
BEFORE THE
UTAH SOLID AND HAZARDOUS WASTE CONTROL BOARD

In the Matter of:

Weber County C&D Class VI Landfill
Solid Waste Permit #1101

October 25, 2012

Administrative Law Judge
Connie S. Nakahara

MEMORANDUM AND RECOMMENDED ORDER
(Recommending the Board Grant, in part, and Deny, in part,
Petitioner Counterpoint Construction Company's
Motion for Summary Judgment;
Grant, in part, Deny, in part,
Respondents' Motions for Summary Judgment)

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Motion for Summary Judgment;
Grant, in part, Deny, in part,
Respondents' Motions for Summary Judgment)

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 that allege 1) that its right to due process was violated when it was not properly notified regarding the commercial permit application; 2) that the Executive Secretary failed to ensure compliance with all applicable statutory and regulatory requirements prior to issuance of the commercial permit; 3) that the Executive Secretary improperly issued two conflicting permits for the same landfill; 4) that the Executive Secretary improperly approved commercial operation; and 5) that in violation of the Solid Waste Management Act, the Executive Secretary and the Department of Environmental Quality failed to promulgate necessary rules and allowed the landfill to accept waste generated in the City of

Ogden.¹ 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 in Counterpoint's requests for agency action. Based on the discussion below, it is RECOMMENDED that the Utah Solid and Hazardous Waste Control Board ("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;

REVOKE the Class VI, commercial nonhazardous solid waste landfill permit for the Weber County Landfill **IF** the Class IVb, noncommercial nonhazardous solid waste landfill permit has not been terminated within thirty (30) days of the Board's decision in this matter; **or**

AFFIRM the Class VI, commercial nonhazardous solid waste landfill permit for the Weber County Landfill **IF** the Class IVb, noncommercial nonhazardous solid waste landfill permit has been terminated within thirty (30) days of the Board's decision in this matter; and

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

I. Procedural Requirements.

Pursuant to Utah Code Ann. § 19-1-202(1)(f), the Executive Director of the Utah Department of Environmental Quality appointed Connie Nakahara as the Administrative Law Judge to conduct an adjudicative proceeding,² on behalf of the Board³ regarding

¹See *infra* n.21 describing the issues raised by Counterpoint but not admitted in this proceeding.

²See Letter from Amanda Smith to Connie Nakahara (April 20, 2011) (*appointing* Connie Nakahara as Administrative Law Judge on behalf of the Board regarding requests for agency action dated March 9, 2011, and March 31, 2011, and amended request for agency action dated March 14, 2011); Letter from Amanda Smith to Connie

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, 2011.⁴ This *Memorandum and Recommended Order* 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.⁵ This proceeding was conducted as a formal adjudicative proceeding in

Nakahara (July 12, 2011) (*appointing* Connie Nakahara as Administrative Law Judge on behalf of the Board regarding request for agency action dated June 13, 2011).

³Pursuant 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)).

⁴Counterpoint 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.

⁵This *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

accordance with Title 63G, Chapter 4, Utah Administrative Procedures Act.

Consistent with Utah Code Ann. § 19-1-301(6)(a)(iii), this *Memorandum and Recommended Order* includes:

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

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

- (i) approve, approve with modification, or disapprove [the ALJ's] proposed dispositive action; or
- (ii) return the proposed dispositive action to the [ALJ] for further action as directed.

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, and this *Memorandum and Recommended Order*. An electronic copy of the agency record is attached to the hard copy of this *Memorandum and Recommended Order*.

III. Legal Standard.

At issue in this proceeding are separate motions for summary judgment, 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,

subject to judicial review under Section 63G-4-403").

Rule 56.⁶ 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.”⁷ The facts and inferences from those facts must be viewed in “the light most favorable” to the nonmoving party.⁸

A party opposing a summary judgment motion “has the burden of disputing the motion with material facts.”⁹ A party cannot rely on unsupported bare contentions that raise no material questions of fact.¹⁰

IV. Background.

On October 19, 2009, the Executive Secretary issued a Class IVb, noncommercial nonhazardous solid waste landfill¹¹ permit (“Noncommercial Permit”) to Weber County, as owner, and Moulding, as operator (collectively “Permittees” or

⁶UTAH CODE ANN. § 63G-4-102(4)(b); see also UTAH ADMIN. CODE R305-6-215(4)(b).

⁷*Overstock.com, Inc. v. Smartbargains, Inc.*, 2008 UT 55, ¶ 12, 192 P.3d 858 (quoting Utah R. Civ. P. 56©).

⁸*W.M. Barnes Co. v. Sohio Natural Res. Co.*, 627 P.2d 56, 59 (Utah 1981) (citations omitted); see also *Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (citing *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983) (additional citations omitted)).

⁹*Overstock.com, Inc.*, 2008 UT 55, ¶ 16.

¹⁰*Id.* at ¶ 12 (citing *Reagan Outdoor Adver., Inc. v. Lundgren*, 692 P.2d 776, 779 (Utah 1984)).

¹¹A 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).

“Applicants”).¹² Counterpoint, who owns property adjacent to the Weber County Landfill, challenged the issuance of the Noncommercial Permit.¹³ In a separate adjudicatory proceeding for the Noncommercial Permit, this Board upheld the Noncommercial Permit as modified pursuant to the Board’s order.¹⁴ Concurrent with the Noncommercial Permit adjudicatory proceeding, the Weber County Landfill was constructed and operated under the approval granted in the Noncommercial Permit.¹⁵

Later Weber County and Moulding submitted an application for a Class VI,¹⁶ commercial nonhazardous solid waste permit for their existing noncommercial Landfill.¹⁷ 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.¹⁸ On March 28, 2011, the Executive Secretary authorized commercial operations at the Weber County Landfill.¹⁹

¹²Material Fact ¶ 4 (*Joint Stipulation of Undisputed Facts (“JSF”) ¶ 8*).

