

**McIntyre, David**

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**From:** Poy, Stephen  
**Sent:** Wednesday, February 29, 2012 10:38 AM  
**To:** McIntyre, David; Dricks, Victor; Uselding, Lara; Powell, Amy; Browder, Rachel; Erickson, Randy  
**Cc:** White, Duncan; Powell, Tamara  
**Attachments:** ML1133600720.pdf; ML11334A1450.pdf

The attached letter (ML113360072) is being dispatched to the State of Colorado as a part of a performance concern. The attached Communication Plan (ML11334A145) was prepared to respond to any questions the NRC may get as a result of the letter which will be made publically available.

If you have any questions, you can contact me or Duncan White.

Thanks,

Steve

Stephen Poy

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

phone: 301 415 7135  
fax: 301 415 5955  
email: [stephen.poy@nrc.gov](mailto:stephen.poy@nrc.gov)  
mail stop: T-8E24

# **Communications Plan Regarding Current Performance Concerns Involving the Piñon Ridge Uranium Mill License and the State of Colorado**

## **Background:**

On March 23, 2010, a concerned individual (CI) in a letter to the U.S. Nuclear Regulatory Commission (NRC) raised questions regarding Colorado's process for public participation during licensing decisions relating to uranium recovery operations. In the concerns, the CI contended that the Colorado Department of Public Health and the Environment (CDPHE) in its regulations did not provide for a notice and opportunity for public comment on proposed 11e.(2) byproduct material license or license amendments, provide for a public hearing, and make the Agreement State's environmental analysis of the proposed licensing action available to the public prior to such notice and public comment opportunities.

During the Integrated Materials Performance Evaluation Program (IMPEP) Review of the Colorado Program from March 12, 2010 to March 16, 2010, the review team examined files and associated documentation related to licensing of in-situ and conventional mill facilities, license amendment files, and other licensing documentation. For the recovery facilities, the licensing actions during the review period consisted of a completeness review of a new application. Colorado's procedure for reviewing a new application for a source and 11e.(2) byproduct material license consists of a completeness review, two public meetings by a licensee, funding for the county in which the proposed facility is located to provide comments on the applicant's environmental report, a 270-day period for staff to review the application and to publish a licensing decision (the license and supporting analysis), and an opportunity for hearing following publication of that decision documentation. In discussions with the staff, the review team was informed that the public will have the opportunity to submit comments throughout the review period.

The concerns were brought before an Allegation Review Board on April 29, 2010. In closing out that case, it was determined after review of Colorado regulations and discussions with the Program Manager of the Colorado Radiation Control Program that Colorado regulations were compatible with NRC regulations. The State of Colorado regulations do provide an opportunity for members of the public to submit written comments for a proposed license or amendment. There are procedures for requesting an opportunity for a public hearing to provide oral comments after an environmental analysis has been made. There are procedures for CDPHE to respond in writing to those comments. A letter explaining these findings was sent to the CI in June 2010.

On Jan. 5, 2011, the State of Colorado released a statement that after a 14-month review of the Piñon Ridge Application for a uranium mill, CDPHE approved the issuance of a preliminary license for Energy Fuels Resources Corporation and noticed a 60-day period for the licensee to request a public hearing. No hearings were requested by the licensee. Subsequently on March 7, CDPHE issued a final license to Energy Fuels.

On February 14, 2011, NRC received another letter from the original CI claiming that the public in the licensing of Piñon Ridge was denied the opportunity for comment and that there were no procedures to request a public hearing to provide oral comments related to the licensing actions. The letter requested that the NRC determine that CDPHE had not implemented Colorado regulations as required by the Atomic Energy Act of 1954 (the Act) and that the NRC order the CDPHE to notice a 60-day opportunity for the public to provide comments on the draft license for the Piñon Ridge Uranium Mill. Subsequently on March 10, NRC received a phone call from another CI with identical claims.

