BEFORE THE EXECUTIVE DIRECTOR OF THE
UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY

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| In the Matter of: Corrective Action Plan Approval Top Stop C-4, Located at 15 South Main Street, Gunnison, Utah Facility Identification No. 2000220, Release Site MHB | FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED DECISION<br><br>April 4, 2016<br><br>Richard K. Rathbun,<br>Administrative Law Judge |

This matter is before me pursuant to an appointment by the Executive Director of the Utah Department of Environmental Quality dated August 29, 2013. The appointment charges me to conduct a permit review adjudicative proceeding in accordance with Utah Code Ann. § 19-1-301.5 and Utah Admin. Code R 305-7. Now before me is the Request for Agency Action (RAA) filed on or about August 20, 2013 by the Petitioner, Wind River Petroleum *dba* Top Stop Convenience Stores ("Wind River"). The RAA challenges and seeks remand of the July 23, 2013 Corrective Action Plan Approval letter issued by the Respondent, Director of the Division of Environmental Response and Remediation ("Director") in connection with Wind River's response to a gasoline release from the site of the Top Stop C-4 facility at 15 South Main Street, Gunnison, Utah (the "CAP Approval").

After briefing by the parties, oral argument was held on Dec. 10, 2014 and the parties submitted their proposed findings of fact and conclusions of law on January 23, 2015. Upon consideration of the pleadings and exhibits, administrative record and the arguments of counsel, I submit the following Findings of Fact, Conclusions of Law and Recommended Decision to the Executive Director. For the reasons set forth below, I recommend that the Executive Director

remand the CAP Approval to the agency for further proceedings consistent with this Recommended Decision.

## PROCEDURAL BACKGROUND

1. This administrative adjudication arises under the Utah Underground Storage Tank Act, Utah Code Ann. §§ 19-6-401 to -429 ("UST Act") and implementing regulations found in Utah Admin. Code R311-200 to -212, which adopt and incorporate 40 CFR Part 280 in its entirety.

2. Wind River initiated this permit review adjudicative proceeding when it filed its Request for Agency Action ("RAA") on August 20, 2013. The RAA contested the CAP Approval issued July 23, 2013 by the Director for a petroleum release from a gas station owned by Wind River, known as the Top Stop C-4, located at 15 South Main Street in Gunnison, Utah.

3. The RAA requested relief in the form of a remand of the CAP Approval Order to the Director for reconsideration of the CAP proposed by Wind River on June 7, 2013 and the withdrawal of conditions imposed by the Director in his July 23, 2013 CAP Approval Order. The Director filed his written response to the RAA on October 4, 2013 and submitted the Initial Administrative Record on November 14, 2013.

4. The Director then filed his Motion to Dismiss RAA for Failure to Comment, with exhibits, on November 29, 2013. Wind River's opposition, including exhibits, and the Director's reply memorandum were filed December 20 and 30, 2013, respectively. The undersigned ALJ denied the Director's motion to dismiss on July 2, 2014.

5. During the briefing on the merits, Wind River filed a motion to supplement the administrative record, which was granted by the ALJ on November 17, 2014. The supplemental information entered into the record as a result included an expert report prepared by Wind

River's consultant, Wasatch Environmental, and a declaration from Keith Christensen attesting to and attaching the settlement agreements reached between Wind River and property owners in Gunnison.

6. As allowed by Utah Admin. Code R305-7-210, the Director supplemented the administrative record on November 26, 2014, filing the affidavits of Doug Hansen and Morgan Atkinson.

7. Upon completion of briefing on the merits of the RAA, this matter came before the ALJ for oral argument on December 10, 2014 at 10:00 a.m. Appearing as counsel at the argument were Rita Cornish and Megan Houdeshel on behalf of Wind River, and Kimberlee McEwan on behalf of the Director.

8. After oral argument, the parties submitted supplemental briefing regarding the effect, if any, of the settlement agreements entered into between Wind River and the residents of Gunnison on any requirement under 40 CFR § 280.66 that Wind River mitigate adverse consequences of its actions taken in response to the petroleum release, and also fully briefed the supplemental case authority that had been introduced by Wind River at the December 10, 2014 hearing.

9. After the merits briefing was completed and oral argument on the merits had been held, the Director filed a motion to supplement the administrative record on December 24, 2014, seeking permission either to add documentation to the record (Affidavit of Paul Zahn with Exhibit), or in the alternative, that judicial notice be taken by the Executive Director that DERR Directors have conditionally approved CAPs over many years prior to the instant case. That motion has remained pending (and was at the time proposed findings and conclusions were

submitted by the parties), and is addressed in a separate order issued contemporaneously with this Recommended Decision.

10. Having reviewed the parties' briefing and exhibits, arguments of counsel and the administrative record in this matter, I recommend that the July 23, 2013 CAP Approval be remanded to the Director and the Division of Environmental Response and Remediation ("DERR") for further review and action consistent with applicable law.

## FINDINGS OF FACT

1. A petroleum release in the vicinity of Top Stop C-4, 15 S. Main, Gunnison, Utah, was reported by Wind River to the Division of Environmental Response and Remediation (DERR) in August, 2007. (Wind River RAA ¶ 8; Director's Response ¶ 8)
2. This action arises from abatement measures for the release taken by Wind River and its contractor, Wasatch Environmental, Inc. ("Wasatch"). (Wind River RAA ¶ 8; Director's Response ¶ 8)
3. Between August 2007 and February 2008, Wind River and Wasatch conducted an emergency response to mitigate gasoline vapors in local businesses and residences and a subsurface investigation to identify the extent of the contamination plume. This included installation of soil ventilation systems, which included trenches backfilled with flowable-fill on private and public property. (Wind River RAA ¶ 9; Director's Response ¶¶ 9, 10)
4. Representatives of Wind River, Wasatch and DERR met on February 7, 2008 to discuss corrective action, and Wind River submitted a "CAP Summary Letter" to DERR dated May 9, 2008. (IR 000001)
5. Wind River initiated an emergency response to begin remediation upon discovery of the spill, and "[d]ue to the emergency nature of the project's development, the volatility of the

petroleum product, the high permeability of the sediments beneath the site, the apparently high rate of plume migration, and large plume dimensions, the [soil vapor extraction ("SVE")] alternative for corrective action was recommended and approved." (Wasatch Corrective Action Plan Summary Letter May 9, 2008 - IR000004)

6. The SVE alternative required construction of trenches, which were backfilled with flowable-fill on private and public property. *See* IR000626, 2012 Draft CAP: "The SVE trenches were constructed by placing approximately 3 feet of crushed gravel in the bottom of the trench; a horizontal 4-inch diameter slotted, PVC well screen was installed on the gravel; and approximately 1 foot of gravel was placed over the well screen. The remainder of the trench was backfilled with flow-fill (a lean concrete mix) to within 1 foot of the surface and with native backfill to the surface."
7. The goal of the remediation system was to intercept the flow of gasoline (primarily vapor) and extract it from the surface. (Wasatch Supplemental Information report by Les Pennington, P.E. dated October 10, 2014 at p. 2; IR001409-1426; "October 10, 2014 Wasatch Report").
8. The flow-fill was used to "form a tight seal with the walls of the trench which improves vacuum extraction efficiency of gasoline vapors." (*Id.* at p. 3)
9. Wasatch found that "the flow-fill does not inhibit plant growth," and that "site visits to Gunnison reveal that vegetation has re-grown in the trenched areas and there does not seem to be a problem with planting." (*Id.* at p. 3).
10. The SVE trenches, as filled by flow-fill and the other constituents described in paragraph 6 above, are approximately 2 feet wide and 12-15 feet deep, with the flow-fill topping off approximately 12 inches below grade. (Wind River's CAP, IR000172; 2010 CAP

Addendum, IR000232; 2012 draft CAP, IR000626, and 2013 Final CAP, IR 000988, as well as a letter from Wasatch, Wind River's environmental consultant, dated February 3, 2011, IR000553).

11. The locations and general layouts of the SVE treatment systems installed by Wasatch during the emergency response and site investigation activities are depicted in Figure 1 (IR001011) of the May 31, 2013 CAP Addendum. They include the systems identified by Wasatch as: East Horizontal SVE System; West A and B Horizontal SVE Systems; South Horizontal SVE System; 255 South 100 West SVE System; Central Horizontal SVE System; and West Alley Horizontal SVE System. (Section 2.2 of May 31, 2013 CAP Addendum, IR000988-990).
12. As part of the East Horizontal SVE System, a horizontal SVE trench was installed on the east side of Main Street, and three vertical wells on the former Top Stop site were connected to the SVE system. The system began operation on August 29, 2007 and was decommissioned in March, 2012. (IR000988-989).
13. The West A System was installed on the west side of Main Street, and the West B System was installed behind the Casino Star Theatre. West A system operation began on September 21, 2007, and West B system operation began on January 17, 2008. (IR000989).
14. The South Horizontal SVE System was installed in an open field adjacent to the north of the 255 South 100 West property. System operation began on November 20, 2007, and was decommissioned in March, 2011. (IR000989).
15. The 255 South 100 West SVE System was installed during the period of August 8, 2008 (drilling of two SVE wells) through approximately August 11, 2009 (installation of trench

beneath garage floor) and was decommissioned in September, 2010 when the residence was demolished. (IR000989).

16. The Central Horizontal SVE System was installed on the 60 West 200 South Street property near its north boundary, beginning operation on November 27, 2007. In February 2008, additional horizontal SVE trenches were installed on properties lying adjacent to the north, west, and east of the 60 West 200 South Street property. The system operated through approximately early November, 2010. (IR000990).
17. The West Alley Horizontal SVE System was installed in a pre-existing garage building located near the west boundary of the 36 West 100 South Street property. The extraction trench extended from north to south along the east side of the property. The system began operation on May 16, 2008, and was shut off and decommissioned in September, 2012. (IR000990).
18. The locations and general layouts of the SVE treatment systems installed by Wasatch during the emergency response and site investigation activities are depicted in Figure 1 (IR001011) of the May 31, 2013 CAP Addendum. No as-built drawings were made of the SVE systems, as they were installed as part of an emergency response to the release. (Wasatch letter February 3, 2011; IR000552-553; RAA Exhibit C).
19. The administrative record does not indicate the total length of the SVE trenches with flow-fill installed by Wasatch. The SVE systems (seven in number, as described in Finding of Fact ¶ 11 above) were put into place to remedy a plume that had moved approximately 1500 feet toward the southwest from Wind River's Top Stop station as of the May-June 2008 public comment period. (Public Notice, Public Comment Period: May 19, 2008 – June 19, 2008; IR000022; RAA Exhibit E).

