

Sollenberger, Dennis

From: Brown, Carrie
Sent: Monday, April 12, 2010 11:13 AM
To: Sollenberger, Dennis
Cc: Schneider, Kathleen
Subject: FW: Colorado Department of Public Health and Environment Agreement Program and Atomic Energy Act State Compliance Requirements
Attachments: UW_toDuncan White_NRC_reCDPHE.100323.pdf
Follow Up Flag: Follow up
Flag Status: Flagged

Per Kathy's request!

From: White, Duncan
Sent: Tuesday, March 23, 2010 5:41 PM
To: Brown, Carrie
Subject: FW: Colorado Department of Public Health and Environment Agreement Program and Atomic Energy Act State Compliance Requirements

Attached is a performance concern regarding the State of Colorado.

From: sarah@uraniumwatch.org [<mailto:sarah@uraniumwatch.org>]
Sent: Tuesday, March 23, 2010 4:52 PM
To: White, Duncan
Subject: RE: Colorado Department of Public Health and Environment Agreement Program and Atomic Energy Act State Compliance Requirements

Dear Mr. White,

Attached please find a letter regarding the Colorado Department of Public Health and Environment implementation of Atomic Energy Act Agreement State compliance requirements.

A paper copy will follow in the mail.

I request an electronic acknowledgment of the receipt of this letter.

Sincerely,

Sarah M. Fields
Program Director
Uranium Watch
PO Box 344
Moab, Utah 84532
sarah@uraniumwatch.org
435-210-0166

Uranium Watch

P. O. Box 344
Moab, Utah 84532
435-210-0166

via electronic and first class mail

March 23, 2010

Duncan White, Branch Chief
Agreement State Programs Branch
Division of Materials Safety and State Agreements
Office of Federal and State Materials and
Environmental Management Programs
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Duncan.White@nrc.gov

RE: Colorado Department of Public Health and Environment Agreement Program and
Atomic Energy Act State Compliance Requirements

Dear Mr. White:

I am writing to bring to your attention what I believe to be a substantive inconsistency between the requirements of the Atomic Energy Act with respect to the Nuclear Regulatory Commission (NRC) Agreement State programs and the program of the Colorado Department of Public Health and Environment (CDPHE). This inconsistency pertains to the noticing and comment provisions related to licensing decisions for 11e.(2) byproduct material operations, commonly referred to as uranium recovery operations, or uranium mills. The CDPHE has failed to adopt laws or regulations that comply with the Atomic Energy Act Agreement State requirements.

ATOMIC ENERGY ACT

The Atomic Energy Act, at 42 U.S.C., Chapter 23, § 2021 (Cooperation with States), lays out procedures and requirements for states to assume certain responsibilities for nuclear materials, including 11e.(2) byproduct material. Section 2021(o) addresses "state compliance requirements." Section 2021(o) requires that Agreement States, in the case of 11e.(2) byproduct material licenses, provide certain procedures for public involvement in the regulatory decision making process. Section 2021(o) states, in pertinent part:

In the licensing and regulation of byproduct material, as defined in section 2014(e)(2) of this title, or of any activity which results in

the production of byproduct material as so defined under an agreement entered into pursuant to subsection (b) of this section, a State shall require—

(3) procedures which--

(A) in the case of licenses, provide procedures under State law which include—

(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript . . .

(C) require for each license which has a significant impact on the human environment a written analysis (which shall be available to the public before the commencement of any such proceedings) of the impact of such license, including any activities conducted pursuant thereto, on the environment . . .

The intent of Congress is clear. The plain language of the statute requires that an Agreement State provide a notice and opportunity for written public comment on a proposed 11e.(2) byproduct material license or license amendment, provide for a public hearing with a transcript, and make the Agreement State's written environmental analysis of the proposed licensing action available to the public prior to such notice and public comment opportunities. My understanding of the provisions for "a public hearing, with a transcript" refers to a public hearing to take oral comments from any member of the public, not an adjudicatory proceeding under an Agreement State's administrative procedures. Clearly, Congress intended that the public have an opportunity to review the Agreement State's environmental analysis of a proposed agency action prior to and in conjunction with an opportunity to provide written and oral comments on a proposed licensing action.

STATE OF UTAH

The procedures of the State of Utah and the Utah Department of Environmental Quality, Division of Radiation Control (DRC), fully implement the requirements of 42 U.S.C. Section 2021(o)(A)(i) and (C). Pursuant to Section 2021(o)(A)(i) with respect procedures that provide for a notice and opportunity for public comment and a public hearing, the DRC will notice an opportunity for the public to submit written comments on the DRC's draft environmental analysis (termed Safety Evaluation Report, or SER) and the draft license, license amendment, or licensing decision. Also, if requested by the public or initially determined appropriate by the DRC staff, the DRC will hold a public hearing near the site (e.g., in Blanding near the White Mesa Uranium Mill) to provide an opportunity for oral comments from any member of the public. Pursuant to Section 2021(o)(C), the SER is made available before the commencement of the public comment period and public hearing.

After the DRC reviews the public comments, issues the final SER, and the proposed licensing action is approved, amended, or denied, there is an opportunity for interested

persons to request an adjudicatory hearing in accordance with the applicable Utah administrative procedures. Participation in such a proceeding requires the establishment of standing. Additionally, the DRC responds in writing and in detail to written and oral comments received from the public during the public comment period.

