From:	sarah@uraniumwatch.org
To:	White, Duncan
Cc:	Jackson, Deborah; Reis, Terrence; Camper, Larry; McCraw, Aaron; Gary.Baughman@nrc.gov
Subject:	CDPHE Draft Rule for Uranium and Thorium Processing
Date:	Saturday, November 09, 2013 6:50:33 PM
Attachments:	toSTarltonComments_131031.pdf UW_CDPHE_Comments_Part_18Rule.131109.pdf

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Dear Mr. White,

Thank you for the information.

I am attaching the initial comments I made to Steve Tarlton of the Colorado Dept. of Public Health and Environment (CDPHE) and my additional, more detailed, comments regarding the proposed changes to the CDPHE rules in order to comply with 42 USC § 2021(o)(3)(A),(C), and (D) and other NRC Agreement State requirements.

I do not understand why the NRC has not made clear to Mr. Tarlton and the CDPHE, with specificity and particularity, the changes that the CDPHE must make in its statute and/or regulation in order to be in compliance with the Atomic Energy Act. Not the exact wording, but the hearing-process frame work that must be there in order to comply with the the Atomic Energy Act (AEA).

Looking back at the letter sent by the NRC to the CDPHE on February 27, 2012, in response to my allegations of February 14, 2011 (originally submitted to the NRC in March 2010), I continue to be troubled by the failure of the NRC to handle this issue in a competent and honest manner. In that February 2012 letter, the NRC indicates that the CDPHE must modify CDPHE regulations at 6 CCR 1007-1, Part 18.6.1 "to provide specifically for issuance of a public notice announcing an opportunity for the public to submit comments and request a public hearing on uranium milling licensing actions and the compliance with standards for the protection of the public health, safety, and the environment from hazards associated with the licensed material." That is a pretty limp and totally inadequate description of the requirements in the AEA that the CDPHE must conform to. It demonstrates an indifference on the part of the NRC regarding Agreement State compliance with the AEA, an indifference that goes back 35 years.

The NRC's 2012 letter did not include an analysis of all of the requirements in 42 USC § 2021(o)(3)(A),(C), and (D). The NRC letter clearly lacks a full description of these statutory requirements and the changes that the CDPHE must implement. I believe that the CDPHE must amend its statutes, not just its regulations.

The NRC has not been straight with the CDPHE and with me. The NRC told me that my allegation had been resolved long before the CDPHE amended its statute and regulations to comply with the AEA requirements. Now, they have proposed changes to their rules that is still not in conformance with the AEA. This is because they do not provide for a hearing with an opportunity for cross examination AFTER the issuance

of the draft environmental analysis. Section § 2021(o)(3)(C) clearly states that the environmental analysis must be available PRIOR to the proceeding described in Section § 2021(o)(3)(A). By having the proceedings after the issuance of the environmental analysis, the public in an Agreement State, like the public in an NRC regulated state, would have an opportunity to comment and provide input on the draft environmental assessment of the proposed licensing action.

Again, the NRC has not resolved my allegations regarding the CDPHE's compliance with the AEA. In fact, the situation is worse, because the CDPHE has proposed rule changes that are not in compliance with the AEA requirements and continue to cloud and confuse the issues. One reason for the problems with the proposed rule is the failure of the NRC to step up and clearly state what changes Colorado must implement. As I state in my comments to the CDPHE, Colorado should change its statute first. If the proposed rule is adopted as currently contemplated, it will only end up in court, with additional waste of taxpayer time and money.

This ongoing failure of Colorado to comply with the AEA is the responsibility of both the the NRC and the CDPHE. I try to figure out what is wrong with both agencies, and the conclusions I have drawn are not very positive.

