October 19, 1982

SECY-82-419

ADJUDICATORY ISSUE

(Affirmation)

For: The Commissioners

From: Martin G. Malsch, Deputy General Counsel

Subject: PETITION OF SUNFLOWER COALITION REGARDING COLORADO AGREEMENT

Discussion: On May 11, 1982 the Sunflower Coalition filed with the Secretariat a "Petition for Reconsideration of Nuclear Regulatory Commission Approval of Amended Agreement with the State of Colorado."

1. Background

Sunflower Coalition began its challenges to Colorado's performance as an Agreement State with a petition to the Commission filed May 26, 1981 asking the Commission to terminate or suspend the Colorado agreement. Sunflower claimed that Colorado had failed to protect the public health and safety and had violated the Uranium Mill Tailings Radiation Control Act (UMTRCA), P.L. 95-604. The Commission denied Sunflower's petition on June 24, 1981. The Commission found that Colorado was complying with UMTRCA and that the asserted deficiencies in Colorado's program either did not exist or did not affect the State's ability to protect adequately the public health and safety. Sunflower filed suit in Federal District Court in Denver seeking review

CONTACT:
Martha A. Torgow, OGC
4-1465

of the Commission's denial. On March 3, 1982 the District Court granted NRC's motion to dismiss for lack of jurisdiction. The court concluded that the NRC's June 24, 1981 decision was a final order reviewable exclusively in the Court of Appeals. Sunflower did not appeal the District Court decision and did not seek review in the Court of Appeals.

2. The Amended Agreement

The Uranium Mill Tailings Radiation Control Act (UMTRCA) requires that any state which wishes to continue to regulate mill tailings after November 8, 1981 must be in compliance with UMTRCA and must enter into an amended agreement with the NRC. The Stratton-Schmitt Amendment to the Energy and Water Development Appropriation Act for Fiscal Year 1982, P.L. 97-88, effectively postponed through FY 82 this requirement that the States may only regulate mill tailings pursuant to an agreement with NRC. 1/ Therefore, Colorado is not required to enter into an amended agreement with the NRC in order to continue regulating mill tailings through FY 82. Nevertheless, the Governor of Colorado did request an amendment to the existing agreement to ensure continued State regulatory authority over mill tailings.

The proposed amended agreement and the staff's assessment of Colorado's radiation control program were published for public comment in the Federal Register. 46 Fed. Reg. 50628 (October 14, 1981). In response to the Federal Register notice, Sunflower claimed that there

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1/ Passage of either the House version of the continuing resolution for FY 83, H.J.Res. 599, or the present version of H.R. 7145, the pending House FY 83 appropriations bill for energy and water development, would further postpone the effectiveness of this requirement.

were "serious procedural deficiencies" in the Colorado program. The asserted deficiencies included (1) that the Colorado program does not provide for judicial review of licensing determinations as required by section 274(o)(3)(iii) of the AEA (42 U.S.C. 2021(o)(3)(iii)), and (2) that the lack of civil penalty authority in the Colorado program leaves the State with inadequate enforcement authority to protect the public health and safety. The Commission on March 30, 1982 approved the amended agreement, which became effective on April 20, 1982, the date of the Governor's signing.

3. Sunflower's May 11, 1982 Petition

The Sunflower Coalition bases its present petition for reconsideration of the amended agreement on three assertions. The first two are repeats of Sunflower's comments on the proposed amended agreement: i.e., the alleged lack of a State provision for judicial review and the lack of civil penalty authority. The third restates Sunflower's claims in its May 26, 1981 petition that the Colorado program has failed to comply with UMTRCA "and other state and federal statutes and regulations" and further asserts that the Colorado program lacks adequate staff and facilities to achieve compliance. 2/

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2/ By letter of May 19, 1982, Sunflower Coalition supplemented its petition with testimony of a Mr. Belmont Evans before a Colorado State hearing.

