
BEFORE THE EXECUTIVE DIRECTOR
OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

In the Matter of:

**JORDAN VALLEY WATER
CONSERVANCY DISTRICT**

**Notice of Violation and Compliance
Order No. 1709022**

**ORDER ON MOTION TO STRIKE
AND
ORDER ON MOTION TO STAY**

February 27, 2018

Langdon T. Owen, Jr.
Administrative Law Judge

Jordan Valley Water Conservancy District (“Jordan Valley”) filed a Request for Agency Action dated October 20, 2017, then filed a Request for Appointment of Administrative Law Judge, and filed a Motion for Stay, both on November 8, 2017. The Motion for Stay requested a stay of the Compliance Orders contained in the Notice of Violation and Compliance Order No. 1709022. The Administrative Law Judge (“ALJ”) was appointed December 4, 2017, but that appointment erroneously described the type of proceedings and was corrected by a new notice of appointment dated December 11, 2017. The Director of the Division of Waste Management and Radiation Control (the “Division”) filed its Director’s Memorandum in Opposition to Motion to Stay January 18, 2018. The ALJ in this matter entered a Notification of Further Proceedings and First Prehearing Order on January 23, 2018, following a telephonic scheduling conference held January 19, 2018. The Notice of Further Proceedings set the response date for the Motion to Strike and for a response to the Motion for Stay for the same date, January 24, 2018, with any reply to either due from Jordan Valley by January 31, 2018. On January 22, 2018, Jordan Valley filed its Motion to Strike the Director’s Untimely Opposition to Motion to Stay (“Motion to Strike”). A hearing on the Motion to Strike and on the Motion for Stay was held at the

Department of Environmental Quality on February 13, 2018. Jordan Valley appeared at the hearing represented by its counsel, Gregory J. Savage and Marie Bradshaw Durrant; the Division appeared at the hearing represented by its counsel, Raymond D. Wixom and Bret F. Randall.

ORDER ON MOTION TO STRIKE

The ALJ ruled orally at the February 13, 2018, hearing that the Motion to Strike was denied. This ruling was based on a reading of the applicable statute and rules under which further proceedings after the initial review of the Request for Agency Action, where the Request is not summarily granted or denied, start with the notification to the requesting party that further proceedings are required to determine the agency's response to the request. UCA § 63G-4-201(2)(d) and R. 305-7-306(3). This means that the Division's January 24, 2018 Memorandum in Opposition to Motion to Strike the Director's Opposition to Motion to Stay was early, not late. Also, under the Notification of Further Proceedings, the Division's Opposition to the Motion to Stay could even have been supplemented (but was not) until January 24, 2018. The 21-day response deadline under R. 305-7-312(2) could not begin until after the Notification of Further Proceedings. This result causes no prejudice to Jordan Valley, which has had a full opportunity to present its position.

ORDER ON MOTION FOR STAY

The Division issued the Notice of Violation and Compliance Order at issue in the matter on September 22, 2017. Jordan Valley filed a Request for Agency Action November 8, 2017, and filed a Motion for Stay November 8, 2017. The Motion for Stay requested that the September 22, 2017 Compliance Orders be stayed. There were five components to the

Compliance Orders. The Director has agreed that components 4 and 5 may be stayed, and by this Order they are stayed.

Components 1, 2, and 3 remain at issue. In summary, these components require that Jordan Valley (1) account for its management of solid and hazardous wastes, (2) prepare a sampling and analysis work plan to investigate the affected site at State Painting's property, and (3) implement the sampling and analysis plan upon approval of the plan.

In order to obtain a stay of the Compliance Orders, Jordan Valley must demonstrate all four elements specified in R. 305-7-318(b). The first element is that Jordan Valley, the party seeking the stay, will suffer irreparable harm unless the stay is issued. Jordan Valley argues that the irreparable harm lies in a violation of its right to due process unless the Division first determines where the waste was produced and that the waste is subject to regulation. Jordan Valley argues that for Jordan Valley to develop and implement a plan to determine these, rather than the Division, puts Jordan Valley to expense and exposes it to any risk associated with the task, for which costs it cannot recover and will need pass onto its ratepayers. The Division points out that Jordan Valley would have remedies against State Painting, the contractor hired by Jordan Valley, or State Painting's bonding company. On the other hand, the potential remedies against State Painting may prove inadequate if it is insolvent and where the bonding company may well resist liability, the value of this remedy is uncertain. The value of these remedies may be uncertain, but they had not been clearly shown by Jordan Valley to lack any value. Jordan Valley still has the opportunity to demonstrate in these proceedings that the Compliance Order was not proper, that a clean-up operation is not appropriate, or that it is not the proper party to plan and conduct such and operation. Thus, at this point in the proceedings, Jordan Valley will not suffer irreparable harm by the mere possibility that it may not be successful in these

proceedings. If it turns out that it is the appropriate party to plan and conduct clean-up operations, it will be bearing the costs and risks associated with such activities, but this would, in such event, be appropriate.

