

White, Duncan

From: Sarah Fields [sarah@uraniumwatch.org]
Sent: Monday, February 14, 2011 4:24 PM
To: Thaggard, Mark
Cc: White, Duncan
Subject: CO Dept. of Public Health and Environment
Attachments: UW_MThaggard_NRC_reCDPHE.110214.pdf; 42 USC 2021(o).doc; NRCtoSFields_reCDPHE.100709.pdf

Dear Mr. Thaggard,

Attached please find a letter regarding the Colorado Department of Public Health and Environment and their failure to issue any kind of public notice for public comment and a hearing upon the issuance of the license for a new uranium mill in Colorado. This includes 2 attachments. A paper copy will follow in the mail.

Sincerely,

Sarah M. Fields
PO Box 344
Moab, Utah 84532
435-259-9450
sarah@uraniumwatch.org

Uranium Watch

P. O. Box 344
Moab, Utah 84532
435-259-9450

via electronic and first class mail

February 14, 2011

Mark Thaggard, Deputy Director
Division of Intergovernmental Liaison and Rulemaking
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
Mark.Thaggard@nrc.gov

RE: Allegation of Violation of the Atomic Energy Act, 42 U.S.C. § 2021(o) by the
Colorado Department of Public Health

Dear Mr. Thaggard:

BACKGROUND

On March 23 and April 7, 2010, I brought to the Nuclear Regulatory Commission's (NRC's) attention a number of concerns about the Colorado Department of Public Health and Environment's (CDPHE's) implementation of the sections of the Atomic Energy Act of 1954 (AEA), as amended, that are applicable to NRC Agreement States: 42 U.S.C. § 2021(o). See Exhibit A. Specifically, I discussed the CDPHE's implementation of the notice, comment, and hearing requirements for source material licensing actions.

In reply to my concerns, I received a letter from you on July 9, 2010. See Exhibit B. That letter led me to believe that the CDPHE would meet the requirements of 42 U.S.C. § 2021(o)(3)(A), (C), and (D) for 11(e)(2) byproduct material licensing actions.

The AEA requires a public notice and opportunity for public comment and hearing (with a transcript, opportunity for cross examination, and a written determination that is subject to judicial review) for 11e.(2) byproduct material licensing actions by Agreement States. The Agreement State's environmental analysis must be available to the public before the

commencement of any such proceeding. Your July 2009 letter states that "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 made the Agreement State's written environmental analysis of the proposed licensing action available to the public prior to such notice and public comment opportunities." You explained that your "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." Further, the letter states: "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."

APPROVAL OF PIÑON RIDGE URANIUM MILL LICENSE

On January 5, 2011, the CDPHE announced¹ their approval of a radioactive materials license for the proposed Energy Fuels Resources Corporation Piñon Ridge Uranium Mill in the Paradox Valley, Montrose County, Colorado, and issued the Environmental Impact Analysis².

When the CDPHE announced the issuance of the license, they placed a Fact Sheet³ on the CDPHE website: "Fact Sheet for the Energy Fuels Piñon Ridge Uranium Mill Radioactive Materials License Approval." The Fact Sheet did not claim to be a "public notice." The Fact Sheet states, "The applicant has 60 days to review this decision analysis (and license, if appropriate) and request a formal hearing on the license." It also states, "If a hearing is not requested, the license becomes final." There is no mention of an opportunity for a public hearing or opportunity to provide comments—as contemplated by the AEA and your 2010 letter.

The Fact Sheet only referred to an opportunity for a formal adjudicatory proceeding for the licensee under Colorado's administrative procedures, although the Fact Sheet did not reference the implementing regulations and statutes. The Fact Sheet did not extend the opportunity for a "formal" adjudicatory hearing to the public. Be that as it may, it was premature to announce an opportunity for a formal hearing prior to a public hearing and opportunity for public comment, and agency written determination based on the evidence presented during the public comment period.

