Michael A. Zody, USB #5830
Jacob A. Santini, USB #12650
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
MZody@parsonsbehle.com
JSantini@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Defendants Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, & Energy Fuels Resources (USA) Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Grand Canyon Trust, Plaintiff, vs. Energy Fuels Inc.; Energy Fuels Holdings Corp.; EFR White Mesa LLC; & Energy Fuels Resources (USA) Inc., Defendants.	**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT** Case No. 2:14-cv-00243-CW-BCW Judge Clark Waddoups Magistrate Judge Brooke C. Wells

Pursuant to Federal Rule of Civil Procedure 56 and DUCivR 56-1, Defendants Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, and Energy Fuels Resources (USA) Inc. (collectively "the White Mesa Mill" or "Mill"), by and through counsel, move for summary judgement against Plaintiff Grand Canyon Trust (Plaintiff or "GCT").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CODE OF FEDERAL REGULATIONS

FEDERAL REGISTER

UTAH ADMINISTRATIVE CODE

OTHER AUTHORITY

INTRODUCTION

Plaintiff is attacking the way the White Mesa Mill has been approved and permitted to operate for over 25 years by the U.S. Environmental Protection Agency ("EPA"), the U.S. Nuclear Regulatory Commission ("NRC") and the State of Utah. Plaintiff claims to want to enforce a Clean Air Act regulation called Subpart W, which applies to uranium mills. Subpart W, which is formally cited and explained below, limits uranium mills to operating two tailings impoundments at one time (the "phased disposal work practice"), and requires mills to keep emissions from tailings impoundments that existed on December 15, 1989 ("existing impoundments") from exceeding a radon flux emission standard. If an operating, existing tailings impoundment exceeds the standard, then Subpart W requires the uranium mill to take steps to reduce the flux below the standard, until the supervising agency concludes emissions have been sufficiently controlled.

The White Mesa Mill ("Mill") is the only operating conventional uranium mill (one that processes mined ore, as opposed to using an in-situ leach process) in the United States. Since the enactment of Subpart W, the Mill has been licensed, permitted and allowed to operate two evaporation ponds, and a small catchment basin, in addition to two operating tailings impoundments. Plaintiff claims the evaporation ponds and the small catchment basin, which were all permitted and openly operated for years and were subject to numerous inspections by the regulators, are now illegal under the phased disposal work practice. Plaintiff's effort to overturn 25 years of regulatory oversight must be rejected as contrary to the law, as well as basic equity.

Plaintiff also wants the Court to insert itself into Utah's ongoing regulation of radon flux emissions at the Mill. While radon flux did briefly exceed the radon flux standard, it was quickly brought back under the standard by the Mill through remedial actions, primarily adding more cover to the tailings impoundments at issue and conducting more testing to show compliance. Utah concluded the Mill brought the emissions under the standard in 2014. The Mill has remained under the standard, as shown by several radon flux tests, since that time.

Plaintiff's case should be dismissed with prejudice because the Mill has complied with Subpart W. The Mill has only operated two tailings impoundments in compliance with the phased disposal work practice. Plaintiff's phased disposal claim is also barred by the statute of limitations, the doctrine of laches, the requirement to exhaust administrative remedies and the preclusion against collaterally attacking regulatory approvals. Plaintiff's radon flux claims are barred by the Mill's compliance with Subpart W and its remedial mechanisms, and because they are moot. Emissions have been controlled and are subject to ongoing radon flux testing by the Mill, which reports the results to the relevant agencies who will continue to oversee ongoing compliance with Subpart W.

REGULATORY BACKGROUND

The primary regulatory programs that govern the White Mesa Mill derive from the Atomic Energy Act of 1954 ("AEA"), as amended by the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"). The AEA and UMTRCA establish licensing, operational and long-term disposal requirements that govern uranium mills and their tailings. The NRC implements the AEA and UMTRCA, unless the NRC approves a State's request to become an Agreement State. Utah was approved as an Agreement State in 2004, and the Utah Division of

Radiation Control ("DRC"), now a part of the Utah Division of Waste Management and Radiation Control ("DWMRC"), oversees the Mill's compliance with the AEA and UMTRCA. Upon cessation of operations, and if disposal criteria are met, the Mill site will be transferred to the Department of Energy for long-term custody and maintenance.

Because the Mill receives and possesses "source material" and "11e.(2) byproduct material," the Mill must maintain licenses that govern those materials. Source material, per 10 CFR § 40.4 (2016), is "uranium or thorium," or "ores which contain by weight one-twentieth of one percent (0.05%) or more of: (i) uranium, (ii) thorium or (iii) any combination thereof." 11e.(2) byproduct material, per Section 11 of the AEA, is defined as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2), AEA § 11(e)(2).

The Mill originally obtained its license from the NRC, with the DRC issuing the license after Utah became an Agreement State. The license issued by DRC is called the Radioactive Materials License ("RML"). DRC also has jurisdiction over groundwater programs at the Mill, and has issued the Groundwater Discharge Permit ("GWDP"). The RML and GWDP work hand in hand, and cross-reference each other, in establishing the primary environmental and safety programs for the Mill. The Utah Division of Air Quality ("DAQ") also issued an air permit for the Mill, called an Approval Order ("AO").[1]

The primary regulations governing Mill operations and closure are set forth at 10 CFR Part 40, Appendix A. As required by UMTRCA, EPA issued generally applicable standards for

[1] For an overview of the Mill site and the RML, GWDP and AO history and implementation, consult the webpage devoted to Energy Fuels within the Utah Department of Environmental Quality (DEQ) website: http://www.deq.utah.gov/businesses/E/energyfuels/whitemesamill.htm

radiological hazards at uranium mills, set forth in 40 CFR Part 192 (Subpart D, 192.30-.34, being relevant in this case). As contemplated by UMTRCA, the EPA standards have been incorporated into 10 CFR Part 40, Appendix A, resulting in the NRC or the Agreement States having implementation and enforcement jurisdiction over those standards.

The primary regulations designed to protect workers and the public from radiation are set forth at 10 CFR Part 20. These regulations, as implemented through the RML, establish a network of sampling and monitoring to protect workers and the general public. The Mill reports results of the monitoring twice a year in Semi-Annual Effluent Reports. The Semi-Annual Effluent Reports show consistent compliance with applicable limits designed to protect the public.[2]

In addition to the 10 CFR Part 20 regulations, the Mill must also comply with "Subpart W – National Emission Standards for Radon Emissions from Operating Mill Tailings, 40 CFR Part 61, Subpart W," ("Subpart W") enacted under Section 112 of the Clean Air Act (CAA). 42 U.S.C. § 7412(d), CAA § 112(d); 54 Fed. Reg. 51654, 51657-58 (December 15, 1989). The original Subpart W was enacted on September 24, 1986, with the current Subpart W becoming effective on December 15, 1989. EPA initially retained authority to implement and enforce Subpart W, but it delegated that authority to the State of Utah, DAQ, in 1995.

As suggested by its title, Subpart W focuses on limiting radon emissions from *operating* tailings impoundments. Radon emissions from *non-operating* tailings impoundments are subject to the closure standards in 10 CFR Part 40, Appendix A. Under Subpart W, operating tailings impoundments, that existed as of December 15, 1989, must test for radon flux from the surface

[2] See http://www.deq.utah.gov/businesses/E/energyfuels/reports/effluent_rpt.htm.

of the impoundment and demonstrate compliance with a standard of 20 piC/m^2-sec on an annual basis. If the impoundment exceeds the annual standard, the Mill must begin monthly monitoring and develop a plan to reduce emissions below the standard. The Mill must continue monthly monitoring until the relevant agency, previously EPA, now DAQ, determines monthly reporting is no longer necessary. New tailings impoundments, built after December 15, 1989, are not required to test for radon flux or to meet the radon flux standard.

Subpart W also imposes work practice standards on new tailings impoundments, known as phased or continuous disposal. The source gets to choose between the phased or continuous disposal options. The Mill operates under the phased disposal option. The phased disposal work practice provides that tailings impoundments constructed after December 15, 1989, must be no more than 40 acres in surface area and must meet the liner and construction requirements in 40 CFR § 192.32(a) (which are incorporated into and enforced under 10 CFR Part 40, Appendix A). Also, under the phased disposal option, the Mill can have no more than two impoundments, including existing impoundments, in operation at any one time.

Subpart W has a companion regulation, entitled "Subpart T – National Emission Standards for Radon Emissions from the Disposal of Uranium Mill Tailings," which applied to tailings impoundments after operations ceased. Subpart T, which was stayed and eventually rescinded, would have required tailings impoundments to meet the 20 piC/m^2-sec radon flux standard within two years after the end of operations. In 1990, Section 112 of the CAA was amended, with the purpose of avoiding duplicative regulation, by allowing EPA to exempt sources from Section 112 if EPA found NRC regulatory programs protected public health. 42 U.S.C. § 7412(d)(9), CAA § 112(d)(9). In 1994, EPA completed a rulemaking which rescinded

Subpart T, based upon a finding that the closure requirements in 10 CFR Part 40, Appendix A (which incorporate the 40 CFR Part 192, subpart D requirements), would provide sufficient protection of public health. 59 Fed. Reg. 36280, 36287 (July 15, 1994).

Criterion 6 and 6A in 10 CFR Part 40, Appendix A, outline the design and performance requirements for closed tailings impoundments and outline the closure process. Under Criterion 6, the closed impoundment must be designed to control radiological hazards for 1,000 years, to the extent reasonably achievable, and in any case for 200 years, and the cover must be designed to limit radon flux below 20 piC/m^2-sec to the extent practicable throughout the design life of the closure cover. The closure cover must include a final radon barrier designed to meet the 20 piC/m^2-sec standard. Under Criterion 6A, 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, Commission-approved reclamation plan." (Emphasis in original). Criterion 6A also provides: "Deadlines for completion of the final radon barrier and, if applicable, the following interim milestones must be established as a condition of the individual license: windblown tailings retrieval and placement on the pile and interim stabilization (including dewatering or the removal of freestanding liquids and recontouring)." The time for performing milestones can be extended if the source can show it will meet the 20 piC/m^2-sec standard and prove compliance through annual testing. A tailings impoundment can also be allowed to continue accepting certain wastes during the closure process, without the pile being deemed to revert to operational status.[3]

[3] The CAA contains a citizen suit provision, Section 304, 42 U.S.C. § 7604, while the AEA and UMTRCA do not. The Mill's compliance with the closure rules in 10 CFR Part 40 Appendix A is not subject to challenge in this case. Once a tailings impoundment stops operating, Subpart W no longer applies to it.

EPA has been in the process of revising Subpart W for several years. It published the proposed revisions to Subpart W on May 2, 2014. 79 Fed. Reg. 25388 (May 2, 2014). The proposed rule expressly provides that evaporation ponds, which would be called non-conventional impoundments in the revised rule, are not subject to the phased disposal work practice. The proposed rule would eliminate the requirement to test any tailings impoundments, whether existing or newly constructed, for radon flux. EPA's website indicates that it expects to complete the Subpart W rulemaking in 2016.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

NUMBER OF TAILINGS IMPOUNDMENTS: CLAIM 2

Plaintiff's Second Claim for Relief alleges that the Mill is in violation of Subpart W's limitation on the number of tailing impoundments. [FAC ¶¶ 45-49.] For operators using phased disposal, Subpart W provides: "The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time." 40 CFR § 61.252(b)(1). Subpart W defines "operation" to "mean that an impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment is in operation from the day that tailings are first placed in the impoundment until the day that final closure begins." *Id*. § 61.251(e). Phased disposal "means a method of tailings management and disposal which uses lined impoundments which are filled and then immediately dried and covered to meet all applicable Federal standards." *Id*. § 61.251(f).

A CAA citizen suit is subject to the 5-year statute of limitations established in 29 U.S.C. § 2462. *Sierra Club v. Okla. Gas & Elec. Co.*, __ F.3d __, 2016 WL 873362, *3 (10th Cir. March 8, 2016). This limitation demands that an action on a claim must be "commenced within

five years from the date when the claim first accrued." 29 U.S.C. § 2462. The legal doctrine of laches "bars a claim where there is: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1091 (10th Cir. 2014). The legal doctrine of exhaustion of administrative remedies requires litigants to "exhaust available administrative remedies prior to seeking judicial review." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 743 (10th Cir. 1982); *Park Cnty. Res. Council v. U.S. Dep't of Agric.*, 817 F.2d 609, 619 (10th Cir. 1987). The CAA does not allow Plaintiff to use a citizen suit to "collaterally attack facially valid state permits." *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 175 F.Supp.2d 1071, 1079 (E.D. Tenn. 2001); *Nucor Steel-Ark v. Big River Steel, LLC*, 93 F.Supp.3d 983, 992 (E.D. Ark. 2015); *cf. U.S. v. Solar Turbines, Inc.*, 732 F.Supp. 535, 539-40 (M.D. Pa. 1989) ("EPA can not as a matter of law pursue enforcement action against an owner/operator who has committed no violation that can be attributed to it other than to act in accordance with a permit it received from an authorized permit-issuing authority, but which permit EPA believes the issuing authority improperly granted.").

In support of the Mill's Motion for Summary Judgment on Claim 2, the following facts are undisputed:

1. Construction of the White Mesa Mill ("Mill") started in 1979 and operations commenced in 1980. The Mill grinds and leaches ore to extract uranium and vanadium in the form of yellowcake (uranium) and black flake (vanadium), the primary end market products of the Mill. Declaration of Harold Roberts ("Roberts Dec.") ¶ 5; Appendix to Defendants' Motion for Summary Judgment and Memorandum in Support ("Defendants' Appx.) Ex. 14 and Ex. 15.

2. The Mill has a tailings management system that is used to dispose of tailings generated by the Mill. A map showing the configuration of the cells is attached as Exhibit 1. The tailings management system consists of a series of evaporation ponds and tailings impoundments, all of which are referred to as cells with identifying numbers. Roberts Dec. ¶ 6; Defendants' Appx. Ex. 14 and Ex. 15.

3. There are five cells in total in the tailings management system: Cell 1 (evaporation pond), Cell 2 (full tailings impoundment in closure), Cell 3 (active tailings impoundment), Cell 4A (active tailings impoundment) and Cell 4B (evaporation pond, planned to become an active tailings impoundment when Cell 3 begins closure). Roberts Dec. ¶ 7; Defendants' Appx. Ex. 14 and Ex. 15.

4. The waste stream exiting the Mill consists of two basic components: tailings solids and process solutions. The tailings solids are conveyed in the tailings pipeline in slurry form to the tailings impoundments. The tailings slurry flows out of the counter-current decantation ("CCD") circuit and, specifically, the number 8 CCD thickener. The tailings slurry is placed in tailings impoundments, where the solids settle out from the liquid portion. Process solutions, called raffinate or S/X (solvent extraction) solutions, are also separately conveyed by a different pipeline into an evaporation pond. Roberts Dec. ¶ 8; Defendants' Appx. Ex. 14 and Ex. 15.

5. As the tailings impoundments are filled with tailings and the tailings settle and become sufficiently stable, the Mill advances what is known as interim cover or platform fill over the tailings to prevent blowing of tailings, to reduce radon emissions, and to begin the reclamation of the impoundment. As a result, an operating tailings impoundment can have three

basic areas: covered areas, beaches (uncovered tailings) and solutions. Roberts Dec. ¶ 9; Defendants' Appx. Ex. 14, Ex. 15 and Ex. 17.

6. The Mill must operate the tailings impoundments and evaporation ponds such that process solutions do not exceed freeboard limits on the cells set in the GWDP. The Mill is a zero-discharge facility, which means that any waters or solutions not used in the process must be evaporated. This requires the Mill to actively manage process solutions by transferring solutions between the tailings impoundments and the evaporation ponds. Process solutions are also circulated back to the Mill for re-use to reduce the amount of fresh water the Mill has to add to the process. The re-use of the process solutions also allows the recovery of residual uranium and vanadium values. At full operation, the Mill discharges approximately 600 gallons a minute to the tailings management system which must be evaporated. The amount of required evaporative surface area is therefore dictated by this discharge rate and the net rate of evaporation in the Blanding area. Roberts Dec. ¶ 10; Defendants' Appx. Ex. 14, Ex. 15 and Ex. 20.

7. The process solutions contain dissolved solids that may precipitate, under certain chemical conditions, to the bottom of the evaporation ponds. Also, the raffinate process solutions, if allowed to fully evaporate, can form a layer of crystals on the bottom of the evaporation pond. However, the Mill has not observed significant amounts of precipitated solids or raffinate crystals in the evaporation ponds: Cell 1 and Cell 4B. Roberts Dec. ¶ 11; Defendants' Appx. Ex. 14, Ex. 15 and Ex. 17.

8. As required by the RML (see Sections 9.4(D), 9.5 and 9.11 of Defendants' Appx. Ex. 37), the Mill has an approved Reclamation (Rec) Plan, version 3.2 dated January of 2011. The Rec Plan describes the overall closure process for the entire Mill facility, which involves

demolishing all Mill buildings, scraping and excavating impacted soils and burying everything, demolished buildings included, in the tailings impoundments for long-term disposal. Cell 1 will be excavated (the liner, sediments, impacted soils) and disposed of in one of the tailings cells. A small portion of Cell 1 may be relined and Mill demolition debris disposed of in it. Cell 2 will be covered in place, as will Cell 3 and Cell 4A. The Rec Plan envisions that Cell 4B will transition to being used as a tailings impoundment and will be covered in place like Cells 2, 3 and 4A. However, if the Mill were to close now, the Mill would seek to revise the Rec Plan to provide for excavation and disposal of Cell 4B in Cell 4A, given that no tailings solids have been placed in Cell 4B. The Mill would do this because there is no need to place an engineered cover over a cell that has not received any tailings and will not be used for permanent disposal of tailings. Rather, the cell would be removed and permanently disposed of in one of the Mill's tailings impoundments. Roberts Dec. ¶ 12; Defendants' Appx. Ex. 17 and Ex. 37; Declaration of Phil Goble ("Goble Dec.") ¶ 17.

9. Rec Plan 3.2 calls for a multi-layered, six feet thick cover to be placed over the tailings disposal impoundments. The first layer is a three feet minimum random soil fill (platform fill) layer, the second layer is a one-foot thick clay layer, the third layer is a two-foot thick random fill (frost barrier) layer and the fourth layer is a three to eight inch rip-rap layer to stabilize slopes and provide erosion resistance. The first layer, the platform fill, is part of the final radon barrier and is included when performing the radon flux attenuation calculations for long-term disposal of the impoundment. Roberts Dec. ¶ 13; Defendants' Appx. Ex. 17.

10. Construction of Cell 1 was completed in June 1981, with a surface area of 55 acres and a single-layer, synthetic bottom liner to protect groundwater. Cell 1 has been used

only as an evaporation pond. Cell 1 directly receives raffinate solutions, as well as process solutions pumped from other cells. Cell 1 also receives liquids from the drains in the Mill laboratory and storm water runoff. The tailings pipeline at the Mill has never been directed to discharge tailings solids into Cell 1. Cell 1 remains in operation as an evaporation pond. Roberts Dec. ¶ 10; Defendants' Appx. Ex. 14 and Ex. 15.

11. Construction of Cell 2 was completed in May 1980, with a surface area of 67 acres and a single-layer, synthetic bottom liner to protect groundwater. Cell 2 operated as a tailings impoundment, receiving tailings solids from the tailings pipeline. Cell 2 was filled with tailings, and stopped receiving tailings from the tailings pipeline, sometime after the late 1980's but well before 2008. Cell 2 reached capacity and could no longer receive tailings solids or process solutions under the RML and GWDP. Roberts Dec. ¶ 15; Defendants' Appx. Exhibits 14, 15, 20 and 37. However, until March 21, 2008, a small area of Cell 2 remained open for disposal of on-site trash. On March 21, 2008, the platform fill layer was advanced over that small area, and Cell 2 stopped receiving any waste. Declaration of David Turk ("Turk Dec.") ¶ 6; Defendants' Appx. Exhibits 7-9.

12. On May 22, 2008, DAQ conducted an inspection of the Mill. The inspector noted that "Cell 2 has already been closed." The inspector further stated: "Cell 2 has recently been closed and is now covered by fill material." Declaration of Jay Morris ("Morris Dec.") ¶ 4; Defendants' Appx. Ex. 11. In addition, in June of 2008, the testing company that performed the radon flux testing for Cell 2 noted in its report that Cell 2 consisted of one region of cover only, with no beaches or standing liquid. This is further shown in the diagram attached at the end of the report which shows Cell 2 as being fully covered. Turk Dec. ¶ 6; Defendants' Appx. Ex. 13.

13. As required by the Rec Plan, RML and GWDP, and because Cell 2 was filled and entered the closure phase: (1) the Mill has been actively dewatering Cell 2 since as early as January 2008, and (2) the Mill has been monitoring settlement plates on the surface of the platform fill. Roberts Dec. ¶ 16; Defendants' Appx. Ex. 17, Ex. 20 and Ex. 37.

14. Construction of Cell 3 was completed in September 1982, with a surface area of 71 acres and a single-layer, synthetic bottom liner beneath it to protect groundwater. The dikes (sides) of Cell 3 were constructed with earthen material. Cell 3 has operated as a tailings impoundment, receiving tailings solids from the tailings pipeline, and process solutions pumped from other cells on occasion. Cell 3 is almost full to capacity with tailings, but has a small area that remains open and which could receive tailings. Roberts Dec. ¶ 17; Defendants' Appx. Ex. 14 and Ex. 15.

15. In 1989, the Mill applied to both NRC and EPA to construct Cell 4A. The Mill supplied the same Cell 4 Design report to both agencies. The Design Report proposed immediate construction of 40 acre Cell 4A, with a second 40 acre Cell 4B to be constructed later. The Mill had originally envisioned an 80 acre cell, but split the cell in two in order to comply with Subpart W's phased disposal requirements. Cell 4A included a more extensive liner system beneath it to protect groundwater, comprised of a synthetic liner and clay underlay. Roberts Dec. ¶ 18; Defendants' Appx. Ex. 1, Ex. 14 and Ex. 15.

16. The 1989 application to EPA was made under the original 1986 Subpart W. At the time the application was submitted to EPA, Cell 1 was operating as an evaporation pond, and Cells 2 and 3 remained open to receive tailings, although Cell 2 was nearing final capacity. The ongoing operation of Cell 1 as an evaporation pond was clearly stated on the face of the Cell 4

Design report. Cells 1, 2 and 3 were depicted on maps attached to the application, along with proposed Cell 4A and future Cell 4B. EPA approved the application to construct Cell 4A on March 16, 1989. Roberts Dec. ¶ 19; Defendants' Appx. Ex. 1 and Ex. 46.

17. On June 26, 1989, Utah updated the air emissions Approval Order (AO) for the Mill specifically to authorize construction of Cell 4A and 4B. The AO, in paragraph 5, approved the construction of 4A and 4B with "a phased final surface area of no more than 40 acres each." It further stated that "Cell #4 shall be designed as a below-grade repository similar to the previously constructed cells in the Tailings Management System." Roberts Dec. ¶ 20; Defendants' Appx. Ex. 2.