Also, the level of personal risk which may be associated with compliance (as to components 2: formulating a plan, and 3: carrying out the plan) is not clear. Jordan Valley asserts the material is inert; the Division asserts it is not inert, but may not be hazardous. This issue will be determined later in these proceedings. Jordan Valley suggests there may be non-inert and even hazardous material from other sources which could be disturbed by any implementation of an analysis and sampling plan or perhaps even in doing the assessments necessary to formulate a plan. The showing by Jordan Valley on these risks are not enough to demonstrate actual imminent harm or risk. Rather, the showing at this stage remains speculative. Such personal risk would not apply to component 1 at all and is speculative as to components 2 and 3.

In order to show irreparable harm, the claimed harm must be imminent and not speculative. *Direx Israel, LTD v. Breakthrough Medical Corp.*, 952 F.2d 802 (4th Cir. 1991). Here the harm is both not imminent and speculative. This first element under R. 305-7-318(b) is not met as to any of the three components of the Compliance Orders.

The second element Jordan Valley needs to demonstrate for a stay is that the threatened injury to Jordan Valley, the party seeking the stay, outweighs whatever damage the proposed stay is likely to cause the Division, the party restrained or enjoined by the stay. This element indicates a weighing of risk is needed. Here, whichever party does the work to evaluate the situation bears whatever cost and risk is associated with it. This cost and risk eventually falls to the ratepayers of Jordan Valley (assuming no recovery from State Painting or its bonding

company), or to the taxpayers of Utah. The weight of the risk appears the same either way. The threatened injury to Jordan Valley does not outweigh whatever damage could be caused to the Division. Thus this element has not been met as to any of the three components of the Compliance Order.

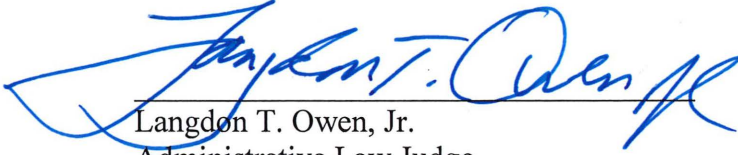
The third element is that the stay, if issued, would not be adverse to the public interest. Jordan Valley argues that because the material at issue is inert and has been in place since December of 2016, a stay would not violate the public interest. The facts about the nature of the material are at issue and need to be determined. A stay would remove potential sanctions needed to assure the proper dealing with the material by Jordan Valley should it be found to be the responsible party. Environmental protection is important to the public in general and particularly to its members in the housing project in the vicinity of the material at issue. Setting aside an important enforcement tool under these circumstances is not in the public interest. Thus, this element has not been met as to any of the three components of the Compliance Orders.

The fourth element is that either there is a substantial likelihood that Jordan Valley, the party seeking the stay, will prevail on the merits of the underlying claim, or the case presents serious issues on the merits which should be the subject of further adjudication. Here, the Division has presented sufficient information about the materials to initially justify requiring Jordan Valley to meet the terms of the three components of the Compliance Order at issue. The Division has authority to issue such an order. UCA §§ 19-6-107(2)(m), 19-6-103(3)(d) and (e), 19-6-112(2)(a). The information presented by Jordan Valley does not yet appear to be sufficient to show full compliance with the Compliance Order or that the Compliance Order was not justified. Thus the first part of element four, substantial likelihood of success on the merits, has not been met. However, Jordan Valley has presented enough information to demonstrate that

this case presents serious issues on the merits which should be subject to further adjudication. Thus, this element has been meet. However, this is insufficient to justify a stay where the other elements of the rule have not been met, as discussed above.

The Motion for Stay is therefore denied.

DATED this 27th day of February, 2018.



Langdon T. Owen, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that on this 27th day of February, 2018, a true and correct copy of the foregoing Order on Motion to Strike and Order on Motion for Stay was sent by electronic mail to the following:

Administrative Proceedings Records Officer
Environment Division
DEQAPRO@utah.gov

Scott Anderson, Director
Utah Division of Waste Management and Radiation Control
standerson@utah.gov

Raymond D. Wixom
Bret Randall
Assistant Attorneys General
Environmental Division
rwixom@agutah.gov
bfrandall@agutah.gov

Jordan Valley Water Conservancy District
Greggory J. Savage
Marie Bradshaw Durrant
Ray Quinney & Nebeker
gsavage@rqn.com
mbdurrant@rqn.com

