commercial landfill if it wants to and if it meets the requirements for doing so. And it's appropriate for the Executive Secretary, when they meet those requirements, to allow them to operate under the permit that they want to operate under.

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

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

If Counterpoint doesn't appeal the Board's decision, assuming, of course, that the Board decides in favor of the respondents rather than
Counterpoint -- if the Board -- if Counterpoint doesn't challenge the Board's appeal -- pardon my tongue -- if the Board [sic] doesn't challenge the Board's decision to the Court of Appeals, that would mean that within 60 days the Executive Secretary would report back to the Board that he had terminated the Class IVb permit. Otherwise, that would occur 30 days after the Court of Appeals makes its final decision.

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

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

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

Our third issue. If for some reason the Class VI permit is struck -- we want to allow these people to stay in business and not have to shut down and start over again; I understand that. I also understand we don't want to get in a situation where someone could tie up a permit through endless litigation and delays and have people not be able to operate.
When the Director made the decision to hold the Class IVb permit in abeyance, if you will, and he made the decision that it was going to allow them to operate under the Class VI, and we were going to follow the Class VI procedures and standards and allow them to take the commercial waste, was that -- was that decision communicated anywhere in writing so that someone could tell that we are operating under the Class VI permit, the IVb is being held in abeyance until the adjudication finishes?

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

MR. WIXOM: The Executive Secretary wrote a letter to the permittees, to Weber County and to Moulding, after the legislature and the governor had approved of the landfill permit and after a representative of Weber County had informed the
Executive Secretary that all of the statutory requirements for approvals had been completed.

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

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

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

MR. WIXOM: Yes.

MR. MURRAY: And probably in this huge record.

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

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

Mr. Woolley.

MR. WOOLLEY: The question -- you
mentioned the ten-year renewal. It used to be a five-year renewal so is this one -- the new permit was requested on the old five-year plan or the new ten-year plan?

Does that make sense?

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

MR. WOOLLEY: Okay.

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

No? All right. Thank you.

Mr. Penrod, for Counterpoint.

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

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

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

Had he made the Class IVb permit
operational, he could have enforced both permits simultaneously.

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

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

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

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

I suggest 20 years is far too long to begin the process of promulgating rules. Accordingly, I move this Board to begin the process
of promulgating rules relevant to the administration
of the Solid Waste Management Act.

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

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

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

The judge has held that any failure to
notify us was harmless error. It was not. The
principal reason that we filed our request for agency
action was because we were aggrieved as a result of
not being notified by anyone about the intent to
apply for a commercial permit. No one notified us;
not the Division, not Weber County, not Moulding.
This, despite nearly constant communications on the previous proceeding.

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

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

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

   The judge's interpretation allows the definition to include its exact opposite. If you buy into this, consider its implications on the second part of the same definition. Section B of that same section says, "Commercial does not include a facility that receives waste for recycling," which, by this
measurement of logic, will now -- can now mean does not receive waste for recycling.

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

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

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

Thank you.

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

MR. PENROD: Yes, sir.

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

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

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

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

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

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

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

MR. MURRAY: I understand that, but I'm not understanding how you enforce both of them
because it puts -- the Class IVb is a subset of VI
so --

MR. PENROD: Right.

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

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

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

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

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

MR. PENROD: Yes, sir.

MR. MURRAY: In regards to your
profit/nonprofit argument. Are you suggesting that
municipalities can't have enterprise divisions
because most cities do have enterprise divisions who
do have an objective to make a profit, to raise money for operations of those divisions.

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

    MR. MURRAY: Okay.

    Mr. Dupont?

    MR. DUPONT: Yeah.

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

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

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

    MR. PENROD: No, it doesn't say anything
about the source. It's only whether it's for-profit or not-for-profit.

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

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

MR. DUPONT: The jurisdiction of the owners.

MR. PENROD: With other --

MR. DUPONT: Yeah.

MR. PENROD: -- counties or --

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

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

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

MR. PENROD: Yes.

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

MR. MURRAY: Let's -- can I -- can I interject, Dr. Dupont, because when we -- when we determined before that they were nonprofit, it was
because of the material they were selected. They qualified as a nonprofit facility under the act because of limitations they were willing to accept on the nature of the waste that they bring.

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

MR. DUPONT: VI.

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

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

MR. DUPONT: Well -- I mean, I thought the permits were -- were designed to restrict the source of waste coming into a facility rather than whether that -- I mean, if I'm a private landfill could I not -- I guess I'm not able to get a Class IV permit; is that correct?
MR. MURRAY: You can, you just can only accept waste from --

MR. MICKELSON: The district.

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

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

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

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

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

Mr. Woolley, you had a comment?

MR. WOOLLEY: And maybe -- not to muddy the water but I think there's -- in my mind there is a difference between the operating entity and the entity itself. I think we have -- the LDS Church,
for example, is a nonprofit company but they own profit businesses.

    MR. DUPONT: Yeah.

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

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

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

    MR. DUPONT: Owner.

    MR. WOOLLEY: -- the owner.

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

    Okay. Thanks, Mr. Penrod.

    Mr. Wilson for Weber County.
MR. MALMBORG: Well, Mr. Mike Malmborg.
MR. MURRAY: I'm sorry, Mr. Malmborg.
MR. MALMBORG: If that's all right.

For Moulding or for Weber County?

MR. MALMBORG: Mike Malmborg. I'm on behalf of Moulding & Sons Landfill, LLC.
I didn't bump it.
MR. MURRAY: Okay.

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

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

Prior to this matter, the commercial permit, there was a long-litigated issue on the
noncommercial permit. Weber County got a noncommercial permit and Counterpoint contested that. This Board determined that the noncommercial permit was validly issued and that Counterpoint's assertions were wrong.

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

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

The problem with that is, as Mr. Wixom indicated, when you have a noncommercial -- or a commercial permit that's issued to a -- the holder of a noncommercial permit operating a landfill, if you immediately have to terminate that existing noncommercial permit before the commercial permit's even finally determined to be valid and someone like Counterpoint comes along and challenges that, you are left in an awkward situation where you don't yet know whether your commercial permit is even going to be valid and final and upheld. And they are demanding
that the long-litigated and finally determined by this Board valid noncommercial permit, they say that needs to be immediately revoked.

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

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

We disagree that -- Counterpoint's position is apparently that both could have been enforced. Their apparent position is that only waste from within Weber County can be accepted and that won't violate the commercial permit, but the fees, the additional fees that are associated with the commercial permit will need to be paid and, you know, the -- the detrimental side to both permits are going to be enforced.
It's just not reasonable. And there is nothing -- most importantly, there is nothing that would direct that that's a requirement. They can't point to anything.

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

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

If they don't file an appeal, then the permit becomes final, the commercial permit is final and there is no reason anymore to have this noncommercial permit and it can be terminated within 30 days of that.
If Counterpoint files an appeal, well, then, the Court of Appeals is going to have to determine whether or not Judge Nakahara's decision and the Board adopting that decision was properly made. And if it were to uphold the decision, then at that point the commercial permit would be final and within 30 days of that I don't think that the respondents would have any problem with the noncommercial permit being terminated. It just doesn't make sense to terminate the noncommercial permit when we are still trying to find out whether this commercial permit is valid. And it creates a real potential endless cycle of challenges and -- which, unfortunately, for the last three years we've already kind of been stuck in. But the judge's decision is -- is well thought out.

I will just address briefly; Counterpoint talked about the notice. The judge carefully looked at this issue and determined Counterpoint did have -- Counterpoint knew and filed a comment. They filed a comment in the proceeding and the judge looked at that comment and said, "You know what? In your comment and in this entire year and a half proceeding, Counterpoint, you have not made one substantive comment or disagreement about the permit,
the commercial permit. The only thing you've said is we didn't give notice. But you did file a comment so you obviously knew about it."