18. Construction of Cell 4A was substantially complete on November 30, 1989. On December 21, 1989, the NRC approved a license amendment to allow Cell 4A to receive process solutions only, not tailings: "Process solutions may be discharged into Cell 4A at a maximum rate of 750,000 gallons per day. Disposal of tailings is not authorized." On March 1, 1990, the NRC approved a license amendment to allow Cell 4A to also receive tailings. However, Cell 4A was used for evaporation of process solutions (raffinate) only in 1990. No tailings solids from the tailings pipeline were placed into Cell 4A at that time. Roberts Dec. ¶ 21; Defendants' Appx. Ex. 3, Ex. 4, Ex. 14 and Ex. 15.

19. Revised Subpart W became effective on December 15, 1989. As required by Subpart W, the Mill began testing radon emissions from Cells 2 and 3 in 1990. The 1990 annual result for Cell 2 (49.0) was above the 20 piC/m^2-sec standard, while the result for Cell 3 was below the standard. Declaration of Bryce Bird ("Bird Dec.") ¶ 9; Defendants' Appx. Ex. 5.

20. On March 18, 1991, the Mill reported the results to EPA, which on June 7, 1991 issued a Compliance Order, requiring the Mill to submit a schedule and action plan to bring the radon emissions below the standard. The Mill complied with this order by submitting the required schedule and action plan. The Mill then added cover to Cell 2 and retested the radon emissions to show compliance. On December 3, 1991, EPA found the Mill had complied with the order and relieved the Mill of further corrective action and monthly reporting. Bird Dec. ¶ 9; Defendants' Appx. Ex. 5.

21. In the June 7, 1991 Compliance Order (CO), EPA stated: "The facility has two operating mill tailings piles, designated Cell 2 and Cell 3." CO, ¶ 1. EPA also stated, "As operating mill tailings piles, Cells 2 and 3 are subject to Title 40 of the Code of Federal Regulations ('CFR'), at 40 CFR Part 61, Subpart W, National Emission Standards for Radon Emissions from Operating Mill Tailings (40 CFR 61.250 through 61.256), promulgated December 15, 1989, under the Clean Air Act." CO, ¶ 2. Bird Dec. ¶ 9; Defendants' Appx. Ex. 5.

22. Bryce Bird, the current Director of DAQ, held the position of Environmental Scientist with DAQ in the 1990's. He inspected the Mill in the early 1990's and was involved with the transition of authority over Subpart W from EPA to Utah and worked directly with EPA employees regarding the application of Subpart W to the Mill. During his inspections of the Mill, Mr. Bird observed that Cell 2 and Cell 3 were the operating tailings impoundments that received the tailings solids, and that Cell 1 and Cell4A were used to evaporate liquids. During his inspections and through communications with EPA employees, there was a common understanding that only Cell 2 and Cell 3 were the operating tailings impoundments, and that the evaporation ponds were not operating as tailings disposal cells and therefore, were not counted

as part of the two operating cell maximum. Utah had a common understanding that the EPA considered the Mill to be in compliance with the two cell maximum requirement. Bird Dec. ¶¶ 2-8.

23. Cell 4A had not been used after 1990 and the liner became damaged from thermal stress due to exposure to direct sunlight. The drying process resulted in a layer of raffinate crystals forming in the bottom of the cell. The raffinate crystals were removed from the bottom of Cell 4A in the mid-2000's and disposed of in Cell 3. This was done in conjunction with the relining of Cell 4A in 2007 and 2008. The relining was completed and approved for use by DRC on September 17, 2008. The relined Cell 4A was used initially to receive process solutions and thereafter started receiving tailings solids as Cell 3 filled up. Roberts Dec. ¶ 22; Defendants' Appx. Ex. 12, Ex. 14 and Ex. 14.

24. In June 2008, the Mill applied for approval from the DRC to construct Cell 4B. Consistent with the plan stated in the 1989 applications to EPA and NRC, Cell 4B was designed as a 40 acre cell to comply with Subpart W's size limitation. Cell 4B included an extensive two layer synthetic liner system beneath it plus a geo-clay layer to protect groundwater. Roberts Dec. ¶ 23; Defendants' Appx. Ex. 10.

25. On April 13, 2010, the Mill also applied for approval for Cell 4B from DAQ pursuant to Subpart W. The application was copied to EPA. The application explained in detail the history of the construction and operation of the cells. The application made clear the Mill would continue to operate Cell 1 as an evaporation pond, that Cell 2 was closed and that before tailings solids would be disposed of in Cell 4B, Cell 3 would cease operating. The application explained that until Cell 3 ceased operating, Cell 4B would be used only as an evaporation pond,

resulting in Cell 3 and Cell 4A being the two operating tailings impoundments under Subpart W. Roberts Dec. ¶ 24; Defendants' Appx. Ex. 15.

26. On May 3, 2010, the DAQ granted approval for Cell 4B, finding "our review determined that these facilities will not cause emissions in violation of the standard found in 40 CFR 61.252, if properly operated." No one filed a challenge to DAQ's approval. EPA did not object to the approval. Roberts Dec. ¶ 25; Defendants' Appx. Ex. 16.

27. DRC granted final approval to operate Cell 4B on January 31, 2011. No one filed a challenge to DRC's approval. EPA did not object to the approval. Roberts Dec. ¶ 26; Defendants' Appx. Ex. 18.

28. On November 5, 2011, the Executive Director of the DEQ wrote a letter to the Ute Mountain Ute Tribe responding to concerns it had expressed regarding the Mill, including relating to Subpart W. The Executive Director explained that Subpart W required that "tailings impoundments be lined, to be less than 40 acres, and limit[s] sources to two impoundments in operation at any one time. Since these requirements have been in place, Denison [the prior operator of the Mill], has met them." Bird Dec. ¶ 12; Defendants' Appx. Ex. 19; Goble Dec. ¶ 11; Defendants' Appx. Ex. 19

29. Phil Goble, with Utah DWMRC, has worked with DAQ staff to oversee Subpart W issues, particularly related to the number of operating tailings impoundments. Mr. Goble attended EPA conference calls, along with DAQ employees, regarding the White Mesa Mill, and explained Utah's position that the Mill was in compliance with the phased disposal work practice. Mr. Goble learned during these calls that some EPA employees were advancing a new interpretation of Subpart W, and now considered evaporation ponds to be subject to the phased

disposal work practice. Mr. Goble expressed concern about the enforceability of this new interpretation. Goble Dec. ¶¶ 5-9; see also Bird Dec. ¶ 13.

30. On February 19, 2014, Mr. Goble sent an email to an EPA employee confirming Utah's position that the Mill was in compliance with the phased disposal work practice. He stated that Cell 1 and Cell 4A were used for liquid management and no tailings had been placed in them, and were not operating tailings cells. He further explained that Cell 2 had begun final closure: "Tailing placement has ceased and temporary cover has been placed over it. Final closure activities (dewatering) have begun and the cell is no longer active. Tailing Cell 2 must be dewatered and stabilized before final cover is placed." He explained that Cell 3 and 4A were the two active tailings cells in compliance with the phased disposal work practice. Goble Dec. ¶ 12; Defendants' Appx. Ex. 30.

31. On July 10, 2014, DRC issued a response to comments on a proposal by the Mill to process an alternate feed material. DRC explained in detail Utah's position on why the Mill was in compliance with the phased disposal work practice. The response to comments pointed out the definition of tailings used by EPA as being "sand like wastes." Goble Dec. ¶ 13; Defendants' Appx. Ex. 36.

32. On August 11, 2014, DAQ Director Bryce Bird sent an email to EPA regarding a CERCLA Off-Site Rule Determination for the Mill. He explained the history and regulatory interpretations by Utah and EPA regarding the phased disposal limitation:

> • *Does the Mill meet the requirements of 40 CFR § 61.252(b)(1); "Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of 40 CFR 192.32(a) as determined by the Nuclear Regulatory Commission. The owner or operator shall have no more than two*

> *impoundments, including existing impoundments, in operation at any one time."?*
>
> There are two impoundments currently in operation, as that term is defined in 40 CFR § 61.251(e), at the White Mesa Mill, cell 3 and cell 4A. Cell 3 began operation in 1982 and is therefore not subject to the 40 acre limitation. Cell 4A is 40 acres and therefore meets the quoted limitation.
>
> There is also a cell in closure at the site. Cell 2 has not received any waste since at least 2008 and is currently undergoing dewatering. Although the cell has been closed as a factual matter, that status was recently formalized with a July 23, 2014 letter prohibiting the addition of any new waste in the cell.
>
> Finally, there are also two impoundments for treatment and reuse of liquid waste. Those cells are also not in "operation," as that term is defined in 40 CFR § 61.251(e) because they have never received tailings. We recognize that EPA in its new rulemaking for Subpart W makes some comments about that interpretation (79 FR 25388, at 25397), but it is also important to recognize that the interpretation in the first sentence of this paragraph has been the one consistently applied by DAQ and EPA for approximately 25 years. Given this lengthy history, we believe it is appropriate to address any concerns about the way the regulation is being implemented by amending the rule, as EPA has proposed to do.

Bird Dec. ¶ 15; Defendants' Appx. Ex. 39.

33. On October 29, 2014, DRC sent a comment on the proposed Subpart W to EPA.

DRC copied DAQ Director Bryce Bird, who concurs in the comment. Paragraph 4 reads:

> On page 25402, the EPA states regarding evaporation ponds: "EPA has consistently maintained that these non-conventional impoundments meet the existing applicability criteria for regulation under Subpart W." The State of Utah disagrees with this statement. EPA inspected the White Mesa Mill for compliance from the time Subpart W was first promulgated until it delegated this authority to Utah in April of 1995. As the DAQ Director has reminded EPA staff in meetings, DAQ Staff accompanied EPA during these inspections. At no time did the EPA inspectors take the position that the non-conventional impoundments were subject to Subpart W. EPA also did not bring up the matter with respect to DAQ's oversight in 1995 or for

> nearly two decades after that. It was not until meetings in 2012 and 2014 that EPA representatives indicated their interpretation of the requirements of Subpart W had changed to require non-conventional impoundments be considered as in "operation" for the purposes of the rule. This change of interpretation was made without notice or justification to either the regulator or the regulated entity, and without any corresponding change in the regulation. It also relies on an awkward interpretation of a definition of two different things – uranium byproduct material and tailings – and assumes that they are thereby joined as a single material by the definition. The definition does not say that byproduct materials and tailings are co-extensive; it is more likely that they were combined together for the purpose of including the limitation about ore bodies in the definition of both materials.
>
> Given this history, it is unrealistic to expect that any regulator could successfully implement a new interpretation that would require the regulated entity to make substantial changes in long-standing or existing disposal management facilities. For these reasons, we support making the change explicit in the rule, as has been proposed.

Bird Dec. ¶ 16; Defendants' Appx. Ex. 41; Goble Dec. ¶ 15.

34. At present, Cell 1 and Cell 4B continue to operate as evaporation ponds, while Cell 3 and Cell 4A operate as tailings impoundments. Roberts Dec. ¶ 27.

35. Until recently there was a small, less than one acre retention basin located immediately west of and adjacent to the Mill CCD circuit and pre-leach thickener. Roberts Pond, as it was known, was part of the original Mill construction in the early 1980's. Roberts Pond performed as a catch basin for process upsets and overflows from Mill operations, and also captured storm water runoff. The Mill at times would also direct materials from the Mill operations to be stored in Roberts Pond and then returned to the Mill process. Roberts Pond accumulated sediment over time and was periodically cleaned out. The sediments removed from Roberts Pond were either returned to the Mill ore pad for processing (if they had sufficient

uranium values) or deposited in a tailings impoundment for disposal. Roberts Dec. ¶ 28; Defendants' Appx. Ex. 34 and Ex. 43.

36. The existence and use of Roberts Pond has been documented in several reports, aerial photographs and diagrams including but not limited to: the original 1979 grading plan for the Mill, the 1988 Design Report, the 1997 Environmental Assessment by NRC, a 2002 As-Built Construction Report, the 2007 license renewal application to DRC, the 2008 application to DRC to construct Cell 4B and the 2010 application to DAQ to construct Cell 4B. Roberts Dec. ¶ 29; Defendants' Appx. Exhibits 1, 6 and 15. With oversight by DRC/DWMRC, and in accordance with DRC/DWMRC soil cleanup standards, Roberts Pond was taken out of service in March of 2014, and excavated, backfilled and regraded between 2014 and early 2016. Roberts Dec. ¶ 30; Defendants' Appx. Ex. 34 and Ex. 43; Goble Dec. ¶ 10.

37. The Mill has never been advised that Utah or EPA considered Roberts Pond to be subject to the phased disposal work practice standard. Roberts Dec. ¶ 31. Utah did not consider it to be a tailings impoundment, and Mr. Goble with DWMRC, who attended calls with EPA about the Mill, doesn't recall discussions about Roberts Pond with EPA. Goble Dec. ¶ 10.

38. The Mill's approved design and operations are dependent on the use of evaporation ponds in conjunction with the tailings impoundments as part of the tailings management system. The Mill has expended resources, including the initial construction and operation of the Mill facility based on its approved design, the continued use of Cell 1, the re-lining of Cell 4A, and the construction of Cell 4B, in reliance on the ability to use evaporation ponds to meet the design criteria for a zero-discharge facility. The Mill has incurred extensive costs in developing the Rec Plan and associated bonding, based upon phased disposal being

allowed without limiting the evaporation ponds at the site. The entire Mill design, permitting and licensing, construction, operation, reclamation and bonding is based on a zero-discharge facility with adequate licensed evaporative capacity available for continuous operations. Roberts Dec. ¶ 38; Defendants' Appx. Exhibits 1-4, 6, 10, 12, 14-17, 20, 37 and 46.

CELL 2 RADON EMISSIONS: CLAIM 1

Plaintiff's First Claim for Relief alleges that the Mill operated Cell 2 in violation of Subpart W's radon-222 emission limitations in 2012 and 2013. Subpart W provides: "Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec) of radon-222." 40 CFR § 61.252(a). An existing tailings impoundment is subject to the 20 pCi-emissions limitation only if the impoundment is in operation. *Id.* §§ 61.254(b). Under Subpart W, the term "operation" means "that an impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment is in operation from the day that tailings are first placed in the impoundment until the day that final closure begins." *Id.* § 61.251(e). Subpart W contains an automatic remedial mechanism that provides: "If the facility is not in compliance with the emissions limits of § 61.252 in the calendar year covered by the report, then the facility must commence reporting to the Administrator on a monthly basis . . . . This increased level of reporting will continue until the Administrator has determined that the monthly reports are no longer necessary." *Id.* § 61.254(b). The facility must also explain the controls or other changes it will make to the facility to bring it into compliance with the standard. *Id.*

The doctrines of constitutional and prudential mootness apply when "circumstances [have] changed since the beginning of the litigation that forestall any occasion for meaningful

relief." *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997). A claim is constitutionally moot when "intervening events" cause a plaintiff to "lose[] one of the elements of standing during litigation." *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012). A claim is no longer redressable when "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010); *WildEarth Guardians*, 690 F.3d at 1185. A claim is prudentially moot when "events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand no decision but dismissal." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012); *S. Utah Wilderness Alliance*, 110 F.3d at 727.

In Support of the Mill's Motion for Summary Judgement on Claim 1, the following facts are undisputed:

39. The Mill began measuring radon flux from Cell 2 and Cell 3 in 1990. Attached as Exhibits 2 (Cell 2) and 3 (Cell 3) hereto are tables summarizing the radon flux results from the sampling each year until the present.

40. Cell 2 briefly exceeded the 20 piC/m^2-sec standard in 1990, but since then it remained under the standard on an annual basis for every year until 2012, when the flux exceeded the standard, based upon the results of four sampling events conducted that year. Exhibit 2 hereto.

41. On March 29, 2013, the Mill reported the 2012 results to DAQ, along with an explanation of the cause of the increase in radon flux and a plan to bring the results back under the standard by, among other things, adding cover and doing monthly sampling. The analysis of the cause of the increase in radon flux included excavating test pits in February of 2013 to assess the tailings sands composition and the platform fill cover depth. After this analysis, the Mill concluded that the increase in radon flux in 2012 was the result of dewatering of the cell, which is required under the Mill's RML and GWDP as part of the reclamation and final closure of the cell, to ensure long term stability of the cell prior to placement of the final layers of the cover. The dewatering had reduced the water level in the cell, as intended, which had the effect of drying out a portion of the tailings in the cell, thereby allowing for an increased radon flux. The Mill met with DAQ and DRC staff in March 2013 to explain the findings of the Mill's analysis and to discuss the Mill's proposal to add more cover and begin monthly radon flux sampling. Roberts Dec. ¶ 33; Defendants' Appx. Ex. 29.

42. In June and July 2013, the Mill began adding cover to hot spots where radon flux readings were higher and focusing on known sources of radiological contamination at or near the surface of the cell cover. In August of 2013, the Mill also added more cover to the hot spots, and sprayed these areas with water and compacted them. Moving into September of 2013, the Mill removed windblown tailings from Cell 3 and reburied it on Cell 3 and constructed a 5 foot berm to reduce the blowing from Cell 3 to Cell 2. In addition, between December 16, 2013 and February 6, 2014, the Mill placed what it called the first lift of additional cover over larger areas of Cell 2, which provided added thickness to the platform fill that had already been placed over the entire surface of the Cell. Turk Dec. ¶ 8; Defendants' Appx. Exhibits 25-29.

43. An aerial photograph showing the hot spot cover work and the first lift is attached as Exhibit 4 hereto. The circular areas with yellow shading represent the hot spots that were initially covered. The yellow shading represents the first lift of additional cover, which was later overlaid with a second lift of additional cover, shown in green. The second lift is explained below. Turk Dec. ¶ 9; Defendants' Appx. Ex. 28.

44. The efforts by the Mill were successful, and by September of 2013 and continuing until May of 2014, for each month the radon flux results were consistently below the standard. Turk Dec. ¶ 10; Exhibit 4 hereto.

45. On May 30, 2014, the Mill submitted the monthly results for April of 2014, along with a request to cease the monthly monitoring. The request summarized the steps taken to reduce radon flux emissions and included a table showing the results of the monthly monitoring and reporting. Turk Dec. ¶ 11; Defendants' Appx. Ex. 35.

46. On July 23, 2014, the DRC and DAQ agreed that the Mill could cease monthly monitoring because Cell 2 had remained under the standard for nine months. DRC and DAQ also clarified that because Cell 2 had been closed since at least 2008, it was not actually covered by Subpart W and that jurisdiction had shifted to DRC. Even so, DRC required the Mill to continue semi-annual radon flux monitoring of Cell 2. Turk Dec. ¶ 12; Defendants' Appx. Ex. 38. Bird Dec. ¶ 14; Goble Dec. ¶ 14; Morris Dec. ¶ 6.

47. The Mill continued monthly monitoring for May, June and July of 2014 because it had not received the July 23, 2014 letter. The results for May and June were below the standard. However, the results for July were slightly over the standard, at 20.4. Upon learning this, DRC required more platform fill to be added to Cell 2. Turk Dec. ¶ 13; Defendants' Appx. Ex. 40.

The Mill placed this second lift of additional platform fill between August 26, 2014 and November 29, 2014. See Exhibit 4. Turk Dec. ¶ 14; Defendants' Appx. Ex. 28.

48. As shown in Exhibit 2, the radon flux sampling since July of 2014 (4 sampling events; twice per year), shows Cell 2 has remained below the standard.

49. Even though Cell 2 had entered closure and stopped operating by 2008 and the Mill was not required to continue sampling Cell 2 after that time, it continued to do so because it had not considered the issue closely enough under Subpart W to appreciate that the Mill could have ceased sampling Cell 2. The Mill continued sampling Cell 2 at the same time it sampled Cell 3 and reported the results to DAQ. Roberts Dec. ¶ 34.

50. The Mill has been working with DRC/DWMRC to revise the Rec Plan. The basic difference is that the proposed revised cover will now have a total thickness of 10.5 feet and the new proposed final top layer of the cover will be an evapotranspiration (ET) layer (top cover with drought tolerant plants) as opposed to a rip-rap rock cover. The Mill believes the ET cover will be more effective in drawing water out of the cover that would otherwise infiltrate the rip-rap cover, and thus the ET cover will be more effective long-term in minimizing potential ground water impacts and other factors. Roberts Dec. ¶ 35.

51. On September 21, 2015, the DWMRC Director Scott Anderson sent a letter to a citizen who had filed a petition to reinstate Subpart T. In that letter, DWMRC explained the ongoing process to renew the RML and GWDP, and to develop the new Rec Plan. This is a significant and complex undertaking that has involved extensive technical work by DWMRC and the Mill. As explained in the letter, DWMRC indicated that it would continue requiring the Mill to remain under the 20 piC/m^2-sec standard at Cell 2 until the permanent radon barrier is placed.

Once DWMRC is satisfied with the draft RML, GWDP and revised Reclamation Plan, those documents will be noticed for public comment and DWMRC will consider those comments before making final decisions. Goble Dec. ¶ 16; Defendants' Appx. Ex. 45.

52. With DWMRC oversight, and in advance of the anticipated approval of the new Rec Plan, the Mill is continuing with the closure process for Cell 2. Phase 1 of this work is scheduled to start in late spring of this year and continue during the construction season (possibly into fall of 2016). Phase 1 will consist of adding material for Layers 1, 2 and 3 of the cover. Layer 1, the Secondary Radon Attenuation and Grading Layer in the new cover design, will consist of adding more platform fill to the existing cover to insure a total thickness of 2.5 feet. Layer 2 (placed on top of Layer 1), is the Primary Radon Attenuation Layer and will be 4.0 feet thick. Layer 3 (placed on top of Layer 2), is a Water Storage/Biointrusion/Frost Protection/Secondary Radon Attenuation Layer and is 3.5 feet thick. In Phase 1, 1.5 feet of Layer 3 will be added. Phase 2 would involve placing the rest of Layer 3, and then placing Layer 4 on top of Layer 3. Layer 4 is anticipated to be a 0.5 foot thick Erosion Protection Layer. Given that Cell 2 has over two years of radon flux data below the standard, the Mill believes that adding this significant amount of cover will provide further assurance Cell 2 will continue to remain below the standard. The Mill is also in discussions with DWMRC to construct a test plot of the entire ET cover, with all the layers, in a smaller area on Cell 2. Roberts Dec. ¶ 36.

CELL 3 RADON EMISSIONS: CLAIMS 3, 4 AND 5

Plaintiff's Third, Fourth, and Fifth Claims for Relief relate to Cell 3 and allege violations of Subpart W's test notification and monitoring protocols as individual claims and also as a combined alleged violation of Subpart W's radon-222 emission limitation in 2013. [FAC ¶¶ 50-

62.] Subpart W provides: "Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) of radon-222." 40 CFR § 61.252(a). Compliance with the 20 pCi-limit is determined annually through radon flux monitoring. *Id*. § 61.253. An operator may elect to base compliance on a "single set of radon flux measurements" or may elect to base compliance on measurements made "over a one year period." *Id*. If an operator opts to take multiple measurements over a one year period, the operator must provide regulators "a schedule of the measurement frequency to be used" and the source "may" submit this schedule "prior to or after the first measurement period." *Id.* § 61.253.

If an operator elects to use multiple measurements taken over a one year period, the radon flux emissions are determined by the "arithmetic mean of the mean radon flux for each measurement period." *Id*. Part 61, Appendix B, § 2.1.1. When calculating the mean radon flux for each measurement period, the method distinguishes between different regions of the tailings impoundment, those regions being: water covered areas, water saturated beaches, dry top surface areas, and sides. *Id*. § 2.1.2. An operator is not required to take measurements from side regions when the side of the tailings impoundment was constructed of "earthen materials." *Id*. The operator is directed to conduct the test under "weather conditions" and "moisture content" of the tailings impoundment that "provide measurements representative of the long term radon flux" from the impoundment. *Id.* § 2.1.1. The selection of representative conditions is subject to DAQ review and approval. *Id*.