If the Utah Division of Radiation Control had approved the Piñon Ridge Uranium Mill, a public notice of a public hearing and an opportunity to comment on the environmental analysis and draft license would have been sent out and placed on the DRC website.

¹ <http://www.cdphe.state.co.us/hm/rad/rml/energyfuels/decision/index.htm>

² <http://www.cdphe.state.co.us/hm/rad/rml/energyfuels/decision/envimpactanalysis.pdf>

³ <http://www.cdphe.state.co.us/hm/rad/rml/energyfuels/decision/decisionfs.pdf>

After the hearing and public comment opportunity, a final environmental analysis and final decision would be issued, which considered the evidence presented during the public comment period. Then, there would be a notice of an opportunity for the licensee or member of the public to request a formal adjudicatory hearing. Thus, the right of the public to provide comments on the proposed licensing action and environmental analysis is preserved, and the right of the public to request a formal adjudicatory hearing is also preserved. The CDPHE did not extend such rights to the public for the Piñon Ridge Uranium Mill licensing decision.

FAILURE TO ISSUE PUBLIC NOTICE FOR PUBLIC COMMENT AND HEARING

Considering the requirements for a public notice of an opportunity for public comment and a public hearing AFTER the release of the Environmental Impact Analysis, one would have expected that the CDPHE would issue such a notice at the time that the Environmental Impact Analysis was issued, that is, February 5, 2011.

To the best of my knowledge, since January 5, 2011, the CDPHE has not issued a public notice announcing an opportunity for public to submit comments and participate in a public hearing regarding the issuance of a license for a the new Piñon Ridge Uranium Mill and the Environmental Impact Analysis. Further, there is every indication that the CDPHE has no intention whatsoever to notice an opportunity for public hearing and comment, pursuant to the AEA.

I am on the list to receive CDPHE notices related to the Piñon Ridge Uranium Mill and have not received any public notice of a hearing or public comment opportunity on the Piñon Ridge decision and Environmental Impact Analysis. No public notice announcing an opportunity for public comment and a public hearing has been posted on the CDPHE website since the environmental analysis was issued. When I ask the CDPHE about such a notice and hearing opportunity, I get the runaround and have been told that the AEA did not apply to the CDPHE.

Therefore, the CDPHE has failed to issue a public notice after the issuance of the Environmental Impact Analysis for Piñon Ridge Uranium Mill that would provide for public comments and a public hearing. Nor was there a notice that would provide the public with an opportunity to request a formal adjudicatory proceeding, although such a notice would be premature. Colorado Revised Statute 24-4-104 does not clearly provide instructions for the public to request such a formal proceeding. The hearing contemplated under Code of Colorado Regulations, 6 CCR 1007-1, Part 18.6, is clearly a formal adjudicatory proceeding and not an opportunity for general public comment and a public hearing contemplated by 42 U.S.C. § 2021(o). According to your letter of 2010, Congress intended that there be such a public hearing and comment opportunity subsequent to the release of the environmental analysis.

In sum: The CDPHE failed to issue any notice to the public announcing the opportunity for a public hearing and public comments period (including how to submit comments;

suspense date; contact person; date, time, and location of public hearing; and background information) on the issuance of the license for the Piñon Ridge Uranium Mill. The CDPHE has demonstrated a blatant disregard for the Atomic Energy Act's requirements for Agreement State regulation of uranium recovery licensees.

I tried to explain to the NRC in April and May 2010 that this would be the case, but I was essentially ignored.