¹³Material Fact ¶ 24; *RFAA #1* at 2.

¹⁴Material 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).

¹⁵Material Fact ¶¶ 5, 22 (*JSF ¶¶ 9, 39*).

¹⁶ 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).

¹⁷Material Fact ¶ 6 (*JSF ¶ 10*).

¹⁸Material Fact ¶¶ 14, 21 (*JSF ¶¶ 23, 38*).

¹⁹Material Fact ¶ 18 (*JSF ¶ 30*).

Thereafter, Counterpoint filed two requests for agency action.²⁰

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 Management Act.²¹

Counterpoint filed a motion for summary judgment seeking a favorable ruling regarding allegations it filed in its requests for agency action.²² Respondents also jointly filed motions for summary judgment seeking a ruling on all claims raised in Counterpoint's requests for agency action.²³ The parties' cross motions for summary

²⁰See *RFAA #1; Amended RFAA #2*.

²¹See *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* (June 16, 2011); *Order* (September 29, 2011).

²²See *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).

²³*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*

judgment are addressed below in this memorandum and recommended order.

V. Material Facts.

The parties filed *Joint Stipulation of Undisputed Facts*.²⁴ 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.²⁵
3. *Joint Stipulation of Undisputed Facts* ¶ 5 is incorporated by reference as material fact ¶ 3.²⁶
- 4-8. *Joint Stipulation of Undisputed Facts* ¶¶ 8 through and 12 are incorporated by reference as material facts ¶¶ 4 through 8, respectively.²⁷
- 9-10. *Joint Stipulation of Undisputed Facts* ¶¶ 15 and 16 are incorporated by reference as material facts ¶¶ 9 and 10, respectively.²⁸

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).

²⁴ *Joint Stipulation of Undisputed Facts* (“JSF”) (January 10, 2012) attached as Exhibit A to Respondents’ *Due Process SJ Memo* attached hereto as Exhibit 1.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

- 11-12. *Joint Stipulation of Undisputed Facts* ¶¶ 18 and 19 are incorporated by reference as material facts ¶¶ 11 and 12, respectively.²⁹
13. *Joint Stipulation of Undisputed Facts* ¶ 21 is incorporated by reference as material fact ¶ 13.³⁰
- 14-16. *Joint Stipulation of Undisputed Facts* ¶¶ 23 through 25 are incorporated by reference as material facts ¶¶ 14 through 16, respectively.³¹
17. *Joint Stipulation of Undisputed Facts* ¶ 28 is incorporated by reference as material fact ¶ 17.³²
- 18-20. *Joint Stipulation of Undisputed Facts* ¶¶ 30 through 32 are incorporated by reference as material fact ¶¶ 18 through 20, respectively.³³
- 21-23. *Joint Stipulation of Undisputed Facts* ¶¶ 38 through 40 are incorporated by reference as material facts ¶¶ 21 through 23, respectively.³⁴
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.³⁵
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.³⁶

²⁹*Id.*

³⁰*Id.*

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*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.

³⁶Exhibit 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.³⁷
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.”³⁸
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. . . .³⁹
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).”⁴⁰
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

³⁷Utah 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).

³⁸See *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*).

³⁹*Noncommercial Permit Board Order* at 4 (accepting, approving, and adopting Recommended Order in *ALJ’s Noncommercial Permit Recommended Order* at 34).

⁴⁰See *Noncommercial Permit Board Order* at 4 (accepting, approving and adopting *ALJ’s Noncommercial Permit Recommended Order* at 33-34).

Permit was resolved and dismissed the adjudicative proceeding.⁴¹

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.⁴² 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).⁴³ Respondents adamantly disagree.

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

The solid waste rules provide that:

⁴¹*Noncommercial Permit Board Order* at 4 (accepting, approving and adopting *ALJ's Noncommercial Permit Recommended Order* at 34).

⁴²*Material Fact* at ¶ 9 (*JSF* ¶ 15).

⁴³*RFAA #1* at 4-5 (citing UTAH ADMIN. CODE R315-310-3(2)(a) and (b)); *Counterpoint's SJ* at 13.

(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.⁴⁴

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.⁴⁵ 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 Counterpoint.⁴⁶

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).

⁴⁴UTAH ADMIN. CODE R315-310-3(2).

⁴⁵*Counterpoint's SJ* at 15.

⁴⁶*Respondents' Due Process SJ Memo* at ¶¶ 20-23.

Respondents maintain that the Commercial Permit application is for an existing facility not a “new facility or a facility seeking expansion.”⁴⁷ 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.⁴⁸ 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.⁴⁹

The provisions of subsection -3(2)(a) clearly apply to “each permit application.”⁵⁰ Subsection -3(2)(b) is ambiguous as to the “person[s]” that the Executive Secretary 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).

- b. Provisions of UTAH ADMIN. CODE R315-310-3(2)(a) Apply to “Each Application.”

Section R315-310-3 includes three subsections, -3(1), -3(2), “Public Participation

⁴⁷*Respondents’ Due Process SJ Memo* at ¶ 20.

⁴⁸*Respondents’ Due Process SJ Memo* at ¶ 20.

⁴⁹*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).

⁵⁰UTAH ADMIN. CODE R315-310-3(2).

Requirements,” and -3(3), “Special Requirements for a Commercial Solid Waste Disposal Facility.”⁵¹ 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.⁵² Moreover, subsection -3(2)(a) applies to “each permit application.”⁵³

c. The Commercial Permit Imposes Identical Requirements to R315-310-3(3)(b) Provisions.

UTAH CODE ANN. § 19-6-108(3)©, 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.⁵⁴ In that the regulatory authority for Condition I.A. appears to be established in both UTAH CODE ANN. § 19-6-108(3)© and UTAH ADMIN.

