DISTRICT COURT CITY AND COUNTY OF DENVER 1437 Bannock Street Denver, CO 80202	
Plaintiff: Sheep Mountain Alliance; and **Plaintiff-Intervenors**: Town of Telluride, Colorado; Town of Ophir, Colorado v. **Defendant**: Colorado Department of Public Health and Environment; Jennifer Opila, in her official capacity as the person issuing a license on behalf of the Colorado Department of Public Health and Environment; and **Indispensible Party**: Energy Fuels Resources	♦ COURT USE ONLY ♦ Case Number: 2011CV861 Division/Courtroom: 203

JUDICIAL REVIEW ORDER

THIS MATTER comes before the court on plaintiff's First Amended Complaint for judicial review of defendant, Colorado Department of Public Health and Environment's (defendants will be referred to collectively as "CDPHE") issuance of a Radioactive Materials License No. 1170 – 01, Amended Number: 00 ("License"). The License allows Indispensable Party Energy Fuels Resources ("Energy Fuels") to construct and operate the Pinon Ridge Uranium Mill in Montrose County, Colorado.

Jurisdiction

1. Plaintiff, Sheep Mountain Alliance ("plaintiff" or "SMA") has standing to seek judicial review under the Colorado Administrative Procedures Act, C.R.S. §24-4-101 et seq. ("APA") as a person adversely affected by the agency action in issuing the License. Section 24-4-106(1). See Declaration of Hilary White, Exhibit 3 to Plaintiff's Opening Brief.
2. To the extent not already determined by November 7, 2011 order granting plaintiff-intervenors', the Town of Telluride, Colorado and the Town of Ophir, Colorado,

("Towns") Motion to Intervene, the court finds that the Towns also have standing as persons adversely affected by the issuance of the License. See Declarations of Telluride Mayor, Stuart Fraser, and Ophir Mayor, Todd Rutledge, Exhibits 1 and 2 to Motion to Intervene.

3. Judicial review is available only to review final agency actions. Section 24-4-106(2). While the parties dispute whether the final agency action was the January 5, 2011 approval and granting of a license as claimed by plaintiff and the Towns, or the March 7, 2011 issuance of a corrected final license as asserted by CDPHE and Energy Fuels, it is undisputed that plaintiff seeks review of a final agency action.

Introduction

4. This judicial review involves consideration of the interrelationship among federal and state statutes and regulations, and their application to an exceptionally extensive administrative record. This combination has given rise to numerous issues and arguments by the four parties. The court has considered all of the arguments in the briefs as well as relevant portions of the record and has attempted to address all arguments material to plaintiff's claims. To the extent that a specific argument has not been addressed, it is because the court has determined that it is not material or is subsumed in other arguments.
5. The Towns' arguments address only plaintiff's First Claim for Relief challenging CDPHE's procedure in failing to conduct an adjudicatory hearing prior to issuing the License. Both make similar arguments. CDPHE's and Energy Fuels' arguments address all claims and are similar.
6. Since major issues on this review involve compliance with statutes and regulations within required time frames, the court believes that it would be helpful to first present a general factual background, then the legal framework which, among other things, includes procedural requirements and time frames, and lastly a chronology of events incorporating statutory requirements and timeframes.

Factual Background

7. This case arises out of CDPHE's issuance of the License. The administrative record, particularly the Decision Analysis and Environmental Impact Analysis, Energy Fuels

Pinon Ridge Uranium Mill ("Decision Analysis"), PL-AR 000001-000432, shows that the licensing decision was the product of an enormous undertaking. Prior to submitting its application in November, 2009, Energy Fuels worked with CDPHE for approximately 2 ½ years on parcel selection and preparation of the application ("Application"). Energy Fuels then submitted a 15 volume license Application to CDPHE on November 18, 2009. Approval of the Application and final issuance of the License occurred in January and March of 2011, although the actual issuance date is disputed.

8. The licensing process involved a large number of engineering and environmental science professionals generating, reviewing, and evaluating thousands of pages of technical, engineering and environmental material. These included materials submitted by the public, including plaintiff, the Towns and other local government entities. Substantial public comment was received through two statutory public meetings and five additional public meetings. The administrative record slightly exceeds 70,000 pages.
9. The record also shows that the magnitude of the licensing task was fully warranted in light of the potential health, safety and environmental risks posed by the operation of a uranium mill.

Legal Framework

10. Both federal and state law govern the licensing and regulation of facilities handling and processing radioactive materials, including uranium. Evolution of the process by which federal agencies have transferred regulatory authority in this area to states is set forth in several of the briefs. While helpful background, it need not be repeated here.
11. Particularly relevant to this judicial review is the allocation of that authority as set forth in the ARTICLES OF AGREEMENT BETWEEN THE UNITED STATES ATOMIC ENERGY COMMISSION AND THE STATE OF COLORADO FOR DISCONTINUANCE OF CERTAIN COMMISSION REGULATORY AUTHORITY AND RESPONSIBILITY WITHIN THE STATE PURSUANT TO SECTION 274 OF THE ATOMIC ENERGY ACT OF 1954, AS AMENDED, and the 1982 AMENDMENT to that AGREEMENT (referred to collectively as the "State Agreement"). In general terms, the State Agreement provides that, subject to certain exceptions, the Atomic Energy Commission (now the Nuclear Regulatory Commission ("NRC")) grants to Colorado regulatory authority with

respect to defined byproduct materials, including uranium. Under Article II of the State Agreement, the NRC retains authority pertaining to byproduct material in several areas including, for example, establishing minimum standards governing reclamation, long-term surveillance or maintenance of a byproduct facility, and establishing terms, conditions and standards for decontamination of sites and decommissioning of facilities. An area of particular relevance here is the establishment of minimum procedural requirements in approving or denying applications for radioactive materials licenses.

