09-3783
TAX TYPE: PROPERTY TAX - LOCALLY ASSESSED COMMERCIAL
TAX YEAR: 2009
DATE SIGNED: 10-14-2010
COMMISSIONERS: B. JOHNSON, M. JOHNSON, D. DIXON, M. CRAGUN

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER, Petitioner, vs. BOARD OF EQUALIZATION OF RURAL COUNTY, STATE OF UTAH, Respondent.	**INITIAL HEARING DECISION** Appeal No. 09-3783 Parcel No. ##### Tax Type: Property Tax / Locally Assessed Commercial Tax Year: 2009 Judge: Dixon Pignanelli

This Order may contain confidential "commercial information" within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to Utah Admin. Rule R861-1A-37. The rule prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process. However, pursuant to Utah Admin. Rule R861-1A-37, the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this notice, specifying the commercial information that the taxpayer wants protected. The taxpayer must mail the response to the address listed near the end of this decision.

Presiding:
D'Arcy Dixon Pignanelli, Commissioner

Appearances:
For Petitioner: REPRESENTATIVE-1 FOR PETITIONER, Pro Se
REPRESENTATIVE-2 FOR PETITIONER, Pro Se

For Respondent: RESPONDENT-1, Assessor, RURAL COUNTY
RESPONDENT-2, RURAL COUNTY Contract Appraiser

STATEMENT OF THE CASE

Petitioner (the "Property Owner") is appealing the assessed value established for the subject property for the lien date January 1, 2009 by the RURAL COUNTY Assessor. The County Assessor ("The County") set the value of the subject parcel at $$$$$ with $$$$$ for the land and $$$$$ for the improvements.

Although appealed to the RURAL COUNTY Board of Equalization (BOE), the BOE record indicates Assessor RESPONDENT-1 requested a ten-day stay as she was not ready to proceed with the BOE hearing and the County's contract commercial appraiser was not in attendance. The Property Owner objected. The Assessor then asked the appeal be denied and the parties proceed directly to a hearing before the Utah State Tax Commission. The Property Owner agreed to proceed to a hearing before the Tax Commission. Accordingly, the BOE record shows the appeal from the Property Owner was denied which means the BOE upheld the value of the County Assessor for the subject property at $$$$$.

Pursuant to Utah Code Annotated Sec. 59-1-502.5 an Initial Hearing[1] was held on June 3, 2010 in the RURAL COUNTY Offices in CITY-1, Utah with the Petitioner and Respondent participating in person. The Property Owner requested the value of the subject parcel be lowered to $$$$$[2] with $$$$$ for the land and $$$$$ for the improvements. The Assessor as representative for Respondent (the "County") requested the value of the subject be lowered to $$$$$ with $$$$$ for the land and $$$$$ for the improvements.

APPLICABLE LAW

The Tax Commission is required to oversee the just administration of property taxes to ensure that property is valued for tax purposes according to fair market value. Utah Code Ann. §59-1-210(7).

All tangible taxable property located within the state shall be assessed and taxed at a uniform and equal rate on the basis of its fair market value, as valued on January 1, unless otherwise provided by law. Utah Code Ann. §59-2-103

Fair market value means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Utah Code Ann. §59-2-102(12)

Any person dissatisfied with the decision of the county board of equalization concerning the assessment and equalization of any property, or the determination of any exemption in which the person has an interest, may appeal that decision to the Tax Commission. In reviewing the county board's decision, the Commission may admit additional evidence, issue orders that it considers to be just and proper, and make any

1 The BOE record shows the parties requested to proceed to a formal hearing before the Tax Commission. Formal hearings must be held in CITY-2, Utah in a commission hearing room so it can be recorded. In a telephone call with both parties Commissioner Dixon learned the record improperly said "formal hearing" and the parties really wanted to proceed to an initial hearing to be held in CITY-1.

correction or change in the assessment or order of the county board of equalization. Utah Code Ann. §59-2-1006(3)(c).

