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

GRAND CANYON TRUST, Plaintiff, v. ENERGY FUELS INC., ENERGY FUELS HOLDINGS CORP., EFR WHITE MESA LLC, and ENERGY FUELS RESOURCES (USA) INC., Defendants.	Case No. 2:14-cv-00243-CW-BCW **GRAND CANYON TRUST'S MOTION FOR SUMMARY JUDGMENT AGAINST ENERGY FUELS RESOURCES (USA) INC. AND EFR WHITE MESA LLC** **ORAL ARGUMENT REQUESTED** **JUDGE CLARK WADDOUPS**

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INTRODUCTION

In March 2013, Energy Fuels confessed to the State of Utah and U.S. Environmental Protection Agency (EPA) that the company had violated the federal Clean Air Act. It reported that a 67-acre radioactive waste "impoundment" at its uranium-processing mill outside White Mesa, Utah, emitted more radon-222 during 2012 than is allowed by federal standards. A year later, in March 2014, the company owned up to violating those standards a second time, once again by letting the same impoundment, called Cell 2, emit too much radon during 2013. Radon emissions in 2013 from another 71-acre impoundment at the mill, known as Cell 3, also exceeded the federal limit. But Energy Fuels, by tinkering with its radon measurements in ways the law disallows, reported a result that snuck in just below the limit.

The standards the company violated were set by EPA after it concluded that radon gas emitted from uranium-mill wastes, commonly called "tailings," increases the risk that those living near uranium mills will get cancer, especially lung cancer. EPA's standards are meant to keep radon levels safe by requiring uranium mills to phase out big tailings impoundments that were built before EPA adopted the standards, and then transition to using just two 40-acre impoundments that are cleaned up one-by-one as they get full. Until the old, existing impoundments are closed for good, their radon emissions are subject to a numeric limit.

Not only has Energy Fuels been violating that limit by letting Cells 2 and 3 emit too much radon, but the company also has been operating more impoundments than the radon standards allow. Indeed, more than a quarter century after EPA adopted the radon standards, Energy Fuels operates five impoundments spanning 275 acres, not one square inch of which has been completely reclaimed. And until at least March 2014, the company also got rid of wastes in

a smaller, sixth impoundment, called Roberts Pond.

In this citizen suit, the Grand Canyon Trust asserts five claims seeking injunctive relief and civil penalties for Energy Fuels' violations of the radon-emission standards. In this motion, the Trust seeks summary judgment against Energy Fuels Resources (USA), Inc. ("EFR USA") and EFR White Mesa LLC ("EFR White Mesa") as to liability on all five of those claims.[1]

Four claims (numbered 1, 3, 4 and 5 in the complaint) seek relief for the company's 2012 and 2013 emissions-limit and radon-sampling violations. Proof of these claims is open and shut. All the facts needed to find Energy Fuels liable were self-reported by the company to the State of Utah and EPA in records Energy Fuels was required to submit to the government, typically under penalty of perjury. The Trust should be granted summary judgment on these claims.

The Trust's last claim (the second claim in the complaint) asserts that Energy Fuels has been violating the two-impoundment limit in the radon-emission standards. The company admits all the material facts about how it has used each of the Mill's impoundments. So the only issue to resolve is a legal one: Which of the Mill's six impoundments are subject to EPA's two-impoundment limit? The answer is all of them. The Court therefore should grant summary judgment on liability to the Trust on its second claim for relief.

The Trust requests oral argument on this motion.

[1] This lawsuit has been bifurcated into liability and penalty phases. Third Am. Sched. Order, ECF No. 54 at 2–3. This motion accordingly seeks summary judgment on liability only. And the Trust seeks summary judgment against only Energy Fuels Resources (USA) Inc. and EFR White Mesa LLC, which are subsidiaries of the other two defendants. Those two defendants—Energy Fuels Inc. and Energy Fuels Holdings Corp.—have agreed to guarantee any judgment against their subsidiaries. Order, ECF No. 49 (July 23, 2015).

BACKGROUND

I. The White Mesa Mill

The White Mesa Mill is an acid-leaching, uranium-processing mill that turns uranium ore and "alternate feed materials"[2] into a product called yellowcake, which is then enriched for use in nuclear reactors. Ex. 3 at 14:9–18; Ex. 4 at DEQ211.[3] The Mill sits about five miles north of the town of White Mesa, Utah a centuries-old Ute Mountain Ute tribal community, and roughly six miles south of downtown Blanding. Ex. 5 at GCT3394; Ex. 6 at EFR696; Ex. 7 at GCT11291 (Google Earth image of the Mill).

Energy Fuels[4] uses about 275 acres next to the Mill to get rid of its wastes. Ex. 8 at EFR649, 652; Ex. 3 at 15:10–14. Most of that area is known in the company's jargon as the "tailings-management system," which is split up into five "impoundments" named Cell 1, Cell 2, Cell 3, Cell 4A, and Cell 4B. Ex. 9 at 45:8–45:15. Until at least March 2014, Energy Fuels also let Mill waste build up for years at a time in a half-acre impoundment next to the Mill called Roberts Pond. Ex. 9 at 201:22–202:21; Ex. 10 at EFR21069; Ex. 11 at EFR4562; Ex. 12 at 16.

A. How the Mill Extracts Uranium and Produces Wastes

Regardless of what Energy Fuels feeds into the Mill, the company makes yellowcake using basically the same process. *See* Ex. 5 at GCT3419–20. It first mixes the material it wants to process with water, grinds it into a pulp, and then soaks the pulp in sulfuric acid and other chemicals to dissolve the uranium in it. Ex. 1 at 20:20–23:1. The resulting slurry is next

[2] Alternate feed materials are uranium-bearing substances other than uranium ore. Ex. 1 at 19:14–21. They come from contaminated industrial sites. Ex. 2 at EFR1509–13.
[3] The Mill also extracts vanadium from some materials it processes, making a product called "black flake." Ex. 1 at 19:1–6.
[4] "Energy Fuels" when used in this brief means both Energy Fuels Resources (USA) Inc. and EFR White Mesa LLC unless otherwise stated.