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

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

Thank you.

Do you have any questions for me?

MR. MURRAY: Any questions?

MR. MALMBORG: No?

MR. MURRAY: Okay. Thank you.

MR. MALMBORG: Thank you.

MR. MURRAY: Okay.

MR. WILSON: Do I have any time, Mr. Chair?

MR. MURRAY: Yeah, I believe you do.

Is there time left?
MR. BEKKEMELLOM: Yes.
MR. MURRAY: Yes. Please.
MR. BEKKEMELLOM: Eight minutes left.
MR. WILSON: Eight minutes.
MR. MURRAY: Will you please state your name and who you are representing?
MR. WILSON: David Wilson for Weber County.

And on a personal note, if you saw me, I had teeth before but I can't articulate clearly; I'm in the middle of a transplant, two of them, so I've taken them out so I could speak clearly to the Board. And I'm not supposed to touch that. You say it's placed perfectly, but it may depend on your height.

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

MR. WILSON: In any event, I think the things that need to be said have been said so I'm going to briefly give you a one- or two-minute history of the landfill in Weber County, the C&D Landfill. And I know C&D landfills are probably not high on your radar with the -- more things you have that have more gravity for you to administer and deal with.
Weber County lost Mr. Moulding -- used to run a private landfill. Am I echoing? He closed that landfill because he -- he had filled it as high as his permit would allow. It -- we didn't have one for a couple years. Mr. Laird, our director of -- of solid waste was looking for a spot.

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

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

They applied for it, the first class for, January 22nd, 2009. We began operations on
October 19th of 2009.

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

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

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

That was the genesis, really, of Weber County going to a commercial permit. That and Davis County had asked if they could bring waste. We had negotiated a contract for them to have C&D waste brought to us because they did not have a C&D landfill at the time.
Of course you know the history of that. It was challenged and we are before you today hopefully for a final decision, pending an appeal, which is -- I guess it depends on which way it goes, maybe either party will appeal.

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

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

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

I will restate, not to beat a dead horse, but our only quibble with -- and it's not really a
quibble, a clarification with Judge Nakahara's
decision. And my editorial comment is you are very
lucky to have her. I don't want to get myself in
trouble with local district judges, but she does an
excellent job of evaluating all the issues and
reasoning on her decisions.

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

So, in the end, we would ask just what has
been stated by both Mr. Wixom and Mr. Malmborg, and
that is, you leave the Class IV dormant until we have
a final decision from either an appellate court or that appellate time has run, no matter who appeals, and so that we don't have to jump through those hoops again if for some reason the Class VI is invalidated.

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

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

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

All right. Thank you.

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

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

We have several options. We can -- I'm looking, Sandra, for the fancy language. But basically we can accept the ALJ's decision as is, we
can accept it with modifications, we can do something
different or we can tell her to try again.

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

I'm sorry.

MS. ALLEN: The respondents also filed
written comments.

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

MS. ALLEN: Okay.

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

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

Dennis.

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

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

    MR. DUPONT: Woolley would have been able to deal with that.
    
    MR. MICKELSON: Well, I can potentially deal with that as well. I've permitted a number of facilities.

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

    I don't know if that helps at all.
    
    MR. RIDING: So in this case maybe there was a thought of a contingency plan having one --
    
    MR. MICKELSON: It appears in this case that Weber -- and, again, I'm speaking just in generalities. It appears that they wanted to be able to cost-effectively perhaps serve their citizens by -- by getting additional waste out of the district, and part of that could have been by servicing Davis County.

    MR. MURRAY: Mr. Wilson, could we call you back up again, because you addressed this and maybe we -- what was the reason that you went from the IVb to the VI application?
MR. WILSON: I didn't speak clearly, did I?

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

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

Okay.

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

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

MR. MURRAY: Okay. Thank you. Does that help, Dennis?

MR. RIDING: Yeah.

MR. MURRAY: Mr. Ellertson.

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

MR. MURRAY: Sure.

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

Is that the essence of what...

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

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

MR. WIXOM: That is correct.

MR. ELLERTSON: And that's what I'm --
okay. So may I continue to clarify that?

MR. MURRAY: Please.

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

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

MR. ELLERTSON: Okay.

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

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

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

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

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

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

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

MR. ELLERTSON: Okay.

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

MR. ELLERTSON: Okay. Thank you.

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

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

MR. ELLERTSON: Just don't touch it.

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

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

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

MR. ELLERTSON: Thank you for that, sir.

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

MR. PENROD: No, sir.

MR. MURRAY: No? Okay.

MR. ELLERTSON: Thank you.

MR. MURRAY: Does that help?

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

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

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

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

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

I can see the reason why you would leave one permit in place while the other one is being challenged, because if the challenge is effective and we vacated the other one, then we are sending somebody back to start all over again and that
perpet -- that could potentially create a situation
where parties could prevent activity in ad infinitum,
because you would just continue to appeal and hold it
in Court of Appeals forever.

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

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

    Any others?

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

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

MR. MURRAY: Which number are you looking at?

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

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

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

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

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

MS. ALLEN: Yeah, so that's the -- the comments are something that the -- either party was
able to file to say how they thought the
administrative law judge got it right or did not.

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

MS. ALLEN: Yes.

MR. DUPONT: -- as well as other

specific...

MS. ALLEN: Yes. In particular, what
you'll be doing is -- the findings of fact and

conclusions of law start at page 44. And the

conclusion -- that's in the -- the finding -- the

conclusions -- the findings of fact start at page 44.

The conclusions of law start at page 52. And the

recommended order starts at page 55. And the written

comments specify particular items that they think

should be changed.

And then Mr. Penrod addressed certain --

orally he addressed certain other paragraphs that he

thought should be changed.

And so what you need to do is look at the

findings of fact and determine whether there are any

of those that -- that you think need to be modified.

MR. DUPONT: Okay.

MS. ALLEN: And look at the conclusions of

law to see if they need to be modified. And the same
If you think it's all good, then you can adopt the whole thing the way it is. If you think something needs to be modified, you can send it back to the administrative law judge and ask the modifications to be made. Or you can make motions here to indicate specifically how you want what the administrative law judge wrote to be changed.

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

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

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

Okay. Page 44 is where the findings of fact begin. The first one is, "Pursuant to his authority granted in Utah Code Annotated 19-6-108, on
October 19th, 2009, the Executive Secretary of the Solid and Hazardous Waste Control Board issued a Class IVb, noncommercial, nonhazardous waste permit to Weber County, as owner, and Moulding & Sons Landfill, LLC, as operator of the proposed Weber County landfill. The noncommercial permit authorized Weber County and Moulding to construct and operate a noncommercial, nonhazardous solid waste construction/demolition debris (C&D) landfill."

Does anyone have any discussion or issues with that finding?

MR. MICKELSON: No.

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

Any issues with that one?

UNIDENTIFIED SPEAKER: No.

MR. MURRAY: Okay. "On January 18th, 2011, Weber County and Moulding filed an application for a
Class VI commercial nonhazardous solid waste permit (commercial permit) for the existing Weber County landfill that was initially constructed and operated pursuant to the Class IVb noncommercial permit. The Weber County Director of Solid Waste prepared, signed and filed the application for the Weber County Class VI commercial permit under the direction of the three Weber County commissioners. The modification -- the, quote, modification, closed quote, box was checked on the application."

Any issues with that?

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

Any issues or discussion with that one?

Pardon?

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

MR. MURRAY: Yes.

MR. ELLERTSON: And the first sentence
MR. MURRAY: It says, "The application for the Weber County landfill Class VI commercial permit included copies of 2009 letters notifying property owners of the intent to apply for a landfill permit. The Executive Secretary did not create, quote, an interested party list, closed quote, for the Weber County Class VI commercial permit application."

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

MS. ALLEN: The parties stipulated to that fact.

