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CO Denver County District Court 2nd JD
Filing Date: Mar 30 2011 3:39PM MDT
Filing ID: 36771221
Review Clerk: Rebecca A Hendricks

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 2nd Judicial District Denver City & County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202 Phone Number: (720) 865-8301	
PLAINTIFF: Sheep Mountain Alliance. v. **DEFENDANTS**: Colorado Department of Public Health and Environment; Jennifer Opila, in her official capacity as the person issuing a license on behalf of Colorado Department of Public Health and Environment; and, **INDISPENSIBLE PARTY**: Energy Fuels Resources	▲**COURT USE ONLY**▲
ATTORNEYS FOR PLAINTIFF: Attorneys: Travis Stills, #27509 Energy Minerals Law Center Address: 1911 Main Avenue, Suite 238 Durango, Colorado 81301 Phone Number: (970)375-9231 Fax Number: (970)382-0316 Email: stills@frontier.net Attorneys: Jeffrey C. Parsons, #30210 Roger Flynn, #21078 Western Mining Action Project Address: P.O. Box 349, Lyons, CO 80540 Phone Number: (303) 823-5738 Fax Number: (303) 823-5732 Email: wmap@igc.org	Case Number: 2011CV861 Courtroom: 203

FIRST AMENDED COMPLAINT

Plaintiff, Sheep Mountain Alliance, by and through their undersigned legal counsel, hereby states and avers the following as its First Amended Complaint for relief against the Defendants, Colorado Department of Public Health and Environment and Jennifer Opila, acting in her official capacity on behalf of Colorado Department of Public Health and Environment.

1. This lawsuit seeks judicial review and invalidation of the Defendant Colorado Department of Public Health and Environment ("CDPHE") issuance of Radioactive Materials License No. Colo. 1170-01, Amendment Number: 00 ("License") to Energy Fuels Resources ("Energy Fuels) on January 5, 2011. The License, issued with conditions, allows Energy Fuels to transfer, receive, possess, and use radioactive materials at a uranium mill in the Paradox Valley of western Colorado. The License allows Energy Fuels to construct and operate a uranium mill and an "11e(2) byproduct" waste disposal cell for the permanent impoundment of the tailings and the eventual interment of the radioactive remains of the mill itself.

2. It has been nearly thirty years since a similar license was issued in Colorado. Although many of the other valleys in western Colorado have been contaminated by uranium milling and the permanent internment of uranium tailings, uranium milling has never been permitted in the Paradox Valley. The Paradox Valley is an area of Montrose County that is zoned to protect its agricultural characteristics.

3. The regional economy has managed to endure several disruptive and unsustainable boom/bust cycles of the uranium industry. Uranium mills provide hazardous and intermittent employment based on widely fluctuating international commodity markets. When the License was issued, Energy Fuels had not obtained financing to design or construct the mill. Energy Fuels has publicly announced plans to pursue leads in Hong Kong and China which might produce investors and customers for its milling proposal. Energy Fuels has entered an information-sharing and royalty agreement with Russia's state-owned uranium company. Publicly available financial reports indicate that Energy Fuels does not have the financial capacity to design, build, operate, and decommission the structures and activities approved in the License.

4. This lawsuit is brought to invalidate the License, which was issued without compliance with the substantive and procedural requirements of Colorado Radiation Control Act and the federal Atomic Energy Act ("AEA"), both of which are implemented by the CDPHE. These requirements are designed to ensure the decisionmaking process is open to informed public involvement and rigorous procedural requirements of a formal adjudication before a radioactive materials license may be issued for purposes of uranium milling and maintaining the radioactive tailings until the property is deeded to either Colorado or the federal Department of Energy ("DOE") for perpetual care. Failure to properly adhere to AEA requirements could prohibit transfer of the tailings to DOE and result in Colorado taking title to the remaining tailings for long term care.

5. The issuance of a Radioactive Materials License is a final agency action based on the culmination of a statutorily required quasi-adjudicatory administrative proceeding that is subject to judicial review. Formal adjudication must take place within the statutory time limit for CDPHE to act on a license. Defendants have prohibited any person, except the Licensee, from filing an administrative appeal. Instead, CDPHE has invited Energy Fuels to seek further administrative review of the License on or before March 4, 2011. Because Colorado law limits the amount of time a permit application may be under review within the quasi-adjudicatory licensing procedure for uranium mill proposals, the remedy in this case is a judgment that

invalidates the License and a remand with directions that Defendants deny the application without prejudice.

PARTIES, JURISDICTION AND VENUE

6. Plaintiff SHEEP MOUNTAIN ALLIANCE is a grassroots citizen organization dedicated to the preservation of the natural environment in the Telluride Region and Southwest Colorado, including the remote West End of Montrose County. The proposed Facility would be built in the Paradox Valley, which is located at the far end of Montrose County and equal driving distance (approximately 70 miles) from the towns Telluride and Montrose. The Facility is sited 7 miles upgradient from the town of Bedrock, Colorado and the Dolores River, which runs across the Paradox Valley. Many of Plaintiff's members live downwind of the proposed facility.

7. In order to fulfill its organizational mission, Sheep Mountain Alliance works to promote and protect the health of regional ecosystems, wildlife habitats, watersheds, a sense of community, quality of life, and a diverse and sustainable local economy. Plaintiff's organizational interests and ability to fulfill its organizational mission are adversely impacted by and aggrieved by the issuance of the License without compliance with substantive and procedural requirements.

8. Plaintiff has members who live and own property in the Paradox Valley whose property interests, interests in avoiding impacts of toxic and radioactive emissions, and interest in the existing agricultural character of the Paradox Valley have been adversely impacted and will be adversely impacted by the issuance of the challenged License. These members regularly use and enjoy the benefits provided by the unique characteristics of the Paradox Valley.

9. The Paradox Valley is part of a public and private land complex which supports a variety of activities, including tourism, recreation, enjoyment of wildlife, and agriculture which are enjoyed by Plaintiff's members. Economic activity regarding uranium mining and milling has not played a significant role in the region's economy over the past thirty years, except the economic activity generated by several uranium mill closure and decontamination projects carried out by the federal Department of Energy's Office of Legacy Management. Uranium mining has sporadically occurred on the canyon walls and the mesas surrounding the Paradox Valley.

10. Unlike the San Miguel River Valley where Nucla and Natarita are located, there has never been a uranium mill in the Paradox Valley. The License concerns a parcel of land that is not remote from the members who live in the Paradox Valley. The License is not sufficiently protective of the use and enjoyment of the Paradox Valley by Plaintiff's members. Plaintiff's interests have been adversely impacted and aggrieved and will continue to be adversely affected by the issuance of the challenged License.

11. Plaintiff, through its staff and members, have exhausted the available administrative remedies and participated extensively in all aspects of the license proceedings by making written and oral statements and submitting detailed technical reports to address regulatory requirements

and the deficiencies in the application materials. Granting Plaintiff's request for relief would remedy harms to the legally protected interests of Plaintiff and Plaintiff's members which flow from Defendants' unlawful conduct during the proceedings below and in the issuance of the License itself.