Petitioner has the burden to establish that the market value of the subject property is other than the value determined by Respondent. To prevail, the Petitioner must (1) demonstrate that the County's original assessment contained error, and (2) provide the Commission with a sound evidentiary basis for reducing the original valuation to the amount proposed by Petitioner. The Commission relies in part on *Nelson v. Bd. of Equalization of Salt Lake County*, 943 P.2d 1354 (Utah 1997); *Utah Power & Light Co. v. Utah State Tax Comm'n*, 590 P.2d 332, 335 (Utah 1979); *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344 (Utah 1996) and *Utah Railway Co. v. Utah State Tax Comm'n*, 5 P.3d 652 (Utah 2000).

DISCUSSION

The subject property is located at SUBJECT PROPERTY, CITY-3, RURAL COUNTY, Utah along what is also called HIGHWAY. The Subject Property is ##### acres of land (or #####-square feet (sf)) improved with a ##### sf warehouse type building, and a large shelter canopy in front of the building. The Subject Property has about 200 feet of frontage along HIGHWAY. The improvements, constructed in 1960, were last used as an old BUSINESS-1 truck stop and convenience market.[3] The Property Owner purchased the property in 2004 at a tax sale for $$$$$ and is using the property to store and repair trucks used in his oil and gas business.

In support of the requested value of $$$$$ the Property Owner first submitted 27 pages of documents including studies, letters, notes and maps from multiple government agencies and government contractors regarding contamination levels on and clean up of the Subject Property dating back to 1994. Many of the documents are from the Division of Response and Remediation (DERR), a division of the Utah Department of Environmental Quality (DEQ). The content of these documents has been summarized by the Commission and are noted in Attachment B of this order.

The Property Owner submitted the documents as proof the property still has environmental contamination from when the site was operated as a truck stop and that the site has not been "released" by DEQ as "clean" of all contaminants. The Property Owner provided the following history of the Subject

2 The BOE appeal form indicates the Property Owner requested a value of $$$$$ at the BOE.
3 The Subject Property is also referred to as the CITY-3 Truck Stop.

Property for the Hearing Officer. The owners who had operated the site as a truck stop abandoned the site. The United States Environmental Protection Agency (EPA) did testing on the Subject Property as early as 1994 and determined there was contaminated ground water migrating from under the Subject Property to neighboring properties and flowing into an adjacent stream. EPA spent over $$$$$ mitigating contamination of the ground water, which included the planting of trees along the south side and west of the subject property.[4] The Property Owner stated the $$$$$ spent addressed the ground water, but did not clean up any of the contaminants in the soil on the Subject Property. When EPA concluded its work on the ground water the Subject Property was put up for tax sale. Although EPA mediated the significant sources contaminating the ground water, which concluded its work, the soils on the property are still contaminated. He holds the State of Utah Division of Water Quality (DWQ) may have to give clearance to proceed with any improvements on the Subject Property that involve digging up dirt.

The Property Owner proffered that in 2007 CITY-3 required the owner of the former BUSINESS-2 site, which is adjacent and north of the Subject Property, to test soil samples for fuel and oil due to surface spills from fill-up stations formerly on the site. The adjacent owner had to clear the site of contaminated soils before the City would issue a building permit. The Property Owner submitted copies of the adjacent owner's receipts to dispose of the contaminated soil at the RURAL COUNTY landfill and proffered the adjacent owners costs were over $$$$$. The County objected to the information as Hearsay[5] stating the adjacent owner may have dug out dirt and taken it to the landfill, but there was no evidence the City required soil samples or that the soil dug up and hauled out was contaminated.

The Property Owner stated NAME-1, the CITY-3 Manager, told him that due to past history, he would require soil samples before any building permit would be issued for the Subject Property. To document how much it would cost to clear the Subject Property of contaminated soils, the Property Owner submitted two bid proposals for excavating and replacing contaminated soil. The first bid was from BUSINESS-3 in CITY-1, Utah, signed by the manager and dated September 11, 2009, and gave a cost of $$$$$ to haul 51,463 tons of dirt to the county landfill @ $$$$$ per ton. The total cost to remove the contaminated soil, haul in road base and clean dirt, and compact was over $$$$$. The Property Owner stated this was to remove dirt down to nine

4 The Commission understands these trees serve to absorb contaminants, which could contaminate the ground water plume that flows into a tributary that feeds CREEK.