On February 4, 2011, the Telluride-based Sheep Mountain Alliance (SMA) filed a lawsuit against the State of Colorado in Colorado District Court. The plaintiffs in the lawsuit, SMA, claim that in the licensing of Piñon Ridge, the public was denied the opportunity for comment and that there were no procedures to request a public hearing to provide oral comments related to the environmental analysis of the Piñon Ridge Application. In response to the lawsuit, the State of Colorado filed a brief that included a motion to dismiss the case. The two key points in their brief are 1) the SMA does not have standing since they do not qualify as an injured party and 2) the SMA does not have standing since they are not a licensee. In the brief, Colorado references Colorado Revised Statutes (CRS) §24-4-104: Licenses – Issuance, Suspension or Revocation, Renewal. In the brief, Colorado stated, “A simple reading of APA sections 104 and 105, however, shows that only the applicant for the license is entitled to request a hearing: ‘The licensee, within 60 days after the giving of notice of [the licensing] action, may request a hearing before the agency as provided in section 24-4-105....’ §24-4-104(7), C.R.S. (2010). In turn, §24-4-105 only provides the procedures to be followed if an adjudicatory hearing is required. §24-4-105(2)(a), C.R.S. (2010). Under the plain language of the statute, unless the applicant requests a hearing, no such hearing is held under §24-4-105, and SMA has no right to demand one.”

Also, in making reference to this section of the Colorado regulations, it appears that Colorado has misapplied the regulations in order to support its actions. CRS §24-4-104 (7) states, “(7) In any case in which the licensee has made timely and sufficient application for the renewal of a license or for a new license for the conduct of a previously licensed activity of a continuing nature, the existing license shall not expire until such application has been finally acted upon by the agency, and, if the application is denied, it shall be treated in all respects as a denial. The licensee, within sixty days after the giving of notice of such action, may request a hearing before the agency as provided in section §24-4-105, and the action of the agency after any hearing shall be subject to judicial review as provided in section §24-4-106.”

In April 2011, CDPHE submitted their current legislation and regulations on uranium recovery for compatibility review. MSSA provided substantive comments in two letters dated October 13, 2011 (<http://nrc-stp.ornl.gov/special/regs/coregs111013.pdf>) and October 24, 2011(<http://nrc-stp.ornl.gov/special/regs/coregs111024.pdf>).

On May 26, 2011, the Denver judge presiding over the lawsuit rejected the State of Colorado's arguments to dismiss the case and cleared the way for the legal challenge to proceed.

After review of the relevant Colorado statutes and regulations, the Act, and briefs submitted in the lawsuit in the SMA lawsuit, the NRC staff concluded that the State of Colorado was in conflict with the NRC regarding the interpretation of their regulations, and the NRC staff had information to substantiate the CI's claims. It has been also determined that the concerns do not represent an immediate threat to public health and safety, nor are they expected to develop any into a threat to public health and safety because the licensee has delayed the schedule for construction of the mill. Due to on-going litigation, Energy Fuels may not start construction until at least March 2012.

Between March 14, 2011 and October 31, 2011, NRC staff, including a representative from the Office of the General Council, held several phone calls with CDPHE, including a senior attorney from the Colorado Attorney General's Office, to discuss the NRC staff findings. During conversations with CDPHE, topics of discussion included the expectations of the Colorado Radiation Program, clarifications on Colorado regulations, and compatibility with respect to section 274o of the Act and 10 CFR Part 150.

As a result of discussions with Colorado officials on the requirements of the relevant Colorado statutes and regulations and the Act, NRC staff determined, and CDPHE has agreed, that CDPHE in its implementation of The Rules and Regulations Pertaining to Radiation Control for the State of Colorado (6 CCR 1007-1, Part 18.6.1) neglected to provide public notice of an opportunity for the public to submit comments and participate in a public hearing after uranium licensing actions potentially impacting the environment.