"thickened" using eight big tanks. Ex. 1 at 23:5–17. In these tanks, a "clarified" uranium-bearing solution rises to the top of the tank and a semi-solid "underflow slurry" settles toward the bottom. Ex. 1 at 23:18–24:15; Ex. 5 at GCT3410–11. The underflow slurry is pumped to the next tank, where it becomes increasingly dense, while the "overflow solution" is pumped back to the previous tank to be further "clarified." Ex. 1 at 23:18–24:15; Ex. 5 at GCT3410–11. Energy Fuels calls this process the counter-current-decantation circuit. Ex. 1 at 23:13–15.

The "underflow slurry" from the last thickening tank is pumped through pipes to the tailings-management system for disposal. Ex. 1 at 24:16–25:23. The uranium-bearing "overflow solution" from the last clarifying tank is sent on to a solvent-extraction circuit. Ex. 1 at 26:25–27:13. There, a chemical extractant pulls uranium out of the solution, separating it into a uranium-enriched solution and a uranium-depleted solution called raffinate. Ex. 1 at 27:14–30:5. The uranium-enriched solution is further concentrated in a "strip circuit" using acidified brine, and then ammonia is added to precipitate uranium out of the solution, creating yellowcake. Ex. 1 at 30:21–31:15, 29:4–12, 30:9–19, 33:8–16; Ex. 5 at GCT3411–12. If Energy Fuels is processing vanadium-bearing feed, the raffinate is sent to another set of circuits to recover vanadium. Ex. 1 at 33:17–23. Otherwise, the company disposes of the waste raffinate from the uranium solvent-extraction circuit in Cells 1, 4A, or 4B. Ex. 9 at 38:20–39:23; Ex. 1 at 32:2–33:7. Waste raffinate from the vanadium-extraction process is disposed of in Cell 1. Ex. 1 at 37:3–10, Ex. 9 at 47:17–24. For purposes of this lawsuit, Energy Fuels calls both these raffinate wastes "process solutions." Ex. 13 at 5–6; Ex. 12 at 19–20; Ex. 9 at 24:16–25, 33:17–34:6.

B. The Mill's Tailings Impoundments

For the first few years that the Mill was running, Energy Fuels pumped the underflow

slurry from the counter-current-decantation circuit into Cell 2, and then sometime in the 1980s, started pumping it into Cell 3 too. Ex. 14 at EFR43535; Ex. 9 at 74:9–18. In this lawsuit, Energy Fuels calls only the solid, "sand-like" part of that slurry "tailings." Ex. 15 at 7. Normally, Energy Fuels uses the word "tailings" to mean anything it gets rid of in the tailings-management system—sands and solutions alike. Ex. 9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2, 160:22–161:8, 210:9–213:15; Ex. 16 at 149:3–151:8, 160:15–161:7.

By the mid-to-late 1980s, Cell 2 was full, or nearly full, of tailings and the company stopped sending the tailings slurry to that cell. Ex. 9 at 83:11–18; Ex. 16 at 193:10–195:3; Ex. 14 at EFR43535. But the company did not close or reclaim the cell. Instead, it kept burying trash and contaminated wastes in Cell 2 until sometime in 2008. Ex. 9 at 83:19–84:14; Ex. 14 at EFR43542. Throughout that time, when the Mill was running, Energy Fuels kept pumping the tailings slurry into Cell 3. Ex. 14 at EFR43535. In October 2008, Energy Fuels began pumping the tailings slurry into Cell 4A, in addition to Cell 3. Ex. 12 at 23; Ex. 16 at 153:4–9. Two years later, in November 2010, Energy Fuels finished building Cell 4B, Ex. 17 at 6, and in January 2011, began moving solutions from Cell 4A into Cell 4B. Ex. 9 at 26:5–26:22; Ex. 13 at 5–6 ("Cell 4B received process solutions primarily pumped from cell 4A starting in January or February of 2011."); Ex. 18 at DEQ52 ("[T]he actual date of initial startup of Cell 4B occurred on January 31, 2011….").

Energy Fuels often calls Cell 4B and Cell 1 "evaporation ponds" because the company uses the cells to let waste solutions evaporate. Ex. 16 at 131:23–132:2, 134:7–12. After enough solutions evaporate, solids that are dissolved in the solutions precipitate out of the solution, and build up on the bottom of the cells, forming what are called "raffinate crystals." Ex. 9 at 50:2–8;

Ex. 16 at 147:8–148:11, 160:15–161:18.

The cells in the tailings-management system are not the only impoundments into which Energy Fuels has put the Mill's wastes. In the past, when solutions spilled out of the Mill's process circuits or were removed from the process due to other problems, Energy Fuels often put them in Roberts Pond. Ex. 9 at 193:23–195:10. Over time, sediment also accumulated in the Pond. Ex. 9 at 200:12–201:1. Some of the process solutions soaked into that sediment, contaminating it with uranium. Ex. 9 at 204:21–206:15. Ore sands too may have been dumped out of the processing circuits into Roberts Pond. Ex. 9 at 201:2–9. By June 2011, Energy Fuels had "managed to get a significant amount of dirt / tailings in Roberts Pond," as Energy Fuels' Executive Vice President of Operations put it. Ex. 19 at EFR23930.

So, the following summer, the company cleaned out the contaminated muck on the bottom of the Pond for the first time in ten years. Ex. 10 at EFR21069 ("Roberts Pond had not … undergone any cleanouts from its initial startup in 2002 until the July 2012 maintenance outage."). For the next year and a half, Energy Fuels let waste build up in Roberts Pond until again cleaning it out in March 2014. Ex. 11 at EFR4562 (explaining that no maintenance activities involving the use of heavy equipment were performed between July 2012 and March 2014). After digging up the whole Pond in the ensuing months, Energy Fuels chose not to put it back into service. Ex. 9 at 193:23–194:7, 197:24–198:7; Ex. 12 at 16.