⁵¹ See generally, UTAH ADMIN. CODE R315-310-3.

⁵² *Id.*

⁵³ UTAH 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.

⁵⁴ Condition 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).

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)©, which requires compliance with subsection -3(2)(b), must also be applicable.⁵⁵ 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 obtain legislative and gubernatorial approval is solely based in UTAH CODE ANN. § 19-6-108(3)© not UTAH ADMIN. CODE R315-310-3(3)(b).⁵⁶

(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 © . . . approval from the governor.⁵⁷

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

Subsection -3(3) mandates additional approvals for a commercial landfill must be

⁵⁵*Counterpoint's SJ Motion* at 15-16. Subsection -3(3)© prohibits construction of the facility until the requirements of subsection R315-310-3(2)(b) are met. UTAH ADMIN. CODE R315-310-3(3)©. 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)© and (d) are also incorrect. *Respondents' Reply* at n.6.

⁵⁶*Respondents' Reply* at ¶ 39.

⁵⁷UTAH CODE ANN. § 19-6-108(3)(c)(i).

obtained from the local government, the legislature and the governor as required by UTAH CODE ANN. § 19-6-108(3)©. 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)© and provide documentation to the Executive Secretary that the solid waste disposal facility is *approved by the local government, the Legislature, and the governor.*

© 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. . . .⁵⁸

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

⁵⁸UTAH ADMIN. CODE R315-310-3(3) (emphasis added).

identified in subsections R315-310-3(3)(a)(I) and (iii).⁵⁹ Applicants are similarly required to notify property owners identified in subsection R315-310-3(3)(a)(I).⁶⁰ 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, 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.

- b. Subsection R315-310-3(3)© Mandates Compliance with Subsection R315-310-3(2)(b) Prior to Construction of a Commercial Facility.

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)©. Respondents claim the Commercial Permit need not comply with section R315-310-3(3).⁶¹ Respondents further assert that the citations in subsections R315-310-3(3)© incorrectly reference subsection R315-310-3(2)(b) instead of R315-310-3(3)(b).⁶² Beyond a bare proclamation and several other incorrect

⁵⁹See UTAH ADMIN. CODE R315-310-3(2)(b).

⁶⁰See UTAH ADMIN. CODE R315-310-3(2)(a)(ii).

⁶¹*Respondents' Due Process SJ Memo* at ¶ 35.

⁶²*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.*

citations in the same section, Respondents provide no support for their claim.

The plain meaning of the language in subsection -3(3)© 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 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.⁶³

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.⁶⁴ The rule clearly requires each

⁶³RFAA #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.

⁶⁴Material Fact ¶ 7 (JSF ¶ 11).

application to document that a “notice of intent to apply for a permit” has been sent to property owners.⁶⁵ As discussed above, the rules are unclear regarding the property owners to be notified.

Respondents acknowledge that through the 2009 notification letters or otherwise, they did not notify Counterpoint of Weber County and Moulding's intent to apply for the Commercial Permit.⁶⁶ 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.⁶⁷

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.

⁶⁵UTAH ADMIN. CODE R315-310-3-(2)(a)(ii).

⁶⁶Material Fact ¶ 12.

⁶⁷RFAA #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.⁶⁸ An alleged error is harmful if it had a reasonable probability of affecting the outcome of this case.⁶⁹

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 prejudiced by Respondents' alleged failure to notify Counterpoint.⁷⁰ Accordingly, any

⁶⁸*Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 423 (Utah 1993) (citing UTAH CODE ANN. § 63-46b-16(4) (1997) (renumbered as 63G-4-403(4) and 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).

⁶⁹*Crookston v. Fire Ins. Exchange*, 817 P.2d 789, 796-97 (Utah 1991) (citing *State v. Knight*, 734 P.2d 913 (Utah 1987)).

⁷⁰*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").

alleged failure by the Executive Secretary to notify Counterpoint or to require Weber County and Moulding to notify Counterpoint results in harmless error.

a. 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.⁷¹ Counterpoint also subsequently challenged the Commercial Permit.⁷²

b. 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.⁷³ 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.⁷⁴

c. 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

⁷¹The 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).

⁷²See *RFAA #1; Amended RFAA #2*.

⁷³Material 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).

⁷⁴*Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (stating a party cannot rely on unsupported bare contentions) (additional citations omitted).

operational requirements and the closure and post closure requirements for both a Class IVb landfill and a Class VI landfill are identical.⁷⁵ 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.⁷⁶ And in addition to the Executive Secretary's approval, the local government, the governor and the legislature must also approve a commercial facility.⁷⁷

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

⁷⁵See UTAH ADMIN. CODE R315-302-3; R315-305-1, -2, -4, -5; R315-308; R315-309; R315-310-1, -2, -4, -5).

⁷⁶See UTAH CODE ANN. § 19-6-108(11).

⁷⁷UTAH CODE ANN. § 19-6-108(3)(c)(i); UTAH ADMIN. CODE R315-310-3(3)(b).

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.⁷⁸ Respondents disagree.⁷⁹ 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*]."⁸⁰

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

⁷⁸*Counterpoint's SJ* at 11-12 (seeking a judgment for its claim stated in *Amended RFAA #2* at 2, 7).

⁷⁹Respondents 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.

⁸⁰*Respondents' Commercial Approval SJ Memo* at 6-7; *Respondents' Commercial Approval SJ* at 1-2.

nonprofit facility.⁸¹ 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.’”⁸²

Counterpoint further submits that the Weber County Landfill is “inherently not for profit” because the facility performs a legitimate government service even when it accepts waste generated outside its jurisdiction.⁸³ Counterpoint subsequently argues the Commercial Permit was improperly issued for the nonprofit Weber County Landfill.

- 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.