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

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

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

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

MR. ELLERTSON: Regarding stipulation, though, that's what I'm wondering.
MR. MURRAY: Oh.

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

MR. ELLERTSON: All right. Thank you.

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

MR. ELLERTSON: Okay.

MS. ALLEN: According to their written comments.

MR. ELLERTSON: Thank you.

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

UNIDENTIFIED SPEAKER: Just 25 and 23.

MS. ALLEN: 15 and 23.

MR. MURRAY: 15 and 23?

UNIDENTIFIED SPEAKER: Good idea.

MR. MURRAY: Okay. Fifteen. "At the time
when Weber County and Moulding filed an application
for a commercial permit, the Weber County landfill
became a, quote, proposed, close quote, commercial
landfill."

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

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

Give us a sec.

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

MR. MURRAY: Wait a minute, Michael.

These are your comments. Can you direct us to what
comment was involved with number 15?

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

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

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

MR. MURRAY: Okay. It says, "The
respondents disagree with Judge Nakahara's finding of
fact number 15, page 48 of her Memorandum and
Recommended Order to the extent it is a finding that
the Class VI permit application made the Weber County landfill a proposed facility."

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

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

MR. MURRAY: Please.

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

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

The Executive Secretary's position is that the Weber County landfill came into existence pursuant to the Class IVb permit. It was authorized under that permit. It was constructed under that permit. It operated for a couple of years before it converted to the Class VI category. And the
Executive Secretary's position is that a landfill is a landfill. If it exists, the neighbors know it's there and that there's no need to be giving neighbors notice when the Class IV facility converts to a Class VI facility.

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

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

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

MR. MALMBORG: All right.

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

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

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

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

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

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

Michael, what -- what's your request?

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

MR. MURRAY: Mr. Wilson?

MR. WILSON: Yes, sir, please.

MR. MURRAY: Mr. Penrod?

MR. PENROD: My recollection is that -- is
that we had stipulated to the fact but I'm not --
can't get through them all here yet so go ahead.

MR. MURRAY: Okay.

Okay. Mr. Dupont.

MR. DUPONT: I think I would -- I would
support the idea that it's a finding of law, not a
fact, but I don't think I would support striking it.

MR. MURRAY: Okay. And your reason?

MR. DUPONT: Well, I think the -- I think
when there is a change in permit or purpose of the
land -- however you want to call it, classification
of a landfill -- I think people should be -- be
notified of that. So I -- I don't think it should be
struck completely.

MR. MURRAY: Okay.

MR. DUPONT: If that's what happened and
the proposal was to have it change its status, then,
you know, it -- I'm not sure --

MR. COOMBS: I agree with Mr. Dupont on
that, that point of -- well...

MR. MURRAY: I think I agree too. If we
are going to change the status of it, I think people
want to know.

UNIDENTIFIED SPEAKER: Want to know, yeah.

MR. MERTZ: Number 15 is not necessarily
talking about the notice portion of it, though.

MR. DUPONT: I think it's a definition of what -- so it's basically -- the proposed commercial landfill, that's -- there is some contention about what that -- what that means, but it seems like that's a finding the judge made and it should be in the finding of law.

MR. MURRAY: I actually found this section of the order very confusing to read, but this finding is coming out of her discussion regarding the issue of portions of the statute referencing a section that didn't exist, and also looking at the title of the section versus what paragraphs two and three did. But -- so I do think it relates to the notice issue. And I think it's whether or not there is a trigger to the notice issue.

Okay.

MR. DUPONT: So can we -- could we suggest that that be moved and --

MR. MURRAY: As a conclusion?

MR. DUPONT: (Nods head.)

MR. MURRAY: Certainly.

I'm thinking the best way to do this is make a list of these at the moment, because we are going to have to entertain these by motion. But I
think I would rather discuss what they all are so that we can have a comprehensive motion. Okay.

So --

MS. ALLEN: I think that's going to be --

MR. RIDING: Do we all agree that it should be moved? Or do you want to vote on them individually or is there --

MR. MURRAY: Let's vote on them all together. Let's go through them all. But if we could -- is there other discussion?

Do you think it should be moved, Dennis, or do you --

MR. RIDING: I -- I agree with Mr. Dupont, too. I think it does deserve to be kept and that -- but I agree with -- with counsel for the landfill, that it sounds more like a conclusion of law to me, not being a lawyer, but it sounds like that. So if it walks like a duck and quacks like a duck...

MR. MURRAY: Okay. Any other discussion?

Mr. Mertz?

MR. MERTZ: No.

MURRAY: Okay. All right. Okay. Number 15. Which is the next one which that is not --

MS. ALLEN: Number 23 was the next one.

Fact number 23 I believe was the next one in the
written comments.

MR. MURRAY: Okay.

MS. ALLEN: You know, I'm not sure how we want to address Mr. Penrod's. He had particular paragraph numbers.

MR. MURRAY: My plan was, when we finish this, I'll ask Mr. Penrod which ones that -- by number and then we'll go back to those.

MS. ALLEN: Okay.

MR. MURRAY: Okay, 23. "The Executive Secretary issued the noncommercial permit and the commercial permit for the Weber landfill. Neither permit has been revoked. The commercial permit allows the landfill to accept waste generated anywhere, whereas the noncommercial permit restricts the acceptance of waste to waste generated in Weber County or within the boundaries of a local government pursuant to an agreement. The waste acceptance provisions in the commercial permit could allow the violation of the waste restriction provision in the noncommercial permit."

Michael.

MR. MALMBORG: This -- this may save a little bit of time. And everyone else can correct me if I'm wrong.
I don't think there is any issue with all of this statement except the last sentence starting, "The waste acceptance provisions." I believe everything prior to that is stipulated.

MR. MURRAY: And what's your issue with the waste acceptance provisions?

Matter of interpretation to you?

MS. ALLEN: I think they wanted -- I think that they wanted to strike that last sentence.

MR. MALMBORG: I think that's right. It's a conclusion of law and we think it's incorrect. We don't agree that it -- that it causes the violation of the noncommercial permit.

MS. ALLEN: So right here?

MR. MURRAY: Yeah, I see what they want to do. I guess I don't understand why you think it's incorrect. That's our whole discussion going into this. I thought -- I think it is correct. If you have a commercial permit, you could violate the noncommercial permit if they were both effective, because the noncommercial permit won't allow you to receive the same waste as the commercial permit.

So why -- what am I missing? I'm missing something if that's incorrect.

MR. WIXOM: I believe, if I recall what we
meant when we wrote the comment, that the thought was
that because the Class IVb permit is not the one that
the Executive Secretary is enforcing. When the
permittee is complying with the Class VI permit, it's
not violating the Class IV permit. And then --

MR. DUPONT: So what you are saying, as
the Executive Secretary's enforcing the situation,
there is not a conflict.

MR. WIXOM: Correct.

MR. MURRAY: Yes.

MR. DUPONT: There could be.

MR. MURRAY: But there could be.

MR. RIDING: That's the word, is "could,"
could allow.

MR. DUPONT: Yeah, could.

MR. MURRAY: I think I'd rather it stay,
gentlemen.

MR. RIDING: Do you think it's a
conclusion of law?

MS. ALLEN: You know, I think that's an
interesting question. I think that between whether
it's a conclusion of fact or a conclusion of law
is -- they are so intermixed that it's very difficult
to disentangle those two and I think that -- that if
the administrative law judge proposes it in a certain
way, that you can accept it that way.

If you feel that you're not comfortable
with it, then as the Board you can, you know, ask
that it be moved to a different section of the order.
But I don't think you need to spend a lot of time,
you know, worrying about which part it goes in.

MR. MURRAY: I think she means this as a
fact. I think she's just -- she is using this as a
basis upon which she is going to reach her
conclusions of law, and one of her issues is there
could be conflicting elements of the permits, the way
I'm reading it.

