

August 8, 2011

Mr. Steve Tarlton, Manager
Radiation Control Program
Colorado Department of Public Health and Environment
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Denver, CO 80246-1530
Via U.S. Mail and Email at steve.tarlton@state.co.us

Re: Cotter Corporation 2011 Annual Surety Review

Mr. Tarlton,

This letter is intended to provide Colorado Citizens Against *ToxicWaste, Inc.* ("CCAT") comments for use by the Colorado Department of Public Health and Environment ("CDPHE") when conducting the 2011 annual review of the financial sureties at the Cotter Uranium Mill in Cañon City.

Unfortunately, CDPHE has not posted any public notice that announces the comment period established by the Colorado Legislature and Governor Ritter via HB10-1348. Despite CCAT's repeated inquiries to CDPHE staff and the Attorney General's Office, no information or clarification has been provided regarding the annual public comment period or the timing of the annual review. The refusal to provide public notice continues the pattern and practice where CDPHE and Cotter consult privately, regardless of the clear mandates for transparent and inclusive annual review. The following CCAT comments address both the procedural and substantive problems with the decommissioning cost estimates and the lack of any actual cost-based estimate of the long term care costs.

First, the "public notice" requirement adopted by HB10-1348 has not been satisfied by Cotter or the CDPHE. The Radiation Control Act and the implementing regulations require Cotter to publish "public notice" in a newspaper local to Cañon City that announces that the required annual report has been submitted to CDPHE in order to initiate the public comment component of the CDPHE's annual review. In 2010, Cotter published notice in the Denver Post long after the annual review period had passed. After much searching during July 2011, it was discovered that Cotter placed public notice on July 14, 2011 in the Florence Citizen newspaper (Exh. 1). Publication of the notice in the Florence Citizen does not provide effective notice to the largest interest group population in Cañon City and Lincoln Park. The Florence Citizen has a circulation of approximately 1,000, while the Cañon City Daily Record has a circulation of approximately 8,000. One can only guess how many people in Cañon City take the Florence Citizen, but we would venture that number to be very small. CDPHE has the authority and opportunity to issue a notice of violation to correct Cotter's pattern of violating the notice requirement, although this appears unlikely as CDPHE has also failed to post statutory notice.

CDPHE is also required to post “public notice” on the CDPHE website. CDPHE has two places where public notices regarding Cotter are commonly posted, on Cotter’s opening web page, and on the Divisions “News and Notice” webpage. On information and belief, no public notice has been published on the Department’s website. Although the “July 8 Cotter Letter” was posted on the Department’s website on some indeterminate date, a bare posting of a “Letter from Cotter” does not satisfy the statutory duty to post a “public notice” alerting citizens and stakeholders to the opportunity and protocol for making comments related to the surety review.

Although the lack of transparency and response to CCAT’s inquiries prevents a clear conclusion, it appears that negotiations between CDPHE and Cotter took place prior to Cotter’s public notice of July 14th and before any public input was received or solicited. In fact, the “Cotter Letter” purporting to be the annual review due on June 30 of each year was not stamped “received” by CDPHE until July 8, 2011. (Exh. 2 - July 8 Cotter Letter). The very same day that CDPHE received the Cotter Letter, the CDPHE response was issued instructing Cotter to increase the bond by a specific amount. (Exh. 3 - July 8 CDPHE Letter). If the July 8 CDPHE Letter was in fact the CDPHE’s annual decision, the Department has effectively denied all meaningful opportunity for public input and involvement despite the HB10-1348 mandate to open this annual review process to public involvement.

Anything short of open solicitation of public input into the annual bond review and decision contradicts the EPA-CDPHE **Community Involvement Plan** written by EPA and CDPHE staffs, the latest version being March 2007.¹ Indeed, instead of using this annual review process as an opportunity to inform the public, CDPHE agreed to cancel the July meeting of the “Community Advisory Group” (CAG) over the objections of CCAT, further insulating the annual bond review from public involvement. These tactics thwart meaningful public involvement and unfortunately repeat and reinforce the inadequate steps taken to establish a lawful bond in 2010, which also involved failure to provide adequate notice and opportunity for public comment prior to rendering a decision per 6 CCR 1007-1, Part 3.9.5.7. Then, as now, CDPHE failed to publish any “public notice” of an annual review or comment period.