5 The Commission can consider Hearsay, it just cannot be considered to be a fact or be determinative of the case. The Commission believes the County is really contesting that the documents do not support the premise.

feet (it was not clear if that was for the entire site). The second bid was from BUSINESS-4 dba BUSINESS-5, out of CITY-1, Utah dated September 23, 2009. The bid is to excavate and haul off 1.5 acres of contaminated soil, 3' to 9' deep, and haul in clean soil for a cost of $$$$$.

The Property Owner referred to an August 2004 letter and application he received from DERR after he purchased the Subject Property (See Attachment B, #6 and #9). He stated he did not respond to the letter (complete the application) because he knew it would cost $$$$$ to $$$$$ (to test the soils). The Property Owner said "I should not have to test my soils to prove them (the County) wrong. NAME-2[6] told us we were crazy to buy the property. It is clear the property is encumbered."

The Property Owner also asked the Commission to take into consideration the prior decisions rendered by the Tax Commission for this subject property for lien dates January 1, 2006 and January 1, 2007. These decisions, Tax Commission Orders 06-1656 and 07-1428, were submitted by the Property Owner. The Property Owner stated that in the six years he has owned the property a lot of his documents regarding the contamination and clean up of the site have been misplaced.[7] The Property Owner also submitted several years of county tax notices and BOE decisions for the Subject Property and an August 2, 2004 stipulation with the County for the Subject Property setting the land value at $$$$$ and the improvements at $$$$$ for a total value of $$$$$, which is the amount for the which Property Owner purchased the Subject Property in June 2004, and value requested for the January 1, 2009 lien date.

The County provided a Restricted Appraisal Report prepared by RESPONDENT-2, a contract commercial appraiser for the County Assessor. For the January 1, 2009 lien date year in question the appraisal uses eight comparable sales in CITY-3--five sales from January 2005 to October 2005, and one each from January 2007, April 2007, and March 2008 (the appraiser stated at the hearing these were unimproved land sales as it was not clear from the appraisal). None of the sales comparables were of contaminated properties. After adjustments to the comparables, the appraisal gives an opinion of value for the land of the Subject Property of $$$$$; the appraisal gives no adjustment to the land of the Subject Property for contamination. The appraisal states the cost approach was used to estimate the contributory value of the subject improvements and assigns a value of $$$$$ to the improvements.

6 The Commission understands NAME-2 to be from EPA Region VIII as referenced in the documents provided.
7 The Commission notes Tax Commission Orders 06-1656 and 07-1428 have been sent to the State of Utah Archives and based on the retention schedule the 2006 appeal will be shredded in 2011, and the 2007 appeal soon after. The Property Owner as a party to these appeals can make a request to the Tax Commission for a copy of the documents in these files, but it is incumbent upon the Property Owner to do so before the files and records are shredded.

RESPONDENT-2 said the Subject Property is being used consistent with approved city and county regulatory uses, and is being used at its highest and best use in its current state, which RESPONDENT-2 considered to be for parking and repairing trucks, as this does not disturb the soils. He stated the building is at the end of its economic life, but it is being used. The Assessor recognized there were restrictions on use of the Subject Property, e.g. it cannot be used as a daycare center and she agreed the Property Owner would not be able to build a brand new building, as it would disturb the soils.

RESPONDENT-2 acknowledged the Subject Property is contaminated and has stigma, but said the County has no evidence of the extent of the contamination or the extent of the clean up performed. He stated it was beyond the scope of the Assessor's Office to contract and determine contamination on the property. The Property Owner should have to do testing for credible and reliable information. RESPONDENT-2 stated there could be a market driven adjustment for contamination, but it is not the Assessor's job to determine the extent of the contamination.

ANALYSIS

In reviewing all the evidence submitted by the Property Owner (itemized and summarized in Attachment B) the data and information indicates the soil is still contaminated, use of the property is limited due to contamination, and the Property Owner has not obtained site closure from DWQ. The documents support the Property Owner's position that the soils on the Subject Property were not mediated. EPA removed the "free product" (see Attachment B, #10) EPA[8] mediated this portion of the clean up before the Property Owner purchased the Subject Property. Once the Property Owner purchased the Subject Property, the Property Owner had the option to submit an application to DERR for review (approval of an action plan to clean up of the remaining contaminated soil) and eventual site closure under DERR **or** have continued oversight and "closure" by DWQ[9] (See Attachment B, #6). The DERR site visit information sheet submitted states "closure" with DWQ would focus on the impact to usable drinking water in the area, and "the differences in these programs managed by two different agencies" would be one of many considerations the new landowner would need to address and decide.

