

2006

# Heal Utah v. Utah Radiation Control Board : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF UTAH

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HEAL UTAH,

Petitioner,

v.

UTAH RADIATION CONTROL BOARD,

Respondent.

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ENERGY SOLUTIONS  
(AKA ENVIROCARE LLC),

Third Party in Interest

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**REPLY BRIEF OF  
PETITIONER HEAL UTAH**

Case No. 20060172-SC

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Oral Argument Requested

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Oral Argument Requested

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|                          |                |
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## **REPLY ARGUMENT**

### **I. A LICENSE AMENDMENT PROVIDING FOR GEOGRAPHIC EXPANSION ONLY IS BEYOND THE JURISDICTIONAL AUTHORITY CONFERRED ON THE EXECUTIVE SECRETARY.**

The Utah Radiation Control Board (“Radiation Control Board”) and Envirocare of Utah L.L.C. (“Envirocare”) incorrectly assume that the only issue before the Court is whether or not it was appropriate to issue the challenged license amendment without first requiring Envirocare to meet and satisfy each of the licensing requirements listed in Utah Administrative Code R313-25.<sup>1</sup> Both parties take for granted that the very type of license issued – a license purporting to authorize the geographic expansion of

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<sup>1</sup> Admittedly, the Radiation Control Board also addresses the “Notice of Completeness” issue in a footnote. Brief of Respondent Radiation Control Board, p. 18 fn. 4. The Board cites Sierra Club v. Department of Env. Qual., 857 P.2d 982 (Utah Ct. App. 1993) for the proposition that “members of the public do not have standing to challenge a Notice of Completion because it is an internal procedural document that is not intended to protect the interests of the general public.” In so holding, the Court of Appeals has essentially ruled that the legislature intended no benefit to the public but intended benefit only to the applicant in requiring that a “Notice of Completeness shall be issued.” Utah Code Ann. § 19-3-105(9)(a). That conclusion is unfounded. HEAL therefore contends that the Court of Appeals holding should be revisited. Issuance of a formal notice benefits the public as well as an applicant by framing the issues surrounding an application’s sufficiency prior to public comment and review. Issuance of the certificate also assures the public of the integrity and reliability of the licensing process. It provides reassurance that an application has been formally submitted and reviewed and is both thorough and complete prior to public comment and agency approval. For at least these reasons, HEAL requests that the Supreme Court revisit the Court of Appeals’ holding on this issue.

Envirocare's radioactive dump site but not the company's operations – was within the jurisdiction of the Executive Secretary.

It is black letter law that an administrative agency enjoys only those powers expressly or impliedly granted by the legislature. Bevans v. Industrial Commission of Utah, 790 P.2d 573, 576-77 (Ut. Ct. App. 1990). Thus, a plain reading of the Radiation Control Act (the “Act”) – the statute creating and empowering the Radiation Control Board – makes clear that the license amendment at issue in this matter goes beyond the legislature's express or implied grant of licensing authority. Utah Code Ann. §§ 19-3-101 et seq.

Only one well defined type license is allowed under the Act. It is a “radioactive waste license” providing for the ownership, construction, modification or operation of a radioactive waste management facility. Utah Code Ann. § 19-3-105(d). Once issued, such a license authorizes its holder to manage radioactive waste by constructing, modifying or operating a radioactive waste facility.<sup>2</sup> Central and essential to such a license is the concept of waste management.<sup>3</sup> No other type of license is mentioned in

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<sup>2</sup> A radioactive waste facility is defined as a facility which “receives, transfers, stores, decays in storage, treats, or disposes of radioactive waste.” Utah Code Ann. 19-3-105(1)(c)(1).

<sup>3</sup> That waste management activity, not meaningless geographic designation, is the only thing the Radiation Control Board is authorized to license was

the Act expressly or by implication and the Act does not concern itself with any activity other than radioactive waste management.

The fatal flaw in the license amendment issued by the Executive Secretary and subsequently endorsed by the Radiation Control Board is, therefore, that the license has nothing to do with radioactive waste management. As the Radiation Control Board described it, “the license is for a geographic boundary change only, and does not authorize any new radioactive waste management or disposal activities . . . on the new property.” Brief of Respondent Radiation Control Board of Utah, p. 14. It is a nonsensical license, purporting to enlarge Envirocare’s existing waste facility without actually enlarging the geographic area on which the company can manage waste.

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apparently clear even to the Radiation Control Board when it promulgated R313-25. The stated purpose of the rule is to “establish procedures, criteria, and terms and conditions upon which the Executive Secretary issues licenses for the land disposal of wastes” or waste management. Utah Administrative Code § R313-25-1. Per Rule 25-4, a radioactive waste license is required before waste is received, possessed, or disposed of at a particular site. The rule does not require companies like Envirocare, however, to obtain a license only to designate a piece of real property as a “potential” site on which waste management may occur in the future. Rule 25-11 is similar. It lists the requirements for issuance of a radioactive waste license. Central to each requirement is the concept of waste management such as proof that the applicant is properly qualified and trained to manage and dispose of waste. The rule is entirely unconcerned with the licensing of the geographic designation of a potential site on which waste management may some day take place.