MR. COOMBS: I agree with that.

MR. MURRAY: Any other discussion on that?
Let's set that one aside too.

Okay. Sandra, what is the next one?

MS. ALLEN: Okay. The next one is

conclusion of law number 13 at page 54.

MR. MURRAY: Which reads, "In that Utah
Administrative Code R315-301-2(10) and (12)
individually define a Class IV landfill and a
Class VI landfill, and R315-13 -- or, excuse me --
R315-310-1(4) allows a landfill to change
classification; a nonhazardous solid waste landfill
cannot be simultaneously classified as both a
Class IV landfill and a Class VI landfill."

And what's the comment?

MR. DUPONT: That seems more like a statement of fact.

MS. ALLEN: They want --

MR. RIDING: Well, if it is, in fact, a fact, do the rules support that position?

MS. ALLEN: I think the comment on that one is that they didn't believe that the Executive Secretary had to terminate one before they issued another in the face of an administrative challenge. So I believe in their comment that they were proposing to rewrite that.

MR. DUPONT: That statement doesn't say what is inferred by -- it doesn't say anything about...

MR. MURRAY: Mr. Wixom?

MR. WIXOM: Yes, sir.

MR. MURRAY: What -- what are you asking us to do with number 13?

MR. WIXOM: I read this as the judge making a conclusion that a landfill can't have two classifications.

MR. DUPONT: (Yeah, so could that be a fact?)
MR. WIXOM: It could be a fact, but I think she's making it a legal -- that legally there can't be two.

MR. RIDING: I don't know if it's the same thing as saying it can't be yellow and orange at the same time. Maybe it's something else.

MR. WIXOM: In the respondents' comments we dealt with conclusions of law 13, 15, 16 and 54 together, and we disagreed with those conclusions to the extent that they -- that they state that the Executive Secretary has to terminate one permit and (indistinguishable) issues another.

I don't know how to both hold my machine and making the...

MR. DUPONT: Thirteen doesn't say that, though, does it?

MR. MURRAY: But I think she's -- but I think you have to read 13, 14, 15, 16 and 17 together. This is the issue of whether or not a permit can be held. This is the whole issue of whether or not we can have two permits in place with one dormant until the other becomes final.

MR. COOMBS: That's the big one.

MR. DUPONT: But 13 doesn't say that. Thirteen just says that you can't classify a landfill
as two things.

MR. MURRAY: Yes.

MR. DUPONT: That's all -- that's all it says. Is that...

MR. WIXOM: I'm trying to flip between too many documents here.

MR. DUPONT: Well, 13 is right...

And that's a totally different issue than, for example, 15 which --

MR. MURRAY: Right.

MR. DUPONT: -- yeah, which is something I do have an issue with.

MR. MURRAY: Well --

MR. WIXOM: We actually talked about --

MR. MURRAY: I'm sorry. Raymond, go ahead. I didn't allow you to finish.

MR. WIXOM: We object to the administrative law judge's determination that a land -- a solid -- nonhazardous solid waste landfill cannot be simultaneously classified as both a Class IV and a Class VI. And it's -- it's -- it's a lawyer's effort to be cautious to say, since we have words on a page that I might interpret one way and others might interpret some other way, we are not care -- we are not comfortable with what Judge
Nakahara has said there because, as is obvious, we think you can have two permits extant at the same time, and the language that Judge Nakahara has in paragraph 13 says you can't. I don't know how to explain it any better than that.

MR. DUPONT: It doesn't say anything about permits, it just says classification. Does that infer permitting?

MR. WIXOM: Well, yes. Under the rules, the solid waste management rules, landfills are divided into different classifications and they get permitted according to whatever classification they are. So, yes, when you say that a permit is a particular class, you are saying it has a permit of that class.

MR. DUPONT: Okay.

MS. ALLEN: (Indistinguishable).

MR. MURRAY: I will. I have an idea. Sorry. We seem like we -- I'm a little flustered here. We have not ever had one that's had this many findings that we are dealing with. I suggest -- or let me suggest to the Board; let's reach a conclusion with regard to this issue that we've spent discussing all day and then when we reach whatever conclusion it is, let's just send this back to Judge Nakahara and
say, "Rewrite this consistent with this ruling," rather than us going through each one of these with regard to this particular issue.

Are you -- is everyone on board with that?

Then let's reach a conclusion on whether or not the Executive Director has discretion to hold one permit dormant, which is the word that's being used here, while the other permit is subject to appeal or challenge.

MR. RIDING: I guess from what I heard earlier when we were talking about this question, normally a landfill starts out with a permit that they are ultimately going to have and they don't request changes as they go along. And so if that's the case, then you wouldn't have this conflict. But I don't know how often this happens. If it happens often enough, then it's worth consideration.

MR. ELLERTSON: It seems --

MR. MURRAY: Mr. Ellertson, go ahead.

MR. ELLERTSON: It seems that if it doesn't say they can't do it and if, in fact, they are operating only under the Class VI at this point in time, the other one is being held in abeyance, it seems to make a lot of sense to me. And if we are looking for some consensus on saying that's what we
are directing in saying that we believe that that should be able to be done, I would say that.

MR. MURRAY: Mr. Dupont.

MR. DUPONT: My biggest concern in all of this is number 15, which really, you know, essentially called unlawful the action of the Executive Director in holding one of the permits in abeyance. And -- and it seems to me we need to make a decision on that and then everything else seems -- would come out -- out of that decision.

Do we want to give the Executive Secretary that ability, that flexibility, for whatever reason, justifiable reason?

MR. RIDING: As a practical consideration of situations where -- where you need to have a landfill and there is the risk that it will be challenged, and I'm sensitive to that. I think it makes sense to allow for that kind of consideration.

MR. MICKELSON: I agree.

MR. COOMBS: And I think that, you know, in an ideal world, laws would address all situations. But where that's just never going to happen, I believe we have to allow some latitude in the judgment-making until those laws can be amended.

MR. MURRAY: Mr. Dupont, you didn't go to
a conclusion, you just raised it as an issue for you. What is your thought?

MR. DUPONT: As long as it's not an issue with public health and safety, it seems that the Executive Director should have discretion, I think. I mean, it's his or her job to run this place the best way they see fit according to the laws. And if there is no, you know, specific rule that says they can't do something, they -- I mean, we can kind of demand of them to use their discretion. So I -- I guess I want to just have a verification that according to the -- the judge's, I guess, annotation to this 19-6-108, she is thinking that he didn't have authority to do that. IS -- what does -- what does that code section say? Can we get some help on that? Because she had referred to code 19-6-108 as her...

MR. ELLERTSON: As the gospel.

MR. DUPONT: Right. As her reason for making that statement.

Can we get some help in interpreting that?

MS. ALLEN: 19-6-108?

MR. DUPONT: It says 19-6-108.

UNIDENTIFIED SPEAKER: That's in her order. It's 6D in her order.

MR. DUPONT: Does that say Executive
Director or is --

MR. MURRAY: I think it's silent. I think that's her point, is it's silent and it doesn't say he has authority. I think that the Division's position is it doesn't say that he does not.

MR. DUPONT: But what does 19-6-108...

MR. MURRAY: Say?

MR. DUPONT: Yeah.

MS. ALLEN: It is several pages.

MR. DUPONT: Dealing with -- what's Section 19?

MR. MERTZ: It deals with new nonhazardous solid or hazardous waste operation plans for a facility or site. Administrative and legislative approval required. Exemptions, time periods, information.

MR. ELLERTSON: What was the first line of that, Brad?

MR. MERTZ: New nonhazardous solid or hazardous waste operation plans for a facility or a site.

MR. MURRAY: Just so you guys know, we punted on this last time.

THE REPORTER: I didn't hear his comment.

