UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

In the Matter of

PETITION OF SUNFLOWER COALITION

MEMORANDUM AND ORDER
(CLI-82-34)

On May 11, 1982, the Sunflower Coalition filed with the Commission a petition for reconsideration of the NRC's March 30, 1982 approval of an amended agreement with the State of Colorado. The Commission entered into the amended agreement at the request of the Governor of that State and pursuant to section 274 of the Atomic Energy Act (42 U.S.C. 2021). The Commission denies Sunflower's petition.

Statutory Framework

Under section 274b of the Atomic Energy Act of 1954, as amended, the Commission is authorized to enter into agreements with the Governor of any State providing for the discontinuance of certain regulatory authority of the Commission and the assumption of that regulatory authority by the Agreement State. The Commission entered into such an agreement with the State of Colorado on January 16, 1968. See 33 Fed. Reg. 2400 (January 31, 1968). Under this agreement the State has regulated byproduct, source and special nuclear material in quantities less than a critical mass. In particular, the State's authority over some material pursuant to this

agreement allowed the State to regulate uranium milling, which otherwise would have been subject to exclusive regulation by the NRC.

Prior to the passage of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), Pub.L. 95-604, the direct control of uranium mill tailings, as distinct from the milling operations themselves, remained a State responsibility pursuant to its inherent police power, whether or not the State had entered into an agreement with the Commission. The passage of UMTRCA changed this legal structure. UMTRCA added uranium mill tailings to the definition of byproduct material in section 11(e)(2) (42 U.S.C. 2014(c)) of the AEA and by so doing gives the Commission direct regulatory authority over those mill wastes. UMTRCA amended section 274 of the AEA to provide that Agreement States may continue to regulate mill tailings if they comply with certain conditions, including the requirement that State licensing and regulatory standards must be at least as stringent as the Federal standards. Pub.L. 95-604, Section 204(e)(1); 92 Stat. 3037; 42 U.S.C. 2021(2). In addition, the State must require procedures which include public hearings, written environmental analyses and judicial review of licensing actions. Pub.L. 95-604, Section 204(e)(1); 92 Stat. 3037; 42 U.S.C. 2021(o)(3).

A 1979 amendment to UMTRCA made clear that there was to be no overlapping or concurrent State and Federal jurisdiction over mill tailings. Instead, Congress provided that States could continue to regulate mill tailings until November 9, 1981, after which NRC would have exclusive authority to regulate mill tailings unless a State entered into an amended agreement under section 274(b) and (o) of the AEC. UMTRCA Section 204(e)(2) and (h), as amended by Pub.L. 96-106 (93 Stat. 800)

Section 22 (1979). However, a provision of the Energy and Water Development Appropriation Act for fiscal year 1982 essentially postponed the effective date for NRC authority to regulate uranium mill tailings until September 30, 1982; the terms of this provision were, in turn, extended by the Continuing Appropriations Resolution for FY 1983, until December 17, 1982. 1/ Although under the Appropriations Act provision the NRC may not displace a State's continued regulation of uranium mill tailings during the period from November 8, 1981 through September 30, 1982, now December 17, 1982, even in the absence of an

---

1/ The provision limited the expenditure of NRC's annual appropriation for fiscal year 1982 for purposes of implementing UMTRCA:

> Provided further, That no funds appropriated to the Nuclear Regulatory Commission in this Act may be used to implement or enforce any portion of the Uranium Mill Licensing Requirements published as final rules at 45 Federal Register 65521 to 65538 on October 3, 1980, or to require any State to adopt such requirements in order for the State to continue to exercise authority under State law for uranium mill and mill tailings licensing, or to exercise any regulatory authority for uranium mill and mill tailings licensing in any State that has acted to exercise such authority under State law: Provided, however, That the Commission may use such funds to continue to regulate byproduct material, as defined in section 11e.(2) of the Atomic Energy Act of 1954, as amended, in the manner and to the extent permitted prior to October 3, 1980.

P.L. 97-88, Title IV, Nuclear Regulatory Commission, Salaries and Expenses (95 Stat. 1147-1148 (1981)) (emphasis added).

Section 101(g) of the Continuing Appropriations Resolution stated:

> Provided further, That no appropriation or fund made available or authority granted pursuant to this paragraph shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during the fiscal year 1982 without prior approval of the Committees on Appropriations ....

P.L. 97-276 (96 Stat. 1135, October 2, 1982).

agreement specifying the terms of that regulation, a State and the NRC are not precluded from voluntarily entering into an amended agreement during that time to provide for State regulations which comply with UMTRCA. In a letter of September 29, 1981, the Governor of the State of Colorado requested the NRC to enter into such an amended agreement. Since the State intended its amended agreement to reflect the requirements of UMTRCA, we have dealt with Sunflower's claims as if UMTRCA were fully in effect. 2/

The Sunflower Petition

On March 30, 1982 the Commission approved an amended agreement with the State of Colorado, which became effective when signed by the Governor on April 20, 1982. In its petition the Sunflower Coalition requests that the Commission reconsider its March 30th decision approving the amended agreement and states three grounds for its request.