20. DERR's Project Manager, Morgan Atkinson, has described the trenches as constituting "several hundred feet" in length. (Atkinson May 22, 2013 email to JayDee Gunnell; IR000980).
21. The first public comment period held to solicit public comment on a draft corrective action plan ("CAP") to remediate the gasoline release in Gunnison Utah began on May 19, 2008 and ran through June 19, 2008 ("First Comment Period"). (IR000022).
22. DERR received public comments from citizens of Gunnison, the City of Gunnison, attorneys representing people and businesses affected by the release, and others. (IR000038-98).
23. DERR responded to the comments received during the First Comment Period in a response to comments document dated September 3, 2008. (IR000099-166).
24. After receiving public comments on the May 9, 2008, CAP Summary Letter, the Director wrote a letter to Wind River dated July 21, 2008 ("CAP Requirements Letter"), outlining requirements for Wind River to address in its final CAP and technical specifications. (IR000049-53).
25. The Director's July 21, 2008, letter stated, *inter alia*, that "[i]n accordance with Utah Admin. Rules R311-202-1, incorporating 40 CFR § 280.66(d)(2), you must mitigate adverse consequences from cleanup activities," and detailed "three areas of concern," including items related to private property site restoration, Gunnison City restoration, and the Top Stop site itself. (IR000049-51).
26. On October 27, 2008, Wind River submitted its September 30, 2008 CAP (corrected version) to DERR. (IR000167-224, "2008 CAP").
27. During the remediation process and in the month of June, 2010, businesses and residents of Gunnison entered into settlement agreements with Wind River that compensated them for all

existing and future property damages, property devaluation, and all claims associated with Wind River's remediation efforts. (Christensen Declaration and settlement agreements attached thereto as Exhibits A and B; IR0001341-1408).

28. Wind River submitted to the DERR a CAP Addendum dated November 15, 2010 (IR000227-543) that the Director approved for public comment by letter dated January 13, 2011. (IR000544-546; "2010 CAP Addendum").

29. The Director's January 13, 2011 Notice of Approval letter instructed Wind River to address several issues, including, in reference to Section 16.0 of the CAP, entitled "Site Restoration," the planned abandonment in place of subsurface piping, stating: "Due to the nature and manner in which the systems and SVE piping was installed, these are not typical SVE lines that can just be capped and left in place. Property owners are essentially left with a subsurface concrete wall and each individual property owner should be given an acceptable option as to how the final abandonment of the SVE lines will be handled." (*Id.* at p.3; IR000546).

30. By letter dated February 2, 2011, Wind River acknowledged receipt of the Director's January 13, 2011 letter, and with respect to property damage (relocation expenses and abandonment of SVE lines) stated its position that Wind River "has already reached a settlement agreement with each of the affected property owners that fully compensates them for these items of property damage and/or displacement." Wind River included an excerpt of the release language used in the settlement agreements and offered to provide redacted copies of the agreements for the Director's review. (IR000549-551).

31. On behalf of Wind River, Wasatch also wrote a letter in response to the Director's January 13, 2011 letter, stating Wind River's position that "the abandonment of the system has been

addressed in the settlement agreement and factored into the payments made to the claimants," and that "flowable fill is only about two feet thick in most locations, it can be excavated, and it does not leave the property owners with a 'concrete wall.'" (IR000552-553)

32. A second public comment period was held on a revised draft CAP (2010 CAP Addendum, IR000227-543) that began on January 31, 2011 and ran through March 4, 2011 ("Second Comment Period"). (IR000547-548).

33. DERR received several public comments to the 2010 CAP Addendum, including concerns over damage to private property resulting from the work done by Wasatch. (IR000559-570; IR000576-594).

34. Representatives of Wind River, Wasatch and DERR met on March 16, 2011, which meeting was followed by the Director's April 25, 2011 letter re-capping the meeting and listing several "DERR requirements" to be enforced. (IR000571-575) These included reference, in section 3.e, to the requirement for mitigation of adverse consequences from cleanup activities, and specifically that "[t]he systems… potentially have adverse consequences to individual property owners due to the associated subsurface piping and flow-fill and other material that is proposed to be terminated below the ground surface and abandoned in place." (IR000571-575).

35. The Director's April 25, 2011 letter also documented Wind River's expressed reliance on the settlement agreements with Gunnison residents and described Wind River's position as "claiming that all adverse consequences were mitigated through the settlement terms." (*Id.* at p.4; IR000574).

36. In a letter dated August 4, 2011, the Director disapproved Wind River's 2010 CAP based on, among other things, Wind River's failure to provide a plan to mitigate adverse consequences

"to off-site properties caused by the installation of the remediation systems, including, but not limited to, the sub-surface piping and flow-fill trenches." The Director also wrote that the DERR was not a party to Wind River's settlement agreement(s), and that "the settlement agreement does not relieve Wind River of regulatory requirements," including 40 CFR § 280.66(d)(2). (IR000617-619).

37. On December 14, 2012, Wind River submitted a Draft CAP Addendum, which included a description of the Soil Vapor Extraction (SVE) system, including flow fill materials and backfilling practices implemented in the system trenches (Section 2.2 at IR000626-627) and a Property Repairs Summary (Appendix N at IR000831-833). (IR000620-967; Wind River RAA ¶ 11).

38. The revised and resubmitted CAP of December 14, 2012 ("Draft Final 2013 Cap," IR000620-967) included language in Section 15 that explained the reach of the monetary settlement agreements entered into by the residents of Gunnison and Wind River. The CAP quoted a section of the settlement agreements, which stated in relevant part:

> Plaintiffs, collectively and individually, for themselves, their agents, representatives, counsel, principals, past and present partners, assigns, heirs, minor children, trusts, and predecessors or successors in interest of any trust, corporation, partnership, or other entity, and for all persons and entities claiming by, through or under any of them...hereby irrevocably, unconditionally, and completely release, acquit, and forever discharge Wind River [and others] as well as their respective affiliates, affiliated entities, directors, officers, employees, agents, representatives, insurers, attorneys, members, managers, heirs, successors, and assigns from any and all claims, demands, liabilities, risks, damages, obligations, losses, expenses, and attorney fees whether in law or equity, known or unknown, past or present, patent or latent, anticipated or unanticipated, foreseeable or unforeseeable, actual or contingent, past, present, or future, including those which are in any way connected with, relate to, or hereafter arise out of the Plaintiffs' Claims, the Allegations, the Leak, and/or the claims and causes of action asserted or that could have been sought . . . ."

[IR000644-645.]

39. The Draft Final 2013 CAP provided in Section 15 that the quoted release language applied to all claims with the exception of those items described in the first four paragraphs of Section 15, including landscape restoration (completed and listed in its Appendix N), equipment decommissioning, removal of sheds and trailers, and groundwater monitoring. On the subject of equipment decommissioning, Section 15 specified that "horizontal piping runs, and all associated fill materials, will be left in place." (IR000644).

40. On February 28, 2013, DERR by letter authorized Wind River to proceed with the public notification process for the Draft Final 2013 CAP "as proposed, or as modified by the following instructions . . . ." Paragraph 4.b. of the instructions provided:

> Section 15.0 of the CAP relies on the terms of the settlement agreement reached between Wind River and the claimants to settle all site restoration issues. While the settlement agreement may have addressed damage claims of individual property owners, it does not meet the DERR's requirement of 'mitigating adverse consequences from cleanup activities" undertaken prior to an approved CAP (See Utah Admin. Code R311-202-1, incorporating 40 CFR Section 280.66(d)(2).
>
> (IR000968-969)

41. A public comment period was held from April 1, 2013 to April 30, 2013, after publication of notice in the "Sanpete Messenger" newspaper on March 27, 2013. (IR000970-971).

42. The DERR received three public comments from Gunnison residents within the Public Notice and Comment period: 1) a comment dated April 9, 2013, from Tami Hansen regarding the need to fix her sprinklers, repair her yard, and "remove the trenches and their contents;" (IR000972); 2) a comment dated April 29, 2013, from Jeremy and Marlo Taylor regarding alternative housing and expressing concern that a CAP was not approved previously (IR000974-976); and 3) a comment from Rodney and JoAnn Taylor dated April 30, 2013, requesting the removal of all wells, flow mix, PVC pipes, gravel and anything else foreign, and that the property be returned to pre-spill condition. (IR000977-978).

43. All of the individuals listed in the preceding paragraph were parties to the settlement agreement(s) with Wind River. (IR001359; IR001394; IR001395).

44. Prior to the public comment process, Wind River and Wasatch met with DERR and the Director (on March 28, 2013) to discuss the mitigation issue. At this meeting, Wind River offered the Director full un-redacted copies of the Settlement Agreements it entered into with the Gunnison residents, and requested that the Settlement Agreements be considered "as they related to property restoration issues such as the trenches and represented the negotiated resolution of such issues." DERR's representatives refused to take and consider a copy of the Settlement Agreements. (Christensen Declaration, IR001341-1342).

45. Wind River released the Draft Final 2013 CAP for public comment and review on March 27, 2013 for a 30 day public comment period that ran from April 1, 2013 through April 30, 2013. (IR000970).

46. Wind River did not make any material changes to Section 15 of the CAP during the period between its release for public comment and submittal of its final form. (*Cf.* 2013 Draft CAP at IR000644-645 and 2013 Final CAP at IR001006-1007).

47. The Director solicited and received information via email from Staker Parson Companies ("Staker Parson") and Utah State University ("USU") regarding the general consistency of flowable-fill and the recommended soil depth necessary for planting vegetation. The contacts with Staker Parson and USU took place approximately three and four weeks, respectively, after close of the comment period on April 30, 2013. (IR000979-981).