MR. DUPONT: I don't think I wanted you to
hear that.

   It just deals with administrative requirements for these facilities, is what I...

   MR. ELLERTSON: Is what you said.

   MR. DUPONT: Yeah.

   MR. MURRAY: The way I read the order, she's come to this conclusion based on 13, that a landfill cannot retain two simultaneous classifications. And by definition, since there is a Class IV and a Class VI, it would be a contradiction to the rules to have two permits held at the same time. I believe that's her reason.

   MR. ELLERTSON: But if you have one held in abeyance, you hold two or one?

   MR. MICKELSON: Would it -- would it be fair to say that it would not be appropriate to have two final permits?

   MR. MURRAY: I believe that would be correct.

   MR. MICKELSON: So maybe that's the distinction, final permit.

   MR. RIDING: Because in those cases, those final permits would conflict in some provision or other.

   MR. MICKELSON: So once the -- the Class
VI permit became final, that would be the act that would terminate the IVb?

MR. MURRAY: I think this almost has to be the rule because you've got to allow people to operate. We can't take the position that the first permit has now expired or extinguished and the second permit is subject to appeal so you can't operate. We got to have -- we got to have the ability for people to be able to operate.

At the same time, I understand the need for the public to be able to have their due process and be able to make whatever challenges they want to make. This just seems appropriate to me that we allow the Director some discretion to...

MR. RIDING: And they kind of support one another, actually, if you think about it, if you are going to let people know about it. Then -- then the provision for that is that the existing permit could remain in place until that whole process works itself through.

So I think that they support one another. I think that if you are going to have one, you should have the other. If you are going to have public notice, you should make a provision for the possibility of the permit that's in place remaining
so until the final disposition is determined.

MR. DUPONT: That's not the case here. It's the new permit that they are operating under, not the existing one.

MR. ELLERTSON: Well, but it could be either way because, in essence, the new permit --

MR. RIDING: I think the issue that I heard with regard to the new permit was that there were cost elements associated with having a new permit and so they were trying to support that new permit while they were trying to get it through, collecting the fees that were associated with it -- that would be associated with it.

MR. MURRAY: Well, part of the key here, too, in my mind, is the discretion has to be exercised in a reasonable fashion. I'd probably be -- I probably would be thinking something different as to which one should be in abeyance if we had some substantive issue that was the focus of a real challenge.

MR. ELLERTSON: And that's the question that's been formulating in my mind. Does the secretary have the ability to say, "We are in this process and we were headed toward allowing the new permit, therefore, we are going to say we can operate
under that permit while the other -- while it's being challenged or not"?

And if they can do that, then it seems like, you know, that it's all right.

Now, if they can't do that, then -- then it should be the other direction. But I thought I was hearing that we felt like that -- that they had that authority, to allow the new permit to be operated under during that period of contest.

MR. MURRAY: Well, I think that's the discussion, do they have authority or do they not. I think the point is that 315-01 is silent. 315 -- whatever -- I'm sorry, I mixed up where we are, Sandra. 19-6-108 is silent as to how that would act in this situation. It doesn't say that he has discretion, it does not say that he does not. So we have both parties arguing.

We've got the judge saying because it doesn't say you can, he does not, and we've got the Division saying because it is silent doesn't say we can't, we can.

And I think within a lot of areas of environmental law there is various amounts of discretion that's given to the regulatory agency to act, and I think the question before us is, is that
discretion broad enough to cover the Director's action -- the Division's actions in this particular situation.

Sit down.

MR. MALMBORG: Okay.

MR. RIDING: Mr. Chairman, is there anything to challenge if they don't allow that permit to go into effect? If they are not actually operating is it -- is there something to challenge at that point? If you're a concerned party and -- and nothing has happened in an operational sense, can you challenge? Can you challenge the proposed situation or does it have to be something that's actually happening?

MR. MURRAY: I'm not sure I follow you, Dennis.

MR. RIDING: If DEQ had not allowed them to operate as a Class VI landfill while that permit was in the process of being finalized, would there have been anything to challenge from the standpoint of Counterpoint if -- if there hadn't been any activities that were consistent with the Class VI landfill going on?

Does that make sense?

MR. MURRAY: I'm not sure if Counterpoint
MR. RIDING: They did challenge because there were Class VI activities going on.

MR. MURRAY: Well, I don't think we've challenged any substantive issues or substantive activities. My read of this is all procedural.

MR. RIDING: So it was -- so it was strictly a procedural challenge?

MR. MURRAY: I'm sorry. Michael, you had a -- you wanted to make a comment?

MR. MALMBORG: Well, I think it went to what Mr. Ellertson was -- and if he wants to speak after, that's fine. I just wanted -- I think what you are saying is can they operate under a -- under a permit that's being appealed, and the answer is yes.

For example, in this, when the noncommercial permit was being appealed for a year and a half, the administrative law judge looked at the issue on a motion to stay, at the enforcement of the permit, and the administrative law judge said it's not appropriate to stay the enforcement of that permit. And during that year-and-a-half process the landfill operated appropriately under the noncommercial permit. That's happened again in here where the commercial permit has not been stayed and
they have operated under that commercial permit.

MR. MURRAY: Does that help, Dennis, with the question you had?

MR. RIDING: I think so, uh-huh.

MR. ELLERTSON: It did help me.

MR. MURRAY: It helped you, Mr. Ellertson?

MR. WIXOM: May the record reflect that Brice Penrod for Counterpoint has left the room?

MR. MURRAY: Thank you.

MR. MERTZ: Quick question. What is the time period typically -- is there a typical period between a new application for a new permit? Is it such that they need to be operating under the new permit or is there a period of time, depending on how long the appeals process takes, that they need to be operating under that new permit to not be affected financially? Does that make sense? What's the time period typically between finally get -- get approval of a new permit, I guess is what I'm asking.

MR. MURRAY: I don't know the answer to that. We have a lot of DEQ people. Can someone address that issue?

Mr. Verbica? Don?

MR. VERBICA: What was that question you are looking for?
MR. MURRAY: I think the question is what's the average time in a permit cycle between the time someone files and a permit's issued.

UNIDENTIFIED SPEAKER: Go to the mike.

MR. MURRAY: Come up to the microphone and --

UNIDENTIFIED SPEAKER: This is a Salt Lake issue.

MR. MURRAY: I'm sorry, I didn't see you sitting over there.

MR. BOHN: Ralph Bohn, the Salt Lake section manager for the Division of Solid and Hazardous Waste.

You -- the time period between the application and the issuance of the permit, that -- it's at least 60 days; 30 days public comment period and about 30 days to review. It could be anything much longer than that, depending on how much time it takes for us to review and to get the comments, get the permit application complete and correct. It could be anywhere from six months to two years.

MR. MICKELSON: Depending on the number of comments you get from the public and --

MR. BOHN: Yeah, yeah. And then we have a public comment period and then we have to respond to
comments, and that can take anywhere from days to months.

MR. MERTZ: So is that why the decision is made, hey, you can operate under that new permit even though it hasn't been approved yet, because of that time process, for the most part?

MR. BOHN: Do you want me to answer?

MR. MURRAY: Let me let our attorney answer that question.

MR. WIXOM: Before I answer that question I would like to say, I have a paranoia about a record. Not enough paranoia to refrain from using words like paranoia but perhaps the -- counsel for the Board, the Board chair could say something about what it means when the Board calls someone from the audience to provide information.

I would argue as an advocate that those materials are not matters of evidence before the Board; they are information that the Board just wants some clarification on. I don't know a better label to put on them than that.

Now, what was the question again?

MR. MERTZ: The question is -- and I appreciate, even though it's helping me understand the situation as far as what we are talking about,
even though I realize it's not related to the details of this case, but the question is, is the permit -- permittee allowed to operate under the guise of the new permit because of the time process that it may take to receive the finalization of that permit?

