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 FOR PARTIAL SUMMARY JUDGMENT (BURDEN OF PROOF, INERT FILL DEFENSE)** June 11, 2018 Langdon T. Owen, Jr. Administrative Law Judge

The Director of the Division of Waste Management and Radiation Control ("Division") filed "Director's Motion for Partial Summary Judgment (Burden of Proof, Inert Fill Defense)" on February 23, 2018 (the "Motion"). Jordan Valley Water Conservancy District ("Jordan Valley") filed on March 16, 2018, its Opposition to that Motion. The Division filed on March 26, 2018, its Reply Memorandum in support of that Motion. A Request to Submit for Decision was filed by the Division on May 1, 2018. A telephonic hearing was held June 8, 2018.

The Division argues that Jordan Valley bears the burden of proof on the defense raised by Jordan Valley that the spent blast material at issue in this case is inert fill material excluded from the definition of "solid waste" under UCA § 19-6-102(19)(b). Jordan Valley argues that the Division has the threshold burden of proof to show that the material is subject to its jurisdiction. Alternatively, it argues that the issue of the burden of proof has become an issue of fact, not law. At the telephonic hearing held June 8, 2018, Jordan Valley asked that the hearing and a decision on the Motion be postponed because after the Motion was set for hearing, the Environmental Protection Agency has decided to take certain actions which could moot the matter. The Administrative Law Judge ("ALJ") decided that the Motion for Summary Judgment likely still

needed decision and proceeded with the hearing. A Motion to Stay/Abate Administrative Proceedings has been brought by Jordan Valley, but that motion is not yet fully briefed or ready for decision.

The ALJ also found that the issue raised by the Motion was a question of legal interpretation, not raising issues of fact that might prevent summary judgment on the issue.

The key provisions relating to the burden of proof are contained in the definition of "solid waste" found at UCA § 19-6-102(19)(a) and (b):

> (19)(a) "Solid waste" means any garbage, refuse, sludge, including sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility, or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining, or agricultural operations and from community activities but does not include solid or dissolved materials in domestic sewage or in irrigation return flows or discharges for which a permit is required under Title 19, Chapter 5, Water Quality Act, or under the Water Pollution Control Act, 33 U.S.C. Sec. 1251 et seq.
> (b) "Solid waste" does not include any of the following wastes unless the waste causes a public nuisance or public health hazard or is otherwise determined to be a hazardous waste:
> (i) certain large volume wastes, such as inert construction debris used as fill material;
>
> ....

In order to be able to assert a violation of law relating to solid waste, the Division would need to first carry the burden to show that the material at issue is solid waste as described in UCA § 19-6-102(19)(a) which sets forth the general rule as to what constitutes solid waste.

After that, Jordan Valley would have the burden to demonstrate that the exclusion contained in UCA § 19-6-102(19)(b)(i) applies in that the material here is "certain large volume wastes, such as inert construction debris used as fill material." This will entail demonstrating that the material involved here actually is inert.

The exclusion under UCA § 19-6-102(19)(b) also contains an "unless" clause which could apply to cause even inert material to fall back into the general description of solid waste under UCA § 19-6-102(19)(a): "unless the waste causes a public nuisance or public health hazard or is otherwise determined to be hazardous waste." The burden on this issue would be on the Division which would need to show that at least one of the conditions contained in the "unless" clause was met.

This interpretation of the statute best comports with the language used and is consistent with how similar provisions have been interpreted. For example, in *Ekoteck Site PRP Comm. v. Self*, 881 F. Supp. 1516, 1524-25 (D. Utah 1995), the oil exclusion from CERCLA, which generally applies to used petroleum, was found not to apply where other hazardous substances not inherent in petroleum are contained in the used petroleum; in other words, the petroleum exclusion defense applies, unless other hazardous substances are present. The court found that the defendants had the burden of proof to establish their right to the exclusion. It also found that "the record indicates contamination at the Ekotek site by hazardous substances beyond those contained in unused oil," and thus it refused the defendants' summary judgment based on the petroleum exclusion. In that case, the defendants had been unable to show they had met their ultimate burden to demonstrate the application of the petroleum exclusion where the application had been rebutted on the record with a showing that other hazardous substances were contained in the petroleum. Thus, the plaintiff had come forward with evidence that indicated that defendants could not meet their ultimate burden to demonstrate that the petroleum exclusion applied.

Similarly, here the assertion of the inert fill defense can be rebutted by a showing that the material is not inert as claimed or, even if inert, one of the provision of the "unless" clause

applies. Since the result would then be that the basic definition of solid waste would apply – a matter on which the Division bears the ultimate burden – it is reasonable to require that the Division come forward with evidence that a provision of the "unless" clause applies. If successful in such a showing, the Division will have demonstrated that Jordan Valley has not met its ultimate burden to prove that the inert fill exclusion to the definition of solid waste applies.

A similar analysis applies in the Energy Solutions L.L.C., Groundwater Quality Discharge Permit No. UGW 450005, Notice of Violation and Compliance Order, Docket No. UGW 14-04 matter cited by the Division. In that case the issue was whether a possible exception would apply to the general rule in a permit relating to the submission of certain data such that "qualified" data could be used instead. The Administrative Law Judge in that Energy Solutions matter stated:

> This matter requires the resolution of two issues: (1) does the QAP [a permit] provide Energy Solutions with the right to submit qualified data...in satisfaction of its obligations under the Permit; and (2) if so, did Energy Solutions comply with the conditions relating to the use of qualified data?

The possible use of qualified data first required the making of certain disclosures. This was, essentially, an inherent feature of the possible use of qualified data without which qualified data could not meet the requirements of the permit.

In the present case, Jordan Valley would also need to show the inherent feature of the exclusion it seeks, that the material actually is inert. As in the Energy Solutions case, a failure to meet this burden would mean no exclusion applies.

In conclusion, the Division would have the burden to show that solid waste is involved here under the general rule set forth in UCA § 19-6-102(19)(a). Jordan Valley would then have the burden to prove that the material is inert so that the exclusion under UCA § 19-6-102(19)(b)

would apply; the Division would have the opportunity to rebut the assertion that the material is inert. The Division would then have the burden to come forth with evidence that even if inert, the exclusion nevertheless would not apply because the material causes a public nuisance or public health hazard or is otherwise determined to be a hazardous waste.

DATED this 11th day of June, 2018.

Langdon T. Owen, Jr.
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that on this 11th day of June, 2018, a true and correct copy of the foregoing Order on Director's Motion for Limited Formal Discovery was sent by electronic mail to the following:

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