48. On behalf of the Director, Project Manager Morgan Atkinson documented his May 21, 2013 telephone contact with "Joe" [no last name recorded] at Staker Parson with the following comments:

I contacted Joe at Staker Parsons to discuss the use of flowable fill. Joe is in technical field sales for Staker? He stated that flow fill generally has a 50-150 psi rating and cannot be removed by hand with a shovel; a backhoe or excavator would be needed if digging into the material. They commonly use flow fill for Questar gas lines and only use 2-feet to support traffic."

(IR000979)

49. On behalf of the Director, Project Manager Morgan Atkinson documented his contacts with USU through his May 22, 2013 email to Jay Dee Gunnell and Mr. Gunnell's responsive email of May 29, 2013. (IR000980-981)

50. Mr. Atkinson's May 22, 2013 email to Jay Dee Gunnell at USU bore the subject line "DEQ Restoration Question," with the following text:

Jay Dee,

Thank you for taking the time to talk with me yesterday afternoon.

For a quick recap, the project we discussed is how to properly restore several hundred feet of three-foot wide trenches in landscaped residential yards to pre-existing conditions. The trenches were back filled with flowable fill to approximately one foot below the surface and overburden soil above that to complete the trench.

The properties should be restored to allow for any type of use, including landscaping and planting of gardens, shrubs and trees.

What would you recommend as a minimum depth the flowable fill should be removed to ensure any type of landscaping could thrive?

Also, what type of soil or fill should be used to complete the trenches to the surface?

Please let me know if you need any additional information or if you have any other recommendations/concerns about anything other than what I have asked about.

Thank you,
Morgan Atkinson

(IR000980)

51. Mr. Gunnell responded by email one week later, on May 29, 2013, with the following text:

Morgan,

> Sorry for the late response. I wanted to touch base with a couple of our specialists in Logan. The general consensus is that as far as vegetables and smaller plants, 6"-12" is sufficient for most crops. As for woody plants I will forward you the words of Mike Kuhns (USU Extension Forestry Specialist).
>
> *Seems to me you would want a minimum of a foot no matter what, and 2-3 feet for woody plants would be good. There is no science to bring to bear on this in a definitive way – just the educated opinions of people like the ones you emailed on this. I'm not sure if the flowable fill material is something he is concerned about chemically. If it is just cured concrete then it being down their* [sic] *starting at a foot down and going deeper I don't see as a big problem, even for trees. They will grow over and around the concrete.*
>
> Mike Kuhns
>
> Hope this helps.
>
> JayDee Gunnell
> [Quoted text hidden]

(IR000981; italics in original).

52. Wind River submitted a final CAP Addendum dated May 31, 2013, which was received by DERR on June 7, 2013. (IR000982-1335; Wind River RAA ¶ 15; Director's Response ¶ 15).

53. On July 23, 2013, the Director issued a letter, approving the CAP received by the agency on June 7, 2013, stating, among other things:

> The public notification process, including an informal open house, has been completed. Concerns expressed by the potentially affected public generally related to property restoration issues. The DERR outlines specific property restoration requirements below. As such, the CAP for the facility is hereby approved subject to the following conditions: . . . [listing conditions in subsequent paragraphs or sections numbered 1-7].

(IR001336-1338).

54. The July 23, 2013 Director's letter included, in paragraph 6, the following conditions required of Wind River regarding "Mitigation of Adverse Consequences, 40 CFR § 280.66(d)(2):

> > [6.a.] The Director of the DERR has identified two adverse consequences that have permanently altered the quality of surface and subsurface soils, and occurred as part of remediation efforts undertaken by Wind River prior to an approved CAP. Wind

River must mitigate these adverse consequences regardless of any private settlement agreement. The first is flowable fill trenches. Wind River's consultant placed flowable fill trenches on public and private property throughout much of Gunnison soon after the petroleum release. In consultation with Utah State University and Staker Parson Companies, the Director of the DERR has determined that the flowable fill in plantable areas must be removed to a minimum of three feet below ground surface and replaced with properly compacted, clean native soil, and topsoil where applicable, in order to facilitate planting, including trees. Adverse consequences from the flowable fill below three feet were not identified. Any damage to yards or property occurring during the flowable fill removal must be repaired and returned to pre-removal status. Second, where rock (including rocks dug up with disturbed soil while placing trenches) and gravel (for roads and other remediation purposes) have been scattered across affected properties, Wind River must remove the rock and gravel and replace any displaced top soil to facilitate plant growth. If a property owner does not want mitigation of adverse consequences undertaken, then the Director requires Wind River to obtain and provide to the DERR a written statement from the affected property owner(s) to that effect. Otherwise, Wind River may provide proof to the DERR that it has contacted the affected property owner and offered to conduct the mitigation as stated above, and the property owner has either rejected the offer of mitigation or has not responded within 60 days of the notice of proposed mitigation. The DERR will not issue a "No Further Action" letter until all mitigation is complete.

[6.b] Other damages to properties affected by the petroleum release, such as damages to sprinklers and landscaping, have been reported due to Wind River's use of heavy equipment and construction/remediation activities prior to an approved CAP. Wind River must repair damages caused by construction/remediation activities undertaken prior to an approved CAP. If the mitigation has already been completed or if a property owner does not want mitigation of adverse consequences undertaken, then the Director requires Wind River to obtain and provide to the DERR a written statement from the impacted property owner(s) to that effect. Otherwise, Wind River may provide proof to the DERR that it has contacted the affected property owner and offered to conduct the mitigation as stated above, and the property owner has either rejected the offer of mitigation or has not responded within 60 days of the notice of proposed mitigation. Any damage resulting to property as a result of repairs taken under this requirement will also need to be mitigated. The DERR will not issue a "No Further Action" letter until all mitigation is complete"

(IR001337-1338; "Condition 6").

37. None of the conditions imposed by the Director in the CAP Approval Order were submitted for public comment prior to their inclusion in the CAP Approval Order. (*Id.*)

## CONCLUSIONS OF LAW

### I. Introduction

Wind River submitted a Draft Final CAP Addendum on December 14, 2012. A public comment period was held April 1-30, 2013, and Wind River submitted a final CAP on June 7, 2013. The Director approved the June 7, 2013 CAP by letter dated July 23, 2013. The July 23, 2013 CAP approval letter, however, included seven "conditions" required of Wind River. It is these seven conditions, and the Director's actions in imposing them, that are the subjects of Wind River's RAA.

Through the course of briefing and argument in these proceedings, Wind River has made clear that it stands by its Final (June 7, 2013) CAP, not asking that it be overturned, but is instead challenging the legal authority and factual support for the Director's action in approving the CAP with seven conditions. Especially burdensome and unsupported, and thus justifying remand to the agency, in Wind River's view, is condition 6, which addresses "Mitigation of Adverse Consequences" as contemplated by 40 CFR § 280.66.

In its opening brief in support of RAA, Wind River argued four main points: (1) the Director exceeded his authority as defined by Utah statutes and rules; (2) 40 CFR 280.66, as incorporated into Utah administrative rules, does not authorize the Director to impose conditions in a CAP approval letter; (3) imposing conditions in requirement for restoration of private property is not authorized by Utah statutes and rules; and (4) the Director lacked substantial evidence to support imposition of condition 6. The Director filed a responsive brief, disputing these points, and the parties followed with reply and sur-reply briefs, respectively. In addition, the parties after oral argument filed supplemental briefs on authorities cited during the argument,

as well as (at the ALJ's request) the effect, if any, on these proceedings of Wind River's settlement agreements with Gunnison residents. These arguments are addressed below.

II. Standard of Review

This permit review adjudicative proceeding is governed by Utah Code Section 19-1-301.5, which requires the presiding administrative law judge ("ALJ") to "conduct a permit review adjudicative proceeding based only on the administrative record and not as a trial de novo." Utah Code § 19-1-301.5(8)(a). The ALJ must "review…the director's determination, based on the record," culminating in a proposed dispositive action that includes findings of fact, conclusions of law, and a recommended order. *Id.* § 19-1-301.5(12)(b)-(c).

As the Petitioner challenging the Director's determination to include additional conditions for the first time in the CAP Approval Order, Wind River carries the burden of proof that such inclusion was in error. *See Taylor v. Pub. Serv. Comm'n,* 2005 UT App 121 (unpublished): "In the typical challenge to agency action, the party challenging the action carries the burden of demonstrating its impropriety." (internal quotations omitted). The Director's determination being challenged could include factual findings, as well as interpretations and applications of law.

To overturn factual findings, Wind River must demonstrate that the Director's findings of fact are not supported by substantial evidence. Otherwise, the ALJ must "uphold all factual, technical, and scientific agency determinations that are supported by substantial evidence taken from the record as a whole." Utah Code § 19-1-301.5(13)(b). While this language, appearing as here cited in the Utah Environmental Quality Code, has not been specifically addressed by Utah Appellate Courts, the same "substantial evidence" standard appears in other Utah statutes, for which case law is instructive.

"Under the Utah Administrative Procedures Act, substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Utah Chapter of the Sierra Club v. Board of Oil Gas and Mining,* 289 P. 3d 558, 562 (Utah 2012)(applying both the Utah Coal Mining Act and the Utah Administrative Procedure Act ("UAPA")), quoting *Associated General Contractors v. Board of Oil Gas and Mining,* 2001 UT 112, ¶ 21, 38 P.3d 291 (applying UAPA; internal quotation marks omitted). "Substantial evidence exists when the factual findings support 'more than a mere scintilla of evidence . . . though something less than the weight of the evidence.'" *Martinez v. Media Paymaster Plus, et al.*, 2007 UT 42 ¶ 35, 164 P.3d 384 (citation omitted). "An administrative law decision meets the substantial evidence test when 'a reasonable mind might accept as adequate' the evidence supporting the decision." *Id.,* quoting *Grace Drilling Co. v. Bd. of Review of Indus. Commission,* 776 P.2d 63, 68 (Utah App. 1989). Therefore, in this administrative adjudication, Wind River, as the challenging party, "bears the burden of demonstrating that the agency's factual determinations are not supported by substantial evidence." See *Utah Chapter of Sierra Club v. Board of Oil Gas and Mining,* 2012 UT 73, ¶ 12, 289 P.3d 558. In order to reverse the Director's decision in conditionally approving the corrective action plan, Wind River must demonstrate that the Director's factual, technical and scientific determinations are not supported by substantial evidence.