MR. WIXOM: If I understand the question, the answer is no. A permittee doesn't get to operate under a permit until the permit is issued. And it's the fact that the permit is issued that allows him to operate.

Again, when the Executive Sec -- the Director issues a permit, he's issued an administrative order. Unless he puts some other effective date in that order, it takes effect immediately.

As it has been mentioned, it could theoretically be stayed, but if it's not stayed, the permittee can begin operating under that permit, notwithstanding the fact that somebody brings an administrative challenge against it.

If, for example, this were a circumstance where we didn't have two permits, we have somebody -- Weber County, the first time it applied for a permit, it applied for the permit. The permit was issued. Counterpoint challenged. The permittee was able to
operate the permit for a considerable period of time
even though Counterpoint had an ongoing challenge.

Does that answer the question?

MR. MERTZ:  (Nods head.)

MR. MURRAY: Well, let's try to get to a
decision here.

In my mind, it doesn't make any sense.
Counterpoint's position, in my mind, does not make
any sense. We can't have two permits active and
trying to be enforced at the same time, because one
permit is less restrictive -- or is more restrictive
than the other.

So we either have a situation where the
Division's got to vacate one and award another one,
or we've got to have a situation where the Director
has the ability to hold one permit in abeyance
pending the appeal process on the second one.

I'm okay -- and I think the next point
here is the rules are silent. So this is an issue
where we've got to decide whether or not it's in the
reasonable discretion of the Director to do it based
upon the notion that the rules don't prohibit it and
the rules don't allow it.

In my mind there are a number of areas of
environmental law where the Director has certain
discretion to act, and I'm okay with him having that discretion here as long as there is a formal way to communicate which one is being enforced so that we don't have miscommunication with the regulated public or with the public in general so that that area is clear. So that's my view.

MR. RIDING: I agree with that.

MR. ELLERTSON: How do you want to proceed to -- to address that? Are we prepared to take action on that specific item now or --

MR. DUPONT: Is that -- that is the -- I mean, that's the issue with -- with --

MR. MURRAY: It's the issue with 15, 16 and 17, I think. I mean, what I propose we do with that issue is we -- if everyone agrees with that, then we -- then whatever motion we make needs to send -- I would suggest we send this back to Judge Nakahara and say, "Rewrite the opinion consistent with this position."

MR. ELLERTSON: And are you ready for a motion to try and do that at this point or are we still --

MR. MURRAY: Do we have other issues that are --

MR. MERTZ: We did address notice as well,
MR. MURRAY: Right. I think she did too.
I think she concluded that notice was required; it
was simply that in this particular instance there was
no harm, because even though the notice wasn't
complied with, Counterpoint became aware of it and
was able to react.

MS. ALLEN: I think the ones that she
had -- that there were comments on, that you have
addressed those. And this is the final remaining one
that you wanted to possibly direct Judge Nakahara to
change. So your motion would be something along the
lines of -- you'd only have to provide her with
direction on a single issue, since you are not
directing her to change her -- her position on
anything else but this.

MR. MURRAY: Okay.

MR. MICKELSON: So basically would you be
addressing item 15 where it says the Executive -- the
Executive Secretary has no authority, changing that
to the Executive Secretary has authority? Would it
be something as simple as that? Is that what
you're...

MS. ALLEN: I think that in the comments
they actually proposed specific language and so there
are some -- some differences there. I think that they had proposed in their comments that when an administrative challenge is pending concerning an initial noncommercial permit -- and they made it very specific to that -- that specific issue. So the question is, is whether the Board wants to make it specific as to that issue alone or formulate a motion that provides greater discretion to be applicable in a greater variety of circumstances.

MR. ELLERTSON: Are you looking at Don page two of those?

MS. ALLEN: I was actually -- I was actually just looking at my notes.

MR. ELLERTSON: I can read it if --

MR. MURRAY: Please read it.

MR. ELLERTSON: "Conclusion of law number 15 at page 54 of Judge Nakahara's October 25, 2012, Memorandum and Recommendation Order is stricken and revised to state, 'The Executive Secretary has authority to hold a permit dormant and allow a landfill to operate under the commercial permit until the administrative challenges are resolved.'"

MS. ALLEN: It would be -- no, I was looking in the -- in the notes that I had of examples of different kinds of motions you could do on the
January 10th item that I sent to you. It's where it says, "I move the Board to modify Administrative Law Judge Connie S. Nakahara's memorandum as follows: Conclusion of law 13 at page 54 is stricken and revised to state."

Do you see where that is?

MR. ELLERTSON: It's the one below the one I was reading, I believe.

MR. MURRAY: Well, my concern with doing it that way is we are going to need to go through each one of these, then. I would prefer that we would -- well...

MS. ALLEN: Yeah.

MR. MURRAY: My preference -- I mean, I'm not -- I'm just one member of this Board. I would prefer that we take a position and say, "Modify the order to be consistent with the notion that" --

MR. ELLERTSON: This concept.

MR. MURRAY: Yeah, to be consistent with this concept.

MR. ELLERTSON: I'll be glad to try something.

MR. DUPONT: Is there any way -- are we not able to talk to the judge? Is that not appropriate? If I was her, I wouldn't want to hear
from a bunch of us. I mean --

MS. ALLEN: Well --

MR. DUPONT: I'm not a lawyer.

MS. ALLEN: The concept is that her order would -- and her memorandum is clear enough that third parties can understand --

MR. DUPONT: Sure.

MS. ALLEN: -- not third parties but that you can understand it, the public can understand it.

MR. DUPONT: But they are very different than our understanding of the issue.

For example, on number 16 she talks -- calls it arbitrary and abuse of discretion. I mean, that's a fairly strong statement compared to what we are talking about.

MS. ALLEN: That's kind of a legal standard but --

MR. DUPONT: It's still a fairly strong -- to me it seems like a fairly strong legal statement.

MS. ALLEN: It -- kind of at the end of the day there will be a transcript and then there will be minutes and there will still be an order from this Board that you can look at it and see if it's clear enough to her what you want her to change.

And if you follow what Kevin is proposing
then you'd order -- that you're -- you would encapture that concept that in a circumstance where there are two permits that have been issued, because one is on appeal and you want to let one lie dormant until the matter is finally settled, because you don't want your permittee to be without a permit, that you embrace that concept and you want her to rewrite her opinion to also embrace that concept and allow it.

MR. DUPONT: Does she have an option of not agreeing with that?

MS. ALLEN: Of -- pardon me?

MR. DUPONT: Not agreeing with our recommendation to her?

MS. ALLEN: No, she doesn't.

MR. DUPONT: Oh, okay. Oh. That's interesting.

MR. ELLERTSON: Here is your chance.

MR. MURRAY: And, see, my point on the issue of it's arbitrary and an abuse of discretion, I'm saying that to make it not arbitrary, in my mind, if there is a reasonable basis that the Division can indicate why they are holding the permit dormant and it's effectively communicated to the parties affected by it, then I don't think it's arbitrary or an abuse
of discretion.

MR. DUPONT: I agree.

MR. MURRAY: And I think on the issue of permitted by law, I think the law is silent on it so I don't think we can say it's not permitted.

MR. ELLERTSON: I agree with that.

MR. DUPONT: But we are not called to --

MR. COOMBS: But what you are saying is -- what I'm trying to understand, Kevin, is -- is to do that in a -- in a motion in a general way rather than going through each individual finding. And I agree with that, I think we -- we put the motion in such a way that it captures the concept as you have described it and then let the administrative law judge reformulate that -- that in the way that we are trying -- that we are hoping that -- you know, we are trying to get her to do that.

MR. DUPONT: And that she feels comfortable with as well.

MR. MURRAY: So I guess the question is, is this the only issue that we disagree with and are we otherwise willing to tell her we are fine with her order.