Only the Radiation Control Board submission attempts to deal with this flaw. It contends that its jurisdiction or authority to issue the license amendment in question is implied by Utah Code Annotated § 19-3-105(4)(a) which requires a license application, renewal or amendment when a company like Envirocare proposes a different waste management site than was previously approved. Plainly read, the referenced section assumes approval of waste management activities at a new location, not approval of a geographic location without approval of waste management activity or with approval of waste management activity to come at some later date. The section referenced by the Radiation Control Board does not expressly authorize a license expanding geography but not operation. Nor does it do so by implication.

Moreover, it is of no consequence to this appeal that the Radiation Control Board rejected this argument when it reviewed the Executive Secretary's grant of the license amendment. When determining the threshold issue of whether an agency has the authority to act, this Court owes no deference to the agency in question. As the Court of Appeals explained in Bevans:

This absence of deference is appropriate because a determination of what authority has been statutorily conferred on an administrative agency by the legislature is not 'illuminated by [the] agency's expertise.' Hurley, 767 P.2d at 527. On the contrary, it is an issue

an appellate court is as well, or better, suited to decide as the agency itself. See id.; Taylor v. Utah State Training School, 775 P.2d 432, 435 (Utah Ct. App. 1989); see also Utah Dep't Admin. Servs., 658 P.2d at 608 (appellate court does not defer to agency on questions of general law because the court has “comparatively greater qualifications on these questions”).

Bevans v. Industrial Comm'n. of Utah, 790 P.2d 573, 575-76 (Utah Ct. App. 1990).

**II. ALTERNATIVELY, A LICENSE AMENDMENT PROVIDING FOR GEOGRAPHIC EXPANSION ONLY IS A MISAPPLICATION OF EXISTING LAW NOT ENTITLED TO DEFERENCE.**

Whether or not the Executive Secretary and Radiation Control Board had authority to issue a geographic license only is not, as Envirocare suggests, a technical determination entitled to deference. The only license defined in the Act and, therefore, the only type of license the Executive Secretary and Radiation Control Board are authorized to issue is a “radioactive waste license” authorizing waste management activity. Utah Code Ann. § 19-3-105(1)(d). Whether that term is broad enough to encompass a license which by the Radiation Control Board’s own admission is a geographic license only, totally unconcerned with technical issues surrounding actual waste management activity, is a matter of statutory construction not technical determination.

Statutory construction is reviewed as a “question of law under a correction-of-error standard unless the statute expressly or impliedly grants the agency discretion to interpret the statutory language.” Sierra Club v. Utah Solid and Hazardous Waste Control Board, 964 P.2d 335, 344 (Utah Ct. App. 1998) (quoting Epperson v. Utah State Retirement Bd., 949 P.2d 779, 781 (Utah Ct. App. 1997)). “Under the correction of error standard, this court affords no deference to the agency’s interpretation or application of statutory terms.” Id. (quoting Allred v. Utah State Retirement Bd., 914 P.2d 1172, 1174 (Utah Ct. App. 1996)).

**III. THE PIECEMEAL PROCESS PROPOSED BY ENVIROCARE AND THE RADIATION CONTROL BOARD DENIES HEAL AND THE PUBLIC AT LARGE THE FULL BENEFIT OF ALL THE SAFEGUARDS IN THE ACT.**

The Act itself is part of Title 19 of the Utah Code Annotated, otherwise referred to as the Environmental Quality Code (the “Code”). The stated purposes of the Code include charges to “safeguard public health and quality of life by protecting and improving environmental quality” and to “build consensus among the public, industry, and local governments in developing environmental protection goals.” Utah Code Ann. § 19-1-102(3) and (4)(b). To realize such purpose, a clear and transparent licensing process which provides the public with each and every safeguard

intended by the legislature is essential. The incomplete, unnecessarily incremental licensing process proposed by Envirocare and the Radiation Control Board minimizes safeguards designed to maximize environmental quality and frustrates consensus and transparency.

In its submission to the Court, the Radiation Control Board makes clear that “[b]oth the agency and Envirocare have acknowledged that Envirocare may use [the license] amendment as a basis for requesting legislative and gubernatorial approval for expansion of Envirocare’s facility.” Brief of Respondent Radiation Control Board of Utah, p. 20 fn. 5. Such approval is required pursuant to Utah Code Annotated § 19-3-105(3)(d). Ambiguous, however, is whether Envirocare and the Radiation Control Board believe it necessary for Envirocare to go back to the governor and the legislature for approval of any waste management activity on the newly designated property OR whether they believe approval by the Radiation Control Board and Executive Secretary alone is sufficient. Either scenario denies the public at large the full protection of legislative and gubernatorial approval and oversight. Transparency and consensus also suffer.