12. The State Agreement requires that party-states, such as Colorado, comply with Atomic Energy Act section 274o ("§ 274o") which sets forth minimum standards for procedures relating to issuing licenses for the handling of byproduct material. See 1982 AMENDMENT Section 5. Section 274o (also 42 U.S.C. 2021(o)) requires that as part of the licensing process, party-states provide procedures under State law which include at a minimum: "...(3)(i) an opportunity, after public notice, for written comments and a public hearing, with a transcript, [and] (ii) and opportunity for cross-examination..."
13. Pursuant to authority granted under the State Agreement, Colorado enacted the Radiation Control Act ("RCA"), C.R.S. 25-11-101 et seq. RCA §203 (subsections of section 203 will be referred to as "§203___" or "section 203____") sets forth the procedures for licensing a facility handling radioactive materials. Subsection 203(1)(b)(I) provides that no facility shall handle classified (radioactive) material unless it has received a license "… in accordance with sections 24-4-104 and 24-4-105, C.R.S…" (emphasis added). Subsection 203(2)(b)(I) requires that the licensing agency, CDPHE, conduct two public meetings, one or both of which "…shall be a hearing conducted to comply with section 24-4-104 or 24-4-105, C.R.S." (emphasis added). The parties disagree on how those two subsections should be interpreted.
14. CDPHE has promulgated regulations implementing the RCA §302. Of particular relevance to licensing is 6 C.C.R. 1007-1 Part18, Licensing Requirements for Uranium and Thorium Processing (subsections of Part 18 will be referred to as "§18.___" or "section 18.___." Other numbered Parts of 6 CCR 1007-1 will be referred to in the same format). Section18.6 covers licensing of uranium milling facilities. Subsections of 18.6.1 provide for, among other things: (a) an opportunity for public hearing on a license application to be conducted in accordance with the procedure in §§ 24-4-104

and 24-5-105 and 18.6; (b) notice of a public hearing to include notice of the procedure on how to apply to become a party to the hearing, §18.6.2; (c) procedures for seeking party status with the right to participate in pre-hearing matters and the hearing, §18.6.3; and (d) procedures for the conduct of the hearing which are substantially similar to those of APA §105. Section18.6 .7. The parties dispute whether RCA §203 and regulation §18.6 are in conflict and how both can be reconciled with APA §§104 and 105.

Chronology

a. Starting in June, 2007, the CDPHE worked with Energy Fuels in reviewing land parcels for purchase, 12/11 AR 000003-000008, and in preparing the application. PL-AR 000026.
b. On November 18, 2009, Energy Fuels submitted its 15 volume Application for a radioactive materials license. PL-AR-000026. Under RCA subsection 25-11-203 (3)(c)(V)(A), CDPHE had 45 days to make a written determination that the application was substantially complete.
c. On December 18, 2009, CDPHE issued its written determination that the license was substantially complete. PL-AR 033080. Under RCA subsection 203(3)(c)(V)(B), CDPHE then had 45 days to convene the first public meeting/hearing on the Application, and 30 days thereafter to convene the second public meeting/hearing. Under subsection 203(2)(b)(I), one or both of these public meetings were required to comply with §24-4-104 or §24-4-105.
d. CDPHE complied with the time requirements of subsection 203(3)(c)(V)(B) by holding the first public meeting on January 21, 2010 and the second on February 17, 2010. Transcripts of both public meetings were prepared as required by subsection 203(2)(b)(I). See PL-AR 029880-030001 and 030026-030062.
e. It is undisputed that neither of the public meetings above was an adjudicatory hearing under either §24-4-105 or §18.6.1. It is further undisputed that at neither of the meetings was there an opportunity for cross-examination.
f. A total of five additional public comment sessions sessions, attended by CDPHE representatives but convened by local government entities, were held in June and July of 2010. See PL-AR 033096-033098; 033113,033114. It is undisputed that none

of these meetings was an adjudicatory hearing, and that there was no opportunity for cross-examination at any of the meetings.

g. On April 20, 2010, the County of Montrose published its review of an environmental assessment submitted by Energy Fuels to CDPHE as required by subsection 203(2)(c). This gave the CDPHE 270 days from April 20, 2010, which the parties agree was January 17, 2011, to approve, approve with conditions, or deny the Application. Subsection 203(3)(c)(V)(C)(2009).

h. On January 5, 2011 CDPHE issued its Decision Analysis, PL-AR 00001-000432, approving the Application with conditions and granting a license.

i. On March 7, 2011, after the 60 days provided in §24-4-104(9) for Energy Fuels to request a hearing under 24-4-105, CDPHE issued a "final,corrected" license. The parties dispute whether CDPHE's January 5, 2011, or its March 7, 2011 action constituted issuance of the License and the final agency action.

j. Energy Fuels' Decommissioning Funding Plan was filed on March 7, 2011 on the same date as, but prior to, issuance of the License.