Martin G. Malsch
Deputy General Counsel

Attachments:
1. Proposed Commission Decision
2. Sunflower Petition (w/o attachments)
3. Testimony of Mr. Belmont Evans
4. Memo from State Programs

Commissioners' comments should be provided directly to the Office of the Secretary by c.o.b. Wednesday, November 3, 1982.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, October 27, 1982, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

This paper is tentatively scheduled for affirmation at an Open Meeting during the Week of November 8, 1982. Please refer to the appropriate Weekly Commission Schedule, when published, for a specific date and time.

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Attachment 1

Attachment 2

BY EXPRESS, CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Sunflower Coalition
P. O. Box 234
Denver, Colorado 80201
May 11, 1982

Samuel Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Petition for reconsideration of Nuclear Regulatory Commission approval of amended agreement with State of Colorado

Dear Mr. Chilk:

The Sunflower Coalition ("Coalition") is an unincorporated association comprised of individual Colorado residents and five separate member associations made up of individual Colorado residents, namely FUTURE - Folks United to Thwart Unsafe Radiation Emission, of Denver; Auraria Nuclear Education Project Uranium Task Force, of Denver; Citizens for Safe Energy, of Pueblo; La Gente Unida Para El Progreso Del Pueblo, of Alamosa; and Pikes Peak Justice and Peace Commission, a Colorado nonprofit corporation, of Colorado Springs.

The Coalition has party standing regarding approval by the Nuclear Regulatory Commission ("NRC") of an amended agreement ("amendment") between it and the State of Colorado on March 30, 1982. The Coalition submitted comments on the proposed amendment on November 8, 1981, pursuant to a Federal Register notice dated October 14, 1981. A copy of said notice and comments are attached hereto as Exhibits A and B, respectively.

In addition, the Coalition represents Kay Stricklan of Canon City, Colorado, who has party standing both as a member of the Coalition and as an individual who personally submitted comments on the proposed amendment.

The Coalition hereby petitions the NRC to reconsider its approval of the amendment, and as grounds for its request states the following:

A. The Colorado Department of Health ("CDH") has never been given authority by the Colorado legislature or any other body to impose civil penalties upon operators of uranium mills and tailings disposal sites who violate licensing conditions. Recognizing that meaningful enforcement of uranium mill and tailings statutes and regulations is virtually impossible unless a regulatory agency has the power to impose fines, the CDH and other organizations and concerned individuals have repeatedly sought a remedy to this problem from the Colorado legislature, without success. (As recently as this spring, a bill which would have provided up to $10,000 per day in fines for license violators passed the Colorado House but was tabled by a Senate committee.)

   The NRC itself has recognized the need for such state legislation and has even drafted and made available to Colorado and other agreement states a model civil penalties act (see memo of G. Wayne Kerr, Sept. 29, 1980, with enclosure; attached hereto as Exhibit C).

It is difficult for the Coalition to understand how the NRC could fail to recognize this shortcoming in the Colorado radiation program. The NRC and other agencies have documented over the years extensive problems with uranium mills and tailings in our state, many of which could have been prevented if the CDH had had some method of enforcement available, other than shutting a mill down. The latter has never been a viable consideration for economic and political reasons, and so the state has resorted for the most part to meaningless and unforceable citations.

The goal of the original agreement to which the amendment pertains was a "program for the control of radiation hazards adequate to protect the public health and safety" (see p. 1 of the copy of said agreement attached hereto as Exhibit D). The Coalition maintains that Colorado has never had an adequate program with regard to uranium mills and tailings, in good part because the state legislature has never passed the recommended civil penalties legislation.

B. There is no state provision for judicial review of uranium licensing decisions, contrary to federal law. (See Exhibit B and also a report of National Wildlife Federation, et al. v. Cotter Corporation, et al. attached hereto as Exhibit E.)

C. The CDH uranium radiation control program to date has frequently failed to comply with the Uranium Mill Tailings Radiation Control Act of 1978, as amended in 1979, and with various other state and federal statutes and regulations. Even in areas where the program has appeared adequate in theory, implementation has fallen short because of inadequate staff and facilities, a lack of civil penalty authority, and occasionally irresponsible CDH leadership. (See Complaint, Sunflower Coalition v. Nuclear Regulatory Commission, et al., U. S. District Court for Colorado, Civil Action No. 81-C-66, attached hereto as Exhibit F.)

