

Branch Evaluation, Plan & Recommendation

Agreement State Performance Concern Number: FSME-2011-AS-0004

Facility Name:	AGREEMENT STATE:	Colorado
Responsible Div: MSSA	ARB Date:	November 22, 2011
TIME OF ARB: 11:00	LOCATION OF ARB: T8C5c	CALL IN: (888) 577-8994 50131#
Overall Responsible Branch:	Agreement States Program Branch	TECHNICAL STAFF: S. Poy/ D. Sollenberger

<u>Received Date</u>	<u>30 Days</u>	<u>70 Days</u>	<u>90 Days</u>	<u>120 Days</u>
2/14/2011	3/16/2011	4/25/2011	5/15/2011	6/14/2011

Purpose of this ARB: 3rd						
Basis for a Subsequent ARB: Status Update						
Does the Allegor OBJECT to the NRC requesting that the licensee/State formally assess/evaluate the concern(s)?	<input type="checkbox"/>	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A
If any of the following factors apply, this allegation shall not be submitted to a licensee for investigation or review.						
<input type="checkbox"/>	Information cannot be released in sufficient detail to the licensee without compromising the identity of the allegor or confidential source.					
<input type="checkbox"/>	The licensee could compromise an investigation or inspection because of knowledge gained from the discussions.					
<input type="checkbox"/>	The allegation is made against the licensee's management or those parties who would normally receive and address the allegation.					
<input type="checkbox"/>	The basis of the allegation is information received from a Federal or State agency that does not approve of the information being released.					
ARB PARTICIPANTS						
ARB Chairman:	D. Jackson	D. White				
OAC:	C. Brown/ S. Easson	S. Poy				
OI:		R. Browder				
OGC:	P. Jehle	J. Luehman				

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Concern: 1

*Code or Functional Area:

Responsible Branch: **ASPB**

*Discipline:

*OI Investigation Priority: **N/A**

OI Case Number:

*OI Priority Basis:

Concern: (A concern is one or two sentences.)

The Colorado Department of Public Health and the Environment (CDPHE) has not issued a public notice announcing an opportunity for the public to submit comments and participate in a public hearing regarding the issuance of a license for the new Piñon Ridge Uranium Mill and the Environmental Impact Analysis.

Concern Background, Supporting Information, & Comments:

NEW INFORMATION IN BOLD

Previously, the CI claimed that Colorado regulations were not compatible with NRC regulations and that Colorado was not properly providing the public an opportunity for comment when issuing licenses for uranium mills. This was determined to be incorrect.

Currently, it is the CI's understanding that on January 5, 2011 the CDPHE announced 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 Analysis.

- 1.) Based on this and the CI's interpretation of The Rules and Regulations Pertaining to Radiation Control for the State of Colorado (6 CCR 1007-1, Part 18.6), it is the CI's claim that CDPHE has not issued a public notice announcing an opportunity for the public to submit comments and participate in a public hearing regarding the issuance of a license for the new Piñon Ridge Uranium Mill and the Environmental Impact Analysis. It is the overall concern from the individual that CDPHE has no intention to provide an opportunity for public hearing and comment.
- 2.) The CI also claims that CDPHE has failed to provide the public with the opportunity to request a formal adjudicatory proceeding.

Actions:

With regard to the above claims, the CI requests that the following actions be taken:

- 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 the 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 the 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 the 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 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 the Piñon Ridge Uranium Mill.
- 5.) Undertake a full review of the CDPHE previous license amendments for uranium recovery

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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.

NOTE:

On March 3, 2011, staff received documents from the State of Colorado regarding a similar case by the Sheep Mountain Alliance who are suing the State for a similar concern. Colorado has made a motion to dismiss the case and a Judge will make a decision within a month.

The previous ARB directed staff schedule a conference call with the state to get an understanding of how they implement their regulations regarding public hearings and have OGC participate in the call. This call was conducted on March 14, 2011 and included Duncan White, Dennis Sollenberger, Patricia Jehle, and Stephen Poy. During the call Colorado indicated that under 24-4-104 and 24-4-105, Colorado Revised Statutes, the State provides the opportunity for notice and a public hearing only for licensees. Since the CI in their request for notice and opportunity for a public hearing only referenced 24-104 and 24-4-105, Colorado did not recognize the request. Our understanding is that Colorado was only prepared to provide the opportunity for notice and public hearing to the CI if they referenced 6 CCR 1007-1, Part 18.6 of the Colorado regulations in their request. The staff indicated that Colorado was not correctly implementing the regulations and that the requirements of 274o were not being met. The staff sent additional documentation to the State and gave Colorado time to discuss amongst themselves what had transpired during the call. Colorado has not contacted the NRC staff to clarify their position. Since the call of March 14, the NRC staff has had an opportunity to review the latest proposed regulations for Part 18 for the State of Colorado.