Regarding mixed questions of law and fact, the Utah Supreme Court in *Murray v. Utah Labor Comm'n*, 308 P.3d 461 (2013) has explained that mixed questions of law and fact "involve application of a legal standard to a set of facts unique to a particular case. Indeed, in the agency context, we have stated that we 'use the terms mixed question of fact and law and application of the law interchangeably.'" (*Id.,* ¶ 24; internal citations omitted). The Court in

*Murray* also directs that for an "abuse of discretion" standard to apply, the agency action itself must involve discretion., of which "a basic feature . . . is choice." (*Id.,* ¶ 30) A discretionary decision, then, "involves a question with a range of 'acceptable answers,' some better than others, and the agency or trial court is free to choose from among this range without regard to what an appellate court thinks is the 'best' answer."

With respect to the agency's strictly legal interpretations, the Environmental Quality Code directs a reviewing court to "review all agency determinations in accordance with Subsection 63G-4-403(4) [of UAPA], recognizing that the agency has been granted substantial discretion to interpret its governing statutes and rules." Utah Code Ann. § 19-1-301.5(14)(c)(i). Recognizing the role of agency expertise on terms specific to issues within its statutory charge, the Director's legal interpretation of DERR's operable statutes and regulations should be overturned only upon a clearly erroneous interpretation or application of the law. *Utah Chapter of the Sierra Club v. Board of Oil, Gas and Mining,* 2012 UT 73, ¶ 10, 289 P.3d 558, 562; *Associated Gen. Contractors v. Board of Oil, Gas and Mining,* 2001 UT 112, ¶ 18, 38 P.3d 291. Still, the agency's general interpretations of the law, including constitutional questions, rulings on the agency's jurisdiction or authority, common law principles, and statutes the agency is not charged to administer, are reviewed for correctness, granting little or no deference to the agency's determination. *Utah Chapter of the Sierra Club v. Board of Oil, Gas and Mining,* 2012 UT 73, ¶ 9, 289 P.3d 558, 562. While this is in the context of appellate review of an agency's dispositive action under that section, the statute's intent is clear and is appropriate to be applied by the ALJ in these administrative proceedings.

However, where the plain language of the statue is unambiguous, no further interpretation is necessary and the ALJ shall give effect to the plain language of the statute. *See Murray v.*

*Utah Labor Comm'n*, 2013 UT 38, ¶¶ 33, 36-40 (no abuse of discretion standard of review where there is no range of acceptable answers and the statute is unambiguous); *see, also Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (noting that "if a statute speaks directly to the precise question at issue, the agency is afforded no discretion, for…the agency must give effect to the unambiguously expressed intent").

III. Regulatory Background

The Division of Environmental Response and Remediation ("DERR"), under the immediate direction of the Director, is tasked under Utah Code Ann. § 19-1-105(1)(c) to administer the UST Act. Under Utah Code Ann. § 19-6-404(2), and "[a]s necessary to meet the requirements or carry out the purposes of this part, the Director may: . . . (f) enforce rules made by the board and any requirement in this part by issuing notices and orders; [and] (g) review plans, specifications, or other data."

The Director may also "take any abatement, investigative, or corrective action as authorized in this part." Utah Code Ann. § 19-6-404(2)(l). Once a petroleum release from an underground storage tank has occurred, Utah Code Ann. § 19-6-420(2)(a) authorizes the Director to require the owner or operator "to take abatement, or investigative or corrective action, including the submission of a corrective action plan ['CAP']." If the owner or operator submits a CAP, the Director must review the corrective action plan, and in performing such review "shall consider . . . (i) the threat to public health; (ii) the threat to the environment; and (iii) the cost-effectiveness of alternative corrective actions." Utah Code Ann § 19-6-420(4)(b) and (c).

After his review of the CAP, "the Director shall . . . approve or disapprove the plan." Utah Code Ann. § 19-6-420(4)(b). If the Director approves the CAP (or develops his own CAP), he must: "approve the estimated cost of implementing the corrective action plan . . . [and] order

the owner or operator to implement the corrective action plan." Utah Code Ann. § 19-6-420(5)(a) and (b).

If the Director disapproves the plan, he must "solicit a new corrective action plan from the owner or operator." Utah Code Ann. § 19-6-420(7). If the Director disapproves a second submitted CAP, or if the owner or operator fails to submit a second plan within a reasonable time, the Director may develop his own CAP and order the owner or operator to implement that plan. Utah Code Ann. § 19-6-420(8).

Through Utah Admin. Code R311-202-1, Utah has incorporated by reference the federal rule codified at 40 CFR Part 280, entitled Technical Standards and Corrective Action Requirements for Owners and Operators of Underground Storage Tanks (UST) (§§ 280.10 – 280.230). Section 280.66 of that rule reads as follows:

> § 280.66 Corrective Action Plan
>
> (a) At any point after reviewing the information submitted in compliance with §§ 280.61 through 280.63, the implementing agency may require owners and operators to submit additional information or to develop and submit a corrective action plan for responding to contaminated soils and ground water. If a plan is required, owners and operators must submit the plan according to a schedule and format established by the implementing agency. Alternatively, owners and operators may, after fulfilling the requirements of §§ 280.61 through 280.63, choose to submit a corrective action plan for responding to contaminated soil and ground water. In either case, owners and operators are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the implementing agency, and must modify their plan as necessary to meet this standard.
>
> (b) The implementing agency will approve the corrective action plan only after ensuring that implementation of the plan will adequately protect human health, safety, and the environment. In making this determination, the implementing agency should consider the following factors as appropriate:
>
> (1) The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;
>
> (2) The hydrogeologic characteristics of the facility and the surrounding area;

(3) The proximity, quality, and current and future uses of nearby surface water and ground water;

(4) The potential effects of residual contamination on nearby surface water and ground water;

(5) An exposure assessment; and

(6) Any information assembled in compliance with this subpart.

(c) Upon approval of the corrective action plan or as directed by the implementing agency, owners and operators must implement the plan, including modifications to the plan made by the implementing agency. They must monitor, evaluate, and report the results of implementing the plan in accordance with a schedule and in a format established by the implementing agency.

(d) Owners and operators may, in the interest of minimizing environmental contamination and promoting more effective cleanup, begin cleanup of soil and water before the corrective action plan is approved provided that they:

(1) Notify the implementing agency of their intention to begin cleanup;

(2) Comply with any conditions imposed by the implementing agency, including halting cleanup or mitigating adverse consequences from cleanup activities; and

(3) Incorporate these self-initiated cleanup measures in the corrective action plan that is submitted to the implementing agency for approval.

IV. Analysis; Reasons for Recommended Decision

1. The Director Exceeded His Statutory Authority When He Modified the CAP through the July 23, 2013 CAP Approval.

The Underground Storage Tank Act, Utah Code §§19-6-401 *et seq.*, (the "UST Act") confers authority on the Director to review and then approve or disapprove a CAP. However, that authority is limited. *See* Utah Code Ann. § 19-6-404(2)(l) (authorizing the Director to "take any abatement, investigative, or corrective action *as authorized*" by the UST Act (emphasis added)). Indeed, an agency may only take action that is specifically authorized by its governing legislation. *Williams v. Public Service Comm'n of Utah*, 754 P.2d 41, 50 (Utah 1988)("All

powers retained by the [agency] are derived from and created by statute. The [agency] has no inherent regulatory powers and can only assert those which are expressly granted.").

Wind River has challenged all seven paragraphs of "conditions" included by the Director in his July 23, 2013 CAP Approval. Wind River argues that Utah law does not allow a CAP Approval to include conditions, pointing to the plain language of Utah statutes and administrative rules. The Director argues against this, citing a long history of "approval with conditions" by the agency, and pointing to language in the federal rule, 40 CFR 280.66, incorporated by reference into Utah law, as allowing the Director to modify a plan with conditions of approval, as undeniably was done here.

Despite the excellent briefing and argument of the parties, Utah law gives us little guidance on the question whether approval of a CAP "with conditions" is allowed. Neither is it clearly prohibited. This should be of little surprise, as given the state of the law, both parties have wisely refrained from arguing that the UST Act dictates the form of "approval" to be issued by the Director. In the simplest sense, a "condition" might simply be any term of an agreement or declaration, although it is often used to identify a contingency or event prerequisite to the legal effect of such agreement or declaration.

A ruling that took Wind River's arguments to an extreme, for example, could prohibit the agency from issuing such sensible and common conditions as those requiring the securing of local permits, notification of local authorities upon certain events (e.g., explosives use, hazardous substances releases), and the allowance of modifications only upon written permission, etc. Conversely, a decision here allowing the Director (as he has argued) to issue any and all conditions of approval, no matter how costly, technologically unsupported, or previously un-evaluated through public comment, etc. (as was Condition 6 here), renders meaningless Utah's

statutory scheme of CAP preparation (e.g., drafting, public comment, revision and final proposal by the responsible party). If not meaningless, it certainly makes the process unpredictable in workload, duration, and costs, factors which Wind River (as would be any owner or operator) is under the statute entitled to evaluate, as appropriate, before writing and submitting its final CAP for approval.

In reading the statutes, rules and other authorities cited by the parties, with guidance from Utah courts on statutory construction, I conclude that the Director is not authorized to modify a CAP through a CAP Approval. Because I recommend a remand of the CAP Approval on those grounds (unlawful modification), it is unnecessary to get to the question whether "conditions" are allowed in DERR's approval action. It is axiomatic that a state agency's authority is limited to those powers "explicit or clearly implied" in its authorizing statutes. *Hi-Country Estates Homeowners Assoc. v. Bagley and Co.,* 901 P.2d 1017, 1021 (1995), *citing Mountain States Tel. & Tel. Co.,* 754 P.2d at 930. I conclude that the Director's right to choose the format and nomenclature of his written actions is clearly implied by the UST Act. Insofar as the CAP Approval actually modified the terms of Wind River's final 2013 CAP, however, the Director's actions were unlawful and must be corrected on remand.