We believe that the NRC has failed to address fully the many practical shortcomings of the CDH in its decision to approve the amendment and, more importantly, has not established adequate means for bringing Colorado into compliance, should the state program fail again. Colorado signed the original agreement in January 1968 and for over fourteen years uranium radiation control in our state has been woefully lacking. One need only consider the Cotter mill in Canon City, the Union Carbide mill at Uravan, or the mounds of unreclaimed tailings in Grand Junction and Durango, to realize what the citizens of this state are up against. Consequently, we would like to know what the NRC intends to do, should history repeat itself.

In summary, the Coalition respectfully requests that the Nuclear Regulatory Commission reconsider its March 30, 1982 decision. We do

not believe your approval of the state program as it now stands is warranted, and we urge your further consideration of the matters discussed above and in the accompanying exhibits. We seek your thoughtful assistance for ourselves, our children and grandchildren, and for the people, air, land and water of our state.

Sincerely,

SUNFLOWER COALITION

By Margaret Puls

Margaret Puls, Member
Sunflower Coalition
(303) 831-4301 (home)

Enclosures

release

Sunflower Coalition
P. O. Box 234
Denver, Colorado 80201
May 13, 1982

Samuel Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Petition for reconsideration . . . of Sunflower Coalition
dated May 11, 1982

Dear Mr. Chilk:

Contrary to other reports we have received, Colo. House Bill 1040, "Civil Penalties - Radiation Control," did not pass the House this series. Consequently, the last sentence of paragraph A of the above referenced petition for reconsideration should be revised to read:

> (As recently as this spring, a bill which would have provided up to $10,000 per day in fines for license violators was tabled by the Colorado House Appropriations Committee.)

Thank you for taking note of this change.

Sincerely,

SUNFLOWER COALITION

Margaret Puls

Margaret Puls, Member

Attachment 3

Sunflower Coalition
P. O. Box 234
Denver, CO 80201
May 19,1982

Samuel Chilk, Secretary
U. S. Nuclear Regulatory Commission
Washington, DC 20555

Re: Petition for reconsideration . . . of Sunflower Coalition dated May 11, 1982

Dear Mr. Chilk:

Enclosed for your information re the above-referenced petition, please find a copy of "Testimony of Mr. Belmont Evans, a health physicist employed by the Colorado Department of Health, who retired in 1979. Presented at a hearing on 'The Health Effects of Radioactive Materials in Colorado' by the Colorado Statewide Health Coordinating Council in Canon City, at the Fremont County Auditorium on March 20, 1981."

We feel Mr. Evans' testimony is particularly relevant to Paragraph C of the petition.

Sincerely,

MP

Margaret Puls, Member
Sunflower Coalition

Enclosure

Testimony of Mr. Belmont Evans, a health physicist employed by the Colorado Department of Health, who retired in 1979. Presented at a hearing on "The Health Effects of Radioactive Materials in Colorado" by the Colorado Statewide Health Coordinating Council in Canon City, at the Fremont County Auditorium on March 20, 1981.

"First of all I would like to congratulate Mr. Salazar on his intelligent move from Conn. to Colorado. I'm a New Jerseyite by birth and I might point out that a recent statistical study done by the National Institutes of Health showed that Colorado's cancer rate is the fifth lowest among the 50 states and the District of Columbia, and Mr. Salazar's home state and my home state are among the five with the highest cancer rate. This in spite of the fact that our background radiation levels in Colorado are about three times what you expect at sea level.

The people of Canon City are guilty. Guilty of living too far away from Denver. The State Health Department has a number of rather serious problems and those within easy traveling distance of Denver are taken care of. For example, Rocky Flats is visited three times a week to pick up environmental samples. Fort St. Vrain is visited at least once a month to pick up environmental samples. Mesa County has five health department personnel to work over the problem of tailings piles. But once you get south of Monument Hill, apparently, people in Denver are afraid you might get shot in the back with an arrow.