Standard of Review

15. Agency actions are presumed to be valid, and the burden to show invalidity is upon the party challenging the action. *Quaker Court Limited Liability Company v. Board of County Commissioners of Jefferson County*, 103 P.3d 1027(Colo. App. 2004). On judicial review, the court must examine the record in the light most favorable to the agency's decision, *Lawley v. Department of Higher Education*, 36 P.3d 1239 (Colo, 2001), and resolve reasonable dooubts as to the correctness of an administrative decision in favor of the agency. *Van Sickle v. Boyes*, 797 P.2d 1267 (Colo.1990). An agency's interpretation of its governing statutes and regulations is entitled to great deference and should be followed unless inconsistent with the statute or regulation or clearly erroneous. *Coffman v. Common Cause*, 102 P.3d 999 (Colo. 2004).

Plaintiff's Claims

16. Before addressing plaintiff's claims, the court addresses an issue regarding certification of the record, which does not appear to be the subject of any of plaintiff's claims for relief but is raised in Plaintiff's Opening Brief. Plaintiff contends that the License must

be invalidated and the case remanded because CDPHE's certification of the record, Third Certification of Administrative Record ("Certification") is defective and incomplete. Opening Brief at 29. The court is not persuaded. The only documents which plaintiff has shown to have been not included in the Certification are documents generated in the two and one half years before the Application was submitted in November, 2009. Those documents are now part of the record as SUPP. PL 000001-0009304. In any event, plaintiff has not shown that CDPHE considered any pre-Application documents in issuing the License, or that there are any deficiencies in the existing record.

17. The First Amended Complaint ("Complaint") asserts Eleven Claims for Relief. Plaintiff has submitted argument on the first six, and ninth claims. In presenting argument, none of the parties has related its arguments to specific claims. The court does, however, believe that it has tied the arguments to the proper claim.

First Claim for Relief-Unlawfully Issuing a Radioactive Materials License Without Conducting the Necessary Administrative Procedures

18. Plaintiff seeks an order invalidating the License on the ground that it was not issued in accordance with the procedures of the APA, and that it was issued contrary to law. §24-4-106(7). (Unless stated otherwise, "plaintiff" includes the Towns whose arguments are similar on this claim). Plaintiff first contends that the License was issued in violation of 42 U.S.C. 2021(o) (also section 274o of the Atomic Energy Act) which requires that Colorado, in the case of licenses, provide procedures under state law which include, as relevant here, an opportunity for the public to participate in a public hearing which includes an opportunity for cross-examination. §§42 U.S.C. 2021(o)(3), §274o. CDPHE ("CDPHE" includes Energy Fuels whose arguments are similar) argues that it is not bound by 42 U.S.C. 2021(o), because under 42 U.S.C. 2021(b), federal licensing provisions do not apply to specific licensing proceedings in Colorado.

19. Assuming that §§ 42 U.S.C. 2021(o) and 274o do not apply directly, they do require that Colorado, under the State Agreement, enact and comply with procedures which, at a minimum, comply with §274o. See 1982 Amendment to State Agreement, Section 5. As further discussed below, RCA §203 and §18.6 comply at least facially with the requirements of 274o. It is undisputed, however, that at least with respect to providing

a public hearing with an opportunity for cross-examination, CDPHE did not comply with either §203 or §18.6. This was based upon CDPHE's interpretation of the RCA and APA discussed below.

20. Plaintiff next contends that the APA, RCA and §18.6, considered together, obligated the CDPHE to provide an adjudicatory hearing on the Application. Specifically, it contends that subsections 203(1)(b)(I) and 203(2)(b)(I) give interested members of the public a right to a §105 hearing upon proper request. It further argues that CDPHE enacted §18.6.1 to permit interested persons to obtain party status and to request, and participate in such a hearing. Plaintiff's Opening Brief at 22.

21. In response, CDPHE argues that the only way to harmonize the §203(b)(1)(I), which does not mandate a §105 hearing, and §18.6.1 which does, with each other and with the APA, is to interpret them to require a §105 hearing only if requested by the applicant. CDPHE's argument is as follows: Subsection 203(1)(b)(I), which requires compliance with both §§24-4-104 and 24-4-105, serves to incorporate those sections into the RCA. By its plain language, subsection 25-1-203(2)(b)(I), which requires that one or both public meetings be a hearing conducted to comply with §24-4-104 or 24-4-105 (emphasis added), means that a §105 hearing is not mandated. To harmonize the above RCA subsections with the APA, CDPHE looks to the APA for the right to a §105 hearing in a §104 licensing proceeding. The only provision in §104 referring to a §105 hearing is subsection 104(9). It provides that within 60 days after a license is denied without a hearing, the applicant may request a hearing under §24-4-105 (emphasis added). Therefore, CDPHE contends, under RCA §203, only the applicant for a license may request a §105 hearing. To reconcile the above with §18.6.1, CDPHE argues that only if the applicant requests a §105 hearing, do the procedures set forth in §18.6.1 come into play by providing the procedure for seeking party status and requesting an adjudicatory hearing under §105 or §18.6.1. CDPHE's Answer Brief at 10, 11. The court is not persuaded.