8 The Commission notes EPA contracts with the State of Utah DEQ to oversee some types of EPA clean-ups, such as the Subject Property. Per the MOU between DWQ and DERR both divisions of DEQ, DERR oversaw the Subject Property. (See Attachment A)

9 The Commission notes these agencies are DERR and DWQ, both divisions of DEQ (see Attachment A)

Although the subject property is being used, based on the documents submitted, the Subject Property has not received closure under the requirements of DEQ. This is made clear based on a Memorandum of Understanding (MOU) between DERR and DWQ. (See Attachment A) The MOU is important to understanding whether the Subject Property has been "cleared", "signed-off", or "received closure", either term being used to indicate an overseeing government agency has determined the site is clean of any contaminates. Under the DEQ MOU, if a property is actively engaged in cleanup of an Aboveground Storage Tank (AST), DERR may retain oversight and bill DWQ for administrative costs. Otherwise the file must be transferred to DWQ for retention and oversight. In reading the memorandum dated August 6, 2004 by NAME-3 of DERR (See Attachment A, #4) it is clear he was transferring the file for the Subject Property to DWQ. The documents also support there is enough contamination and concern with the Subject Property that if and when the Property Owner applies for a building or demolition permit with the City, it will trigger further remediation of the site by the City, County and State.

The Commission notes inconsistencies with statements made in the County's appraisal and verbal statements and acknowledgements made at the hearing. On page four of the county appraisal, the report states "The EPA has since 'closed the file' thus declaring the property clean and clear for business. DERR and DWQ have no issues with the property." Page eight of the County Appraisal Report states "Proof pertaining to the contamination rests with the property owner. Until proof can be provided otherwise, there is no justification to reduce the market value estimate of the subject property." However, from statements made at the hearing it appears the County is no longer contesting the Subject Property is contaminated, uses of the property are restricted and the Subject Property has stigma. Instead the County is arguing the Property Owner has not provided evidence to show "the extent" of the contamination. On page nine the appraiser writes, "I do have in my file's evidence to support a reduction in value for contaminated properties. However, until the extent of the subject property contamination is known, it would be irresponsible appraisal practice to arbitrarily apply a discount to the property's market value estimate." At the hearing the County made clear it believes the Property Owner needs to quantify the amount of the contamination on the Subject Property.

The Commission holds it is the County's responsibility to apply a reasonable adjustment to the value of the Subject Property based on the contamination information it has, and for the Property Owner to then contest the amount of adjustment applied to the Subject Property with documentation of contamination. The

Commission holds the Property Owner has provided enough evidence to establish some extent of the contamination. These are:

(1) A Utah RBCA (risk based corrective action) Tier 1 Worksheet for the CITY-3 Truck Stop completed by the DERR project manager, NAME-3, and signed and dated April 4, 2002 (Attachment B, #10). It gives the depth to top and base of contaminated soil on-site as approximately 3 feet top and 9 feet base and documents that contamination on-site exceeds acceptable levels.

(2) The map dated March 30, 1994 completed by the Technical Assistance Team for Emergency Response, Removal and Prevention EPA Contract 68-WO-0037, CITY-3 Gas. (See Attachment B, #15) The map shows where the soil and water samples were taken on the Subject Property and surrounding properties. The map estimates a perimeter of the dissolved phase and a perimeter for the product phase (See definitions in Attachment A). Based on the Utah RBCA the free product (product phase) was removed. Remaining is the dissolved phase, which by the map is estimated to cover the majority of the Subject Property. If the County required more evidence it would reason the County could request the known contamination levels at each of the soil test sites.