II. National Emission Standards for Hazardous Air Pollutants (NESHAPs)

By adding Section 112 to the Clean Air Act in 1970, Congress directed EPA to publish a list of "hazardous air pollutants," and then, for each pollutant, establish an "emission standard … at the level which in [EPA's] judgment provides an ample margin of safety to protect the public

health from such hazardous air pollutant." Pub. L. 91-604 § 4(a), 84 Stat. 1685. Congress defined the term "hazardous air pollutant" to mean "an air pollutant … which in the judgment of the [EPA] may cause, or contribute to, an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." *Id.*

In late 1979, EPA designated radionuclides as a hazardous air pollutant after finding that exposure to radionuclides increases the risk of getting cancer and suffering genetic damage. "[NESHAPs]; Addition of Radionuclides to List of Hazardous Air Pollutants," 44 Fed. Reg. 76,738, 76,738 (Dec. 27, 1979). Seven years later, in 1986, EPA concluded that radon-222, a radioactive decay product of uranium that is released into the air from tailings impoundments at uranium mills, poses a significant enough health risk (particularly of lung cancer) to warrant establishing emission standards for those releases under Section 112 of the Act. "[NESHAPs]: Standards for Radon-222 Emissions from Licensed Uranium Mill Tailings," 51 Fed. Reg. 34,056, 34,056–57 (Sep. 24, 1986). After years of litigation, EPA revised its radon-emission standards in December 1989. "[NESHAPs]: Radionuclides," 54 Fed. Reg. 51,654 (Dec. 15, 1989).[5] Those standards remain in effect and are codified at 40 C.F.R. Part 61, Subpart W.

EPA adopted two standards for tailings impoundments in Subpart W. First, the agency established a numeric limit for radon-222 emitted from "existing impoundments" that were "licensed to accept additional tailings and … in existence as of December 15, 1989." 40 C.F.R. §§ 61.252(a), 61.251(d). EPA set that limit to 20 picocuries per square meter per second—

[5] The presently codified version of Section 112, 42 U.S.C. § 7412, which mandates technology-based emission standards for hazardous air pollutants, was enacted in 1990, Pub. L. 101-549 § 301 (Nov. 15, 1990), and was thus not the authority for EPA's 1989, health-based radon-emission standards (which were unaffected by the 1990 amendments, 42 U.S.C. § 7412(q)).

20 pCi/(m^2-sec)—a measure of radioactivity.[6] *Id.* § 61.252(a). Second, the agency adopted "work-practice standards"—i.e., design and operating requirements—for new tailings impoundments built and licensed after December 15, 1989. *Id.* § 61.252(b). Those standards, in pertinent part, forbid operators from building tailings impoundments after December 15, 1989, unless those impoundments are "designed, constructed and operated" using "phased disposal" of tailings in no more than two 40-acre impoundments at any one time. *Id.* § 61.252(b)(1). Both new and "existing impoundments" count against this two-impoundment limit. *Id.*

III. The Mill's Operating Permits

Three main permits govern the Mill's operations: an air-emissions approval order, a radioactive materials license, and a groundwater discharge permit. All three are issued by Utah state agencies under federal law, where authority has been delegated, and otherwise under state law. The Utah Division of Air Quality ("Air Quality Division") administers the Mill's approval order under the Utah Air Conservation Act, Utah Code Ann., Title 19, Ch. 2. *See* Ex. 20. The order requires Energy Fuels to comply with Subpart W. Ex. 20 at EFR691.

The Utah Division of Waste Management and Radiation Control ("Radiation Division") issues and oversees Energy Fuels' radioactive materials license for the Mill.[7] The license authorizes Energy Fuels to possess "radioactive material" in the form of natural uranium and prohibits the company from disposing of anything at the Mill other than "byproduct material" as that term is defined by 42 U.S.C. § 2014(e)(2). Ex. 2 at EFR1501, EFR1507 (§ 10.1.B.).

[6] A picocurie (pCi) is one trillionth of one curie (Ci), which is a unit for measuring the intensity of radioactivity of a material. *See* U.S. Nuclear Regulatory Commission, "Curie (Ci)," "Picocurie (pCi)" *available at* http://www.nrc.gov/reading-rm/basic-ref/glossary.html.

[7] The Divisions of Radiation Control and Solid and Hazardous Waste merged in 2015 into the Division of Waste Management and Radiation Control. *See* 2015 Utah Laws Ch. 451.

"Byproduct material" under section 2014(e)(2) has almost exactly the same definition as "tailings" under Subpart W: It means "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).

The Radiation Division also oversees the Mill's groundwater discharge permit. Ex. 21. *See also* Utah Code Ann. §§ 19-5-107(3), 19-5-102(6). The discharge permit authorizes Energy Fuels to dispose of "tailings" in "existing Tailings Cells 1, 2, and 3…." Ex. 21 at EFR715 ("[T]ailings disposal in existing Tailings Cell 1, 2, and 3 is authorized by this Permit as defined in Table 3 and Part 1.D.1, above.").

IV. The Mill's Reclamation Plan

To get a radioactive materials license, Energy Fuels had to submit a plan explaining how the company would decommission and reclaim the Mill and its tailings impoundments. *See* 10 C.F.R. § 40.31(h) (requiring uranium-milling applications to include written specifications for the disposition of byproduct material to achieve the requirements and objectives of 10 C.F.R. Part 40, Appendix A); Utah Admin. Code R313-24-4 (incorporating 10 C.F.R. 40.31(h) by reference). Federal and State regulations require that plan, as well as the Mill's radioactive materials license, to include a deadline for building a "final radon barrier" and "milestones" for retrieving windblown tailings and stabilizing the tailings pile (including dewatering it). *See* 10 C.F.R. Pt. 40, Appx. A, "Reclamation Plan"; Criterion 6A; Utah Admin. Code R313-24-4 (incorporating pertinent parts of Appendix A by reference). *See also* 10 C.F.R. Pt. 40, Appx. A, "Milestone means an action or event that is required to occur by an enforceable date."

Despite these requirements, neither Energy Fuels' radioactive materials license nor its

reclamation plan has deadlines for reclaiming the Mill's impoundments. *See* Ex. 2; Ex. 22 at EFR6398–424, EFR6457 ("Placement of cover materials will be based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations."); Ex. 9 at 188:7–14. In fact, though the Radiation Division has "approved" Energy Fuels' reclamation plan, the company and the Division have been revising the plan for years, including the design of the final radon barrier. Ex. 9 at 166:25–167:22, 128:2–129:23; Ex. 16 at 171:13–23.

