

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: September 3, 2014 12:17 PM CASE NUMBER: 2013CV32397  <input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
SHEEP MOUNTAIN ALLIANCE and ROCKY MOUNTAIN WILD Plaintiffs; v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, JENNIFER OPILA, IN HER OFFICIAL CAPACITY; CDPHE EXECUTIVE DIRECTOR DR. CHRISTOPHER URBINA, IN HIS OFFICIAL CAPACITY; and DEFENDANT INDISPENSABLE PARTY ENERGY FUELS RESOURCES CORPORATION, Defendants.	
<b>ORDER RE: ENERGY FUELS RESOURCES CORPORATION'S          MOTION FOR REMAND TO HEARING OFFICER</b>	

THIS MATTER comes before me on Energy Fuels Resources Corporation's ("Energy Fuels") Motion for Remand to Hearing Officer, filed on May 2, 2014. I have reviewed the Motion, the Colorado Department of Public Health and Environment ("CDPHE") Response, the Sheep Mountain Alliance ("SMA") and others Response, Reply, the entire case file, as well as the applicable case and statutory law, and make the following findings of fact and conclusions of law:

### I. Background

On November 18, 2009, indispensable party Energy Fuels submitted an application to defendant Colorado Department of Public Health and Environment ("CDPHE") for the issuance of a Radioactive Materials License. Energy Fuels sought to construct and operate a Uranium Mill in Montrose County, Colorado. CDPHE determined that the application, including a voluminous Environmental Impact Analysis, was substantially complete and ready to be presented for public hearings required by Colorado statute. *See* C.R.S. § 25-11-203 (2)(b)(I) (2013). Several public hearings were held, and the license was issued by CDPHE to Energy Fuels in 2011.

Plaintiff Sheep Mountain Alliance (“SMA”), among others, filed an appeal of CDPHE’s license decision with the Colorado District Court, alleging that the public hearings held by Energy Fuels and CDPHE did not meet statutory requirements. On June 13, 2012, the Denver District Court found CDPHE’s action of issuing Energy Fuels a license without first holding a hearing pursuant to C.R.S. § 24-4-105 to be illegal. The prior court invalidated the issued license and remanded with instructions to hold a §105 hearing, and included a new timeframe for the parties to follow.

The parties proceeded. At the Hearing Plaintiffs claimed the purpose of the Hearing was determine whether Energy Fuel’s application met all criteria under state law for issuance of a license. Energy Fuel claimed the purpose was to gather evidence within the procedural confines of APA § 105. The Hearing Officer agreed with Energy Fuels and determined the Hearing was an intermediate step in CDPHE’s granting the license. A decision was then reached by CDPHE granting a license to Energy Fuels.

Plaintiffs sought invalidation of a Radioactive Materials License issued to Energy Fuels by CDPHE on April 25, 2013. Plaintiffs made six claims in arguing that the license should be invalidated: (1) CDPHE deprived SMA of an “initial decision” following the required hearing, (2) the hearing officer failed to determine and adhere to an explicit burden of proof in the hearing as required by 6 C.C.R. 1007-1 § 18 (“part 18 regulations”), (3) the hearing officer did not apply the substantive protections of part 18 regulations, (4) the hearing lacked competent socioeconomic data in violation of part 18 regulations, (5) CDPHE arbitrarily relied on an unlawful Environmental Impact Analysis, and (6) cumulatively, CDPHE’s licensing action and decision violates the Uranium Mill Tailings Radiation Control Act (“UMTRCA”), the Atomic Energy Act (“AEA”), the Administrative Procedure Act (“APA”), Colorado Radiation Control Act (“RCA”), and part 18 of the implementing regulations.

I denied CDHPE’s Motion to Dismiss the Complaint on September 9, 2013 and denied Energy Fuels’ Motion to Dismiss the Complaint on September 16, 2013.

In order to resolve issues raised in the Complaint, Energy Fuels requests that I hold its license in abeyance and remand the entire matter to CDPHE and the Hearing Officer to address all of Plaintiff’s claims. Specifically, Energy Fuels moves that I (1) order the Hearing Officer render an initial decision based solely on the record from the initial Hearing and (2) determine which party bore the burden of proof and whether that burden was satisfied. Defendant moves that CDPHE review all Plaintiffs substantive and procedural claims (3), (4), (5), and (6). Defendant and Indispensable Party argue remand is appropriate, asserting that the Hearing Officer’s Finding of Fact, Conclusions of Law, and Ruling were deficient. They also claim such an order would promote judicial efficiency.