(3) Commission Order 07-1428 issued June 2, 2008 for a hearing held on May 2, 2008 for the same Subject Property. The same parties participated in the 2008 hearing conducted by another Commissioner. The Property Owner requested the Commission take notice of this hearing order. The County did not object. Page two of Order 07-1428 references a letter submitted by the Property Owner. The order reads "…the letter from EPA states that "The only way to quickly and conclusively remove the problem of the gasoline contamination under the building would be to demolish the building and excavate and dispose of the contaminated soils." This appears to be the same letter referenced by the CITY-3 Manager in his letter dated May 5, 2003 to NAME-3 at DERR, which says NAME-2 with Emergency Response (of EPA) has stated that safety issues have not been corrected as to product contamination under the building. (See Attachment B, #11) It would appear CITY-3 takes for fact the conclusions of EPA in regards to contamination under the building located on the Subject Property.

The Commission holds the County could at the very least quantify from these records the extent of contamination under the building on the Subject Property. The footprint of the building is given as 7,728 sq. ft. This equates to approximately 2,576 cubic yards of dirt down to nine feet. One cubic yard of dirt equals

approximately one ton. The Property Owner provided a bid of $$$$$ per ton to dispose of soil at the landfill. This gives a value of $$$$$ to dispose of the soil under the building. This does not include soil testing to obtain a building permit, costs to demolish and dispose of the improvements, costs to tear out, remove and dispose of the cement in the building, or costs to bring clean soil back onto the site.

In a property tax case, the taxpayer has the burden of showing an error in the Board of Equalization value. Petitioners have met that burden based on the documents submitted and summarized in Attachment B. Soils on the Subject Property are clearly contaminated. While free product has been removed and trees planted around the subject and neighboring properties to continue to cleanse contaminates from entering ground water as it moves from the soils on the Subject Property to the underground plume and flows to the tributary that feeds CREEK, the documents clearly indicate there is still considerable soil contamination on the Subject Property.

The petitioners have also met their burden of quantifying a cost to remove contaminated soil from the Subject Property to the depth of nine feet for at least 1.5 of the 1.8 acres. The bids to remove contaminated soil from the Subject Property far exceed the value placed on the land by the County or recommended by the appraisal from the County. The Property Owner provided no documentation to contest the value of $$$$$ placed on the improvements. The County also provided no documentation as to how it arrived at the value of those improvements. The Property Owner did provide the stipulated agreement for the Subject Property for 2004, which placed a value on the improvements of $$$$$. The commercial appraiser testified the value of the improvements had reached the end of their useful life. Despite this, the Commission is without any evidence to determine a different value for the improvements other than that established by the BOE.

Under these circumstances, and as the Commission determined in the 2006 and 2007 appeals for the same Subject Property, **the Commission affirms** that the approach approved by the Court of Appeals in *Salt Lake County BOE v. Utah State Tax Commission, ex rel. Baggett*, No. 2005 Ut. App. 360 (2005) is appropriate. See also, *Schmidt v. Utah State Tax Commission*, 980 P.2d 690 (Utah 1999). In *Baggett*, the taxpayer's home was on a Superfund site. The evidence indicated that the cost to cure the contamination exceeded the land value. The taxpayer continued to occupy the home. In *Baggett* the Commission upheld the value of the improvement, but reduced the land value to zero. The Court of Appeals affirmed that holding.

Applying the rationale of *Baggett* to this case, the Commission holds the value of the improvements is $$$$$ as determined by the Board of Equalization; however, the cost to clear contaminated soil from the

Subject Property far exceeds its current market value, so, in the absence of any evidence of sales of similarly contaminated land, or an income value, the Commission finds the value of the land is zero.

DECISION AND ORDER

Based upon the foregoing, the Tax Commission finds that the value of the subject property as of January 1, 2009 is $$$$$. The RURAL COUNTY Auditor is hereby ordered to adjust its records in accordance with this decision. It is so ordered.

This decision does not limit a party's right to a Formal Hearing. However, this Decision and Order will become the Final Decision and Order of the Commission unless any party to this case files a written request within thirty (30) days of the date of this decision to proceed to a Formal Hearing. Such a request shall be mailed to the address listed below and must include the Petitioner's name, address, and appeal number:

Utah State Tax Commission
Appeals Division
210 North 1950 West
Salt Lake City, Utah 84134

Failure to request a Formal Hearing will preclude any further appeal rights in this matter.