The legal doctrines of constitutional and prudential mootness were previously provided in the Statement of Elements for Plaintiff's First Claim of Relief. *See supra* text pp. 22-23.

In support of the Mill's Motion for Summary Judgment on Claims 3, 4 and 5, the following facts are undisputed:

53. From the inception of radon flux sampling in 1990, until 2013, Cell 3 radon flux annual sampling results remained below the 20 piC/m^2-sec standard. See Exhibit 3.

54. On April 11, 2013, the Mill gave notice to DAQ, copied to EPA, of the annual sampling for Cell 3, indicating sampling would be conducted June 10-13, 2013. The results from that sampling event were 22.7, slightly over the standard. On July 18, 2013, the Mill provided notice to DAQ, copied to EPA, stating the Mill intended to sample Cell 3 two more times in calendar year 2013. Turk Dec. ¶ 54; Defendants' Appx. Ex. 22 and Ex. 24.

55. After learning the June 2013 Cell 3 results, the Mill started analyzing steps to reduce the radon flux from the Cell. On October 22, 2013, the Mill constructed three compaction test cover areas on Cell 3 and began conducting radon flux sampling on those smaller areas to assess the effectiveness of varying cover compaction levels. The test cover area sampling was conducted four times, once in November and December of 2013, and once again in January and February of 2014. Turk Dec. ¶ 16; Defendants' Appx. Ex. 23.

56. The two additional Cell 3 sampling events in 2013 took place on September 22-23 and December 3-4. For both events, the Mill elected not to re-sample the beach area, but rather to carry the beach area readings forward from the June 2013 sampling event. The reasons for doing so are reflected in emails the Mill exchanged with the testing company, Tellco Environmental. As documented in the email correspondence, the Mill focused on re-sampling the cover area because it was the cover area that was considered to be driving the readings to be over the standard, and the Mill intended to take steps to reduce the cover area emissions. The

exchange of emails also reflects that it was determined that Method 115, which governs the testing, allowed the Mill to choose a single set of measurements for the beach areas, while re-testing the cover areas. Turk Dec. ¶ 17; Defendants' Appx. Ex. 23 and Ex. 32.

57. During the December 3-4 sampling event, the testing company Tellco noted the following Environmental Conditions:

> **5.4 Environmental Conditions**
>
> A rain gauge and thermometer were placed by Cell 3 to monitor rainfall and air temperatures during sampling in order to ensure compliance with regulatory measurement criteria.
>
> In accordance with 40 CFR, Part 61, Appendix B, Method 115:
>
> - Measurements were not initiated within 24 hours of rainfall.
>
> - After the placement of canisters on the Cell 3 covered region on December 03, 2013, approximately 0.02 inches of rainfall were measured in the onsite rain gauge. The rain turned to snow towards the end of the brief storm and deposited approximately 1/4-inch of snow, which melted by mid-day. None of the canisters were surrounded by water and all of the earthen seals were intact.
>
> - The minimum ambient air temperature during the sampling period was 32 degrees F on December 04, 2013. The ground was not frozen; however, some of the water puddles had a surface ice layer approximately 1/2-inch thick, which melted by mid-day.

Defendants' Appx. Ex. 32 (at EFR001327).

58. On March 27, 2014, the Mill reported the 2013 results to DAQ. The Mill reported that it was in compliance with the standard, using the results averaged from the three sampling events. The attached reports clearly showed the method of averaging by carrying the beach readings forward from the June sampling event into the September and December events in 2013. Turk Dec. ¶ 18; Defendants' Appx. Ex. 32.

59. After completing the compaction test areas and assessing the effectiveness of this testing, the Mill moved ahead with adding cover to Cell 3. This additional cover was placed between May 5, 2014 and June 11, 2014. See Exhibit 5 hereto (an aerial photograph showing the cover work). The Mill also began gradually advancing the cover region over the beaches and liquid regions. This cover work was documented in the Third Quarter 2014 Cell 3 Report, generated in connection with the sampling done September 11-13, 2014. The Mill reported this cover work to DAQ in the Annual Cell 3 report submitted on March 30, 2015. Turk Dec. ¶ 19; Defendants' Appx. Ex. 42.

60. DAQ reviewed the 2013 annual report for Cell 3 on April 10, 2014. DAQ noted that the reported results for 2013 were below the standard and found Cell 3 to be in compliance. Defendants' Appx. Ex. 33. DAQ is aware of the concerns raised by the Grand Canyon Trust, but nonetheless accepts the results as being in compliance, including with the averaging employed by the Mill that carried beach readings forward from the June 2013 sampling event. DAQ did so in part because of the flexibility in the language of Method 115 which allows the source to choose to take more frequent measurements over the course of a year. DAQ was also influenced by the fact that it was aware the Mill was taking steps to address the higher radon areas on Cell 3 and showing a trajectory of improvement in the radon flux levels. Morris Dec. ¶¶ 7-8, 10, 12.

61. With respect to giving more than one notice of the schedule for annual testing, DAQ interprets Section 61.253 as containing permissive language that allows the source to give a notice of schedule both before and after the first sampling event in a given year. Morris Dec. ¶ 9.

62. With respect to the weather conditions during the December 2013 testing, DAQ concluded that the method allows for temperatures to drop below 35 degrees Fahrenheit if more than one sampling event is conducted over the course of the year (Method 115, Section 2.1.1). DAQ accepted the testing conditions in 2013, finding nothing in the 2013 Annual Report to suggest the results were not representative of long term radon flux. Morris Dec. ¶ 11.

63. Since the beginning of 2014, the Mill has sampled both the cover and beach areas of Cell 3 during each sampling event, and has sampled Cell 3 on a quarterly basis. DAQ expects the Mill to continue sampling cover and beach areas, unless the Mill gets approval from DAQ to do otherwise. The Mill has conducted nine rounds of quarterly sampling from 2014 to the present, and each quarter the results for Cell 3 have remained below the standard. See Exhibit 3 hereto; Morris Dec. ¶ 12.

ARGUMENT

I. Claim 2 (Phased Disposal Work Practice): The Mill Has Complied with the Phased Disposal Work Practice Since the Inception of Subpart W.

On December 15, 1989, the day Subpart W went into effect, the Mill openly operated Cell 1 as an evaporation pond, Cells 2 and 3 as tailings impoundments, and Roberts Pond as a small overflow catchment basin. With approvals from both EPA and NRC received in 1989, the Mill constructed and operated Cell 4A. It operated for a brief period as an evaporation pond in 1990. Against this backdrop, EPA stated in June of 1991 that the Mill had two tailings impoundments in operation and subject to Subpart W: Cell 2 and Cell 3. Utah has continued this interpretation of Subpart W at the Mill, an interpretation that does not consider evaporation ponds or Roberts Pond to be tailings impoundments and hence does not consider them as being

subject to the phased disposal work practice standard, since EPA delegated authority to Utah in 1995.

Section 61.252(b) imposes the phased disposal work practice standard. It provides that a mill can "have no more than two impoundments, including existing impoundments, in operation at any one time." 40 CFR § 61.252(b)(1) (2015). Subpart W defines "phased disposal" as "a method of tailings management and disposal which uses lined impoundments which are *filled* and then immediately *dried* and *covered* to meet all applicable Federal standards." *Id.* § 61.251(f) (emphasis added). An "existing impoundment" is defined as a "uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989." *Id.* § 61.251(d). The term "operation" is defined to "mean that an impoundment is being used for the *placement* of new *tailings* or is in standby status for such placement. An impoundment is in operation from the day that *tailings* are first placed in the impoundment until the day that final closure begins." *Id.* § 61.251(e) (emphasis added).

Subpart W does not contain a separate definition of tailings, but rather defines two terms together, which has created some confusion. Subpart W defines "uranium byproduct material or tailings" to mean "the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content." *Id.* § 61.251(g). The reference to byproduct material derives from the definition of 11e.(2) byproduct material in the AEA, which is defined as: "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 42 U.S.C. § 2014(e)(2), AEA § 11(e)(2). As envisioned under the AEA, byproduct material is the broader category of waste produced at a mill and regulated under UMTRCA, while tailings represent a

form or subset of byproduct material. Subpart W's definition, on the other hand, is confusing because it combines the two in one definition.

Utah has interpreted Subpart W by distinguishing between the tailings solids that are placed in tailings impoundments for long-term disposal, from the process solutions that are evaporated in the evaporation ponds. Utah is instructed by the way EPA has characterized tailings in the rulemakings associated with Subpart W. For instance, Utah has cited the preamble to the 1994 rulemaking that repealed Subpart T. In that preamble, EPA stated "Uranium mill tailings are the sand-like wastes that result from the processing of uranium ore. Tailings are stored in large surface impoundments, called piles . . . ." 59 Fed. Reg. 36280, 36280/2 (July 15, 1994). Utah's interpretation is also consistent with how the NRC distinguished between tailings and process solutions when the NRC granted the initial approval to operate Cell 4A on December 21, 1989: "Process solutions may be discharged into Cell 4A at a maximum rate of 750,000 gallons per day. Disposal of tailings is not authorized."

Utah's interpretation is consistent with the way uranium mills are operated and how tailings are generated and disposed of. Uranium mills generate two primary waste streams from the milling process: the tailings solids and process solutions. The tailings solids are conveyed in slurry form to the active tailings impoundments. The tailings impoundments are the structures being filled with solids for disposal which will ultimately be "*dried* and *covered* to meet all applicable Federal standards," as contemplated by the definition of phased disposal in Subpart W, 40 CFR § 61.251(f), and as required by 10 CFR Part 40 Appendix A. Evaporation ponds are not filled with the tailings solids, and do not develop the beaches and cover areas that emit the radon emissions targeted by Subpart W.

The overall language of Subpart W supports this longstanding application of the phased disposal limit to the Mill. First of all, Subpart W does not define or expressly apply to evaporation ponds, even though their presence and necessity for phased disposal was documented by EPA in the rulemaking process. Had EPA intended to regulate them, it could have simply said so in the text of the rule. Second, the language of Subpart W focuses on impoundments that are "filled" with "tailings" for "disposal" and then "dried" and "covered." These concepts do not make sense when applied to an evaporation pond, which consists of liquids that are evaporated.

Shortly after Subpart W went into effect, in a June 7, 1991 Compliance Order directed to the Mill, EPA confirmed that the Mill had two operating impoundments. EPA stated this as a factual finding in the Compliance Order: "The facility has two operating mill tailings piles, designated Cell 2 and Cell 3." EPA also stated, "As operating mill tailings piles, Cells 2 and 3 are subject to Title 40 of the Code of Federal Regulations ('CFR'), at 40 CFR Part 61, Subpart W, National Emission Standards for Radon Emissions from Operating Mill Tailings (40 CFR 61.250 through 61.256), promulgated December 15, 1989, under the Clean Air Act." EPA did not designate Cell 1 or 4A, or Roberts Pond, as operating impoundments subject to Subpart W.[4]

Focusing on the impoundments that have been operated for "tailings" disposal as interpreted by DAQ (and NCR and originally EPA), the Mill has clearly complied with the phased disposal work practice. At the inception of Subpart W, and as found by EPA, the Mill operated only Cell 2 and Cell 3. Cell 2 stopped operating no later than 2008. Since 2008, only

[4] The fact that Roberts Pond has never been considered by EPA, nor NRC or Utah for that matter, to be a tailings impoundment is underscored by the fact that it was never constructed to meet the 1000-year design criteria required by 10 CFR Part 40 Appendix A for a tailings impoundment. It was also never specified in the Rec Plan, approved initially by NRC and subsequently by Utah, as requiring an engineered cover with associated required bonding.

Cell 3 and 4A have received tailings solids for disposal. Cell 4B has operated as an evaporation pond only.

Plaintiff may contend that a cell remains in "operation" until the final radon barrier is placed on a cell. FAC, ¶ 23. This reading is inconsistent with how DAQ and DRC/DWMRC have interpreted the term "operation" and inconsistent with the language of Subpart W. Under the first sentence in the definition of "operation" a cell stops operating once it stops receiving tailings and is no longer on standby for placement of tailings. Cell 2 met this definition several years before 2008, but in any event no later than March 21 of that year when it stopped receiving any waste for disposal. The second sentence in the definition of operation provides that a cell remains in operation until "the day that final closure begins." 40 CFR § 61.251(e). Subpart W does not define "the day that final closure begins." Importantly, and contrary to Plaintiff's theory, Subpart W does not refer to the installation of the "final radon barrier" as marking the end of operations.

The interplay between Subpart W and the closure requirements in Appendix A makes clear that final closure is a process. Once a cell stops operating, but only after it stops operating, it becomes subject to the closure requirements in 10 CFR Part 40, Appendix A (which incorporates the 40 CFR Part 192 closure requirements). Both Appendix A and Part 192 indicate that the closure process for an impoundment triggers after it "ceases operation" and both use a similar definition of operation as Subpart W, employing the phrase "the day final closure begins" as the end of operations. 10 CFR Part 40, Appx. A, Criterion 6A; 40 CFR §§ 192.31(p), 192.32(3)(i). As such, operation must by definition end before an impoundment transitions into the closure requirements, because closure only starts once operations cease. This means that the

"day final closure begins" is the day a cell stops operating to receive wastes, and transitions into the closure process and regulations in Appendix A, as implemented through the applicable Reclamation Plan.

This is the only interpretation that makes any sense. The closure process for a tailings impoundment includes dewatering and settlement of the tailings, so that sufficient structural integrity is achieved to allow placement of the final cover layers. This typically takes a matter of years to accomplish, during which time no more tailings can be added to the impoundment. If a tailings impoundment is considered to be in operation during this period of years, and the evaporation pond is considered to be a tailings impoundment as the Plaintiff contends, then the Mill would have two "operating tailings impoundments" during the closure process for the impoundment, and must shut down for a matter of years until the final radon barrier is completed for the impoundment before a new tailings impoundment can be brought into service.

DAQ and DRC/DWMRC have explained that Cell 2 stopped operating in 2008, as evidenced by the fact Cell 2 had stopped receiving any waste, had a layer of platform fill extended over it, and had begun the tailings dewatering and consolidation and settlement monitoring process. This closure work is being done under the provisions of the Rec Plan, and the provisions of the RML and GWDP that apply to cells in closure.

DAQ's interpretations and application of subpart W are owed substantial deference. As a general rule, federal courts "must give substantial deference to an agency's interpretations of its own regulations." *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 684 (10th Cir. 2010) (internal quotation marks omitted). When EPA delegates authority to a state, it places the state in EPA's seat and vests the state with the same authority that EPA originally had. *Ind. Bell*

Tel. Co. v. McCarty, 362 F.3d 378, 387 (7th Cir. 2004) (holding that where an agency delegates authority, the decisions of the delegee "is entitled to the same degree of deference as if it were made by the agency itself" (internal quotation marks omitted)); *MCImetro Access Transmission Servs., Inc. v. BellSouth Telecomm., Inc.*, 352 F.3d 872, 880 n.8 (4th Cir. 2003) (same).

The district court's discussion in *GTE International Incorporated v. Hunter* illustrates the substantial deference that is owed to DAQ here. 649 F.Supp. 139 (D. Puerto Rico 1986). *GTE* centered on conflicting regulatory interpretations by a federal agency, which promulgated the disputed regulations, and a state agency, which had been delegated the authority to implement and administer the regulatory scheme. *Id.* at 146. The district court found both agencies' interpretations were rational. *Id.* at 147. But rather than selecting which of the interpretations was best, the district court determined that the delegation vested the state's interpretation with controlling weight.

> What we cannot find rational is the action of the [federal agency] in delegating authority . . . and, then, when the [delegee] has made a decision within the bounds of its discretion and acted upon it, capriciously withdrawing the authority delegated and stating that it thinks the [delegee] should have done it differently, and must now redo it, even though the agency's directive was not theretofore mandated by any regulation or guideline.

Id. This determination is in line with the principle that a delegating agency "binds [itself] by such delegation and may not exercise such powers absent express retention of them." *Am. Vanguard Corp. v. Jackson*, 803 F.Supp.2d 8, 14 (D.D.C. 2011) ("Once authority has been delegated to a certain agency official to take a particular action under a statute, *only* that official may take such action."); *Black v. Snow*, 272 F.Supp.2d 21, 26 (D.D.C. 2003) ("[O]nce a regulation has been issued delegating power from one officer to a subordinate, the former may not thereafter invoke the delegated power himself, at least as long as the regulation remains in

effect."). Consequently, not only does delegation vest the delegee with authority to interpret and implement a regulatory scheme, but it necessitates that the delegee's interpretations be controlling over the delegating agency's own interpretations.

Beginning on May 15, 1995 and continuing through today, EPA delegated "*its authority* for the *implementation and enforcement* of . . . subpart W" to DAQ. 60 Fed. Reg. 13912, 13912/3 (March 15, 1995) (emphasis added). In doing so, EPA vested UDAQ with the authority to interpret Subpart W and apply it to Energy Fuels' tailings management system. Moreover, the delegation also burdened DAQ with the obligation to expend the agency's time and resources (in lieu of EPA expending the same) to permit, monitor, inspect, and enforce the Subpart W regulations on the Mill. To do that, DAQ must be allowed to interpret Subpart W, and these interpretations are given controlling weight under the substantial deference standard. Additionally, the deference that must be afforded to DAQ's interpretation is reinforced by the evidence that DAQ's interpretations are consistent with the intent that EPA expressed when it implemented the regulation immediately upon enactment of Subpart W, as reflected in the June 7, 1991 Compliance Order.

The new reading of Subpart W apparently advanced by some EPA employees is owed no deference. Unlike DAQ's interpretation, the indications that some EPA employees now consider evaporation ponds as being subject to the phased disposal work practice is contradicted by EPA's implementation of Subpart W immediately upon enactment. Courts are particularly careful when an agency changes its interpretation, and the new interpretation is used in an enforcement action. *U.S. v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1144 (10th Cir. 2010) ("It is hard to see how [the obligation to provide an explanation] could be any less salient when an agency seeks to

abandon a prior interpretation in favor of a new one" and identifying potential due process considerations were an agency to attempt to "punish a regulated party for following the agency's own interpretation"); *see also Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 515 ("[A]n agency's interpretation of a . . . regulation that conflicts with a prior interpretation is entitled to considerably less deference that a consistently held agency view." (internal quotation marks omitted)); *cf. Perez v. Mortgage Bankers Ass'n*, 135 S.C. 1199, 1209 (2015) (stating the arbitrary and capricious standard requires "substantial justification" where an agency's "prior policy has engendered serious reliance interests" (internal quotation marks omitted)). In this case, the Mill has relied on NRC's, EPA's and Utah's interpretations that were consistently applied for over 25 years under Subpart W, in the construction and operation of the Mill facilities.

II. Claim 2 (Phased Disposal Work Practice): GCT's Claim is Barred by 25 Years of Delay.

Plaintiff is simply too late to file a claim that the Mill operates too many tailings impoundments. Indeed, the statute of limitations and the legal doctrines of laches, exhaustion of administrative remedy and impermissible collateral attack on an agency approval, all provide sound bases for dismissing the untimely filing of the allegations contained in Claim 2.

A. Statute of Limitations

A CAA citizen suit is governed by the statute of limitations established in 29 U.S.C. § 2462. *Sierra Club v. Okla. Gas & Elec. Co.*, __ F.3d __, 2016 WL 873362, *3 (10th Cir. March 8, 2016). Under this statute, a claim must be "commenced within five years from the date when the claim *first accrued*." 29 U.S.C. § 2462 (emphasis added). There has been much debate over the effect that this statute of limitations has on CAA claims that are based on conduct initially occurring outside of the limitations period but continuing into the limitations period. In fact, a

circuit court split has developed over this issue. *E.g., U.S. v. E. Ky. Power Co-op, Inc*., 498 F.Supp.2d 970, 972 (E.D. Ky. 2007). But the Tenth Circuit's recent decision in *Oklahoma Gas & Electric* resolved the question definitively in this jurisdiction. The plain language of section 2462 controls and the statute of limitations begins to run when a claim "first accrues" and "the clock under § 2462 begins only once." 2016 WL 873362, *4 & 5. A claim first accrues when a plaintiff "has a complete and present cause of action." *Id*. (internal quotation marks omitted). Furthermore, the Tenth Circuit clarified what type of violations fit into its analysis of section 2462: "if any form of violation exists beyond the first day [of the violative conduct], it is best characterized as a continuing violation rather than a series of repeated violations." *Id*. at *3.

The allegations contained in claim 2 fully accrued no later than December 15, 1989, the day that EPA promulgated the current Subpart W. 54 Fed. Reg. 51654 (December 15, 1989); *see also* FAC ¶ 49 (alleging a continuing violation by alleging the White Mesa Mill "has violated and continues to violate" subpart W). At that time, the Mill operated Cells 2 and 3 as tailings impoundments, Cells 1 and 4A (permitted, constructed and on the cusp of being licensed to operate) as evaporation ponds, and Roberts Pond as a retention basin for storm water and process upsets and overflows. Additionally, Cell 4B was always contemplated to be constructed and operated as part of the Mill and its addition is merely the effect of how the Mill's impoundment system would be operated in light of subpart W. Given that the Mill's operations of the tailings management system, which relies upon evaporative capacity in the evaporation ponds, has not

changed since 1989, Plaintiff's claim regarding the number of operating tailings impoundments accrued at that time and is now barred by the statute of limitations.[5]

B. Laches

Claim 2 also fits into the laches doctrine and should be dismissed. Laches "bars a claim when there is: (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1091 (10th Cir. 2014) (internal quotation marks omitted).[6] The first element is viewed as "unreasonable delay" in bringing the claim. *Jicarilla Apache Tribe*, 687 F.2d at 1338. But the delay does not depend on "subjective awareness" of the basis for the claim; rather a "party must exercise reasonable diligence in protecting his rights." *Id.* at 1338 – 39; *see also Biodiversity Conservation Alliance*, 762 F.3d at 1094 (finding unreasonable delay where the challenged action was "substantially implemented" in the 7 years that plaintiff delayed in filing suit). As to the prejudice element, courts have found that expenditures of time and resources based on reliance in non-challenged plans or approvals is sufficient to show undue prejudice. *Biodiversity Conversation Alliance*, 762 F.3d at 1096 (finding prejudice where the defendant "has invested significant time and resources, and requiring the [defendant] to change its blueprint governing these efforts would compromise the work that has already been done"); *Jicarilla*

---

[5] In deciding *Oklahoma Gas & Electric*, the Tenth Circuit also decided the applicability of the concurrent remedy doctrine to CAA citizen suits. Specifically, the court found that "an equitable claim is barred where the only difference between it and a time-barred legal claim is the relief sought." 2016 WL 873362, *7 (internal quotation marks omitted). Plaintiff's claims for civil penalties and injunctive relief are based on identical facts and, therefore, Plaintiff's claims for injunctive relief are also barred by the statute of limitations.

[6] The federal judiciary has determined that application of laches ought to be "invoked sparingly" and is disfavored in environmental cases. *Park Cnty. Res. Council v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1337 (10th Cir. 1982). But application of the doctrine is "left to the discretion of the trial court." *Jicarilla Apache Tribe*, 687 F.2d at 1338. This is an instance where the facts overcome the disfavored presumption, and the Court should exercise its discretion to dismiss Claim 2 on the basis of laches.