The disregard for public involvement in the 2010 and 2011 annual surety reviews, despite the requirements of HB10-1348, should not be allowed to continue. CCAT has copied Governor Hickenlooper, key sponsors of HB-1348, and the Colorado State Board of Health in the hope that this decades-old problem can be rectified by executive oversight that ensures CDPHE operates with the clear direction that the affected public has a significant interest and right to be involved in how CDPHE conducts its regulatory responsibilities. Whether based on the Part 3.9.5.7 of 6 CCR 1007-1, the **Consent Decree**, or the **Community Involvement Plan**, local residents must be an integral part of this process.

Second, CCAT provides the following specific comments regarding the July 8 Cotter Letter and the July 8 CDPHE Response. Because CDPHE simply ignored comments provided by CCAT in November 2010, failing to respond in any way, those comments are incorporated here by reference, regarding the deficiencies in the April 2010 estimate on which the current adjustments are uncritically based.

Following are our comments:

1. Cotter is claiming now to take credit/reductions against the surety bond for work that is not completed as of June 30, 2011. There is no lawful basis to reduce the bond amount for work that has not been completed as of June 30, 2011. By silently accepting Cotter's proposal, CDPHE

¹Community Involvement Plan available at: <http://www.cdphe.state.co.us/hm/cotter/lincolnparkcottercip.pdf>

exposes Colorado and the taxpayers of Colorado to an identified risk of \$1,390,492 and the prospect of delayed remediation and closure should Cotter default on these efforts.

2. Cotter is using a value for the CPI-U which advantageously gives it the smallest adjustment for inflation. While Cotter calls this value CPI-U in the body of its letter and in the accompanying table to the June 30 submission, it is the "Chained-CPI-U" number that they strategically chose to use. The appropriate CIP-U is 3.6%, not 3.3%. Cotter should not be allowed to use the Chained CPI-U since it is subject to revision for all dates after 2009². (See p. 4 online). The CDPHE's July 8, 2011 letter does not contain any indication that CDPHE verified the CPI-U Cotter chose to use. CDPHE's silent acceptance of the CPI-U results in a bonding adjustment that is 10% smaller than otherwise would and should have been.
3. The public has never had the opportunity to see, review, or comment on a June 30, 2011 Cotter letter seemingly negotiated between Cotter and CDPHE on the **burden rate** for any of the work being estimated by Cotter. This letter is referenced on page 3 of Cotter's June 30 Annual Surety Update (See Exh. 2). The absence of the posting of this letter on the CDPHE website and the lack of inclusion of this important document with Cotter's submission contributes to a significant loss of transparency to any and all parties who might wish or have cause to critically comment on this surety bond adjustment, including **burden rate**.
4. The 2010 Annual Environmental Report and ALARA Review dated July 15, 2011³ indicates that Cotter has based its annual 2010 ALARA emissions calculations on outmoded MILDOS software that relies on FORTRAN and Excel spreadsheets (See Appendix D, p. 3). Purchase of the modern modeling software is not included in the bonding estimates, and is not only required for current activities, it would be required should CDPHE or the federal government assume responsibility for the site.
5. No estimate is provided for the cost of replacing Cotter's use of inadequate pallet walkways into the tailings impoundments to conduct pH sampling. Modern boom sampling equipment that could take grab samples from the impoundment is available to provide a data-based analysis of both the current conditions and the necessary remedial actions. Because the facility currently lacks safe and modern sampling technology to address the unique conditions at this site, these costs must be calculated into the annual surety.
6. This entire 2011 surety update and adjustment is based upon and referenced to the December 2010 agreement between CDPHE and Cotter to set the RML surety at \$20.8 million. As a result, the mistakes made in the 2010 surety estimate still remain uncorrected by CDPHE. CCAT's constructive, legitimate comments in November 2010 were simply ignored. CCAT has received no formal response to those comments from CDPHE, although it appears that CDPHE worked with Cotter to reach a bilateral agreement that excluded local residents and other interested persons. The public has no way of knowing what comments were received on the surety by CDPHE in 2010, as none were posted as is the general practice by CDPHE when soliciting public

² Chained CPI-U information available at <http://www.bls.gov/news.release/pdf/cpi.pdf>

³ 2010 Environmental Report and ALARA Review, Appendix D, available at <http://www.cdphe.state.co.us/hm/cotter/letterfromcotter/2010perfrpt/index.htm>

opinion on department decisions (e.g. Proposed Groundwater Guidance public comments were posted in 2010)⁴.