Sincerely,

Sarah M. Fields
Program Director
Uranium Watch
PO Box 344
Moab, Utah 84532

> -------- Original Message --------
> Subject: Re: CDPHE Draft Rule for Uranium and Thorium Processing
> From: "White, Duncan" <Duncan.White@nrc.gov>
> Date: Wed, November 06, 2013 6:21 pm
> To: "'sarah@uraniumwatch.org'" <sarah@uraniumwatch.org>
>
> Ms. Fields:
>
> As an update to my previous response to you on this matter, CDPHE submitted the reference draft rule for our review earlier this week. We expect to finish our review within 60 days. Our comments will be provided to the State and be made public.
>
> Duncan White
>
> ---
>
> **From**: sarah@uraniumwatch.org <sarah@uraniumwatch.org>

To: White, Duncan
Sent: Sun Oct 27 10:37:18 2013
Subject: CDPHE Draft Rule for Uranium and Thorium Processing

Dear Mr. White,

This past week the Colorado Department of Public Health and Environment issued a public notice of the proposed rulemaking associated with compliance with the hearing requirements in the Atomic Energy Act for Agreement State 11e.(2) byproduct material licensing actions. The CDPHE issued the proposed changes to Part 18 for public comment.

http://www.colorado.gov/cs/Satellite/CDPHE-HM/CBON/1251627045148

I would like to know if the CDPHE sent the draft rule to the NRC for review and comment. If so, did the NRC review and comment on the draft rule?

Thank you,

Sarah Fields
Program Director
Uranium Watch
PO Box 344
Moab, Utah 84532

Dear Mr. Tarlton,

I highly recommend that the Colorado Department of Public Health and Environment (CDPHE) withdraw the proposed changes to 6 CCR 1007-1 Part 18 "Licensing Requirements for Uranium and Thorium Processing," cancel the meetings, and start again.

The proposed rule does not conform to the provisions of the Atomic Energy Act of 1954 (AEA), as amended by the Uranium Mill Tailings Radiation Control Act of 1978, found at 42 U.S.C. § 2021(o)(3)(A), (C), and (D). Those provisions in the AEA require an opportunity for comment and hearing with a transcript and an opportunity for cross examination **prior** to a Agreement State decision on a proposed 11e(2) byproduct material license application. The Agreement State is supposed to take into consideration the public comments and testimony and evidence from the hearing and cross examination in making that decision. The required Agreement State environmental analysis of the proposed license, license amendment, or license renewal **must** be made available to the public prior to the comment and hearing proceeding and the opportunity for cross examination.

The proposed changes to Part 18 place a hearing with an opportunity for cross examination **before** the issuance of the final environmental analysis, not **after**, as required by the AEA. Therefore, the public will have no opportunity to comment on a draft environmental analysis, as they would a federal Environmental Assessment or Environmental Impact Statement issued pursuant to the National Environmental Policy Act. The proposed rule only allows for public comment on the draft license after the issuance of the CDPHE decision. Further, the proposed rule only allows for cross examination of the applicant, not of the CDPHE staff. That is contrary to the intent of the AEA.

Utah is also going through a process of beginning to hold hearings pursuant to 42 U.S.C. § 2021(o)(3) and developing procedures for those hearings that will be the subject of a rulemaking. At a recent hearing on a proposed license amendment to the White Mesa Uranium Mill license, the Utah Division of Radiation Control (DRC) staff answered questions during cross examination. The DRC did require that parties submit questions prior to the hearing, but there was ample opportunity for follow-up questions.

It is telling that in the public notice of the Part 18 rulemaking, the CDPHE did not post any of the correspondence between the CDPHE and the Nuclear Regulatory Commission (NRC) that is relevant to proposed change in order to comply with 42 U.S.C. § 2021(o)(3) (A), (C), and (D). The CDPHE did not include the allegations that were made to the NRC regarding compliance with the AEA provisions and the NRC responses to those allegations. The CDPHE did not include the language of 42 U.S.C. § 2021(o)(3)(A), (C), and (D), which the

CDPHE is attempting to comply with. This means that the CDPHE is not interested in full disclosure of the reasons for the proposed changes to Part 18 regarding public notice, comment, and hearings, or in informing the public of the provisions of the AEA that the CDPHE must comply with.

It is also telling that the CDPHE has not asked the NRC to review the proposed rule.

The problem is the existing provisions of the Radiation Control Ac (RCA), which were not developed taking into consideration the requirements of the AEA. At this time the CDPHE is trying to meld the RCA hearing and decision requirements with those in the AEA. It does not work. Therefore, the CDPHE should end this rulemaking process and go to the State Legislature and first amend the Radiation Control Act so that Colorado's statute regarding the 11e.(2) byproduct material decision making process will conform to the requirements of the AEA.