Apache Tribe, 687 F.2d at 1339 (finding sufficient prejudice based on "expenditures and the loss of future profits").

Plaintiff has exercised a lack of diligence in bringing the claim that the Mill has been violating the work practice standard. Cells 1, 2, 3 and Roberts Pond all were operating when Subpart W went into effect on December 15, 1989. Cell 4A was licensed to operate shortly thereafter on December 21, 1989 and operated briefly in 1990. It was unreasonable for Plaintiff to delay until April 2014 to bring this claim. Furthermore, Plaintiff's delay has prejudiced the Mill. The Mill's fully approved design and operations are dependent on the use of evaporation ponds that are separate and distinct from the tailings impoundments. The Mill has expended resources – namely, the initial construction and operation of the Mill facility based on its approved design, the continued use of Cell 1, the re-lining of Cell 4A, and the construction of Cell 4B – in reliance on the use of evaporation ponds. The Mill has incurred extensive costs in developing the Rec Plan and associated bonding, based upon phased disposal being allowed without limiting the evaporation ponds at the site. It is improper for Plaintiff to wait more than two decades to assert a claim that the evaporation ponds and Roberts Pond are tailings impoundments subject to section 61.252(b)(1) of Subpart W.

C. Failure to Exhaust and Collateral Attack

Furthermore, the doctrine of exhaustion of administrative remedies also requires dismissal of claim 2. The Court may impose a requirement that litigants "must exhaust available administrative remedies prior to seeking judicial review." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 743 (10th Cir. 1982); *see also Park Cnty. Res. Council*, 817 F.2d at 619 (stating that application of the doctrine "is a matter within the trial court's discretion"); *Ass'n of*

Irritated Residents v. C & R Vanderham Dairy, 435 F.Supp.2d 1078 (E.D. Cal. 2006) (distinguishing between statutorily-based exhaustion and judicially-required exhaustion). The application of judicial exhaustion is based upon "rationales supporting the exhaustion doctrine," which include deference to agencies possessing expertise "outside the conventional experience of judges," the recognition of agency autonomy, and the development of a factual record. *Park Cnty. Res. Council*, 817 F.2d at 619.

Plaintiff had administrative remedies available to it to contest the Mills' operation of evaporation ponds and Roberts Pond, but did not exhaust these remedies. On June 26, 1989, Utah approved the construction of Cell 4A and 4B by issuing an amended Approval Order. This determination was subject to review under the Utah Air Conservation Act. Utah Code Ann. § 26-13-10(2) (1989).

Subsequently, on April 13, 2010, the Mill applied to DAQ for approval of Cell 4B under the NESHAP. The application spelled out exactly how the Mill had operated for years, and intended to continue operating, under the phased disposal work practice, with evaporation ponds and Roberts Pond not being counted in the two operating impoundment limit. On May 3, 2010, DAQ authorized the construction of Cell 4B. This determination was subject to administrative review by an administrative law judge and the Utah Air Quality Board. Utah Code Ann. § 19-1-301 (2010 Supp.); Utah Admin. Code R307-103-1 et seq. (2010).

In the 1989 and 2010 DAQ actions, the issue of what facilities were impoundments covered by section 61.252(b)(1) was at issue as DAQ's approvals authorized the construction and operation of Cells 4A and 4B. These agency determination could have been challenged in an administrative proceeding, a challenge that would have developed a contemporaneous factual

record and called on the applicable agency to exercise its specialized expertise. Rather than obtaining the benefit of administrative review, Plaintiff has delayed years to invoke the Court's jurisdiction to argue that the Mill's operations, consistent with the DAQ approvals, was unlawful, which is an argument that the approvals were wrongly given. Plaintiff is not permitted to do this in a CAA citizen suit. *E.g., Nucor Steel-Arkansas v. Big River Steel, LLC*, 93 F.Supp.3d 983, 990 (E.D. Ark. 2015) (holding that CAA section 304(a)(1) does not authorize "a collateral attack on a facially valid state-issued permit"); *cf., U.S. v. AM Gen. Corp.*, 34 F.3d 472, 475 (7th Cir. 1994) (stating that the CAA did not vest EPA with the authority to "mount a collateral attack on a permit by bringing a civil penalty action"); *Nat'l Parks Conservation Ass'n v. Tenn. Valley Auth.*, 175 F.Supp.2d 1071, 1079 (E.D. Tenn. 2001) (finding "no evidence" that the CAA authorizes citizen suits to "be used to collaterally attack facially valid state permits"). Having failed to mount an administrative challenge to these agency determinations, the Court should dismiss Claim 2 due to Plaintiff's failure to exhaust available administrative remedies.

Moreover, surely the Mill cannot be faulted in this case. It sought and obtained approvals from NRC, EPA and Utah to design, construct and operate the tailings management system exactly as it has been operated. It provided full disclosure of the fact that it operated evaporation ponds and would continue to do so, but nonetheless received government approval to proceed. Indeed, citizens cannot pursue claims "against an owner/operator who has committed no violation other than acting in accordance with a facially valid permit;" *NPCA v. TVA*, 175 F.Supp.2d at 1078-79, as such a suit would "lay waste to a source's ability to rely on a permit it has been issued." *U.S. v. Solar Turbines, Inc.*, 732 F.Supp. 535, 539-40 (M.D. Pa. 1989) ("EPA would have this court hold, however, that it is a violation for an owner/operator of a source to act

on a permit that has been issued to it and which authorizes its action. This the court holds is unreasonable."); *cf. AM General Corp.*, 34 F.3d at 475 (finding that the CAA does not support the "harsh remedy" that would result if the court allowed EPA to pursue a civil penalty action against a source that had proceeded in compliance with a state-issued permit). Plaintiff's real dispute is with the approvals given by the agencies, not with the Mill.

III. Claim 1 (Cell 2 Radon Flux): The Mill Has Complied with Subpart W.

A. Starting No Later than 2008, Subpart W No Longer Applied to Cell 2.

Subpart W's radon flux standard applies to "operating existing mill impoundments." 40 CFR § 61.254. As explained in Section II above, Cell 2 stopped operating no later than 2008. As such, the monitoring and reporting requirements in Subpart W ceased to apply. DAQ agrees that Subpart W did not apply after 2008. Because Subpart W no longer applied, the Mill could not have violated Subpart W's radon flux standard.

B. The Mill Complied with Subpart W's Remedial Mechanisms.

Even assuming Subpart W continued to apply, there is no basis to find the Mill violated Subpart W. This is because Subpart W contains an automatic remedy for when a cell exceeds the 20 piC/m^2-sec standard. Under Section 61.254, if the source exceeds the standard for a calendar year, upon reporting the results by March 31 of the following year, the source must start monthly monitoring and explain to the agency the remedial steps the source will take to bring the emissions back under the standard. 40 CFR § 61.254(b). Section 61.254 places substantial discretion in the enforcing agency to discontinue monthly reporting when the agency, DAQ in this instance, "has determined" it is no longer necessary. *Id.*

At the time Plaintiff gave notice of suit (January 2014) and then filed this lawsuit (April 2014), the Mill had already given notice to DAQ in March of 2013 that it had exceeded the standard and then took steps, informing DAQ along the way, to bring Cell 2's readings below the standard. This started as early as February 2013 when the Mill excavated test areas on Cell 2 to assess the cause of the increase in emissions, and continued through 2014 as the Mill conducted monthly radon flux sampling, reported the results on a monthly basis, and added cover and took other steps to reduce emissions. DAQ, in conjunction with DRC, concluded by July 23, 2014, that the Mill had satisfactorily demonstrated compliance, and relieved the Mill of the monthly reporting obligation.

Where, as here, the emission standard at issue contains a presumptive remedy to be overseen by the relevant agency, and the source complies with that remedy, as determined by the agency in exercising discretion granted to it in the regulation, there is no basis to find the source violated an emission limit sufficient to justify the maintenance of a citizen suit. The citizen suit is a premature, and unnecessary action. The Mill did what it had to do, as required by the regulatory scheme, and the citizen suit accomplishes nothing, save for adding an unnecessary layer of cost to the operation of the Mill.

IV. Claims 3, 4 and 5 (Cell 3 Radon Flux): The Mill Complied With Method 115.

Claims 3, 4 and 5 ask the Court to wade deep into the details of how emissions are measured and calculated under Subpart W and Method 115 of Appendix B to the Radon NESHAPs, a matter more properly left to the discretion of DAQ as the regulating agency.

A. Claim 3: Sources Can Give Two Notices of Schedule.

In Claim 3, Plaintiff complains that the Mill gave two notices of schedule in 2013 for conducting radon flux monitoring of Cell 3. Both Subpart W, Section 61.253, and Method 115, Section 2.1.1, allow the source to decide the frequency of sampling over the course of a year. Section 61.253 provides that the source "may" submit the schedule "prior to or after the first measurement period." DAQ reads this language as allowing the source to submit a schedule before and after the first measurement period. This is an allowable, rational interpretation of the permissive language in the regulation.

B. Claim 4: The Mill Properly Applied the Method.

In Claim 4, Plaintiff complains about how the Mill averaged the radon flux measurements in 2013 (not re-sampling the beach areas in September and December) and about the weather conditions reported in the third sampling event in December of 2013. DAQ accepted the annual report for 2013, and has concluded the way the Mill averaged the results and the weather conditions were acceptable under Method 115 in the circumstances. DAQ was aware the Mill was adding cover and taking steps to control emissions from Cell 3, as it had been doing for Cell 2, and this influenced DAQ's decision to accept the 2013 report. This is a matter within the discretion of the agency, and there is no need for this Court to second guess DAQ on this issue.

C. Claim 5: The Mill Met the Standard.

DAQ reviewed the 2013 annual flux report and, as noted above, found Cell 3 in compliance with the standard. DAQ has explained why it accepted the report, and this explanation is rational. The Court should defer to DAQ and dismiss Claim 5.

V. Claims 1, 3, 4 and 5 (Cell 2 and 3 Radon Flux) are Moot.

In addition to the reasons stated in Sections III and IV above, the Court should dismiss all of the claims related to the radon flux standard as being moot.

A. Mootness Doctrine.

Federal courts recognize two forms of mootness: constitutional and prudential. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010); *see also S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("Under both Article III and prudential mootness doctrines, the central inquiry is essentially the same: have circumstances changed since the beginning of the litigation that forestall any occasion for meaningful relief."). Plaintiff's claims related to the radon flux emissions and the monitoring of the same (i.e., claims 1, 3, 4, and 5) are moot under both doctrines because circumstances have so changed that there is no meaningful relief to be had.

Constitutional mootness is a doctrine that rises from the federal courts' limited jurisdiction over cases and controversies. *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1182 (10th Cir. 2012). Court's apply this doctrine through the lens of standing, analyzing whether "intervening events" cause a plaintiff to "lose[] one of the elements of standing during litigation." *Id.*[7] Dismissal due to the events that eliminate the *redressability* prong of standing is necessary upon a showing that "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *See Rio*

[7] Energy Fuels does not concede that standing existed at the time Plaintiff filed the Complaint. To prevail, Plaintiff has the burden of demonstrating standing at all stages of the case. *Id.* Well before Plaintiff filed the Complaint on April 2, 2014, the Mill had added cover to both Cells 2 and 3 and radon flux testing showed they were below the standard.

Grande, 601 F.3d at 1115 (noting that there must be evidence that the defendant did not change course to deprive the court of jurisdiction); *see also WildEarth Guardians*, 690 F.3d at 1185 (noting that a movant must show that the "allegedly wrongful behavior could not reasonably be expected to recur" for the doctrine to apply).

Prudential mootness is based on a "different set of concerns" than its constitutional counterpart. *WildEarth Guardians*, 690 F.3d at 1182 n.6. Prudential mootness rests in the court's "remedial discretion," which includes the authority to "deny relief altogether unless the moving party can satisfy the court that relief is needed." *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (internal quotation marks omitted) ("[I]f events so overtake a lawsuit that the anticipated benefits of a remedial decree no longer justify the trouble of deciding the case on the merits, equity may demand no decision but dismissal."); *see also S. Utah Wilderness Alliance*, 110 F.3d at 727 (stating that the doctrine applies when a claim "is so attenuated that considerations of prudence and comity . . . counsels the court to stay its hand, and to withhold relief" (internal quotation marks omitted)).[8] Prudential mootness is particularly apt, according to the Tenth Circuit, where the "great grinding gears" of a statutory program "and administratively overseen" cure is already in motion. *Winzler*, 681 F.3d at 1211.

Indeed, the Tenth Circuit's decision in *Winzler* illustrates the applicability of prudential mootness to plaintiff's claims against the Mill. During the pendency of a suit alleging vehicle

[8] While the doctrine is grounded in equity, a citizen suit seeking civil penalties is also subject to dismissal due to prudential mootness. *See Mississippi River Revival, Inc. v. City of Minneapolis, Minn.*, 319 F.3d 1013, 1016 n.3 (8th Cir. 2003) (finding the Supreme Court overruled prior caselaw that allowed citizen suits to survive in the face of prudential mootness through a claim seeking civil penalties); *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1160 (9th Cir. 2002) (citing to Supreme Court precedent as recognizing that "events following the commencement of a suit [may] moot a claim for civil penalties"); 13C Wright & Miller, Fed. Practice & Procedure § 3533.3 (2015) (stating that mootness in a citizen suit does not turn on an interest in assessment of civil penalties because those penalties are payable to the United States but hinges only on the need to deter future violations); *Cf. WildEarth Guardians*, 690 F.3d at 1186 (finding that civil penalties would not bar the application of mootness).

defects, the defendant issued a nationwide recall to fix the alleged defect, an action that triggered specific activities and oversight required by federal law. *Id.* at 1209. By doing so, the defendant provided the plaintiff all the relief that they could get if the judicial court action continued. *Id.* at 1211.

> Given all this, there remains not enough value left for the court to add in this case to warrant carrying on with the business of deciding its merits. . . . At best, we might duplicate their efforts and waste finite public resources in the process. . . . Our intervention would, as well, surely add new transaction costs for Toyota and perhaps reduce the incentive manufacturers have to initiate recalls (as Toyota did here), all while offering not even a sliver of additional relief for [plaintiff].

Id.

B. The Radon Flux Claims are Moot

The facts in this case support dismissal of the radon flux claims 1, 3, 4, and 5 as being moot. Starting before the notice of intent to sue was filed, the Mill began taking steps to reduce radon flux emissions from both Cell 2 and Cell 3. The Mill followed through on those steps, with oversight by DAQ, as contemplated by Subpart W and Method 115. DAQ and DWMRC have clarified that Cell 2 is no longer subject to the NESHAP. Even so, the Mill has demonstrated compliance for over two years at both Cell 2 and Cell 3 with the radon flux standard. In implementing 10 CFR Part 40 Appendix A, DWMRC has required the Mill to continue showing compliance with the radon flux standard at Cell 2 during the closure process. Also under 10 CFR Part 40 Appendix A, DWMRC will continue to oversee the closure of Cell 2, the update to the Rec Plan and the issuance of the renewed RML and GWDP. The interested public, including the Plaintiff Grand Canyon Trust, will have an opportunity to comment on the final agency actions. Ongoing compliance with Subpart W is a matter better left where it

belongs, in the hands of the agencies acting under authority delegated by the Federal government to oversee the Mill. The Court should dismiss claims 1, 3, 4 and 5 on mootness grounds.

CONCLUSION

The Mill has operated under Subpart W for 25 years in compliance with the phased disposal work practice, with approvals, licenses and permits issued by NRC, EPA and Utah. When radon flux emissions have risen above the standard, first in 1990 and then in 2012, the Mill took immediate steps, with oversight by EPA in the early 1990's, and then with oversight by Utah, to add cover to bring the emissions under the standard. Given this history, and the ongoing oversight by the regulatory agencies, Plaintiff's lawsuit has no basis, and it should be dismissed with prejudice.

DATED April 27, 2016.

/s/ Michael A. Zody
Michael A. Zody
Jacob A. Santini
PARSONS BEHLE & LATIMER

Attorneys for Defendants Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, & Energy Fuels Resources (USA) Inc.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT was filed in the Court's ECF system on this 27th day of April 2016, and was served via the ECF system on all counsel of record.

/s/ Michael A. Zody
Michael A. Zody
Jacob A. Santini
Parsons Behle & Latimer

Attorneys for Defendants

Michael A. Zody, USB #5830
Jacob A. Santini, USB #12650
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
MZody@parsonsbehle.com
JSantini@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Grand Canyon Trust, Plaintiff, vs. Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, & Energy Fuels Resources (USA) Inc., Defendants.	**DEFENDANTS' OPPOSITION TO GRAND CANYON TRUST'S MOTION FOR SUMMARY JUDGMENT** Case No. 2:14-cv-00243-CW-BCW The Honorable Clark Waddoups Magistrate Judge Brooke C. Wells

Pursuant to Federal Rule of Civil Procedure 56 and DUCivR 56-1, Defendants Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, and Energy Fuels Resources (USA) Inc. (collectively the "Mill"), by and through counsel, oppose Plaintiff Grand Canyon Trust's ("Plaintiff") Motion for Summary Judgment. [Dkt. No. 67.]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Federal Statutes

Code of Federal Regulation

Federal Register Documents

Other Legal Authority

INTRODUCTION

Plaintiff's Motion for Summary Judgment asks the Court to decide this case by ignoring years of regulatory oversight of the White Mesa Mill by the State of Utah, the U.S. EPA and the U.S. NRC. The Mill has been appropriately regulated by the relevant authorities, and has been licensed and permitted to operate exactly how it has been operating, including under the radon flux NESHAP for uranium mills, Subpart W. The Mill and the regulators have been actively working together to insure continued compliance with Subpart W. There is no need for the Court to insert itself into the middle of this complex and ongoing regulatory process. The Mill explains this relevant regulatory history in its Motion for Summary Judgment, and raises multiple defense to Plaintiff's claims, including the fact that many of the claims are moot. The Mill incorporates the defenses raised in its Motion for Summary Judgment as defenses to Plaintiff's Motion for Summary Judgment.

The Mill specifically responds to Plaintiff's Motion for Summary Judgment below. As an initial matter, Plaintiff has not shown it has standing because the injuries it alleges focus on the overall existence of the Mill, without sufficient nexus to Subpart W, and the claimed injuries lack a reasonable basis. On the merits of the claims, the Mill explains how each of Plaintiff's claims is defective. The simple fact is that the Mill has complied with the work practice standards, emission limits and remedial mechanisms set forth in Subpart W. This case is an unnecessary attempt to insert the Court into an ongoing, complex regulatory program which is being fully and adequately addressed by the regulators. The Mill asks the Court to dismiss this case with prejudice at summary judgment.

BACKGROUND

The Mill directs the Court to the Regulatory Background Section in the Mill's Motion for Summary Judgment for an overview of the regulatory programs that relate to the Mill's tailings impoundments. Plaintiff's Background Section attempts to shade the facts, and contains several misstatements. However, because that Background is offered neither as undisputed fact nor legal argument, the Mill only points out a few of the more significant errors below.

Plaintiff states that the Mill "disposes" of waste raffinate in Cell 1, an evaporation pond. This is not correct. Solutions are sent to Cell 1 to be evaporated. Upon closure of Cell 1, any residual materials in the bottom of Cell 1 will be excavated and disposed of in one of the tailings impoundments. Cell 1 is not a disposal cell.

Plaintiff states that Roberts Pond received wastes, which is not the case. Roberts Pond received overflow materials from the milling circuit, and stormwater runoff. The overflow materials would be returned at times to the stage in the milling circuit from which they came. Those materials would not be wastes, but rather work in process materials. When the Mill periodically cleaned out accumulated sediments in Roberts Pond, if those sediments had sufficient uranium values, they would be returned to the ore pad for processing. If they had insufficient values they would be disposed of in a tailings impoundment.

Plaintiff says that in "this lawsuit" the Mill distinguishes between tailings sands and solutions, suggesting this is a new use of terminology. This is not a correct or fair characterization. There are many examples of the Mill, and the regulators, making the distinction between tailings solids and solutions. While there is an overall tailings management system, and solutions go into that system, it is the structures that are being filled with the tailings

solids and then dewatered and permanently covered that are the tailings impoundments, while evaporation ponds are just that – structures used to evaporation solutions.

Plaintiff wants to pick apart the Mill's radon sampling efforts, while ignoring all the work the Mill was doing to analyze the cause of any increased emissions and the Mill's efforts to add cover and take other steps to bring the emissions below the standard. This was a significant undertaking by the Mill and it worked. The brief rise of emissions slightly over the standard has been remedied by the Mill. This was already taking place as required by law, and Plaintiff should have let the process play out, rather than bring this time consuming and costly lawsuit.

RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS[1]

I. All Claims for Relief: Violation of Emission Standard or Limitation (42 U.S.C. § 7604 and Subpart W)

Legal Authority

"[A]ny person may commence a civil action on his own behalf against any person . . . who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of . . . an emission standard or limitation under [Chapter 85 of Title 42]." "'Emission standard or limitation under [Chapter 85 of Title 42]' means—(1) [an] "emission limitation, standard of performance or emission standard, [or] (3) . . any requirement under section .7412 of [Title 42, i.e., Section 112 of the Clean Air Act] (without regard to whether such requirement is expressed as an emission standard or otherwise). . . ."

"**Subpart W—National Emission Standards for Radon Emissions From Operating Mill Tailings. § 61.250 Designation of facilities.** The provisions of this subpart apply to owners or operators of facilities licensed to manage uranium byproduct materials during and following the processing of uranium ores, commonly referred to as uranium mills and their associated tailings."

RESPONSE: Undisputed.

[1] For clarity, the Mill's Response to Plaintiff's Statement of Elements and Undisputed Material Facts follows the formatting Plaintiff used in its Motion for Summary Judgment. For brevity, the Mill has omitted Plaintiff's footnotes.

Material Facts

1. EFR White Mesa owns the Mill.

RESPONSE: Undisputed.

2. EFR USA operates the Mill.

RESPONSE: Undisputed.

3. The Mill has been licensed since at least 2007 to manage uranium byproduct material during and following the processing of uranium ores.

RESPONSE: Undisputed.

II. All Claims for Relief: 60-Day Notice (42 U.S.C. § 7604(b))

Legal Authority

"No action may be commenced . . . under [42 U.S.C. § 7604(a)(1)] prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator [of the EPA], (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order. . . ."

RESPONSE: Undisputed.

Material Facts

1. On January 29, 2014, the Trust notified Energy Fuels, EPA, and the State of Utah that the Trust intended to sue Energy Fuels under the Clean Air Act's citizen-suit provision for violating Subpart W: (1) by letting average annual radon-222 emissions from Cell 2 exceed 20 pCi/(m^2-sec) in 2012 and 2013; and (2) by operating more than two impoundments.

RESPONSE: Undisputed insofar as paragraph 1 accurately reflects the allegations contained in Plaintiff's January 29, 2014 notice letter. The Mill disputes the legal and factual conclusions stated in the January 29, 2014 notice letter.

2. The Trust filed its initial complaint 63 days later, on April 2, 2014.

RESPONSE: Undisputed.