Petitioner first asserts that Colorado's radiation control program is inadequate to protect the public health and safety because the Colorado Department of Health (CDH) does not have the authority to impose civil penalties on operators of uranium mills and tailings disposal sites. Sunflower argues that a meaningful enforcement of uranium mill tailings

---

2/ Because the NRC is precluded from displacing exercise of State authority over mill tailings at this time, it follows that even if the Commission were to find that the amended agreement did not satisfy UMTRCA, a Commission suspension, revocation, termination or amendment of the agreement would not force an alteration of the State's program to regulate uranium milling and tailings disposal. The only recourse available to the NRC would be to renegotiate the agreement with the Governor of Colorado. However, because the NRC and the State of Colorado intended to develop an amended agreement which would comply with UMTRCA, we have proceeded to consider Sunflower's petition as if UMTRCA was applicable and have found that the amended agreement is fully consistent with that Act.

regulations is virtually impossible without civil penalty authority and cites in support of this assertion the fact that the NRC has drafted and sent to Agreement States a model civil penalties act. Sunflower raised this same issue in its November 16, 1981 comments to the Commission on the proposed amended agreement. 3/ The Commission considered Sunflower's comments in deciding to approve the amended agreement. Sunflower does not present in its petition any information which persuades us to reconsider our approval of the Colorado agreement.

The absence of one specific type of enforcement authority does not necessarily make the Colorado program inadequate to protect the public health and safety. Civil penalty authority is not required by either UMTRCA or the Atomic Energy Act. The NRC has recommended that Agreement States include civil penalty authority in their enforcement programs but does not require that an Agreement State provide such authority in order to have an effective enforcement program.

The Commission's policy in reviewing the enforcement authority of Agreement States has been to determine whether the State has sufficient enforcement options available so that a level of enforcement activity similar to that of the NRC is possible. The focus has not been on specific types of enforcement options. The Commission believes that civil penalty authority is useful but does not find it indispensable for the protection of the public health and safety. The State of Colorado has an enforcement

---

3/ The Sunflower Coalition raised, and the Commission responded to, this same issue in its May 1981 petition challenging the Agreement State Program with the State of Colorado. See, In the Matter of Petition of Sunflower Coalition, CLI-81-13, 13 NRC 847, 858, June 24, 1981.

program which includes several enforcement options other than the imposition of civil penalties. 4/ These enforcement mechanisms are sufficient to maintain a level of enforcement activity similar to that of the Commission and to protect the public health and safety. We have no indication that they will not use the enforcement options available to them to effectively protect the public health and safety. 5/ The Commission has in the past found the State's enforcement practices, even without civil penalty authority, to be compatible with those of the Commission.

Petitioner's second assertion is that Colorado has no statutory provision for judicial review of uranium licensing decisions, contrary to Federal law. In support of this proposition, Sunflower cites a decision by the Colorado Court of Appeals, Natural Wildlife Federation, et al. v. Cotter Corp., et al. Division II, Nos. 80 CA 1180 and 80 CA 1206 (September 10, 1981), which Sunflower asserts held that the Colorado Radiation Control Act does not provide for judicial review. Therefore, Sunflower concludes, an express procedural requirement of section 274o of the AEA is not met by the Colorado Radiation Control Program, contrary to the Commission's conclusion that the Colorado program is "in accordance with the requirements of section 274o."

4/ The State of Colorado can issue emergency orders to protect public health and safety and impound radioactive materials (C.R.S. § 25-11-103(5)), initiate injunctive proceedings against licensees (C.R.S. § 25-11-106), and impose criminal penalties (C.R.S. § 25-11-107(3)). Further, the Colorado Rules and Regulations Pertaining to Radiation Control, in Section 3.22.2, authorize revocation, suspension, or modification of licenses.

5/ The Commission has previously explained why it does not believe so-called "serious incidents of failure" in the Colorado program as cited by Sunflower amount to sufficient reason to question the program's effectiveness. See, 13 NRC 858, 859.

The Commission believes that Sunflower has misinterpreted the requirements of Section 274. Section 274o of the AEA requires only that there be procedures under State law for judicial review of the written determination required to be made in licensing actions under section 274(o)(3)(A)(iii). UMTRCA, which amended the AEA to include this requirement, does not require that the Colorado Radiation Control Act (CRCA) itself specifically contain a provision for judicial review. In Colorado, judicial review of licensing determinations is provided by statutes other than the CRCA. The Colorado Rules and Regulations Pertaining to Radiation Control (§ 3.9.9.3.4) provide that parties to licensing 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 C.R.S. 1973, 24-4-106 of the Colorado APA provides that final agency action is subject to judicial review and that any party adversely affected by any agency action may commence an action for judicial review in a Colorado district court. An agency 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. C.R.S. 1973, Section 24-4-102(1). Colorado thus has procedures for judicial review as required by section 274o. 6/

6/ The case cited by Sunflower, National Wildlife Federation v. Cotter Corp., does not alter this conclusion. That case decides only that the plaintiffs in that case lacked standing to bring a private action to enforce the Colorado Radiation Control Act. On rehearing, the court specifically refused to decide whether the plaintiffs had standing to sue under the Colorado Administrative Procedure Act, § 24-4-101, et seq., C.R.S. 1973, since the plaintiffs had not begun their action within the 30-day mandatory time period set out in that act.