At a recent meeting, an official of the health department suggested that this problem might be brought under control if the local county would hire a health physicist. Well, this is not just a problem for Fremont County, but Pueblo County and my own county of El Paso also have an interest in this problem. I believe that the health department should place a lot more emphasis on the environmental surveillance of the facilities here in Fremont County. I think that the health department is guilty of covering up the fact that they don't have enough personnel, they don't have enough working equipment to do a really good job.

It was after the CBI's report was released that we discovered that the health department had not made a single uranium analysis in water in a year. This means that samples that are picked up normally will sit in these plastic containers in the hallways in the health department and Lord knows what changes take place, what elements plate out on the inside of these things.

The philosophy of the health department during the eight years that I worked for them was one of "don't rock the boat". For example, in 1971, when I first joined the Department, I noticed that there were very high uranium concentrations in the North Table Mountain Water supply. No action was taken on this until after the CBI report on Cotter, and then the Department did ask the EPA to look at standards for drinking water and uranium.

In 1972 the operators of Rocky Flats decided to clean out some settling ponds on a stream which carried their waste into the reservoir for Broomfield. In doing this they increased the concentration of plutonium in the water. The levels were well below the so-called standards that were established by the AEC. However, my concern was the fact that unnecessary plutonium was being released offsite and was settling in the mud of Great Western Reservoir. This now is of concern, but I got no backing from my supervisors in the health department.

In 1973 came the famous tritium incident, when we found a tremendous concentration of tritium in the water coming from Rocky Flats. We were forbidden to give a sample of this to any laboratory to analyze, the philosophy being, if it was turned out that our analysis were the result of errors, it would place the health department in a very poor light.

In 1978 (actually 1979), when there was the big flack about radium in Denver, it turned out, according to the Denver Post, that the Department had been notified six months previously by a federal official that there were these hot spots in the town. However, they chose to ignore this, apparently, until they were given a second notice from personnel in Nevada.

I think that the philosophy of the health department may be changing as a result of what has happened here in Canon City.

Now, I have run into a problem that is most disturbing. I recently attended a hearing on a waste disposal permit for Rocky Flats. This was conducted by the EPA. They announced at the beginning of this hearing that they would consider only biological problems and chemical problems and that the EPA has absolutely no control over the release of radioactive materials from a federal facility. Looking into this, they were correct, that under the Atomic Energy Act as modified, the EPA has absolutely no control over radiological releases. I believe that steps should be taken to amend the Atomic Energy Act to permit the EPA to take a look at this. Had this been done in 1973, I am sure that the tritium incident would have been released to the public a lot sooner and solutions to the problem would have been developed a lot sooner than they were. I do hope that the state will make some sort of an effort to try to amend the Atomic Energy Act. That's all I have."

Since 1949 I have been involved in the nuclear business, and 8 years of that with the state health dept.
(inaudible)
Health Physicist.
(inaudible)
That's correct, I retired in 1979.
(inaudible)
In spite of all of the problems here in Colorado, once you hit 65, a health physicist is on the wood pile.
(inaudible)
Which report was it, maybe I still have it?
(inaudible)
No one knows better than Chuck, the overloaded work that goes into radiochemistry there at the health department.
(inaudible)
Okay, there was a Rocky Mountain arsenal where there was a lot of chemical waste produced and because they were disposing of this _____ underground, it caused all kinds of problems. It really doesn't apply unless there's a specific kind of a discharge underground.
Oh, we feel very strongly that the Cotter Corp. is discharging underground by virtue of the fact that they're (inaudible)
That's where the argument comes in, maybe by changing it we could straighten out that so there's no argument _____ because now we wind up in court and let a judge decide.

Your interpretation that it does not apply in all cases to all uranium mines and millings, thank you.

I attest that this is a true transcript of statements made.

Benie L. Wood

Benie L. Wood, Notary Public

4-10-81
Date

My Commission Expires Feb. 9, 1982

Attachment 4

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

Ref: SA/JRM

JUN 22 1982

MEMORANDUM FOR: Martha Torgow, OGC

FROM: G. Wayne Kerr, Director
Office of State Programs

SUBJECT: SUNFLOWER PETITION FOR RECONSIDERATION OF COLORADO AMENDED AGREEMENT

This is in regard to the subject petition for reconsideration of NRC approval of the amended agreement with the State of Colorado which became effective on April 20, 1982.