In additional comments on the proposed Part 18, I will suggest statutory changes and explain my position in more detail. This issue has been around way too long. Further delays due to the CDPHE being on the wrong track and denying the problem, judicial challenge of the changes to Part 18 if adopted as proposed, and further embarrassment of the CDPHE will not helpful to the CDPHE or the public.

Sincerely,

Sarah M. Fields
Program Director
Uranium Watch
PO Box 344
Moab, Utah 84532

URANIUM WATCH

COMMENTS ON CDPHE RULEMAKING (DRAFT A – 10/23/2013)

Below please find comments submitted on the proposed changes to 6 CCR 1007-1 Part 18, Licensing Requirements for Uranium and Thorium Processing. Comments are submitted to the Colorado Department of Public Health and Environment (CDPHE) on behalf of Uranium Watch. Uranium Watch is a not-for profit public interest organization. Uranium Watch represents individuals and communities that are impacted by uranium mining and proposed uranium milling operations in Colorado and the applicable Colorado statutes and regulations.

I request that the CDPHE make these comments and any other comments submitted by Uranium Watch available on the CDPHE website for this proposed rulemaking.[1]

I. INTRODUCTION

1. GENERAL COMMENTS

1.1. One of the purposes of the October 23, 2013, proposed changes to the 6 CCR 1007-1 Part 18, Licensing Requirements for Uranium and Thorium Processing, (Proposed Rule) is to bring the CDPHE regulations into compliance with provisions of the Atomic Energy Act of 1954 (AEA), as subsequently amended. The applicable provisions are found at 42 U.S.C. § 2021(o)(3)(A), (C), and (D). However, the information provided by the CDPHE regarding the proposed rule fails to mention the fact and fails to cite this federal statute. Further, the Proposed Rule is not accompanied by a regulatory analysis that examines how the Proposed Rule will bring the CDPHE into compliance with 42 U.S.C. Chapter 23, § 2021(o)(3)(A), (C), and (D). This failure to be explicit about the requirements of the AEA has resulted in confusion.

The CDPHE should have included an regulatory analysis in the proposed rule regarding the implementation of the 42 U.S.C. § 2021(o)(3)(A), (C), and (D). There should be specific information about how, exactly, the proposed rule meets the requirements of Section 2021(o)(3)(A), (C), and (D).

1.2. The background information related to the Proposed Rule on the CDPHE website does not contain any information related to the communications between the Nuclear Regulatory Commission (NRC) and the CDPHE and other parties regarding the need to bring Colorado into compliance with provisions of the AEA with respect 11e.(2) byproduct material (uranium and thorium mill tailings) licensing actions. This failure demonstrates that the CDPHE is not interested in full public disclosure of the reasons for the proposed changes to Part 18.

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[1] http://www.colorado.gov/cs/Satellite/CDPHE-HM/CBON/1251627045148

1.3. The applicable provisions at 42 U.S.C. § 2021(o)(3)(A), (C), and (D) state, in pertinent part:

> 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--
>
> ***
>
> (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;
>
> ***
>
> (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).

1.4. The provisions of Section 2021(o)(3)(A) and (C) require a series of actions that are supposed to occur in a specific and timely order:

> A. An application for a license, significant license amendment, or license renewal for a uranium or thorium mill or tailings disposal facility.
>
> B. Review of the license application by the Agreement State regulatory agency and the issuance of an environmental analysis of the proposed licensing action.
>
> C. A public notice, comment period, and a hearing with a transcript and an opportunity for cross examination after the issuance of the environmental analysis.
>
> D. 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.

1.5. The AEA process is a simple, orderly process. However, the CDPHE's Proposed Rule has become a lengthy, confused process that does not meet the AEA requirements with respect the timing of the issuance of the environmental analysis, the required hearings (with an opportunity for cross examination), and the issuance of an agency determination that considers the evidence received during the comment period and hearing.