V. Energy Fuels' Self-Reported Subpart W Violations in 2012 and 2013

To ensure compliance with Subpart W's numeric radon-emission limit, mill owners and operators are required to measure "radon flux" from "existing impoundments" using a protocol called Method 115. 40 C.F.R. § 61.253. Under Method 115, radon-flux measurements must be taken from three regions of each tailings pile: (1) water-saturated areas (beaches); (2) dry top-surface areas; and, (3) sides, if they are not built with dirt. 40 C.F.R. Pt. 61, Appx. B ("Method 115") § 2.1.3 ("Radon flux measurements shall be made within each region on the pile, except for those areas covered with water."); Method 115 § 2.1.2 (identifying the "[r]egions that shall be considered for operating mill tailings piles" when taking radon-flux measurements).

Mill owners and operators typically may choose to take one annual set of radon-flux measurements or take "more frequent measurements … over a one year period." Method 115 § 2.1.1. When measurements are made over a one-year period, they "may involve quarterly, monthly or weekly intervals," Method 115 § 2.1.1, and, "prior to or after the first measurement period," the owner or operator must submit to EPA "a schedule of the measurement frequency to be used." 40 C.F.R. § 61.253. The radon-flux results "for each calendar year" must be reported to EPA and the State by March 31 of the next year. 40 C.F.R. § 61.254(a).

A. 2012 Radon-Flux Measurements from Cells 2 and 3

On May 4, 2012, Energy Fuels sent its "[s]chedule for the 2012 NESHAPs [r]adon [f]lux [m]easurements" to the Utah Air Quality Division and EPA. Ex. 23 at EFR35271–72. Energy Fuels explained that it would "perform its 2012 NESHAPs Radon Flux measurements" for "Tailings Impoundments 2 and 3" from June 11–15, 2012. Ex. 23 at EFR35272. The company took these measurements as planned. Ex. 24 at EFR35276. And when the results came back ten days later, they showed that Cell 2's radon flux exceeded Subpart W's 20 pCi/(m^2-sec) emission limit. *Id.* The average for the whole pile was 23.1 pCi/(m^2-sec). *Id.*

So Energy Fuels decided to take more measurements. The company has not said exactly why it made that decision, but one obvious outcome of taking more measurements could be to lower the average for the year below Subpart W's numeric limit. Ex. 16 at 49:24–53:7. On August 3, 2012, Energy Fuels sent the Division and EPA a second measurement schedule for Cell 2, Ex. 25 at EFR35273–75, (but not Cell 3, whose radon flux came in under 20 pCi/(m^2-sec) in June), Ex. 26 at GCT8875. This new schedule said that Energy Fuels would take a second set of radon-flux measurements from Cell 2 in September and a third set in late November or early December. Ex. 25 at EFR35274. The September results came back yet higher than June: 26.6 pCi/(m^2-sec). Ex. 27 at EFR31861. The company then bumped up its third set of measurements to October. Ex. 28 at EFR35269–70. But the radon flux came back higher still, edging up to 27.7 pCi/(m^2-sec). Ex. 26 at GCT8972. So, the company took a fourth set of measurements in November. Ex. 26 at GCT8992. That round of sampling came back at 26.1 pCi/(m^2-sec) for the whole cell, Ex. 26 at GCT9002, bringing the average for the year to 25.9 pCi/(m^2-sec), *id.* at GCT8875.

Energy Fuels sent its 2012 Subpart W report to the Air Quality Division on March 29, 2013. Ex. 26 at GCT8875. The company reported that the "measured radon flux from Cell 2 in 2012 … exceeded the standard set out in 40 CFR 61.252 of 20 pCi m^{-2} s^{-1}," and it proposed "actions and a timeframe to bring Cell 2 into compliance with the standard set out in 40 CFR 61.252." Ex. 26 at GCT8875. Because the Mill was out of compliance with Subpart W, both the company and Division concluded that Energy Fuels had to start monitoring and reporting radon flux from Cell 2 monthly. Ex. 26 at GCT8872, GCT8883. *See also* 40 C.F.R. § 61.254(b).

B. 2013 Radon-Flux Measurements from Cells 2 and 3

Energy Fuels failed to get back into compliance with Subpart W in 2013. Instead, the company reported that Cell 2's radon flux for the year was 20.4 pCi/(m^2-sec). Ex. 29 at GCT8228 ("The result of the 2013 radon-222 flux monitoring for Cell 2 was 20.4 pCi/(m^2 -sec) … which exceeds the 20 pCi/(m^2-sec) set out in 40 CFR 61.252(a) for the year."). For Cell 3, Energy Fuels reported an annual radon flux just under the Subpart W limit: 19.4 pCi/(m^2-sec). Ex. 30 at GCT8280. But the company got that result using measurement methods it had not used before and has not used since. Ex. 16 at 95:12–99:3; 118:22–119:6.

Much like Energy Fuels did for Cell 2 in 2012, the company told the Air Quality Division in April 2013 that it would perform its "[a]nnual sampling event" for Cell 3 between June 10–13, 2013. Ex. 31 at EFR35264. But when the results of the June sampling came back, the average radon flux for Cell 3 was 22.7 pCi/(m^2-sec). Ex. 32 at EFR24924. So once again, Energy Fuels responded by taking samples that had not been scheduled in its initial notice to the Division and EPA. The company sent another sampling schedule to the Division and EPA on July 18, 2013. Ex. 33 at EFR992–93. This time, Energy Fuels added two more sampling events to the 2013

schedule, one in September, and another in "Late November/Early December." Ex. 33 at EFR992. The company sent a third schedule to the Division and EPA on September 5, 2013, setting a date of December 2–4 for the third sampling event. Ex. 34 at EFR1067.

What Energy Fuels did not say in its July or September schedules is that it would be sampling only Cell 3's cover region and not its beach. Ex. 30 at GCT8318, GCT8351. The company then combined the June beach measurement with the September and December cover measurements to come up with an annual average of 19.4 pCi/(m^2-sec). Ex. 30 at GCT8280, GCT8318, GCT8320, GCT8351, GCT8353. Had Energy Fuels relied only on the complete June measurements—the only sampling event where radon flux from both regions was measured—it would have reported an annual radon flux for Cell 3 of 22.7 pCi/(m^2-sec). Ex. 30 at GCT8293.