12. Defendant COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT ("CDPHE") is the Colorado regulatory Department with jurisdiction and authority to implement the Colorado Radiation Control Act, C.R.S. §§ 25-11-101, *et seq.* The Colorado Radiation Control Act is the statutory mechanism through which the State of Colorado implements the federal Atomic Energy Act, which sets forth the regulatory requirements for the processing of radioactive materials, and the disposal of 11e(2) byproduct materials, including those activities proposed by Energy Fuels.

13. On behalf of the CDPHE, Defendant JENNIFER OPILA approved the issuance of License No. Colo. 1170-1 on January 5, 2011. On information and belief, Ms. Opila was acting upon authority delegated from Martha Rudolph, CDPHE Executive Director. Ms. Rudolph was Executive Director on January 5, 2011.

14. ENERGY FUELS RESOURCES CORPORATION ("Energy Fuels"), a wholly-owned subsidiary of Energy Fuels Inc., a Canadian Corporation, is the entity that applied for and received the License. On information and belief, Energy Fuels Resources relies entirely on its Canadian parent to fund its operations. On information and belief, Energy Fuels Resources has not generated any income from its uranium mines during the previous five years. None of Energy Fuels Resources mines are currently in operation. The request for approval to vent radon from Energy Fuels' Energy Queen mine has been denied by the Environmental Protection Agency. Energy Fuels' Whirlwind Mine has been allowed to fill with water after repeated water quality violations. On information and belief, at the time the License was issued Energy Fuels Resources has not obtained the financing required to fully design and engineer the mill and associated tailings facilities. On information and belief, at the time the License was issued, Energy Fuels Resources had not obtained the financing required to build the mill or associated tailings facilities. On information and belief, at the time the License was issued, Energy Fuels Resources had not obtained the financing required to decommission or close the mill and associated tailings facilities. Energy Fuels' financial statements are publicly available through the System for Electronic Document Analysis and Retrieval (SEDAR.com).

15. This Court has jurisdiction in this case pursuant to the Colorado Administrative Procedure Act, C.R.S. § 24-4-106. The Atomic Energy Act requires that licensing decisions be subjected to judicial review. 42 U.S.C. § 2021(3)(A)(3). The Radiation Control Act requires a quasi-adjuratory administrative proceeding be completed before the issuance of a radioactive materials license involving uranium milling and tailings disposal. C.R.S.§ 25-11-203(1)(b)(1). All administrative remedies available to Plaintiff have been exhausted.

16. Venue is proper in this Court pursuant to C.R.C.P. 98(b), as this action is brought against public entities whose offices are in Denver, and the decisions and actions at issue in this case occurred in the City and County of Denver. (*See* C.R.S. § 24-4-106(4)("The residence of a state

agency for the purposes of this subsection (4) shall be deemed to be the city and county of Denver.").

STATUTORY AND REGULATORY FRAMEWORK

17. Colorado's authority to license uranium mills and the radioactive tailings is derived from the Agreement State Program of the federal Atomic Energy Act. 42 U.S.C. §§ 2011 *et seq.*. The State implementation of the program is by regulation (C.C.R. 1007-1) and statute. C.R.S. § 25-11-101, et seq.(Radiation Control Act ("RCA")). The state must adhere to the Agreement State Agreement (as amended August 1982) any carry out its program in a manner which must be at least as stringent as the federal program. 42 U.S.C. § 2021. Colorado laws implementing the Agreement State program put CDPHE in charge of carrying out regulation of radioactive materials in Colorado pursuant to the federally delegated "Agreement State" program.

18. A state's failure to conduct its licensing activities in compliance with the AEA is grounds for revocation of such state's "Agreement State" program. 42 U.S.C. 2021(o). A state may adopt requirements that are more protective than the AEA.

19. Tailings and other wastes generated while milling uranium ore into yellowcake are referred to as "11e(2) byproduct" based on the definition from the Atomic Energy Act, which is codified at 42 U.S.C. 2014 (e)(2). *See also* C.R.S. § 25-11-201(1)(adopting federal definition). A key objective of the regulation of milling and 11e(2) byproduct is to prevent environmental contamination and to reduce on and off site release and exposure to effluents and radiation to levels that meet the "as low as reasonably achievable" ("ALARA") standard as it applies to licensing of uranium milling and tailings disposal. *See* 6 CCR 1007-1 Part 18.

20. "The greatest potential sources of offsite radiation exposure (aside from radon exposure) are dusting from dry surfaces of the tailings disposal area not covered by tailings solution and emissions from yellowcake drying and packaging operations. During operations and prior to closure, radiation doses from radon emissions from surface impoundments of uranium or thorium byproduct materials must be kept as low as is reasonably achievable." CCR 1007-1 Part 18 Appendix A Criterion 8

21. The minimum procedural requirements which all Agreement States must follow when conducing a licensing proceeding involving uranium milling and tailings/11e(2) byproduct material are set forth in AEA, and include the following:

> In the licensing and regulation of byproduct material, as defined in [42 U.S.C. 2014 (e)(2)], 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; [...]

42 U.S.C. 2021(o).

22. Colorado's quasi-adjudicatory administrative procedure for reviewing an application for a new milling and 11e(2) byproduct material license must take place within the a statutorily prescribed period for staff review of the application and publication of a final licensing decision. Any "affected party" can seek judicial review after the decision document is published and the license is issued.

23. Colorado may not lawfully issue a new milling and11e(2)byproduct material license until a formal hearing with the opportunity for cross examination has been conducted. *See* 42 U.S.C. § 2021(o) *accord* C.R.S.§ 25-11-203(1)(b)(1)(requiring licenses be issued "in accordance with sections 24-4-104 and 24-4-105, C.R.S.")

24. The Colorado regulations implementing the RCA/AEA require that a Rule 105 adjudication be provided before a license may be issued:

> There shall be an opportunity for public hearings to be held in accordance with the procedures in 24-4-104 <u>and</u> 24-4-105, C.R.S. 1973, as amended, and RH 18.6, 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 RH 1.4.

6 CCR 1007-1 § 18.6.1(emphasis supplied).

25. The notice of opportunity for a Rule 105 public hearing must describe the availability of a draft license for review by the interested and affected persons who may seek party status at the Rule 105 public hearing. 6 CCR 1007-1 § 18.6.2.1.4.

26. The RCA does not allow incremental review and approval of a license application. The RCA requires a license application be approved or denied "as a whole." C.R.S. § 25-11-203(3)(c)(I).

27. The RCA prohibits the commencement of formal proceedings on the license until such time as the Department certifies the application "substantially complete." C.R.S. § 25-2-3(2)(b)(I).

28. The RCA and regulations implementing the RCA are designed to ensure sufficient time for RCA/AEA mandated formal hearings by requiring that where an applicant submits to the Department an application that does not clearly and completely demonstrate how objectives and

requirements of Part 18 of the state radioactive materials regulations are met, that failure "shall be grounds for refusing to accept an application." 6 C.C.R. 1007-1 §18.3.

29. The license must be issued, if at all, within a specific amount of time. C.R.S. § 25-11-203(2)(c)(V)(C). The deadline for issuing the final license is the present matter is 270 days from the publication of the county comments on the Environmental Analysis submitted by the applicant. *Id.* A draft license must be issued to form the basis of public involvement and Rule 105 quasi-adjudicatory hearings during the statutory review period.