1.6. The problem is that the CDPHE is trying to fit the provisions of 42 U.S.C. § 2021(o)(3) into the existing CDPHE regulations that were promulgated to comply with the Colorado Radiation Control Act (RCA), CRS 25-11-203. The RCA and the implementing regulations were not developed taking into consideration the requirements of 42 U.S.C. § 2021(o)(3)(A), (C), and (D). This is the fault of the CDPHE, the NRC, the Colorado Legislature, and the Office of Colorado Attorney General. Compliance with a significant statutory requirement that applied to Colorado as an NRC Agreement State slipped through a large crack for 35 years. Trying to meld the AEA requirements into existing statute and regulations is not going so well, as will be discussed below.

What the CDPHE needs to do is to go to the State Legislature, explain the situation, and ask for revisions in the Colorado Revised Statutes. Section 2021(o) (3) clearly states that an Agreement State must "provide procedures under State law." If an Agreement State's existing State law does not allow for the procedures to be established with just a change in regulations, the law itself must be amended.

If the Colorado RCA is not amended, you will have a very unwieldy, redundant, costly, and unworkable process that does not allow the CDPHE and the public the time for careful consideration of the facts and issues in uranium (and thorium) mill licensing actions. Nor does the process, as described in the Proposed Rule, conform to 42 U.S.C. § 2021(o)(3)(A), (C), and (D).

1.8. See further discussion at Section III.11, below.

II. PROPOSED RULE

2. Section 18.2 — *APA 105 hearing" means a formal adjudicatory hearing conducted in response to a request for a hearing on action by the Department granting or denying an application for a license or license amendment and held in accordance with the Colorado Administrative Procedure Act (APA), 24-4-105, CRS.*

RCA 203 hearing" means a formal process conducted in response to a license application for amendment received by the Department, and held to meet the intent of and in accordance with the Colorado Radiation Control Act (RCA), Section 25-11-203, CRS.

COMMENT

2.1. The definitions of APA 105 and RCA 203 hearing definitions fail to identify the type of hearing that is required under Section 2021(o)(3)(A). The Proposed Rule must be perfectly clear regarding the type of hearing required by the AEA for 11e.(2) byproduct material licensing actions.

3. Section 18.3 — Special Requirements for Issuance of Specific Licenses For Source Material Milling. *There shall be an opportunity for a public meeting and hearing, prior to the granting, denial or renewal of a specific license permitting the receipt, possession or use of source material for milling or byproduct material as in definition (2) of 1.2.2. The hearing process for APA hearings shall follow the requirements of Section 18.7 unless otherwise required by statute. The Department may require one or more public meeting(s) beyond those specifically identified in Part 18. Such public meetings are not considered hearings, but may, in some instances, contain 231 certain elements that may be found in a statutory hearing*."

COMMENT

3.1. Section 18.3 states that "there shall be an opportunity for a public meeting and hearing, prior to the granting, denial or renewal of a specific license . . . ." The section then states that "the hearing process for APA hearings shall follow the requirements of Section 18.7 unless otherwise required by statute." Section 18.3 does not specifically state that the opportunity for a public hearing would be an APA hearing.

Further the definition of an APA 105 hearing in Section 18.2 states": "'APA 105 hearing' means a formal adjudicatory hearing conducted in response to a request for a hearing on action by the Department granting or denying an application for a license or license amendment. In other words, the adjudicatory hearing would be held after a final agency action. However, Section 18.3 states that the hearing opportunity will take place "prior" to an agency action.

In sum, this section is confusing. It appears to apply APA hearing provisions, which are meant for hearings following an agency action, to a hearing process that must take place prior to the agency action. Additionally, the APA hearings are conducted in response to a request for a hearing. However, the hearings required by Section 2021(o)(3)(A) are a statutory requirement. There is nothing that states that such hearings are to be held only when there is a request for a hearing.

It does not appear that the CDPHE Part 18 Section 18.2 APA 105 definition of the hearing process conforms to the hearing requirements in 42 U.S.C. § 2021(o)(3)(A).

3.2. Additionally, 42 U.S.C § 2021(o)(3)(A) requires an opportunity for public comment, that is, written public comment prior to a licensing action. There is no mention in the proposed Section 18.3 of an opportunity for public comment.