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.⁸⁴ The Board then upheld the issuance of the Noncommercial Permit but ordered that the Noncommercial Permit be modified to state:

⁸¹*Amended RFAA #2 at 7; Counterpoint’s SJ at 11.*

⁸²*Counterpoint’s SJ at 7, 11 (Counterpoint’s Material Fact ¶ 61 (citing the 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”) (May 12, 2011) 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.*

⁸³*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.*

⁸⁴*Material Fact ¶ 26.*

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. . . .⁸⁵

The Board's ruling, its findings of fact, and conclusions of law were based upon the Noncommercial Permit issued by the Executive Secretary.⁸⁶ 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 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.⁸⁷

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.⁸⁸ 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.⁸⁹

⁸⁵Material Fact ¶ 28.

⁸⁶See 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").

⁸⁷Material Fact ¶¶ 27, 29.

⁸⁸Material Fact ¶ 16 (JSF ¶ 25).

⁸⁹In 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.

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.⁹⁰ Counterpoint also asserts that the Solid Waste Management Act “allows discretionary access without the imposition of commercial fees.”⁹¹

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; . . .⁹²

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 -123.⁹³ 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.

⁹⁰ *Counterpoint's SJ* at 12 (citing UTAH CODE ANN. § 19-6-503(1)).

⁹¹ *Id.*

⁹² UTAH CODE ANN. § 19-6-503(1) (emphasis added).

⁹³ See also *Respondents' Reply SJ* at ¶ 11.

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 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.⁹⁴

Counterpoint asserts that a commercial facility is a for profit facility that is not excluded under UTAH CODE ANN. § 19-6-102(3)(b).⁹⁵ 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.”⁹⁶ The Act provides no

⁹⁴*Respondents’ Reply to SJ* at ¶¶ 9, 10.

⁹⁵*Counterpoint’s SJ* at 11.

⁹⁶UTAH 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.⁹⁷ 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.⁹⁸ 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.⁹⁹

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.¹⁰⁰ The local government, the governor and the legislature must also authorize any commercial facility.¹⁰¹

Thus, anyone who desires a commercial permit, including a not for profit facility, must demonstrate it meets additional criteria and must obtain additional approvals.

⁹⁷See generally UTAH CODE ANN. § 19-6-102.

⁹⁸Material Fact ¶ 2 (JSF ¶ 3); UTAH CODE ANN. § 19-6-108(3)(a)(I); UTAH ADMIN. CODE R315-301-5(1).

⁹⁹See 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.

¹⁰⁰See UTAH CODE ANN. § 19-6-108(11).

¹⁰¹UTAH CODE ANN. § 19-6-108(3)(c)(i).

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.¹⁰² 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,¹⁰³ 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 "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.

¹⁰²Counterpoint 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.

¹⁰³*W.M. Barnes Co.*, 627 P.2d at 59 (additional citations omitted).

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.¹⁰⁴ 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.¹⁰⁵ 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).¹⁰⁶

Section 19-6-108(3)(c)(I) states that no person may construct any facility listed under Subsection (3)(c)(ii)¹⁰⁷ until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a),¹⁰⁸ approval by the governor and the Legislature.¹⁰⁹

The Commercial Permit application was signed by the Weber County Director of

¹⁰⁴*Amended RFAA #2 at 2-5.*

¹⁰⁵*Respondents' Commercial Approval SJ Memo at 7-8.*

¹⁰⁶*Respondents' Commercial Approval SJ Memo at 6-7.*

¹⁰⁷Subsection (3)(c)(ii) facilities are commercial nonhazardous solid or hazardous waste treatment or disposal facilities. UTAH CODE ANN. § 19-6-108(3)(c)(ii).

¹⁰⁸The 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).

¹⁰⁹UTAH CODE ANN. § 19-6-108(3)(c)(i).

Solid Waste pursuant to the directions of each of the three Weber County Commissioners.¹¹⁰ Counterpoint does not challenge the signed affidavits provided by the Weber County Commissioners.¹¹¹ 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 Director 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).

- D. The Weber County Landfill Cannot Simultaneously Retain Both a Noncommercial Nonhazardous Solid Waste Permit and a 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.¹¹² Counterpoint, thus, seeks a summary judgment ruling that the Noncommercial Permit is either moot or void.¹¹³

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

¹¹⁰Material Facts ¶¶ 3, 25 (*JSF* ¶ 5).

¹¹¹See *Counterpoint's Response* at 15.

¹¹²*Counterpoint's SJ* at 22.

¹¹³*Id.* at 22-25.

for the Weber County Landfill.¹¹⁴ 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.¹¹⁵ The Executive Secretary has issued two nonhazardous solid waste permits for the same landfill.¹¹⁶

2. The Issuance of Two Permits is Unreasonable Where the Commercial Permit and the Noncommercial Permit Contain Conflicting Waste Acceptance Provisions.

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 of a local government pursuant to an agreement with Weber County.¹¹⁷ 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.¹¹⁸

Consequently, compliance with waste acceptance criteria under the Commercial Permit could, nevertheless, simultaneously allow violation of the waste acceptance limitations in the Noncommercial Permit. It is improper for the Executive Secretary to

¹¹⁴Material Fact ¶ 4 (*JSF* ¶ 8).

¹¹⁵Material Fact ¶¶ 14, 21 (*JSF* at ¶¶ 23, 38).

¹¹⁶During 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. 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.

¹¹⁷Material Fact ¶ 28.

¹¹⁸Material Fact ¶ 16 (*JSF* ¶ 25).

issue the Commercial Permit where it allows the existing Noncommercial Permit to be violated.¹¹⁹

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.¹²⁰ By definition, the rules clearly distinguish between a Class IV (noncommercial C&D landfill) and a Class VI (commercial C&D landfill).¹²¹ Thus, in contradiction to the rules, by retaining both the Commercial Permit and the Noncommercial Permit, the Executive Secretary has simultaneously classified the Weber County Landfill as both a commercial and a noncommercial facility.