STATE OF COLORADO

The Colorado Department of Public Health and Environment (CDPHE), Radiation Management Unit (RAM), is the agency that administers and enforces Colorado's NRC Agreement State program.

The CDPHE RAM process for reviewing 11e.(2) byproduct material license or license amendment applications is set forth in Colorado Revised Statute (CRS) 25-11-203¹ and CDPHE rules and regulations at 6 CCR 1007-1, Part 18, RH 18.6.² The CDPHE procedures for public involvement are also discussed in the August 2009 Summary of Uranium Recovery Regulations.³

The CDPHE RAM has a public participation process that includes an opportunity for the public to comment on an application, applicant's environmental report, and the county's assessment of the applicant's environmental report. The process also requires two public meetings to be held by the licensee or prospective licensee to receive public comments, which are forwarded to the CDPHE RAM. This comment process happens **prior** to the development and release of the CDPHE environmental analysis that is required under Section 2021(o)(C).

Pursuant to Colorado rule 6 CCR 1007-1, RH 18.6, after the CDPHE makes a decision on proposed licensing action, there is then a notice and an opportunity for interested persons to request a formal adjudicatory proceeding. As with many state adjudicatory proceedings, an interested person must establish standing.

There does not appear to be any Colorado statute or regulation that established procedures for a public participation process whereby there is a notice and opportunity for the public to submit written comments or provide oral comments at a public hearing on the CDPHE's environmental analysis or proposed license or license amendment for uranium recovery operations, as required by the Atomic Energy Act.

CDPHE rules, at 6 CCR 1007-1, RH 18.5, require that the CDPHE RAM develop an environmental analysis, as required by 42 U.S.C. § 2021(o)(C). However, there are no procedures for making that regulatory analysis available to the public prior to a notice

¹ <http://www.michie.com/colorado/lpext.dll?f=templates&fn=main-h.htm&cp=>

²

<http://www.cdphe.state.co.us/regulations/radiationcontrol/10070118uraniumthoriumprocessing.pdf>

³ <http://www.cdphe.state.co.us/HM/rad/rml/recoveryregs.pdf>

and opportunity for the public to comment and a public hearing on the licensing action. As discussed above, there are no procedures for a notice and opportunity for the public to submit written comments to the CDPHE for a proposed license or amendment. There are no procedures for requesting an opportunity for a public hearing to provide oral comments after the environmental analysis has been made available, nor procedures that require the CDPHE to respond in writing to those comments.

Clearly, the CDPHE public procedures to involve the public in the decision making process for uranium recovery licenses and license amendments do not meet the requirements of the Atomic Energy Act, specifically, 42 U.S.C. § 2021(o)(A)(i) and (C).

This is of immediate significance, because the CDPHE is currently reviewing an application for the first new conventional uranium mill in the United States in over 25 years.

Recently, I brought the requirements of 42 U.S.C. § 2021(o)(A)(i) and (C) to the attention of CDPHE staff. The staff confirmed that there will not be a notice and written comment opportunity or public hearing for the proposed Piñon Ridge Uranium Mill license after the release of the CDPHE's written environmental analysis, as required by § 2021(o)(A) and (C). Staff stated:

We believe that there is sufficient opportunity for the public to comment on the environmental report in the application and also to review the assessment of the environmental report prepared by the county. We encourage comment and input to our analysis of this information over the approximately year-long review process. There is no explicit comment period for our decision and the decision document.

DISCUSSION

The CDPHE's procedures do not conform to the requirements of the applicable federal statute—42 U.S.C., Chapter 23, § 2021. The comment period on an application and the applicant's environmental report, as contemplated by the CDPHE regulations, does not meet the federal requirements. The comments are not comments on the proposed licensing action after the CDPHE's environmental analysis has been made available. Further, the licensee or prospective licensee, rather than the CDPHE conducts the public meetings; so, the public meetings to take comments are not held by a disinterested party.

In the CDPHE process, the public will not have an opportunity to comment on the proposed license provisions or the agency's environmental and technical review of the proposed licensing action. Further, the agency will not have the benefit of the receipt and review of the public comments on the proposed license and the agency's environmental and technical evaluation of the proposed licensing action. Nor, would the agency respond to such comments in the final environmental assessment, as is the case with a final Environmental Impact Statement (EIS) under the National Environmental Policy Act. The receipt and review of public comments by an Agreement State, similar to a

federal agency's receipt and review of comments on a draft EIS, was contemplated under the Atomic Energy Act.

It is hard to understand why the NRC permits an Agreement State to ignore the plain wording of a statutory Agreement State compliance requirement.

REMEDY

Therefore, I request that the NRC formally notify the CDPHE that they must conform to all of the requirements of 42 U.S.C. § 2021(o)(A) and (C). This means that the State of Colorado must amend its statutes or regulations to include and reference **all** of the requirements in 42 U.S.C. § 2021(o)(A) and (C). Additionally, the CDPHE must adhere to those Agreement State compliance requirements.

In the case of the Piñon Ridge Uranium Mill application review process, the CDPHE must make the agency's written environmental analysis of the proposed project available to the public and then publish a public notice that announces an opportunity for the public to provide written comments and oral comments (at a public hearing conducted by the CDPHE) on the CDPHE environmental analysis and proposed licensing action. The CDPHE must review the public comments and take them into consideration in the final environmental analysis and licensing decision.

I request a prompt resolution of this matter.

Please feel free to contact me if you have any questions or to set up a meeting to discuss this matter.

Sincerely,

Sarah M. Fields
Program Director