3.3. Section 18.3. This section fails to state that this should apply to significant license amendments, not just new licenses, denials, or license renewals. The provisions of 42 U.S.C. § 2021(o)(3)(C) "require for each license which has a significant impact on the human environment a written analysis." The written environmental analysis "shall be available to the public before the commencement of any such proceedings," that is, the proceedings outlined in Section 2021(o)(3)(A). "Licenses" include license amendments. Therefore, the notice, comment, and hearing proceeding must also apply to significant license amendments that require an environmental analysis.

3.4. Section 18.3 needs to be completely rewritten.

4. Section 18.3.8.2 — *Within forty-five (45) days after publication of the determination that the application required by 18.3.8.1 is substantially complete, an initial public meeting shall be convened in accordance with the Colorado Radiation Control Act (RCA), 25-11-203, CRS. Such meeting shall, at a minimum require:*

(1) At least two weeks' written notice before the meeting;
(2) The meeting be hosted and presided over by a person selected upon agreement by the Department, the local Board of County Commissioners and the applicant;
(3) The licensee or applicant to provide a summary of the facility's application to receive, store, process, or dispose of classified material and the nature of the classified material; 359
(4) An opportunity for the public to comment and be heard;
(5) The licensee or applicant to provide transcripts of the meeting, which: 361
(a) allows the public to make copies of a transcript of the meeting; and
(b) shall be provided to the Department in an electronic format in a manner 363 that allows posting on the Department's website within ten

(10) 364 days after receipt from the transcription service.

COMMENT

4.1. Part 18 should identify the specific sections that are required under the Colorado RCA.

4.2. Colorado Revised Statute (CRS) 24-11-203(2)(B)(I) requires 2 public meetings to be hosted and presided over by a person selected upon agreement by the department, the board of county commissioners of the county where the facility is located, and the applicant. It also states that one of both meeting shall be conducted to comply with CRS 24-4-104 or 24-4-105. CRS 24-4-105 contains provisions for hearings and determinations and states at (3): "At a hearing only one of the following may preside: The agency, an administrative law judge from the office of administrative courts, or, if otherwise authorized by law, a hearing officer who if authorized by law may be a member of the body which comprises the agency." Therefore, for at least one meeting, no matter what the department, County Commissioners, or applicant desires, only an administrative law judge, agency representative, or hearing officer can conduct the meeting.

This provision should be included in Section 18.3.8.2.

5. Section 18.3.8.3 — *A second such public meeting shall be convened within thirty days after the first public meeting. Within thirty (30) days after the public meeting required by 18.3.8.2, an RCA 203 hearing shall be convened in accordance with the Colorado Radiation Control Act (RCA), 25-11-203, CRS. Such hearing shall, at a minimum require:*

(1) At least two weeks' written notice before the hearing;

(2) The hearing to be hosted and presided over by a person selected upon agreement by the Department, the local Board of County Commissioners and the applicant;

(3) The licensee or applicant to provide a summary of the facilities' application to receive, store, process, or dispose of classified material and the nature of the classified material;

(4) Cross-examination of the applicant by interested persons;

(5) An opportunity for the public to comment and be heard;

(6) The licensee or applicant to provide transcripts of the hearing, which:

(a) allows the public to make copies of a transcript of the hearing; and

(b) shall be provided to the Department in an electronic format in a manner that allows posting on the Department's website within ten (10) days after receipt from the transcription service.

COMMENT

5.1. As stated above at Comment 4.2, the meeting/hearing should be presided over by an administrative law judge, agency representative, or hearing officer.

5.2. Apparently, the CDPHE intends for this second meeting fulfill the statutory requirements of 42 U.S.C § 2021(o)(3)(A) for public notice, public comment, and a hearing with a transcript and opportunity for cross examination. But, there is a problem, 42 U.S.C § 2021(o)(3)(C) requires that the agency's written environmental analysis "shall be available to the public before the commencement of any such proceedings." The environmental analysis would not be available within the required time frame for the second public meeting. Therefore, the CDPHE cannot use the second meeting to fulfill the requirements of 42 U.S.C § 2021(o)(3)(A) unless the Section 18.3.8.3 extends the time within which the second meeting is held to at least 90 days after the release of the environmental analysis, technical report, and draft license or license amendment.

