

1997

V-1 Oil Company v. Department of Environmental Quality and the State of Utah : Brief of Respondents

Utah Court of Appeals

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**UTAH COURT OF APPEALS
BRIEF**

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DOCKET NO. 970315-CA

IN THE UTAH COURT OF APPEALS

V-1 OIL COMPANY, :

Appellant/Petitioner, :

v. :

Case No. 970315-CA

DIVISION OF ENVIRONMENTAL :

RESPONSE AND REMEDIATION, THE :

DEPARTMENT OF ENVIRONMENTAL :

QUALITY AND THE STATE OF UTAH, :

Appellee/Respondents.

Priority 14

BRIEF OF RESPONDENTS

Appeal from a decision of the
Utah Solid and Hazardous Waste Control Board
Jeff Utley, Board Chair

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FILED

DEC 29 1997

COURT OF APPEALS

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STATEMENT OF JURISDICTION

V-1 Oil Company filed its petition for review of the final Order of the Department of Environmental Quality's Solid and Hazardous Waste Control Board after a formal adjudicative proceeding. This Court has jurisdiction over the petition by virtue of Utah Code Ann. § 63-46b-16 (1997) and § 78-2a-3(2)(a) (1996).

ISSUES PRESENTED/STANDARDS OF REVIEW

1. In challenging the findings of the Solid and Hazardous Waste Control Board ("Board"), has the Petitioner marshaled the supportive record evidence and shown that the findings are not supported by substantial evidence when viewed in light of the whole record?

Petitioner must marshal all of the evidence supporting the findings of the Board and then show that, despite all of the supportive evidence, the finding is not supported by substantial evidence. Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993); Mt. Fuel Supply v. Public Serv. Comm'n, 861 P.2d 414, 424-425 (Utah 1993); First Nat'l Bank of Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

2. Did the Board correctly determine that the executive secretary acted in accordance with the Underground Storage Tank Act, Utah Code Ann. §§ 19-6-401 to 429 (1995 and Supp. 1997), and Utah Admin. Code, R311-202 (1995) in issuing the Emergency Order and the Notice of Noncompliance?

The Board's application of the law to the facts may be reviewed by the Court for correctness of the Board's determination that the executive secretary was acting within

the scope of the statutes and regulations. Drake v. Industrial Comm'n, 939 P.2d 177, 181-82 (Utah 1997).

3. Did the Board correctly apply Utah law in requiring V-1, as the party responsible for a release from an underground storage tank ("UST"), to take abatement, investigative and/or corrective action?

The Board's application of the law to the facts may be reviewed by the Court for correctness of the Board's determination that the executive secretary was acting within the scope of the statutes and regulations. Drake v. Industrial Comm'n, 939 P.2d 177, 181-82 (Utah 1997).

4. Was the Board's determination that, in accordance with the Utah Underground Storage Tank Act, Utah Code Ann. § 19-6-420 and Utah Code Ann. R311-202, if the owner or operator fails to take any of the abatement, investigative, or corrective action ordered by the executive secretary, the executive secretary may use UST fund monies to perform investigative, abatement, and/or corrective action, a correct application of the law?

The Board's application of the law to the facts may be reviewed by the Court for correctness of the Board's determination that the executive secretary was acting within the scope of the statutes and regulations. Drake v. Industrial Comm'n, 939 P.2d 177, 181-82 (Utah 1997).

5. When viewed as a whole, do the findings of fact, conclusions of law and order issued by the Board "disclose the logical process employed to permit meaningful

review?" Commercial Carriers v. Industrial Comm'n of Utah, 888 P.2d 707, 711 (Utah App. 1994).

Whether a trial court's findings of fact and conclusions of law are adequate to permit appellate review is a legal question. LaSal Oil v. Department of Env'tl. Quality, 843 P.2d 1045, 1047 (Utah App. 1992), citing Adams v. Board of Review, 821 P.2d 1, 4 (Utah App. 1991).

6. Did V-1 Oil Company waive its arguments claiming due process violations in the issuance of the Notice of Noncompliance by not presenting any argument concerning due process violations in the issuance of the Notice of Noncompliance at the administrative hearing or in its Appellate Brief?

If a party does not argue an issue, the "Court will not engage in constructing arguments out of the whole cloth." State v. Mace, 921 P.2d 1372, 1376 (Utah 1996, citing State v. Lafferty, 749 P.2d 1239, 1247 * n. 5 (Utah 1988), cert. denied, 504 U.S. 911, 112 S. Ct. 194 (1992).

DETERMINATIVE STATUTES AND RULES

1. Utah Underground Storage Tank Act, Utah Code Ann. §§ 19-6-401 to - 429 (1995 & Supp. 1997).
2. Environmental Response and Remediation, Underground Storage Tanks, Utah Admin. Code R311-200 to -212 (1995).

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises under the Utah Underground Storage Tank Act ("Act"), Utah

Code Ann. §§ 19-6-401 to -429 (1995 & Supp. 1997) and Utah Admin. Code R311-202 ("Rules"). It involves a determination by the Solid and Hazardous Waste Control Board to uphold the actions of the Executive Secretary (UST) Solid and Hazardous Waste Control Board ("executive secretary") in issuing an Emergency Order and a Notice of Noncompliance. In the Emergency Order the executive secretary found that V-1 was responsible for a release of petroleum on and outside of its property. The release constituted an emergency situation. V-1 failed to comply with the Order to take the statutorily required steps to perform investigative, abatement, or corrective action to deal with the contamination; therefore, the executive secretary issued a Notice of Noncompliance to V-1. Issuance of the Notice of Noncompliance allowed the executive secretary to use public monies to investigate and abate the release after V-1 failed to act.

Under the Act and the Rules, the owner or operator of an underground storage tank which has caused a release is required to take action in response to the release from the UST system. Utah Code Ann. § 19-6-420 (1995 & Supp. 1997); Utah Admin. Code R311-202, which adopts 40 C.F.R. § 280 by reference. In the case of an ongoing emergency release which is impacting people and the on and off-site environment, an immediate response is even more vital. Whether or not it is an emergency situation the executive secretary may order the owner or operator to take abatement, investigative or corrective action, including the submission of a corrective action plan. Id. If the owner or operator fails to take any of the abatement, investigative, or corrective actions ordered by the executive secretary, the executive secretary may use

UST fund monies to perform investigative, abatement, or corrective action. Utah Code Ann. § 19-6-420 (2)(b) (1995 & Supp. 1997).

B. Course of the Proceedings and Statement of Facts.

On Friday, January 12, 1996, A & A General Contractors ("A & A"), located at 328 West Whitney Ave. (1455 South), complained to Salt Lake City Public Utilities ("City") about strong concentrations of vapors in the A & A building. R. 262. The City found that a nearby sewer line, running east-west on Whitney Ave., had a "very strong" gasoline smell, and that the surface of the water in the sewer line was covered with a sheen of gasoline. Id. The City workers flushed the sewer lines. Id. A & A complained about the gasoline smell again on January 15 and 16, 1996, and the City again flushed the sewer. R. 252-256. City workers noted that the only underground storage tank facility in the area was a V-1 station located about 100 yards from the sewer line. R. 255. On January 16, 1996, the City reported the gasoline in the sewer to the Division of Environmental Response and Remediation ("DERR" or "division") and asked DERR if the V-1 facility had a history of past releases. R. 255. The City made a video of the inside of the sewer, which disclosed petroleum entering and flowing through the sewer. R. 254-255. To alleviate the threat posed by the release, the City and later DERR, flushed water through the sewer from January until June 1996. R. 873.

DERR records revealed that although there had been 14 UST sites in the general vicinity of the sewer, 13 of the sites were "closed"¹ between 1967 and 1992,

¹ "Closed" means an underground storage tank no longer in use that has been: (a) emptied and cleaned to remove all liquids and accumulated sludges; and

and the only facility still in use was V-1 Oil. R. 250-251, 844-445. DERR records showed that from 1985 through 1995, there had been a number of reports of releases and leaks at the V-1 facility, and the soil and groundwater had, on several occasions, been found to be heavily contaminated with petroleum. R. 284, 287, 288, 293, 294. DERR records showed that a month before the sewer release, V-1 removed two paved-over 6000 gallon underground storage tanks from the facility and the area around the tanks was found to be contaminated with petroleum. R. 266-280. One of the tanks had holes in it and both tanks contained varying levels of a mixture of gasoline and water. Id. Also, the month before the release into the sewer, V-1 confirmed a release at the facility. R. 384. Regional groundwater flow maps provided to DERR show V-1 to be located up-gradient from the point at which the contamination was entering the sewer line. R. 214-216.