30. The RCA/AEA requirement that a Rule 105 quasi-adjudicatory hearing with cross examination opportunities be conducted within the statutory deadline was reviewed and left undisturbed when the RCA was amended by HB10-1348.

31. A radioactive materials license may not be issued until all procedural and substantive requirements of the AEA, RCA, implementing regulations, federal standards, and Agreement State Agreements are satisfied.

32. Where the RCA/AEA requirements and the APA may conflict, the APA does not eliminate the requirement of the more specific statutory scheme. C.R.S. § 24-4-107.

33. A license proceedings regarding a tailings facility may not be segmented temporally. All likely expansions must be analyzed and considered in the initial license proceeding before a license may be issued.

> The specifications shall be developed considering the expected full capacity of tailings or waste systems and the lifetime of mill operations. Where later expansions of systems or operations may be likely (for example, where large quantities of ore now marginally uneconomical may be stockpiled), the amenability of the disposal system to accommodate increased capacities without degradation in long-term stability and other performance factors shall be evaluated.

C.C.R. 1007-1 § Appendix A.

34. The permissible scope of CDPHE analysis of a license application concerning uranium milling and tailings disposal is not limited.

> All site-specific licensing decisions based on the criteria in this Appendix or alternatives proposed by licensees or applicants will take into account the risk to the public health and safety and the environment with due consideration to the economic costs involved and any other factors the Department determines to be appropriate.

6 C.C.R. 1007-1 Appendix A (emphasis supplied). The Department's exercise of discretion to set and limit the scope of the analysis during consideration of a license involving uranium milling and tailings disposal must be articulated in judicially reviewable documents entered into the Administrative Record. C.R.S. §§ 24-4-105, 106

35. The need for Colorado's implementation of the AEA Agreement State Program to meet or exceed the requirements of federal law is explicitly recognized in the applicable regulations, which requires the RMU to prepare an Environmental Impact Analysis ("EIA") which is the analog to the Environmental Impact Statement used by the U.S. Nuclear Regulatory Commission (NRC) to satisfy the procedural requirements of the National Environmental Policy Act. *See* 6 CCR 1007-1 at § 18.4.1.

36. RCA regulations require that the EIA "shall be available to the public and for review by the U.S. Nuclear Regulatory Commission at the time of public notice of hearing." *Id.*

37. The establishment of cost estimates for decommissioning and long-term care and a fully executed financial surety instrument to cover these estimates is a condition precedent for application approval and issuance of the requested license. C.C.R. 1007-1 § 3.9.5.1.

38. In addition to the regulations in Part 3 that apply to radioactive materials generally, the regulations specific to milling and tailings disposal confirm that financial assurance be established as a condition precedent to license issuance:

> Prior to issuance of the license, the applicant shall (1) establish financial assurance arrangements, as provided by RH 3.9.5, to ensure decontamination and decommissioning of the facility and (2) provide a fund adequate to cover the payment of the cost for long-term care and monitoring as provided by RH 3.9.5.10.

C.C.R. 1007-1 § 18.5.

39. In turn, section 3.9.5.4 lists the acceptable methods for establishing financial assurance. All forms of payment contemplate prepayment. Id. at 3.9.5.4(2). Section 3.9.5 does not contemplate the establishment of financial assurance based on promises to pay on some future date. "Self-guarantee" schemes are explicitly prohibited for uranium milling licenses. Id. at 3.9.5.4(3)(c).

40. "The value of the financial assurance warranty must not be dependent upon the success, profitability, or continued operation of the licensed business or operation." *Id* at § 3.9.5.4(8).

41. Where financial assurance is concerned, the Agreement State Agreement (as amended August 1982) explicitly requires CDPHE to adhere to federal standards established by the Nuclear Regulatory Commission ("Commission" or "NRC"). The 1982 Amendment states, in part: "B. Such State surety or other financial requirements must be sufficient to ensure compliance with those standards established by the Commission pertaining to bonds, sureties, and financial arrangements to ensure adequate reclamation and long term management of such byproduct material and its disposal site." These standards are found in federal statute, regulations, and Guidance Documents prepared by the U.S. Nuclear Regulatory Commission. Defendants are bound by the Commission's financial surety standards set out in NUREG 1757.

42. NUREG 1757 provides the accepted federal standards and methodology for establishing financial surety cost estimates. NUREG 1757 Vol 3 at 1-1 (guidance "applies to financial assurance requirements for licensees under 10 CFR Parts 30, 40, 70, and 72, with the exception of licensees subject to criteria 9 and 10 of Appendix A to Part 40 (uranium recovery facilities)". Because Colorado regulations do not rely on the NRC-specific surety requirements of Criteria 9 and 10 of 10 C.F.R. Part 40 Appendix A, NUREG 1757 provides applicable federal standards for the financial assurance requirements in Colorado. *Compare* C.C.R. 1007-1 Part 18, Appendix A Criteria 9 (transfer of ownership) and 10 (hazardous constituents).

43. The standards in NUREG 1757 are consistent with Colorado statutes and regulations.

44. The financial surety requirements are included in the License at paragraph 23. *citing* 6 C.C.R. 1007-1 § 3.9.5.

45. The financial surety must be established before the license issues and must remain in place during the life of the facility. *See also*: 6 C.C.R. 1007-1 § 3.9.5.8 ("With the approval of the Department, a licensee may reduce the amount of a decommissioning warranty as decommissioning activities are completed in accordance with an approved decommissioning plan and/or to reflect current site conditions and license authorizations.).

46. In 2010, the Colorado Legislature examined existing and proposed uranium milling activities in Colorado. In response, the Legislature strengthened the annual reporting and review procedures for financial surety by adopting HB10-1348. HB10-1348 was signed into law on June 8, 2010. The plain language and intent of HB10-1348 was to immediately correct serious problems with Colorado's implementation of the financial surety requirements that had been identified by the NRC in 2009. To this end, the legislature included a provision in the bill to specifically make HB 10-1348 effective immediately upon signature of the Governor, rather than the typical July 1 date marking the start of the State's new fiscal year.

47. Uranium mills in Colorado do not enjoy "reasonable investment-based expectations" enjoyed by purely private businesses. Department of Health v. The Mill, 887 P.2d 993 (Colo. 1994)("Given this regulatory environment, it is unreasonable for The Mill to claim it had no notice of the significant risk of further regulation of the site.").

48. The amount of the financial surety must be based on Department-approved cost estimates. CCR 1007-1§ 3.9.5.5.

49. For purposes of easy verification, the U.S. Nuclear Regulatory Commission standards set out in NUREG 1757 require the amount of surety be formalized in a document known as a Decommissioning Funding Plan.

> *Decommission Funding Plan (DFP).* A document that contains a site-specific cost estimate for decommissioning, describes the method for assuring funds for decommissioning, describes the means for adjusting both the cost estimate and funding level over the life of the

facility, and contains the certification of financial assurance and the signed originals of the financial instruments provided as financial assurance.