VI. The Trust's Citizen Suit Under the Clean Air Act

Neither EPA nor the State of Utah took enforcement action against Energy Fuels for violating Subpart W. Defs.' Answers ¶ 32 (Oct. 31, 2014), ECF Nos. 33, 34. So, on January 29, 2014, the Trust notified Energy Fuels, EPA, and the State that the Trust intended to sue the company under the Clean Air Act's "citizen-suit" provision. Ex. 35 at GCT1282–89.

On April 2, 2014, the Trust filed its complaint, alleging that Energy Fuels had violated Subpart W by: (1) failing to keep the 2012 and 2013 average annual radon-222 emissions from Cell 2 below 20 pCi/(m^2-sec), contrary to the radon-222 emission limit (40 C.F.R. § 61.252(a)); and (2) operating more than two impoundments, contrary to the phased-disposal work-practice standard (40 C.F.R. § 61.252(b)(1)). Pl.'s Compl. ¶¶ 31–42, ECF No. 2.

Days before the Trust filed the complaint, Energy Fuels sent its annual Subpart W report to the Air Quality Division, describing how Energy Fuels sampled for and calculated Cell 3's

radon flux in 2013. Ex. 30 at GCT8280, GCT8318, GCT8351. After concluding 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 thus, Subpart W's radon-222 emission limit (40 C.F.R. § 61.252(a)), the Trust notified Energy Fuels on July 29, 2014, that the Trust intended to amend its complaint to assert additional claims. Ex. 36 at EFR47121–32. The Court granted leave to amend on October 15, 2014, Order, ECF No. 28, and the Trust filed its amended complaint later that day. Pl.'s First Am. Compl., ECF No. 29.

STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

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]."[8] "'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)…."[9]

"**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."[10]

Material Facts

1. EFR White Mesa owns the Mill.[11]

2. EFR USA operates the Mill.[12]

3. The Mill has been licensed since at least 2007 to manage uranium byproduct material during and following the processing of uranium ores.[13]

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[8] 42 U.S.C. § 7604(a)(1).
[9] 42 U.S.C. § 7604(f).
[10] 40 C.F.R. § 61.250.
[11] First Am. Compl. ¶ 9 (Oct. 15, 2014), ECF No. 29 (alleging that EFR White Mesa owns the Mill); EFR USA's Answer ¶ 9 (Oct. 31, 2014), ECF No. 34 (admitting that EFR White Mesa is the owner of the Mill); EFR White Mesa's Answer ¶ 9 (Oct. 31, 2014), ECF No. 33 (same).
[12] First Am. Compl. ¶ 9, ECF No. 29 (alleging that EFR USA operates the Mill); EFR USA's Answer First Am. Compl. ¶ 9, ECF No. 34 (admitting that EFR USA is the operator of the Mill); EFR White Mesa's Answer First Am. Compl. ¶ 9, ECF No. 33 (same).
[13] Ex. 37 at EFR613 (authorizing the transfer, receipt, possession, and use of natural uranium), EFR613 ("The authorized place of use shall be the licensee's White Mesa uranium milling facility…."); EFR617 ("The licensee is hereby authorized to possess byproduct material in the form of uranium waste tailings and other uranium byproduct waste generated by the licensee's milling operations authorized by this license."); Ex. 2 EFR1501, 1505 (same).

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 …."[14]

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.[15]

2. The Trust filed its initial complaint 63 days later, on April 2, 2014.[16]

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).[17]

4. The Trust filed its amended complaint on October 15, 2014.[18]

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."[19] "[T]o satisfy Article III'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

[14] 42 U.S.C. § 7604(b)(1)(A).
[15] Ex. 35 at GCT1282–89.
[16] Pl.'s Compl., ECF No. 2.
[17] Ex. 36 at EFR47121–32.
[18] Pl.'s First Am. Compl., ECF No. 29.
[19] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

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."[20]

Material Facts

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.[21]

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.[22]

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

The Trust's first claim for relief asserts that Energy Fuels violated the Clean Air Act—*viz.*, the radon-222 emission standard in 40 C.F.R. § 61.252(a)—in 2012 and 2013 by failing to keep radon-222 emissions from Cell 2 below 20 pCi/(m^2-sec).

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."[23] "*Existing impoundment* means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."[24]

Material Facts

1. Cell 2 was in existence as of December 15, 1989.[25]

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[20] *Laidlaw*, 528 U.S. at 180–81.
[21] Ex. 38 ¶¶ 2–7.
[22] Ex. 39 ¶¶ 1–12; Ex. 40 ¶ 1–6; Ex. 41 ¶¶ 1–9; Ex. 42 ¶ 1, 3–9.
[23] 40 C.F.R. § 61.252(a).
[24] 40 C.F.R. § 61.251(d).
[25] First Am. Compl. ¶ 33 (Oct. 15, 2014), ECF No. 29 (alleging that "[c]onstruction of Cell 2 was completed in May 1980"); Energy Fuels' Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 34 (admitting the allegation that construction of Cell 2 was completed in May 1980); EFR White Mesa's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 33 (same).

2. Cell 2 was licensed to accept additional tailings as of December 15, 1989.[26]

B. Element 2: Radon-222 emissions over 20 pCi/(m^2-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."[27]

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).[28]

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).[29]

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

The Trust's fifth claim for relief asserts that Energy Fuels violated the Clean Air Act—*viz.*, the radon-222 emission standard in 40 C.F.R. § 61.252(a)—in 2013 by failing to keep radon-222 emissions from Cell 3 below 20 pCi/(m^2-sec).