### **III. Law and Analysis**

#### **A. Order is Not Prejudicial and Promotes Judicial Economy**

A review of the case record suggests the Order is not Prejudicial because it is not likely to require Plaintiff to expend unnecessary resources. Further, judicial economy is served by remanding this case because it directly allows for the resolutions of issues raised by Plaintiff.

**B. Hearing Officer Can Resolve Plaintiff's Claim Surrounding the Burden of Proof**

Public officials acting in an adjudicatory capacity are entitled to “quasi-judicial absolute immunity” if there are sufficient procedural safeguards in the adjudicatory actions. *Churchill v. Univ. of Colo. At Boulder*, 285 P.3d 986, 999-1005 (Colo. 2012). There is no case law to suggest that the remand of a post-hearing assignment of the burdens of proof is a violation of due process rights.

**C. Remand is Appropriate**

The Administrative Procedure Act is to provide “a plain, simple, and prompt remedy to persons or parties . . . aggrieved by agency actions.” C.R.S. § 24-4-106(1). When there can be no meaningful review on the merits, the proper action is to remand the case for appropriate proceedings. *See Lawless v. Bach*, 489 P.2d 316, 318 (Colo. 1971); C.R.S. § 24-4-106(7). Remand is appropriate where a hearing officer “failed to adopt any findings or conclusions or to give any reasons for its action.” *Ivy v. State Personnel Bd.*, 860 P.2d 602, 605 (Colo. App. 1993). “[T]he court shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply such interpretation to the facts duly found or established.” C.R.S. § 24-4-106(7).

Here, the Hearing Officer failed to make a conclusion as to whether Energy Fuels application met all criteria for issuance of a license pursuant to C.R.S. § 25-11-203. Additionally, there are no questions of law or constitutional issues that I need to resolve.

**IV. Order**

It is ordered that: (1) **The Energy Fuels license is held in abeyance**, (2) **That this matter is remanded for hearing consistent with this Order**, including the following:

- A. CDPHE is ordered to convene an appropriate Hearing Officer. Original Hearing Officer shall be selected if he or she is available and are eligible to issue a *post hoc* determination of the burdens of proof in the hearing. If Original Hearing Officer is unavailable or ineligible to issue a *post hoc* determination of the burdens of proof in the hearing, then CDPHE shall select another appropriate Hearing Officer. That Hearing Officer shall review the record of the initial §105 hearing.
- B. Limited Discovery shall be made available only for the purpose of determining whether the original Hearing Officer is eligible to enter *post hoc* determinations of the burdens of proof in the hearing due to post-hearing ex-parte communications.

- C. After limited discovery, CDPHE shall decide whether the original Hearing Officer is eligible.
- D. The Hearing Officer formally assigned to the case shall issue an initial decision as to whether Energy Fuels' application met all criteria under state law for issuance of a license pursuant to C.R.S. § 25-11-203. Hearing Officer shall also issue a *post hoc* determination of the burdens of proof in the hearing.
- E. Said Hearing Officer shall make decisions based on the record from the initial §105 hearing.
- F. Parties may modify terms of who is the Hearing Officer by written stipulation signed by all parties, provided that any such stipulation does not impair the rights of any party.
- G. Following proceedings with the Hearing Officer, CDPHE shall review whether the original Hearing Officer in the original Hearing applied substantive protections of part 18 regulations, possessed competent socioeconomic data as per part 18 regulations, whether CDPHE arbitrarily relied on an unlawful Environmental Impact Analysis and whether the CDPHE's licensing violated UMTRCA, AEA, APA, RCA, and part 18 of the implementing regulations,
- H. CDPHE shall review the determination of Energy Fuel's License with regards to prior §105 record and additional proceedings mandated by this order.

SO ORDERED this 3<sup>rd</sup> day of August, 2014.

BY THE COURT:



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Robert L. McGahey, Jr.  
District Court Judge