The UST Act expressly provides that the Director may only approve or disapprove a corrective action plan submitted by an owner or operator. Specifically, the UST Act provides:

> (a) If the director determines corrective action is necessary, the director shall order the owner or operator to submit a corrective action plan to address the release.
>
> (b) If the owner or operator submits a corrective action plan, the director shall review the corrective action plan and approve or disapprove the plan.

Utah Code Ann. § 19-6-420(4)(a)-(b) (emphasis added).

Where a responsible party (as did Wind River here) submits a draft CAP for consideration, including public comment, the Director can, and indeed should, suggest changes or additions that he thinks are appropriate. After the Director's full evaluation and comment, consideration of public comments, and any changes to the draft plan made by the owner/operator as a result, he can then approve or disapprove the CAP as written.

The UST Act also outlines the Director's options should he disapprove a CAP:

> (7) If the director disapproves the plan, he shall solicit a new corrective action plan from the owner or operator.
>
> (8) If the director disapproves the second corrective action plan, or if the owner or operator fails to submit a second plan within a reasonable time, the director may:
>
> (a) develop his own corrective action plan; and
>
> (b) act as authorized under Subsections (2) and (5).

Utah Code Ann. § 19-6-420(7) and (8).

Therefore, if the Director disapproves a CAP, he can require that a second CAP be submitted for consideration under the same process. This is exactly what happened in the instant case. If, after a second round of the Director's full evaluation and comment, consideration of public comments, and any resulting changes to the draft plan made by the owner/operator, the Director is still dissatisfied with the CAP, he again has the choice to approve or disapprove the CAP.

And after a second CAP disapproval, he has the additional option of creating his own CAP for implementation as authorized by subsections (8)(a) and (b) of the statute quoted above, including the right to order the owner or operator to implement the Director's CAP. (Utah Code Ann. § 19-6-420(5)). After two CAP rejections, then, the Director has the additional option of creating his own plan. It renders this option meaningless for the Director to be allowed to

unilaterally modify the owner or operator's second-submitted plan by way of an approval action. If the Director can re-write a plan in such manner, the authority given him to write his own plan is unnecessary, as simply approving the party's plan with the Director's add-ins could achieve the same purpose. This would be a statutory interpretation we are cautioned against, as it would render the Director's own CAP-writing authority superfluous, and agency action must not render the Utah Code internally inconsistent. *Hi-Country Estates Homeowners Association v. Bagley and Company,* 901 P.2d 1017, 1021-1022).

Another critical element of the UST Act has been overlooked or skipped here by the Director's actions. The same statutory section quoted above also sets forth the criteria to be considered in reviewing a CAP as part of the Director's decision-making process:

> (c) In reviewing the corrective action plan, the director shall consider the following:
>
> (i) the threat to public health;
>
> (ii) the threat to the environment; and
>
> (iii) the cost-effectiveness of alternative corrective actions.

Utah Code Ann. § 19-6-420(4)(c). Condition 6 of the CAP Approval (IR001336-1338), in which the Director addresses mitigation of adverse consequences, potentially requires digging out the top two feet of flow-fill in the project's already-backfilled trenches, among other tasks. While the actual linear feet of trenches is not found in the administrative record, Project Manager Atkinson has described their extent as "several hundred feet," (IR000980) and the Director's own CAP Approval description was of "flowable fill trenches on public and private property throughout much of Gunnison." (IR001337-1338, emphasis added).

As these were imposed only in the CAP Approval, and not before, they constitute elements of CAP work not subjected to an estimate of estimate of actual costs or evaluated in

any cost-effectiveness sense as required. Add unknowns such as potential homeowners' claims for property damage and disruption, etc. resulting from this new work (despite prior settlements or any claimed benefits of the flow-fill removal and other work) and the deficiencies of Condition 6 become even more onerous.

Condition 6 undeniably changes the terms, scope of work and cost burdens of Wind River's Final CAP in measures never contemplated or authorized by the UST Act, and must be remanded to the Director for reconsideration and further action. On the other hand, parts of the CAP Approval appear of little burden to Wind River, such as condition 2's requirement of obtaining the Director's prior approval before implementing CAP modifications. Although unclear on this record, other terms might just restate obligations appearing already in the CAP. (*See, for example*, the condition 1 reference to a Contingency Response Plan (*Cf.* CAP § 13.0; IR001004-1005); the condition 4 reference to oxygen release compound ("ORC") injection (*Cf.* CAP § 2.10; IR000633); the condition 5 reference to cleanup levels (*Cf.* CAP § 12.0; IR000641-642); and the condition 7 reference to confirmation sampling (*Cf.* CAP § 9.0 ).

I specifically find Condition 6 to be an unlawful modification of the CAP, requiring remand for reconsideration and appropriate action by the Director. On the other hand, I find insufficient information in this administrative record, or in the parties' briefings, for me as ALJ to pass judgment on conditions 1-5 and 7 of the CAP Approval. Upon remand, the Director should evaluate and consider whether conditions 1-5 and 7 (as condition 6 indeed does) modify the Final CAP. If so, they must be subjected to the proper procedural steps, along with an evaluation of their cost-effectiveness and how they address the threat to public health and environment, etc. as required by Utah Code Ann. § 19-6-420.

The Director has argued that because 40 C.F.R. § 280.66(c) contemplates that owners and operators are required to implement an approved CAP "including modifications to the plan made by the implementing agency," he was therefore allowed to modify the Wind River CAP by his act of approval. (*See* Director's Response Brief at 8-9 (quoting 40 C.F.R. § 280.66(c)). This argument, however, must be rejected since it overreaches the language of 40 C.F.R. § 280.66 and wholly ignores Utah Code §19-6-420(4)(b).

Even where an agency is granted discretion to interpret its own statutes and rules, that discretion is not absolute. "The abuse of discretion standard . . . extends only to truly discretionary decisions. A discretionary decision involves 'a question with a range of "acceptable" answers . . . .'" *Union Pacific R.R. v. Utah Dept. of Trans.*, 2013 UT 39, ¶ 16. A question of law, like the one presented here, posing whether the Director has the authority to act in a certain way under an unambiguous statute, is not the type of question with a wide range of acceptable answers and, therefore, does not warrant an abuse of discretion standard of review. *See Murray v. Utah Labor Comm'n*, 2013 UT 38, ¶¶ 33, 36-40; *see, also Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) (noting that "if a statute speaks directly to the precise question at issue, the agency is afforded no discretion, for . . . the agency must give effect to the unambiguously expressed intent").

Utah Code § 19-6-420(4)(b) speaks directly to the issue of the Director's permissible actions with respect to a CAP. This statutory authority regarding CAP review is limited to a decision to "approve or disapprove the plan." *Id.* (emphasis added). Nothing in DERR's governing statute gives it the authority to modify an owner/operator's CAP by way of the agency's act of approval, whether by language denominated "conditions" or otherwise. Thus, DERR's interpretation of 40 C.F.R. § 280.66 results in an impossible scenario: a regulation that

exceeds DERR's statutory authority as a matter of law. *See* Utah Code § 19-1-301.5(14)(c)(i) (incorporating by reference Utah Code § 63G-4-403(4)(b), which provides that relief should be granted where that agency has acted beyond the jurisdiction conferred by any statute).

There is an interpretation that harmonizes 40 C.F.R. § 280.66 and Utah Code § 19-6-420(4)(b), and which is in accordance with general principles of statutory construction. We are here required to examine the plain language of the statute, while construing it "in harmony with its overall legislative objective," and agency rules are likewise invalid if not in harmony with the statute. *Eaton Kenway v. Auditing Div. of Utah State Tax Commission,* 906 P.2d 882, 885, 886 (1995). *See also Koch Indus., Inc. v. U.S.*, 603 F.3d 816, 821 (10th Cir. 2010) ("As with all regulations, . . . implementing regulations 'must be interpreted so as to harmonize with and further and not to conflict with the objective of the statute [they] implement[].'"). 40 C.F.R. § 280.66(a) provides that in the event an owner or operator is directed to or chooses to submit a CAP, they "are responsible for submitting a plan that provides for adequate protection of human health and the environment as determined by the implementing agency and must modify their plan as necessary to meet this standard." 40 C.F.R. § 280.66(b) then goes on to provide that the "agency will approve the [CAP] ***only after*** ensuring that implementation of the plan will adequately protect human health, safety, and the environment." (Emphasis added).

In other words, the owner or operator prepares and submits the plan; and, prior to approval or disapproval, the Director can direct the owner/operator to modify the plan if it does not provide for adequate protection of human health and the environment. At that point, Utah Code § 19-6-420(4)(b) states that the Director shall "approve or disapprove the plan," and Utah Code § 19-6-420(4)(c) and 40 C.F.R. §280.66(b) establish the criteria that must be considered to determine whether the CAP (or modified CAP) should be approved. If the CAP includes

modifications prior to its approval, 40 C.F.R. §280.66(c) directs that "[u]pon approval of the [CAP]…owners and operators must implement the plan, including modifications."

Nothing in 40 C.F.R. § 280.66(d) changes this procedure for review, modification, and approval of a CAP, which does not allow the Director modify a CAP through his action of approval. Instead, 40 C.F.R. §280.66(d) merely authorizes the agency to impose conditions prior to the initiation of emergency remediation actions where an owner or operator chooses to begin clean-up activity prior to CAP approval. *See* 40 C.F.R. § 280.66(d)(1) and (2).

The authority to impose conditions prior to the initiation of clean-up is necessary in the event an owner or operator chooses a remediation technique that has the potential to increase the spread of the contamination resulting in adverse consequences of remediation. This danger is exactly the scenario for which EPA promulgated 40 C.F.R. § 280.66:

> Since the implementing agency retains this authority, [to require mitigation of adverse consequences of cleanup activities], EPA expects that owners and operators who choose to initiate cleanup prior to approval of this CAP will select cleanup technologies that are widely used and recognized to be effective. EPA believes some cleanup techniques, such as extraction and treatment of petroleum vapors from soils, can be initiated with little risk of *worsening contamination at the site*. 53 Fed. Reg. 37082, 37081 (September 23, 1988) (emphasis added).