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."[30] "*Existing impoundment* means

[26] Ex. 14 at EFR43529. *See also* Ex. 26 at GCT8876 (stating in 2012 Subpart W report, under penalty of perjury, that Cell 2 was an "'existing impoundment' as defined in 40 CFR 61.251"); Ex. 29 at GCT8232 (stating in 2013 Subpart W report, under penalty of perjury, that Cell 2 was an "'existing impoundment' as defined in 40 CFR 61.251"); Ex. 16 at 62:15–63:3 (confirming in corporate deposition that Cell 2 is an "existing impoundment").
[27] 40 C.F.R. § 61.252(a).
[28] Ex. 26 at GCT8875 ("The result of the 2012 radon-222 flux monitoring for Cell 2 was 25.9 pCi m-2 s-1 (averaged over four monitoring events)….").
[29] Ex. 29 at GCT8228 ("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.").
[30] 40 C.F.R. § 61.252(a).

any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."[31]

Material Facts

1. Cell 3 was in existence as of December 15, 1989.[32]

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.[33]

B. Element 2: Radon-222 emissions over 20 pCi/(m^2-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."[34]

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.[35]

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.[36]

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).[37]

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[31] 40 C.F.R. § 61.251(d).
[32] First Am. Compl. ¶ 33 (Oct. 15, 2014), ECF No. 29 (alleging that "[c]onstruction of Cell 3 was completed in September 1982"); Energy Fuels' Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 34 (admitting the allegation that construction of Cell 3 was completed in September 1982); EFR White Mesa's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 33 (admitting the allegation that construction of Cell 3 was completed in September 1982).
[33] Ex. 17 at 13–14 ("Energy Fuels Resources admits Cell 3 was an existing impoundment as of December 15, 1989 and remains to this day licensed to accept additional tailings."); Ex. 43 at 10 (same); Ex. 29 at GCT8232 (stating under penalty of perjury in its 2013 Subpart W report that Cell 3 was an "'existing impoundment' as defined in 40 CFR 61.251").
[34] 40 C.F.R. § 61.252(a).
[35] Ex. 30 at GCT8288.
[36] Ex. 30 at GCT8293, GCT8325, GCT8358.
[37] Ex. 30 at GCT8293.

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

The Trust's third claim for relief asserts that Energy Fuels violated the Clean Air Act—*viz.*, the sampling-schedule requirements in 40 C.F.R. § 61.253—in 2013 by revising its previously submitted radon-flux sampling schedule after the first measurement period.

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."[38] "*Existing impoundment* means any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."[39]

Material Facts

1. Cell 3 was in existence as of December 15, 1989.[40]

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.[41]

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."[42]

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[38] 40 C.F.R. § 61.252(a).
[39] 40 C.F.R. § 61.251(d).
[40] First Am. Compl. ¶ 33 (Oct. 15, 2014), ECF No. 29 (alleging that "[c]onstruction of Cell 3 was completed in September 1982"); Energy Fuels' Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 34 (admitting the allegation that construction of Cell 3 was completed in September 1982); EFR White Mesa's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 33 (admitting the allegation that construction of Cell 3 was completed in September 1982).
[41] Ex. 17 at 13–14 ("Energy Fuels Resources admits Cell 3 was an existing impoundment as of December 15, 1989 and remains to this day licensed to accept additional tailings."); Ex. 43 at 10 (same); Ex. 29 at GCT8232 (stating under penalty of perjury in its 2013 Subpart W report that Cell 3 was an "'existing impoundment' as defined in 40 CFR 61.251").
[42] 40 C.F.R. § 61.253.

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.[43]

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.[44]

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."[45]

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.[46]

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.[47]

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

The Trust's fourth claim for relief asserts that in 2013 Energy Fuels violated the Clean Air Act—*viz.*, the sampling-methodology requirements in 40 C.F.R. § 61.253 and Method 115—by failing to take radon-flux measurements from both Cell 3's cover region and beach region during all measurement events and thus calculating the average annual radon flux by combining the June 2013 beach results with the September and December 2013 cover results.

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."[48] "*Existing impoundment* means

[43] Ex. 31 at EFR35264.
[44] Ex. 30 at GCT8288 ("On June 10, 2013, one hundred sampling locations were spread out throughout the Cell 3 Beaches region; and on June 11, 2013, one hundred sampling locations were spread out throughout the Cell 3 Covered region.").
[45] Ex. 33 at EFR992. On September 5, 2013, Energy Fuels sent a third schedule to the Division and EPA, setting a date of December 2–4 for the third sampling event. Ex. 34 at EFR1067.
[46] Ex. 30 at GCT8318.
[47] Ex. 30 at GCT8351.
[48] 40 C.F.R. § 61.252(a).

any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of December 15, 1989."[49]

Material Facts

1. Cell 3 was in existence as of December 15, 1989.[50]

2. Cell 3 was licensed to accept additional tailings as of December 15, 1989.[51]

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."[52] "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."[53] "Radon flux measurements shall be made within each region on the pile, except for those areas covered with water."[54]

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

[49] 40 C.F.R. § 61.251(d).
[50] First Am. Compl. ¶ 33 (Oct. 15, 2014), ECF No. 29 (alleging that "[c]onstruction of Cell 3 was completed in September 1982"); Energy Fuels' Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 34 (admitting the allegation that construction of Cell 3 was completed in September 1982); EFR White Mesa's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 33 (admitting the allegation that construction of Cell 3 was completed in September 1982).
[51] Ex. 17 at 13–14 ("Energy Fuels Resources admits Cell 3 was an existing impoundment as of December 15, 1989 and remains to this day licensed to accept additional tailings."); Ex. 43 at 10 (same); Ex. 29 at GCT8232 (stating under penalty of perjury in its 2013 Subpart W report that Cell 3 was an "'existing impoundment' as defined in 40 CFR 61.251").
[52] 40 C.F.R. § 61.253.
[53] Method 115 § 2.1.2.
[54] Method 115 § 2.1.3.

under Subpart W.[55] Energy Fuels did not sample Cell 3's beach region during the September 22–23, 2013, radon-flux sampling event.[56]

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.[57] Energy Fuels did not sample Cell 3's beach region during the December 3–4, 2013, radon-flux sampling event.[58]

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

The Trust's second claim for relief asserts that Energy Fuels has violated and continues to violate the Clean Air Act—*viz.*, the two-impoundment limit in 40 C.F.R. 61.252(b)(1)—by operating more than two impoundments at the Mill every day since at least November 11, 2010.

