

Uranium Watch

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February 26, 2013

via electronic and first class mail

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

RE: Concern Raised to the U.S. Nuclear Regulatory Commission Regarding the Utah
Division of Radiation Control - FSME-2012-AS-004

Dear Mr White:

Over the past year I have communicated with the Nuclear Regulatory Commission (NRC) about my concerns that the State of Utah, an NRC Agreement State for 11e., is not complying with all of the Atomic Energy Act (AEC) the requirements applicable to Agreement States. I have submitted an allegation and have had other correspondence with NRC staff over the past year. My understanding is that the NRC intends to respond in the near future to my allegation in light of submittals of July and December 2012.

As a supplement to my allegation, I wish to bring to the NRC's attention additional information regarding the Utah Division of Radiation Control's (DRC's) compliance with the provisions of 42 U.S.C. § 2021(o)(3)(C). This information concerns a February 2013 DRC 11e.(2) byproduct material licensing action. It is relevant to my allegation, because the DRC references consultation with NRC staff in the final licensing decision documents. As discussed below, DRC statements contradict statements made to Uranium Watch (UW) by the NRC in the July 2012 letter from Deborah Jackson, Deputy Director, Division of Intergovernmental Liaison, forwarding the "Statement of Concern and NRC Response, FSME-2012-AS-004."

BACKGROUND

On February 4, 2013, the DRC issued Amendment 8 to the EnergySolutions Radioactive Material License UT 2300478.¹ This license is for an 11e.(2) byproduct material impoundment, which is subject to the requirements of 42 U.S.C. § 2021(o)(3). As part of the issuance of the License Amendment, the DRC issued a Public Participation Summary (PPS).² UW had submitted comments on the proposed licensing action on October 10, 2012, and the DRC responded to those comments in the PPS. UW comments included comments on what UW perceives as the failure of the DRC to comply with all of the requirements set forth in 42 U.S.C. § 2021(o)(3)(A)(i), (ii), and (iii) in the subject 11e.(2) licensing action. Those comments and the DRC response are found on pages 2-4 of the PPS. The DRC's PPS responses are incomplete and confusing.

URANIUM WATCH RESPONSE TO DRC'S PPS STATEMENTS

Below are UW responses to specific sections of DRC PPS Response #2, in reply to UW comments regarding "Compliance with the requirements of the Atomic Energy Act."

1. DRC: *The issue, as described by the commenter is not factually correct. The DRC has provided the public with an opportunity of a public notice, public hearing and cross examination as required by 42 U.S.C. § 2021(o), (see: Utah Administrative Code R313-17-2, public notice and comment, and R305-6, Administrative procedures).*

Uranium Watch Response —

1.1. The DRC states that they have provided opportunities for a public hearing and cross examination, and reference *Utah Administrative Code R313-17-2, public notice and comment, and R305-6, Administrative procedures*. Here the DRC fails to cite the specific subsections of R313-17-2 and R305-6 (R305-7 in the new DRC rules) where the DRC has provided the public with an opportunity of a public notice, public hearing and cross examination. The PPS response states that the opportunity for "cross-examination" occurs in the appeals process, not in the public comment and public hearing process. See Section 3, below.

1.2. Utah Administrative Rule R313-17-2 requires a notice and comment period for 11e.(2) byproduct material licensing actions such as Amendment 8.³ It also provides for a notice of a public hearing, but does not require a hearing for any licensing action, including 11e.(2) licensing actions. See Rule R313-17-2(4). There are no written procedures that require a transcript and opportunity for cross examination at such a hearing. Administrative Rule R305-7 (the Administrative procedures replacing R305-6)

¹ <http://www.radiationcontrol.utah.gov/docs/2013/SignedAmendment8UT2300478.pdf>

² <http://www.radiationcontrol.utah.gov/docs/2013/PublicParticipationSummaryUT2300478Amendment8final.pdf>

³ <http://www.rules.utah.gov/publicat/code/r313/r313-017.htm>

provides opportunities for an adjudicatory proceeding in a challenge to a final permitting action by any Division of the Utah Department of Environmental Quality (DEQ). These procedures do not apply to hearing to be held PRIOR to a final licensing decision by the DRC or other DEQ division.

