**BEFORE THE EXECUTIVE DIRECTOR**
**OF THE UTAH DEPARTMENT OF ENVIRONMENTAL QUALITY**

| | |
|---|---|
| In the Matter of: Corrective Action Plan Approval for Top Stop C-4, Located at 15 South Main Street, Gunnison, Utah Facility Identification No. 2000220 Release Site MHB | **EXECUTIVE DIRECTOR'S ORDER**<br><br>August 11, 2016 |

Pursuant to Utah Code Ann. § 19-1-301.5 and Utah Admin. Code (UAC) r. 305-7, on April 4, 2016, the Administrative Law Judge (ALJ) issued a proposed decision in this matter. The ALJ recommended that the Corrective Action Plan (CAP) Approval be remanded to the Director of Environmental Response and Remediation (Director) for his reconsideration and for further action in accordance with Utah law. The ALJ also notified the parties that they could submit comments on the ALJ's recommended decision in accordance with UAC r. 305-7-213(6). Both parties submitted comments. Due to the passage of time and the near completion of the corrective action, neither party thought remand would be meaningful.

## PROCEDURAL HISTORY

On August 20, 2013, in accordance with Utah Code Ann. § 63G-4-301, Petitioner, Wind River, filed a Request for Agency Action (RFAA) challenging and seeking remand of the July 23, 2013 CAP letter issued by the Respondent, Director. An ALJ was appointed in this matter pursuant to Utah Code Ann. § 19-1-301.5.

After extensive briefing by the Parties including a Motion to Dismiss and several motions to supplement the record, oral argument was held on December 10, 2014. The parties submitted their proposed Findings of Fact, Conclusions of Law, and Recommended Decision to the ALJ on January 23, 2015. On April 4, 2016, the ALJ submitted his *Findings of Fact, Conclusions of Law, and Recommended Decision* (ALJ Recommended Decision) to the Executive Director. Among other conclusions, the ALJ determined that the requirements of Condition 6 of the CAP Approval were not supported by substantial evidence. The ALJ recommended 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. *ALJ Recommended Decision at 50.*

## FINDINGS OF FACT

I adopt and incorporate by reference the ALJ's Findings of Fact. *ALJ Recommended Decision at 4-16.*

## SCOPE OF REVIEW

When the ALJ submits his Proposed Finding of Fact Conclusions of Law and Recommended Decision to the Executive Director, the Executive Director may: (1) adopt, adopt with modifications or reject the proposed dispositive decision; or (2) return the proposed dispositive decision to the Administrative Law Judge for further action as directed. *Utah Code Ann. § 19-1-301.5.* In this matter, I partially adopt and partially reject the ALJ's Order.[1]

[1] "Our statutes do not mandate or indicate that the Commission is bound by the findings of the Administrative Law Judge when the evidence is conflicting. On the contrary, Section 35-1-82.54 provides

## THE ALJ'S DECISION REGARDING SUPPLEMENTING THE RECORD

On October 10, 2014, Petitioner filed a *Motion to Supplement the Administrative Record* (*Motion to Supplement*) with a "Wasatch Environmental Corrective Action Plan Summary Letter" (Wasatch Report), with attachments, and the August 29, 2014, "Declaration of Keith S. Christensen Offered to Supplement the Record." Attached as exhibits to the Christensen declaration were the 2010 settlement agreements (Agreements) that Wind River entered into with residents and businesses affected by the Wind River release. The Director objected to supplementing the record, asserting that the documents did not meet the criteria for supplementing the record outlined in Utah Code Ann. § 19-1-301.5(9)(c)(i). *Director's Response to Wind River's Motion to Supplement the Administrative Record,* dated October 31, 2014.

On November 17, 2014, the ALJ issued an Order granting Petitioner's *Motion to Supplement the Administrative Record*. While I agree with the ALJ's decision to supplement the record with the Wasatch Report, I disagree with his decision to include the Christensen declaration and Agreements.

The Agreements were between Wind River and those affected by the release. The Director was not a party to the Agreements and had no input into their content. He did not know what was included in the Agreements, as they were confidential and, if shared with

---

that when a case is referred to the full Commission, it shall review the entire record, and may make its own findings of fact and enter its award thereon, . . . [T]here is nothing in our statutes which limits the power of the Commission itself in reviewing and adopting or reversing the findings of its Administrative Law Judge." United States Steel Corp. v. Industrial Comm'n, 607 P.2d 807, 810 (Utah 1980). A similar issue was reviewed in a case involving DEQ where the court stated "a hearing officer's decision is 'merely a proposal which the ultimate agency decision maker [may] accept or reject.'" LaSal Oil Co. v. Department of Envtl. Quality, 843 P.2d 1045, 1048 (Utah App. 1992) (quoting Vali Convalescent & Care Inst. v. Div. of Health Care Fin., 797 P.2d 438, 449 (Utah App. 1990)). The Court further stated that "the Commission could, in its review of the record made before the Administrative Law Judge, . . . make its own findings on the credibility of the evidence presented." Vali 797 P.2d at 448 (quoting United States Steel Corp. 607 P.2d at 811 (internal quotation marks omitted).