MR. DUPONT: There is a -- on page 56 there is some issues about classification -- let's
see. Not allowing classification VI and IVb. So she's basically granted that -- that statement that you cannot have a simultaneous classification for both classes. That's in the middle of page 56. So that would be consistent with --

MR. ELLERTSON: That's the same issue.

MR. MURRAY: I mean, I agree with that. You can't have both of them, and I think what we are saying, though, is by holding one in --

MR. DUPONT: That wouldn't be the case, then, for this.

MR. MURRAY: Right.

MR. DUPONT: Okay.

MR. MURRAY: I think what we are saying is the Division Director is saying, "We are holding this one aside. We are not classifying it as noncommercial, we are classifying it as commercial." So it is a commercial solid waste facility. If something happens with this --

MR. DUPONT: We want them to -- allowed -- allowed to be able to go back to that noncommercial status.

MR. MURRAY: Right. Right. Yes.

MR. DUPONT: And then the only other thing I have on my notes here is on page 58, that issue
that was been brought up a number of times with the
30-day termination, you know, to suggest we -- that's
30 days termination after the permit.

MR. MURRAY: Final. I agree. Yeah, that
makes a lot of sense to me.

MR. DUPONT: And that's, again, sort of
consistent with this idea.

MR. MURRAY: Terminate the permit once
the -- 30 days after the second one becoming final.
I think that makes a lot of sense. That has to have
been the intent of the rule. I mean -- in my mind
anyway.

MS. ALLEN: Final and nonappealable.

MR. MURRAY: Yes. When it becomes final
and nonappealable, at that point you vacate the
other.

Okay. I believe we've addressed all of
Mr. Penrod's comments. He's removed himself from the
room so we can't ask him.

Is there anything in any of your notes
that he raised that we have not discussed? Anyone?

We don't have the benefit of written
comments from him so we can't go through written
comments. And we now don't have the benefit of
asking him whether there is anything we have failed
to address so...

I guess this other issue that he did raise was the nonprofit/for-profit, but I think that's been adequately dealt with.

Mr. Wixom, you look like you would like to say something.

MR. WIXOM: Would the Board entertain a suggestion?

MR. MURRAY: Certainly.

And I do agree with your prior comment, when we call somebody to clarify something internally for us, I don't know that that needs to be part of the record.

Go ahead.

MR. WIXOM: Counsel for the Executive Secretary mentioned and counsel for Moulding mentioned and at least one board member mentioned the idea that there is a distinction between a final permit and a permit that is not final.

When you look at paragraph 13 that we had up there a minute ago, the Board might think that there is some value in dealing with the concept of final versus nonfinal permit.

MR. MURRAY: If I follow your question, I think we are agreeing that there is a difference
between a permit that becomes final and nonappealable
and something less than that status. Is that -- am I
summarizing what everybody is saying correctly?

MR. RIDING: Yes. I think that's true.

And we are here in terms of the time frames and the
requirements to be observed that way, that once the
time frame has elapsed it becomes -- it becomes
final, if it hasn't been challenged, so I think there
is a clear distinction.

MR. MURRAY: Okay.

Brett, you have --

MR. MICKELSON: No, that's -- that's what
I was trying to articulate earlier.

MR. MURRAY: Okay.

Mr. Dupont, you okay with that?

MR. DUPONT: Yes.

MR. MURRAY: Mr. Ellertson?

MR. ELLERTSON: Yes.

MR. MURRAY: Mr. Mertz?

MR. MERTZ: Yes.

MR. MURRAY: Okay. Mr. Coombs?

All right. Then are there any other
issues that we need to discuss? If not, I would
entertain a motion, if anybody is so inclined.

UNIDENTIFIED SPEAKER: Brett has got one
written down over here. Maybe.

MR. MURRAY: No motion?

MR. ELLERTSON: Oh, no, there is going to be one.

MR. MURRAY: There is going to be one? We are working on it? Okay.

MR. ELLERTSON: Assuming that this could be a group effort if we try and make this motion.

MR. MURRAY: I'm perfectly fine with that.

MR. DUPONT: And we can have more than one --

MR. MURRAY: Am I going to get in trouble if we don't Roberts' Rules of Order this?

MS. ALLEN: I think you are fine.

MR. MURRAY: Okay. Let's go ahead.

MR. ELLERTSON: Well, I would offer a motion that we provide the following information to the administrative law judge in terms of what our intent would be that -- did somebody say something or was that me bumping something? That --

MR. MURRAY: Can I -- I think in the preface of the motion we need to say we accept the order or in part request the following modification.

MR. ELLERTSON: Okay. That would be the front part of the motion.
MS. ALLEN: And you would also want to say that you move the Board to return the proposed dispositive motion to the administrative law judge with the following directions. Please do the following. List them.

MR. ELLERTSON: Okay, that.

MS. ALLEN: And that's -- that's partially written on page four of a potential motion that you might make.

MR. ELLERTSON: Which -- which one are you --

MS. ALLEN: I'm looking at C on page four.

MR. ELLERTSON: And just that I move the Board return the proposed dispositive action to the administrative law judge with directions to revise and resubmit to the Board findings of facts, conclusions of law and a recommendation order in conformity with the modifications adopted by the Board as follows or to include?

MS. ALLEN: Yes, but with the following direction.

MR. ELLERTSON: Okay, with the following direction. That we alter it, with the understanding that we are recognizing the value in there being an opportunity to -- and you used some wording -- I'm
going to say to hold in abeyance a permit while
the --

UNIDENTIFIED SPEAKER: An existing permit.

MR ELLERTSON: What's the term that you
were using? While...

MS. ALLEN: Until the other permit is
final and nonappealable.

MR. ELLERTSON: While the action -- what
are we -- while the new permit is being challenged?
I'm not saying that very well.

MS. ALLEN: That's correct.

MR. ELLERTSON: While the new permit is
being challenged, and yet that permit is being
allowed to operate under that the -- that the
original permit be held in abeyance until such time
as the other one is final. And that at the time that
it becomes final, that then there would be a 30-day
period within which the Executive Secretary would
have to declare the original permit as no longer
valid.

MR. MERTZ: Terminated.

MR. ELLERTSON: Or terminated. That's the
better word.

MR. MURRAY: Okay. There is a motion on
the table. Is there a second?
MR. ELLERTSON: Fix it to make it better.
MR. MURRAY: Or do you want to make some modifications to it?
MR. MICKElSON: I think that maybe some modifications to where it states that the Executive Secretary has the ability in the interim time in these permits to hold one permit so that we are actually saying that the Executive Secretary does have the ability or the authority to -- to conduct that action while one permit is being finalized. So however we would articulate that.
MS. ALLEN: To hold one permit in -- to hold the IVb permit in abeyance until the --
MR. ELLERTSON: Do we want to be specific and talk about those? That would be great. Yeah.
MS. ALLEN: Until the Class VI permit is finalized and nonappealable or a decision is made? And all appeals are concluded.
MR. ELLERTSON: Until the Class VI is final and no longer appealable and nonappealable.
MR. MURRAY: Okay. Let me try and restate that.
So we are moving -- move the Board to return the proposed dispositive action to the administrative law judge with directions to revise
and resubmit to the Board findings of facts, conclusions of law and a recommended order consistent with the following. That the Executive Director has discretion --

MR. WIXOM: Executive Secretary.

MR. MURRAY: Sorry. Executive Secretary has the discretion, when a new permit has been applied for, to hold the existing permit in abeyance and allow the applicant to operate under the permit that has been challenged until such time as the permit becomes final and nonappealable, at which time the original permit must be terminated within 30 days.

MR. MICKELSON: Yes.

MR. MURRAY: Is that accurate?

MR. MICKELSON: Yes.

MR. MURRAY: Okay.

MR. ELLERTSON: Somebody second it?