Based upon the factors stated above and in accordance with Utah Code Ann. §§ 19-6-404 and -420 and Utah Admin. Code R311-202, on January 19, 1996, the executive secretary issued an Emergency Order requiring V-1 to take abatement, investigative, and corrective action. R.1-5. V-1 retained a consultant, TriTechnics Corporation, ("TriTechnics") to determine whether V-1 was the source of the contamination entering the sewer on Whitney Ave. V-1's consultant submitted a report to DERR in a timely fashion as ordered, but the report did not completely comply with the Order. R. 799. V-1 did not outline a plan to conduct any abatement activities to

(b) either removed from the ground or filled with an inert solid material. Utah Code Ann. § 19-6-401(7) (1995 & Supp. 1997).

lessen the impact to the surrounding area or to alleviate the emergency situation as required in the Order. Id. The report submitted by V-1's consultant stated that the inventory reports kept at the V-1 facility showed an almost 2,300 gallon loss of petroleum in the months before the release into the sewer. R. 265. V-1's consultant recommended additional site characterization and abatement activities both on and outside of the V-1 property. R. 629, 638. V-1 did not authorize or perform these actions. R. 629, 638.

In phone conversations and correspondence which took place between January 19 and January 23, 1996, DERR was informed by V-1 counsel that V-1 would not take the abatement and corrective action required by the Order. R. 227, 235, 796. DERR had been barred by V-1 counsel from speaking with V-1's consultants or employees. R. 795. TriTechnics had been instructed not to contact DERR or its representatives. R. 613. Therefore, DERR could not ascertain what, if any, steps V-1 might be taking to comply with the Emergency Order. Id. DERR knew that V-1 had not complied with the Emergency Order to take abatement action and that petroleum was continuing to flow into the sewer. R. 796-97. Therefore, on January 25, 1996, in accordance with Utah Code Ann. § 19-6-420 (2) (b), the executive secretary issued a Notice of Noncompliance advising V-1 that - due to its refusal to take abatement action in the face of an imminent, direct and substantial threat to the public health and environment - DERR would use public monies and commence abatement, investigative and corrective action. R. 008-010. On February 1, 1996, V-1 filed a Request for Agency Review asking the Board to dismiss the Emergency Order and Notice of Noncompliance. R.

014. A formal administrative hearing was held before the Utah Solid and Hazardous Waste Control Board on February 13, 1997. On April 17, 1997, the Board issued an Order upholding the executive secretary's issuance of the Emergency Order and the Notice of Noncompliance. R. 1094.

SUMMARY OF THE ARGUMENT

The Board's Order should be affirmed because V-1 has not presented the Court with any reviewable issues. The majority of the issues posed by V-1 in its appellate brief are not issues properly before this Court: V-1 has misconstrued and misinterpreted the Findings of Fact, Conclusions of Law and Order issued by the Board. V-1 attributes various "findings" and "conclusions" to the Board and then presents arguments concerning those "findings" and "conclusions." However, most, if not all, of what V-1 calls the "findings" and "conclusions" of the Board are actually a summary of the factors relied upon by the executive secretary in issuing the Emergency Order and Notice of Noncompliance and by the Board in upholding his action.

In its Request for Agency Action, V-1 requested that the Board dismiss the Emergency Order and Notice of Noncompliance. R.013. The Board responded by finding that the executive secretary was in compliance with the Act and the Rules in issuing the Emergency Order and the Notice of Noncompliance and upheld his actions. R. 891-900. The Board further found that based upon the geo-probe data, monitoring well data, and other factors, there was sufficient support for the executive secretary to have found that V-1 is a source of the contamination on the V-1 property and in the sewer line. Id. The Board did not find that all of the factors relied upon by the executive

secretary were unquestionable. Nor did the Board find that there could not have been another contributing party. However, the Board was not asked to rule upon the possibility of contribution from another source. The Board issued an order based upon the issue submitted by V-1 and concluded that the executive secretary acted in accordance with the Act and the Rules.

V-1 is asking this Court to review and reverse an administrative proceeding other than the proceeding which went before the Board. V-1 is asking this Court to regard this matter as if the Board had made an apportionment of liability. The Board did not make such an apportionment and the Court cannot overrule a determination that was not made by the Board.

The evidence which the executive secretary reviewed and which was presented to the Board was sufficient for the Board to uphold the issuance of the Emergency Order and Notice of Noncompliance. V-1 has failed to marshal the evidence in support of the Board's ruling as required, but the evidence is still substantial. V-1 has also failed to cite the pertinent sections of the Act and the Rules in its analysis of the evidence. The sections V-1 references are misapplied or misinterpreted. The federal regulation V-1 cites in making its assertions is 40 C.F.R. § 280.50. This section is inapposite because it delineates the actions to be followed by an owner or operator in the case of a *suspected* release. The releases on and outside V-1's property are *confirmed* releases and the applicable federal regulation is 40 C.F.R. § 280.60. Additionally, V-1 ignores the facts that a federal regulation does not take precedence over a state statute in a delegated state and that it is the UST Act with which the

executive secretary is required to comply. Despite this the executive secretary acted in compliance with the relevant federal regulation, 40 C.F.R. § 280.60.

V-1's arguments concerning what constitutes a release must also be disregarded. V-1 does not rely upon the statutory definition of "release" but instead uses its own incorrect definition. Therefore, all arguments presented by V-1 which rely on its definition of a release are fatally flawed. Finally, the fifth issue presented in V-1's brief must be disregarded because due process in the issuance of the Notice of Noncompliance was not an issue presented to the Board nor argued in V-1's brief.

There can only be one genuine issue before this Court. That issue is whether or not the Board erred in finding that the Executive Secretary abided by the Act and the Rules in issuing the Emergency Order and the Notice of Noncompliance. However, V-1 has not asked this Court to review this issue. Because V-1 has not presented this Court with a reviewable issue, the Court must affirm the Order of the Board.

ARGUMENT

I. PETITIONER'S ARGUMENTS ASSERTING THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE NOT SUPPORTED BY THE EVIDENCE, ARE INSUFFICIENT, ARE INCOMPETENT OR ARE ARBITRARY AND CAPRICIOUS MUST BE DISMISSED BECAUSE PETITIONER HAS MISCONSTRUED AND MISINTERPRETED THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ISSUED BY THE BOARD.

A. Petitioner has failed to distinguish between "Findings of Fact" and "Conclusions of Law" and the elements relied upon by the executive secretary in issuing the Emergency Order and Notice of Noncompliance.

In the brief submitted to this court V-1 attributes various "findings" and

"conclusions" to the Board and then presents arguments concerning those "findings" and "conclusions." However, most, if not all, of what V-1 asserts are the "findings" and "conclusions" cannot be attributed to the Board. The conclusions the Board reached are as follows: (1) that the geo-prob and monitoring well data, and other factors support the Executive Secretary's finding that V-1 is a source of the petroleum contamination found on the V-1 property and which entered the sewer line on Whitney Avenue and therefore the Emergency Order was properly issued under Utah Admin. Code R311-202, which incorporates by reference 40 CFR Part 280; (2) that the Executive Secretary complied with all of the requirements of the Underground Storage Tank Act in issuing the Emergency Order because Utah Code Ann. § 19-6-404 allows the Executive Secretary to issue notices and orders and § 19-6-420 states that in case of a release the Executive Secretary shall name as may responsible parties as reasonably possible and may order the owner or operator to take abatement, investigative or corrective action; and (3) that issuance of the Notice of Noncompliance was authorized by Utah Code Ann. § 19-6-420 (2)(b). R. 892-93.

All of the other so-called conclusions that V-1 attributes to the Board were not conclusions but a summary of the evidence relied upon by the executive secretary in issuing the Emergency Order and Notice of Noncompliance. In the Board's Findings of Fact, Conclusions of Law and Order, the sections entitled Findings of Fact and Conclusions of Law are where the Board recounted what occurred after A & A noticed and reported vapor in its building. Many of these factors are undisputed, i.e., that V-1 owns or operates USTs, that V-1 removed two abandoned USTs in December 1995 or

that there were inventory losses from V-1's USTs in October, November and December 1995. Brief of Petitioner at 7-8.