At the March 2011 CAG meeting, CDPHE responded to CCAT questions by asserting that it was too late to correct mistakes brought to CDPHE's attention in November 2010 CCAT Comments, though that was the comment deadline imposed by CDPHE. We were assured that the Radiation Management Unit would address these mistakes and errors in the next review of June 30, 2011. Because it appears that the old mistakes are being brought forward without further scrutiny, CCAT incorporates by reference all previous comments regarding the legitimacy, appropriateness, accuracy, and correctness of the current \$20.8 million surety bond basis from which Cotter is making 2011 adjustments. The most significant errors in terms of surety bond underestimation were:

- a. None of these estimates are based upon an up to date, complete, vetted, reviewed, and approved Decommissioning and Reclamation Plan that takes into consideration all of the new conditions discovered since the last Plan was approved, the latest site data, contamination plumes, and etc. We assert this mill is being dismantled and reclaimed without an approved Revised Decommissioning and Reclamation Plan or schedule. Hence the surety bond is at risk and most likely significantly underestimated;
- b. CDPHE inappropriately and incorrectly apportioned 42% of the total surety bond estimate to the RAP and 52% to RML sureties based upon total estimated "capital cost" percentages, when those percentages as calculated from the estimates CDPHE provided in 2010 would dictate 22% to RAP and 78% to RML, thus underestimating the RML surety by almost \$9 million. The incorrectness and inappropriateness of the percentages CDPHE used in 2010 is further borne out by the fact that the 2009 surety bond percentages between RAP and RML were 15% to RAP and 85% to RML. CDPHE has yet to explain, after numerous requests to do so, the rationale or legitimacy of the 42% and 58%. This apportionment of percentage to the RAP and RML is not borne out by past history, nor is it borne out by CDPHE's 2010 estimates. We still firmly believe the \$20.8 million RML surety is underestimated through this apportionment by at least \$9 million because of the purposeful misallocation of that \$9 million to the RAP surety estimate;

CCAT continues to believe that separation of the bond into two sections, RML bond and RAP bond is not supportable under Colorado law. All components of the bond must be reviewed under the processes established by the Radiation Control Act and implementing regulations. The RCA makes no distinction between any amounts required to be posted through other requirements such as a federal court consent decree. To the contrary, the RCA and regulations unambiguously require the RML bond to be sufficient to cover all clean up necessary at the site for the purpose of transfer to either the Department of Energy or Colorado "without ongoing maintenance." 6 CCR 1007-1 Part 18 Criteria 1. It is of no consequence to the RCA bond calculation that the closed-door RAP negotiations have proven ineffective, are still unresolved, or that CDPHE/Cotter may be discussing plans to transfer the site to Colorado or the federal government in a still-contaminated condition.

⁴ Groundwater Guidance Public Comments available at <http://www.cdphe.state.co.us/hm/nfalowthreat.htm>

Instead of providing any public process or review with respect to the RAP amount, CDPHE has blocked public involvement and transparency by actively opposing CCAT involvement in setting the RAP surety. The use of the RAP to set a portion of the RCA surety ignores the statutory right of participation strengthened in 2010. Importantly, the RAP involves costs necessary to clean up the contamination that has plagued the site for decades where the previous and ongoing expenditure of millions of dollars has proven unsuccessful in both characterizing the contamination and effecting clean-up. CDPHE must require Cotter to re-submit a complete surety report which includes a discussion of the bond amounts needed to conduct cleanup, including past, present and future expenditures involved in the RAP or federal consent decree. At minimum, CDPHE must incorporate the costs associated with the RAP in any final decision approving Cotter's 2011 bond review.

- c. To bring this \$9 million error further into question, it mysteriously disappeared from the second round of CDPHE estimates for the RAP surety in October 2010. The work required of Cotter, from the initial April 2010 estimate to the October estimate, was basically unchanged, and even included the addition of a \$1.7 million evaporation pond not included in the April 2010 RAP surety estimates. This only serves to further bring the 42%-58% allocation into question;
- d. The failure of Cotter to use inflation-adjusted discount rates in calculating present values resulting in underestimation of Cotter's own estimates;
- e. The failure to properly account for future value of periodic costs in estimates;
- f. CDPHE's use of a 90% confidence interval adjustment to achieve \$20.8 million for the RML surety is unsupportable, despite CDPHE's claim that it is a "realistic, but conservative" estimate. A conservative estimate is one that has been overestimated and one that has erred on the side of caution. One intentionally overestimates uncertain risks in order to be confident they are not being underestimated. CDPHE chose to eliminate that element of conservatism, and effectively removed all contingency from CDPHE's estimates (\$4 million);
- g. Calculating contingency as 25% of capital costs rather than 25% of all costs;
- h. We have numerous other issues from our November 2010 Comments which went unaddressed and refer you to those comments for completeness, and incorporate them here by reference.