NUREG 1757 establishes that "A DFP outlines the work required to decommission a facility, provides a site-specific cost estimate for the decommissioning, and states that the funds necessary to complete the decommissioning have been obtained."

50. A current Decommissioning Funding Plan is also required by state regulation for all Radioactive Materials Licenses. C.C.R. 1007-1§ 3.9.6.

> This plan shall contain a cost estimate for decommissioning, as required in this section, including means for adjusting cost estimates and associated funding levels periodically over the life of the facility. Cost estimates must be adjusted at intervals not to exceed three years.

Id. at 3.9.6.4

51. The control of radioactive materials is achieved through the requirement that a license cannot be issued unless a lawful and current set of procedures, plans, and programs have been lawfully reviewed and approved. The plans and programs applicable to a uranium mill with a tailings disposal facility that are particularly relevant to this litigation include, but are not limited to, the following:

- Part 18, Appendix A: Criteria Relating To The Operation Of Mills And The Disposition Of The Tailings Or Wastes From These Operations.

- "Milling operations must be conducted so that all airborne effluent releases are reduced to levels as low as is reasonably achievable. The primary means of accomplishing this must be by means of emission controls." Appendix A at Criterion 8. "ALARA (acronym for "as low as is reasonably achievable") means making every reasonable effort to maintain exposures to radiation as far below the dose limits in this part as is practical consistent with the purpose for which the licensed activity is undertaken, taking into account the state of technology, the economics of improvements in relation to state of technology, the economics of improvements in relation to benefits to the public health and safety, and other societal and socioeconomic considerations, and in relation to utilization of nuclear energy and licensed materials in the public interest." 10 C.F.R. § 20.1003.

- "Decommissioning plan" means a written document that includes the licensee's planned procedures and activities for decommissioning of the facility or site. *Id.* § 1.1.2, see also §18.8.3(required contents of a decommissioning plan)

- "Reclamation plan", for the purposes of Criterion 6A of Appendix A of this Part 18, means the plan detailing activities to accomplish reclamation of the tailings or waste disposal area in accordance with the technical criteria of Appendix A of this Part.

The reclamation plan must include a schedule for reclamation milestones that are key to the completion of the final radon barrier including as appropriate, but not limited to, wind blown tailings retrieval and placement on the pile, interim stabilization (including dewatering or the removal of freestanding liquids and recontouring), and final radon barrier construction. (Reclamation of tailings must also be addressed in the closure plan; the detailed reclamation plan may be incorporated into the closure plan.) CCR 1007-1§ Appendix A

- "Closure plan" means the Department approved plan to accomplish closure. Id. at §2.

52. Federal guidance also describes the requirements of a Decommissioning Plan (DP):

Decommissioning Plan (DP): A detailed description of the activities that the licensee intends to use to assess the radiological status of its facility, to remove radioactivity attributable to licensed operations at its facility to levels that permit release of the site in accordance with NRC's regulations and termination of the license, and to demonstrate that the facility meets NRC's requirements for release. A DP typically consists of several interrelated components, including (1) site characterization information; (2) a remediation plan that has several components, including a description of remediation tasks, a health and safety plan, and a quality assurance plan; (3) site-specific cost estimates for the decommissioning; and (4) a final status survey plan.

NUREG 1757 Vol. 3 at xxi *citing* 10 CFR 30.36(g)(4).

53. Colorado's regulatory scheme requires that lawful closure, reclamation, and decommissioning plans be in place at all times so that reclamation of tailings impoundments may commence without delay whenever operations cease. 6 C.C.R. 1007-1 Part 18 Appendix A, Criterion 6A(1)("For impoundments containing uranium byproduct materials, the final radon barrier must be completed as expeditiously as practicable considering technological feasibility after the pile or impoundment ceases operation in accordance with a written, Department-approved reclamation plan.").

54. The costs associated with activities that must be carried out in accordance with approved plans for decommissioning, reclamation, closure, and corrective action programs must be accounted for in the decommissioning surety cost estimate and covered by a current surety instrument. C.R.S. §§ 25-11- 110(2)(a); 110(4); see also CCR 1007-1§ 3.9.5.5, §18.8.3.4.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

55. At issue in this case are Defendants' actions (and inactions) in failing to adequately maintain or follow legally-mandated procedures to properly determine whether to approve, deny, or approve with conditions, the issuance of a radioactive materials license. C.R.S. §§ 25-11- 203. These financial assurance and decommissioning planning requirements must be implemented by

Defendants in a manner at least as strict as federal law, consistent with Colorado law, and meeting standards set by the Nuclear Regulatory Commission ("NRC"). All aspects of Colorado's Agreement State Program must satisfy requirements of the Atomic Energy Act.

56. In early 2007, CDPHE began billing Energy Fuels for time spent working with Energy Fuels on preparation of the application for a Radioactive Materials License.

57. Before and during the formal license proceeding, Sheep Mountain Alliance and its members repeatedly requested that CDPHE adhere to the specific requirements that apply to the issuance of a radioactive materials license concerning uranium milling and tailings disposal.

58. In November 18, 2009, Energy Fuels submitted a multi-volume application requesting a radioactive materials license.

59. On December 15, 2009, Sheep Mountain Alliance sent a letter to CDPHE via the email posted by the agency as the method to send comments. The December 15 letter asserted several grounds that indicated the Application was not substantially complete.

60. On December 18, 2009, without considering Sheep Mountain Alliance's objections, CDPHE issued its determination that the Application was substantially complete. CDHPE's completeness determination initiated the quasi-adjudicatory licensing proceeding required by the RCA/AEA.

61. After the application was deemed substantially complete, CDPHE allowed Energy Fuels to supplement the application with many thousands of pages of amendments, revisions, and responses to CDPHE four requests for additional information which included formal determinations that the application lacked information or failed to address substantial regulatory requirements.

62. Despite repeated requests during the license proceedings, CDPHE refused to answer technical questions regarding the application that were asked by Sheep Mountain Alliance, its members, and the public.

63. Two opportunities for public comment were provided where official transcripts were made. During the meetings conducted in February and January 2010, CDPHE did not provide a detailed substantive presentation of the project or a draft license to review. The meetings relied on Energy Fuels to provide PowerPoint presentations of the project proposal.

64. Sheep Mountain Alliance, its members, and the public requested an opportunity to question Energy Fuels and CDPHE during the January and February 2010 meetings. CDPHE declined the requests and the questions went unanswered. Cross examination opportunities were not provided at the January and February 2010 meetings.

65. No other on-the-record meetings or hearings were held during the license proceeding. No opportunity to conduct on-the-record cross examination was provided during the licensing proceeding.

66. Montrose County elected used the RCA's $50,000 study provision and submitted its comments on April 20, 2010. A draft of a socioeconomic study was also provided by Montrose County, but it was never made final.

67. The submission of the Montrose County study on April 20, 2010 triggered the decision deadline. By statute, January 17, 2010 became the deadline to either issue a license or deny the application.