5.3. Even if the AEA did not require the availability of the environmental analysis prior the required comment period and hearing, it would not make sense and would be contrary to the public interest for the hearing with an opportunity for cross-examination to be held before the public was able to review the draft environmental analysis, draft technical evaluation, draft decision analysis, and draft license.

An Agreement State environmental analysis of a proposed licensing action is similar to an Environmental Assessment or Environmental Impact Statement for a NRC regulated licensing action. The NRC licensing process must conform to the requirement the National Environmental Policy Act (NEPA). A significant part of the NEPA process is the opportunity for the public to provide comments on the draft NEPA document. That is necessary to assure that all environmental impacts are properly identified, characterized, analyzed, and considered in the final agency action.

The whole purpose of an environmental impact analysis to so that the regulatory agency will have the necessary information before them to make informed decisions, identify all significant environmental impacts, and establish the proper mitigative measures and license conditions that will be protective of the environment and public health and safety. Therefore, the public in an Agreement State must have equal opportunity to provide public comments and establish a record via cross examination **after** the issuance of the draft agency environmental analysis.

The Proposed Rule does not provide that opportunity.

6. Section 18.3.8.5 — *Within three hundred sixty (360) days after the hearing required by 18.3.8.3, the Department shall provide notice of:*

(1) Issuance of a decision document where the license application is approved, or is approved with conditions. The decision document shall include:

(a) A decision analysis;

(b) An environmental impact analysis; and

(c) A draft license;

or

(2) Denial of the application, and shall issue a decision document summarizing the basis for denial. Denial of the application shall be considered the final agency action, subject to appeal in accordance with 18.3.8.9.

COMMENT

6.1. As discussed above, 42 U.S.C § 2021(o)(3)(C) requires that the agency's written environmental analysis "shall be available to the public before the commencement of any such proceedings" required by 42 U.S.C § 2021(o)(3)(A). Further, the proceedings and the availability of the environmental analysis are to take place **prior** to the agency decision, because the agency is supposed to consider the comments and results of the hearing and cross examination to make an informed licensing decision and to make any changes to the draft environmental analysis. Further, the CDPHE should respond to public comments on the draft environmental analysis in the final decision analysis.

6.2. A period of 360 days to issue a decision document is arbitrary and may be far too short under certain circumstances, for example, the issuance of a new license or renewal of an old license. Utah is also an NRC Agreement State. The Utah Division of Radiation Control has been reviewing the License Renewal Application for the White Mesa Mill for over 6 years. Although that is a bit long, the review of a License Renewal application could take well over a year and the review of a new license application far longer. Also, in response to public comments and the hearing with an opportunity for cross examination, the CDPHE might discover the need for additional information from the licensee and the need for additional review and analysis. The CDPHE should not be in a hurry to review and approve a license, license amendment, or renewal application.

7. Section 18.3.8.5 — *The Department shall approve, approve with conditions, or deny the application within three hundred sixty days after the second public meeting.*

COMMENT

7.1. See COMMENT 6.1 and 6.2 above and COMMENTS 8.1, 8.2, and 8.3, below.

8. Section 18.3.8.6 — *Upon issuance of the decision document required by 18.3.8.5(1), and prior to issuance of a final license, the Department shall:*

(1) Begin a forty-five (45) day public comment period that shall be noticed at the 408 time the decision analysis document is published; and 409

(2) Hold at least one public comment meeting within the forty-five (45) day comment period.

COMMENT

8.1. First of all, what is the point of the public comment once the CDPHE has issued the decision document, environmental analysis (CDPHE's environmental assessment) that approves, approves with conditions, or denies the application? The decision has, basically, already been made.

8.2. If the purpose of the additional comment period is to comply with any provision of 42 U.S.C § 2021(o)(3), it is too late. Section 2021(o)(3)(A)(iii) clearly states that the notice, comment, hearing, and cross examination proceeding ends with "a written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period." Section 2021(o)(3)(C) requires that the notice, comment, hearing, and cross examination proceeding take place **after** the environmental analysis has been made available. All the Proposed Rule is offering—after the CDPHE environmental assessment has been made available—is an opportunity for public comment. The CDPHE is not asking for comment on a draft environmental analysis. There is no opportunity for a hearing with cross examination and no written determination based on the evidence presented during the comment period and at such a hearing.