Third, conditions at the facility have deteriorated over the past year. No attempt has been made to measure radon flux, even though the tailings cells are exposed. TCE groundwater contamination has been confirmed, but no estimate of remediation costs has been produced, no plans have been made to contain the groundwater plume, and no corrective action program has been adopted. Instead, Cotter proposes passive monitoring in order to avoid the cost of deploying a Geoprobe rig, which would provide more certain and more immediate confirmation of the source, extent, health impacts, and costs involved with the newest groundwater plume. Because Cotter has asserted its unwillingness to take reasonable steps to characterize the problem in favor of the low cost option, CDPHE should rely on the

bond to hire its own contractor and direct the work. Unfortunately, CDPHE has let the financial surety languish and the current surety instruments may not be sufficient to address even this new groundwater plume, which alone could require many tens of millions of dollars in characterization and remedial activities. The range of potential costs must be documented in a surety estimate that is publicly noticed and made reviewable for public comment as part of Cotter's 2011 annual update and report.

Fourth, the required reclamation, decommissioning and closure plans have not been adopted, leaving the estimate as an unsupportable negotiated agreement between CDPHE and Cotter instead of realistic estimates. Further compounding the problem, CDPHE has allowed Cotter to rely on Task Specific Work Plans that "were developed and utilized when warranted for non-routine activities and hazard mitigation/reduction tasks that are not covered by procedures or work plans." (*2010 Environmental and Occupational Performance Report, ALARA Review and Annual Report on Remedial Action Plan Activities*, at xii).⁵ This *ad hoc* approach is confirmed by the ALARA Audit, "The audit plan includes remarks that document control of procedures is poor. This item is essentially unchanged from previous two years." (*Id.*, at *ALARA Independent Audit*, Appendix B, p. 1-3). The poor adherence to plans and procedures by Cotter and CDPHE is confirmed by the NRC's April 2010 critique of CDPHE's ongoing failure to comply with administrative procedures.

In some cases, the review documents did not include a decision of record, final evaluation report, or similar documentation with the final conclusions of the staff's evaluation of the proposed action. ...The review team discussed with Program managers and staff the importance of documenting final decisions to instill public confidence in that decision and to support requests for technical assistance from Federal or other State agencies.

(NRC, *Integrated Materials Performance Evaluation Program Review of the Colorado Agreement State Program, April 12-16, 2010*, ML101790349. See section 4.4.4, p. 17).⁶

Fifth, Cotter has made no attempt to estimate the cost of removing the tailings and placing them in a newly constructed and competent tailings disposal cell. This is not only reasonably foreseeable, it is the method used to decommission and close each of the uranium mills in Colorado under UMTRCA Title I. UMTRCA Title II is not meant to provide private parties a less stringent or slower remediation option, as has become the practice of CDPHE at Durita, UraVan, and Cotter. After twenty-seven years as a Superfund Site characterized by inactivity and intermittent operations at the Cañon City mill, it is now clear that keeping the mill barely operative with the excuse of incremental/step-wise decommissioning, and a license still in force that should have been terminated in March 2009 after Cotter had failed to conduct any principal activities for a period of 24 months as specified by regulations, has become a *de facto* cost avoidance strategy adopted by both Cotter and CDPHE. The criteria for disposal explicitly recognizes that disposal is a long-term inquiry that is likely to include sizable sums for excavating, transporting, and placing the tailings into a competent disposal site.

Criterion 1C. In the selection of disposal sites, primary emphasis must be given to isolation of tailings or wastes, a matter having long-term impacts, as opposed to consideration only of short-term convenience or benefits, such as minimization of transportation or land acquisition costs.

⁵ Cotter 2010 Environmental Report available at

<http://www.cdphe.state.co.us/hm/cotter/letterfromcotter/2010perfrpt/2010annualrpt1to4.pdf>

⁶ NRC 2010 Colorado IMPEP ML101790349 available at http://nrc-stp.ornl.gov/reviews/10co_imp.pdf.

While isolation of tailings will be a function of both site and engineering design, overriding consideration must be given to siting features given the long-term nature of the tailings hazards.

Criterion 1D. Tailings should be disposed of in a manner that no active maintenance is required to preserve conditions of the site.