It was made clear at the hearing that evidence which was presented to the Board was intended to demonstrate the information that the executive secretary relied upon in deciding to issue the Emergency Order and Notice of Noncompliance. R. 816. Despite this, V-1 misinterprets or misapplies much of the evidence. For example; V-1 claims that the "only" evidence presented to the Board in support of what V-1 claims was the Board's conclusion that "groundwater flow is lightly [sic] northwest in the direction of the Jordan River" was a groundwater flow map. Brief of Petitioner at 19. By doing so V-1 ignores all of the evidence from DERR's witnesses and its own witness that V-1 is up-gradient from the release. R. 246-49, 616, 620, 725, 803. Further, the Board did not "find" or "conclude" that the groundwater flow is to the northwest. The Board stated that "[r]egional groundwater flow maps indicate that V-1 is up-gradient from the point at which contamination was entering the sewer line." R. 898. The Board found/concluded that a regional groundwater map that the executive secretary reviewed in deciding to issue the Emergency Order indicated that in the area of the release the direction of the groundwater is slightly northwest in the direction of the Jordan River. Finally, the indication of the groundwater map was verified by charts of the release and testimony. R. 246-49. (Charts attached herein as attachment 1).

- i. **V-1 did not ask the executive secretary, the Board or the lower court for an apportionment of liability in accordance with Utah Code Ann. § 19-6-424.5.**

In its appeal, V-1 is asking the Court of Appeals to review and reverse an

administrative apportionment of liability. This is not what V-1 requested in its Request for Agency Review by the Board nor the proceeding over which the Board presided. The proceeding before the Board was a review of whether the Emergency Order and Notice of Noncompliance were issued in accordance with the applicable statutes and regulations.

At the hearing there was some discussion as to what V-1 was asking of the Board. R. 588. The Board relied upon V-1's Request for Agency Action in determining that V-1 was asking the Board to dismiss the Emergency Order and Notice of Noncompliance. R.012-014. The Request for Agency Action asked that "the agency grant relief by dismissing the actions instituted in the Emergency Order, as well as the Notice of Noncompliance . . ." R. 013. The Board responded by finding that the executive secretary was in compliance with the law in issuing the Order and Notice and upheld his actions. R. 892-93.

In its appellate brief V-1 seems to misunderstand what it asked of the Board and based upon that mistake, V-1 is asking this Court to overrule a determination which the Board did not make. V-1 is asking the Court to review an apportionment of liability. The Board concluded that the evidence the executive secretary relied upon in issuing the Emergency Order and Notice of Noncompliance was sufficient to show that V-1 is a source of the release. The Board did not rule on whether other owners or operators may or may not have contributed to the release. Nor did the Board apportion responsibility. It is not possible for the Court to address the question of another owner's or operator's contribution to the release because the Board did not make a ruling on

this issue. This fact was specifically stated at the hearing by a Board member before the Board voted: "The issue before this board isn't an apportionment of liability for remediation . . . I believe on the basis of the evidence that's been provided that it was reasonable for the division to issue the emergency order. . ." R. 588.

The usual method for determining responsible parties is outlined in section 19-6-424.5 of the Act. The executive secretary provides notice and an opportunity to be heard to all parties whom he is aware are responsible for a release. The executive secretary is not required to name all possible parties, but he must name all of the parties that the evidence before him shows are responsible or contributed to the release. It is not a defense to the action if the executive secretary fails to name a party. Utah Code Ann. § 19-6-424.5 (3) (1995).

The Act is intended to protect the public and the environment. A release from an underground storage tank is a release of a hazardous material that is a threat to the public and the environment and needs to be dealt with quickly. Whether or not the release is an emergency the executive secretary is not required to waste months in a lengthy, detailed investigation that names all responsible parties and proves their responsibility beyond question. The executive secretary uses the abundant information contained in DERR files and any other relevant information he finds or which is provided to him in determining the responsible parties.²

² DERR has comprehensive files concerning USTs. Information concerning releases, the age of tanks, the surrounding soils, maintenance of USTs, yearly inspections of the USTs, inventory records, other USTs in the area and the history of those USTs, etc. are all kept on file. The Act and the Rules provide numerous

After the executive secretary determines the responsible parties, Utah Code Ann. § 19-6-424.5 provides a method for other responsible parties to be named and for an apportionment of liability to be made in an administrative proceeding or a judicial action. The same methods and standards apply if the determination and apportionment are made by the Board or a court. Utah Code Ann. § 19-6-424.5 (2) (a) (1995).

Responsible parties may present evidence concerning their degree of responsibility, and each party bears the burden of proving its own proportion of responsibility for the release. Utah Code Ann. § 19-6-424.5 (2)(b)(i) & (ii) (1995). If a party does not prove its proportionate contribution, the court, the Board, or the executive secretary shall apportion liability to the responsible party or parties based on the available evidence. Id. In the case before this Court, V-1 did not ask the Board for an apportionment of liability. Rather, they asked the Board to dismiss the Emergency Order and the Notice of Noncompliance. However, even if V-1 had requested an apportionment of liability, the evidence was not sufficient to demonstrate that another party was responsible for the release but instead demonstrated that V-1 is a source.

methods by which information concerning the status of UST facilities is gathered and maintained. All UST owners and operators were required to provide information about USTs to DERR in 1989. DERR is to be notified before USTs are installed or removed or closed. UST sites are inspected yearly. There are procedures for a site assessment protocol. All releases are required to be reported and corrective action plans submitted prior to remediating a site. The executive secretary will also look at factors such as soil composition, groundwater flow, the presence of utility lines, sewers and other conduits, weather conditions, etc.

ii. Parties who are proved to not be responsible or who expend a non-proportionate share for a release are protected by the Act.

The Act is intended to protect the public and the environment by ensuring that a release of petroleum does not continue unabated, damaging the public or the environment. However, this does not mean that there are no safeguards provided to protect the owner or operator of an UST. Section 19-6-420 of the Act first requires that the executive secretary identify the responsible party or parties. As described above in footnote 2, the executive secretary relies upon DERR records and all other available information in making this determination. Further, if the responsible party is covered by the Petroleum Storage Tank Fund and the abatement action is ordered by the executive secretary or the executive secretary approves the corrective action plan, the responsible party only has to pay the first \$10,000 of the costs and the fund will pay up to \$990,000 toward investigation, abatement and clean up of the release. Utah Code Ann. §§ 19-6-419 & 19-6-420 (3) (a) (1995 & Supp. 1997).

If, as in the case at hand, the release is an emergency presenting an imminent and substantial danger to the public or the environment, the owner may take immediate abatement action and then be reimbursed by the fund.³ Utah Code Ann. § 19-6-420 (3) (b) (1995 & Supp. 1997). Another safeguard is that, as described above, the apportionment of liability may be reviewed in a proceeding before the executive

³ The Act requires notification of DERR within 24 hours of such an abatement action for an owner or operator to qualify for reimbursement. Utah Code Ann. § 19-6-420 (3) (1995 & Supp. 1997). The owner or operator must be eligible for the fund. Utah Code Ann. § 19-6-401 to 429 (1995 & Supp. 1997).

secretary, the court or the Board. Utah Code Ann. § 19-6-424.5 (1995). In a case such as this, if the party or parties found to be responsible claim that other responsible parties exist they would provide the names of those other parties. They can also begin emergency abatement measures knowing that they could be reimbursed in accordance with section 19-6-420 (3) (b) of the Act, if they qualify for the fund. Using the DERR files and information provided by the responsible party or parties, the executive secretary would evaluate the likelihood of the other party's or parties' responsibility. If they are found to be responsible they would be named as contributors. Finally, if, at any time during the investigative and corrective action stage, another party is found to have contributed to the release, there could still be an apportionment of liability and other parties could still be held responsible for their proportionate share of the release. In the case at hand, if it is found that there are other responsible parties, there may still be an apportionment of liability.

If V-1 had requested an apportionment of liability, the Board would have reviewed the evidence put before it concerning the extent of V-1's or other parties' responsibility. However, because V-1 did not request an apportionment of liability, the Board did not allocate responsibility. Rather, the Board reviewed the evidence to see if, in accordance with the Act, the evidence was sufficient for the executive secretary to have issued the Emergency Order. R. 588. Since V-1 has not provided this Court with reviewable issues addressed by the Board, the Board's Order must be affirmed.