DATED this _____ day of _____, 2010.

R. Bruce Johnson
Commission Chair

Marc B. Johnson
Commissioner

D'Arcy Dixon Pignanelli
Commissioner

Michael J. Cragun
Commissioner

DDP/ddp 09-3783.int

Attachment A - Definition of Terms

The Commission took administrative notice of the State of Utah Department of Environmental Quality and the United States Government Environmental Protection Agency websites in defining these terms.

AST	Above Ground Storage Tanks
Geoprobe®	A patented instrument used to take dirt samples deep from the ground
DEQ	Department of Environmental Quality (in this case of the State of Utah)
DERR	Division of Environmental Response and Remediation, a division of DEQ. The Division is contracted and receives funds from the United States Environmental Protection Agency (EPA) to oversee cleanup of Leaking Underground Storage Tanks (LUST) sites in Utah. DERR is also contracted under an MOU with the Division of Water Quality (DWQ), also a division of DEQ, to oversee the clean up of Aboveground Storage Tanks (AST). DWQ has responsibility of ASTs, but DERR has the experience from doing LUSTs. The MOU between DERR and DWQ states that as long as clean up of an AST is in an active state, DERR can retain oversight and may bill DWQ for the costs of oversight. If a site owner is not actively cleaning the property for an AST, the case file is to be transferred to DWQ for further oversight.
DWQ	Division of Water Quality. In this case a division of Utah DEQ. DWQ has responsibility for oversight of contamination from ASTs.
Free Product	Also "free phase product" or "product phase." In this case it refers to gasoline that has not mixed with groundwater. It is not the dissolved phase or dissolved fraction in the soil.
LUST	Leaking Underground Storage Tanks
MOU	Memorandum of Understanding. In this case the "MOU" refers to an MOU between DERR and DWQ, both divisions of the State of Utah DEQ. The MOU is critical to understanding whether the subject property has been "cleared", "signed-off", or "received closure", either term being used to indicate an overseeing government agency has determined the site has been clear of contaminates to an acceptable level. Under the MOU, DERR only has oversight of a property contaminated by an AST if the property owner is actively engaged in cleaning up the site, then DERR may bill DWQ for services to oversee the clean up. Otherwise the file must be transferred to DWQ for retention and oversight. DWQ has responsibility for oversight of ASTs. (See #9 of Attachment B)

RBCA	Risk Based Corrective Action. In this case a Tier 1 Work sheet completed by DERR.
MCL	Maximum Contaminant Levels (MCLs) are standards set by the United States Environmental Protection Agency for drinking water quality. An MCL is the legal threshold limit on the amount of a substance that is allowed in public water systems under the Safe Drinking Water Act.
RCL	Residual Containment Levels (for soil). The minimum contaminant levels in soil that may require further investigation at the federal level.
Screening Level	Acceptable levels for closure consideration
START	Superfund Technical Assessment and Response Team. A company contracted by EPA to sample sites for contamination.

Attachment B
Property Owner's Documents

Note: The "#" is for reference in this order. The "Page #" is how the Property Owner numbered the documents for submission to the hearing.

#1 Page 1 The Tax Deed from RURAL COUNTY showing the purchase of the subject property by the Property Owner for $$$$$. It is dated June 7, 2004.

#2 Pages 2-6 Private contractor sampling activities report performed for the Superfund Technical Assessment and Response Team (START), EPA Region VIII, for CITY-3 Truck Stop (subject property name prior to purchase by the Property Owner), dated April 1997. Page 2 states the site was studied by the EPA Region VIII Technical Assistance Team contractor who installed monitoring wells and conducted additional investigations; the findings were presented in an April 1994 report. *"Contamination at the site is gasoline in groundwater and subsurface soils. The gasoline source was traced to aboveground storage tanks (ASTs) and associated buried lines."* Page 3, 3.2 Soil Sampling. It states soil samples were taken from one borehole adjacent to N-GP-09 with cores taken at three, five, seven and nine feet bgs. Page 5, (page 7 of the report) states, *"The seven and nine foot bgs samples had benezene concentrations of 150 and 6,100 ppb respectively. These values greatly exceed the groundwater concentration of 8.2 pppb. The geoprobe core sample was heavily stained starting at 7.5 feet bgs. . . . Soil contamination at sample location N-GP-09 was probably caused by contact with the free-phase gasoline. The higher (chemical names) concentrations typical of gasoline are reflected in the soil sample results.* (The following pages of the report were not provided, 2, 4, 5, 6, 8, 10, 11.)