In a phone call on August 15, 2011, CDPHE, including a senior attorney from the Colorado Attorney General's Office, indicated that they would take steps toward the following two corrective actions:

1. Colorado will work with Energy Fuels in order to provide the opportunity for a public hearing regarding the issuance of the new license for the Piñon Ridge Uranium Mill.. (NRC staff noted that any such hearing should provide for all qualified parties to participate not just the SMA, the Plaintiff in the lawsuit.)
2. Colorado will provide modifications to its regulations to the NRC that would clarify the regulation in 6 CCR 1007-1, Part 18.6.1 to specifically provide for a public notice announcing an opportunity for the public to submit comments and request a public hearing for uranium milling licensing actions potentially impacting the environment. (Anticipated to be developed in 2012).

It appeared that the matter was heading toward a resolution when Colorado informed NRC staff that an offer to provide the opportunity for a public hearing was extended to the SMA. The offer by Energy Fuels to provide the opportunity for a limited public hearing was presented to the SMA in exchange for a withdrawal of the current and future lawsuits relating to licensing of the Piñon Ridge Uranium Mill. The SMA did not respond to the offer, and it does not appear that there will be a resolution any time soon. In a phone call on November 21, CDPHE informed NRC staff that the lawsuit was moving forward and that both sides would be presenting briefs to the court. The State of Colorado requested a delay in the issuance of the letters to the CI's and the CDPHE until after the next IMPEP Periodic Meeting, which is scheduled for April 2012.

The ARB directed the staff to draft a letter to CDPHE requesting a plan to resolve the issues (a response is requested from CDPHE in 30 days) and to draft a letter to the individuals who raised the concerns. The ARB has made this decision for the following reasons:

1. NRC staff has determined that CDPHE in its implementation of 6-CCR 1007-1, Part 18.6.1 neglected to provide public notice of an opportunity for the public to submit comments and participate in a public hearing on uranium licensing actions.
2. The Program Manager of the Colorado Radiation Program has communicated to NRC staff that he does not have the authority to resolve either the generic or the site specific issues without the concurrence and support of the Colorado Attorney General's Office and CDPHE upper management.
3. This performance concern has been identified and has been the topic of discussions between NRC staff and CDPHE since March 2011.
4. The ARB feels that the NRC needs to resolve the issues and respond to the CI's in a timely manner.

These signed letters will be released concurrently and will be available to the public.

NRC staff will continue to follow this action through the IMPEP process and the regulatory review process.

Below is a communication plan and time line. This information has been provided to ensure that the appropriate groups are made aware in a timely manner of the information relating to the performance concern. (The performance concern being the lack of public hearing, notice, and opportunity for comment.)

### **Potential Questions and Answers:**

1. How did this issue come to the attention of the NRC?

The concerns surrounding the issue were provided to the NRC staff from a concerned individual.

2. Why is the NRC now asking the State of Colorado for a written response?

NRC staff has been in discussions with the State of Colorado regarding the public hearing process since the concerns were initially raised early in 2010. The second series of concerns was presented to NRC staff prior to the filing of the legal challenge against Energy Fuels and CDPHE. NRC staff worked with the State of Colorado to develop a resolution for the generic issues and this specific case. The NRC provided the CDPHE ample opportunity to review and analyze Colorado statutes and regulations, and the Act, before drafting a public statement with a request for a written response. In an effort to remain outside of the SMA-CDPHE litigation and allow resolution of the state court case, the NRC staff deferred to the State of Colorado's requests to permit the State to resolve the matter in the state court. The Staff also provided time for Colorado to reach an agreement with SMA and to issue notices for public comment and an opportunity for a hearing. However, once the NRC recognized that the issues concerning agreement state obligations under the Act would not be resolved in a timely manner by the State of Colorado, the Staff decided to seek an explanation in writing.

3. What is NRC doing to address the inconsistencies in the Colorado regulations and the Atomic Energy Act?

After numerous conversations with CDPHE, NRC staff has drafted a public letter to CDPHE requesting a plan to address and document the inconsistencies.

4. Given that CDPHE initially told the NRC that a public hearing was part of their licensing process, but later took a different view at the time the Piñon Ridge license was to be issued, what actions does NRC plan to take to ensure that Colorado's regulations are compatible and implemented consistent with NRC regulations?