22. While the court is aware that an agency's interpretation of its governing statutes and regulations is generally entitled to great weight, *Vecellio v. Regents of University of Colorado*, 252 P.3d 52,55 (Colo. App. 2010), that interpretation may be rejected if it is clearly erroneous or inconsistent with the rule or underlying statute. Id. The court rejects CDPHE's interpretation as inconsistent with the language of §203. First, it is not

reasonable that if the legislature had intended to limit the right to a §105 hearing to applicants whose license applications had been denied without hearing, it would have worded subsections 203(1)(b)(I) and 203(2)(b)(I) as it did. Neither subsection, nor any other language in the RCA, remotely suggests CDPHE's interpretation. Second, §18.6.1, is inconsistent with CDPHE's interpretation. It provides, in relevant part, that: "There shall be an opportunity for public hearings held in accordance with the procedures in 24-4-104 and 24-4-105 and 18.6, prior to the granting, denial or renewal …" of a license (emphasis added). Third, CDPHEs' interpretation would significantly limit the opportunity for public participation in the licensing process. This is inconsistent with the legislative declaration in RCA § 25-11-301, recognizing that uranium mill tailings at mill operations pose a significant health hazard and the need to control such tailings to minimize their environmental impact. Finally, contrary to the minimum standards set forth in §274o, CDPHE's interpretation would in many instances permit, as it did in this case, effective denial of the right of interested members of the public to a public hearing with an opportunity for cross-examination.

23. CDPHE further contends that §18.6.1 by itself cannot provide the procedure for plaintiff, the Towns or other interested members of the public to obtain a §105 adjudicatory hearing under §203(2)(b)(I), because there is an irreconcilable conflict between the timeframes in §203 and §18.6.1. Specifically, subsection 203(3)(c)(V)(B) requires that the second of the two public meetings provided for in subsection 203(2)(b)(I) must be convened within 75 days of CDPHE's determination that the application is substantially complete. However, §18.6.2.2 requires that the notice of hearing, which includes the matters of fact and law to be considered, §18.6.2.1.3, and a description of the proposed licensing action and a statement of the availability of its text, §18.6.2.1.4, be published and mailed out not less than 90 days prior to the hearing. In addition, §18.4.1 requires that CDPHE make available to the public a comprehensive Environmental Impact Analysis ("EIA") at the time the 90-day notice of hearing is sent. Thus, the notice of hearing would have to be mailed out, and the EIA would have to be available, no less than 15 days prior to any determination that the application was substantially complete. An application is "substantially complete" when all major portions of the application are included. PL-AR 000027. The court agrees that the timeframes in §203 and §18.6.1 are facially irreconcilable.

24. The court finds unpersuasive plaintiff's argument that §203 and §18.6.1 may be reconciled by interpreting "convene" in §203(3)(c)(V)(B) to refer to the mailing of the 90 day notice. Plaintiff's Reply Brief at 16. The common meaning of "convene" is to assemble or cause to assemble as for a meeting. Random House Webster's Dictionary, (2d ed. 1996) at 144. Plaintiff's interpretation is not only at odds with the plain meaning of "convene", it would render §203(3)(c)(V)(B) meaningless because it places no time limitation on the convening or holding of the public meeting/hearing. Further, provisions for giving notice within timeframes are commonly included in statutes and are routinely expressed in terms of "notice" and a number of days. It is not reasonable that the legislature used "convene" in §203(3)(c)(V)(B) for that purpose.
25. The court concludes that interpreting §18.6.1 as providing the procedure for obtaining a §105 hearing as provided for in subsection 203(2)(1)(I), creates an irreconcilable conflict between the statute and regulation. Therefore, to the extent so interpreted, it is void. *Miller International Inc. v. State*, 646 P.2d 341, 344 (Colo. 1982) (any regulation which is inconsistent with, or contrary to a statute is void and of no effect).
26. The Towns contend that there is an alternative interpretation of §18.6.1 which enables interested members of the public to obtain an adjudicatory hearing without being inconsistent with the §203 time requirements. They contend that §18.6.1 provides an adjudicatory hearing under §§105 and/or 18.6.6 in addition to the two public meetings provided for in subsection 203(2)(1)(I). Towns' Brief at 7-9; Towns' Reply at 12-18. The Towns point out that while §203 meeting requirements apply to the licensing of facilities for disposal of radioactive materials generally, Part 18 of the regulations (hence §18.6 .1) applies specifically to possession or use of source material from milling uranium ore. Further, milling creates tailings which pose a greater environmental, and public health risk than do non-milling operations. Finally, §18.1.1 provides that the requirements of Part 18 are in addition to, and not in substitution for, other applicable requirements of the regulations.
27. The Towns contend that this interpretation avoids the irreconcilable time conflict discussed above. They propose that the 90-day notice of hearing required by section 18.6.2.2 could be sent out at any time after a determination of substantial completion, and the hearing completed within the 270 days provided in subsection 203(3)(c)(V)(C) for the CDPHE to render its decision. The 75-day time limit in subsection

203(3)(c)(V)(B) would not apply because the adjudicatory hearing would be in addition to the two "public meetings" provided for in subsection 203(b)(1)(I).