#3 Pages 7-11 Tables of samples taken from the subject property between 8/22/96 and 2/18/97. Page 8 is a record of the soil samples taken.

#4 Page 12 An internal memo on State of Utah, Department of Environmental Quality (DEQ) letterhead, between employees of the Division of Environmental Response and Remediation (DERR), a division of DEQ. It is dated August 6, 2004, and the subject is "No Further Action and Transfer of all Hardcopy AST Information to the Division of Water Quality (DWQ), Former CITY-3 Truck Stop." In summary, the memo states that in accordance with the Memorandum of Understanding between the DERR and DWQ adopted on August 26, 1996, "no further action"[10] was required by the DERR (because) the Property Owner had not submitted the required "application for review", and no closeout letter will be sent as it is not an active LUST (leaking underground storage tank) site, and the release file will be transferred to the DWQ for further oversight per the aforementioned MOU.

#5 Page 13 A memo from DERR to DWQ on DEQ letterhead, subject "Transfer of the Former CITY-3 Truck Stop Aboveground Storage Tank Release Site. In part it says: *"under the provision of the MOU, the DERR is transferring the CITY-3 Truck Stop release file to DWQ for further oversight."* It is copied to the Director of the Tri-County Health Department, CITY-3 Manager, the County Appraiser's Office, and NAME-2, EPA Region VIII, and others.

#6 Page 14 A LUST Site Visit Information Sheet, for the subject property dated June 22, 2004. It is a record of the first meeting of the Property Owner and NAME-3 the DERR Project Manager for the underground storage tank remediation for the subject property. The record indicates NAME-3 explained the compliance status of the facility and the regulatory options found under the DERR or DWQ. They discussed the petroleum release attributed to the above ground storage tanks (AST) and the prospects for site closure. NAME-3 outlined the Property Owner's options going forward. The sheet says *"Under the DERR cleanup guidance, the Property Owner would be required to perform confirmation sampling of soil and ground water and possibly be required to actively cleanup the release (of petroleum). Under the DWQ guidance, petroleum release information and considerations for closure may be focused on impacts to usable drinking water in the area. The differences in these programs managed by two different agencies[11] would be one of many considerations the new*

10 The Commission holds "no further action" in the context of this memo is not the same as a "no further action" letter issued from the Executive Secretary of the Utah Solids and Hazard Waste Control Board.

11 The Commission notes although these are two different agencies, they are both divisions of the State of Utah

landowner will face." The memo continues by stating that in addition to discussing compliance matters he checked for potential petroleum vapor exposure. Using historic maps from EPA's work, he determined a hole in the concrete floor of the shop had exposed subsurface soils overlying a suspected hot spot for petroleum exposure. He checked this location and others and at the time, did not detect any organic vapors. Finally, the site visit sheet gives the following "Action Items: Send REPRESENTATIVE-1 FOR PETITIONER a compliance letter that declares the AST release and its management under two different programs, and contractor information. Provide CITY-3 a copy of this report. Stay in touch with REPRESENTATIVE-1 FOR PETITIONER and assist him in his efforts to obtain site closure under the DERR or transfer the file to DWQ for their review."

#7 Page 15 The cover letter sent to the property owner from NAME-3 of DERR with the June 22, 2004 site visit.

#8 Page 16 A copy of the same document that is page 13.

#9 Pages 17 –18 The application for site remediation for petroleum release from AST. It references the MOU between DERR and DWQ, and reads "The MOU provides that the DERR LUST will provide administration for DWQ regulated aboveground storage tank petroleum releases and may charge the authorized fees established under the annual legislative appropriations bill for staff time committed to these efforts." Page 18 states the conditions the submitter must agree to "When the DERR determines that my submissions of information and documentation indicate that the release does not presently pose a known threat to human health or the environment . . . the DERR will issue a letter to the DWQ and to me to that effect. The letter will be substantially similar to the closure letters the DERR LUST program issues upon completion of the work at a leaking underground storage tank site (LUST). (This would have to be an application form used in 2004.)