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."[59]

Material Facts

1. Energy Fuels finished building Cell 4B on November 11, 2010.[60]

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

[55] Ex. 30 at GCT8318, GCT8320.
[56] Ex. 30 at GCT8320.
[57] Ex. 30 at GCT8351, GCT8353.
[58] Ex. 30 at GCT8353.
[59] 40 C.F.R. § 61.252(b).
[60] Ex. 17 at 6 ("Construction of Cell 4B was completed on November 11, 2010.").

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."[61]

"*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."[62]

Material Facts

1. Energy Fuels uses phased disposal at the Mill.[63]

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."[64]

"*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."[65]

"*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."[66]

[61] 40 C.F.R. § 61.252(b).
[62] 40 C.F.R. § 61.251(f).
[63] EFR USA's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 34 ("Energy Fuels … avers that it does employ phased disposal in compliance with Subpart W."); EFR White Mesa's Answer First Am. Compl. ¶ 33 (Oct. 31, 2014), ECF No. 33 ("EFR White Mesa … avers that the White Mesa Mill employs phased disposal in compliance with Subpart W.").
[64] 40 C.F.R. § 61.252(b)(1).
[65] 40 C.F.R. § 61.251(e).
[66] 40 C.F.R. § 61.251(g).

Material Facts

The Trust can prevail on its second claim for relief on at least five, independent factual bases. The material facts for each of these outcomes are set out below. If the Court rules for the Trust on Alternative A, it is not necessary to rule on Alternative A1. Likewise, if the Court rules for the Trust on Alternative C, it is not necessary to rule on Alternative C1. Because it may affect the relief to be ordered, however, it is necessary to determine whether to grant summary judgment on at least one version of Alternative A, Alternative B, and Alternative C.

Alternative A

1. Cell 3 has been in operation since at least November 11, 2010.[67]

2. Cell 4A has been in operation since at least November 11, 2010.[68]

3. Cell 1 has been used for the continued placement of process solutions since at least November 11, 2010.[69]

4. Cell 4B has been used for the continued placement of process solutions since January 31, 2011.[70]

5. Process solutions are waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content.[71]

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[67] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).
[68] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 4A is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).
[69] Ex. 17 at 14 ("Energy Fuels admits Cell 1 has from time to time received process solutions since February 1, 2009."); Ex. 43 at 10 (same); Ex. 14 at EFR43535.
[70] Ex. 13 at 5–6 ("Cell 4B received process solutions primarily pumped from Cell 4A starting in January or February of 2011."); Ex. 18 at DEQ52 ("Please take notice pursuant to 40 CFR 61.09(a)(2) that the actual date of initial startup of Cell 4B occurred on January 31, 2011…"); 40 C.F.R. § 61.02 ("Startup means the setting in operation of a stationary source for any purpose.").
[71] Ex. 12 at 19–20 ("Process solutions that are discharged to the mill's tailings impoundments or evaporation ponds are solutions that emanate from the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for its uranium content and that are not tailings, as defined in Energy Fuels Answer to Interrogatory No. 14."); Ex. 44 at 12 (same); Ex. 12 at 21 ("All impounded substances, other than 11e.(2) byproduct material received from third-party [in-situ recovery] facilities for direct disposal, are tailings or wastes produced by the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for

Alternative A1

1. Cell 3 has been in operation since at least November 11, 2010.[72]

2. Cell 4A has been in operation since at least November 11, 2010.[73]

3. Cell 1 has been used for the continued placement of process solutions since at least November 11, 2010.[74]

4. Cell 4B has been used for the continued placement of process solutions since January 31, 2011.[75]

5. Sand-like wastes that result from the processing of uranium ore eventually precipitate out of process solutions in Cells 1 and 4B.[76]

Alternative B

1. Cell 3 has been in operation since at least November 11, 2010.[77]

2. Cell 4A has been in operation since at least November 11, 2010.[78]

3. Tailings were first placed in Cell 2 in 1980.[79]

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its uranium content."); Ex. 44 at 13 (same); Exs. 45, 46 at 3 (defining "[i]mpounded substance" to include process solutions).

[72] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[73] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 4A is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[74] Ex. 17 at 14 ("Energy Fuels admits Cell 1 has from time to time received process solutions since February 1, 2009."); Ex. 43 at 10 (same); Ex. 14 at EFR43535.

[75] Ex. 13 at 5–6 ("Cell 4B received process solutions primarily pumped from Cell 4A starting in January or February of 2011."); Ex. 18 at DEQ52 ("Please take notice pursuant to 40 CFR 61.09(a)(2) that the actual date of initial startup of Cell 4B occurred on January 31, 2011…"); 40 C.F.R. § 61.02 ("Startup means the setting in operation of a stationary source for any purpose.").

[76] Ex. 9 at 49:22–50:8, 63:18–64:16, 115:1–116:2; Ex. 16 at 160:15–162:2.

[77] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[78] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 4A is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[79] Ex. 12 at 23 ("Cell 2 was first put into service in 1980…."); Ex. 44 at 14 (same); Ex. 14 at EFR43535 (showing a tailings placement period for Cell 2 of "1980–Mid 1980's").

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.[80]

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.[81]

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.[82]

Alternative C

1. Cell 3 has been in operation since at least November 11, 2010.[83]

2. Cell 4A has been in operation since at least November 11, 2010.[84]

3. From at least November 11, 2010 through at least March 2014, Roberts Pond was used for the continued placement of process solutions.[85]

4. Process solutions are waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content.[86]

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[80] Ex. 22 at EFR6398–424, EFR6457 ("Placement of cover materials will be based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations."); Ex. 9 at 188:7–14.
[81] Ex. 9 at 166:25–167:22, 128:2–129:23; Ex. 16 at 171:13–23.
[82] Ex. 9 at 168:1–169:25, 174:9–21; Ex. 21 at EFR721–22 (closed-cell-performance requirements).
[83] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).
[84] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 4A is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).
[85] Ex. 9 at 193:23–195:10, 200:12–201:1, 204:21–206:15; Ex. 47 at EFR21568–72.
[86] Ex. 12 at 19–20 ("Process solutions that are discharged to the mill's tailings impoundments or evaporation ponds are solutions that emanate from the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for its uranium content and that are not tailings, as defined in Energy Fuels Answer to Interrogatory No. 14."); Ex. 44 at 12 (same); Ex. 12 at 21 ("All impounded substances, other than 11e.(2) byproduct material received from third-party [in-situ recovery] facilities for direct disposal, are tailings or wastes produced by the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for

Alternative C1

1. Cell 3 has been in operation since at least November 11, 2010.[87]

2. Cell 4A has been in operation since at least November 11, 2010.[88]

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.[89]

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its uranium content."); Ex. 44 at 13 (same); Exs. 45, 46 at 3 (defining "[i]mpounded substance" to include process solutions).