B. V-1's arguments are specious because V-1 neither understands nor properly interprets the applicable state and federal statutes and regulations

It is necessary to clarify the germane statutes because V-1 either ignores or misunderstands the applicable law and the clearly defined meaning of essential terms. [W]ords and phrases used in a statute, if also defined by statute, must be construed according to that definition. Utah State Bar v. Summerhayes & Hayden Public Adjusters, 905 P.2d 867, 871 (Utah 1995).

In its brief V-1 often refers to what it calls a "release" or denies that "releases" occurred on its property. Brief of Petitioner at 28-32. In doing so, V-1 ignores the statutory definition of a release and relies on its own incorrect interpretation. In accordance with Utah law, "release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an underground storage tank or petroleum storage tank. Utah Code Ann. §19-6-402 (25) (1995 & Supp. 1997). The definition of "underground storage tank" includes the tank, pipes and lines, and ancillary equipment. Utah Code Ann. §19-6-402 (29) (1995 & Supp. 1997). Under federal regulation, 40 C.F.R. § 280.12, "release" means any spilling, leaking, emitting, discharging, escaping, leaching, or disposing from an UST into groundwater, surface water or subsurface soils.

V-1 also misunderstands the requirements for reporting a release or distinguishing between a suspected and a confirmed release, or a release and a overfill. Federal regulation 40 C.F.R. § 280.50, adopted in Utah Admin. Code R311-202, addresses what an owner or operator is required to do if there is a suspected release. This section requires that any suspected release - - meaning "leaking,

emitting, discharging, escaping, leaching, or disposing" of any amount of petroleum be reported. V-1 maintains that they are only required to report a "release of 25 gallons." R. 702. This is wrong. In making this incorrect assumption V-1 claims to rely upon 40 C.F.R. § 280.53 (Reporting and cleanup of spills and overfills), which requires containment, clean up and reporting of a spill or overfill of over 25 gallons. R.771-772.

V-1 ignores the fact that a *spill* is not the same as a release and that section 280.53 does not apply to all releases but only to *spills* and *overfills*. Under 40 C.F.R. § 280.12, the definition of an "overfill release" or a spill is a release that occurs when a tank is filled beyond its capacity, resulting in a discharge of the regulated substance to the environment. "[W]hen the construction of a section involves technical words and phrases which are defined by statute, the provisions must be construed according to such particular and appropriate meaning or definition." Cannon v. McDonald, 615 P.2d 1268, 1270 (Utah 1989). Spills and overfills are usually aboveground releases and occur when an UST is being filled or petroleum dispensed. Section 280.53 put a definitive number of gallons on spills and overfills because they occur aboveground and the owner or operator can estimate the amount of the overfill. With a "leaking, emitting, discharging, escaping, leaching, or disposing" from a tank that is underground, any release must be reported. William Moore, a expert witness for DERR, testified that V-1 is incorrect in assuming that it only had to report a release if it was 25 gallons or more. R. 742. As Mr. Moore stated, a release is "[a]ny petroleum that escapes into the environment." Id. Thus, any time petroleum escapes from an underground tank at an UST facility it must be reported.

C. The Executive Secretary complied with applicable state and federal law in issuing the Emergency Order and Notice of Noncompliance.

i. The Executive Secretary complied with all of the requirements of the Act, Utah Code Ann. § 19-6-420.

State laws empower the executive secretary to act if there is a release from an underground storage tank.⁴ The laws and regulations also describe the procedures that

⁴ **Utah Code Ann. § 19-6-404 (1995)**

- (2) As necessary to meet the requirements or carry out the purposes of this part, the executive secretary may:
 - (f) enforce rules made by the board and any requirement in this part by issuing notices and orders;
 - (j) take any necessary enforcement action authorized under this part;
 - (l) take any abatement, investigative, or corrective action as authorized in this part.

Utah Code Ann. § 19-6-420 (1995 & Supp. 1997)

- (1) If the executive secretary determines that a release from a storage tank has occurred, he shall:
 - (a) identify and name as many of the responsible parties as reasonably possible...
- (2) Regardless of whether the responsible parties are covered by the fund, the executive secretary may:
 - (a) order the owner or operator to take abatement, investigative, or corrective action, including the submission of a corrective action plan; and
 - (b) if the owner or operator fails to take any of the abatement, investigative, or corrective action ordered by the executive secretary, the executive secretary may take any one or more of the following actions:
 - (i) subject to the conditions in this part, use monies from the fund or state cleanup appropriation to perform investigative, abatement, or corrective action.

the executive secretary is required to follow in ordering an owner or operator to contend with a release or for having DERR deal with a release. The Board upheld the issuance of the Order and Notice because the executive secretary followed the requirements.

First, the executive secretary identified and named as many responsible parties as possible by reviewing records, groundwater flow maps, and site histories of all UST facilities in the area of the release as described above in footnote 2. Utah Code Ann. § 19-6-420 (1) (1995 & Supp. 1997). The executive secretary identified V-1 as a responsible party and then issued an Order to it as the owner or operator to take abatement, investigative, and corrective action. Utah Code Ann. § 19-6-420 (2) (a) (1995 & Supp. 1997). Although V-1 received the Order and did some investigation on its property, it did not take any abatement action on or outside of its property. R. 790, 794-98. Abatement action is "action taken to limit, reduce, mitigate or eliminate a release from an underground storage tank or petroleum storage tank, or to limit or reduce, mitigate, or eliminate the damage caused by that release." Utah Code Ann. § 19-6-402 (1) (1995 & Supp. 1997).

When the investigative report was submitted by V-1's consultant, it further confirmed that V-1 was the source of the release. R. 790, 794-98. Counsel for V-1 had informed DERR that DERR personnel and counsel were to speak only with V-1 counsel and not with its consultants. R. 795. Therefore, DERR contacted counsel and asked what, if any, actions V-1 was planning to take to abate the spill. R. 796. DERR also asked V-1 counsel if V-1 would be willing to take over the responsibility of abating

the release through the flushing of the sewers.⁵ R. 796. Counsel for V-1 informed DERR that V-1 would only take abatement action when it had been confirmed to its satisfaction that V-1 was the source of the release. Id. V-1's response violated the Act and was unsatisfactory.

In accordance with section 19-6-420 (2)(b) of the Act, since the owner or operator had failed to fully comply with the Act or to take abatement action, the executive secretary issued the Notice of Noncompliance. This allowed DERR to use public funds which were necessary for DERR to take over the abatement and investigation of the release.

ii The Executive Secretary complied with all of the requirements of 40 C.F.R. § 280.

As stated above, the executive secretary abided by the applicable state statutes in issuing the Emergency Order and Notice of Noncompliance and the Board was correct in upholding his actions. The executive secretary also acted in accordance with state rule, Utah Admin. Code R311-202 (Underground Storage Tank: Technical Standards), which adopts by reference federal environmental regulation, 40 C.F.R. § 280 (Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks.)

In its analysis of 40 C.F.R. § 280, V-1 makes several basic mistakes. First, a statute takes precedence over a rule. In this matter, the federal regulation is adopted by

⁵ Flushing the sewers with water was the temporary abatement method employed until the sleeve was installed in the sewer to block the area where the petroleum was entering the sewer.

Utah rule and does not take precedence over a state statute. Second, Utah operates under a delegated state program and has its own federally approved UST compliance program. DERR follows the Act rather than the federal regulations. "If a state program receives EPA authorization, its standards supersede federal regulations." AM Intern., Inc. v. Datacard Corp., 106 F. 3rd 1342, 1350 (7th Cir. 1997), citing Dague v. City of Burlington, 935 F. 2d 1343 (2d Cir. 1991), rev'd in part on other grounds, 505 U. S. 557, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992); see also, Clorox Co. v. Chromium Corp. , 158 F.R.D. 120 (ND Ill. 1994). Third, the executive secretary is in compliance with the federal regulations. V-1 has ignored the relevant section of the federal regulations and relied on an inapplicable section of the regulation in making its analysis. Brief of Petitioner at 15.

V-1 claims that DERR did not comply with § 280.50.⁶ Brief of Petitioner at 15-18. This section of the C.F.R. focuses on the investigative procedures required if there is a *suspected* release. 40 C.F.R. § 280.50 to 280. 53. The section of the federal regulations applicable to this case is § 280.60 (Release Response and Corrective action for UST

⁶ V-1 claims that "it is undisputed that V-1 responded ... as required by state and federal regulations..." because DERR counsel said, "V-1 did everything it could, on its own property." V-1's brief at 16-17. Simply doing everything you can on your own property does not comply with the state or the federal regulations. It does not even, as V-1 asserts, comply with 40 C.F.R. 280.50, which requires investigation of off-site impacts. Further, the statement was incorrect because V-1 did not take abatement action on its property, but only took investigative action on its own property.