REMEDY

Uranium Watch requests that the NRC promptly remedy this situation by the following:

1. Make a determination that the CDPHE failed to comply with the applicable notice, comment, and hearing requirements in 42 U.S.C. § 2021(o)(3)(A) for Piñon Ridge Uranium Mill.
2. Order the CDPHE to immediately notice a 60-day opportunity for the public to provide comments on the Environmental Impact Analysis and draft license for Piñon Ridge Uranium Mill, as contemplated by 42 U.S.C. § 2021(o)(3)(A).
3. Order the CDPHE to immediately notice a public hearing on the Environmental Impact Analysis and draft license for Piñon Ridge Uranium Mill, as contemplated by 42 U.S.C. § 2021(o)(3)(A) to take place in the Paradox Valley at least 45 days from the date of the public notice.
4. Take appropriate enforcement action if the CDPHE fails to issue a public notice to provide for a public hearing and opportunity for public comment on the Environmental Impact Analysis and draft license for Piñon Ridge Uranium Mill.
5. Undertake a full review of the CDPHE previous license amendments for uranium recovery facilities and the public notices and opportunities for public comment and a public hearing that accompanied the issuance of those license amendments and related environmental analyses.

INTEREST

Uranium Watch is a public interest 501(C)(3) nonprofit organization with members whose interests would be adversely impacted by the construction and operation of the Piñon Ridge Uranium Mill.

Mark Thaggard /NRC
February 14, 2011

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I believe it would be helpful to have a conference call regarding this matter.

Sincerely,

Sarah M. Fields
Program Director
sarah@uraniumwatch.org

Cc: Duncan White, Agreement State Programs Branch
Attachments: As stated

Atomic Energy Act of 1954, as amended.

42 U.S.C. Chapter 23, Section 2021 (Cooperation with states) at (o):

42. U.S.C. § 2021(o): State compliance requirements: compliance with section 2113(b) of this title and health and environmental protection standards; procedures for licenses, rulemaking, and license impact analysis; amendment of agreements for transfer of State collected funds; proceedings duplication restriction; alternative requirements

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--

(1) compliance with the requirements of subsection (b) of section 2113 of this title (respecting ownership of byproduct material and land), and

(2) compliance with standards which shall be adopted by the State for the protection of the public health, safety, and the environment from hazards associated with such material which are equivalent, to the extent practicable, or more stringent than, standards adopted and enforced by the Commission for the same purpose, including requirements and standards promulgated by the Commission and the Administrator of the Environmental Protection Agency pursuant to sections 2113, 2114, and 2022 of this title, and

(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,

(ii) an opportunity for cross examination, and

(iii) a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period and which is subject to judicial review;

(B) in the case of rulemaking, provide an opportunity for public participation through written comments or a public hearing and provide for judicial review of the rule;

(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, which analysis shall include--

(i) an assessment of the radiological and nonradiological impacts to the public health of the activities to be conducted pursuant to such license;

(ii) an assessment of any impact on any waterway and groundwater resulting from such activities;

(iii) consideration of alternatives, including alternative sites and engineering methods, to the activities to be conducted pursuant to such license; and

(iv) consideration of the long-term impacts, including decommissioning, decontamination, and reclamation impacts, associated with activities to be conducted pursuant to such license, including the management of any byproduct material, as defined by section 2014(e)(2) of this title; and

(D) prohibit any major construction activity with respect to such material prior to complying with the provisions of subparagraph (C).



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
July 9, 2010

Ms. Sarah M. Fields
Program Director
Uranium Watch
P. O. Box 344
Moab, Utah 84532

SUBJECT: Concerns You Raised to the U. S. Nuclear Regulatory Commission
Regarding Colorado's Department of Public Health and Environment
Agreement Program and Atomic Energy Act State Compliance
Requirements - FSME-2010-AS-0008

Dear Ms. Fields:

The U. S. Nuclear Regulatory Commission (NRC) has concluded its inquiry into the concerns you raised in your letters to Mr. Duncan White dated March 23, 2010 and April 7, 2010, your email dated April 9, 2010, and in the telephone meeting that occurred in early May 2010, in which you raised questions regarding Colorado's process for public participation during licensing decisions regarding uranium recovery operations. The concerns you raised and our responses are provided in the enclosure.