#10 Page 19 A Utah RBCA (risk based corrective action) Tier 1 Worksheet, for the CITY-3 Truck Stop completed by the DERR project manager, NAME-3, for the site, signed and dated April 4, 2002.

Department of Environmental Quality.

Under "site assessment" it states the contaminating source was gasoline through piping. It states the "free product" contamination sources (gasoline) were removed, there was "treatment of dissolved phase contamination" (the planting of trees), and "removal of free-phase product (gasoline) of approximately 10,068 gallons." It gives the depth to top and base of contaminated soil as approximately 3' top and 9' base and notes that the contamination source affecting surface water is 350 feet from a tributary to CREEK. The second page gives the screening level (acceptable levels for "closure" consideration) and highest concentration at source for the soil. These are summarized in the chart below:

Constituents	Ground water Screening level	Ground water Highest concentration at source On site / Off site	Soil Screening level	Soil Highest concentration at source (on site at N-GP-09 @ 91 Geoprope®)
Benzene	0.3	2.1 7.0	0.9	6.1
Tolunene	7		61	8.2
Ethylbenzene	4		23	54
Xylenes	73		235	230
Nuphthalene	0.1		10	
MTBE	0.2		0.3	
TPH-gasoline	10	4.1 / 24	1500	2,000 (TVPH)
TPH – diesel	10		5000	
Oil and Grease / TRPH	10		10000	

The DERR Project Manager gives the recommended tier one action as "perform a Tier 2 risk assessment or clean up to applicable levels" (handwritten). This Utah RBCA Worksheet dated April 4, 2002 also appears to be the document referenced in a letter dated May 19, 2003 from NAME-3 to the CITY-3 Manager (see #11 below).

#11 Page 21 A letter from the City of CITY-3 dated May 5, 2003 from the City Manager to NAME-3, at DEQ, regarding the CITY-3 Truck Stop, now the subject property. It references a letter from "NAME-2 with Emergency Response" (see # 5 to see NAME-2 is with EPA Region VIII) stating that

safety issues have not been corrected as to product contamination under the building (at the subject property). The letter discusses brown field funds to correct the issues, and requests a list of times to bring the project into compliance, and states "CITY-3 and RURAL COUNTY want to get this project off of our blight list."

#12 Page 22 – Response letter from NAME-3, DERR to CITY-3 Manager dated May 19, 2003. It includes a RBCA (Risk Based Corrective Action) Tier 1 Worksheet. The letter states known contaminant levels of soil are listed on page two of the RBCA. *"This is the quick evaluation of where contamination at the site stands today" compared to the "screening level",* which is where it needs to be for closure consideration. The letter also states that more stringent RCL/MCL standards may apply to the subject property for closure evaluation because the groundwater plume moves off of the subject site and affects third party properties. It also references a DRAFT EPA report that discusses some site sampling.

#13 Pages 23 –24 A bid form BHI in CITY-1 Utah for PETITIONER, dated 9/11/20009 to excavate contaminated soil from the shop site and haul clean soil back. The bid is to excavate down to nine feet, haul 51,463 tons of soil to the county landfill, haul 45,745 tons of pit run and 5,718 tons of road base back to the site, and compact 51,463 tons total. The bid was $$$$$.

#14 Pages 25-26 A bid from BUSINESS-4 to excavate and haul off 1.5 acres of contaminated soil 3-9' deep. Haul in clean soil. The bid was $$$$$.

#15 Page 27 A map dated March 30, 1994 completed by the Technical Assistance Team for Emergency Response, Removal and Prevention EPA Contract 68-WO-0037, CITY-3 Gas. The map shows where the soil and water samples were taken on the Subject Property and surrounding properties.

#15 Page 28 A map of the site showing the plume flow. The Property Owner provided soil samples from two test holes he dug and provided in plastic bags to the Hearing Officer. The map notes from where on the site the soil samples were taken.[12]

12 Although the soil samples provided were taken back to the Commission Offices, the Commission did not consider the smell of the samples in rendering this decision.