MR. MURRAY: Is there a second?

MR. MICKELSON: I'll second that.

MR. MURRAY: Okay. Is there any discussion?

Okay. Go ahead.

MS. ALLEN: I was going to say the followup motion would be in all other respects you
accept her proposal, her recommended order.

MR. MURRAY: Okay. Is there discussion on that motion? If there is no discussion, I'll call for a vote.

All in favor?

(Board members indicate aye.)

MR. MURRAY: Any opposed?

Okay. And then in terms of the rest of the order is there a motion?

MR. ELLERTSON: And that would be to accept the remaining portions of the order as stated?

MR. DUPONT: There were a couple --

MS. ALLEN: Accept and approve.

MR. DUPONT: Weren't there a couple -- weren't there a couple of findings of fact that were suggested to be moved so we should deal with those. It's where we started this whole thing.

MR. MURRAY: That's 15.

MR. COOMBS: I thought we agreed that -- not to strike 15 or amend it. So that would be accepting it as written.

MR. ELLERTSON: Well, there was some discussion about moving it to a conclusion of law or a finding of law as opposed to a conclusion of fact or whatever the terms are.
MR. MURRAY: I don't feel strongly about this. I think some of these things read like conclusions of law or findings of fact, but she is using them one way or another to support a conclusion that she is reaching. So I don't have strong feelings about that. But I'm happy to entertain a motion if one of you want to make it.

MR. MERTZ: Well, 15 totally contradicts her motion we just made.

MR. MURRAY: Well, she is going to have to rewrite the decision.

MR. ELLERTSON: The motion dealt with the broad discussion.

MR. MURRAY: And the way we've made this motion, it's got to come back to us for reconsideration anyway. So we are going to be able to read a second time if something appears inconsistent...

MR. DUPONT: And you were talking about the conclusion of law 15. The finding of fact 15 has to do with it becoming a proposed commercial landfill. And I don't think anybody had an issue with that. So maybe we should just leave it.

MR. MURRAY: Okay. Then I'll entertain a motion with regard to the rest of the order.
MR. DUPONT: I'll move that we support the rest of the administrative law judge's order as written.

MR. MURRAY: Okay. Motion by Mr. Dupont. Is there a second?

MR. COOMBS: I'll second it.

MR. MURRAY: Second by Mr. Coombs. Any discussion?

All in favor?

(Board members indicate aye).

MR. MURRAY: Opposed?

All right.

MS. ALLEN: All right. Then I have a question for the Board. I will -- Board counsel will review the record and prepare an appropriate order based on the members' comments and votes. And in this instance I thought that I would go ahead and prepare the order and put it -- ask you to put it on an agenda either next month or the following month so that you can see what the order is and compare your -- the minutes and the transcript and see if that's how you want to do it.

Is that -- does that sound acceptable to you?

MR. DUPONT: And then from there it goes
back to the --

MS. ALLEN: And then after that it would
-- yeah, after you approve it and it's final in your
mind, then it goes back to the administrative law
judge to take action and then she'll resubmit
something to you.

MR. MURRAY: Yes, that sounds fine with
me.

We may have a logistical issue. Does this
Board not reorganize in March? Is that correct? We
could be in a situation that by the time we get the
decision back from her, it's a different board.

MR. DUPONT: That's what all of the
documentation is for.

MR. MURRAY: Okay.

MR. ELLERTSON: Yeah, but is there a
way -- is there a way to act more quickly on it?

MR. MICHELSON: Can you electronically
distribute that as an information packet?

MS. ALLEN: Well, the alternative would be
that I -- I could prepare the order and submit it to
the Board chair, who is the presiding officer who
would be reviewing it and saying this is not -- we
are returning it.

MR. MURRAY: I don't want to do that. I
would like to have everyone's comments so...

MS. ALLEN: So I don't know if --

MR. MURRAY: Well, are -- do we -- is February our last meeting or March our last meeting?

MR. WIXOM: February.

MR. MURRAY: February. Okay.

Mr. Wixom.

MR. WIXOM: The Board could determine to have additional meetings. Those meetings could, with proper notice, be electronic.

MS. ALLEN: That is correct.

MR. MURRAY: Maybe that's what we --

MR. MICKELSON: If that's possible, I think that's what we should -- that would be best.

MR. MURRAY: Yeah, let's do it that way. Okay. We'll proceed that direction.

MR. ELLERTSON: So do we want to set times?

MR. MURRAY: Why don't we --

MS. ALLEN: It still has to be noticed up so if you would note what your calendars are, you want to do that, then...

MR. MURRAY: How long do you think we need, Sandra, for you to do that?

MS. ALLEN: Probably a week, maybe.
Could we...

MR. MURRAY: Would it be possible to -- something on the 24th?

MR. ELLERTSON: I'm good.

MR. MURRAY: Can we do an electronic meeting on the 24th?

MR. ELLERTSON: Yes. What time?

MR. MURRAY: Let's do whatever we need to do to notice an electronic meeting on the 24th, with the idea that by that point we will have a proposed motion in circulation. Not motion...

MS. ALLEN: Order.

MR. MURRAY: Order that we can discuss.

MR. ELLERTSON: When do we think the order will be ready?

MS. ALLEN: When will the transcript be ready?

THE REPORTER: In a week.

MS. ALLEN: So we will probably need a couple of days after we get the transcript to look at the transcript and then prepare the order.

MR. MURRAY: The 24th is two weeks from today.

MS. ALLEN: That would be fine.

MR. MURRAY: So that should work?
MR. ELLERTSON: My challenge is finding a
time during the day that we are going to do that.
I'm saying, what time do you --

MR. MICHELSON: What time do you have
open?

MR. ELLERTSON: Probably after 3:00.

MR. MURRAY: I'm fine with that. 3:00.

MR. DUPONT: Yes. I don't have to travel,
right? I'll just sit in my office?

MR. MURRAY: Yeah, you -- just a phone
call.

MR. DUPONT: (Indistinguishable).

MR. MURRAY: All right. Then our next
meeting will be an electronic meeting at 3:00 on the
24th of January.

MR. DUPONT: And you will send out
notification to remind us?

UNIDENTIFIED SPEAKER: Yes, sir.

MR. MURRAY: Mike.

MR. MALMBORG: If I may. If you are
hoping to have Judge Nak -- review Judge Nakahara's
revised order by February, okay.

MS. ALLEN: Oh.

MR. MALMBORG: Then I was going to say, if
you are hoping to review it by February, you may want
to instruct Sandra or give some direction in your
motion regarding that timeline.

MS. ALLEN: All right. Do you want to put
that in the motion, that you request Judge Nakahara
that you want -- do you want to request -- set forth
in the motion to request Judge Nakahara to provide
you with the revised dispositive action by a given
date?

MR. ELLERTSON: Is February 1st
reasonable?

MS. ALLEN: I don't know if it's
reasonable but --

MR. MICHELSON: So...

MR. MURRAY: That only gives her a week.
I think --

MS. ALLEN: No.

MR. MURRAY: I think if we do that, we
have to say prior to February 14th.

MR. ELLERTSON: Well, we don't meet till
the 14th, right?

MR. MURRAY: Yeah. Our official meeting
-- our next scheduled board meeting is February 14th,
so I think we would request that she return it to us
before the 14th of February.

MS. ALLEN: Okay.
MR. MURRAY: Okay. Any other issues, comments?

We are adjourned.

(Hearing concluded at 4:12 p.m.)

* * *
REPORTER'S HEARING CERTIFICATE

STATE OF UTAH )
COUNTY OF SALT LAKE ) ss.

I, Dawn M. Perry, Certified Shorthand Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said proceeding was taken down by me in stenotype on January 10, 2013, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 17th day of January, 2013.

Dawn M. Perry, CSR
Notary Public
Residing in Salt Lake County