Thus, EPA was concerned about "worsening contamination at the site," and approved oversight authority for implementing agencies to impose conditions that would mitigate such adverse consequences before they occurred. As is evident by EPA's explanation in the federal register, EPA was not concerned about after-the-fact adverse consequences requiring property restoration that the Director seeks to impose in this case.

It is clear from the record that the Director understood the statutory framework because he disapproved of Wind River's 2008 Draft CAP and 2010 Addendum and required Wind River to re-submit a new plan. (IR000619). Wind River complied with the Director's request and submitted a revised 2013 Draft CAP. (IR000620-967). At no time did the Director give Wind

River a list of conditions or propose modifications that he deemed necessary for inclusion in the Wind River CAP to ensure mitigation of adverse consequences.

Where the drafting, evaluation, comment and finalization process for the Final 2013 CAP ended, as here, with the Director's dissatisfaction with the plan's handling of "mitigation of adverse consequences" and other terms, the Director's only options, absent Wind River's acquiescence in further revisions, were to approve the plan, or to disapprove it and then direct his agency to draft an entirely new plan. *See* Utah Code § 19-6-420(8) (authorizing the Director to "develop his own corrective action plan"). The Director did not take advantage of either of these two authorized options. Instead, the Director exceeded his statutory authority by creating a new vehicle to modify the Final CAP in terms (especially Condition 6) that were seen for the first time by Wind River in the CAP Approval Order.

It is true that the Director and Wind River had multiple contacts, as one would expect for a project this large in area and lengthy in time, on various elements of the investigation and abatement of the release of contaminants from Top Stop C-4 in Gunnison, Utah. These meetings, correspondence and other discussions spanned a period of roughly six years, from the August 9, 2007 date of Wind River's first report of release through the July 23, 2013 date of the Director's CAP approval letter. The parties engaged in correspondence and meetings over features and conditions of both Wind River's emergency abatement measures and the several iterations of its draft CAP, including amendments.

On several occasions over the course of the project, and as reflected in the administrative record, the issue of mitigation of adverse consequences was discussed or documented. (Findings of Fact ¶¶ 25, 29, 34, 35, 36, 44). Wind River consistently took the position that the settlement agreements had satisfied its obligations to the affected property owners. (Findings of Fact ¶¶ 27,

30, 31, 35, 38, 40, 44). Wind River also described its plan to leave the SVE trenches' horizontal piping and flow-fill in place, and reported on its property restoration efforts, such as sprinkler repair and similar issues. (Findings of Fact ¶¶ 31, 39)

While the Director posited that more was expected from Wind River to satisfy him that "mitigation of adverse consequences" would be adequately addressed, he outlined no specific requirements until his issuance of the July 23, 2013 CAP Approval. See, for example: Director's February 28, 2013 letter (IR000968): "While the settlement agreement may have addressed damage claims of individual property owners, it does not meet the DERR's requirement of 'mitigating adverse consequences'"; Director's July 21, 2008 letter (IR000049): "repair sprinklers and landscaping . . . repair damage resulting from construction;" Director's January 13, 2011 letter (IR000544): "Property owners are essentially left with a subsurface concrete wall and each individual property owner should be given an acceptable option as to how the final abandonment of the SVE lines will be handled;" Director's April 25, 2011 letter (IR000571): "The systems as installed prior to CAP approval potentially have adverse consequences to individual property owners due to the associated subsurface piping and flow-fill or other material that is proposed to be terminated below the ground surface and abandoned in place;" Director's August 4, 2011 letter disapproving Wind River's 2010 CAP Addendum (IR000617): "The DERR has requested that Wind River mitigate adverse consequences . . . [which] may include subsurface piping and flow-fill . . . ."

By contrast, the Director's July 23, 2013 CAP approval letter (IR001336-1338) contains, for the first time, new and specific requirements to be imposed upon Wind River, including: removal of flow-fill in plantable areas to a minimum of three feet below ground surface; replacement of the flow-fill with "properly compacted, clean native soil, and topsoil where

applicable;" repair of yards and other property to "pre-removal status;" removal of rocks and gravel and replacement of displaced topsoil to facilitate plant growth; obtaining statements from property owners regarding each owner's position whether he/she agrees to allow the work, etc.; DERR's withholding of a "No Further Action" letter until all mitigation is complete; and repair of all other damage to property, such as damage to sprinklers and landscaping. Insofar as it modifies the 2013 Final CAP, such action is contrary to the unambiguous language of DERR's governing statute. I therefore recommend that the CAP Approval be remanded for reconsideration and further action by the Director consistent with his statutory authority.

2. The Director Exceeded His Authority When He Imposed Property Restoration Obligations Upon Wind River in His Issuance of CAP Approval Condition 6

The Director must only take action in accordance with DERR's governing statute. Condition 6 of the CAP Approval exceeded the Director's statutory authority because it addressed factors beyond those dictated by statute. "Agency action is arbitrary or capricious if the agency has relied on factors which Congress has not intended it to consider." *Oklahoma v. U.S. E.P.A.*, 723 F.3d 1201, 1211 (10th Cir. 2013) (quoting *Ariz. Pub. Serv. Co. v. U.S. E.P.A.*, 652 F.3d 1116, 1122 (10th Cir. 2009)).

Here, the UST Act limits the scope of the Director's review of a corrective action plan, submitted by an owner or operator to three factors: (i) the threat to public health; (ii) the threat to the environment; and (iii) the cost-effectiveness of alternative corrective actions. Utah Code § 19-6-420(4)(c). *See also* Utah Admin. Code 311-211-3 (limiting the Director's review of a corrective action plan to consideration of "[t]he impact or potential impact *of the contamination* on the public health . . . [and] the environment," economic considerations, and available technology (emphasis added)).

Likewise, 40 C.F.R. § 280.66(b) limits the Director's review of a corrective action plan to a consideration of whether the plan "will adequately protect human health, safety, and the environment" and enumerates certain factors that should be considered such as:

> (1) The physical and chemical characteristics of the regulated substance, including its toxicity, persistence, and potential for migration;
> (2) The hydrogeologic characteristics of the facility and the surrounding area;
> (3) The proximity, quality, and current and future uses of nearby surface water and ground water;
> (4) The potential effects of residual contamination on nearby surface water and ground water;
> (5) An exposure assessment; and
> (6) Any information assembled in compliance with this subpart.

Here, the Director exceeded his statutory and regulatory authority when he considered property restoration issues and the quality of surface and subsurface soils for planting vegetation—factors not listed in the applicable statutes and regulations—during his review and evaluation of the Wind River CAP and his issuance of Condition 6 of the CAP Approval. . (IR001337-1338). These improper factors were the sole basis upon which the Director relied to impose these additional remediation requirements in the CAP Approval. (*Id.)* For example, the only reason the Director imposed the requirement to remove the flow-fill to three feet below the ground surface was to facilitate the planting of woody bushes and trees. (IR001337: "the flowable fill in plantable areas must be removed to a minimum of three feet below ground surface and replaced with properly compacted, clean native soil, and topsoil where applicable, in order to facilitate planting, including trees").

In support of condition 6, the Director has argued that the factors in Utah Code § 19-6-420(4)(c) are inclusive, not exclusive. In other words, he argues that the statute simply sets forth items the Director must consider, not that the list limits him in his consideration of other factors. This argument, however, must be rejected. Agencies are not entities of general jurisdiction with

equitable powers—instead they are creatures of statute and have only the authority granted them by the Legislature. As such, a permittee is entitled to relief from an agency decision when "the agency has engaged in an unlawful procedure or decision-making process, or *has failed to follow the prescribed procedure*." Utah Code Ann. § 63G-4-403(4)(e) (emphasis added).

Here, the procedure for evaluating a CAP is unambiguously set forth in Utah Code § 19-6-420(4)(c): "In reviewing the [CAP], the director *shall consider* the following: (i) the threat to public health; (ii) the threat to the environment; and (iii) the cost-effectiveness of alternative corrective actions." (Emphasis added.) "Under the doctrine of *expressio unius est exclusio alterius*, to express or include one thing implies the exclusion of the other. The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." *U.S. v. Brown*, 529 F.3d 1260, 1264 (10th Cir. 2008) (citations and quotation marks excluded); *see e.g., Crawford fitting Co. v. J.T. Gibbons Inc.*, 482 U.S. 437, 443 (1987) (rejecting argument that Federal Courts had authority to award costs to prevailing parties for items not specifically listed in 28 U.S.C. § 1920) (superseded by statute); *see also Carrier v. Salt Lake County*, 2004 UT 98, ¶ 35, 104 P.3d 1208 ("the omission of 'gravel pits' as an enumerated permitted conditional use suggests that a gravel pit operation is not an authorized conditional use in the FR-20 Zone").

Similarly, Utah Code § 19-6-420(4)(c) and 40 C.F.R. § 280.66 limit the agency in its review of a plan to protect human health, safety, and the environment. Thus, the Utah Legislature limited the Director's review of the CAP to consideration of whether it adequately protected human health, safety and the environment. Had the Utah Legislature wanted to make this list non-exclusive, it could have added language such as "not limited to the following three criteria" or included a broader range of criteria for the agency to consider. It did not.

If property damage occurred during the course of cleanup activities, the Director is not responsible to ensure the property damage is addressed under a corrective action plan, unless it poses a threat to human health, safety, or the environment. Indeed, the Director recognized this in his response to comments on the initial 2008 CAP Summary when he stated "[t]he DERR does not have the authority or the mechanism to restore property values. This is a damage claim that must be addressed though other procedures." (IR000101).

Accordingly, the Director's decision to impose the requirements of Condition 6 was arbitrary and capricious and contrary to law. I recommend that the Wind River CAP be remanded to the agency for further consideration and that the Director limit his review of the CAP to the factors he is statutorily authorized to consider. Upon remand, the Director should limit his review and consideration of the CAP to an evaluation of whether the implementation of the CAP will adequately protect public health, safety and the environment, along with the cost-effectiveness of alternative corrective actions as directed by Utah Code § 19-6-420(4)(c) and 40 C.F.R. § 280.66(b).