28. While the Towns' interpretation is not without some rational basis, the court agrees with Energy Fuels that it must be rejected as inconsistent with the provisions of §203 regarding the number of public hearings. Energy Fuels Answer Brief at 32-33.
29. Section 203 sets forth the essential framework within which CDPHE must operate in determining whether or not to grant or deny a radioactive materials license.
30. An integral part of that framework is there be two public meetings not "two or more." "One or both of the meetings.." must be conducted to comply with section 24-4-104 or 24-4-105. Section 203(2)(b)(I). Transcripts of the "two public meetings" are to be prepared, Id. Along with other submissions, the two transcripts are to be considered by CDPHE in deciding whether or not to approve a license application. §203(3)(c)(I). Further, the §203 framework requires that certain actions be taken within rigid time frames. Section 203(3)(c)(V)(B) provides that "… first public meeting or hearing…" must be convened within 45 days…and the "second such public meeting or hearing…" be convened within 30 days thereafter.
31. Reasonably interpreted, §203 provides for two, and only two, public meetings or hearings, one or both of which are to be conducted to comply with section 24-4-104 or 24-4-105. Nothing in §203 suggests an additional adjudicatory hearing. Interpreting §18.6.1 to provide for one would render the reference to a "24-4-105" hearing in §203(2)(b)(I) largely superfluous. The Towns' interpretation is also inconsistent with the CDPHE's interpretation of its own regulations. Notwithstanding the court's rejection above of CDPHE's interpretation limiting the request for hearing to the applicant only, the CDPHE's interpretation as to the number of public hearings is still entitled to great deference and may be rejected only if clearly erroneous. *Vecellio*, 252 P.3d at 55. The court does not find it to be clearly erroneous.
32. The court does conclude that the RCA and APA can be harmonized as follows. As stated above, §25-11-203(1)(b)(I) provides that license applications are to be processed in accordance with sections 24-4-104 and 24-4-105 (emphasis added). Section 25-11-203(2)(b)(I) provides that one or both required meetings be conducted to comply with section 24-4-104 or 24-4-105 (emphasis added). These two sections can be harmonized with the APA by the defendant proceeding initially with at least one of

the public meetings/hearings as a §105 hearing. The defendant could then include in its notice of hearing that any person who may be affected or aggrieved by an agency action may seek to be admitted as a party to that proceeding upon written request under §105(2)(c). Any person admitted as a party could then avail him/her/itsself of the rights of a party under §105, and the hearing could proceed as a §105 hearing. If no third person either applied for party status or was admitted as a party, the applicant could either proceed with the hearing as a §105 hearing or waive its rights under §105 and proceed with the hearing as, in substance, a §104 hearing. The court believes that the above procedure would be consistent with both RCA section 203 and the APA.

33. The court recognizes that conducting a §105 hearing within the 75-day timeframe under §203(3)(c)(V)(B) might be difficult in cases such as this involving a voluminous and complex application. However, the record does not establish that this could not be accomplished, and the hearing need only be convened, not completed, within 75 days. Section 105(4) provides for the scheduling of a continued hearing after a hearing is commenced.
34. The court concludes that CDPHE acted contrary to law and not in accord with APA procedures in failing to provide plaintiff with the opportunity to request a hearing under §24-4-105. Therefore, the court sets aside CDPHE's action in issuing the License.
35. The court remands the case to CDPHE for further proceedings set forth below.

Ninth Claim for Relief-Unlawfully Issuing, Amending and/or Modifying the License without Conducting the Necessary Administrative Procedures.

36. The court addresses this claim out of order because the ruling on this claim affects other claims addressed below.
37. Under §25-11-203(3)(c)(V)(C)(2009), CDPHE had 270 days after the publication of Montrose County's Review of Energy Fuels' Environmental Assessment on April 10, 2010 to approve, approve with conditions, or deny Energy Fuels' Application. The parties agree that the 270 days expired on January 17, 2011. CDPHE approved the application with conditions and granted a license on January 5, 2011. PL-AR 000121. CDPHE issued a final, corrected license on March 7, 2011. PL-AR 033184-033203. Plaintiff contends that January 17, 2011 was the final date for issuing the license, and that by issuing the final, corrected license on March 7, 2011, CDPHE did not approve a

license "as a whole" as required by subsection 203(3)(c) (I), did not approve the license within the statutory time frame, acted without jurisdiction, and without conducting the necessary administrative procedures. The court is not persuaded.

38. The CDPHE's final action which is the subject of this judicial review was the issuance of Radioactive Materials License No. Colo. 1170-01, Amendment Number: 00 ("License"). First Amended Complaint, para. 1. The court finds that the issuance of the License occurred on March 7, 2011.