1.3. The adjudicatory proceeding is triggered by the filing and serving of a Request for Agency Action; it is not triggered by a public notice of an opportunity for written comments and a public hearing. According to the current Rule R305-7, the filing of a Request for Agency Action is limited to those who commented on the proposed licensing action and to the issues raised in those comments. Further, a requestor must show standing to participate in such a proceeding. The Request for Agency Action must contain certain statements and information. The proceeding involves special procedures; parties; filing dates; an Administrative Record, and the submittal of briefs, motions, legal arguments to an Administrative Law Judge. It is best conducted by those of the legal profession. There is currently no provision for cross examination of either DRC staff or the applicant in such proceedings. Adjudicatory proceedings pursuant to R-305-7 are not “public hearings,” nor do they provide an opportunity for “cross examination.”

1.4. Required Procedures: Rule R305-7 refers to written comments and oral comments made during public hearings that may be held prior to any Request for Agency Action. Rule R305-7-209. Administrative Record, at (1)(d), states:

(1) To the extent they relate to the issues and arguments raised in the Request for Agency Action, the Administrative Record shall consist of the following items, if they exist:

- (c) the notice and record of each public comment period;
- (d) the notice and record of each public hearing, including oral comments made during the public hearing;
- (e) written comments submitted during the public comment period;
- (f) responses to comments that are designated by the Director as part of the basis for the decision relating to the Permit Order;

Therefore, R305-7 contemplates public notice of an opportunity for written comments and a public hearing. It contemplates that the comments and responses to comments will provide a basis for the decision related to the Permit Order, as provided for in 42 U.S.C. § 2021(o)(3)(A)(i), (ii) and (iii).

1.5. Required Procedures: Additionally, Section 2021(o)(3)(A)(iii) requires “a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period.” That means that the DRC staff must consider ALL of the evidence presented during the public comment period and public hearing when making a final agency licensing determination. However, the Administrative Procedures for Adjudicatory Proceedings (R305-7-209(1)) states that the Administrative Record contains the record of of public hearings and comments “to the

extent they relate to the issues and arguments raised in the Request for Agency Action.” The purpose of a Request for Agency Action is to adjudicate the agency determination. That agency determination, for 11e.(2) byproduct licensing actions, must consider the results of the public comment period and a public hearing, with a transcript and opportunity for cross examination. A Utah Adjudicatory Proceeding is NOT a “public hearing.”

1.6. Compliance with Required Procedures—Public Hearing: The DRC did not notice an opportunity for a public hearing when they noticed the opportunity for public comment on the proposed Amendment 8.⁴ To the best of my knowledge, the DRC has not issued a public notice providing an opportunity for a public hearing or opportunity for cross examination since issuing the License Amendment 8 on February 4, 2013. There is no such notice on the DRC website home page, which contains information and links regarding License Amendment 8.⁵

1.7. Compliance with Required Procedures—Environmental Analysis: Section 2021(o)(3)(C) requires “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 The DRC did not develop an environmental analysis for License Amendment 8, The DRC did not even respond to UW comment that such an environmental analysis had not been developed.

2. DRC: *Various portions of State law meet the requirements of 42 U.S.C. § 2021(o)(3)(A)(i), (ii) and (iii). The Agency has noted that U.S. Code, title 42 does not describe what the sequence of events must be, just that certain steps occur.*

Uranium Watch Response —

2.1: Required Procedures: The AEA, at 42 U.S.C. § 2021(o)(3), first requires the development of an environmental analysis document by the Agreement State for each license which has a significant impact on the human environment (Section 2021(o)(3)(C)). This procedure also applies to license amendments. Next, it requires an opportunity, after public notice, for written comments and a public hearing, with a transcript, and an opportunity for cross examination (Section 2021(o)(3)(A)(i) and (ii)). Then it requires “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” (Section 2021(o)(3)(A)(iii)). This sequence of events is pretty clear. There is no mention of an opportunity for “cross examination” during an adjudicatory proceeding after the license or other licensing decision is issued, or that the

⁴ <http://www.radiationcontrol.utah.gov/docs/2012/Sept/publicnotice%20UT2300478%20amendment%208%20final.pdf>

⁵ <http://www.radiationcontrol.utah.gov/>

cross examination occurs during the judicial review. In fact, there is no mention of an opportunity for an adjudicatory proceeding in Section 2021(o)(3).