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.¹²² Notwithstanding whether Counterpoint has standing to unilaterally challenge the Noncommercial Permit, Counterpoint may challenge the validity of the Commercial Permit where that permit

¹¹⁹In its motion for summary judgment, Counterpoint seeks enforcement of the Noncommercial Permit, which is outside the scope of this proceeding. See *Counterpoint's SJ* at 23.

¹²⁰See 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.

¹²¹UTAH 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).

¹²²*Respondents' Commercial Approval Memo SJ* at 16.

authorizes the Permittees to violate the existing Noncommercial Permit.¹²³

5. The Executive Secretary has No Authority to Hold a Permit Dormant.

Respondents cite no legal authority for this unprecedented practice, yet they proclaim that the Executive Secretary has discretion to hold one permit "dormant."¹²⁴ Although Respondents claim that "[i]n no event will the Landfill be operating under two separate permits . . .," Respondents have provided no legal assurances to restrict operations pursuant to a single permit.¹²⁵ Nor have Respondents provided any procedural process in which the Executive Secretary could use his claimed discretion to hold a permit dormant.¹²⁶ To allow the Executive Secretary to arbitrarily determine which permit or permit provisions to hold dormant or enforce would be a clear abuse of discretion and contrary to acceptable regulatory practice. Regardless of the Executive Secretary's suggested intent to minimize costs and preserve resources, it is not reasonable nor permissible to allow such an arbitrary discretion. Accordingly, Respondents' request for a summary judgment ruling that Counterpoint's claim fails as a matter of law is DENIED regarding Counterpoint's claim that the Weber County Landfill

¹²³Although Counterpoint emphasizes 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.

¹²⁴*Respondents' Commercial Approval SJ Memo* at 15.

¹²⁵*Id.* at 14.

¹²⁶Moreover, the record is devoid of any evidence that the Noncommercial Permit is in fact dormant.

cannot be concurrently issued two permits with conflicting permit requirements.¹²⁷

6. Recommendation.

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 revocation of the Noncommercial Permit.¹²⁸ Therefore, the only alternative is to revoke the Commercial Permit to eliminate the arbitrary circumstance of two conflicting permits issued to the same landfill. It is recommended that the Board order the Executive Secretary to revoke the Commercial Permit **only** if the Noncommercial Permit is not terminated within thirty (30) days of the Board's decision.

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,

¹²⁷Counterpoint 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) (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*.

¹²⁸*Order Denying Request for Reconsideration* (July 7, 2011).

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.¹²⁹ Respondents oppose Counterpoint's position and seek a summary judgment ruling.¹³⁰

Section 19-6-108(3)(c)(I) states no person may construct any facility listed under Subsection (3)(c)(ii)¹³¹ until he receives, in addition to and subsequent to local government approval and subsequent to the approval required in Subsection (3)(a),¹³² approval by the governor and the Legislature.¹³³

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.¹³⁴ 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.¹³⁵

Subsequent to the construction of the Landfill under the Noncommercial Permit, Weber County and Moulding sought to reclassify the noncommercial landfill to a

¹²⁹*Counterpoint's SJ at 18-19* (quoting UTAH CODE ANN. § 19-6-108(3)(c)(I)).

¹³⁰*Respondents' Commercial Approval SJ at 1-2.*

¹³¹Subsection (3)(c)(ii) facilities includes a "commercial nonhazardous solid waste disposal facility." UTAH CODE ANN. § 19-6-108(3)(c)(ii)(A).

¹³²The 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).

¹³³UTAH CODE ANN. § 19-6-108(3)(c)(i).

¹³⁴*Counterpoint's SJ at 18.*

¹³⁵Material Fact ¶ 22 (*JSF* ¶ 39).

commercial landfill by filing a commercial permit application.¹³⁶ The Executive Secretary prohibited operation of the Landfill as a commercial landfill pending a final permit and 19-6-108(3)(c)(I) approvals.¹³⁷

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 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.¹³⁸ 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

¹³⁶Material Fact ¶¶ 6, 21 (*JSF* ¶¶ 10, 38).

¹³⁷Material Fact ¶ 15 (*JSF* ¶ 24).

¹³⁸See 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).

of the Weber County Landfill.¹³⁹

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."¹⁴⁰

Accordingly, Respondents' motion for summary judgment is GRANTED and 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.¹⁴¹ 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 § 19-6-503.¹⁴² In addition, Counterpoint claims waste generated within the City of Ogden was illegally disposed at the Weber County

¹³⁹See generally *H.C.R. 018*.

¹⁴⁰Material Fact ¶ 15.

¹⁴¹*Counterpoint's SJ* at 19-20.

¹⁴²*RFAA #1* at 8.

Landfill.¹⁴³ Counterpoint seeks a summary judgment ruling ordering the Executive Secretary to promulgate rules to carry out his obligation under the Solid Waste Management Act.¹⁴⁴ Arguing that Counterpoint's claims concerning the Solid Waste Management Act fail, Respondents seek a summary judgment ruling that 1) the Solid 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.¹⁴⁵ Counterpoint opposes *Respondents' SWMA SJ Memo*.¹⁴⁶ Respondents also oppose Counterpoint's motion for summary judgment regarding the Solid Waste Management Act.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹

¹⁴³*Counterpoint's SJ* at 21.

¹⁴⁴*Id.* at 22.

¹⁴⁵*Respondents' SWMA SJ Memo* at 11.

¹⁴⁶*See Counterpoint's SJ* at 6-10.

¹⁴⁷*Respondents' Opposition to SJ* at 8.

¹⁴⁸*See* UTAH CODE ANN. § 63G-4-102(2)(a) (the Utah Administrative Procedures Act does not govern rulemaking).