Therefore, this extra comment period and meeting serves no purpose and does not, as proposed, conform to 42 U.S.C § 2021(o)(3)(A)(iii) and (C), which requires that there be a "written determination which is based upon findings included in such determination and upon the evidence presented during the public comment period" and that the environmental analysis be available to the public before the commencement of the comment period and public hearing.

8.3. A public comment period (and hearing) on the draft environmental analysis and draft license must come **before** the CDPHE makes the decision to approve, approve with conditions, or deny the application, not after that determination has been made. The purpose of the comment period is to inform the decision to approve, modify, or deny the application. The CDPHE must not limit the comments that are allowed after the issuance of the environmental analysis to possible modifications in the final license.

9. Section 18.3.8.8 — *Within thirty (30) days following the public comment period and public comment meeting required by 18.3.8.6, the Department shall:*

(1) issue a response summary document outlining the information received and evaluated during the public comment period and public comment meeting; and

(2) evaluate the information received during the public comment period which shall be considered in writing the final license. (3) Issue the final license which shall be the final agency action.

COMMENT

9.1. The comment period outlined in Section 18.3.8.6 has been tacked onto Part 18 in order to fulfill the requirements of 42 U.S.C § 2021(o)(3)(A) and (C). But, it fails to meet those requirements. The "summary document" will not include a final environmental analysis and responses to the comments on the draft environmental analysis. It will not include a record of decision based on the final environmental analysis that has been amended responsive to public comment and evidence presented at the hearing and brought forward through cross examination. Instead, the CDPHE intends to issue a final environmental analysis that has not been subject to public review and comment. The public comments will only be considered in the final license. It will not

be considered in the the issuance of a final environmental analysis or in the decision to approve, modify, or deny the proposed licensing action. The only document that will be amended by the CDPHE after this opportunity for public comment is the license itself.

Therefore, the provisions of Section 18.3.8.8 do not meet the requirements in 42 U.S.C § 2021(o)(3)(A) and (C).

10. Additional changes to Part 18.

10.1. Part 18 must also be amended to include the provisions in 42 U.S.C § 2021 (o)(3)(D), which prohibits "any major construction activity with respect to such material prior to complying with the provisions of subparagraph (C)" of 42 U.S.C § 2021(o)(3).

III. CHANGES IN THE RADIATION CONTROL ACT

11. The CDPHE should consider the following amendments to the Radiation Control Act:

11.1. C.R.S. 25-11-203(2)(b)(I) should be amended to read:

"(I) Public comments and transcript of one public meeting hosted by the CDPHE and presided over by the agency or a hearing officer. The reasonable, necessary, and documented expense of the meetings or hearing shall be paid by the facility. Such meetings shall not be held until the department determines that the application is substantially complete. . . .

(A) Pursuant to part 1 of article 70 of title 24, C.R.S., at least 30-days written notice before the meeting.

(B) Summaries of the applicant's license to receive, store, process, or dispose of classified material and the nature of the classified material, and an opportunity to be heard; and

(C) Access to make copies of a transcript of the meetings, and shall provide an electronic copy to the department in a manner that allows posting on the department's web site within ten days after receipt from the transcription service;

11.2. C.R.S. 25-11-203(2)(b) should include a new provision after Section (2)(b)(I):

"Public comments and transcript of a public meeting and public hearing with an opportunity for cross examination hosted by the CDPHE and presided over by an administrative law judge or a hearing officer. Participants in the public hearing may cross examine the staff of the CDPHE, any outside contractor or expert that was hired to review the application, or the applicant. The reasonable, necessary, and documented expense of the meeting and hearing shall be paid by the applicant. The CDPHE shall provide the public with:

(A) The environmental assessment, described in Section (2)(b)(III), at least 90 days before the meeting and hearing.

(B) Pursuant to part 1 of article 70 of title 24, C.R.S., at least 30-days written notice before the meeting and hearing.