39. Subsection 25-1-203(3)(c)(V)(C) (2009) required that CDPHE approve, approve with conditions, or deny the Application on or before January 17, 2011. CDPHE's action on January 5, 2011 was the approval of the license with conditions. PL-AR 000121. No party has shown anywhere in the record that Energy Fuels affirmatively consented to those conditions. Under APA §104(11) where conditions are not consented to, approval of a license with conditions constitutes a denial of the application. Where an application is denied without a hearing, the applicant has 60 days to request a §105 hearing on the application. Section 104(9). The agency's action after such a hearing is subject to judicial review. Id. Thus, it is the final agency action.

40. The court finds reasonable the CDPHE's interpretation of §104(9) that its January 5, 2011 approval with conditions not consented to, constituted a denial of the application without a hearing. Therefore, CDPHE had to wait 60 days before issuing a license. If it had issued a license before the 60 days had expired, CDPHE would have rendered §104(9) ineffective. Energy Fuels did not notify the CDPHE until March 7, 2011, the 60^{th} day, of its decision not to appeal the denial. PL-AR 030206. Accordingly, the court rejects plaintiff's argument that the License was issued beyond the 270-day time limit.

41. The court also finds plaintiff's remaining arguments on this claim unpersuasive. Plaintiff's contention that the agency acted without jurisdiction is based on plaintiff's having filed its original complaint for judicial review on February 4, 2011. Having determined that the final agency action occurred on March 7, 2011, the court concludes that the original complaint was filed prematurely, and that the CDPHE retained jurisdiction over the license application. Further, comparing the Decision Analysis, PL-AR 000001-000432, and the conditions set forth therein, PL-AR 000414-431, with the relatively minimal changes to those conditions in the License, PL-AR 033185-033202,

the court is not persuaded that CDPHE did not approve the license as a whole on January 5, 2011, prior to issuance of the License on March 7, 2011.

42. Plaintiff has not met its burden of proof that CDPHE acted either unlawfully on not in accordance with required procedures in issuing the License on March 7, 2011. The court finds against the plaintiff on plaintiff's Ninth Claim for Relief.

Second Claim for Relief-Failure to Establish Financial Surety Before Issuing Radioactive Materials License.

43. Plaintiff contends that the CDPHE failed to require that Energy Fuels furnish Department-approved, executed financial assurance warranties for decommissioning and long-term care prior to the issuance of the License as purportedly required by §3.9.5.1. Resolution of this issue requires interpretation of two apparently conflicting sections in the regulations.

44. In apparent contradiction to §3.9.5.1, §18.5.5 provides in relevant part: "Prior to issuance of the license, the applicant shall (1) establish financial assurance arrangements, as provided by 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 §3.9.5.10…. Financial assurance shall be provided prior to commencement of construction or operation." In addition, §3.9.6.5 permits financial assurance for decommissioning to be made by a certification in the Decommissioning Funding Plan ("DFP"), filed at the time of issuance of the license, certifying that appropriate assurance will be obtained after the license is issued, but prior to the receipt or possession of radioactive material.

45. In support of its argument that §3.9.5.1 controls, plaintiff points out that Part 3 is titled: "Licensing Radioactive Material"; while Part 18 is titled: "Licensing Requirements for Uranium and Thorium Processing." While the License is a "Radioactive Materials License", the "Authorized Radioactive Material and Use" describes in general terms a uranium processing operation. PL-AR 033185-033186. Furthermore, plaintiff has relied extensively on Part 18 in its argument in support of its First Claim for Relief.

46. Under CDPHE's interpretation, Part 18 applies to financial assurance warranties. Considering, among other things, that Part 3 covers radioactive materials licenses generally, and Part 18 covers licenses for uranium processing operations which is the

primary activity the License was issued for, the court does not find the CDPHE's interpretation to be plainly erroneous and accepts that interpretation. *See Vecellio*, 252 P.3d at 55.

47. Finally, there is support in the record that CDPHE complied with §§ 18.5.5 and 3.9.6.5 with regard to decommissioning and long-term care by requiring assurance of adequate funding prior to the start of construction. See PL-AR 100106, 100109, 030204, and Condition No. 23 of the License, PL-AR 000430.
48. The court finds against the plaintiff on its Second Claim for Relief.

Third Claim for Relief: The Long Term Care Warranty Is Not Based On Required Actual Cost Estimates.