3. On July 29, 2014, the Trust notified Energy Fuels, EPA, and the State of Utah that the Trust intended to amend its complaint to assert that Energy Fuels, in sampling Cell 3 in 2013,

had violated Subpart W's sampling-schedule requirements (40 C.F.R. § 61.253), sampling-methodology requirements (40 C.F.R. § 61.253 and Method 115), and Subpart W's radon-222 emission limit (40 C.F.R. § 61.252).

RESPONSE: Undisputed insofar as paragraph 3 accurately reflects the allegations contained in Plaintiff's July 29, 2014 notice letter. The Mill disputes the legal and factual conclusions stated in the July 29, 2014 notice letter.

4. The Trust filed its amended complaint on October 15, 2014.

RESPONSE: Undisputed.

III. All Claims for Relief: Standing

Legal Authority

"An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." "[T]o satisfy Article Ill's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

RESPONSE: Undisputed insofar as Plaintiff has accurately quoted the caselaw Plaintiff cites. Plaintiff's presentation of the legal authority is incomplete. *See* Statement of Additional Elements and Material Facts below.

Material Facts[2]

1. The Grand Canyon Trust's mission is to protect and restore the landscapes, air, wildlife, and beauty of the Colorado Plateau, including the environment and the health of those who live near and use areas that the uranium industry pollutes.

[2] Plaintiff did not identify any material facts to support the causation and redressability elements necessary for standing.

RESPONSE: Undisputed that the Trust describes its mission this way, but the Mill disputes that it has polluted any areas used by Trust members. *See* Statement of Additional Elements and Material Facts below.

2. Members of the Trust have suffered an injury in fact because they live within a few miles of the Mill, use the land adjacent to the Mill for recreation, breathe the air downwind of the Mill, gather plants around the Mill, and use the area around the Mill for other activities, and the Mill's operations and radon emissions detract from these interests.

RESPONSE: Disputed. Plaintiff has not shown that the standing declarants have suffered an injury in fact that is connected to the Mill's alleged violations of Subpart W. *See* Statement of Additional Elements and Material Facts below.

STATEMENT OF ADDITIONAL ELEMENTS AND MATERIAL FACTS

To establish standing, a plaintiff must show they have suffered an injury that is connected to the activity challenged in the suit as opposed to a generalized complaint about the existence of a facility. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000); *Conservation Law Found. v. U.S. EPA*, 964 F.Supp.2d 175, 189 (D. Mass 2013). Subpart W is focused on limiting the potential human health impacts of radon emissions from operating tailings impoundments. 40 CFR § 61.252; [Def. Resp. Appx. No. 1, 54 Fed. Reg. 51654, 61655-56, 51679-82 (December 15, 1989).] Consequently, to establish an injury for their claims under Subpart W, Plaintiff was required to show its members suffered an injury to their health as a result of the Mill's operation of its tailings management system.

1. In responding to the Mill's First Set of Discovery Requests, Plaintiff disclaimed all health injuries that resulted from the Mill's alleged violation of Subpart W. [Def. Resp. Appx. No. 2, Interrog. Nos. 2 & 3 ("Because the Trust does not intend to rely on any person's

health injuries to establish standing in this case, no such injuries are relevant to the claims and defenses in this lawsuit.").]

2. The Mill operates a network of monitoring equipment and conducts various sampling activities, both of which are aimed at protecting the Mill's workers and the public. The monitoring and sampling, which is implemented through the Mill's RML under 10 CFR Part 20, is reported to regulatory officials twice a year in Semi-Annual Effluent Reports. The Semi-Annual Effluent Reports show consistent compliance with applicable limits designed to protect the public. *See* http://www.deq.utah.gov/businesses/E/energyfuels/reports/effluent_rpt.htm.

3. On February 3, 2016, the Mill took the deposition of Bill Crowder. Mr. Crowder is a declarant that Plaintiff has relied on to establish standing. [Def. Resp. Appx. No. 3, Crowder depo., excerpted.]

4. During his deposition, Mr. Crowder stated that if the Mill's emissions complied with Subpart W, he would not be injured by the Mill. "But I presume if the mill's in compliance with federal law and regulation then I'm reasonably okay. And if not, then probably not reasonably okay; that there's a reason there's a federal level on that." [*Id*. at 15:22 – 16:1.]

5. Mr. Crowder also stated that he understands radon is invisible and, while he claims an impact upon his recreational interests, his sensory experiences (sight, smell, touch, taste and hearing) while recreating have not been impacted by radon emissions from the Mill. [*Id*. at 18:3-21.]

6. Radon testing shows that the Mill has remained below Subpart W's emission standard for both Cell 2 and Cell 3 throughout 2014, 2015, and 2016. [Dkt. Nos. 60-2 & 60-3.]

IV. First Claim for Relief: Violation of Radon-222 Emission Limit from Cell 2 in 2012 and 2013

A. Element 1: Existing uranium mill tailings pile (40 C.F.R. § 61.251(d))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec) (1.9 pCi/(ft^2-sec)) of radon-222." "*Existing impoundment* means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."

RESPONSE: Undisputed insofar as Plaintiff accurately quotes Subpart W. However, Plaintiff's presentation of the legal authority is incomplete. *See* Statement of Additional Elements and Material Facts below.

Material Facts

1. Cell 2 was in existence as of December 15, 1989.

RESPONSE: Undisputed.

2. Cell 2 was licensed to accept additional tailings as of December 15, 1989.

RESPONSE: Undisputed.

B. Element 2: Radon-222 emissions over 20 pCi/(m2-sec) (40 C.F.R. § 61.252(a))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec) (1.9 pCi/(ft^2-sec)) of radon-222."

RESPONSE: Undisputed insofar as Plaintiff accurately quotes Subpart W. However, Plaintiff's presentation of the legal authority is incomplete. *See* Statement of Additional Elements and Material Facts below.

Material Facts

1. Average annual radon-222 emissions from Cell 2 in 2012, as reported by Energy Fuels to the Air Quality Division, were 25.9 pCi/(m^2-sec).

RESPONSE: Undisputed.

2. Average annual radon-222 emissions from Cell 2 in 2013, as reported by Energy Fuels to the Air Quality Division, were 20.4 pCi/(m^2-sec).

RESPONSE: Disputed. The document Plaintiff cites to support this material fact reports an annual result but also indicates that monthly testing had remained below the standard since September 2013:

> Although Cell 2 is no longer in operation, consistent with 40 CFR 61.254b, EFRI chose to perform monthly radon flux monitoring beginning the month immediately following submittal of the report for the year in non-compliance. Monthly sampling for Cell 2 was conducted from April through December 2013.
>
> The result of the 2013 radon-222 flux monitoring for Cell 2 was 20.4 pCi/(m2-sec) (averaged over 9 monthly sampling events), which exceeds the 20 pCi/(m2-sec) set out in 40 CFR 61.252(a) for the year. Although, based on the monthly sampling results, radon flux for Cell 2 was lower than 20 pCi/(m2-sec) since September 2013 and has remained below 20 pCi/(m2-sec) since that time.

[Dkt. No.68-29 at GCT0008228.]

STATEMENT OF ADDITIONAL ELEMENTS AND MATERIAL FACTS

Subpart W's emission limitation only applies to "operating existing mill impoundments." 40 CFR § 61.254(a). Under Subpart W, "Operation means that an impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment *is in operation* from the day that tailings are first placed in the impoundment *until the day that final closure begins*." 40 CFR § 61.251(e) (emphasis added).

1. Cell 2 entered closure and stopped operating no later than March 21, 2008. [Dkt. No. 60, Def. MSJ at pp. 12-13, ¶¶ 11-13, p. 26, ¶ 49.]

V. Fifth Claim for Relief: Violation of Radon-222 Emission Limit from Cell 3 in 2013

A. Element 1: Existing uranium mill tailings pile (40 C.F.R. § 61.251(d))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec) (1.9 pCi/(ft^2-sec)) of radon-222." "*Existing impoundment* means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."

RESPONSE: Undisputed.

Material Facts

1. Cell 3 was in existence as of December 15, 1989.

RESPONSE: Undisputed.

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.

RESPONSE: Undisputed.

B. Element 2: Radon-222 emissions over 20 pCi/(m2-sec) (40 C.F.R. § 61.252(a))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) (1.9 pCi/(ft2-sec)) of radon-222."

RESPONSE: Undisputed insofar as Plaintiff accurately quotes 40 CFR § 61.252(a). However, Plaintiff omits that when compliance with Subpart W's emission limitation is determined on an "annual[]" basis, it is determined based on the "mean radon flux" of all the sampling taken over the course of a year, and Plaintiff also omits that testing and reporting, and thus compliance, can shift to a monthly basis as well. 40 CFR §§ 61.253, 61.254; 40 CFR Part 61, Appendix B, Method 115, § 2.1.1.

Material Facts

1. Energy Fuels took radon-flux samples from Cell 3's beach region and cover region between June 10-11, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W.

RESPONSE: Undisputed.

2. During 2013, only for the June sampling event did Energy Fuels calculate the weighted average radon flux using beach and cover radon-flux measurements taken during the same sampling event.

RESPONSE: Undisputed.

3. Radon-222 emissions from Cell 3 reported by Energy Fuels to the Air Quality Division for June 2013 were 22.7 pCi/(m^2-sec).

RESPONSE: Disputed insofar as Plaintiff asserts that the June 2013 sampling results represent the sole basis for determining whether Cell 3 complied with Subpart W's emission standard in 2013. The Mill conducted three radon flux sampling events in 2013, testing for radon flux in June, September and December. The annual average of the three tests was 19.4 pCi/(m2-sec) and the Mill reported Cell 3 was in compliance with Subpart W's emission standard for 2013. [Dkt. No. 60, Def. MSJ at pp. 29-30, ¶¶ 54-58.]

VI. Third Claim for Relief: Violation of Sampling-Schedule Requirements

A. Element 1: Existing uranium mill tailings pile (40 C.F.R. § 61.251(d))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) (1.9 pCi/(ft2-sec)) of radon-222." "Existing impoundment means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."

RESPONSE: Undisputed.

Material Facts

1. Cell 3 was in existence as of December 15, 1989.

RESPONSE: Undisputed.

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.

RESPONSE: Undisputed.

B. Element 2: Revision of a previously submitted radon-flux sampling schedule after the first measurement period (40 C.F.R. § 61.253)

Legal Authority

"Compliance with the emission standard in this subpart shall be determined annually through the use of Method 115 of appendix B. When measurements are to be made over a one year period, EPA shall be provided with a schedule of the measurement frequency to be used. The schedule may be submitted to EPA prior to or after the first measurement period."

RESPONSE: Undisputed that the quote is accurate, but it omits that testing and reporting, and thus compliance, can shift to a monthly or other periodic basis as well. 40 CFR §§ 61.253, 61.254.

Material Facts

1. Energy Fuels submitted to the Air Quality Division and EPA a measurement notice for Cell 3 radon-flux measurements for 2013 on April 11, 2013, before taking any radon-flux measurements from Cell 3 under Subpart W. The notice told EPA that Energy Fuels would perform an "[a]nnual sampling event" between June 10 and June 13, 2013.

RESPONSE: Undisputed.

2. Energy Fuels took radon-flux samples from Cell 3 between June 10-11, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W.

RESPONSE: Undisputed.

3. On July 18, 2013, Energy Fuels submitted a measurement schedule to the Air Quality Division and EPA stating that Energy Fuels would take additional radon-flux samples from Cell 3 between September 21-23 and in "Late November/Early December."

RESPONSE: Undisputed.

4. Energy Fuels took radon-flux samples from Cell 3 between September 22-23, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W.

RESPONSE: Undisputed.

5. Energy Fuels took radon-flux samples from Cell 3 between December 3-4, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W.

RESPONSE: Undisputed.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The Mill reported the 2013 results of the Cell 3 radon flux monitoring to DAQ on March 27, 2014. The Mill reported that it was in compliance with the emissions standard and that the results were the average from the three sampling events. [Dkt. No. 60, Def. MSJ at p. 30, ¶ 58.]

2. DAQ reviewed the 2013 Annual Radon Flux Monitoring Report and interpreted Section 61.253 as containing permissive language that allowed the Mill to provide regulators more than one notice of schedule during a year. [*Id*. at p. 31, ¶ 61].

VII. Fourth Claim for Relief: Violation of Method 115's Measurement Protocols

A. Element 1: Existing uranium mill tailings pile (40 C.F.R. § 61.251(d))

Legal Authority

"Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec) (1.9 pCi/(ft^2-sec)) of radon-222." "Existing impoundment means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."

RESPONSE: Undisputed.

Material Facts

1. Cell 3 was in existence as of December 15, 1989.

RESPONSE: Undisputed.

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.

RESPONSE: Undisputed.

B. Element 2: Failure to take radon-flux measurements from each region on the pile during each sampling event (Method 115 § 2.1.3)

Legal Authority

"Compliance with the emission standard in [40 C.F.R. Subpart W] shall be determined annually through the use of Method 115 of appendix B." "The distribution and number of radon flux measurements required on a pile will depend on clearly defined areas of the pile (called regions) that can have significantly different radon fluxes due to surface conditions. The mean radon flux shall be determined for each individual region of the pile. Regions that shall be considered for operating mill tailings piles are: (a) Water covered areas, (b) Water saturated areas (beaches), (c) Dry top surface areas, and (d) Sides, except where earthen material is used in dam construction." "Radon flux measurements shall be made within each region on the pile, except for those areas covered with water."

RESPONSE: Undisputed that the quote is accurate, but it omits that testing and reporting, and thus compliance, can shift to a monthly or other periodic basis as well. 40 CFR §§ 61.253, 61.254.

Material Facts

1. Energy Fuels took radon-flux samples from Cell 3's cover region between September 22-23, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W. Energy Fuels did not sample Cell 3's beach region during the September 22-23, 2013, radon-flux sampling event.

RESPONSE: Undisputed.

2. Energy Fuels took radon-flux samples from Cell 3's cover region between December 3-4, 2013, to be used in calculating the 2013 average annual radon flux for Cell 3 under Subpart W. Energy Fuels did not sample Cell 3's beach region during the December 3-4, 2013, radon-flux sampling event.

RESPONSE: Undisputed.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The Mill reported the 2013 results of the Cell 3 radon flux monitoring to DAQ on March 27, 2014. The Mill reported that it was in compliance with the emissions standard and

that the results were the average from the three sampling events. [Dkt. No. 60, Def. MSJ at p. 30, ¶ 58.]

2. DAQ reviewed the 2013 annual report for Cell 3 and, on April 10, 2014, determined that Cell 3 complied with the emission standard for 2013. DAQ is aware of Plaintiff's complaint regarding the method the Mill used to demonstrate compliance with the emission standard but, nonetheless, accepted the 2013 monitoring as showing compliance with the emission standard. DAQ did so, in part, due to the flexibility in the language of Method 115, which allows a source to opt to take more frequent measurements over the course of a year and because DAQ was aware that the Mill was taking steps to reduce Cell 3's radon emissions focusing on the cover areas. [*Id*. at p. 29-30, ¶ ¶ 55-56, p. 31 ¶ 60.]

VIII. Second Claim for Relief: Violation of Subpart W by Operating More than Two Impoundments

A. Element 1: Construction of an impoundment after December 15, 1989 (40 C.F.R. § 61.252(b)).

Legal Authority

"After December 15, 1989, no new tailings impoundment can be built unless it is designed, constructed and operated to meet one of the two following work practices: (1) Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of 40 CFR 192.32(a) as determined by the Nuclear Regulatory Commission."

RESPONSE: Undisputed.

Material Facts

1. Energy Fuels finished building Cell 4B on November 11, 2010.

RESPONSE: Undisputed. Additionally, in April 2010, the Mill applied for approval for Cell 4B from DAQ pursuant to Subpart W. The application detailed the history of construction and operation of the cells and made clear that the Mill would continue to operate Cell 1 as an

evaporation pond, that Cell 2 was closed, that before tailings solids would be disposed of in Cell 4B, Cell 3 would cease operating, and that Cell 4B would only be used as an evaporation pond until Cell 3 ceased operating. The result was that Cells 3 and 4A would be the two operating tailings impoundments under Subpart W and that Cells 1 and 4B would operate as evaporation ponds. On May 3, 2010, DAQ granted approval for the construction of Cell 4B and on January 31, 2011 DRC/DWMRC granted approval to operate Cell 4B. No entity challenged these approvals. [Dkt. No. 60, Def. MSJ at pp. 16-17, ¶¶ 25-26.]

B. Element 2: Use of phased disposal (40 C.F.R. §§ 61.252(b), 61.252(f))

Legal Authority

"After December 15, 1989, no new tailings impoundment can be built unless it is designed, constructed and operated to meet one of the two following work practices: (1) Phased disposal in lined tailings impoundments that are no more than 40 acres in area and meet the requirements of 40 CFR 192.32(a) as determined by the Nuclear Regulatory Commission."

"Phased disposal means a method of tailings management and disposal which uses lined impoundments which are filled and then immediately dried and covered to meet all applicable Federal standards."

RESPONSE: Undisputed.

Material Facts

1. Energy Fuels uses phased disposal at the Mill.

RESPONSE: Undisputed that the Mill uses phased disposal. But the Mill disputes Plaintiff's assertion, which is not stated here but is material to Plaintiff's argument, that the construction of Cell 4B was the event that made the Mill's tailings management system subject to Subpart W's phased disposal requirements. [Dkt. No. 67, Pl. MSJ at p. 44.] The White Mesa Mill has been subject to and operated under the phased disposal requirements since Subpart W was originally enacted in 1986 and amended in 1989. [Def. Resp. Appx. No. 4, Final Rule for

Radon – 222 Emissions from Licensed Uranium Mill Tailings, Background Information Document, EPA 520/1-86-009, at 7-24; Dkt. No. 60, Def. MSJ at pp. 13-14, ¶¶ 15-17; Dkt No. 63-14 at ER000458.]

C. Element 3: Operation of more than two impoundments (40 C.F.R. §§ 61.252(b)(1), 61.251(e), 61.251(g)).

Legal Authority

"The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time."

"*Operation* means that an impoundment is being used for the continued placement of new tailings or is in standby status for such placement. An impoundment is in operation from the day that tailings are first placed in the impoundment until the day that final closure begins."

"*Uranium byproduct material or tailings* means the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content."

RESPONSE: Undisputed insofar as Plaintiff has accurately quoted Subpart W. However, the Mill disputes Plaintiff's presentation of the legal authority in that Plaintiff has omitted the definition of "phased disposal" from Element 3. The definition of "phased disposal" is important on this element because it provides context for how Subpart W operates. Under the regulation, "Phased disposal means a method of tailings management and disposal which uses lined impoundments which are *filled* and then immediately *dried and covered* to meet all applicable Federal standards." 40 CFR § 61.251(f) (emphasis added).

Additionally, the Atomic Energy Act defines "byproduct material" as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 23 USC § 2014(e)(2), AEA § 11(e)(2).

Material Facts

Alternative A

1. Cell 3 has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. Cell 3 has been a tailings impoundment in operation since Subpart W was originally enacted in 1986 and amended in 1989. [Dkt. No. 63-14 at EFR00459.]

2. Cell 4A has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. The Mill completed construction of Cell 4A on November 30, 1989 and, after receiving a license amendment from NRC on December 21, 1989, used the cell for a short time for evaporation of process solutions. [Dkt. No. 60, Def. MSJ at p. 14, ¶ 18.] The Mill relined Cell 4A in 2008 (the work was completed on September 17, 2008) and initially used Cell 4A for process solution evaporation and thereafter the Mill began placing tailings in Cell 4A. The Mill continues to use Cell 4A as an operating tailings impoundment. [*Id*. at p. 16, ¶ 23; Dkt. No. 63-14 at EFR00459.]

3. Cell 1 has been used for the continued placement of process solutions since at least November 11, 2010.

RESPONSE: Disputed. Under Subpart W, the term "placement" is a term of art that refers to the placement of tailings. 40 CFR § 61.251(e) (defining "operation" as the "continued placement of new tailings"); *see also Id.* at § 61.252(b)(1) (applying the two impoundment limitation to "impoundments . . . in operation"). The term does not refer to the handling of process solutions. *Id.* at § 61.251(f) (defining "phased disposal" as a method of "tailings management" where the impoundments are "filled" then "dried and covered"); 23 USC § 2014(e)(2), AEA § 11(e)(2) (defining "byproduct material" as "tailings or wastes"). Construction of Cell 1 was completed in June 1981, and Cell 1 has only been used as an

evaporation pond, receiving raffinate solutions, process solutions, liquids from drains in the Mills laboratory and storm water runoff, since that time. [Dkt. No. 60, Def. MSJ at pp. 11-12, ¶ 10.]

4. Cell 4B has been used for the continued placement of process solutions since January 31, 2011.

RESPONSE: Disputed. Under Subpart W, the term "placement" is a term of art that refers to the placement of tailings. 40 CFR § 61.251(e) (defining "operation" as the "continued placement of new tailings"); *see also Id.* at § 61.252(b)(1) (applying the two impoundment limitation to "impoundments . . . in operation"). The term does not refer to the handling of process solutions. *Id.* at § 61.251(f) (defining "phased disposal" as a method of "tailings management" where the impoundments are "filled" then "dried and covered"); 23 USC § 2014(e)(2), AEA § 11(e)(2) (defining "byproduct material" as "tailings or wastes"). In April 2010, the Mill applied for approval for Cell 4B from DAQ pursuant to Subpart W. The application detailed the history of construction and operation of the cells and made clear that the Mill would continue to operate Cell 1 as an evaporation pond, that Cell 2 was closed, that before tailings solids would be disposed of in Cell 4B, Cell 3 would cease operating, and that Cell 4B would only be used as an evaporation pond until Cell 3 ceased operating. On May 3, 2010, DAQ granted approval for Cell 4B and on January 31, 2011 DRC/DWMRC granted approval to operate Cell 4B. [Dkt. No. 60, Def. MSJ at pp. 16-17, ¶¶ 25-27.] The Mill continues to use Cell 4B as an evaporation pond. [*Id*. at p. 20, ¶ 34.]

5. Process solutions are waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content.

RESPONSE: Disputed. Paragraph 5 is not a statement of fact but rather is a legal conclusion where Plaintiff has applied the term "process solution" to Subpart W's definition of "Uranium byproduct material or tailings." 40 CFR § 61.251(g). Subpart W's limitation on the number of impoundments a facility using phased disposal may use is restricted to impoundments "in operation" and operation is limited to impoundments used for the "placement of new tailings." 40 CFR §§ 61.251(e), 61.252(b)(1). Tailings are "the sand-like wastes that result from the processing of uranium ore at the White Mesa Mill which are conveyed in slurry form through the tailings pipelines for disposal in the operating tailings impoundments, which at present are Cells 3 and 4A." [Docket No. 68-15 at p. 7, Interrog. No. 19.]

Alternative A1

1. Cell 3 has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 1 of Plaintiff's Alternative A.

2. Cell 4A has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 2 of Plaintiff's Alternative A.

3. Cell 1 has been used for the continued placement of process solutions since at least November 11, 2010.

RESPONSE: Disputed for the same reasons as stated in Response to Paragraph 3 from Plaintiff's Alternative A.

4. Cell 4B has been used for the continued placement of process solutions since January 31, 2011.

RESPONSE: Disputed for the same reasons as stated in Response to Paragraph 4 from Plaintiff's Alternative A.

5. Sand-like wastes that result from the processing of uranium ore eventually precipitate out of process solutions in Cells 1 and 4B.