Thank you for informing us of your concerns. We believe that our actions in this matter have been responsive. Closure of an Agreement State concern does not prevent us from revisiting it, especially if we obtain new information. This process is an important source of information in support of the NRC's safety mission. The NRC staff takes its safety responsibility to the public seriously and will continue to do so within the bounds of our lawful authority. Unless the NRC receives additional information that suggests that our conclusions should be altered, we plan no further action on this matter.

Should you have any additional questions, or need further assistance in this matter, please contact Mr. Duncan White on (301) 415-2598 or email duncan.white@nrc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark Thaggard", is positioned above the typed name.

Mark Thaggard, Deputy Director
Division of Intergovernmental Liaison
and Rulemaking
Office of Federal and State Materials and
Environmental Management Programs

Enclosure:
Statement of Concerns & NRC Responses

CERTIFIED MAIL 7006 0810 0005 9659 6163
RETURN RECEIPT REQUESTED

ENCLOSURE

FSME-2010-AS-0008

STATEMENT OF CONCERNS & NRC RESPONSES

Concern 1:

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.

NRC Response:

This is correct. The Rules and Regulations Pertaining to Radiation Control for the State of Colorado (6 CCR 1007-1, Part 18.6) do provide for the aforementioned items. More specifically, 6 CCR 1007-1, Part 18.6.2.1 provides notice and opportunity for written public comment on a proposed material license or license amendment. In addition, 6 CCR 1007-1, Part 18.6.1 and CRS 24-4-104 provide for a public hearing and transcript. Also, 6 CCR 1007-1, Part 18.4.1 makes the State of Colorado's written environmental analysis of the proposed licensing action available to the public at the time of public notice of hearing.

Concern 2:

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).

NRC Response:

This is correct. These public meetings are for the State to gather information that will be considered in the development of their environmental analysis and are in addition to the required hearing discussed in the response above.

Concern 3:

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.

NRC Response:

This is correct. An interested person must establish standing, however, the definition of standing in Colorado is not very restrictive, and would not prevent someone from a State other than Colorado from participating in a hearing. Colorado's regulations in 6 CCR 1007-1, Part 18.6 provides guidance on establishing standing.

Concern 4:

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.

NRC Response:

As stated above, the State of Colorado does provide for such a hearing and procedures do exist and are described in Colorado's regulations in 6 CCR 1007-1, Parts 18.6.6.2, 18.6.6.3, and 18.6.6.4. Colorado will accept written comments up to the time the final license is issued.

Concern 5:

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.

NRC Response:

As stated above, Colorado's regulations in 6 CCR 1007-1, Parts 18.6.6.2, 18.6.6.3, and 18.6.6.4 provide for oral comments. Section 274o of the Atomic Energy Act and 10 CFR 150.31 of NRC's regulations do not require Agreement States to provide written responses to oral or written comments. The State of Colorado may do so at its own discretion.

Concern 6:

In other words, the public has no opportunity for comment unless someone objects to the CDPHE's final proposed license in the context of an adjudicatory hearing. Adjudicatory hearings cost money and require the establishment of standing.

NRC Response:

This statement is not true. Colorado's regulations in 6 CCR 1007-1, Part 18.6 does provide the public (both those for or against the proposed action) an opportunity to comment after publication of the State's environmental analysis and prior to issuance of the final license.

Regarding statements addressed to the NRC staff during a phone call concerning upcoming changes in Environmental Protection Agency (EPA) policies, NRC staff met with Loren Setlow of the EPA during the 2010 Uranium Recovery Workshop in Denver, Colorado the week of May 24. There were discussions involving uranium and thorium milling regulations, and the EPA is aware of current NRC positions discussed in the responses above.

NRC Conclusion:

The NRC could not substantiate your concerns regarding inconsistencies between the requirements of the Atomic Energy Act with respect to the NRC Agreement State programs and the program of the CDPHE. In addition, the staff has not found any inconsistencies pertaining to the noticing and comment provisions related to licensing decisions for 11e.(2) byproduct material operations. The staff has determined that CDPHE laws and regulations are complying with the Atomic Energy Act Agreement State requirements.