(C) Access to make copies of a transcript of the meetings, and shall provide an electronic copy to the department in a manner that allows posting on the department's web site within ten days after receipt from the transcription service;

11.3. Sections (2)(b)(II) and (III) would be renumbered.

11.4. Section (3)(c)(III)(V)(B) shall be amended to read: "The first public meeting required by subparagraph (I) of paragraph (b) of subsection (2) of this section shall be convened at least 60 days after publication of its determination that the application is substantially complete. The public meeting and hearing required by subparagraph (II) of paragraph (b) of subsection (2) of this section shall be convened at least 90 days after the release of the environmental analysis required by subparagraph (IV) of this subsection." [This is the renumbered subsection.]

11.5. Section (3)(c)(III)(V)(C) shall be deleted. Although it is in the public interest to have timely decisions on proposed licenses, license amendments, and license renewals, it is unreasonable to have such a strict limitations on the time required to issued a decision. New licenses, license amendments, reclamation plans, and complex license amendments might might take longer to review. Further, this provision does not take into consideration the need for the CDPHE to review and consider public comments and evidence presented at the hearing and through cross examination. The CDPHE review of this information may result in the need for additional information from the applicant and additional substantive analysis. The CDPHE needs time to respond to comments and finalize the environmental analysis, decision analysis, and draft license in response to public comments and the hearing.

11.6. The Radiation Control Act indicates that a hearing would be conducted pursuant to C.R.S. 24-4-105. This would be a formal adjudicatory proceeding. The CDPHE and the public should consider another, less formal, proceeding, while still allowing for public comment and cross examination, pursuant to 42 U.S.C § 2021(o)(3)(A).

IV. CHANGES TO PROPOSED RULE

12. If there are no changes to the RCA, the following changes in Part 18 would be advisable:

12.1. The second public meeting (currently required by statute) would not include an opportunity for cross examination. This is because the environmental analysis, or environmental assessment, would not yet be available. 42 U.S.C § 2021(o)(3)(C) demands that the Agreement State's environmental analysis be available prior to the conduct of a hearing with an opportunity for cross examination.

12.2. Part 18 would be amended to provide for a third meeting and hearing with a transcript and opportunity for cross examination, which would be held after the release of the draft environmental analysis, draft license, and draft decision analysis. The CDPHE should give the public from 60 to 90 days to review the draft decision documents before the hearing, depending on the length and complexity of the application and decision documents. The hearing should include an opportunity to cross examine both the applicant, CDPHE staff, and any CDPHE contractor or expert involved in the review of the application. The hearing could be either a formal hearing, pursuant to C.R.S. 24-4-105, or a more informal hearing with requirements yet to be developed by the CDPHE.

12.3 The final decision would be based on the application, requests for additional information and responses thereto, CDPHE final decision documents (environmental analysis, technical analysis, decision analysis), public comments, and the evidence presented at the hearing and during cross examination.

13. If there are changes to the Colorado RCA as suggested above at 11, Part 18 would be amended pursuant those changes.

13.1. Part 18 would be amended to allow for an initial public meeting to take public comment on the application, similar to as described in Section 18.3.8.1 and 18.3.8.2. The hearing would be sponsored by the CDPHE and presided over by CDPHE staff or a hearing officer.

13.2. There would be no second meeting as described in Section 18.3.8.3.

13.3. The CDPHE would release the draft environmental analysis, draft license, and draft decision analysis for public comment.

13.4. The CDPHE would give the public from 60 to 90 days to review and comment on the draft decision documents. The CDPHE would notice a public meeting and hearing from 60 to 90 days after the release of the draft decision documents. The meeting and hearing would provide an opportunity for public comment, receipt of written comments, and a hearing with a transcript and opportunity for cross examination of the applicant and CDPHE staff.

13.5. After the CDPHE reviewed and considered all of the pertinent information, including the public comments and evidence presented in the hearing and during cross examination, the CDPHE would make a final determination and issue the final environmental analysis. There would be no public comment or meeting after the release of the final decision. At that time, an interested person would be able to appeal the final decision, in accordance with Colorado statutes, in an adjudicatory proceeding before a request for judicial review.

Thank you for providing this opportunity for comment,

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