3. DRC: *Utah State law allows for these opportunities; public notice, public comment, public hearing and cross examination. Furthermore, a recording of the public hearing is made and a transcript can be made available to the public regarding public hearings, a public participation summary is made available regarding comments received, and the opportunity for cross examination is available during the appeal process when the agency action is appealed within 30 days of execution by an individual or party. Based on these opportunities and processes, the DRC meets the intent of 42 U.S.C. § 2021(o)(3)(A) (i),(ii) and (iii).*

Uranium Watch Response —

3.1. Required Procedures: From the DRC's statement, DRC believes that the required opportunity for "cross examination" is isolated from the other elements of Section 2021(o)(3)(A). The statement implies that DRC 1) can set the venue for that cross examination, 2) is not required to provide a public notice of an opportunity to cross examine, and 3) can significantly limit public access to the opportunity to conduct cross examination in any 11e.(2) licensing action. The DRC seems to think that the opportunity to cross examination is not related to the requirement for public notice of opportunity for public comment and a public hearing in Section 2021(o)(3)(A)(i) and is not related to the requirement for a written determination in 2021(o)(3)(A)(iii). So, "cross examination" stands there alone, with no requirement for public notice, no association with a public hearing opportunity, no requirement for a written agency decision on the proposed licensing action (based on the evidence elicited during cross examination), and no mention in Section 2021(o)(3)(A) of cross examination in the context of an adjudicatory proceeding that does not include public notice and excludes the general public. That is really hard to believe.

3.2. In the July 2012 letter from Ms. Jackson to UW regarding FSME-2012-AS-004, Ms. Jackson stated that the new Administrative Procedure in Utah Code 19-1-301.5 "only applies to adjudicatory proceedings related to challenges to licensing actions that have already been taken by the State agency, and is not applicable to the hearings required by the AEA prior to State agency 11e.(2) licensing actions." The Administrative Procedures in R305-7 were promulgated to implement UC 19-1-301.5. As with UC 19-1-301.5, R305-7 would only apply to "challenges to licensing actions that have already been taken by the State agency." It does not apply to licensing actions PRIOR to the final agency decision. Therefore, R305-7 would not be "applicable to the hearings required by the AEA prior to State agency 11e.(2) licensing actions." The DRC directly contradicts what Ms. Jackson stated in July 2012.

3.3. Required Procedures: Currently, the DEQ Administrative Appeal procedures provide no opportunity for cross examination in adjudicatory proceedings applicable to 11e.(2)

byproduct material licensing actions (R-305-7-202 to 217).⁶ Currently, DRC regulations do not require a public notice of an opportunity for a public hearing for 11e.(2) byproduct material licensing actions.

3.4. DRC Compliance: The DRC did not provide an opportunity for a public hearing (with or without an opportunity for cross examination) prior to the issuance of License Amendment 8.

4. DRC: *The DRC is in compliance with the Atomic Energy Act. And lastly, this is demonstrated in the DRC's satisfactory rating of adequate and compatible from the last NRC's Integrated Materials Performance Evaluation Program (IMPEP) audit conducted in 2011.*

Uranium Watch Response —

4.1. As discussed herein, the DRC is NOT in compliance with the AEA.

4.2 The NRC IMPEP reviews do not include a evaluation of an Agreement State's compliance with 42 U.S.C. § 2021(o)(3). UW has no knowledge of the NRC reviewing the DRC's compliance with the AEA. This is also evidenced by an IMPEP Review public meeting regarding the Colorado Department of Public Health and Environment (CDPHE), which UW listened to via conference call. UW brought up the issue of the CDPHE's failure to comply with the Section 2021(o)(3) provisions during the questions at the end of the meeting. UW was told the review did not cover that issue, and referred UW to other NRC staff. Eventually, the issue of the CDPHE compliance with 42 U.S.C. § 2021(o)(3) was addressed by the NRC in the context of an allegation. In fact, the CDPHE has systematically violated these provisions of the AEA.