¹⁴⁹*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*

Counterpoint's request to order the Executive Secretary or DEQ to conduct rulemaking pursuant to their obligations under the Solid Waste Management Act is outside the scope of this proceeding.¹⁵⁰ If it so desires, Counterpoint may separately petition for rulemaking pursuant to the Utah Administrative Rulemaking Act, 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.¹⁵¹ 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 MOOT and need not be addressed.

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).

¹⁵⁰Counterpoint'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. *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. See UTAH CODE ANN. § 63G-3-601 (Petition for Rulemaking); *Remand in the Matter of South Davis* at 10-12.

¹⁵¹*Remand in the Matter of South Davis* at 10-12.

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 permit application as required by UTAH ADMIN. CODE R315-310-1(4).¹⁵² 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.¹⁵³

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.¹⁵⁴ Finding no genuine issue of material fact,¹⁵⁵ 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

¹⁵²*RFAA #1* at 3.

¹⁵³*Respondents’ Reply* at ¶ 45.

¹⁵⁴*Counterpoint Response* at 14.

¹⁵⁵See *Overstock.com, Inc.*, 2008 UT 55, ¶ 12 (stating a party cannot rely on unsupported bare contentions that raise no material fact).

Permit.¹⁵⁶ In its comment, Counterpoint argues that it had not been properly notified about the proposed Commercial Permit application.¹⁵⁷ 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]."¹⁵⁸ Counterpoint failed to respond to Respondents' motion for summary judgment or assert why one day was inadequate to consider its comment.¹⁵⁹ 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.¹⁶⁰ Counterpoint then asserts that because the Commercial Permit was not final, the legislature and governor could not consider approving the Commercial Permit.¹⁶¹ Respondents argue the Commercial Permit was properly submitted to the legislature.¹⁶²

Whether the Permittees could seek legislative and gubernatorial approval is a

¹⁵⁶RFAA #1 at 9.

¹⁵⁷Material Fact ¶ 13 (JSF ¶ 21).

¹⁵⁸Respondents' Due Process SJ Memo at ¶ 30.

¹⁵⁹See *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.)

¹⁶⁰RFAA #1 at 2.

¹⁶¹*Id.* at 9.

¹⁶²Respondents' Due Process SJ Memo at 11.

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.¹⁶³

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.

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

¹⁶³UTAH ADMIN. CODE R315-12-2.2(b) (2010). (Rule in effect when Counterpoint filed *RFAA #1* and Amended *RFAA #2*.)

Moulding & Sons Landfill, LLC (“Moulding”), as operator, of the proposed Weber County Landfill.¹⁶⁴ The Noncommercial Permit authorized Weber County and Moulding to construct and operate a noncommercial nonhazardous solid waste, construction/demolition debris (“C&D”) landfill.¹⁶⁵

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.¹⁶⁶ In a separate adjudicatory proceeding, Counterpoint was granted standing to intervene to raise issues concerning the Noncommercial Permit.¹⁶⁷
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.¹⁶⁸ 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.¹⁶⁹ The “Modification” box was checked on the application.¹⁷⁰
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.¹⁷¹ The Executive Secretary did not create “an interested party list” for the Weber County, Class VI Commercial Permit application.¹⁷²
5. The draft Weber County Landfill Class VI, Commercial Permit was

¹⁶⁴Material Fact ¶¶ 2, 4.

¹⁶⁵Material Fact ¶ 5.

¹⁶⁶Material Fact ¶ 24.

¹⁶⁷Material Fact ¶ 30.

¹⁶⁸Material Fact ¶¶ 6, 22.

¹⁶⁹Material Fact ¶¶ 3, 25.

¹⁷⁰Material Fact ¶ 23.

¹⁷¹Material Fact ¶ 7.

¹⁷²Material Fact ¶ 8.

subject to a public comment period between January 28 and February 28, 2011.¹⁷³

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.¹⁷⁴ 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.¹⁷⁵
7. On March 1, 2011, the Executive Secretary issued the Class VI Commercial Permit for the existing Weber County Landfill.¹⁷⁶ Subject to limitations on the type of waste it can accept, the Commercial Permit allows the Weber County Landfill to accept wastes from anywhere.¹⁷⁷ The Noncommercial Permit was in effect at the time that the Commercial Permit was issued and neither permit has been revoked.¹⁷⁸
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.¹⁷⁹ 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.¹⁸⁰ On March 28, 2011, the Executive Secretary granted approval for the Weber County Landfill to operate pursuant to its Class VI Commercial Permit.¹⁸¹

¹⁷³Material Fact ¶ 11.

¹⁷⁴Material Fact ¶ 8.

¹⁷⁵Material Fact ¶¶ 11, 13; *Respondents Due Process SJ Memo* at ¶¶ 13, 29.

¹⁷⁶Material Fact ¶¶ 14, 22.

¹⁷⁷Material Fact ¶ 16.

¹⁷⁸Material Fact ¶ 21.

¹⁷⁹Material Fact ¶ 15.

¹⁸⁰Material Fact ¶ 17.

¹⁸¹Material Fact ¶ 18.

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.¹⁸²
10. 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 Hazardous Waste Control Board ("Board") for their consideration.¹⁸³
11. Pursuant to an order issued on June 20, 2011, in the separate adjudicatory proceeding for the Noncommercial Permit, the Board: a) upheld the Noncommercial Permit; and b) with an ordered modification, accepted, approved, and adopted the *Noncommercial Permit Memorandum and Recommended Order*.¹⁸⁴

Need to Notify Counterpoint.

12. 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.¹⁸⁵ 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.¹⁸⁶ Subsection R315-310-3(2)(a) applies to "[e]ach permit application."¹⁸⁷ Therefore, the rule is not ambiguous regarding which permit applications must comply with subsection R315-310-3(2).¹⁸⁸

¹⁸²RFAA #1; Amended RFAA #2.