3. The Director's factual determinations regarding Condition 6 are not supported by substantial evidence.

The evidence in the record that the Director relies upon is insufficient to support the requirements in Condition 6, especially the requirement that the flow-fill be removed to three feet below the ground surface. An agency decision is supported by substantial evidence if there is a "quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Kennon v. Air Quality Bd.,* 2009 UT 77, ¶ 28, 270 P.3d 417, citing *Associated Gen. Contractors v. Board of Oil Gas & Mining,* 2001 UT 112, ¶ 21, 38 P.3d 291. In the *Kennon* case, where challenge was made to the adequacy of the evidence supporting the

Director's determination that an 18-month permit review had been completed, the Utah Supreme Court held that a record limited to a post-it note indicating that the permittee was contacted regarding a review was "woefully inadequate to convince a reasonable person that a review took place, let alone that the review was sufficiently rigorous . . . ." (2009 UT 77, ¶ 28).

Condition 6 directs Wind River to undertake work in three general respects. (IR001337-1338). First, Condition 6 directs Wind River to excavate each of the flowable-fill trenches installed as part of the cleanup efforts to a depth of three feet and to back fill the trenches with compacted, clean native topsoil. Second, Condition 6 directs Wind River to remove rock and gravel from affected properties and replace any displaced topsoil. And third, Wind River has been directed generally to repair damages to sprinklers and landscaping on affected properties. The Director lacks substantial evidence in the record to support the imposition of these additional remediation requirements.

This issue—that the Director lacked substantial evidence in the record to support his decision to require additional remediation—is a challenge by Wind River to a factual finding by the Director. Accordingly, pursuant to Wind River's burden of persuasion on factual questions, Wind River was required to marshal all of the evidence that relates to this claim. Based on this marshaling effort and the briefing submitted by the parties, I have included the following additional findings of fact submitted and proposed by Wind River and specifically related to the question of whether the Director's decision to impose Condition 6 in the CAP Approval Order is supported by substantial evidence:.

a. "The SVE trenches [in Gunnison] were constructed by placing approximately 3 feet of crushed gravel in the bottom of the trench; a horizontal 4-inch diameter slotted, PVC well screen was installed on the gravel; and approximately 1 foot

of gravel was placed over the well screen," and the remainder of the trench was backfilled with flow-fill (a lean concrete mix) to not less than 1 foot of the surface and with native backfill to the surface. (*See* IR000626).

b. DERR never communicated the exact conditions it wanted included in the Wind River CAP prior to listing them for the first time in the CAP Approval Order. (IR000049, Letter from DERR to Craig Larson re comments on 2008 CAP Summary Letter -- responding to comments regarding "site restoration of property damaged by abatement/remediation activities" lacking any requirement for removal of flowable fill from trenches); IR000545, DERR Notice to Proceed With Public Notice ("[T]hese are not typical SVE lines that can just be capped and left in place. Property owners are essentially left with a subsurface concrete wall and each individual property owner should be given an acceptable option as to how the final abandonment of the SVE lines will be handled.").

c. DERR admitted that it lacked authority to restore property values or address aesthetic property concerns. (IR000101, 2008 response to comments on 2008 CAP Summary Letter: "The DERR does not have the authority or the mechanisms to restore property values. This is a damage claim that must be addressed through other procedures.").

d. Irrespective of DERR's concern that property values must be restored, Gunnison residents settled and resolved all past and future property damage claims resulting from Wind River's remediation efforts in the Settlement Agreements entered into between Wind River and the Gunnison residents in 2010. (IR001341-1408).

e. The Director refused to consider the Settlement Agreements in his review of the Wind River CAP during the approval process. (*Id.* at 1342; *see also* the Director's Response to Wind River's Opening Brief at 22 ("the Director was not a party to any settlement agreement with Wind River…the Director has never read them, and could not base any decision regarding the CAP submitted by Wind River.").

f. The sole technical basis upon which the Director based his decision to impose the Condition 6 requirement to remove flow-fill down to three feet below grade included a telephone log of a conversation with an individual named "Joe" at the Staker Parsons Company ("telephone log"), and a short email exchange with two individuals from Utah State University ("USU emails"). (IR000979; IR000980-981).

g. The telephone log concluded that the flowable fill Staker Parsons uses for road base cannot be removed by hand with a shovel. (IR000979). Joe never visited the SVE trenches in Gunnison to determine the relative strength of that flowable fill. (*Id.)*

h. The USU emails revealed that at least a foot of topsoil would be "sufficient" for planting woody shrubs, even trees, and the concrete wouldn't be a problem because "[t]hey will grow over and around the concrete." (IR000981). Moreover, there "is no science to bring to bear on this in a definitive way." (*Id.)*

i. Wind River's remediation consultant, Les Pennington of Wasatch Environmental, reported that the flowable fill crumbled when it was no longer frozen, implying that the material could be dug by hand. (IR001411).

j. DERR's engineer, Morgan Atkinson, confirmed this conclusion when he reported that the flowable fill chunk crumbled by the weight of his hand once it was no longer frozen. (IR001430).

k. Specific physical repairs to property affected by Wind River's remediation efforts were negotiated in the Settlement Agreements and have been fully performed as evidenced by the invoices submitted by Wind River. (IR001413-1423).

In summary, the evidence the Director relied upon in this case to require removal of flow-fill down to a three-foot depth is, as in the *Kennon* case, woefully inadequate. In fact, the primary element of the Director's cited evidence, an email from representatives of Utah State University, actually contradicts the Director's requirement.

Neither the email responses from Staker/Parson and USU (IR000979-81) nor the Director's reference to his agency's "consultation" with these entities (July 23, 2013 CAP Plan Approval, IR001337) give any indication that the responding individuals ever visited and inspected the Gunnison remediation project site. In addition, their expertise is unclear, at best, according to the administrative record. Joe at Staker Parsons "is in technical field sales?" (question mark in original).

JayDee Gunnell at Utah State University ("USU") is not identified by department or technical field. Mr Gunnell apparently acknowledged some lack of expertise on the subject of Mr. Atkinson's inquiry (IR000980), by reporting that in order to answer the "DEQ Restoration Question" he "wanted to touch base with a couple of our specialists in Logan." (IR000981). The quote that follows is then attributed to Mike Kuhns, identified as a USU Extension Forestry Specialist, and states:

> Seems to me you would want a <u>minimum of a foot</u> no matter what, and 2-3 feet for woody plants would be good. There is no science to bring to bear on this in a definitive way – just the educated opinions of people like the ones you emailed on this. I'm not sure if the flowable fill material is something he is concerned about chemically. If it is just cured concrete then <u>it being down their [sic] starting at a foot down and going deeper I don't see as a big problem, even for trees. They will grow over and around the concrete.</u>

(IR000981; Emphasis added).

Throughout the stages of drafting, comment and revision, etc., the Wind River CAP (in both the first rejected and second approved iterations) consistently stated Wind River's plan that portions of the SVE trench systems, including horizontal piping and flow-fill, would remain in place upon decommissioning. Yet the Director would require, under his CAP Approval, the removal of flow-fill down to three feet below grade, based solely on the Staker/Parson and USU emails.

On its face the USU email states that one foot (the current status) would be an acceptable "minimum," a depth that would not be "a big problem, even for trees . . .[which will grow over and around the concrete." While Mr. Kuhns offers that "2-3 feet for woody plants would be good," he goes on to explain that "if it is just cured concrete, then it being down [there] starting at a foot down and going deeper I don't see as a big problem, even for trees. They will grow over and around the concrete." (IR000981). This evidence actually contradicts the Director's chosen standard of three feet, rather than supports it.

The other element mentioned in this context is the question whether flow-fill can be excavated by hand tools, should a homeowner need to do so. This is the subject of the telephone contact by DERR Project Manager, Morgan Atkinson, with "Joe" [no last name given] at Staker Parsons. With no evidence that he visited the project site or had access to the specifications of the flow-fill actually used there, he reportedly told Mr. Atkinson "that flow fill generally has a 50-150 psi rating and cannot be removed by hand with a shovel; a backhoe or excavator would be needed if digging into the material." (IR000979) This telephone log of a conversation indicating that flowable fill "cannot be removed by hand with a shovel" contains no explanation

of the qualifications of "Joe" [last name not given] other than the statement that "Joe is in technical field sales for Staker?" (IR000979).

There is also no evidence in the record that the type of fill used in the trenches in Gunnison had a 50-150 psi rating, which was the type of fill upon which "Joe" based his opinion. Moreover, a two-foot thickness of the flowable fill used by Staker Parsons is reportedly used to support road traffic, and would necessarily be stronger than what was used in the trenches, which were installed in fields to assist removal of gasoline vapors (and not for load-bearing purposes). (*See id. and Cf.:* Findings of Fact ¶¶ 6-8).

Additionally, Mr. Atkinson's telephone log (IR000979) does not overcome the evidence in the record that a piece of the actual flowable-fill removed from the trench in Carissa Kuhni's field could be crumbled by hand, as recounted by Morgan Atkinson, a DERR engineer, and Les Pennington, Wind River's environmental consultant. [IR001411, IR001430.] This evidence is not sufficient to convince a reasonable mind that the flowable-fill installed in Gunnison could not be hand dug.

There is no evidence in the record indicating that anyone in Gunnison even intends to excavate the flow-fill buried in the SVE trenches on their property, unless such intent can be read into the stated requests of two property owners, received during the comment period, that the trench contents be removed. (April, 2013 comments of Hansen and Taylor; See Findings of Fact ¶ 41). There is likewise no indication in the record indicating that the two-foot wide runs of backfilled trenches, with flow-fill one foot below grade, have interfered with any resident's plans for "planting, including trees," such as could justify Condition 6.

Based on the USU and Staker/Parson contacts, and nothing more, the Director's CAP Approval modified the CAP to require digging up the SVE trenches to remove flow-fill from the

existing one-foot below grade to the level of three feet below grade. The only record evidence the Director can point to as supporting the three-foot removal specification consists of the email string between USU's Mr. Kuhns and DERR's Project Manager, Morgan Atkinson, along with the latter's telephone log of a discussion with "Joe" at Staker Parsons.