RESPONSE: Disputed. The record evidence Plaintiff cites in support of this statement does not state that "sand-like wastes" precipitate out of process solutions. [Dkt. No. 68-9 Roberts Decl. at 49:22-50:8 (stating that the Reclamation Plan calls for the eventual removal of "raffinate crystals from Cell 1"); 63:18-64:16 (identifying "residual crystals" as being present when Cell 4A completely dried out); 115:1-116:2 (identifying the potential for "dissolved solids" to be present if Cell 1 were to completely dry out); Dkt. No. 68-16 at 160:15-162:2 (identifying "radium 226" as tending to "precipitate into a solid form and to fall out of the solutions").

Alternative B

1. Cell 3 has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 1 of Plaintiff's Alternative A.

2. Cell 4A has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 2 of Plaintiff's Alternative A above.

3. Tailings were first placed in Cell 2 in 1980.

RESPONSE: Undisputed.

4. Energy Fuels' Reclamation Plan Revision 3.2 - Final does not include milestones for retrieval of windblown tailings, interim stabilization of Cell 2 (including dewatering), or final radon barrier construction.

RESPONSE: Disputed. The Mill has a fully approved Rec Plan, Revision 3.2 as correctly cited by Plaintiff. [Dkt. No. 60, Def. MSJ at pp. 10-11, ¶ 8.] As Plaintiff states (fn 80), the Rec Plan provides: "Placement of cover materials will be based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations." [Dkt. No. 68-22 at EFR006457.] This statement gives the regulator, which was NRC when the Rec Plan was originally approved and now is DWMRC, authority to establish the schedule as conditions allow.

5. Energy Fuels has proposed changes to Reclamation Plan Revision 3.2 - Final by submitting Reclamation Plan Revision 5.0 to the Radiation Division, and the Division has not yet approved Reclamation Plan Revision 5.0.

RESPONSE: Undisputed.

6. The Radiation Division has not approved Energy Fuels' report on infiltration-and-contaminant-transport modeling that is required to ensure compliance with the minimum performance requirements in Section I.D.8. of the company's groundwater discharge permit.

RESPONSE: Disputed. The Mill has an approved Reclamation Plan which addresses the performance requirements in Section I.D.8. in the GWDP. [Dkt. No. 63-17 at EFR006412-13.]

Alternative C

1. Cell 3 has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 1 of Plaintiff's Alternative A.

2. Cell 4A has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 2 of Plaintiff's Alternative A.

3. From at least November 11, 2010 through at least March 2014, Roberts Pond was used for the continued placement of process solutions.

RESPONSE: Disputed. Under Subpart W, the term "placement" is a term of art that refers to the placement of tailings. 40 CFR § 61.251(e) (defining "operation" as the "continued placement of new tailings"); *see also Id.* at § 61.252(b)(1) (applying the two impoundment limitation to "impoundments . . . in operation"). The term does not refer to the handling of process solutions. *Id.* at § 61.251(f) (defining "phased disposal" as a method of "tailings management" where the impoundments are "filled" then "dried and covered"); 23 USC § 2014(e)(2), AEA § 11(e)(2) (defining "byproduct material" as "tailings or wastes"). Roberts Pond was a small, less than one acre retention basin that was included in the original Mill design and was used as a catch basin since Mill inception for process upsets and overflows from Mill operations, and also captured storm water runoff. None of the record cites provided by Plaintiff state that Roberts Pond received process solutions that were directed to the tailings impoundments. Roberts Pond was not used as a waste facility, but was part of the Mill's process. Material contained in Roberts Pond was put back into the Mill's process, placed on the Mill's ore pad (to be put back into process), or disposed of in the Mill's tailings management system when it was determined that the material had no additional value. Neither the Mill nor regulators ever considered Roberts Pond to be subject to the phased disposal work practice standard. [Dkt. No. 60, Def. MSJ at pp. 20-21, ¶¶ 35-37.]

4. Process solutions are waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content.

RESPONSE: Disputed for the same reasons as stated in Response to paragraph 5 of Alternative A. Additionally, as explained in Response to Paragraph 3 of Alternative C, the

solutions contained in Roberts Pond were not the same process solutions that were discharged to the Mill's tailings management system.

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The Mill took Roberts Pond out of service in March 2014. [*Id*. at p. 21, ¶ 36.]

2. Plaintiff filed their initial complaint, alleging violations of Subpart W's limitation on the number of operating tailings cells, on April 2, 2014. *See* Paragraph 2 of Part II above.

Alternative C1

1. Cell 3 has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 1 of Plaintiff's Alternative A.

2. Cell 4A has been in operation since at least November 11, 2010.

RESPONSE: Undisputed. *See* additional information provided in Response to Paragraph 2 of Plaintiff's Alternative A.

3. From at least November 11, 2010 through at least March 2014, Roberts Pond was used for the continued placement of sand-like wastes that result from the processing of uranium ore.

RESPONSE: Disputed. Under Subpart W, the term "placement" is a term of art that refers to the placement of tailings. 40 CFR § 61.251(e) (defining "operation"); *see also Id.* at § 61.252(b)(1) (limiting facilities to "two impoundments . . . in operation at any one time"). The term does not refer to the handling of process solutions. *Id.* at § 61.251(f) (defining "phased disposal" as a method of "tailings management" where the impoundments are "filled" then "dried and covered"). Roberts Pond was not a waste facility but was a small catch basin that was included in the original Mill design and was used since Mill inception to collect process upsets

and overflows from Mill operations, and also storm water runoff. Material contained in Roberts Pond was put back into the Mill's process, placed on the Mill's ore pad (to be put back into process), or disposed of in the Mill's tailings management system when it was determined that the material had no additional value. [Dkt. No. 60, Def. MSJ at pp. 20-21, ¶¶ 35-37.]

Additionally, the record citations Plaintiff identifies do not state that sand-like wastes were placed in Roberts Pond. For instance, Harold Roberts, the Mill's 30(b)(6) deponent, clarified what the term "sands" in Roberts Pond entailed: After stating that "ore sands" could be present in Roberts Pond, Mr. Roberts stated that those sands were not considered tailings "[b]ecause they're from the mill circuit, and they're not fully processed." [Dkt. No. 68-9, Roberts Decl. at 201:6-21.]

STATEMENT OF ADDITIONAL MATERIAL FACTS

1. The Mill took Roberts Pond out of service in March 2014. [Dkt. No. 60, Def. MSJ at p. 21, ¶ 36.]

2. Plaintiff filed their initial complaint, alleging violations of Subpart W's limitation on the number of operating tailings cells, on April 2, 2014. See Paragraph 2 of Part II above.

ARGUMENT

I. Standing: Plaintiff's Standing Declarants Have Not Suffered an Injury in Fact.

Standing requires a plaintiff to show "it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000); *see also S. Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1155 (10th Cir. 2013) (stating that the injury element requires a showing of a "direct stake in the outcome" as opposed to mere "abstract

concerns" (internal quotation marks omitted)). Moreover, a plaintiff's injury must be connected to the "challenged activity" targeted in the citizen suit and not a generalized complaint about the existence of a facility. *Laidlaw*, 528 U.S. at 183; *Conservation Law Found. v. U.S. EPA*, 964 F.Supp.2d 175, 189-90 (D. Mass. 2013) (applying the principle stated in *Laidlaw* and finding the plaintiff lacked standing because plaintiff failed to "present adequate evidence of a link between their injury and the defendants' actions"); *see also SUWA*, 707 F.3d at 1156 (finding an injury was sufficiently shown where the plaintiff submitted declarations alleging injury was the result of the specific activity challenged in the suit).

Plaintiff has not met its burden to show its standing witnesses have suffered an injury as a result of the Mill's alleged violations of Subpart W. Plaintiff limited the scope of its citizen suit to allegations that the Mill was liable under the Clean Air Act for violations of the National Emission Standards for Radon Emissions from Operating Mill Tailings, i.e., Subpart W of 40 CFR Part 61. [Dkt. No. 29, FAC at ¶¶ 1, 44, 49, 54, 60, 62; Dkt. No. 67, Pl. MSJ at pp. 29-30]. Plaintiff also limited the scope of the injury Plaintiff would rely on to prove standing as Plaintiff disclaimed all health injuries that resulted from the Mill's alleged violation of Subpart W. [Def. Resp. Appx No. 2, Interrog. Nos. 2 & 3 ("Because the Trust does not intend to rely on any person's health injuries to establish standing in this case, no such injuries are relevant to the claims and defenses in this lawsuit."); Dkt. No. 67, Pl. MSJ at p. 31 (identifying injury to "aesthetic and recreational values" as the basis for Plaintiff's standing).]

But Subpart W's focus is on limiting the potential human health impacts of radon emissions originating from operating tailings impoundments. 40 CFR § 61.252 (establishing an emission limitation for existing tailings impoundments and work practice standards); [Def. Resp.

Appx No. 1, 54 Fed. Reg. 51654, 51655-56, 51679-82 (December 15, 1989).]. Consequently, to allege an injury that provides a basis for standing in this case, Plaintiff was required to show an injury that is linked to the target of Subpart W. Because Plaintiff has disclaimed any health impacts from the Mill's operations, Plaintiff has not shown its standing witnesses suffered an injury relevant to the claims of Plaintiff's citizen suit.

Furthermore, even if the Court were to accept that a recreational injury alone was sufficient in this context, Plaintiff still has not met its burden because the injury alleged in Plaintiff's Motion for Summary Judgment is based on complaints about the Mill's operations in general and a fear of potential future impacts. The Supreme Court has held that a citizen suit's standing may rest on an injury to "recreational values," but that injury must be connected to the "*challenged activity*." *Laidlaw*, 528 U.S. at 183 (emphasis added); *see also Conservation Law Found.*, 964 F.Supp.2d at 189 ("[T]he Supreme court has concluded that an organizational plaintiff lacks standing where the affidavit on which it relies does not connect the alleged injury to the defendant's activity.").[3]

Rather than alleging an injury from the operation of the Mill's tailings disposal system, Plaintiff's injury is derived from complaints about "the Mill" in general. [Dkt. No. 67, Pl. MSJ at p. 31 ("When *the Mill is running*, they smell a bad chemical odor and see a reddish smoke

[3] Plaintiff attempts to broaden the Supreme Court's holding as allowing generalized complaints to satisfy the injury-in-fact requirement. Plaintiff wrote that "'*[R]easonable* concerns about the effect' *of a defendant's polluting activities* that affect a plaintiff's interests satisfy the injury-in-fact requirement." [Dkt. No. 67, Pl. MSJ at p. 31 (quoting *Laidlaw*, 528 U.S. 183-84) (emphasis added)]. The full statement by the Supreme Court shows the necessary nexus between the challenged activity and the alleged injury: "In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' *reasonable* concerns about the effects *of those discharges*, directly affected those affiants' recreational, aesthetic, and economic interests." *Laidlaw*, 528 U.S. at 183-84 (emphasis added).

coming from *the Mill* (emphasis added)); *id*. at p. 32 ("Because of *the Mill's* operations and radon emissions, they have changed how they gather plants for medicinal uses, and their family no longer hunts near *the Mill* for deer to eat (emphasis added)); *id*. ("Mr. Crowder and Ms. Leppanen get less pleasure out of their property, their home, and the red rock country surrounding it because they are concerned about *the Mill's* radon emissions." (emphasis added))]. The Mill disputes Plaintiff's general allegation as there is no credible evidence that the Mill's operations are adversely affecting Plaintiff's standing witnesses. Nevertheless, by focusing on the Mill in general, Plaintiff has not demonstrated their standing witnesses have been injured by the Mill's operations of the tailings disposal system.

Moreover, Plaintiff has not provided sufficient information to support an argument that Plaintiff's curtailed activities are reasonable. Plaintiff must show that their injuries are "concrete and particularized" and "actual or imminent." Plaintiff's witness Mr. Crowder admitted that he understands radon is an invisible gas and that radon from the Mill has not impacted any of his sensory experiences while he has been recreating in the area. [Def. Resp. Appx. No. 3, Crowder depo. at 18:3-21.] Plaintiff is left with arguing that its members are injured because they are "confronted with," "worry[] about," and "alter[] their recreational" activities due to a fear of increased cancer. [Dkt. No. 67, Pl. MSJ at p. 33.] But Plaintiff has not provided evidence that demonstrates the emissions from Cell 2 and 3 lift their concerns to be actual and concrete injuries. The lack of credibility of these concerns is highlighted, as shown in Exhibits 2 – 3 of the Mill's Motion for Summary Judgement [Dkt. Nos. 60-2, 60-3], by the fact that the radon emissions from Cell 2 and 3 have historically remained below Subpart W's emission standard, the Mill only had a short period where emissions exceeded the standard, and the Mill took

prompt action to reduce emissions.[4] Given this history and affirmative action, Plaintiff's fears are not credible and the curtailment of activities by Plaintiff's standing witnesses is not reasonable.

II. Cell 2 Did Not Violate Subpart W's Emission Limitation.

In Part IV.A of their Motion, Plaintiff argues that the Mill violated Subpart W's emission limitation at Cell 2 in 2012 and 2013. But Plaintiff's argument is undermined by omissions of elements critical to their claims and factual information that undermines their theory of liability.

A. Cell 2 was not subject to Subpart W's emission limitation.

Plaintiff's Cell 2 claim rests fundamentally on the fact that Cell 2 is an "existing impoundment." [Dkt. No. 67, Pl. MSJ at pp. 35-37]. The Mill agrees that Cell 2 *was* an "existing impoundment" during its operating life. But Plaintiff's argument on summary judgment fails to account for the fact that Subpart W's emission limitation only applies to existing tailings impoundments that are "operating." 40 CFR § 61.254(a) (only requiring annual reporting for operating tailings impoundments); *see also* 40 CFR Part 61, Subpart W (titled as "National Emission Standards for Radon Emissions *from Operating Mill Tailings* (emphasis added)); *Id*. at § 61.251(e) (defining "operation" as ending when "final closure begins."). Once a tailings impoundment ceases to be classified as an operating existing tailings impoundment, Subpart W no longer applies and the impoundment is no longer regulated by DAQ. *Id*. at § 61.250 ("[Subpart W] does not apply to the disposal of tailings."); [Def Resp. Appx No. 1, 54 Fed. Reg. at 51682 (establishing a separate regulatory system – i.e., Subpart T, 40 CFR § 61.220

[4] Indeed, Bill Crowder, one of Plaintiff's standing witnesses, conceded that if the Mill were in compliance with Subpart W he would not be injured. [Def Resp. Appx No. 3, Crowder depo. at 15:20-16:1.]

et seq. – that governs impoundments that cease to operate); Dkt. No. 60, Def MSJ at pp. 5-6 (providing an explanation of the relationship between Subpart W, Subpart T and 10 CFR Part 40); Dkt. No. 63-38 ("clarify[ing] the regulatory status of Tailings Cell 2" and stating that DAQ and DRC agree that "Subpart W NESHAP requirements no longer apply" to Cell 2 and that the cell is regulated under 10 CFR Part 40, Appendix A).][5]

As demonstrated in Part II of the Mill's Motion for Summary Judgment, Cell 2 stopped operating no later than 2008. Subpart W's emission limitation ceased to apply to Cell 2 at that time and, consequently, there could be no violation of Subpart W's inapplicable emission standard.

B. Plaintiff's Cell 2 claim ignores the automatic remedy built into Subpart W.

Even if Subpart W applied to Cell 2, Plaintiff failed to acknowledge that Subpart W contains an automatic remedy – a remedy overseen and enforced by DAQ – that ensures compliance with Subpart W's emission limitation. Furthermore, Plaintiff failed to deal with the fact that the Mill followed the requirements of this presumptive remedy (an effort that predates Plaintiff's notice of suit and the filing of its citizen suit) and reduced Cell 2's emissions.

Having brought suit under the CAA's citizen suit provision, Plaintiff's suit is a narrow one with a limited purpose; that purpose being to require compliance. *Ellis v. Gallatin Steel Co.*,

[5] Plaintiff ignores the DRC letter clarifying the status of Cell 2, focusing on the fact that the Mill continued to sample Cell 2 under Subpart W after 2008 and that DAQ continued to review the resulting reports. [Dkt. No. 67, Pl. MSJ at pp. 36-37.]. The Mill acknowledged that it erred when it continued to sample Cell 2 after 2008. [Dkt. No. 60, Def. MSJ at p. 26, ¶ 49.] Additionally, state regulators explained that the agency also made a mistake when it continued to review the Cell 2 sampling reports submitted by the Mill. [Dkt. No. 65, Morris Decl., ¶ 6.] A mistaken report and review does not convert Cell 2 into an operating tailings impoundment subject to Subpart W.

390 F.3d 461, 475 (6th Cir. 2004); *cf. Ailor v. City of Maynardville, Tenn.*, 368 F.3d 587, 596 (6th Cir. 2004) (finding a citizen plaintiff lacked standing where the operator instituted "remedial efforts to stop violations").[6] Where the purpose of a citizen suit is satisfied by some means other than the litigation initiated by the citizen, federal courts have dismissed the suit because the suit is "unnecessary." *See Gwaltney of Smithfiled, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60 (1987) (stating that a source's effective efforts to comply with applicable environmental statutes will render a citizen suit unnecessary); *see also Clean Harbors, Inc. v. CBS Corporation*, 875 F.Supp.2d 1311, 1332 (D. Kan. 2012) (declining to impose any injunctive relief where an EPA-issued permit "already provides the relief that would be available.").

Elevated emissions from an existing tailings impoundment trigger section 61.254(b)'s remedial provisions, which require (1) monthly radon monitoring, which continues until regulators determine monthly monitoring is no longer necessary, and (2) identification of the remedial steps being taken to reduce emissions. These conditions render a citizen suit alleging violations of Subpart W's emission limitation unnecessary where the source and the regulator are following the remedial measures because the measures already address the excess emissions.

Plaintiff's claim focuses only on the fact of the reported emissions, but entirely ignores the fact that the Mill and DAQ followed Subpart W's remedial measures. On March 29, 2013 (more than a year before Plaintiff filed its citizen suit seeking compliance), the Mill reported elevated emissions from Cell 2 for 2012, identified its efforts to understand the cause of the

[6] A number of cases cited in this section involve citizen suits drawn from other federal environmental laws. Federal courts have concluded that the citizen suit provisions of other environmental statutes, such as the Clean Water Act, are instructive in interpreting the scope of the CAA's citizen suit provision. *Group Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 123 n.7 (3d Cir. 2016).

increase in emissions, stated it would begin monitoring radon emissions on a monthly basis, and proposed actions to reduce emissions from the cell. [Dkt. No. 63-21 at EFR000752 – 59.] While the Mill reported that the average radon for 2013 exceeded the Subpart W emission limitation, the Mill's actions were successful in significantly reducing emissions from Cell 2 as the monthly monitoring determined that emissions began to fall beginning in September 2013. [Dkt. No. 60-2 at p. 2.] The most recent test found that radon from Cell 2 represented less than a quarter of the emissions allowed under Subpart W. [*Id*. (showing March 2016 radon sampling resulted in 4.1 pCi/(m2-sec)).] Consequently, by the time Plaintiff filed their claim alleging Cell 2 violations, the citizen suit was unnecessary because the Mill, under the supervision of DAQ, had followed Subpart W's remedial measures and successfully moved to reduce the emissions from Cell 2.

III. Cell 3 did Not Violate Subpart W's Emission Limitation, Notification Requirements or Monitoring Protocols.

Plaintiff's theory of liability against the Mill for its operation of Cell 3 in 2013 turns on eliminating two of the three radon sampling tests conducted by the Mill that year. Specifically, in an effort to nullify the results of those tests, Plaintiff argues that the second and third tests conducted in 2013 are invalid because the Mill improperly scheduled the tests and did not sample the entirety of Cell 3 during the tests. [Dkt. No. 67, Pl. MSJ at pp. 37-38.] But at the same time, Plaintiff also contends that the Mill is also liable for the September and December tests because the alleged procedural infirmities that make the tests null are independent violations of Subpart W. [*Id*. at p. 40, 42.] If the alleged procedural errors do, in fact, nullify the September and December sampling (a determination that the Mill argues is not supported by

Subpart W, as argued below), the logical result is to proceed with the understanding that those tests are a regulatory nullity for which there can be no liability.[7]

A. DAQ agreed the Mill may submit multiple measurement schedules.

Plaintiff argues that the "plain language" of Subpart W prohibited the Mill from submitting more than one schedule for its radon flux monitoring during a given year. [Dkt. No. 67, Pls. MSJ, p. 38]. While the language of the regulation does not fall in Plaintiff's favor, the plain language is not the only consideration that the Court must account for. Federal courts "must give substantial deference to an agency's interpretation of its own regulations" and this deference requires the court to give the agency's interpretation "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 684 (10th Cir. 2010) (internal quotation marks omitted).[8]

The language that Plaintiff relies on reads:

> When measurements are to be made over a one year period, EPA shall be provided with a schedule of the measurement frequency to be used. The schedule may be submitted to EPA prior to or after the first measurement period.

[7] Additionally, Plaintiff lacks standing on all of their Cell 3 claims. "The plaintiff bears the burden to establish standing at the time the suit is filed, and if the defendant's offending conduct has ceased by that time, we dismiss for lack of redressability." *WildEarth Guardians v. Pub. Serv. Comm'n of Colo.*, 690 F.3d 1174, 1185 (10th Cir. 2012); *see also Berry v. Farmland Indus., Inc.*, 114 F.Supp.2d 1150, 1154 (D. Kan. 2000) (The U.S. Supreme "Court ruled that to survive a motion for summary judgment a plaintiff must come forward with specific facts from which a reasonable fact finder could conclude either that the defendant was in fact violating the Act at the time plaintiff filed their complaint or that future violations of the Act were imminent."). In both their First Amended Complaint and their Motion for Summary Judgment, Plaintiff only argues that the Mill violated Subpart W's scheduling requirements, testing protocols, and emission standard in 2013. [Dkt. No. 29, FAC at ¶¶ 53, 60, 62; Dkt. No. 67, Pl. MSJ at pp. 38, 40, 42.] But Plaintiff's First Amended Complaint – wherein all of Plaintiff's Cell 3 claims first appeared – was not filed until October 15, 2014. [Dkt. No. 29.]

[8] The Mill previously explained why DAQ's interpretations of Subpart W are afforded deference. [Dkt. No. 60, Def. MSJ at pp. 37-39.]

40 CFR § 61.253. Plaintiff argues that the use of the phrases "a schedule" and "before or after"[9] means that the regulation only allows a single schedule to be submitted. [Dkt. No. 67, Pl. MSJ at pp. 38-39.] DAQ interpreted section 61.253 as permitting the Mill to submit more than one notice of schedule. [Dkt. No. 65, Morris Dec. ¶ 9.] In particular, DAQ's interpretation is influenced by the permissive language contained in the second sentence quoted above.

DAQ's interpretation is not plainly erroneous; the regulation does not prohibit a source from submitting "a schedule" and then electing to submit "a schedule" again later in the year. Additionally, by using the word "may," DAQ found the second sentence vests the Mill with discretion to elect when it submits its testing schedule. These interpretations of the testing method by DAQ are reasonable and the Court should not second guess the agency on this issue within its area of expertise.