68. Sheep Mountain Alliance and its members requested notice of any and all hearing opportunities.

69. Notice of an opportunity to participate in a Rule 105 hearing was never provided during the license proceedings.

70. Sheep Mountain Alliance and its members provided comments at each phase of the license proceedings. During June 2010, Stratus Consulting, a consultant hired by Sheep Mountain Alliance, provided substantive technical comments regarding deficiencies in the application materials. CDPHE declined to address substantive issues raised by Stratus Consulting in June 2010.

71. By letter dated June 29, 2010, CDPHE demanded that Sheep Mountain Alliance provide all substantive comments on or before September 17, 2010. Sheep Mountain Aliance declined on the basis that numerous deficiencies identified by CDPHE still had not been addressed by Energy Fuels.

72. Many thousands of pages of amendments, updates, and revisions to the permit application were provided to CDPHE by Energy Fuels during the licensing proceeding up to and including November 2010. Much of the information involved determinations that the application lacked information or fully failed to address substantial issues. For example the application did not address effluent releases involving heavy metals.

73. Based on objections raised by Sheep Mountain Alliance and others, on October 7, 2010, CDPHE set a November 12, 2010 deadline for Energy Fuels to submit the final responses on hundreds of still-unanswered questions and incomplete portions of the application.

74. Sheep Mountain Alliance, its members, and its consultants were required to review and comment on thousands of pages of new information and reports submitted to CDPHE between November 8 and 12, 2010. The dates on the November 2010 documents do not correspond to the date CDPHE posted the documents to the CDPHE website. http://www.cdphe.state.co.us/hm/rad/rml/energyfuels/postap/10docs/index.htm.

75. In mid-December 2010, Sheep Mountain Alliance, its members, and consultants submitted additional substantive and technical comments to CDPHE. On information and belief, CDPHE did not consider these comments before making its licensing decision.

76. CDPHE conduct of the proceedings denied meaningful public participation opportunities of the type required by state and federal law.

77. The License was issued by CDPHE on January 5, 2011, nearly two weeks ahead of the January 17, 2011 statutory deadline by which a license could lawfully issue. The License was issued as a final license. The License document bears an official signature and includes no indication that it was issued as a draft license. All future administrative proceedings involve proposed amendments to the License. A copy of the License (and accompanying documents) was sent via Federal Express and received by Sheep Mountain Alliance on January 10, 2011.

78. CDPHE issued the License without first conducting a Rule 105 hearing.

79. CDPHE issued the License without first making the EIA available to the public and the NRC for review and comment.

80. The License Decision states that the License issued on January 5, 2010 was not a final license. The Decision Analysis "assumes" a final license will be issued in March 2010, three months after the statutory deadline. The Decision Analysis provides no basis on which a license may be issued as draft during the license period only to be finalized at some date outside of the statutory period. Colorado law does not allow extension of the statutory period for conducting a quasi-adjudicatory licensing proceeding.

81. Before the License was signed and issued on January 5, 2010, financial surety was not established. Instead, the License sets out a schedule for posting the bond over a number of months.

82. The EIA did not analyze likely expansions of the mill, and such analysis is not available to inform the public, NRC, and other agencies with regulatory power over the facility.

83. Before, during, and after the licensing proceedings, Energy Fuels spokespersons have announced the intent to expand the mill to 1000 tons per day, which is 66% of the capacity of the 1500 ton per day equipment described in the application materials. After the license was issued, Energy Fuels spokesperson George Glasier announced that Energy Fuels still plans to operate at the 1000 ton per day design capacity of the mill. The License was issued without analyzing the full impact of Energy Fuels' plans to expand operation of the proposed facility to meet the capacity of the equipment.

84. CDPHE issued the License based on the determination that the licensee will be able to provide surety at some future date. This determination is contrary to state law and federal standards regarding surety.

85. The License Decision does not present a lawful cost estimate on which to set the financial surety amount at $11,898,480.

86. The financial surety amount does not conform with the federal standards set out in NUREG 1757 that require the amount of the cost estimate be increased by a contingency factor of at least 25 percent added to the sum of all estimated costs to account for uncertainty.

87. During the 1980s and 1990s, an intense state and federally funded clean-up effort was carried out under Title I of the Uranium Mill Tailings Radiation Control Act (UMTRCA) for uranium mills throughout Colorado and the United States. Full cost accounting for the extensive clean up conducted at these multiple sites under this program is difficult to obtain. On information and belief, the costs of clean-up and ongoing monitoring and maintenance at the other Colorado mills has ranged between $50 million and $500 million per facility. Excavation and re-placement of tailings into a new repository before closure was the method used at all other uranium milling facilities in Colorado. Removing radionuclides and heavy metals from contaminated groundwater is a difficult and expensive process.

88. The financial surety cost estimates did not contain an estimate for long term care costs. The $827,596 long term care fund that is mandated by License at ¶25(A)(ii) is based on the statutory minimum amount, adjusted for inflation. On information and belief, the $827,596 has not been placed in a long term care fund. By contrast, state regulation confirms that the long term care fund be established based on an actual cost estimate:

> The amount of funds to be provided by such long-term care warranties <u>shall be based on Department-approved cost estimates</u> and shall be enough that with and assumed six percent annual real interest rate, the annual interest earnings will be sufficient to cover to the annual costs of site surveillance by the Department, including reasonable administrative costs incurred by the Department, in perpetuity, subsequent to the termination of the license.(a) For each source material mill licensee, the long-term care warranty must have a minimum value equivalent to $250,000 in 1978 dollars.

CCR 1007-1§ 3.9.5.10(C)(4).

89. The 25% contingency factor set out in NUREG 1757 also applies to the cost estimate for the long term care fund.

90. On information and belief, lawful cost estimates and proof of financial instruments which provide acceptable surety was not included in a lawful Decommissioning Funding Plan. Every Licensee must maintain a current, CDPHE-approved Decommissioning Funding Plan.

91. CDPHE failed to produce an analysis of the cumulative impacts of the uranium milling proposal regarding radiation exposures, groundwater, or surface water.

92. A reliable water supply has not been identified to reduce dust and radon emissions in accordance with the As Low As Reasonably Achievable standard by, among other things, keeping the tailings moist to avoid excursions.

93. The concerns raised in the December 2010 Stratus Consulting Report were not considered or addressed by CDPHE before issuing the License.

94. The socioeconomic analysis in the EIA ignores the reality of the uranium industry where the mills are built and then operated sporadically and often go into standby for years. Sometimes the mills restart for a short period, but often they never operate again. The Socioeconomic Analysis submitted by Power Consulting in December 2010 was not considered or addressed by CDPHE before issuing the License.

95. Sheep Mountain Alliance's concerns regarding wildlife impacts were not addressed by CDPHE before issuing the License.

96. The License at ¶25 (B) relies on all representations in the application to satisfy unspecified regulatory standards, even though serious deficiencies were identified in the application. The Decision Analysis and EIA do not address whether or where, if anywhere, the deficiencies in the application that were identified during the Licensing Proceeding have been cured. The License terms cannot be reasonably based on a generic string cite to thousands of pages of documents in the hearing file.

97. The Administrative Record that existed at the time of issuance of License does not correct deficiencies identified during the Licensing Proceedings. Energy Fuels' responses, including those incorporated into the License at ¶25, provided conceptual descriptions and future promises.