Systems Containing Petroleum or Hazardous Substances). ⁷ This is the section which is applicable in the case of a *confirmed* release. Petroleum flowing into a sewer is considered a confirmed release. Once a release is confirmed, the owner or operator must report the release, take action to prevent a further release, identify and mitigate hazards, abate and monitor the regulated substance, remedy hazards, investigate,

⁷ **40 C.F.R. §280.60 Release Response and Corrective Action for UST Systems Containing Petroleum or Hazardous Substances.**

Owners and operators of petroleum or hazardous substance UST systems, must, in response to a confirmed release from the UST system, comply with the requirements of this subpart...

40 C.F.R. §280.61 Initial response.

Upon confirmation of a release in accordance with § 280.52 or after a release from the UST system is identified in any other manner, owners and operators must perform the following initial response actions within 24 hours of a release or within another reasonable period of time determined by the implementing agency:...

- (b) Take immediate action to prevent any further release of the regulated substance into the environment; and
- (c) Identify and mitigate fire, explosion, and vapor hazards.

40 C.F.R. §280.62 Initial abatement measures and site check.

- (a) Unless directed to do otherwise by the implementing agency, owners and operators must perform the following abatement measures:...
- (2) Visually inspect any aboveground releases or exposed belowground releases and prevent further migration of the released substance into surrounding soils and ground water;
- (3) Continue to monitor and mitigate any additional fire and safety hazards posed by vapors or free product that have migrated from the UST excavation zone and entered into subsurface structures (such as sewers or basements). . . ;
- (6) Investigate to determine the possible presence of free product, and begin free product removal. . .

40 C.F.R. §280.64 Free product removal.

. . . owners and operators must:

- (a) Conduct free product removal in a manner that minimizes the spread of contamination into previously uncontaminated zones. . .
- (b) Use abatement of free product migration as a minimum objective . . .

submit site results, submit a soil and groundwater cleanup report, remove free product, and submit a corrective action plan. 40 C.F.R. § 280.60-280.65 (1995). In the Emergency Order, V-1 was instructed to perform an initial abatement, site check, and site characterization, investigate the release into the sewer and remove and abate any free product, submit a soil and groundwater cleanup report and Corrective Action Plan and implement the Corrective Action Plan. R. 1- 8. These requirements are the same actions commanded by 40 C.F.R. §§ 280.60 to 280.65. Therefore, the executive secretary was in compliance with the federal regulations and V-1's arguments concerning the federal regulations are flawed and should be rejected.

II. BECAUSE V-1 HAS FAILED TO PROPERLY MARSHAL THE EVIDENCE PRESENTED IN THE RECORD, ITS CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE SHOULD NOT BE REVIEWED.

This case is governed by the Utah Administrative Procedures Act; therefore, the petitioners must show that the Board's findings are "not supported by substantial evidence when viewed in light of the whole record before the court[.]" Utah Code Ann. § 63-46b-16 (1997); U.S. West Communications, Inc. v. Public Serv. Comm'n, 882 P.2d 141, 146 (Utah 1994); Zissi v. Utah State Tax Comm'n, 842 P.2d 848, 852 (Utah 1992). The burden of marshaling the evidence and submitting it to the Appellate Court is the same in formal administrative hearings as in civil cases. "[Petitioner] bears the burden of marshaling all of the evidence supporting the findings and then, despite the supporting facts, showing that the findings are not supported by substantial evidence." Kennecott Corp. v. Utah State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993); Mt. Fuel Supply v. Public Service Comm'n, 861 P.2d 414 (Utah 1993); First Nat'l Bank of

Boston v. County Bd. of Equalization, 799 P.2d 1163, 1165 (Utah 1990).

In putting forth its arguments concerning this case, V-1 has ignored a number of vital factors. V-1 has completely ignored applicable state and federal regulations, the majority of the evidence presented by the state's witnesses, and the results of tests of 39 geo-probes surrounding the entire area of the release. The brief "statement of facts" provided by V-1 does not begin to record the extensive facts and evidence presented in at the hearing. Rather, it is a statement of those facts which favor V-1 and no other relevant facts.

Our insistence on compliance with the marshaling requirement is not a case of exalting hypertechnical adherence to form over substance. "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research.

State v. Larsen, 828 P.2d 487, 491 (Utah App. 1992), aff'd, 865 P.2d 1355 (Utah 1993)(citations omitted).

V-1 only argues selected evidence which is favorable to its own position without presenting any evidence supporting the agency's position; thus, the agency's decision should be upheld based upon V-1's failure to marshal the evidence. "It is the petitioner's duty to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence." Department of Air Force v. Swider, 824 P.2d 448, 451 (Utah App. 1991), citing Grace Drilling v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989); see also,

Heinecke v. Department of Commerce, 810 P.2d 459, 464 (Utah App. 1991); Sampson v. Richins, 770 P.2d 998, 1002 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989).

In its brief, V-1 claims that what V-1 calls the "findings" and "conclusions" of the Board are not supported by substantial evidence. Brief of Petitioner at 18-28.

However, V-1 does not marshal the evidence which the executive secretary relied upon in issuing the Emergency Order and Notice of Noncompliance and that was presented to the Board in a manner sufficient to allow the Court to evaluate V-1's claims. Further, V-1 is mistaken as to what were the Board's actual findings and conclusions.

V-1 has not met the burden of marshaling the evidence in support of the administrative agency's findings or showing how those findings are not supported by substantial evidence. Therefore, this Court should affirm the Order of the Agency.

III. ALTHOUGH V-1 HAS MISINTERPRETED THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ISSUED BY THE BOARD, THE FACTS PRESENTED TO THE BOARD WERE SUPPORTED BY EVIDENCE AND TESTIMONY AND THEREFORE ARE COMPETENT, SUFFICIENT AND NOT ARBITRARY OR CAPRICIOUS.

A. V-1 is a source of the release into the sewer.

After the release was reported to DERR, the records concerning any UST facilities that were located in the immediate area were checked. R. 844-845. DERR records revealed that, in the past, there had been 14 UST sites in the general vicinity of the release into the sewer. Thirteen of the sites were "closed" between 1967 to 1992 and the only site not "closed" as outlined in the Act is V-1. R. 246-249 (attachment 1), 844-845. DERR checked the records to see if any of the 14 sites could have been the

source of the release. Sites 1, 2, 3, 4, 11, 12, and 13 are all to the north or down-gradient of the release and could not have contributed.⁸ Id. Records showed that when sites 4, 9, 10, 12, and 13 were "closed," testing was performed and there were no detectible levels of contamination on or spreading from the sites. Id. Sites 1, 5, 7, 8, and 11 were "closed" and any contamination on or off the site has been investigated, abated and remediated. Id. Sites 2, 3, and 6 were in the process of being "closed" and were being investigated and remediated. Id. There was no evidence that there had been a release from any of these sites spreading to the area of the contamination.

The most powerful evidence which demonstrates that V-1 is a source of the petroleum release is the results of the testing of the groundwater and soils. A consultant retained by DERR, Delta Environmental Consultants, Inc. ("Delta"), performed 39 geo-probe tests in the area surrounding the site of the sewer release and the V-1 facility. R. 100-190. These probes revealed that there was no discernable contamination in the area around the plume of contamination on the V-1 facility. R. 246-49 (attachment 1). The plume spreads from the V-1 facility to where it was releasing into the sewer. Id. Geo-probe tests were performed to the north of the sewer line in the vicinity of A&A; to the west of V-1 and west of the place where the petroleum was entering the sewer; east of the sewer and V-1 and south of the sewer line and V-1. Id. The results of the tests show contamination of groundwater and soils in a definable plume extending north from V-1, with some spreading to the northeast, the majority of the plume moving to the

⁸ V-1 has not disputed that the gradient is to the north, but rather whether the gradient is to the northeast or northwest.

northwest and ending where it enters the sewer. Id. The area of the contamination encompasses V-1 and is an isolated and definable plume of contamination surrounded by an area where the test probes found no or non-detectable levels of contamination. Id.

The fact that the plume extends from the V-1 facility to the place where the petroleum was entering the sewer line and there was little or no detectable contamination around the plume clearly shows that the contamination was not from any other UST facilities.

i. The contamination plume did not come from an aboveground source on the Southern Pacific property.