¹⁸³Material Fact ¶ 19; see generally, ALJ's *Noncommercial Permit Memorandum and Recommended Order*.

¹⁸⁴Material Fact ¶ 30.

¹⁸⁵UTAH ADMIN. CODE R315-310-3; see *infra* Part VI.A.2.a.(2).

¹⁸⁶See Part VI.A.2.a.(2).

¹⁸⁷UTAH ADMIN. CODE R315-310-3(2)(a).

¹⁸⁸See Part VI.A.2.a.(1).

13. 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).¹⁸⁹ 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).¹⁹⁰ 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.¹⁹¹
14. The section caption for R315-310-3 provides no clarification to which "persons" should receive the subsection R315-310-3(2)(b) letters.¹⁹²
15. At the time when Weber County and Moulding filed an application for a commercial permit, the Weber County Landfill became a "proposed" commercial landfill.¹⁹³
16. Both Class IVb noncommercial and Class VI commercial landfills must meet identical performance standards, operating requirements, and closure/post closure requirements.¹⁹⁴ 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.¹⁹⁵
17. An applicant must also 1) demonstrate its commercial nonhazardous solid waste facilities is beneficial and necessary, and 2) receive approval from the Executive Secretary, the local government, the governor and the legislature.¹⁹⁶

¹⁸⁹ See UTAH ADMIN. CODE R315-310-3(2)(a)(ii).

¹⁹⁰ See UTAH ADMIN. CODE R315-310-3(2)(b).

¹⁹¹ See UTAH ADMIN. CODE R315-310-3(3).

¹⁹² See Part VI.A.2.a.(1).

¹⁹³ See Part VI.A.2.b.

¹⁹⁴ See Part V.A.4.b.

¹⁹⁵ *Id.*

¹⁹⁶ UTAH CODE ANN. §§ 19-6-108(3)(c)(I), -(11); UTAH ADMIN. CODE R315-310-3(3)(b).

18. Counterpoint learned about the draft Commercial Permit and filed a comment on the last day of the public comment period.¹⁹⁷ In this proceeding, Counterpoint has challenged whether the Executive Secretary adequately authorized the Commercial Permit pursuant to the additional statutory requirements for commercial facilities.¹⁹⁸ 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.¹⁹⁹ Counterpoint has not claimed the Weber County Landfill is not beneficial or necessary.²⁰⁰
19. 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.²⁰¹

Nonprofit Facility Under the Noncommercial Permit.

20. 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 boundaries of the County or waste generated outside the boundaries of Weber County solely under contract with that local government.²⁰²
21. The Solid Waste Management Act grants a public entity the discretion to provide a solid waste management facility to handle

¹⁹⁷Material Fact ¶ 13.

¹⁹⁸See Part VI.A.4.b; see also Amended RFAA #2.

¹⁹⁹*Id.*

²⁰⁰*Id.*

²⁰¹See Part V.A.4.

²⁰²Material Fact ¶¶ 26, 27, 28, 29.

solid waste generated outside its jurisdiction.²⁰³ 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.²⁰⁴ Counterpoint raises no material facts to demonstrate the Weber County Landfill is a nonprofit facility.²⁰⁵

22. 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.²⁰⁶ Any facility issued a commercial permit must meet all applicable permitting requirements for a commercial nonhazardous solid waste facility.²⁰⁷ 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.²⁰⁸

Two Simultaneous Landfill Permits.

23. The Executive Secretary issued the Noncommercial Permit and the Commercial Permit for the Weber County Landfill.²⁰⁹ Neither permit has been revoked.²¹⁰ 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.²¹¹ The waste acceptance provisions in the Commercial Permit could allow the violation of the waste restriction provision in the Noncommercial Permit.²¹²

²⁰³UTAH CODE ANN. § 19-6-503.

²⁰⁴Part VI.B.1.

²⁰⁵*Id.*

²⁰⁶Part VI.B.2.

²⁰⁷*Id.*

²⁰⁸*Id.*

²⁰⁹See Findings of Fact ¶ 7.

²¹⁰*Id.*

²¹¹*Id.* ¶¶ 7, 8, 20.

²¹²See Part VI.D.2.

24. The solid waste rules contemplate that a facility may change classifications, including from a noncommercial to a commercial facility.²¹³ 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.²¹⁴

Construction of the Weber County Landfill.

25. The Weber County Landfill was initially constructed as a noncommercial facility pursuant to the Noncommercial Permit.²¹⁵ Weber County and Moulding filed an application for a commercial permit for the previously constructed Weber County Landfill.²¹⁶ The local government, in addition to the Executive Secretary, the legislature and the governor, must approve a commercial facility prior to construction.²¹⁷
26. The Solid and Hazardous Waste Act does not address the commercial permit approval process for an existing noncommercial facility.²¹⁸ The Executive Secretary barred operation as a commercial landfill prior to legislative and gubernatorial approval.²¹⁹
27. 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."²²⁰

Miscellaneous.

28. 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)

²¹³ See Part VI.D.2. (citing UTAH ADMIN. CODE R315-310-1(4)).

²¹⁴ See Part VI.D.2.

²¹⁵ See Findings of Fact ¶¶ 1, 3.

²¹⁶ *Id.* ¶ 3.

²¹⁷ UTAH CODE ANN. § 19-6-108(3)(c)(i).

²¹⁸ See *generally* UTAH CODE ANN. § 19-6-108.

²¹⁹ See Findings of Fact ¶ 8.

²²⁰ See Part VI.E.

that the Executive Secretary failed to adequately consider Counterpoint's public comment regarding the draft Commercial Permit.²²¹

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).²²² 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.²²³ 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.²²⁴
4. The term "proposed landfill" does not exclude the application of UTAH ADMIN. CODE R315-310-3(2) to the Commercial Permit application.²²⁵
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."²²⁶

²²¹Part VI.G.1. and 2.