CDPHE agreed to develop regulatory language that would make it explicit that the public has an opportunity to request a hearing. Colorado has indicated that the rule changes would be developed after the filing of the briefs in the law suit. NRC staff will continue to follow this action through the IMPEP process and the regulatory review process.

5. Can NRC compel the State of Colorado to provide a notice of opportunity for public hearing and comment on the licensing of the Piñon Ridge Uranium Mill?

No. NRC can make a determination that Colorado regulations are, in part, incompatible with the Act. After making this determination, NRC can request the

State of Colorado make changes to their regulations and policies to bring the program into compliance with the Act.

6. Why is the NRC becoming involved in this matter prior to the conclusion of the lawsuit between CDPHE and the SMA?

The NRC does not seek to involve itself in a state issue or state court determination. NRC staff is following the process established for the staff to undertake when an ARB has determined that a CI has raised concerns.

The fact that the NRC is aware of the case or even that it has relied on the briefs filed in the state proceeding does not change the fact that NRC staff investigated the allegations and concluded that the State of Colorado has not provided an opportunity for public comment and a public hearing in the licensing of a uranium mill facility, pursuant to the State of Colorado's implementation of the sections of the Atomic Energy Act of 1954, as amended, that are applicable to NRC Agreement States. The NRC does not interpret the Colorado Administrative Procedures Act, and the NRC does not intend to file a brief in support of either party in the SMA-CDPHE court case.

It is NRC responsibility to ensure that Colorado regulations comply with the Act and conduct its program accordingly. The NRC should not wait for the courts to reach a decision that coincides with the NRC staff determination and should not rely on a state court determination as to whether Colorado regulations comply with the Act. In court documents, the plaintiffs submitted claims that Colorado regulations do not comply with the Act and that CDPHE's implementation of the Colorado regulations does not meet the requirements of the Act.

Colorado asserts in its court filings "the NRC has no jurisdiction over such [uranium] mills. Contrary to SMA's claims, regulation of uranium mills is not a 'delegated' program and Colorado is not bound by federal regulations or standards pertaining to uranium mills; Colorado applies its own regulations and standards." Brief of Defendant at 3, *Sheep Mountain Alliance v. Colorado Department of Health and Environment*, No. 2011 CV 861 (District Ct., City and County of Denver, Colorado, filed February 23, 2011.) Colorado asserts "[a] simple reading of [Colorado] APA sections 104 and 105, however, shows that only the applicant for the license is entitled to request a hearing. . . . Under the plain language of the statute, unless the applicant requests a hearing, no such hearing is held under §24-4-105, and SMA has no right to demand one. *Id.* at 8-9."

The lawsuit could take months or years to be resolved. The NRC is taking action to resolve the issue of the State of Colorado compliance with section 274o, while the matter, in addition to seven other substantive contentions, is being decided in the state court, in order to respond to the procedural issues raised by the CI's in a timely manner.

**Timeline:**

Week of November 21, 2011: Informed CDPHE that a letter was forthcoming.

Week of November 28, 2011: Notify Office of Public Affairs, Region IV and Office of Congressional Affairs of planned actions.

Call State of Colorado with regard to forthcoming letter.

Week of February 27, 2012: Issue letters to State of Colorado and CI's.

February/March 2012: Analyze CDPHE response and make decisions on further action.

April 2012: Periodic management meeting between NRC and CDPHE.

**NRC Contacts:**

Duncan White	Office of Federal and State Materials and Environmental Management Programs, Division of Materials Safety and State Agreements, Agreement States Programs Branch
David McIntyre	Office of Public Affairs
Victor Dricks	Office of Public Affairs, Region IV
Lara Uselding	Office of Public Affairs, Region IV
Amy Powell	Office of Congressional Affairs
Rachel Browder	Region IV, Regional States Agreement Officer
Randy Erickson	Region IV, Regional States Agreement Officer