the Director, would have been subject to the Government Records Access and Management Act (GRAMA), Utah Code Ann. 63G-2-101 to 901. In his February 2, 2011, letter to the Director, Craig Larsen of Wind River offered to make redacted copies of the settlement agreements available to the Director for review. IR000550. Wind River did not offer the full, non-redacted Agreements to the Director until March 28, 2013. If Wind River wanted the Agreements to be part of the decision-making process, it should have attached them as exhibits to its final CAP, so the residents of Gunnison affected by Wind River's petroleum release could comment on whether the Agreements mitigated adverse consequences. Wind River also knew from the letters written by the Director after Wind River's Agreements were finalized that he did not consider the Agreements to satisfy the requirements to mitigate adverse consequences of work performed prior to an approved CAP.

Additionally and importantly, because the Director was not a party to the Agreements, he does not know if Wind River has met its obligations outlined in the Agreements. Even if the Director had seen the Agreements prior to issuance of the CAP, the Agreements would not have been relevant to or necessary for the resolution of the issues because they do not show what actions were completed to abrogate the effects of the release and the remediation. Further, they do not relieve him of the responsibility of ensuring that Wind River complied with all applicable Division of Environmental Response and Remediation (DERR) requirements.

In his *Recommended Decision,* the ALJ recommends that the Director should be ordered on remand to consider the 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 agreement. *ALJ*

*Recommended Decision at 49.* He further suggests that on remand the Director should be ordered to consider the settlements as satisfying the requirement for mitigating the "adverse consequences of remediation". *Id.* This is asking the Director to assume that Wind River has satisfied the conditions of the Agreements although, as outlined above, the Agreements should not have been a supplement to the record. It is also asking the Director to ignore the information from some residents that they are unhappy with the results of the cleanup, that the "adverse consequences of the remediation" have not been finished, and that mitigation is not complete. According to the ALJ, the residents have retained their full spectrum of legal rights against the owner/operator for property damages caused by a release, and this is a civil case that does not involve the Director. This conclusion puts the Director in an untenable position. The ALJ Recommended Decision would require him to accept an Agreement to which he was not a party and had not seen when making his decision as proof that all the adverse consequences of remediation have been met, while ignoring the pleas of the residents who claim they have not. There is not sufficient evidence in the record that shows that all conditions of the Agreements have been satisfied.

**THE ALJ RECOMMENDED DECISION**

The *ALJ's Recommend Decision* is comprehensive, thorough, and thoughtful. I disagree, however, with the some of the conclusions. For example: the ALJ concluded that the Director exceeded his statutory authority when he modified the CAP by adding Condition 6. According to the ALJ, Condition 6 "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." *Recommended Decision at 28.* According to the ALJ, the Director can add conditions to a

CAP, but those conditions cannot "modify" the CAP. *Id. at 25.* This draws an exceedingly fine line in distinguishing what is a condition and what is a modification as evidenced by the fact that the ALJ finds it necessary to remand the other six conditions for further evaluation to consider "whether conditions 1-5 and 7 (as condition 6 indeed does) modify the Final CAP". *Id.* at 28. This imposes an onerous burden on the Director. Not only must he review and approve or disapprove a CAP but, if he includes any conditions, he must somehow ensure that they do not "modify" the CAP. Since what constitutes a "modification" is open to interpretation, this determination is also an invitation for parties to challenge any conditions by asserting they are modifications. This is an unworkable standard.

Despite the difficulty in determining what constitutes a modification, the ALJ has made it clear that the Director's factual determinations regarding Condition 6 are not supported by substantial evidence. *See, ALJ Recommended Decision* at 37-46. The ALJ has carefully and comprehensively evaluated the evidence and concluded that this condition required too much of Wind River based on insufficient facts. I agree with this decision.

This matter is additionally complicated by the fact that the record should not have been supplemented by the Agreements, and the recommended decision is thus based on some facts that should not have been in evidence. It is impossible to determine or distinguish what parts of the ALJ's decision were influenced by the Agreements, either their terms or the fact that the parties entered into them.