49. Plaintiff contends that CDPHE's action in setting the long-term care warranty at the statutory minimum, rather than basing it on actual costs, was arbitrary and capricious, denied public involvement, and was in violation of §3.9.5.10(4). The court disagrees.
50. Initially, to the extent that plaintiff's argument is based on January 5, 2011 as being the date the License was issued, it is rejected. In ruling on the Ninth Claim, the court determined that the License issuance date was March 7, 2011.
51. Section 3.9.5.10(4) requires, in relevant part, that the funds to be provided by long-term care warranties shall be based on Department-approved cost estimates. Or on its face, that section does not require an estimate based on actual costs. Thus, CDPHE's interpretation that it does not, is not arbitrary or capricious or inconsistent with the language of that section. In addition, the record shows compliance with §3.9.5.10(4).
52. On March 7, 2011, the License issuance date, Energy Fuels provided a cost estimate in the minimum amount allowed under §3.9.5.10(4)(a), which at the time the License was issued, was calculated to be $844,400. The basis for that estimate is set forth at PL-AR 030111-030113. While CDPHE's letter to Energy Fuels notifying Energy Fuels of its approval of the $844,400 amount is date-stamped March 22, 2011, page LD-2 of the January 5, 2011 Decision Analysis indicates approval as of January 5, 2011. PL-AR 000122. Resolving reasonable doubts as to the correctness of its action in favor of the CDPHE, *Atchison Topeka and Santa Fe Railway Co. v. Public Utilities Commission*, 763 P.2d 1037(Colo. 1988), the court finds that de facto approval occurred on or before January 5, 2011.

53. Accordingly, the court finds against the plaintiff on its Third Claim for Relief.

Fourth Claim for Relief: A Decommissioning Funding Plan Has Not Been Prepared to Ensure Adequate Financial Surety Remains in Place.

54. In its Fourth Claim, plaintiff alleges that: a) a current Decommissioning Funding Plan ("DFP") is mandated by state law. Complaint para. 123; b) a DFP was not prepared before the license was issued; c) approving the License without determining that Energy Fuels can ensure continuing availability of funds for decommissioning and long-term care was arbitrary and contrary to law. Complaint, para. 125,126. The court disagrees.
55. To the extent this claim is based on the License issuance date being January 5, 2011, it is rejected for reasons stated in the court's ruling denying plaintiff's Ninth Claim or Relief.
56. The court agrees with CDPHE and Energy Fuels that neither §25-11-110(5) nor §3.9.6 contains any requirement that the DFP be approved prior to the issuance of a license, or by any other specified date. Section 3.9.6 addresses decommissioning funding plans. The relevant subsection is 3.9.6.5(1) which permits an applicant to file a certification that adequate funding for decommissioning will be provided prior to receipt or possession of radioactive material. Nothing in the record suggests that radioactive material has been received on the site. On the other hand, the record does show that the CDPHE required submission of a DFP as a condition for granting the final license, PL AR 000122, and that a DFP was submitted on March 7, 2011 prior to actual issuance of the License. PL-AR 030204-030305.
57. Plaintiff's argument based on claimed noncompliance with NUREG 1757 "standards" is also rejected. NUREG 1757 provides guidance; it is not a rule or regulation, and compliance is not required. *New Jersey v. Nuclear Regulatory Commission*, 526 F3d 98,100 (3rd Cir. 2008).
58. Plaintiff also argues that the License was issued contrary to law because CDPHE did not establish the amount of decommissioning costs before issuing a License. To the extent that this argument is based on January 5, 2011 as being the License issuance date it is rejected for reasons stated in the court's ruling on the Ninth Claim for Relief. Further, there is record support for CDPHE's determination that decommissioning costs

were established prior to the issuance of the License. Appendix C to the DFP filed prior to the issuance of the license on March 7, 2011, PL-AR 030206, sets forth in detail the decommissioning costs. PL-AR 030234-030305.

59. Based on the above, the court finds against plaintiff on the Fourth Claim or Relief.

Fifth Claim for Relief: Issuing a License Before Ensuring Criterion 8 Air Emissions Controls Can Achieve the "As Low As Reasonably Achievable Standard."

60. Plaintiff alleges that during mill operations, Part 18, Appendix A, Criterion 8 requires that radiation doses and radon emissions must be kept as low as reasonably achievable (ALARA), and that the License was issued without a determination that the lowest emissions levels may be attained by applying the ALARA standard. Complaint, para. 132,138. In its Opening Brief plaintiff cites a number of claimed deficiencies and rules violations relating to ALARA operational issues as shown in the Decision Analysis. Plaintiff contends that these demonstrate noncompliance with Criterion 8. The court disagrees.

61. The court agrees with CDPHE's interpretation that ALARA as set forth in Criterion 8 and as defined in 6 CCR 1007-1 §1.2.2 is not a physically or scientifically measurable quantitative or qualitative standard. Rather, as defined in §1.2.2, ALARA is an operational objective based essentially upon "… making every reasonable effort…[to keep radiation exposure]… as far below dose limits… as is practical …[consistent with a number of factors]." Criterion 8 also makes clear that ALARA is something to be achieved during operations rather than being established as a pre-licensing requirement. It requires that "Milling operations must be conducted…[to achieve ALARA…]."

62. What is required prior to issuance of the license is that the applicant provide procedures describing the means employed to meet the ALARA objective during milling operations. Section 18.3.2.1. There is record support that the CDPHE imposed this requirement. The Decision Analysis states that Energy Fuels' ALARA program is a key provision of the Health and Safety Plan. PL-AR 000045. That plan is contained in Volume 11, Section J-1 of the Application. PL-AR 017373-017756. The "ALARA Procedure" at PL-AR 017458-017461 refers to the 250 page Facility Operating Plan which, among other things, goes into great detail about all aspects of mill operation

including ALARA related environmental issues. PL-AR 000342-000359. Finally, Condition 18 I. of the License requires Energy Fuels to implement engineering controls to meet ALARA.