B. DAQ agreed the Mill could test only the cover areas.

Plaintiff next argues that the September and December tests are nullities because the Mill only sampled the cover area of Cell 3 during those tests. [Dkt. No. 67, Pl. MSJ at pp. 40-41.] Once again, Plaintiff ignores that DAQ interpreted the governing regulation – i.e., Method 115 of Part 61, Appendix B – to recognize that the Mill was allowed to focus on testing the cover region during the second and third tests in 2013 and that such testing was reasonable given that the Mill's efforts to reduce emissions were targeted at the cover region of Cell 3.

Method 115 provides that, "A single set of radon flux measurements may be made, or if the owners or operator chooses, more frequent measurements may be made over a one year period. These measurements may involve quarterly, monthly, or weekly intervals." 40 CFR Part

[9] Plaintiff misquotes the regulation; the regulation reads "prior to or after."

61, Appendix B, Method 115, § 2.1.1. This language, as interpreted by DAQ, vested the Mill with a degree of "flexibility" in conducting radon monitoring and that the Method "does not preclude the source from taking additional measurements focusing on a specific region of a tailings pile." [Dkt. No. 65, Morris Dec. ¶ 10.] Furthermore, DAQ acknowledged that its interpretation was influenced by the Mill's efforts to reduce emission from Cell 3, which were focused on the cover region of the cell. [*Id*. at ¶ 10; *see also* Part III.A, *supra* pp. 34-35 (describing the Mill's efforts to identify the cause of increasing emissions from Cell 3's cover region and steps taken to reduce those emissions).]

In contrast to this interpretation, Plaintiff does not identify any single, specific provision that expressly required the Mill to test both the cover and beach regions during every monitoring test. Rather, Plaintiff argues that such a requirement is implied from a combination of a number of provisions contained in Method 115 [Dkt. No. 67, Pl. MSJ at p. 41 (stating that various provisions "[t]aken together" require the result).] and the equation used to calculate radon flux. [*Id*.] Plaintiff's argument does not overcome DAQ's discretion to interpret and apply Method 115, as it did in this case.

C. Cell 3 did not exceed Subpart W's emission limitation.

Given that Plaintiff's argument that the September and December radon sampling for Cell 3 are without merit, the Mill did not violate Subpart W's emission limitation because the annual average of radon flux for the cell, considering the June, September and December sampling, was below Subpart W's emission limitation. [Dkt. No. 60-3.]

IV. The Mill Complies with the Phased Disposal Work Practice.

In claim 2, Plaintiff argues the Mill's evaporation ponds and Roberts Pond were subject to the phased disposal work practice, and that Cell 2 is still operating. As such, according to Plaintiff, when you add any of these structures to Cells 3 and 4A, the two operating tailings impoundments, the Mill has been operating more than two impoundments in violation of the phased disposal work practice.

Plaintiff is wrong. First, Plaintiff entirely ignores how the Mill has been regulated by EPA, NRC and DAQ. DAQ in particular has primary regulatory authority and, as explained in Defendants' Motion for Summary Judgment [Dkt. No. 60 at 8-22, 32-40], has consistently found the Mill to be in compliance with the phased disposal work practice. The Mill does not repeat this argument in this brief. Second, Plaintiff fails to read all of the key provisions in Subpart W together, which show the phased disposal work practice applies to the impoundments that are being filled with tailings solids then dried (dewatered) and covered for long-term disposal, not to evaporation ponds. This argument is set forth in the Defendants' Motion for Summary Judgment [*Id*. at 32-35] and is also not repeated here.

In this brief the Mill focuses first in responding to Plaintiff's argument about EPA's rulemaking record. When viewed in full, this record confirms that evaporation ponds were never subjected to the phased disposal work practice. The Mill then responds to Plaintiff's argument that Cell 2 is still operating and shows that Plaintiff does not really contend the cell is still operating, but instead tries to attack the Mill's approved reclamation plan, which cannot be done in this proceeding. Lastly, the Mill shows that Roberts Pond, a small overflow catch basin for the Mill that was taken out of service in March 2014, was never a tailings impoundment.

A. The rulemaking record shows that evaporation ponds are not subject to the phased disposal work practice.

Plaintiff argues Cell 1 and Cell 4B, which have operated only as evaporation ponds, nonetheless are subject to the phased disposal limit because they have received process solutions and those solutions can precipitate raffinate crystals. Plaintiff relies on EPA's 1986 rulemaking record associated with the original Subpart W. The Mill agrees this record is relevant, but the record supports the Mill's position.

As part of the 1986 rulemaking, EPA surveyed all the uranium mills in the country that would be subject to the regulation, including the White Mesa Mill. It gathered data on the mills and their various structures, including their tailings piles and evaporation ponds. [Def. Resp. Appx. No. 4, Final Rule for Radon – 222 Emissions from Licensed Uranium Mill Tailings, Background Information Document, EPA 520/1-86-009 (Background Document).] EPA noted that the White Mesa Mill was already using the phased disposal method. [*Id.* at 7-24.] In describing existing disposal practices, EPA drew a clear distinction between tailings impoundments, where tailings are disposed of, and evaporations ponds, which were recognized as separate and necessary structures to a phased disposal system. [*Id.* at 3-12 ("The water level in a *tailings impoundment* is controlled through the use of decant towers, pumps, or siphons to recycle the water or to transfer it to *evaporation ponds* for proper maintenance of freeboard. Most mills operate with zero liquid discharge (40 CFR Part 440) and rely on evaporation."); *Id.* at 3-13 (The amount of radon-222 emitted from ore storage piles, milling circuits, *evaporation ponds*, and *tailings impoundments* depends upon a number of highly variable factors . . . .").][10]

[10] Plaintiff notes that at one point EPA described Cell 1 along with Cells 2 and 3 as containing tailings. [Dkt. No. 67, Pl. MSJ at p. 45.] However, in another supporting document, EPA added

In developing cost estimates for operating and closing cells in a phased disposal system, EPA assumed a system with six tailings impoundments plus a separate evaporation pond. [*Id.* at B-5 ("The phased-disposal *impoundment* consists of a serious of *small impoundments or cells*…. The *six cells* are similar in design to the single-cell impoundment. . . . Unlike the model singe-cell impoundment, an *evaporation pond* is included in the cost estimate of phased-disposal impoundments.").] As the Mill has explained to the Court, EPA recognized in the Background Document that "tailings are deposited as a slurry in tailings impoundments." [*Id.* at C-4.] EPA understood, however, that suspended or dissolved solids could be carried over from the tailings impoundment and settle in the bottom of the evaporation ponds. [*Id.* at 3-19.] EPA also recognized that it would not be feasible to place interim cover on evaporation ponds: "*In addition to tailings impoundments*, several mills use *evaporation ponds* for water management. . . . "[I]nterim cover is not applied to *evaporation ponds* because: 1) these ponds receive water from sources other than *tailings impoundments* and would need to remain in service during standby periods; 2) the quantity of tailings present and their contribution to the site's source term are not accurately known; 3) these ponds will eventually be excavated and the material placed on the *tailings impoundments* prior to reclamation; and 4) these ponds are lined to prevent seepage. Movement of heavy equipment on these ponds could destroy the integrity of the liners." [*Id.* at C-9.]

In the preamble to the proposed 1986 Subpart W, after explaining the original proposed phased disposal standard which applied to tailings impoundments, EPA sought input on the

---

a footnote on Cell 1 which stated: "Used for raffinate evaporation." [Def. Resp. Appx. No. 5, Estimates of Population Distributions and Tailings Areas Around Licensed Uranium Mill Sites, EPA 520/6-86-020, August 1986, at 37.]

following question: "Are there any unidentified public health or environmental problems associated with evaporation ponds? *Both the phased disposal and continuous disposal methods require evaporation ponds to dispose of excess water.* The Agency believes most existing evaporation ponds have synthetic liners to prevent infiltration of hazardous constituents into ground water. However, some of these ponds may contain significant quantities of tailings, which are likely to be carried over from *the impoundment area*. The Agency seeks information that may be pertinent to the potential public health and environmental impact from evaporation ponds at uranium milling sites." [Def. Resp. Appx No. 6, 51 Fed. Reg. 6382, 6389/1-2 (February 21, 1986) (emphasis added).] In August of 1986, in responding to public comments, EPA stated: "*Since phased and continuous tailings disposal methods require evaporation ponds*, any health or environmental problems associated with the ponds is important. The Agency agrees that adequate health and environmental protection is provided with a properly designed [lined] pond." Def. Resp. Appx. No. 7, Final Rule for Radon – 222 Emissions from Licensed Uranium Mill Tailings, Response to Comments, EPA-520-1-86-011, August 1986, at p. 12.] In the preamble to the final 1986 Subpart W, and in the text of the rule, EPA referred only to tailings impoundments or tailings piles, particularly when discussing the phased disposal limit, and not to evaporation ponds. [Def. Resp. Appx. No. 8, 51 Fed. Reg. 34056, 34056-67 (September 24, 1986).]

EPA carried forward the distinction between tailings impoundments and evaporation ponds in the 1989 Subpart W rulemaking. In the December 1989 preamble to the final rule, EPA referenced the 1986 Subpart W work practice standard that applied to "tailings impoundments" or "tailings piles," while making no mention of evaporation ponds. [Def. Resp. Appx. No. 1, 54

Fed. Reg. at 51679-80.] As in 1986, in the background documents to the 1989 rulemaking, EPA again noted the existence of evaporation ponds as separate structures from tailings impoundments. For instance, EPA recognized that the contents of any "associated evaporation ponds" would be excavated and transferred to the tailings impoundment upon closure. [Def. Resp. Appx. No. 9, Risk Assessments, Environmental Impact Statement, NESHAPS for Radionuclides, Background Information Document – Volume 2, EPA/520/1-89-006-1, September 1989, at 9-6.] Citing the 1986 Background Document, EPA noted that evaporation ponds are required in a phased disposal system and gave an example of a six cell impoundment system with an evaporation pond being separate from the impoundments. [*Id*. at 9-42, 9-43.]

To summarize, the 1986 and 1989 rulemaking records make clear that uranium mills using phased disposal have structures called tailings impoundments and separate structures called evaporation ponds. The tailings are recognized as being disposed of in the tailings impoundments, while the evaporation ponds are necessary to manage the excess water. When EPA drafted the regulatory language in both the 1986 and 1989 versions of Subpart W, it applied the phased disposal limit to the "tailings impoundments" only, not to evaporation ponds. Given the clear understanding that evaporation ponds were a necessary but separate component of the tailings management system, the result is that only the tailings impoundments were subjected to phased disposal. This understanding was born out in exactly how the EPA and DAQ proceeded to regulate the Mill immediately upon the enactment of Subpart W, under which Cell 1 was considered an evaporation pond and not one of the two operating tailings impoundments.[11]

[11] Plaintiff argues that as a matter of policy evaporation ponds should be subject to phased disposal. However, EPA assumed that evaporation ponds had zero emissions due to their water cover. [Def. Resp. Appx. No. 8, 51 Fed. Reg. 34056, 34060/1 (September 24, 1986) ("The

Plaintiff also relies upon the preamble to EPA's proposed revisions to Subpart W published in 2014. [Def. Resp. Appx. No. 10, 79 Fed. Reg. 25388 (May 2, 2014).] However, Plaintiff fails to note the exacting language used by EPA in describing the currently in effect phased disposal limit. EPA makes a distinction between conventional impoundments and non-conventional impoundments. It states that the White Mesa Mill uses phased disposal, with Cells 1 and 4B being evaporation ponds that fit in the non-conventional impoundment category, while Cells 3 and 4A are conventional impoundments. [Id. at 25394/2.] EPA then consistently describes the existing Subpart W phased disposal limit as only applying to "conventional impoundments." EPA said the existing rule included the "phased disposal or continuous disposal work practice standards, which limit the exposed area and/or number of *conventional impoundments*, thereby limiting the potential for radon emissions." [*Id*. at 25395/1 (emphasis added).] In describing the 1989 rule, EPA stated the rule contains "work practice standards, which limit the exposed area and/or number of *conventional impoundments* at a uranium recovery facility. . . . We also limited the number of *conventional impoundments* operating at any one time to two." [*Id.* at 25397/1.] EPA stated it was proposing to "retain the two work practice standards . . . for *conventional impoundments*." [*Id*. at 25397/3.] Similar statements are found throughout the preamble to the draft rule.

B. Cell 2 is not in operation.

Plaintiff's next argument is that Cell 2 is still operating. However, rather than focus on the facts which show Cell 2 stopped operating no later than 2008, Plaintiff asserts the Rec Plan is

---

Agency assumed an emission rate of zero for all tailings covered with water or saturated with water in estimating radon emissions.").] As such, it makes sense that EPA did not subject evaporation ponds to the phased disposal standard, just like EPA proposes to continue being the case in the pending Subpart W rulemaking.

deficient, and thus somehow Cell 2 cannot be in closure. Plaintiff is attacking the Mill's approved closure process, not the fact that Cell 2 is in closure. This case is about compliance with Subpart W. Once a cell enters the closure process, as Cell 2 clearly has done, Subpart W ceases to apply. At that point, compliance with the closure rules is governed by the AEA and UMTRCA, not the Clean Air Act.[12]

It is undisputed that the Mill has an approved Rec Plan, Revision 3.2. The Rec Plan provides that the closure cover will be placed "based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations." [Dkt. No. 63-17 at EFR006457.] This provision gives discretion to DWMRC to establish the schedule for completion of the final cover as conditions dictate. If Plaintiff believes the Rec Plan is deficient, it should raise that issue with DWMRC, which has jurisdiction over the Rec Plan.

Plaintiff concedes that no later than 2008, the Mill stopped accepting waste in Cell 2, installed the first layer of the final cover (called platform fill in the Rec Plan) and started dewatering Cell 2. [Dkt. No. 67, Pl. MSJ at 52.] Plaintiff erroneously states that there is no final reclamation plan to check these steps off against. Rec Plan Revision 3.2 is a fully approved plan,

[12] Subpart W had a companion regulation entitled Subpart T. [*See* Def. Resp. Appx No. 1, 54 Fed. Reg. at 51682-83, 51702-03 (enacting Subpart T and providing the text of the regulation).] Subpart T applied to tailings impoundments once they entered closure. [*Id*. at 51702.] Subpart T stated that a "pile cannot be considered operational if it is filled to capacity." [*Id*. (*see* text of section § 61.221(b)).] Subpart W provides that it "does not apply to the disposal of tailings." 40 CFR § 61.250. Working together, Subparts T and W make clear that a cell stops operating when it reaches capacity, at which point it transitions into the disposal or closure process. When Subpart T was rescinded, its closure requirements were shifted out of the NESHAP and merged with the closure requirements in Appendix A to 10 CFR Part 40, enacted under the AEA and UMTRCA. [Def. Resp. Appx. No. 11, 59 Fed. Reg. 36280, 36287-89 (July 15, 1994).] EPA recognized that with the rescission of Subpart T, closure issues were no longer under Clean Air Act jurisdiction, and also recognized that there is no citizen suit provision in the AEA and UMTRCA. *Id*. at 36295/1.

and the work is being doing under that plan. The fact that the Mill is in the process of trying to get approval for a new version of the Rec Plan does not void the current Rec Plan. Plaintiff mistakenly asserts that dewatering is "not even mentioned" in the current Rec Plan. [*Id*.] But the Rec Plan provides: "Part I.E.7(b) of the GWDP requires that [the Mill] must monitor and record monthly the depth to wastewater in the slimes drain access pipes as described in the currently approved DMT Plan at Cell 2, and upon commencement of *de-watering* activities, at Cell 3, in order to insure compliance with Part I.D.3(b)(1) of the GWDP." [Dkt. No. 63-17 at EFR006376-77.] The Rec Plan reads this way because Cell 2 had already entered closure and was being dewatered, whereas Cell 3 was still in operation.

The Mill prepares Annual Technical Evaluations of the Tailings Management System, which are called ATERs. [Def. Resp. Appx. No. 12.] The ATER dated August 18-19, 2009 summarized the status of Cell 2 as follows:

> Cell 2 is currently at capacity. The remaining open area of the Cell was covered with platform fill during the prior year [2008]. The pump and pump barge had been removed from the area. The Cell is not allowed to receive slurried tailings or liquid effluent from the milling process. The Cell has been completely covered with approximately four (4) feet of random fill (platform fill) to prevent the migration of wind blown tailings, and *accomplishes the first stage in completion of Cell reclamation*. . . . Elevation readings on the existing settlement monitors are taken monthly and will ultimately be used to determine *when acceptable consolidation* [through dewatering] *of the tailings sand has occurred*.

[*Id.* at EFR008216 (emphasis added).] This document accurately summarizes the status of Cell 2 in 2008, and makes clear Cell 2 had stopped operating and transitioned into the closure process.

Plaintiff also argues that because an infiltration-and-contaminant-transport (ICTR) model is still being finalized, somehow that precludes Cell 2 from being in closure. Again, this

argument mistakes the details of the closure process with the fact of closure itself. Even so, Plaintiff is wrong. Plaintiff cites the Closed Cell Performance Requirements section of the GWDP, which provides that the cell closure design must "comply with all requirements of an approved Reclamation Plan" and meet specified performance requirements. [Dkt. No. 67, Pl. MSJ at p. 51.] However, Plaintiff does not cite language in the approved Rec Plan which references the fact that prior design work had met the performance criteria, but noted that if the new modeling necessitated any changes to the design, those changes would be made. [Dkt. No. 63-17 at EFR006412-13 (Section 3.3 Design Criteria).] The Rec Plan states "as the details of such re-design have not been finalized at this time, the approved 2000 cover design and basis will continue to be used for this version of the Plan." [*Id.*] [13]

C. Roberts Pond was not a tailings impoundment.

Plaintiff's final argument is that Roberts Pond was a tailings impoundment subject to the phased disposal work practice. As noted in the Mill's Motion for Summary Judgment, all of the regulators were aware of the existence of this small, less than one acre pond that was next to the mill circuit, and none of them ever deemed it a tailings impoundment. This is because it was not a tailings impoundment.[14] It was part of the original design of the Mill and functioned as an overflow basin for process upsets at the Mill, and to catch stormwater runoff. Materials that reached Roberts Pond were often returned to the Mill process. At times the Mill would clean out

[13] Plaintiff also ignores the fact that both DAQ and DWMRC agree that Cell 2 entered closure no later than 2008. [Dkt. No. 63-38.] EPA also understands Cell 2 is no longer in operation. In the preamble to the draft revision to Subpart W, EPA identified Cell 3 as the only pre-1989 impoundment "that is currently in operation. . . ." [Def. Resp. Appx. No. 10, 79 Fed. Reg. at 25393/3.]

[14] Further, Roberts Pond was never designed to meet the strict criteria required for a tailings impoundment, nor was it ever included in the Mill's reclamation plan as a tailings impoundment requiring a permanent cover upon reclamation.

accumulated sediment in Roberts Pond and, if it had sufficient uranium values, it would be returned to the ore pad for re-processing through the milling circuit. If the material lacked sufficient value, it would be disposed in a tailings impoundment. This would be no different than cleaning out a tank in the milling circuit that had accumulated sediment. There is no indication EPA ever intended to subject small overflow basins like Roberts Pond to Subpart W's phased disposal work practice. Moreover, any claims related to Roberts Pond are moot because it was taken out of service in March of 2014 and it has been excavated, backfilled and graded.

CONCLUSION

The Mill asks the Court to dismiss this case, and to leave the matter of ongoing oversight and regulation of the Mill where it belongs, in the hands of the regulators who are actively overseeing the Mill's compliance with myriad complex and technical regulations, including Subpart W.

DATED June 30, 2016.

/s/ Michael A. Zody
MICHAEL A. ZODY
JACOB A. SANTINI
Parsons Behle & Latimer

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS' OPPOSITION TO GRAND CANYON TRUST'S MOTION FOR SUMMARY JUDGMENT** was filed in the Court's ECF system on this 30th day of June 2016, and was served via the ECF system on all counsel of record.

/s/ Jacob A. Santini
Michael A. Zody
Jacob A. Santini
Parsons Behle & Latimer

Attorneys for Defendants

Michael A. Zody, USB #5830
Jacob A. Santini, USB #12650
PARSONS BEHLE & LATIMER
201 South Main Street, Suite 1800
Salt Lake City, Utah 84111
Telephone: 801.532.1234
Facsimile: 801.536.6111
MZody@parsonsbehle.com
JSantini@parsonsbehle.com
ecf@parsonsbehle.com

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Grand Canyon Trust, Plaintiff, vs. Energy Fuels Inc.; Energy Fuels Holdings Corp.; EFR White Mesa LLC; & Energy Fuels Resources (USA) Inc., Defendants.	**DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Case No. 2:14-cv-00243-CW-BCW The Honorable Clark Waddoups Magistrate Judge Brooke C. Wells

Pursuant to Federal Rules of Civil Procedure 56 and DUCivR 56-1, Defendants Energy Fuels Inc., Energy Fuels Holdings Corp., EFR White Mesa LLC, and Energy Fuels Resources (USA) Inc. (collectively the "Mill"), by and through counsel, reply to Plaintiff Grand Canyon Trust's Opposition to Defendants' Motion for Summary Judgment.

INTRODUCTION

The Mill's Motion for Summary Judgment explains in detail the regulatory history that informs exactly how the Mill has been permitted and licensed to operate the tailings management system. Plaintiff's Opposition brief, much like Plaintiff's Motion for Summary Judgment, wants to ignore the reality of how the Mill has been regulated. Plaintiff goes so far as telling the Court it can give no deference to twenty plus years of implementation of Subpart W by Utah's regulators, a position that runs directly counter to the basic concept of judicial deference to administrative agencies.

The Mill has managed its tailings in full compliance with Subpart W, with timely and appropriate regulatory approvals to construct and operate new impoundments when required. As required by Subpart W, the Mill reacted quickly when radon levels briefly exceeded the regulatory standard, adding cover to reduce emissions below the standard. The regulators have overseen all this work, and have found the Mill to be in compliance with Subpart W. The simple fact is that the Mill has done everything required of it by the law and has worked in good faith with the regulators to control radon flux emissions. This case has been an unnecessary and costly burden upon the Mill, for no good reason. The Court should dismiss this case with prejudice and award the Mill its attorneys' fees and costs.

REPLY TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

While Plaintiff purports to dispute many of the Mill's material facts, Plaintiff mostly takes issue with the implications of the facts, without raising a real fact dispute. In light of this, the Mill only responds to a handful of Plaintiff's factual points.

- **¶ 13**. In disputing paragraph 13 of the Mill's Material Facts, Plaintiff states that de-watering of Cell 2 is not required by the Mill's Reclamation Plan ("Rec Plan") or Radioactive Materials License ("RML"). [Dkt. No. 78, p. 58.] Plaintiff also states that the Mill's Ground Water Discharge Permit ("GWDP") does not require monitoring of settlement plates.