98. For example, approval of the License was based on conceptual and numerical models describing the tailings cells, not actual plans and designs for construction, operation, and maintenance of the tailings cells.

99. The state legislature has examined the problems posed by uranium mill operations and tailings and made findings that declare uranium mill tailings pose a *per se* health hazard:

> **Legislative declaration:** (1) The general assembly hereby finds and declares that the <u>existence</u> of uranium mill tailings at active and inactive mill operations poses a potential and significant radiation health hazard. . .

C.R.S. § 25-11-301(emphasis supplied). As a matter of Colorado law, potential and significant health hazards exist wherever uranium mill tailings exist.

PLAINTIFF'S CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

Unlawfully Issuing a Radioactive Materials License
Without Conducting the Necessary Administrative Procedures

100. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

101. This claim seeks declaratory and equitable judicial relief to invalidate the Radioactive Materials License Numbered Colo. 1170-01, Amendment No:00 ("License"), which was signed by Jennifer Opila on behalf of CDPHE on January 5, 2011.

102. A licensing proceeding may not commence until a "substantially complete" application has been submitted to CDPHE. C.R.S. § 25-2-3(2)(b)(I).

103. CDPHE initiated the quasi-adjudicatory license proceeding based on an substantially deficient application.

104. A new milling and 11e(2)byproduct material license may not be issued until and unless a quasi-adjudicatory hearing with the opportunity for cross examination has been conducted. *See* 42 U.S.C. § 2021(o) *accord* C.R.S.§ 25-11-203(1)(b)(1)(requiring licenses be issued "in accordance with sections 24-4-104 and 24-4-105, C.R.S.").

105. On January 5, 2010, a signed, final License was issued without providing a formal Rule 105 hearing that provided, among other things, an opportunity for cross examination.

106. The license must be issued, if at all, within a specific amount of time. C.R.S. § 25-11-203(2)(c)(V)(C).

107. The statutory time period for issuing a license based on the time limits applicable to the Energy Fuels application was January 17, 2011. In the alternative, if the license issued on January 5, 2011 was a draft license subject to further proceedings, there is no lawful basis for CDPHE to issue a license on the Energy Fuels November 2009 application after January 17, 2011. CDPHE's "License Decision" contemplates issuance of a "final license" in March 2011.

108. This claim became ripe for adjudication under C.R.S. § 24-4-106 upon CDPHE's issuance of the signed License on January 5, 2011. CDPHE has asserted that only the applicant has an opportunity to commence additional administrative proceedings.

109. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

SECOND CLAIM FOR RELIEF:

Failure to Establish Financial Surety Before Issuing Radioactive Materials License

110. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

111. Colorado requires a licensee to establish and maintain financial surety for financial warranties in the full amount of existing cost estimates before a license may be issued. C.R.S. § 25-11-110(4)(a); accord Id. at 4b-4c CCR 1007-1§ 3.9.5.5-6 (decommissioning warranty); accord Id. at 4(d), CCR 1007-1§ 3.9.5.10(C)(4)(long term care warranty)

112. The License was issued without first confirming that financial surety requirements had been satisfied. The License relies on an unlawful self-guaranty and installment plan that does not ensure Colorado will have the funds to conduct decommissioning of the licensed facilities in the event that Energy Fuels is unable or unwilling to complete decommissioning.

113. Procedures used to establish financial warranty in the License are "not in accord with the procedures or procedural limitations of this article or as otherwise required by law." C.R.S. § 24-4-106(7).

114. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

THIRD CLAIM FOR RELIEF:

The Long Term Care Warranty Is Not Based On Required Actual Cost Estimates.

115. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

116. A long term care warranty is required for all uranium mills Colorado. C.R.S. § 25-11-110(4)(d); CCR 1007-1§ 3.9.5.10(C)(1)(c).

117. The long term care fund that ensures Colorado or the DOE will have adequate funds to maintain the 11e(2)byproduct and tailings cells in perpetuity must be based on an actual cost estimate. CCR 1007-1§ 3.9.5.10(C)(4).

118. Defendants have not conducted a cost estimate for the long term care fund.

119. Documentary proof of the existence and amount of a long term care fund established before license issuance was not included in a Decommissioning Funding Plan.

120. Setting the long term care warranty at the statutory minimum, adjusted for inflation, is arbitrary, capricious, denies public involvement requirements, and violates the requirement that financial surety at the Energy Fuels facility be based on actual cost estimates. CCR 1007-1§ 3.9.5.10(C)(4).

121. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

FOURTH CLAIM FOR RELIEF:

A Decommissioning Funding Plan to Has Not Been Prepared to Ensure Adequate Financial Surety Remains in Place

122. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

123. A current Decommissioning Funding Plan ("DFP") is mandated by state law. C.R.S. § 25-11-110(5)(as amended by HB10-1348); CCR 1007-1§ 3.9.6.

124. A DFP was not prepared before the License was issued. On information and belief, CDPHE deferred the surety requirements based on the inability of Energy Fuels to post a bond during the statutory license review period. To the extent the surety arrangements takes into account Energy Fuels' financial condition, such arrangements are prohibited. *Id* at § 3.9.5.4 (8)("The value of the financial assurance warranty must not be dependent upon the success, profitability, or continued operation of the licensed business or operation.").

125. Approving the License without determining that Energy Fuels can ensure the continuing availability of adequate funds for decommissioning, closure, and perpetual government surveillance of the licensed facility is arbitrary and capricious and contrary to the RCA/AEA statutory scheme.

126. Federal regulations and standards require this Decommissioning Funding Plan be adopted and kept current based on facility-specific cost estimates. *See* 10 C.F.R. §§ 30.35(g)(4), 40.36(f)(4), 70.25(g)(4), and 72.30(d)(4):

> A decommissioning funding plan (DFP) is a financial assurance demonstration that is based on a *site-specific cost estimate* for decommissioning the facility. The amount of the facility-specific cost estimate becomes the minimum required level of financial assurance coverage.

NUREG-1757 (Vol.3) at A-26(emphasis in original).

127. Allowing an informal payment plan for the financial surety instead of a DFP does not meet the requirement that acceptable surety methods must have a provision "[c]onverting the warranty into cash upon forfeiture of the warranty." Id. at 3.9.5.4 (1)(c).

128. "It is worth noting that any company's financial condition is likely to change over time - sometimes dramatically. Changes may be gradual or sudden, and the reasons for change may be specific to a given firm or to an entire industry, or they may relate to the national or the global economy." STP-04-003 (NRC 2004) at 22.

129. The failure to act to adopt a lawful Decommissioning Funding Plan is an ongoing violation, which became subject to judicial review with Defendants' final action on January 5, 2011 when it issued the License without preparing a valid Decommissioning Funding Plan. C.R.S. § 24-4-106.

130. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

FIFTH CLAIM FOR RELIEF:

Issuing a License Before Ensuring Criterion 8 Air Emissions Controls Can Achieve the "As Low As Reasonably Achievable Standard"

131. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

132. "The greatest potential sources of offsite radiation exposure (aside from radon exposure) are dusting from dry surfaces of the tailings disposal area not covered by tailings solution and emissions from yellowcake drying and packaging operations. During operations and prior to closure, radiation doses from radon emissions from surface impoundments of uranium or thorium byproduct materials must be kept as low as is reasonably achievable ["ALARA"]." 6 CCR 1007-1, Part 18, Appendix A Criterion 8.