The petitioner cites three grounds by which the NRC should reconsider its approval. The first concerns civil penalty authority. The facts in this area are not in dispute. The Colorado Department of Health does not have the authority to impose civil penalties on uranium mill operators. The Commission recognized this fact in its assessment of the Colorado regulatory program. They are also correct in stating that the NRC has recommended that Colorado (indeed all Agreement States) seek civil penalty authority. Such authority, however, has never been a requirement for Agreement States, since it cannot be demonstrated that such authority is essential to protect the public health and safety. We note that a variety of other enforcement mechanisms are available to Colorado, for example, it may modify, suspend, or revoke licenses by order of the Department. In our view this is a much more basic enforcement mechanism than issuing civil penalties. The State also has authority to impose criminal penalties. In any case, the subject of civil penalty authority was considered by the Commission in its decision to approve the amended agreement and since no new issues are raised in this area, we do not feel that reconsideration is warranted.

The second point raised concerns the lack of a State provision for judicial review of licensing actions. The petitioner argues in an attachment to his petition that a Colorado case, National Wildlife Federation v. Cotter Corp. Nos. 80 CA 1180 and 80 CA 1206 (decided September 10, 1981) held that under Colorado law the Colorado Radiation Control Act was not subject to judicial review and that, therefore, a requirement of UMTRCA was not met. The case in fact holds that private parties do not have standing under the Radiation Control Act to bring a private action to compel the State agency to void a previously issued license.

This holding does not signify that there is no judicial review of licensing actions in Colorado. To the contrary, the court in the cited case called attention to the fact that the plaintiff had not sought review of the agency action under the State's Administrative Procedure Act. Section 274o(3)(A)(iii) requires only that licensing actions be judicially reviewable. It sets no standard or procedure for review. Colorado Rules and Regulations Pertaining to Radiation Control (as amended August 19, 1981, effective October 1, 1981) provide at Section 3.9.9.3.4 that parties to license action hearings, including persons affected or aggrieved by State action, may appeal from the decision of the hearing as provided by the Colorado Administrative Procedure Act.

Section 24-4-106(2) of the Colorado Administrative Procedure Act, as amended by the 1979 General Assembly, provides that final agency action shall be subject to judicial review. Under Section 24-4-102(1), action includes the whole or part of any agency rule, order, interlocutory order, license, sanction, relief or the equivalent or denial thereof, or failure to act. Section 24-4-106(4) provides that any party adversely affected or aggrieved by any agency action may commence an action for judicial review in the Colorado district court.

The petitioners third point was that "the CDH uranium radiation control program to date has frequently failed to comply with the Uranium Mill Tailings Radiation Control Act of 1978, as amended in 1979, and with various other State and Federal statutes and regulations." On March 1, 1982, the Commission found that the State's program for regulating uranium mill tailings was in accordance with the requirements of section 274o. of the Act and was in all other respects compatible with the Commission program and was adequate to protect the public health and safety. With regard to "various other State and Federal Statutes and regulations," we know of none that specifically apply to the amending of the Colorado agreement. The letter mentions three specific areas where the coalition perceives problems, "inadequate staff and facilities, a lack of civil penalty authority, and occasionally irresponsible CDH leadership." We have already addressed civil penalty authority. With regard to staffing and facilities, the Commission has determined that the Colorado program meets the NRC "Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement" (46 FR 7540, January 23, 1981). This criteria addresses staffing and the availability of field and laboratory instrumentation. Since the petitioner presents no specifics as to why the State's current staffing and facilities are inadequate, reconsideration of the amended agreement is not warranted.

With regard to "occasionally irresponsible CDH leadership," we feel that the State of Colorado has shown exceptional leadership in the area of uranium mill tailings regulation and is committed to a sound regulatory program.

With regard to the May 26, 1982 letter to John Klucsik, the NRC's decision concerning the Colorado amended agreement was published in the Federal Register on May 10, 1982. This notice constituted the only notification of the Commission's decision. Commenters were not notified individually.

G. Wayne Kerr

G. Wayne Kerr, Director
Office of State Programs

cc: T. Rehm