²²²Part VI.A.2.a.(1).

²²³Part VI.A.3.

²²⁴*Id.*

²²⁵Part VI.A.2.b.

²²⁶Part VI.A.2.c.

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.²²⁷ 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).²²⁸
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.²²⁹
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.²³⁰
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.²³¹
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.²³²
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.²³³
12. It is reasonable for the Executive Secretary to determine that the filing of

²²⁷*Id.*

²²⁸Part VI.A.2.c.

²²⁹Part VI.A.4.a.

²³⁰Part VI.A.5.

²³¹Part VI.B.1.a.

²³²Part VI.B.1.

²³³Part VI.B.2.

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.²³⁴

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.²³⁵
14. Claims arising from the enforcement of the Class IVb noncommercial nonhazardous waste permit are outside the scope of this proceeding.²³⁶
15. The Executive Secretary has no authority to hold a permit dormant that was issued pursuant to UTAH CODE ANN. § 19-6-108.²³⁷
16. The Executive Secretary's decision to issue two concurrent permits, the Commercial Permit and the Noncommercial Permit, is arbitrary, an abuse of discretion, and not permitted by law in that it 1) allows the Executive Secretary to arbitrarily determine whether to hold dormant the Noncommercial Permit or the Commercial Permit; and 2) allows Landfill operation pursuant to the waste acceptance provisions in the Commercial Permit to violate the waste acceptance provisions in the concurrent Noncommercial Permit.²³⁸
17. 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.²³⁹
18. The relief requested by Counterpoint seeks to order the Executive Secretary to promulgate rules pursuant to his obligation under the Solid

²³⁴Part VI.C.

²³⁵Part VI.D.

²³⁶*Id.*

²³⁷*Id.*

²³⁸*Id.*

²³⁹See Part VI.E.

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).²⁴⁰

19. Relief requested by Counterpoint seeks enforcement of a municipal ordinance of Ogden City, and is, therefore, outside the scope of this adjudicatory proceeding.²⁴¹
 20. 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 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;

²⁴⁰ See Part VI.F.

²⁴¹ *Id.*

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

4) that the Executive Secretary reviewed the Commercial Permit application as an application for a new permit; 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 rulings:

1) 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;

2) that the Executive Secretary has authority to postpone revocation of a conflicting permit and hold a permit dormant; and

3) 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)©; 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

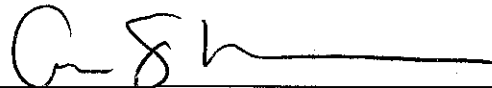
ORDERED that the joint motion of Respondents the Executive Secretary, Weber County and Moulding & Sons, LLC's, captioned *Respondents' Motion for Summary Judgment Concerning the Solid Waste Management Act*, dated February 3, 2012, is GRANTED; and it is

ORDERED that the Executive Secretary notify the Utah Solid and Hazardous Waste Control Board within thirty (30) days of the conclusion of the Board's hearing to consider the Administrative Law Judge's *Memorandum and Recommended Order* in this matter that he has either 1) terminated or 2) not terminated the Weber County Class IVb noncommercial nonhazardous solid waste permit, #0901; and it is

ORDERED that the Weber County Class VI commercial nonhazardous solid waste permit #1101 is AFFIRMED if the Executive Secretary notified the Solid and Hazardous Waste Control Board, pursuant to the preceding paragraph, that the Weber County Class IVb noncommercial nonhazardous solid waste permit #0901 has been terminated, or the Weber County Class VI commercial nonhazardous solid waste permit #1101 is REVOKED; 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.

DATED this 25th day of October, 2012.



Connie S. Nakahara
Administrative Law Judge
160 East 300 South
PO Box 140873
Salt Lake City, UT 84114-0873
cnakahara@utah.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2012, I caused a copy of the foregoing *Memorandum and Recommended Order (Recommending the Board Grant, in part, and Deny, in part, Petitioner Counterpoint Construction Company's Motion for Summary Judgment; Grant, in part, Deny, in part, Respondents' Motions for Summary Judgment)* to be delivered by electronic mail:

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Connie S. Nakahara

EXHIBIT 1

Exhibit A, 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

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:

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.

13. On January 3, 2011, Kerry Gibson replaced Kenneth Bischoff as a Weber County 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 January 28, 2011 and February 28, 2011.

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 10 day of January, 2012

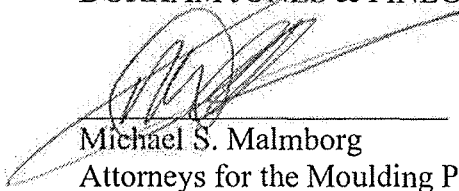
Brice N. Penrod, President
Counterpoint Construction Company

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, 2012



Brice N. Penrod, President
Counterpoint Construction Company

MARK L. SHURTLEFF
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Raymond D. Wixom
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David C. Wilson
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Attorney for Weber County

DURHAM JONES & PINEGAR

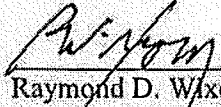
Michael S. Malmberg
Attorneys for the Moulding Parties

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

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Michael S. Malmborg
Attorneys for the Moulding Parties

CERTIFICATE OF SERVICE

I hereby certify that on this 10 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

(X) Email

Gary C. Laird, Solid Waste Director
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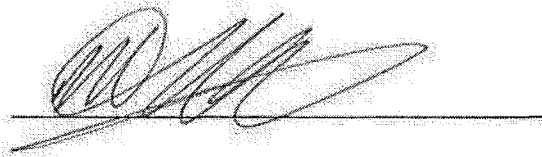
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A handwritten signature in dark ink, appearing to read 'RWixom', is written over a horizontal line.