Criterion 5A. (1) The primary ground-water protection standard is a design standard for surface impoundments used to manage byproduct material. Unless exempted under paragraph 5A(3) of this criterion, surface impoundments (except for an existing portion) shall have a liner that is designed, constructed, and installed to prevent any migration of wastes out of the impoundment to the adjacent subsurface soil, ground water, or surface water at any time during the active life (including the closure period) of the impoundment. The liner may be constructed of materials that may allow wastes to migrate into the liner (but not into the adjacent subsurface soil, ground water, or surface water) during the active life of the facility, provided that impoundment closure includes removal or decontamination of all waste residues, contaminated containment system components (liners, etc.) contaminated subsoils, and structures and equipment contaminated with waste and leachate. For impoundments that will be closed with the liner material left in place, the liner must be constructed of materials that can prevent wastes from migrating into the liner during the active life of the facility.

6 CCR 1007-1, Part 18, Appendix A.

Other comparable uranium milling sites have required clean up expenses in the hundreds of millions, such as the amount required to address the still-licensed Uravan Mill. (See Uravan 2010 Five Year Review)⁷. The Cañon City estimates must be done in context of the CDPHE track record at other uranium mill sites which involved inadequate monitoring by CDPHE and massively underestimated costs. (See *Id.* and See Exh. 4- NRC *Program Evaluation of the Effectiveness of the Uranium Recovery Program*, ML062680160). The current handling of the planning and monitoring requirements at Cotter is strikingly similar to CDPHE actions at Durita, where “CDPHE did not provide adequate justification for allowing the licensee to terminate the groundwater monitoring program prior to license termination” despite it being both necessary and appropriate to monitor groundwater at the site based on potential adverse impacts on public health and safety and the environment in an area of Colorado much less populated than Cañon City. See *Id.* at p. 4 (3). A similar pattern was identified when Colorado attempted to achieve license termination at the Maybell site. See *Id.* at p. 5.

Sixth, there has been no attempt to estimate the long term care costs. Despite repeated opportunities to address this problem, Cotter and CDPHE have apparently agreed to rely on the statutory minimum. This unlawful approach allows CDPHE to avoid the troubling possibility that Colorado may be required to accept the mill for long term care due to the dumping of a wide range of materials into the impoundments. CCAT is concerned that past approvals have allowed mixed waste disposal that could prevent transfer to the federal government under current law. The distinct possibility that Colorado may already have become liable for long term care is an important factor for estimating the long term care fund. Instead, the CDPHE has ignored this problem by failing to require the closure and reclamation planning and surety estimates that would fully disclose the full extent of the problem, the alternative means for achieving final closure, and the costs that would be involved in long term care of the tailings – wherever they may be sent for final internment.

⁷ EPA Uravan 5-Year Review available at <http://www.epa.gov/superfund/sites/fiveyear/f2010080003616.pdf>

Last, the current surety estimates misconstrue the regulatory status. Despite a pattern of CDPHE accepting whatever undocumented “plans” Cotter announces regarding future operations, the surety estimates must be updated to confirm that this facility must be decommissioned immediately. “No principal activities have been conducted for a period of 24 months” at the Cotter facility. (6 CCR 1007-1 § 3.16.3.2(3)). Yet, no notice has been provided by Cotter. (*Id.* at 3.16.3.2). No updated decommissioning plan has been submitted. (*Id.* at 3.16.3.3). CDPHE has made no determination that an alternate schedule may be followed. (*Id.* at 3.16.3.6). In short, Cotter’s unwillingness to satisfy the requirements of Colorado law, despite CDPHE’s inaction to date, provides the circumstances where Colorado should take all necessary steps to begin drawing on the bond to directly pay CDPHE-directed contractors to prepare and implement the necessary plans in a manner that timely satisfies the requirements of state and federal law.

We expect and look forward this time to a formal response from your office to these comments as well as all of the previously unaddressed comments on this issue that we have, with integrity and competence, provided to your office.

Sincerely,

FOR THE CCAT BOARD OF DIRECTORS

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cc: Christopher E. Urbina, Executive Director, CDPHE
Martha E. Rudolph, Director of Environmental Programs, CDPHE

Former Representative Buffie McFadyen
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Tom Massey, Colorado State Representative
Ken Kester, Former Colorado State Senator
Bob Bacon, Colorado State Senator
Ted Harvey, Colorado State Senator
Joyce Foster, Colorado State Senator

Colorado Governor John Hickenlooper

State Board of Health