133. "Milling operations must be conducted so that all airborne effluent releases are reduced to levels as low as is reasonably achievable. The primary means of accomplishing this must be by means of emission controls." *Id.*

134. ALARA is a regulatory standard that must be met at all uranium mills and 11e(2) byproduct disposal facilities in Colorado. Colorado has not defined ALARA. ALARA is a case-by-case, license-specific determination that has not been expressed as a generic numeric standard. Colorado's implementation of the ALARA must be at least as stringent as the federal definition of ALARA set out at 10 C.F.R. § 20.1003. The ALARA standard is much more stringent than the standards contained within the dose limits in Part 4 of the Colorado radiation regulations. The ALARA standard is purposefully additive to the Clean Air Act requirements implemented by other state and federal agencies.

135. The Decision Analysis states that Air Pollution Control Division ("APCD") not the License, addresses and sets emissions limits on particulates and dust through its regulatory program.

136. CDPHE issued the License based on the determination that ALARA requirements are satisfied for airborne effluents based on Clean Air Act permit applications that remain pending before the APCD and U.S. Environmental Protection Agencies.

137. The pending APCD application involves the permissive emissions release standards than the ALARA standard. The "Reasonably Available Control Technology (RACT)" being used by the ongoing APCD permitting process is far less stringent than the ALARA standard. RACT is one of the most permissive Clean Air Act emission standards.

138. The License was issued without determining the lowest emission levels that may be attained by applying the ALARA standard when analyzing the facts and circumstances involved with this particular license application. CCR 1007-1 § 18.3.2.1("Milling operations shall be conducted so that all releases are reduced to as low as is reasonably achievable below the limits of Part 4.").

139. The License cannot issue without prior compliance with Critereon 8 and the ALARA standard.

140. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

SIXTH CLAIM FOR RELIEF:

Ongoing Groundwater Contamination Prevents Issuance of a License at this Site

141. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

142. Colorado law prohibits the licensing of a uranium mill where groundwater has been shown to exceed state standards.

> For an application for a license [. . .] pertaining to the facility's receipt of classified material for storage, processing, or disposal at the facility, a demonstration that: [. . .] (C) There are no current releases to the air, ground, surface water, or groundwater that exceed permitted limits; and (D) No conditions exist at the facility that would prevent the department of energy's receipt of title to the facility pursuant to the federal "Atomic Energy Act of 1954", 42 U.S.C. sec. 2113;

C.R.S.§203(2)(C)(VIII).

143. NRC Regulatory Guide 4.14 explains that identifying and confirming the baseline groundwater conditions at the site are critical to evaluate licensed operations and to detect releases during operations. This baseline cannot be established if there are ongoing releases to groundwater that result in exceedances of state standards.

144. Published EPA reports recognize that uranium mines often play an important role in altering the general chemistry of the nearby groundwater. Studies have documented that infiltration of uranium mine dewatering effluents have been accompanied by a gradual change in the overall chemistry of the groundwater, and the groundwater then bears a greater resemblance to the mine dewatering effluent. *See* Technologically Enhanced Naturally Occurring Radioactive Materials from Uranium Mining, Volume 1: Mining and Reclamation Background (EPA 2008) 9 at 3-18.

145. Groundwater samples taken for the licensing proceeding indicates measured exceedances of groundwater standards for: arsenic (0.0177 mg/L); sulfate (1,810 mg/L); selenium (0.24 mg/L); boron (2.5 mg/L); iron(24 mg/L), manganese (1.4 mg/L). The following were measured above state standards, but specific quantities were not identified in Energy Fuels reports: uranium and gross alpha; chromium; molybdenum; nitrate/nitrite.

146. CDPHE failed to require Energy Fuels to demonstrate and explain the source of existing exceedances of groundwater standards.

147. The failure to identify and remedy the source of existing contamination prevents establishment of a competent baseline on which a License may be issued and regulation of the facility must be conducted.

148. On information and belief, a federal uranium mine is the likely source of elevated radionuclides and heavy metals reported by Energy Fuels during the licensing proceeding.

149. DOE cannot take title to the site where unknown sources of groundwater contamination exist at closure. In the event that the Energy Fuels project proves financially unviable, the need for closure and transfer could occur in the very near future. C.R.S.§203(2)(C)(VIII)(D).

150. Energy Fuels' application was unable to demonstrate that current releases to groundwater do not exceed applicable standards. C.R.S.§203(2)(C)(VIII)(C).

151. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

SEVENTH CLAIM FOR RELIEF:

Failure to Adopt a Corrective Action Plan for Contaminated Groundwater

152. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

153. Colorado regulations compel the implementation of a corrective action program where ground water protection standards are exceeded at a licensed site, whether or not a notice of violation has been issued.

> Criterion 5D. If the ground water protection standards established under paragraph 5B(1) of this criterion are exceeded at a licensed site, a corrective action program must be put into operation as soon as is practicable, and in no event later than eighteen (18) months after the Department finds that the standards have been exceeded.

6 CCR 1007-1, Appendix A, Criteria 5D.

154. CDPHE had actual knowledge of groundwater exceedances on or before July 1, 2009.

155. Although groundwater protection standards are currently exceeded at the now-licensed site, a "corrective action program" has not been put into operation for each exceedance nor for the impacts of the multiple exceedances at the site.

156. The costs associated with the corrective action program must be accounted for in the decommissioning surety cost estimate and covered by a current surety instrument. C.R.S. §§ 25-11- 110(2)(a); 110(4); *see also* CCR 1007-1§ 3.9.5.5

157. The failure to both characterize groundwater exceedances and take the necessary corrective actions prevents an accurate surety cost estimate and prevents issuance of the License.

158. This claim may be remedied by declaring the License invalid *ab initio* and remanding with instructions that CDPHE deny the application and take such other steps as are consistent with any findings of fact and law that may be entered.

EIGHTH CLAIM FOR RELIEF:

Failure To Act

159. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

160. In the alternative, Sheep Mountain Alliance pleads each other claim as an action or failure to act, reviewable pursuant to C.R.C.P. 106 and C.R.C.P 57 and respectfully requests judicial review and declaratory relief in a declaratory judgment order. C.R.C.P. 57.

NINTH CLAIM FOR RELIEF

Unlawfully Issuing, Amending, and/or Modifying a Radioactive Materials License Without Conducting the Necessary Administrative Procedures

161. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

162. CDPHE has indicated its view that that the final, reviewable license decision was not issued until the March 7, 2011 deadline for Energy Fuels to file an administrative appeal. CDPHE *Mot. to Dismiss* at 18 FN 15.

163. Energy Fuels did not file an administrative appeal of the licensing decision or license issued by CDPHE on January 5, 2011.

164. On March 7, 2011, agency Defendants ("CDPHE") released a document purporting to be a "final, corrected original Radioactive Materials License Number Colo. 1170-01" that replaced the License challenged in the present action.