For example, approval of a meaningless geographic license by the governor and the legislature followed by an expansion of Envirocare’s

waste management operations approved by the Executive Secretary and the Radiation Control Board but not the governor and the legislature would deny the public the full protection of the complete and thorough oversight intended by the Act.<sup>4</sup> The governor and the legislature would approve the meaningless expansion of Envirocare's geographic boundaries. But they would be denied the opportunity to review and scrutinize all the requisite technical data and studies associated with an expansion of Envirocare's operations. Such would prejudice the public and would frustrate the purposes of both the Code and the Act.

Even a return to the governor and legislature for approval of expanded Envirocare operations would deny the public the full and intended protection of the Act. Having already obtained gubernatorial and legislative approval of a meaningless geographic license, Envirocare would

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<sup>4</sup> Not only would the public be denied full executive and legislative oversight, but explicit prerequisites in the Act would be ignored as well. Before going to the legislature and governor for approval, the Act requires that the applicant first meet the requirements of Utah Code Annotated § 19-3-105(3)(a) through (c). Subsection (a) requires receipt of a radioactive waste license for a "facility," not a license for geographic expansion, prior to seeking legislative and gubernatorial approval. The Radiation Control Board and Envirocare should not be allowed to by-pass the requirements of (3)(a) with the license amendment at issue, completing the licensing process at some later time after the legislature and governor give approval to a meaningless geographic shell. The license amendment at issue should not be used "as a basis for requesting legislative and gubernatorial approval for expansion of Envirocare's facility." Brief of Respondent Radiation Control Board of Utah, p. 20 fn. 5.

be able to present expanded operations as a foregone conclusion. Full, fair and complete legislative and gubernatorial approval help build consensus and make certain the protection of Utah's environmental quality.

**IV. THE EXECUTIVE SECRETARY MAY NOT ISSUE A RADIOACTIVE WASTE LICENSE THAT DOES NOT COMPLY WITH ALL THE PREREQUISITES OF THE ACT AND AGENCY RULES.**

To regulate radioactive waste licensure under the Act, the Radiation Control Board has promulgated rules such as R313-25. Applicants must comply with those rules when seeking a radioactive waste license. Utah Code Ann. § 19-3-105(3)(a) through (d). Exemplified by R313-25-11, the role of the Executive Secretary is to make certain that compliance occurs before a license is issued.

Assuming for sake of argument that issuance of a geographic license is within the jurisdiction of the Executive Secretary, Envirocare and the Radiation Control Board contend that the Secretary may simply pick and choose which of R313-25's license requirements with which an applicant for a geographic license may comply. "Because," they continue, "no land disposal of radioactive waste is being proposed at this time, the land

disposal requirements of Utah Admin. Code R. 313-25 are not applicable.”<sup>5</sup>

Brief of Respondent Radiation Control Board, p. 18.

The problematic end result of such an approach is a chaotic and unreliable regulatory scheme in which applicants and potential challengers such as HEAL are uncertain as to the requirements applicants must meet, the licenses applicants may obtain, and the process in which both applicant and challenger must participate. Particularly in the case at hand, the approach allows companies such as Envirocare to obtain a license unfettered by regulatory restrictions and requirements which, at least to the public, appears to have passed under the watchful eye of the Radiation Control Board and Executive Secretary. It is a piecemeal approach that warns the public to a particular waste management facility before the proposed facility becomes subject to the technical scrutiny required for an actual operation.

The Act and subsequent rules promulgated by the Radiation Control Board should be construed to allow for a geographic license only when the license proposes an actual waste management site. Such is clearly the intent of both the Act and the rules.

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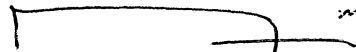
<sup>5</sup> The Radiation Control Board’s contention does prove one thing. If there are no radioactive waste licensing requirements applicable to the geographic license issued to Envirocare, it is reasonable to conclude that the Executive Secretary issued a license for which he lacked jurisdiction.

### **CONCLUSION**

For all the foregoing reasons, Amendment #23 to Radioactive Materials License No. UT2300249 should be revoked allowing the applicant to seek legitimate licensure in the future.

DATED this 31st day of July, 2006.

PRINCE YEATES & GELDZAHLER

A handwritten signature in black ink, appearing to read 'James W. McConkie III', written over a horizontal line.

James W. McConkie III  
Attorney for HEAL Utah



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing  
REPLY BRIEF OF PETITIONER HEAL UTAH was Hand-delivered, on  
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