4.2. Utah's Agreement State compliance with the provisions of 42 U.S.C. § 2021(o)(3) should have been part of the Agreement State approval process that lead to Utah becoming an Agreement State for 11e.(2) byproduct material in 2004. The NRC must review that approval process to determine what was or was not considered with regard Section 2021(o)(3) compliance prior to the 2004 Agreement State approval. That review should be made publicly available.

5. DRC: *In recent consultation with NRC staff, the DRC is enhancing its public hearing procedures for 11e.(2) byproduct material licensing by incorporating an opportunity for interrogatories by participants during the public hearing.*

Uranium Watch Response —

5.1. DRC references recent consultation with NRC staff. The NRC has yet to inform UW of the results of such consultation. Statements made by the DRC in their SSP responses directly contradict written statements made to UW.

⁶ <http://www.rules.utah.gov/publicat/code/r305/r305-007.htm>

5.2. The DRC states it is enhancing its public hearing procedures for 11e.(2) byproduct material licensing, but fails to cite those procedures. UW does not know if the DRC is referring to R305-7 or R313-17-2 . The Utah Rule that provides for an opportunity for a “public hearing” for 11e.(2) byproduct material licensing is Utah Rule R313-17-2(4). Utah Rule R313-17-2(4) states that a public notice of a proposed action may be combined with notice of a public hearing. Utah Rule R305-7 governs procedures for adjudicatory proceedings, not public hearings, and applies to all Utah DEQ adjudicatory proceedings.

5.3. An “opportunity for interrogatories by participants during the public hearing” is not the same as providing an opportunity for “cross examination,” as required by 42 U.S.C. § 2021(o)(3)(A). Normally, interrogatories involve written questions and responses. Cross examination involves oral questions and oral responses, with an opportunity for follow-up questions.

5.4. The DRC and Radiation Control Board have not announced any proposed rulemaking to incorporate such public hearing procedures in DRC regulations.

5.5. Any changes to the DRC rules does not alter the fact that the process for issuing Amendment 8 to RML UT 2300478 did not include a notice of an opportunity for a public hearing, did not include an opportunity for cross examination, and did not include a written environmental analysis.

CONCLUSION

Required Procedures: The DRC does not have procedures that require a public hearing for 11e.(2) licensing actions. The DRC does not have procedure that provide an opportunity for “cross examination,” either before or after the final agency licensing decision.

Implementation of Procedures in License Amendment 8: The DRC did not notice a public hearing. The DRC did not produce a environmental analysis of the proposed licensing action. The DRC did not provide an opportunity for cross examination prior to the final agency decision approving License Condition 8. Any appeal of the DRC decision will not allow for cross examination during the adjudicatory proceeding.

UW is confounded by the DRC’s statements in PPS, since they directly contradict statements made by the NRC to UW in July 2012. It is amazing that what should be the clear and uncomplicated implementation of the AEA provisions is getting tied in tighter and more convoluted knots.

UW asked for a meeting with NRC staff to discuss this. Essentially, the NRC has denied this request, but has not provided a written denial, which would have been appropriate and much appreciated. The prognosis for resolving this any time soon does not look good.

Duncan White/NRC
February 25, 2013

8

Please feel free to contact me if you have any questions or wish to schedule a meeting.

Sincerely,

Sarah Fields
Program Director
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cc: (electronic mail)
Stephen Poy, NRC
Dennis Sollenberger, NRC
Janie Katanic, NRC
Laura Lockhart, Office of the Utah Attorney General