Prior to issuing the Emergency Order, while investigating possible sources for the sewer release, DERR checked the Southern Pacific ("SP") property located between V-1 and Whitney Ave. R. 801. There was no evidence that there had been USTs on the site. Id. Soil samples did not show shallow contamination which would indicate surface spills and there was no evidence to show that Southern Pacific was responsible for the release.⁹ R. 801.

⁹ DERR did not prevent V-1 from gaining access to the Southern Pacific ("SP") property as V- asserts. Brief of Petitioner at 13. On the same day the Emergency Order was issued, DERR provided the name and address of a SP representative to V-1. R. 212. DERR had already contacted SP and asked it to grant access to V-1 to investigate and abate the release. Id. Due to V-1's prohibition on communication between DERR and V-1's consultants, DERR did not even know V-1 was following up on access to the SP property until after the Notice of Noncompliance was issued. R. 765. Counsel for V-1 had led DERR to believe that it wanted DERR to take the lead in investigating the SP property. R. 765-66. Further, V-1 never investigated on any other property, such as Whitney Ave., 1500 South, or the east side of 300 West. Nothing prevented V-1 from investigating these properties, however, only DERR investigated

If the release came from an aboveground source, the soil surface at SP property would have been heavily contaminated. R. 719. Further, soil staining would be noted in the geo-probe soil samples and there no evidence of soil staining. R. 719, 732. Paul Zahn of DERR specifically contacted the Delta consultants who performed the geo-probe tests of the soil and the groundwater to inquire about the issue of soil staining or any visual evidence of staining. R. 732. The consultants concluded that there was no soil staining. R. 732. V-1 mis-characterizes the testimony of Mr. Zahn by claiming that he stated there was "no *inspection* of the area for surface staining." Brief of Petitioner at 35. He was not at the site and thus could not inspect for surface staining. His testimony was about the test results and geology.

Hal Wadson of V-1 testified that for a year he had seen diesel trucks refueled on the SP property in the area of a business, "Line and Designs," located to the west of V-1. R. 675. There was no evidence to show the veracity of these claims. However, even if the claim is true, a spill of diesel fuel could not be the source of the release. First, the soil along the western portion of the SP property was tested and showed non-detectible levels of soil contamination. R. 132, 251. Geo-probes 6 and 7, which indicated non-detectible soil contamination, were located between Lines and Designs and the contamination plume, in the area in which Mr. Wadson indicated the fueling

outside of the V-1 facility. Finally, DERR's concern was abating the continuing release into the sewer. An investigation would have done nothing to abate the flow of petroleum. V-1 refused to immediately abate the release. R232.

took place. R. 251. Second, the contamination in the plume was not diesel fuel but petroleum. R. 722. Diesel fuel is distinguishable from petroleum.

Mr. Wadson also provided unsubstantiated testimony that Rick Warner Ford and "the city" dumped snow on the Southern Pacific property and that when it melts "it's a mess over there." R. 674. Since snow does not naturally contain petroleum it is difficult to ascertain the relevance of this claim. It is unlikely that snow, even from a car dealership or auto repair shop would contain the levels of contamination found in the plume. Further there is no evidence that the snow contained petroleum contributing to the contamination

Finally, V-1 attacks the Board for concluding that the SP property was not the source of the release. Brief of Petitioner at 34. As described above, the Board did not conclude that the SP property was not the source. This was not the issue before them. Rather, the Board concluded that V-1 was a source. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Smith v. Mity Lite, 939 P.2d 684, 686 (Utah App. 1997).

B. Credible evidence shows that since V-1's USTs were installed, there have been several releases of petroleum at the facility and that contamination has been found on the site on several occasions.

Before issuing the Emergency Order, DERR also looked at division records to see if there had been a release or a history of releases from the V-1 site. R. 841. V-1 has attacked documentary evidence concerning releases on the basis of its claim that the testimony of Gary Huskinson, president of V-1, is more credible. Brief of Petitioner at 30. Mr. Huskinson testified that, other than the 1991 release, there was never a

release from the V-1 station prior to 1995. R. 702. However, the testimony of Mr. Huskinson is not based upon personal experience. Mr. Huskinson lives and works in Idaho Falls, Idaho, and is not involved in the day-to-day business of the Salt Lake City station. R. 711. Further, Mr. Huskinson does not rely on the statutory definition of "release" but defines a release as "a release of 25 gallons." R. 702. As stated above, this is not accurate. Mr. Huskinson's defining of "release" in his own fashion undermines any credibility he may have, and does not mean that there has never been a release as it is defined under Utah law. The incidents referred to in the reports as inventory losses or staining were all considered releases. R.742. According to Douglas Hansen of DERR;

Any evidence of a release, a confirmed release, it's visual evidence, . . . with inventory control, if in the first month you are over or short above the amount that's allowed, it's considered a suspected release and needs to be reported. And then the second one, it -- whether you are over or short more than the allowance, again, it's considered a confirmed release.

R. 797.

V- has further attacked the release reports on the basis of the residuum rule. V-1 cites Tolman v. Salt Lake County Attorney, 818 P.2d 23, 32-33 (Utah App. 1991), which is inapposite to the case at hand. In that case vital testimony was offered by one witness in the form of extremely prejudicial statements made by another witness who refused to appear. Not only were the statements found to be prejudicial double hearsay but they were made by an interested party. The case at hand is easily distinguishable from Tolman. "There must be a residuum of evidence, legal and competent in a court of law . . . and a finding cannot be based wholly upon hearsay evidence." Industrial

Power Contractors v. Industrial Comm'n, 832 P.2d 477, 479 (Utah App. 1992). DERR's evidence presented to the Board meets this standard on several levels. First, at an administrative hearing evidence may not be excluded solely because it is hearsay. Utah Code Ann. § 63-46b-8 (c)(1997). The presiding officer is not bound by the rules of evidence and need not adhere to the rules as required in civil actions in the courts of this State. Utah Admin. Code. R311-210 (a) (1997). Second, even if the hearsay rule applied, the documents V-1 objects to fall within an exception to the hearsay rule because they are public records. Utah R. Evid. 803. (1997). V-1 stipulated that the documents submitted by DERR were business records produced in the course of business. R 837. Third, the documents submitted by DERR are supported by the testimony of witnesses. Finally, the documents were submitted to the Board for the purpose of showing what evidentiary sources the executive secretary relied upon in reaching the conclusion that a source of the release is V-1. Thus, the evidence presented at the hearing concerning past releases at the V-1 facility meets the requirements of the residuum rule because it is supported by "a residuum of 'legally competent evidence.'" Hoskings v. Industrial Comm'n of Utah, 918 P. 2d 150, 155 (Utah App.1996); Yacht Club v. Utah Liquor Control Comm'n, 681 P.2d 1224, 1226 (Utah 1984); Wagstaff v. Department of Employment Sec., 826 P.2d 1069, 1072 (Utah App. 1992); Tolman v. Salt Lake County Attorney, 818 P.2d 23, 32-33 (Utah App. 1991).

The first reported release was a line leak which occurred in 1985. DERR files revealed a report of the leak filed with DERR by the Salt Lake City Fire Department. R.

841. The second reported release was in July 1990. R.294, 808. Mr. Huskinson testified that he was aware of this release, and that two or three yards of contaminated soil were removed. R. 702, 714. But his testimony is belied by the written report provided by V-1's consultant. This report shows that the removal of the soil did not remediate the contamination. R.293. In fact, the consultant used by V-1 to investigate (but not to remediate) the release in 1991 found that "the soil that the contractor 'aerated' and replaced in the excavation was only a portion of the soil impacted by the overfill and top leaks." R. 293.

The next report of contamination from a release was in 1992. R. 807. Mr. Hansen testified that documents revealed that tests at V-1 showed high levels of contamination from petroleum constituents. R. 806-07. Mr. Moore testified that he was present during the 1992 testing and that the results showed very high levels of groundwater contamination. R.610. Mr. Moore also testified that he was present for testing at V-1 in early 1995 and high levels of contamination from a release were confirmed. R. 286-288, 608. V-1 has not disputed that it has never complied with a reporting and remediation compliance schedule in relation to any of these releases. R. 284. Further, DERR records do not demonstrate that any action was ever taken by V-1 to remediate any of the releases. R. 284. Since none of these releases have been remediated, the contamination still exists and may have contributed to the plume.