165. The "final, corrected" License also changes financial surety requirements, and "operational requirements" that, on information and belief, were made in response to requests provided by Energy Fuels via an *ultra vires* informal appeals process conducted by CDPHE.

166. CDPHE lacks jurisdiction and is otherwise prohibited from acting on the November 2009 application after January 17, 2011. C.R.S. § 25-11-203(2)(c)(V)(C).

167. Modifications and amendments to the License are subject to administrative procedures and judicial review provisions of the Administrative Procedure Act. *See* C.R.S. §§ 24-4-104-106.

168. Modifications and amendments to the License are subject to procedural requirements of the Radiation Control Act and its implementing amendments. 6 CCR 1007-1 § 18.3.1

169. The action taken by CDPHE on March 7, 2011 is part of a continuing pattern and practice of CDPHE taking action on the license application and issuing licensing decision in violation of the Colorado Agreement State Program and requirements of the Administrative Procedures Act.

170. In the alternative, and incorporating all claims pled herein, the March 7, 2011 License is a final agency action in the original licensing proceeding that is subject to judicial review and for which Plaintiff has no administrative remedy. C.R.S. § 24-4-106.

171. This claim may be remedied by finding and declaring all agency actions invalid, invalidating the License *ab initio,* and remanding with instructions that CDPHE deny the November 2009 application consistent with any findings of fact and law that may be entered.

TENTH CLAIM FOR RELIEF

Pattern and Practice of Failing to Adhere to Administrative Procedures

172. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

173. CDPHE has taken a prohibited incremental approach to license approval, by allowing Energy Fuels to satisfy licensing standards after the license issuance. C.R.S. § 25-11-203(3)(c)(I)(application must be approved, approved with conditions, or denied "as a whole").

174. Plaintiff has pled a pattern and practice claim based ongoing violations where CDPHE deferred required licensing decisions and determinations through a series of *ultra vires* review and approval procedures that purport to be License conditions. *See* "Corrected, Final License" at 2-4, 17.

175. License Condition 10 involves future CDPHE approval of "pre-construction requirements" that involve determination that were required before license issuance.

176. License Condition 11 involves future CDPHE approval of "pre-operational requirements" that involve determination that were required before license issuance.

177. License Condition 23 allows Energy Fuels to satisfy the pre-licensing financial surety requirements many months after the issuance of the License.

178. The Colorado Agreement State Program provides specific procedures for reviewing new license applications and considering requests to modify or amend an existing license. *See e.g.* CCR 1007-1 §§ 18.3.1, 18.6.

179. The Colorado Administrative Procedure Act requires all Colorado agencies to take actions in a manner that can survive judicial review of the administrative record that must accompany agency actions, including documentation of the decision and contemporaneous documentation of substantial evidence on which such action is taken. C.R.S. §§ 24-4-101 *et.seq.*

180. The Nuclear Regulatory Commission's 2010 review of Colorado's Agreement State Program found that CDPHE regularly failed to document its decisions as decisions of record and also failed to provide final evaluation reports or similar documentation with the final conclusions of the staff's evaluation of the proposed actions. The 2010 review identified the need for the Nuclear Regulatory Commission to discuss with CDPHE the importance to documenting final decisions in a manner that instills public confidence and meets administrative decisionmaking requirements.

181. This claim may be remedied by invalidating the License *ab initio,* finding and declaring deferral of required agency actions is an abuse of discretion, and remanding with

instructions that CDPHE deny the November 2009 application and by issuing such other relief as may be consistent with any findings of fact and law that may be entered.

ELEVENTH CLAIM FOR RELIEF

Decommissioning Funding Plan is contrary to law

182. Sheep Mountain Alliance incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

183. On March 22, 2011, CDPHE issued a one paragraph letter purporting to approve a Decommissioning Funding Plan that Plaintiff alleged in Claim Four of the original complaint was not prepared in advance of License issuance.

184. The post hoc approval of the Decommissioning Funding Plan is a final agency action that reaffirms the ongoing procedural and substantive violations of the financial surety requirements and licensing requirements pled throughout the original Complaint.

185. The CDPHE approval of the previously absent Decommissioning Funding Plan is a final agency action that itself is subject to judicial review and for which Plaintiff has no administrative remedy.

186. This claim may be remedied by invalidating the License *ab initio*, declaring that the Decommissioning Funding Plan is invalid and contrary to law, finding and declaring deferral of required agency actions is an abuse of discretion, and remanding with instructions that CDPHE deny the November 2009 application and by issuing such other relief as may be consistent with any findings of fact and law that may be entered.

PRAYER FOR RELIEF

WHEREFORE, Sheep Mountain Alliance respectfully requests that this Court examine the administrative record prepared before issuing the License and enter findings that Defendants violated the requirements of the Agreement State Agreement, Radiation Control Act (C.R.S. § 25-11-101 et seq.), and the Board of Health Regulations (C.C.R. 1007-1) when issuing Radioactive Materials License Numbered Colo. 1170-01, Amendment No:00 ("License"), and enter further findings that Defendants' actions and failures to act cannot be sustained on judicial review pursuant to standards set forth under C.R.S. § 24-4-106, and based on such findings respectfully request the court enter judgment providing the following relief:

1) declare that the License is void *ab intio* due to failure to satisfy all requirements of federal and Colorado law before license issuance;

2) remand to CDPHE and direct by injunction that the judicial findings of fact and law made during the present proceedings require CDPHE to deny the application submitted by Energy Fuels;

3) direct by injunction that CDPHE shall vacate the Administrative Record prepared below and that CDPHE shall begin the licensing proceeding anew should Energy Fuels elect to submit a new application;

4) enjoin Defendants from continuing its pattern and practice of conducting its uranium mill and 11e(2) byproduct material disposal licensing activities in a manner that fails to provide Sheep Mountain Alliance, its members, and the public with the notice, comment, and quasi-adjudicatory procedures of state and federal law;

5) direct by injunction that to assure public resources be recovered from the license applicant, Defendants shall post on its website, a monthly statement that documents the expenditure of CDPHE staff time on any future Energy Fuels proposals in accordance with the "full cost fee" requirements of CCR 1007-1 § 12.11.3;

6) hold unlawful and set aside the agency action and restrain the enforcement of all orders and rules under review, compel any agency action to be taken which has been unlawfully withheld or unduly delayed, remand the case for further proceedings, and afford such other relief as may be appropriate; and,

7) Sheep Mountain Alliance further prays that the Court grant their reasonable costs and attorney's fees, and for such other relief as the Court deems just and proper pursuant to its inherent equitable powers, including any injunctive and declaratory relief.

/S/ Travis E. Stills

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Indispensable Party's Address:

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CERTIFICATE OF SERVICE

This is to certify that I shall cause the foregoing AMENDED COMPLAINT to be served upon all parties via Lexis/Nexis File and Serve. All parties are represented by counsel who have entered an appearance, unless so noted below.

/S/ Travis E. Stills

Travis E. Stills

Pursuant to C.R.C.P. 121, § 1-26(9), a printed copy of this document with original signatures shall be maintained by the filing party and made available for inspection by other parties or the court upon request.