Response: Paragraph 13 identified three sources – the Rec Plan, the RML and the GWDP as requiring the Mill to de-water Cell 2 and monitor settlement plates placed on the surface of the platform fill. The Rec. Plan identifies de-watering as a necessary requirement of the closure process. [Dkt. No. 63-17, EFR006376-77 (referring to requirements in the applicable GWDP that requires the Mill to monitor wastewater in the Cell 2 slimes drain and do the same for Cell 3 once the Mill begins "de-watering activities" at that cell); *see also* Dkt. no. 63-20 EFR000715-17, EFR000730.] Furthermore, Utah regulators have stated that de-watering of Cell 2 is a necessary part of the closure process. [Dkt. No. 63-36, UTAH000665 (Cell 2 "[c]losure began when disposal of tailings ended, and water is currently being removed from the cell in preparation for installation of a final cover. Dewatering must be completed before the cover is installed to minimize settlement that could impact the cover's ability to prevent precipitation infiltration and to contain radon."); Dkt. No. 63-38, UTAH000767 (stating that Cell 2 "is in closure" and that the "cell is currently undergoing dewatering in accordance with the approved reclamation plan"); Dkt. No. 63-39, UTAH000773 (informing EPA that Cell 2 is "in closure" and stating that "Cell 2 has not received any waste since at least 2008 and is currently undergoing dewatering").] The Rec Plan also requires the Mill to monitor the settlement plates placed on the platform fill of Cell 2. [Dkt. No. 63-17, EFR006457 ("Settlement plates and piezometers will be installed and monitored in accordance with Section 5.4 of these Plans and Specifications."), EFR0006460 – 61 (establishing a requirement to install and

monitor settlement plates and providing: "Data collected will be analyzed and the reclamation techniques and schedule adjusted accordingly.").]

- **¶ 39**. Plaintiff raises a number of disputes with the Mill's compilation of the radon flux monitoring reports for Cells 2 and 3, which the Mill attached to its Motion as Exhibit Numbers 2 and 3 (Dkt. Nos. 60-2 & 60-3).

Response: As to Plaintiff's assertion that the September and December 2013 radon sampling tests are "inaccurate", the Mill responds that what was contained in Dkt. Numbers 60-2 and 60-3 are accurate reflections of what was contained in those reports. The remainder of Plaintiff's comments on the Cell 2 and Cell 3 radon test data tables are based on typos, and the inadvertent omissions of a few data points in 2014. The Mill has attached the updated versions of the tables as Exhibit Numbers 1 and 2 to this Reply Memorandum. All of the additional data points were below the radon flux standard.

ARGUMENT

I. THE MILL COMPLIES WITH THE TWO IMPOUNDMENT LIMITATION.

A. Plaintiff Relies on a Circumscribed Reading of Subpart W.

The Parties agree that the Mill may have "no more than two impoundments . . . in operation at any one time." 40 CFR § 61.252(b)(1) (2016) [Dkt. No. 60, p. 33, Dkt. No. 78, p 22.] In its Motion, the Mill based its analysis on what is limited by this provision – as it has for its operations for decades – on a reading of the entirety of Subpart W. Plaintiff's opposition circumscribes much

of Subpart W's actual language by focusing on the definition of "byproduct material or tailings" contained in 40 CFR § 61.251(g). [Dkt. No. 78, pp. 32].[1]

Plaintiff's position is unreasonable in light of the whole of Subpart W. Section 61.252(b)(1) limits the number of "impoundments" that the Mill may operate. Subpart W does not define the term impoundment. But the definition of "phased disposal" is significant in understanding what the regulation aimed to limit: "phased disposal" is a method of "tailings management and disposal" in which "impoundments" are "filled and then immediately dried and covered." 40 CFR 61.251(f). The Mill's evaporation ponds contain process solutions that are either evaporated or returned to the Mill's process; the evaporation ponds are not "filled" with "tailings" that are "dried" and "covered." [Dkt. No. 60, pp. 34-35.][2] Moreover, the process solutions placed in these evaporation ponds are not placed there for "disposal." Plaintiff's definition applied to Roberts Pond is equally unreasonable as that small (less than one acre) facility was never used as a disposal site, never intended to be dried and covered, and has since been removed from the mill's footprint and disposed of in an operating tailings cell. [*Id*. pp. 20-21, ¶¶ 35-37.]

Additionally, Plaintiff's interpretation is in conflict with two-plus decades of regulatory implementation. [*Id*. at pp. 15-20, ¶¶ 22-33 (setting out Utah's interpretation of Subpart W that draws upon EPA's description of tailings as being "sand-like" wastes and applying the phased

[1] Plaintiff does not deal with the Mill's contention that the phrase "byproduct material or tailings" created confusion because tailings are a specific subcategory of byproduct material under the Atomic Energy Act and regulators have treated tailings as such as they developed and implemented Subpart W. [Dkt. No. 60, pp. 33-34.]

[2] Plaintiff argues that the Mill plans to cover 10 acres of Cell 1. [Dkt. No. 78, p. 34.] The Mill's Rec Plan calls for Cell 1 to be "evaporated to dryness" and the "synthetic liner and raffinate crystals" to be removed and placed in tailings cells when the White Mesa Mill is decommissioned. [Dkt. No. 63-17, EFR006407.] The Rec Plan identifies a 10 acre section of Cell 1 that, after the removal of the original liner and any crystals, may be relined and used for the disposal of the demolished White Mesa Mill and some windblown materials. [*Id*.; Dkt. No. 68-9, 161:9-14.] In other words, if constructed, the 10 acres of Cell 1 will be an entirely new cell if it is used for mill disposal.

disposal work practice to the impoundments where the tailings sands are being "disposed" of, not to evaporation ponds where process liquids are being evaporated or re-circulated to the Mill); *id*. at p. 15, ¶ 21 (setting out evidence of EPA's interpretation in 1991); *id* at p. 14, ¶ 18 (setting out evidence of NRC's interpretation in on December 21, 1989 and March 1, 1990); Dkt. No. 76, pp. 37-41 (setting out EPA's interpretation of Subpart W in 1986, 1989, and 2014).][3]

Plaintiff attempts to downplay EPA's 1991 Compliance Order which recited the following Finding of Fact: "The facility has two operating mill tailings piles, designated Cell 2 and Cell 3." [Dkt. No. 60, p. 15, ¶ 21.] At the time EPA made this finding of fact, Cell 1 and Cell 4A had operated as evaporation ponds, and Roberts Pond operated as an emergency catch basin. Yet EPA did not identify Cell 1, Cell 4A or Roberts Pond as "operating mill tailings piles."

B. The Mill Has an Approved Rec Plan, and Closure of Cell 2 is Proceeding Under It.

Plaintiff argues that Cell 2 has not entered closure and therefore continues to count toward Subpart W's two-impoundment limitation. [Dkt. No. 78, pp. 34-36.] Plaintiff's opposition memorandum makes it clear that in arguing that Cell 2 remains in "operation," Plaintiff is really challenging the Mill's fully approved Rec Plan. [*See id*. at p. 35 (e.g., "Even if those tasks [installing platform fill, de-watering and settlement monitoring], in some form, ultimately may contribute to reclaiming Cell 2, they are not being done under a reclamation plan that complies with

[3] Plaintiff argues that DAQ's Subpart W interpretations are afforded no deference. [Dkt. No. 78, pp. 36-39.] But Plaintiff fails to deal with the fundamental reason that DAQ's interpretations are afforded deference; that being that EPA "delegate[d] *its authority* for the *implementation and enforcement*" of Subpart W to DAQ. 60 Fed. Reg. 13912, 13912/3 (March 15, 1995) (emphasis added). The caselaw that Plaintiff relies on does not involve delegation of regulatory authority and is not instructive in this case. [Dkt. No. 78, pp.37-38.]

Appendix A because the company has no such plan."). Plaintiff is mounting an attack on the Mill's approved Rec Plan, which is not allowed in a CAA citizen's suit. [Dkt. Nos. 60, p. 45 & 76, p. 42.][4]

Furthermore, Plaintiff is simply wrong in its assertion that the ongoing closure work being done on Cell 2 is not governed by the Mill's Rec Plan. [Dkt. No. 78, p. 35.] The Rec Plan, approved first by NRC and again by DRC, calls for a multi-layered, six-foot thick cover to be placed over the Mill's tailings impoundments, with the first three-foot layer being comprised of "random fill (platform fill)." [Dkt. No. 63-17, EFR006408; *see also id.* at EFR006415-16 (describing the modeling performed to calculate radon emissions from reclaimed cells as being based, in part, on a three foot layer of platform fill); at EFR006458 (describing how the platform fill will be installed.] De-watering Cell 2 also is an integral step in the closure of a cell under the Rec Plan. *See* Reply to Stmt. of Elements and Undisputed Mat. Facts, ¶13 Response, *supra* pp. 3-4. So too is monitoring settlement of Cell 2. *Id.* The Mill has placed the first layer of platform fill over Cell 2 and is continuing to de-water the cell and monitor settlement. [Dkt. No. 60, p. 12, ¶¶ 11-12.] In short, the Mill has a fully approved Rec Plan and closure of Cell 2 has been proceeding under that plan since at least 2008.

C. The Mill's Affirmative Defenses Require Entry of Summary Judgment.

1. Plaintiff relies upon an illusion that the Mill was not subject to the two impoundment limitation until 2010.

In moving for summary judgment, the Mill argued that Plaintiff's claim on the number of operating cells was barred by the statute of limitations and the doctrine of laches because the claim

[4] Furthermore, Plaintiff's opposition is internally inconsistent. Plaintiff asks the Court to review whether Cell 2 is closed due to alleged inadequacies of the Rec Plan. [Dkt. No. 78, pp. 34-36.] But pages later, Plaintiff tells the Court it would be improper to conduct such an evaluation. [*Id.* p. 41 ("Whether an impoundment's 'final closure' has begun can be a 'complicated factual question' that too should not be subject to re-litigation, in this case or others.").]

accrued no later than when the revisions to Subpart W became effective on December 15, 1989. [Dkt. No. 60, pp. 41, 43.] Plaintiff opposed the application of these doctrines by arguing that the Mill did not become subject to the two-impoundment limit until November 2010 when the Mill completed construction of Cell 4B. [Dkt. No. 78, p. 22.] Plaintiff's position goes directly against the factual and legal history applicable to the Mill.

To be clear, the two-impoundment limitation was not a new requirement imposed for the first time in the December 15, 1989 revisions to Subpart W. Subpart W was originally enacted in 1986, and that enactment established the same two-impoundment limitation. 40 CFR § 61.252(a)(1) (1988) (limiting tailings impoundments to 40 acres in size and prohibiting owners from having "more than two impoundments in operation"). The Mill applied for approval to construct Cell 4A in 1989 as a lined, 40 acre cell in order to comply with the phased disposal requirement. With approvals from both EPA, NRC and DAQ, construction of Cell 4A was substantially completed on November 30, 1989, 15 days before EPA finalized the revisions to Subpart W. [Dkt. No. 60, pp. 13-14, ¶¶ 15-18.] Regulators authorized operation of the Cell 4A on December 21, 1989, six days after the revisions to Subpart W became effective, for the disposal of process solutions only. [*Id.*] It was not until March 1, 1990 that the Mill was authorized to dispose of tailings in Cell 4A. [*Id*. at p. 14, ¶ 18.]

Given the continuity of Subpart W, the timing of construction and the licensing to operate Cell 4A, regulators made the reasonable determination that Cell 4A was a new tailings impoundment (as opposed to an "existing impoundment") under Subpart W, because it was not licensed to accept tailings until after December 15, 1989. 40 CFR § 61.251(d) (2016) (existing impoundment is one "licensed to accept additional tailings and is in existence as of December 15, 1989."). [Ex. 3, DAQ

Inspection Memo, DEQ000249 (DAQ concluding that "Cell 4a was constructed after December 15, 1989"); *see also* Dkt. No. 64, Bird decl., ¶¶ 7-9 (recounting DAQ's inspections of the Mill and DAQ's and EPA's understanding of the Mill's compliance with the two-impoundment limitation); Dkt. No. 77-10 at 25394/2 (EPA finding that Cell 4A was "designed and constructed after 1989" and that the Mill "uses the phased disposal work practice"); Dkt. No. 63-6, DEQ001112 (NRC confirming in 1997 that Cell 4A was "designed, constructed, and placed into operation in 1990" and that the cell complied with EPA regulations).] In short, the Mill triggered phased disposal with the original construction and licensing of Cell 4A in 1989 and 1990, and the Mill has been regulated under the phased disposal work practice since that time.

Plaintiff also argues against the imposition of the statute of limitations by claiming that a new limitations period begins every time the Mill places material in its tailings management system. [Dkt. No. 78, p. 24.] Plaintiff's argument turns on the distinction between "repeated violations," which are new, discrete violations that occur each day, and a "continuing violation," which is a single violation characterized as an "ongoing act." *Sierra Club v. Okla. Gas & Electric Co.*, 816 F.3d 666, 671-72 (10th Cir. 2016). A continuing violation may be identified when "the conduct as a whole can be considered a single course of conduct." *Id*. at 672 (internal quotation marks omitted). The Mill's conduct fits squarely into the single course of conduct box. When Cell 4A began operation, the Mill limited the tailings management system to two operating tailings impoundments, while also operating separate evaporations ponds and Roberts Pond. This status has continued uninterrupted to today. The Mill's operations are an ongoing act that ought to be treated as a single course of conduct.

2. There were available administrative remedies Plaintiff could have exhausted.

Plaintiff opposes summary judgment due to its failure to exhaust administrative remedies by arguing that there were no administrative remedies available to challenge the approvals that allowed the Mill to construct Cells 4A and 4B and operate evaporation ponds in addition to two operating tailings impoundments. [Dkt. No. 78, pp. 28-29.] First, Plaintiff argues that it could not have challenged DAQ's approval to construct Cell 4A because DAQ's authorization predates the December 15, 1989 revisions to Subpart W. [*Id*. at p. 28.] As explained above, Part I.C.1, the two impoundment limitation existed and applied at the time DAQ authorized construction of Cell 4A on June 26, 1989.

Second, Plaintiff argues that it could not challenge the approval to construct Cell 4B. [*Id*. at p. 29.]. DAQ's May 3, 2010 letter authorizing the Mill to construct Cell 4B was challengeable in an adjudicative proceeding. *See* Utah Admin. Code R307-103-3 (2010) (authorizing challenges to "initial orders" via filing a Request for Agency Action); R307-103-2(1) (defining an "initial order[]" as including "approval . . . of permits, plans, or approval orders"); Utah Code Ann. § 19-1-301 (Supp. 2010) (establishing administrative review which would have involved an evidentiary hearing followed by an appeal to Utah's appellate courts). Plaintiff could have challenged and attempted to stop the very event, DAQ's approval to construct Cell 4B, which Plaintiff claims triggered the phased disposal limit.[5]

[5] Plaintiff relies on *Dine Citizens Against Ruining Our Environment v. Klein* to argue that their failure to exhaust should be excused because Plaintiff did not know of the Cell 4B approval. [Dkt. No. 78, p. 29.] But *Dine Citizens* turned on a wholly different scenario; the plaintiff there identified law that required public notice and specifically pursued a cause of action that alleged the government had violated applicable notice requirements. 676 F.Supp.2d 1198, 1210-11 (D. Colo. 2009).

II. CELL 2 DID NOT VIOLATE SUBPART W'S EMISSION STANDARD.

A. Subpart W Ceases to Apply when a Cell Enters Closure.

In Plaintiff's view, Subpart W's emission standard will apply endlessly to Cell 2 because the cell will always be defined as an "existing uranium mill tailings pile." [Dkt. No. 78, p. 40.] Plaintiff is wrong. EPA drafted Subpart W to apply only to operating tailings impoundments, and other regulations – namely 10 CFR Part 40, Appendix A – govern the final closure and "disposal" of the cell. [Dkt. No. 76, pp. 29-30; *see also* 40 CFR § 61.250 ("This standard does not apply to the disposal of tailings."); Dkt. No. 77-1 at 51679/2 (identifying Subpart W as covering "[t]his source category, *operating* mill tailings").]

Moreover, Plaintiff's argument is contradicted by the conditions of Appendix A. Under Appendix A, the Mill is required to (1) design and install a final cover that limits radon emissions from Cell 2 to 20 pCi/m2-sec for at least 200 years, (2) conduct testing to determine that the final cover achieves the emission standard, and (3) report the results of the testing to the DWMRC. 10 CFR Part 40, Appx A, Criterion 6(1), (2), & (4). Appendix A, however, does not require ongoing testing after these steps are complete. But, according to Plaintiff, after completing the final closure and verification with the DWMRC under Appendix A, the Mill would continue to be required to monitor Cell 2's emissions under Subpart W. This is not the case.[6]

[6] Plaintiff's position is completely at odds with the entire regulatory history of *operating* tailings cells being regulated under Subpart W, and *non-operating* cells transitioning to regulation under Subpart T, before it was rescinded and replaced with Appendix A. The whole discussion driving the rescission of Subpart T and approval of Appendix A was based upon the fact that once a cell stops operating, the radon flux standard no longer applied under Subpart W. This is detailed in the preamble to the final rule rescinding Subpart T. [Dkt. No. 77-11, 59 Fed. Reg. 36280 (July 15, 1994).]

B. Subpart W's Remedial Provisions Vest Utah DAQ with Discretion to Decide When to Stop Enhanced Monitoring.

Plaintiff presents Subpart W's remedial provisions as only requiring monthly monitoring when excess emissions are reported. [Dkt. No. 78, pp. 41-42.] The remedial provisions do much more than that and, importantly, vest the agency with discretion to determine when to stop enhanced monitoring. Under Section 61.254(b), elevated emissions trigger an obligation to conduct monthly radon monitoring *and* to report "[a]ll controls or other changes in operation of the facility that will be or are being installed to bring the facility into compliance." The regulation vests the agency with discretion by stating, "[t]his increased level of reporting will continue until the [DAQ] has determined that monthly reports are no longer necessary." *Id*.

The discretion created by this provision is broad; it does not impose a standard for DAQ to apply in determining when compliance is met and when monthly reporting may cease. *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (stating that agency action is beyond review where the applicable statute or regulation provides "no meaningful standard against which to judge the agency's exercise of discretion"). Additionally, as the Mill argued in its Opposition to Plaintiff's Motion, DAQ's oversight of the Mill's efforts to reduce emissions eliminated the need for Plaintiff to file this citizen suit. [Dkt. No. 76, pp. 30-32.]

III. THE MILL OPENLY REPORTED HOW IT HANDLED THE CELL 3 RADON TESTING AND DAQ'S ACCEPTANCE IS OWED DEFERENCE.

Given that Plaintiff primarily relies upon a reference to its Motion for its opposition to the Mill's contentions regarding Cell 3 radon testing, the Mill refers the Court to its Opposition brief. [Dkt. No. 76, pp. 32-35.] There are two points that the Mill will respond to here.

First, the Mill objects to Plaintiff's "tampering" accusation. [Dkt. No. 78, p. 24.] The tests that the Mill performed in 2013 were conducted openly, in accordance with the applicable method, and the Mill reported to the agency precisely how the tests were performed and how it calculated radon emissions. [Dkt. Nos. 63-22 (test notice), 63-24 (same), 68-34 (same); Dkt. No. 63-32, EFR001254 (identifying the three sampling events), EFR001292 (explaining that the September calculated "the mean radon flux for Cell 3 using the measurements of the June 2013 sampling of the Cell 3 exposed tailings region and the results of the September sampling of the cell 3 covered region"), EFR001324 (explaining the same for the calculation of the December test).

Second, Plaintiff argues that DAQ's interpretation of the applicable test methods are owed no deference. DAQ is the primary agency charged with implementing and enforcing Subpart W in Utah and its interpretations are owed deference. [Dkt. No. 60, pp. 37-39.]

IV. PLAINTIFF'S RADON FLUX CLAIMS ARE MOOT.

A. Radon Flux is Below the Standard and There is No Need for Any Relief to be Ordered.

Plaintiff contends that its radon flux claims should not be dismissed because the Court can still impose meaningful relief even though the Mill has completed the work that reduced emissions from both Cells 2 and 3 and recent monitoring confirms that both cells remain below Subpart W's emission standard. But the relief Plaintiff actually identifies is meaningless.

Plaintiff says that injunctive relief remains available in the form of an order that directs the Mill to conduct radon flux sampling in a specific way and to comply with Subpart W's emission standard. [Dkt. No. 78, p. 43.] An order requiring compliance is not a defense to a claim of mootness. *WildEarth Guardians v. Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1187 (10th Cir. 2012) (finding that "public's generalized interest in [CAA] compliance" is not a basis for rejecting the

application of the mootness doctrine). After all, the Mill is already required to comply with Subpart W's emission standard for Cell 3 and, in acknowledging that Subpart W no longer applies to Cell 2, the DWMRC has nonetheless directed the Mill to sample Cell 2 bi-annually and remain under the same 20 pCi/m2-sec standard through other regulations. [Dkt. No. 63-38, UTAH000768.] As to the method of radon flux sampling, Plaintiff offers no compelling reason for the Court to assume the role of the regulator. DAQ is properly supervising the radon flux monitoring and will continue to do so.[7]

As to a civil penalty, Plaintiff argues that such a penalty would provide an incentive that ensures the Mill complies with Subpart W. [Dkt. No. 78, p. 43.] This argument does not save Plaintiff's claims either. The Mill cited caselaw which held that civil penalties did not defeat mootness arguments. [Dkt. No. 60, p. 50, fn 8.] Moreover, the facts show no incentive to comply with Subpart W is necessary here. When the Mill discovered an increase in emissions, it went to work, with the help of technical consultants, to first identify the reasons for the increase. It discovered that the de-watering work being done to close Cell 2 had caused the increase in emissions. The Mill met with the regulators in early 2013 to discuss the Mill's findings and plans to reduce emissions. The Mill then proceeded to execute that plan. All of this was put into motion before Plaintiff noticed their citizen suit. The Mill should not be punished for doing exactly what Subpart W's remedial mechanisms require, which is to take steps to reduce emissions under the supervision of the DAQ.

[7] DAQ has already provided the Mill with guidance as to how it expects it to proceed in the future. In his declaration, Jay Morris stated that the agency expects the Mill to test both the cover and beach areas of Cell 3 in future and that the Mill would need to obtain prior approval from the agency if it became necessary to deviate from this method. [Dkt. No. 65, ¶ 12.] Such a position is logical and recognizes that circumstances may change – for instance, the Mill could find that testing in a specific region was unsafe – that would necessitate flexibility in the method that the Mill deploys to test Cell 3.

B. Plaintiff Misapplies the Mill's Burden of Proof on Mootness.

The Mill recognizes that the burden to show mootness is a significant one. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010). The Tenth Circuit has recently articulated the burden as requiring a showing that "the alleged wrongful behavior could not *reasonably* be expected to recur." *WildEarth Guardians*, 690 F.3d at 1185 (emphasis added). But Plaintiff's application of the burden aims to nullify the doctrine as Plaintiff pursues a standard that would preclude the Court from finding a claim is moot basically so long as Cells 2 or 3 exist. [Dkt. No. 78, p. 46.]

The burden is one of reasonableness: is it clear that the radon violations alleged by Plaintiff could not *reasonably* be expected to recur? The answer in this instance is yes. The Mill took steps to reduce emissions from Cell 2 and Cell 3. The steps were effective as the emissions from both impoundments fell dramatically below Subpart W's emission standard, and have remained below the standard for over two years. [Ex. Nos. 1 & 2.]

CONCLUSION

The Mill asks that the Court dismiss this case with prejudice at summary judgment. The Mill has complied with Subpart W and has followed the course of action approved by the regulators for over twenty five years. Plaintiff has provided no reason for the Court to take over regulation of the Mill from the regulators.

DATED July 22, 2016.

/s/ Michael A. Zody
Michael A. Zody
Jacob A. Santini
PARSONS BEHLE & LATIMER

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** was filed in the Court's ECF system on this 22nd day of July 2016, and was served via the ECF system on all counsel of record.

/s/ Michael A. Zody
Michael A. Zody
Jacob A. Santini
Parsons Behle & Latimer

Attorneys for Defendants