Finally, in recommending that the 2013 CAP be remanded for reconsideration, the ALJ did not consider some matters which did not come before him and which could render his decision moot. He does not address the length of time that has passed since

the inception of the Wind River clean-up of the site of the release. It has been nine years since the August, 2007 release and three years since the Director approved the CAP at issue. In that time, Wind River has largely completed implementing the CAP. *Wind River's Comments in Response to Comments by the Director on the ALJ's Recommended Decision at 5; Director's Comments on ALJ's Recommended Decision at 15.*

The Director filed *Director's Comments on ALJ's Recommended Decision* (*Director's Comments*) on April 18, 2016. In the *Director's Comments,* the Director requested that the CAP not be remanded, stating that: "If the Executive Director determines that the CAP and all its conditions stand, there is no need to remand the CAP. Likewise, if the Director determines that Condition 6 of the CAP is unacceptable for whatever reason, the Director requests that Condition 6 be stricken from the CAP, without a remand of the entire CAP. Wind River is almost three years into implementation of the CAP as it is written, and a remand serves no purpose." *Director's Comments at 15.*

Wind River filed *Wind River's Comments in Response to Comments by the Director on the ALJ's Recommended Decision (Wind River Comments)* in Response to *Director's Comments* on April 25, 2016. Although its *Request for Agency Action* asked that the CAP be remanded, Wind River now requests that the Executive Director uphold DERR's approval of Wind River's CAP, but strike the seven Conditions. Wind River also states that: "Because nearly all of the CAP requirements have been completed, there is no need for remand in this case." *Wind River Comments at 5.*

## ORDER

I could remand this matter for rehearing of the complete RFAA on the basis that Wind River's request to supplement the record with the Agreements should have been denied. Or if I were to adopt the ALJ's recommendation, this matter would be remanded for reconsideration of Conditions 1 to 5 and 7. However, the circumstances, passage of time, and wishes of the parties should be considered. In August, 2007, gasoline vapors were reported in businesses near the Top Stop Convenience Store. Wind River immediately employed Wasatch Environmental to conduct an emergency response and preliminary investigation of the release. Remediation of the release has been ongoing since that time. Wind River submitted the first CAP to the Director in May, 2008. The Director approved the CAP at issue in this matter with conditions in July, 2013. It has been nine years since the release occurred and more than three years since the Director approved the CAP.

Both Wind River and the Director request that there be no remand in this case. According to *Wind River's Comments*, as of April 2016, nearly all CAP requirements were completed. *Wind River Comments at 5.* In the *Director's Comments* the Director states that since the CAP is almost three years into implementation a remand would serve no purpose. *Director's Comments at 15.* As the parties agree that the CAP is almost complete, a determination on the CAP Approval, if rendered, cannot have any practical effect. It is clear that neither party wants this matter to be remanded, that remand would serve no purpose since the CAP is largely implemented, and that remand would only waste both parties' time and resources.

Therefore, the ALJ's finding that the Director's factual determinations regarding Condition 6 are not supported by substantial evidence is upheld and Condition 6 is stricken from the CAP. The DERR approval of the CAP is upheld with the exclusion of Condition 6 and the ALJ's recommendation that this matter be remanded is rejected.

**NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW**

Pursuant to Utah Code Ann. § 19-1-301.5(15), a party may seek judicial review in the Utah Court of Appeals of a dispositive action in a permit review adjudicative proceeding, in accordance with Sections 63G-4-401, 63G-4-403, and 63G-4-405.

DATED this 11th day of August, 2016.

ALAN MATHESON
Executive Director
Utah Department of Environmental Quality

## CERTIFICATE OF SERVICE

I hereby certify that on August 11th, 2016, I caused the foregoing **EXECUTIVE DIRECTOR'S ORDER** to be e-mailed to the following:

Richard K. Rathbun,
Administrative Law Judge
Stucki & Rencher, L.L.C.
215 South State Street, Suite 600
Salt Lake City, Utah 84111
rathbun@stuckirencher.com

Brent H. Everett, Director
Division of Environmental
Response and Remediation
195 North 1950 West, 1st Floor
P.O. Box 144840
Salt Lake City, Utah 84114-4840
beverett@utah.gov

Administrative Proceedings Records
Officer
Environment & Health Division
Utah Attorney General's Office
195 North 1950 West, 2nd Floor
Southwest
P.O. Box 140873
Salt Lake City, Utah 84114-0873
DEQAPRO@utah.gov

Kimberlee McEwan,
Assistant Attorney General
Utah Attorney General's Office
195 North 1950 West, 2nd Floor
Southwest
P.O. Box 140873
Salt Lake City, Utah 84114-0873
kmcewan@utah.gov

Rita M. Cornish
Megan J. Houdeshel
Parr, Brown, Gee & Loveless, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
rcornish@parrbrown.com
mhoudeshel@parrbrown.com
Attorneys for Petitioner Wind River

Shane R. Bekkemellom