V-1 also does not dispute that on December 11, 1995 (a month before the sewer release) two abandoned USTs were removed from the V-1 property. Brief of Petitioner at 7. These tanks had been installed in the 1970's. The area around the

tanks was found to be heavily contaminated with petroleum and both tanks were thin-walled. R. 280. One of the tanks was found to contain approximately 50 gallons of liquid contaminated by petroleum. R. 267-69, 279. The other tank was found to contain approximately 500 gallons of liquid contaminated by petroleum. Id. The tank containing 50-75 gallons of petroleum/water had several holes in the underside. R. 279. Finally, V-1 has not disputed the fact that a V-1 representative confirmed a release at the facility on December 26, 1995. These reports and the data collected by the two environmental consultants, Delta and TriTechnics, confirm that there have been several releases on the V-1 property that could have migrated to the site of the sewer release. R. 246-49 (attachment 1), 790-91.

The testimonies of Gary Huskinson and Hal Wadson actually make it quite likely that there have been even more releases on the V-1 site that have not been reported to DERR. They both displayed a great deal of ignorance or misinterpretation of the reporting requirements. Mr. Huskinson testified that they believed they did not have to make a report unless there was a release of over 25 gallons. R. 720. This makes it possible or even likely that releases were not reported if they did not meet V-1's incorrect definition of a release.

Further, Mr. Moore testified that there were major problems with V-1's methods of inventory control. R. 608. He stated that V-1 was not performing accurate measurements on its inventory control charts and that V-1's methods used in calculating what V-1 considers an "allowable leak rate" is the reporting quantity and not an allowable leak rate. R. 607. Thus anything under that amount would not have been

reported. He also testified that Huskinson and Wadson's understanding of matters such as filling and not filling of pipes leading to an UST and the effect of this on inventory reports was incorrect. R. 605-606. There could have been numerous incidents of releases over the years that went unreported. However, all releases, reported or unreported, still contaminate and impact the soil and groundwater and could have contributed to the sewer release.

C. V-1's claim that it is down-gradient from the site of the release into the sewer is not supported by the evidence but is based upon an unreliable one-time sampling which was limited to V-1's property.

Another factor DERR looked at to determine the source of the sewer release, was the direction of groundwater flow. DERR checked groundwater flow charts which showed that in the area around the sewer release, "the direction of the flow is likely west to slightly northwest in the direction of the Jordan River." R. 216.

At the hearing, evidence concerning the direction of groundwater flow was disputed. V-1 relied upon samples taken from groundwater monitoring wells located on the V-1 property. However, the samples were only taken from eight wells and only on one occasion. R.620. Five of the wells are located on V-1 property and the other three are immediately adjacent. R. 246-49 (attachment 1). This limited sampling does not prove the direction of groundwater flow in the whole area of the plume or outside of V-1's property because it is limited to a very small area, about a quarter of the size of the entire plume caused by the release. Id. V-1's witness, Mr. Condrat of TriTechnics, admitted that he did not know what the gradient is anywhere except on the V-1 property. R. 616. Mr. Condrat further admitted that only "one sampling event, one water

level measurement" would not show the manner in which the groundwater flow could vary and fluctuate. R. 620.

Mr. Condrat did not have a complete knowledge of the site and the release. He was not the person who performed the testing on the V-1 site, but rather is the office manager for TriTechnics. R. 635, 657. Mr. Condrat's lack of actual knowledge of the site made his testimony and conclusions about the site questionable. He testified that he did not know where the plume of contamination flowing from V-1 to the sewer release originated. R. 628. He believed that there were only two geo-probe testing points in the plume, disregarding the fact that there were 17 geo-probe testing points in the plume. R. 249 (attachment 1), 628. He seemed to be unaware of the incidents of prior contamination of the V-1 property other than the release reported in December, 1995. R. 619, 616, 626-7.

As to the testimony which Mr. Condrat did offer concerning groundwater flow, his conclusions were nebulous. He admitted that outside of the V-1 site the groundwater could be flowing to the northwest as regional groundwater flow maps indicate and DERR believes. R. 640. He testified that a large release may move up-gradient and that dispersion can cause a release to move in a direction other than that in which the groundwater flows. R. 618-20. He was only able to testify to the flow of groundwater on the limited area of V-1's property on the one day that the testing was performed. Id. V-1 attacks the evidence concerning the direction of groundwater flow while omitting critical and relevant evidence. Brief of Petitioner at 21-22. "In applying the substantial evidence test, we review the whole record before the Court . . ." Grace Drilling v. Board

of Review, 776 P.2d 63, 68 (Utah App. 1989).

V-1 disregards the limited scope of V-1's testing in claiming that the "Board completely ignored uncontradicted, competent and credible evidence to the contrary," and that "the Board's refusal to acknowledge the uncontradicted testimony regarding the groundwater gradient is arbitrary and capricious." Brief of Petitioner at 20, 22. As stated above, V-1's witness did not offer "uncontradicted, competent and credible evidence." Further, his testimony was contradicted by the testimony of DERR witnesses, the regional groundwater flow maps, and the charts mapping the contamination spreading from the V-1 facility to the site of the release. R. 215-16, 246-249 (attachment 1).

The most powerful evidence concerning the direction of the groundwater flow is the maps produced by Delta combining the results of the geo-probe boring Delta performed and the results of the monitoring wells installed by TriTechnics. R. 246-49 (attachment 1). These charts clearly show the contamination spreading from the V-1 station to the northwest with a certain amount of contamination spreading to the northeast. Id. There is an area of very high contamination in the spreading to the northeast of V-1. Id. This spreading and the location of the high contamination confirms that while the groundwater may flow somewhat to the northeast on the V-1 property, outside the V-1 property groundwater flows to the northwest. Testimony from both DERR's and V-1's witnesses confirmed that a variance in directional flow is not unusual. R. 620, 725, 803.

D. Since V-1 has a history of contamination and releases at the V-1 facility, the contamination released into the sewer could be two or more years old and still originate from the V-1 facility.

As demonstrated above, DERR records show that there have been several incidents of contamination on the V-1 property. The documentation of a consultant hired by V-1 to look at the 1991 release shows that the 1991 release was not remediated as V-1 claims. R. 293. Testimony and laboratory analysis show that in December 1992 and in January 1995, the site was found to be heavily contaminated with petroleum products. R. 286-88. None of the releases have ever been remediated. R.284. Since V-1 representatives are under the mistaken belief that they do not have to report any "release" that is under 25 gallons, there may have been many losses over the years of amounts under 25 gallons which have not been reported to DERR. R. 702.

DERR has not claimed that the loss of almost 2,300 gallons of petroleum from the V-1 USTs in October, November and December 1995 is the direct source of the release into the sewer. Without citing to the record, V-1 asserts that both environmental consultants concluded that there had to be a conduit to the sewer upon which the petroleum flowed. Brief of Petitioner at 27. This is not true. Testimony shows that DERR looked at and then dismissed the possibility that the sewer spill was fresh contamination migrating along a defined pathway. R. 804. In fact, DERR witnesses testified that the product flowing into the sewer is most likely from one or more earlier releases.

Q. You think this may have built up for a while?

A. Yes

Well, contamination will migrate with the water itself, and a couple of things can happen. If you have a single spill incident, that petroleum can actually migrate sort of as a mass all on its own and go between different phases . . . it can go into the water, it can go into the soil surface, it can collect on top of the water as what we call free phase. And depending on the amount of contamination that's there, it can exist in any of those various phases.

And as petroleum contamination would build up, it would move between those phases until -- if you got a high enough concentration it would come out of the dissolved phase, out of the absorbed phase, and into what we call a fresh product phase, and would collect where it had an opportunity to. In this case, on the water in the sewer.

R. 804.

Mr. Condrat testified that it is possible the release into the sewer could be the result of past contamination migrating and then being released into the sewer. R. 615.

He further testified that heavy contamination could become bound up in the soil and then, as the groundwater rose, start flowing again as free product. R. 611-12. DERR witnesses also testified that the release into the sewer could be the result of several releases. R. 791. Paul Zahn noted that the different levels of contamination in different parts of the plume suggest that there has been more than one release with V-1 as the source of the releases. R. 725

The almost 2,300 gallon release and the recent removal of the two abandoned tanks does not have to be the direct source of the sewer release to have contributed to or even instigated the sewer release. V-1's expert admitted that they had looked at the holes in one of the abandoned tanks as a possible source of the release. R. 637. Both tanks had been installed in the 1970's. At the time they were removed one of them, the

one with holes in it, contained a tenth of what the other held. It is distinctly possible that the tank with the holes in it had once contained as much as the other tank and that the holes in the tank have been releasing petroleum for years. If areas of contamination from prior releases were bound up in the soil the additional pressure of a further release and the disturbance caused by the removal of two tanks could have been the final element necessary to push the past releases to the sewer.