In summary, the very evidence upon which the Director relies to impose Condition 6 undermines his conclusion that Wind River must remove the flowable-fill because there was no "science to bring to bear" that would justify needing more topsoil. In fact, the Gunnison residents would be able to plant trees with the flowable-fill in place. Without evidence in the record supporting the Director's requirement to remove the flow-fill, the Director erred in imposing Condition 6 in the CAP Approval Order.

Furthermore, there is no evidence in the record to suggest that the work required under Condition 6 will reduce the threat to public health, safety or the environment caused by the release. DEQ has been empowered and directed by the Utah Legislature to investigate, respond to, and address threats to human health and safety from environmental hazards. *See, e.g.*, Utah Code § 19-1-201(2) (empowering DEQ to "investigate and control matters affecting the public *health* when caused by environmental hazards" and to "establish and operate programs, as authorized by this title, necessary for protection of the environment and public *health* from environmental hazards" (emphasis added)). The touchstone of human health and safety is a key facet of the agency's statutory mandate; and, its importance is mirrored in the limited scope of review allowed to the Director for corrective action plans. *See* Utah Code Ann. § 19-6-420(4)(c) (instructing Director to consider the "threat to human health" during his review of a corrective action plan); 40 C.F.R. § 280.66(a)-(b) (providing that corrective action plan is intended to "adequately protect human health, safety, and the environment" and directing agency to approve

plan if it does so). Thus, the Director has no reasonable basis for acting unless there is substantial evidence that human health, safety or the environment is impacted or potentially impacted by environmental conditions.

Condition 6 does not even purport to protect human health or safety from potential impacts of hazardous releases, but rather requires replacement of the flow-fill in the trenches with compacted topsoil and the removal of rock and gravel as necessary to "facilitate planting, including trees" and to "facilitate plant growth." (IR001337). This is not an appropriate justification for imposing Condition 6. Neither DEQ generally nor the Director specifically has authority to issue CAP Approvals based solely on evidence that performance of the CAP would improve the aesthetics of landscaping or the planting of trees to improve property values.

Finally, the Director also appears to rely upon comments submitted during the CAP approval process to justify the imposition of other elements of Condition 6. However, those issues raised in those comments were all resolved either through actual physical repairs or monetary compensation. *See:* Wind River CAP (IR000999): "As a result of the settlement agreement between Wind River Petroleum and the home owner, [Jeremy and Marlo Taylor], the residence was demolished on September 10, 2010. In lieu of direct compensation for alternative housing, the mortgage on the property was paid by Wind River Petroleum for a short time prior to the owners vacating the property until the time the settlement agreement was reached. It is our understanding that all claims are resolved." Wind River CAP (IR001006): "During the site investigation and treatment installation, the landscaping of a number of the impacted properties suffered minor damages. The affected areas have been restored." Settlement Agreemements (IR001341-1408); Wind River CAP (IR001007): "The settlement agreement also covers issues such as compensation for displacement and temporary housing beyond any compensation that

was provided prior to the settlement agreement." Wind River CAP, Appendix N (IR001196): [reporting completion throughout 2008 of] "repair landscaping…repair fence…remove construction debris from property as indicated resident's comments…repair damages to sprinkling system and irrigation water systems…repair fencing, landscaping, and other damage from construction activities." Invoices (IR001413-1423): [documenting repairs completed for Gunnison Residents].

It appears that the Director ignored all of this evidence in the Record (excluding the invoices, IR0001413-1423, which were added to the record later) when he imposed Condition 6, because everything requested in Condition 6 was reported as complete in Wind River's CAP. The Director has pointed to nothing in the Record to undermine this evidence. Thus, the Director lacked sufficient substantial evidence to support his decision to impose the conditions.

I conclude that the Director lacked substantial evidence in the record to support his decision to impose Condition 6 on Wind River. I therefore recommend that the CAP Approval Order be remanded to the Director and that he ensure he has adequate justification in the record for any requirements he may impose upon Wind River and as allowed by law.

4, The Settlement Agreements Have Already Resolved the Requirements of Condition 6 of the CAP Approval

After oral argument in this matter, the parties submitted additional briefing on the effect, if any, on these proceedings of the settlement agreements entered into between Wind River and the affected property owners in Gunnison. The Director points out that as a non-party to the agreements, he is not bound by them – true enough, even axiomatic. The Director further argues that his statutory authority does not allow him "to review and interpret private settlement agreements to which he is not a party." For those reasons, he refused to consider the settlement

agreements in fashioning the CAP Approval's Condition 6, addressing mitigation of adverse consequences. (Director's Supplemental Briefing, December 31, 2014, at p. 8).

Wind River counters with two main points: (1) that the settlement agreements should have been reviewed by the Director because they provide "clear and unequivocal evidence" that the Gunnison residents were directly compensated for all property damage or other claims; and (2) that consideration of the settlement agreements would demonstrate compliance with the Condition 6 requirement that Wind River obtain a written statement from any property owner not demanding additional work on their property by Wind River. The latter would eliminate the need for such additional documentation that would merely duplicate what is already in place and available to the Director in the form of the settlement agreements.

I conclude that Wind River has the better of the argument on this issue. I therefore recommend that upon remand the Director should be ordered to consider the settlement agreements as having resolved the requirements of Condition 6, and refrain from requiring such terms in connection with any subsequent CAP Approval, for all property owners who were signatories to the agreements. Because DERR has no authority or responsibility to regulate property damage that does not impact human health, safety, or the environment—such as property damage or devaluation that occurs incident to the cleanup of a release—the Utah Legislature has ensured that individual property owners retain their full spectrum of legal rights against the owner/operator for property damages caused by a release. *See, e.g.*, Utah Code Ann. § 19-6-427.

This means that if property damage occurs during the course of cleanup activities, the Director is not responsible to ensure that the property damage is addressed under a corrective action plan or otherwise unless it poses a threat to human health, safety, or the environment.

Instead, individual property owners have the right to seek redress directly from the owner/operator who caused the property damage. Indeed, the Director recognized this in his response to comments on the initial 2008 CAP Summary when he stated: "[t]he DERR does not have the authority or the mechanisms to restore property values. This is a damage claim that must be addressed through other procedures." (IR000101).

This is precisely what occurred here. In 2007, several months after the release of petroleum from Wind River's underground tanks, Gunnison residents initiated lawsuits against Wind River to recover for property damage and property value diminution caused by Wind River's clean-up of the Release. (*See* IR001346, IR001380). In June of 2010, *all* the affected property owners settled and released their claims against Wind River, including claims for property damages caused by the cleanup activities in exchange for a cash payment and, in some cases, the performance of certain repairs to the affected properties by Wind River. (IR001344-1406).

In other words, the affected residents of Gunnison negotiated and resolved with Wind River their claims related to the location and composition of the SVE trenches (including flow-fill) and any other damages to their property. Those negotiations resulted in settlements whereby each affected property owner received a sum that each agreed was adequate to compensate them for all past, present, and future claims related to the trenches, rocks and gravel, and landscaping issues. (*Id.)* These are precisely the conditions that the Director has claimed are "adverse consequences of cleanup activities." However, since the affected owners have already been fully compensated and have released their claims for property damages arising from these conditions, these "adverse consequences of cleanup activities" have already been fully mitigated.

Accordingly, there was no reasonable basis upon which the Director could order Wind River to mitigate consequences that were already fully addressed.

As an alternative to performing the work, Condition 6 permits Wind River to provide DERR with "proof . . . that it has contacted the affected property owner and offered to conduct the mitigation [ordered by Condition 6], and the property owner has either rejected the offer of mitigation or has not responded within 60 days." (IR001337-1338). Ordering Wind River to contact property owners, with whom it has already negotiated and settled all the issues listed in Condition 6, is arbitrary and capricious precisely because Wind River has already obtained releases from each and every one of the affected property owners for the property damages that are the subject of Condition 6. (IR001344-1406). Therefore, the Director can have no rational basis to order Wind River to re-perform acts it has already performed. I conclude that the "adverse consequences of remediation," which the Director cites as a basis for imposing Condition 6, have already been fully mitigated by direct settlement between the affected property owners and Wind River. (IR001341-1408).

Because DERR has no authority or responsibility to regulate property damage that does not impact human health, safety, or the environment—such as property damage or devaluation that occurs incident to the cleanup of a release—the Utah Legislature has ensured that individual property owners retain their full-spectrum of legal rights against the owner/operator for property damages caused by a release. *See, e.g.*, Utah Code Ann. § 19-6-427. With assistance of counsel, all local property owners exercised those rights, secured repairs and/or payments from Wind River, and executed full releases for all "claims . . . past, present, or future" related to the Wind River gasoline leak and remediation. (Christensen Declaration and attached Settlement Agreements, IR0001341-1408). On remand, the Director should be ordered to consider the

settlement agreements, as satisfying the requirement for mitigating the "adverse consequences of remediation," (cited by the Director as a basis for imposing Condition 6), and refrain from imposing Condition 6 or other property restoration obligations upon Wind River in any modified CAP, CAP Approval, or other subsequent action. (IR001341-1408).

## CONCLUSION AND RECOMMENDED DECISION

For the foregoing reasons, I conclude, as a matter of law, that the Director exceeded his statutory authority when he modified the Wind River CAP via the July 23, 2013 CAP Approval. He also exceeded his authority when he evaluated property restoration issues in his issuance of CAP Approval Condition 6. I conclude that his factual determinations regarding Condition 6 are not supported by substantial evidence, and that the Settlement Agreements have already resolved the requirements of Condition 6, eliminating any need for its terms. I recommend that the CAP Approval be remanded to the Director for his reconsideration and for further action on the Final Wind River 2013 CAP in accordance with Utah law.

## NOTICE OF OPPORTUNITY TO COMMENT

Parties may file comments to this Recommended Decision with the Executive Director of the Department of Environmental Quality within ten business days of issuance of this Recommended Decision in accordance with the requirements of Utah Admin. Code R2305-7-213(4). Comments shall not exceed 15 pages. A party may file a response to another party's comments, not to exceed five pages, within five business days of the date of the service of the comments.

DATED this 4th day of April, 2016.

/s/ Richard K. Rathbun
Richard K. Rathbun
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2016, a true and correct copy of the foregoing Findings of Fact, Conclusions of Law, and Recommended Decision was sent by electronic mail to the following:

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