On Feb. 4, the Telluride-based Sheep Mountain Alliance (SMA) filed a lawsuit in Denver District Court seeking to revoke the license. On Feb. 25, the Colorado Department of Public Health and Environment filed a motion to dismiss the suit. The court ruled on May 26, 2011 to deny the motion to dismiss the suit. The lawsuit by the SMA would be allowed to continue through the courts.

Regarding the actions above and the CI's request,

- 1) The staff has determined that the State of Colorado has failed to comply with the applicable notice, comment, and hearing requirements in 6 CCR 1007-1, Part 18.6 of the Colorado regulations which is consistent with 42 U.S.C. §2021(o)(3)(A) for the Piñon Ridge Uranium Mill.
- 2) The outcome of the lawsuit will impact this action.
- 3) It is not up to the NRC staff to respond to this action.
- 4) This action is continually being followed by the NRC staff through the regulatory review process and the IMPEP process. The next IMPEP review would be 2.5 years from now, but it would only consider this licensing action in its review of the uranium milling program evaluation.

The previous ARB directed the staff to contact the State of Colorado (by phone and follow-up with an email) to determine if and when they made notifications to the public in accordance with 6 CCR 1007-1, Part 18.6 regarding the notice and availability for a public hearing for the Piñon Ridge Uranium Mill. Inform the State that this inquiry is the result of an Agreement State Performance concern.

The staff has contacted the State of Colorado, and the State is working with Energy Fuels to reach a settlement for the lawsuit. Energy Fuels has extended multiple offers to provide public hearings if the SMA would drop the lawsuit. The SMA has not responded to any of the offers. It appears that the litigation will continue forward.

(fill in below)

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Concern: **1**

The Atomic Energy Act 42 - U.S.C., Chapter 23, Section 2021 (o) states,
In the licensing and regulation of byproduct material, as defined in section 11e. (2) of this Act, or of any activity which results in the production of byproduct material as so defined under an agreement entered into pursuant to subsection b., 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 made 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.

*Safety Significance:

HIGH



Normal

Low

Basis: Describe the concern's safety significance below (current, on going issue; level of individual(s) involved; etc.)

The concerned individual claims that Colorado is failing to comply with its own regulations and not properly holding public meetings to provide to public the opportunity to comment during the licensing process. In response to the allegation the CI requests that the NRC review previous Colorado uranium mill licensing to determine if this is an on-going issue.

Check each question as applicable to this concern.



Is it a declaration, statement, or assertion of impropriety or inadequacy? Is there a potential deficiency?

Is the impropriety or inadequacy associated with NRC regulated activities?



Is the validity of the issue unknown?

If all of the above statements are checked, the issue is an allegation.

Technical Staff Recommendation(s)

Date	*Recommended Action	Assigned Branch	Planned Date
	The staff has drafted a letter to the State of Colorado, available to the public, requesting Colorado provide information as to their plan to resolve the raised issues.		
	After we receive a response to Colorado's letter, the staff will release a letter to the CI with Colorado's plans to resolve the raised issues.		
	NRC staff will continue to follow this action through the IMPEP process and the regulatory review process.		

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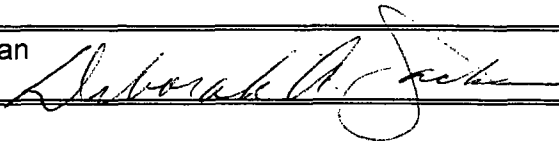
Concern: 1

NOTE: Attach Draft NOV, RFI questions/requests, and/or an inspection plan as a separate document if necessary.

★ Discussion of RFI Recommended Action as Appropriate per AGM 2008-01		YES:	NO:
ARB Date	ARB Decision(s)	Assigned to	Accepted Planned Date
11/22/11	Prepare Comm. plan and timeline for issuing letters to CO.	ASPB/RIV	12/2/11
11/22/11	Send letters to the State of Colorado and CIs concurrently, requesting Colorado provide information (within 30 days) as to their plan to resolve the raised issues and informing the CI's that NRC substantiated the concern.	ASPB	12/2/11
11/22/11	After we receive a response to Colorado's letter, the staff will release an update letter to the CIs with Colorado's plans to resolve the raised issues.	ASPB	TBD
11/22/11	NRC staff will continue to follow this action through the IMPEP process and the regulatory review process.	ASPB	5/31/12

ARB Chairman

Approval:



Date: 25 November 2011