Further, C.R.S. 1973, 21-1-113 (Supp. 1981) grants the right of judicial review of source material license decisions to persons "aggrieved and affected." Thus, there are two statutory grants of jurisdiction to Colorado courts to review the Department of Health's decisions to issue source material mill radioactive materials licenses.

Petitioner's final claim is that the Colorado program has "failed to comply with 'UMTRCA' and other State and federal statutes and regulations." This claim appears to be a restatement of a claim Sunflower made in a petition to the Commission on May 26, 1981. In fact, Sunflower cites in support of its claim here its Complaint in the U.S. District Court for the District of Colorado, which dealt with the same allegations as the May 26 petition. The allegations enumerated in that Complaint were disposed of by the Commission in its decision of June 24, 1981. See In the Matter of Petition of Sunflower Coalition, CLI-81-13, 13 NRC 847 (1981). 7/ In that decision the Commission, after considering specifically Sunflower's allegations of deficiencies in the Colorado program and of specific incidents of failure to protect the public health and safety, concluded that the Colorado program was adequate to protect the public health and safety and that the deficiencies and incidents alleged have not caused any serious failure by Colorado to protect public health and safety. The Commission at that time found no basis to justify terminating or suspending the agreement with Colorado. 13 NRC at 856-860.

7/ The District Court subsequently dismissed Sunflower's complaint as being outside the District Court's jurisdiction. See, Sunflower Coalition v. Nuclear Regulatory Commission, et al., No. 81-C-66, D. Colorado, March 3, 1982. Sunflower did not appeal the District Court's decision.

Petitioner does not now present a new claim or even new information on its old claim. 8/ It merely recycles complaints about the Colorado program which the Commission considered and disposed of almost a year ago. In the Commission's opinion, they do not provide a sufficient reason to reconsider Commission approval of the amended agreement. In sum, the Commission finds no basis in the Sunflower petition for reconsidering its amended agreement with Colorado.

The Commission also notes that the amended agreement, which is now in effect, can not be terminated by the Commission except in accordance with the provisions of section 274 of the Atomic Energy Act of 1954, as amended. The NRC retains the authority under section 274j of the AEA to terminate or suspend an agreement with a State and to reassert its own licensing authority. However, Congress' clear intent was that Agreement States were to regulate agreement materials and that once granted, their authority is not to be revoked lightly. The legislative history of this section States that this authority to terminate "represents a [illegible] power, to be exercised only under extraordinary circumstances." H.R. Rep. No. 1125, 86th Cong. Sess. 1 (1959), p. 12. An agreement is not to be permanently terminated or revoked for minor technical failures to comply with Section 274 or for single incidents of State inaction, but only in exceptional

---

8/ By letter of May 19, 1982, Sunflower Coalition supplemented its petition with testimony of a Mr. Belmont Evans before a Colorado State hearing. After considering this testimony, the Commission believes it does not constitute sufficient cause for the Commission to reconsider its conclusions about the Colorado program.

circumstances. 9/ Rather, the NRC is to cooperate with Agreement States and through its review process obtain compliance by States. The power to terminate the agreement is to be one of last resort where all others fail.

In this case, Sunflower has not presented sufficient information to justify terminating or withdrawing the amended agreement with Colorado. The Commission declines, therefore, to reconsider its approval of the amended agreement or to consider terminating the new agreement. The Sunflower Coalition's petition for reconsideration is denied.

It is so ORDERED.

For the Commission

JOHN C. HOYLE
Acting Secretary of the Commission

Dated at Washington, D.C.,
this 15th day of November, 1982.

9/ However, to offset the original lack of Commission authority to act in single instances of State inaction, Congress in 1980 amended Section 274j to provide for temporary suspension of all or part of an agreement. The emergency power to terminate without notice or hearing is limited to those cases where (1) an emergency situation exists which requires immediate action to protect the health and safety of the public, and (2) the State has failed to take steps necessary to contain or eliminate the dangers within a reasonable time. The temporary suspension is to remain in effect only for as long as the emergency exists. P.L. 96-295; 94 Stat. 787 (June 30, 1980). Congress stated that this authority would be only rarely needed by NRC and that it intended the emergency power to be used only as a last resort. S. Rep. No. 176, 96th Cong. Sess. 2 (1979). No such emergency situation exists in Colorado.