E. Evidence was sufficient to show that the material being released onto property adjacent to V-1 and into the sewer was petroleum.

There was sufficient evidence that the contamination in the sewer was in fact petroleum. A phone-in report from A & A states that A & A initially thought the odor was thinner, but the report goes on to state that when the smell was investigated by Rick Bright of the City it was found to be gasoline. R. 262. Mr. Bright testified that he knew it was gasoline because:

I've seen petroleum in a sewer system before and it looked like gasoline or oil substance in there. At that time when I took the sample the Hazmat team, hazardous materials team and County Health Department, they all basically observed the same thing when they were there.

R.871.

Doug Hansen, who responded to the report from the City of gasoline in the sewer testified that he knows the substance in the sewer was gasoline because:

- A. Well, there was obviously a petroleum smell as we got on the site, it wasn't just contained to the sewers and the manhole. The smell was like gasoline . . . the sewer obviously had . . . a layer of petroleum product on the surface.
- Q. How did you know it was petroleum?
- A. The smell, coloration, it's obvious.

R. 849.

Mr. Hansen also testified that when air samples were taken in the A & A building they showed that "[t]here were levels of petroleum contamination in the building vapors" and that after the soil and groundwater samples were taken and analyzed they showed that the flow of contamination spreading from the V-1 station to the release into the sewer line was gasoline and not another similar substance. R. 782, 779. According to Mr. Hansen it was very evident that the contamination had been identified as gasoline. Id. Paul Zahn agreed that the contamination was gasoline and not diesel fuel or motor oil or train oil based on the chromatography tests. R. 722-23.

All of the evidence presented to the Board concerning what DERR records and inquiries revealed about V-1's history, groundwater flow, other possible sources, and soil geology was sufficient and competent. It was a credible basis for the Board to find that there was sufficient evidence upon which the executive secretary relied in issuing the Emergency Order and the Notice of Noncompliance. "When an agency had discretion to apply its factual findings to the law, we will not disturb the agency's application unless its determination exceeds the bounds of reasonableness and rationality." Smith v. Mity Lite, 939 P.2d 684, 686 (Utah App. 1997), citing VanLeeuwen v. Industrial Comm'n, 901 P.2d 281, 283 (Utah, App.1995).

IV. ALL ARGUMENTS CONCERNING DUE PROCESS IN THE ISSUANCE OF THE NOTICE OF NONCOMPLIANCE HAVE BEEN WAIVED BECAUSE THEY WERE NOT RAISED AT THE HEARING AND THEY HAVE NOT BEEN PRESENTED OR ARGUED IN V-1'S BRIEF.

V-1's issue number 5 presented to this Court is "[w]hether the Board's conclusion

that the Notice of Noncompliance was properly issued was consistent with due process requirements." Brief of Petitioner at 3. The Board's conclusion with regard to the Notice of Noncompliance was that "issuance of the Notice of Noncompliance . . . was authorized by Utah Code Ann. § 19-6-420 (2)(b), and was properly issued." R. 892-93. Due process is not an issue that should be addressed by this Court because it was not presented to the Board nor ruled on by the Board. This Court should not consider an issue raised for the first time on appeal. "The trial court is considered 'the proper forum in which to commence thoughtful and probing analysis' of issues," State v. Brown, 856 P.2d 358, 360 (Utah App. 1993), citing State v. Bobo, 803 P.2d 1268, 1273 (Utah App. 1990).

This issue could only be preserved for appeal if it had been properly raised and argued before the Board. V-1 has waived consideration of these arguments here because a due process violation in issuance of the Notice of Noncompliance was not raised during the hearing. V-1 mentioned due process four times at the hearing and these mentions were not sufficient to allow the Board to make a decision as to due process or to even be considered as having raised the issue.¹⁰ In a Court of Appeals case, the court refused to address an issue to which only passing reference was made; "Because defendant has not developed any argument...we do not address that question on appeal." State v. Saunders, 893 P.2d 584, 590 *n. 5 (Utah App. 1995) cert.

¹⁰ One mention occurred when V-1 requested permission to voir dire the Board to insure a fair tribunal. R.877. And three other times passing references to due process were made in relationship to the issuance of the Emergency Order. R. 595, 597, 717.

granted 910 P.2d 425 (Utah 1995); see also State v. Mirquet 844 P.2d 995, 1001 (Utah App. 1992) (a mere mention or passing reference to an issue before the Board is not sufficient to preserve it for the court of appeals); and State v. Quintana, 826 P.2d 1068, 1069 (Utah App.1991).

As well as having only made passing reference to due process in the issuance of the Notice of Noncompliance at the hearing before the Board, V-1 does not address the issue in its appellate brief. "Generally, where an appellant fails to brief an issue on appeal, the point is waived." Pixton v. State Farm Mut. Auto. Ins., 809 P.2d 746, 751 (Utah App.1991). The only reference to due process in V-1 appellate brief is issue number five which is not argued. Raising an issue without presenting arguments is insufficient. "This Court will not engage in constructing arguments out of whole cloth." State v. Mace, 921 P.2d 1372, 1376 (Utah 1996), citing State v. Lafferty, 749 P.2d 1239, 1247 *n.5 (Utah 1988). As in the case at hand, in Parsons v. Barnes, 871 P.2d 516 (Utah 1994), the court refused to address a due process claim because Parsons had failed to brief the claims and the court would not "engage in constructing arguments out of whole cloth." Parsons at 519 *n.2. See also State v. Webb, 790 P.2d 65 (Utah App.1990).

If this matter had been presented at the hearing or argued in V-1's brief, DERR could have shown that the Notice of Noncompliance was issued in accordance with the Act after V-1 refused to act to abate the release. R. 323. The Notice of Noncompliance was issued in compliance with Utah Code Ann. § 19-6-420 (2) (b), which states that if the owner or operator fails to take any of the abatement, investigative, or corrective

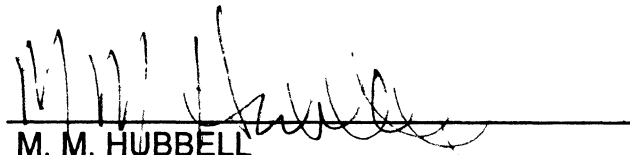
action ordered by the executive secretary, the executive secretary may use public monies to perform investigative, abatement, or corrective action. In both actions and words, V-1 made it clear that it would not take action until it was sure it was responsible. Id. Since V-1 failed to take action, DERR had to take action to contend with the threat to the public and the environment.

If V-1 wished to argue that the Act did not provide due process in the requirements for issuance of a Notice of Noncompliance and for DERR's assumption of responsibility for the abatement, investigative, or corrective action ordered, V-1 should have presented those arguments at the hearing. Since it did not raise the issue at the hearing, the Court should not now consider such arguments. State V. Webb, 790 P.2d 65, 71 *n.2 (Utah App. 1990). Because V-1 has not articulated how the Board erred, and there is no support for its due process claim in the record, the Court must affirm the Board's ruling on appeal. Pixton v. State Farm Mut. Auto. Ins., 809 P.2d 746, 751 (Utah App. 1991)

CONCLUSION

For the foregoing reasons, Respondent asks this Court to affirm the Order of the Utah Solid and Hazardous Waste Control Board.

Respectfully Submitted this 29 day of December, 1997.

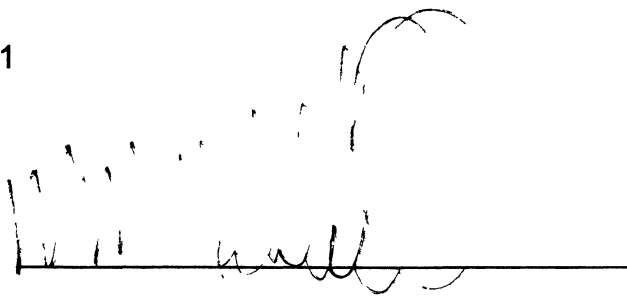

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MAILING CERTIFICATE

I hereby certify that I caused to be delivered two true and correct copies of the foregoing Brief of Appellee this 29 day of December, 1997, to the following:

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A handwritten signature in dark ink, appearing to read "Linette B. Hutton", is written over a horizontal line.

Tab 1