63. In summary, there is support in the record that the CDPHE's issuance of the License was not contrary to law or arbitrary or capricious with regard to Criterion 8, section 18.3.2.1 or other ALARA requirements.

64. The court finds against plaintiff on its Fifth Claim for Relief.

Sixth Claim for Relief- Ongoing Groundwater Contamination Prevents Issuance of a License at this Site.

65. In its Sixth Claim, plaintiff alleges that CDPHE acted contrary to the provisions of subsection 203(2)(c)(VIII)(C) and (D) in issuing the License without requiring that Energy Fuels demonstrate and explain the source of existing contamination levels in excess of groundwater standards at the site, and to demonstrate that current releases do not exceed applicable standards. Complaint, para. 146,150. The court disagrees.

66. Subsection 203(2)(c)(VIII) requires that an applicant provide to the Department an environmental assessment which demonstrates that: "(C) There are no current releases to … groundwater that exceed permitted limits." Nothing in this subsection suggests the requirements which plaintiff imposes above. In any event, the CDPHE has interpreted this subsection as to not impose those requirements, and that interpretation, with or without deference, is not clearly erroneous.

67. Plaintiff also argues that CDPHE arbitrarily determined that the above subsections were not applicable. See PL-AR 000320. Again, the court disagrees. As pointed out by CDPHE, unlike a standard, a permit authorizes discharge of pollutants to a water body and must contain limits that will not exceed standards. Section 25-8-503(4). Here, as plaintiff has alleged and as the record supports, groundwater samples taken from this site indicate that groundwater contaminants exceed standards for a number of chemical substances. Complaint, para. 145. Since contaminant levels exceed standards, it may reasonably be inferred that CDPHE found no occasion for establishing "permitted limits." In any event, no party has pointed to anything in the record indicating that CDPHE has addressed "permitted limits." If there are no "permitted limits," subsection (C) is inapplicable.

68. Plaintiff has presented no argument with regard to, nor cited anything in the record relating to subsection (D) other than the defendant's determination that it was not applicable. Under these circumstances, the plaintiff has not rebutted the presumption of the validity of that determination or in any way shown that that determination was either contrary to law or arbitrary and capricious.
69. In addition, the record shows that defendant's determination that these subsections were inapplicable was made in the context of reviewing substantial data and analysis relating to groundwater contamination. See e.g. PL-AR 000003-000009 (Decision Analysis, Table of Contents listing several sections addressing Groundwater), PL-AR 006526-006529, 006565-006569, 022338-0022344,
70. The court finds against the plaintiff on its Sixth Claim for Relief.

Plaintiff's Remaining Claims

71. In its Answer Brief, Energy Fuels asserts that Plaintiff's Opening Brief does not address its remaining claims. While this is somewhat difficult to determine since Plaintiff's Opening Brief presents arguments without express reference to claims, Energy Fuels appears to be correct. Energy Fuels argues that this constitutes a waiver of those claims. The court agrees. See *Flagstaff Enterprises Construction Inc. v. Snow*, 908 P.2d 1183,1185 (Colo. App. 1995) (issues not presented in an opening brief generally are not considered). Therefore, the court does not address plaintiff's remaining Claims for Relief except to find that they have been waived, and to find against plaintiff on those claims.

ORDER:

The Court, having found unlawful CDPHE's action in issuing the License, sets aside that action, invalidates the License, and remands the case for further proceedings consistent with this Order, including the following:

1.) CDPHE is ordered to convene a hearing pursuant to section 24-04-105 within 75 days of July 5, 2012.
2.) Notice of the hearing will be provided as set forth in section 25-11-203 and will include notice of the right to seek admission as a party pursuant to section 24-4-105(2)(c).

3.) For purposes of proceedings under §25-11-203, this hearing will be a substitute for the February 17, 2010 public meeting. For purposes of the CDPHE's reconsideration and remaking of its licensing decision (below), the transcript of the February 17, 2010 public meeting will remain as part of the record to be considered.

4.) In remaking its licensing decision, CDPHE will follow the procedures set forth in the RCA, particularly § 203, to the extent that those procedures can be applied on this remand.

5.) The administrative record for purposes of the CDPHE's remaking of the licensing decision will be the administrative record as it now exists plus the transcript of the §105 hearing ordered above.

6.) CDPHE will have 270 days from July 5, 2012 to approve, approve with conditions, or deny the Application.

7.) Until the above licensing decision is made, the applicant, Energy Fuels Resources, may not proceed with any activity on the site formerly permitted by the License. Energy Fuels may, however, take reasonable action to protect the public health and safety, and to prevent harm to the environment. In addition, Energy Fuels may take reasonable action to prevent economic waste provided that such action does not pose an unreasonable risk to the public health or safety, or to the environment. Actions taken under this paragraph will be under the supervision of CDPHE.

8.) The parties may modify the terms of this remand by written stipulation signed by all four parties, provided that any such stipulation does not impair the rights of potential additional parties to the §105 hearing above.

DATED THIS 13th DAY OF JUNE 2012.

BY THE COURT:

John N. McMullen
Senior Judge