[87] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[88] Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 4A is a tailings impoundment as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

[89] Ex. 9 at 193:23–195:10, 200:12–201:9, 204:21–206:15; Ex. 47 at EFR21568–72; Ex. 19 at EFR23930 ("They have managed to get a significant amount of dirt / tailings in Roberts Pond."); Ex. 48 at EFR14063 ("[U]tility crew is cleaning out sands in roberts pond and disposing it into Cell 3."); Ex. 16 at 176:24–177:25.

STANDARD OF REVIEW

Summary judgment must be granted if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

ARGUMENT

I. The citizen-suit provision of the Clean Air Act authorizes judicial relief against Energy Fuels for its Subpart W violations.

The Clean Air Act authorizes citizen suits against anyone 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 [the Act]." 42 U.S.C § 7604(a). The phrase "emission standard or limitation" includes: (1) [an] emission limitation … or emission standard, [and] (3) … any requirement under section 7411 or 7412 of [Title 42] (without regard to whether such requirement is expressed as an emission standard or otherwise)…." *Id.* § 7604(f).

Subpart W is an "emission standard" within the meaning of 42 U.S.C. § 7604(f)(1). EPA promulgated Subpart W in response to Section 112's command to set "emission standards" for hazardous air pollutants. Pub. L. 91-604 § 4(a), 84 Stat. 1685. The rule's title and preamble bears that out: "National Emission Standards for Radon Emissions From Operating Mill Tailings." 40 C.F.R. Pt. 61, Subpart W; 54 Fed. Reg. 51,654 ("This final rule announces the Administrator's final decisions on National Emission Standards for Hazardous Air Pollutants (NESHAPs) under section 112 of the Clean Air Act for emissions of radionuclides…."). Because Subpart W as a whole is an "emission standard," all its requirements at issue in the Trust's claims for relief are enforceable in a citizen suit under the Act. *See also* 42 U.S.C. § 7602(k) (defining emission standard or limitation). Furthermore, Subpart W is also enforceable in a citizen suit as a "requirement under section … 7412." 42 U.S.C. § 7604(f)(3). Section 7412

requires that, "[a]fter the effective date of any … regulation promulgated under this section and applicable to a source, no person may operate such source in violation of such … regulation…." 42 U.S.C. § 7412(i)(3)(A). And Subpart W is a regulation promulgated under Section 7412 (i.e. Section 112 of the Clean Air Act). 54 Fed. Reg. 51,654.

Subpart W applies to "owners or operators of facilities licensed to manage uranium byproduct materials during and following the processing of uranium ores…." 40 C.F.R. § 61.250. EFR White Mesa owns the Mill, and EFR USA operates it. *See* Answers ¶ 9, ECF Nos. 33, 34. And the Mill has been licensed since at least 2007 through a radioactive materials license to manage uranium byproduct material during and following the processing of uranium ores. Ex. 37 at EFR613, EFR617 (§§ 6, 9.1, 9.8); Ex. 2 at EFR1501, EFR1505 (same).

II. The Trust gave sixty days' notice of its intent to sue.

On January 29, 2014, the Trust notified Energy Fuels, EPA, and the State of Utah that the Trust intended to bring a citizen suit against Energy Fuels for violating Subpart W. Ex. 35 at GCT1282–89. The Trust filed its complaint 63 days later. ECF No. 2.[90]

III. The Trust has standing.

An association has constitutional standing "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." *Laidlaw*, 528 U.S. at 181.[91] Trust members would have

[90] The Trust sent another notice on July 29, 2014, of its intent to assert three more claims, Ex. 36 at EFR47121–32, and filed an amended complaint on October 15, 2014, ECF No. 29.

[91] The interests the Trust seeks to protect in this lawsuit are germane to the Trust's purpose. Ex. 38 ¶¶ 2–7. Neither the claims asserted nor relief requested requires individualized proof. *See Sierra Club v. Tenn. Valley Auth.*, 430 F.3d 1337, 1345 (11th Cir. 2005).

standing if: 1) they have suffered an "injury in fact"; 2) the injury is "fairly traceable" to the defendant's challenged actions; and 3) it is likely that the injury will be redressed by a favorable decision. *Id.* at 180–81. Standing is determined as of the outset of litigation. *Id.* at 180.

A. Members of the Trust have suffered an injury in fact.

Plaintiffs in environmental cases "adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity." *Id.* at 183. "[R]easonable concerns about the effects" of a defendant's polluting activities that affect a plaintiff's interests satisfy the injury-in-fact requirement. *Id.* at 183–84; *Covington v. Jefferson Cnty.*, 358 F.3d 626, 638 (9th Cir. 2004) ("[E]ven if the only injuries alleged by the [plaintiffs] were threats to the aesthetic and recreational enjoyment of their property, these harms occasioned by … violations [of federal law] in context are sufficient to satisfy the injury in fact requirement."). Neither environmental harm, 528 U.S. at 181, nor adverse health effects need to be proved, *see Concerned Citizens around Murphy v. Murphy Oil USA, Inc.*, 686 F. Supp. 2d 663, 671 (E.D. La. 2010).

Trust members have been injured by the Mill's activities challenged in this lawsuit. Several members live a few miles from the Mill, and the Mill's radon emissions and operations detract from their activities or preclude them altogether. For example, Yolanda Badback and Thelma Whiskers, who are both members of the Ute Mountain Ute Tribe, have lived about five miles from the Mill their whole lives and plan to stay there indefinitely. Ex. 39 ¶¶ 1–2; Ex. 40 ¶ 1. When the Mill is running, they smell a bad chemical odor and see reddish smoke coming from the Mill. Ex. 39 ¶¶ 4, 6, 7; Ex. 40 ¶ 4. Dust often blows toward their house from the Mill. *Id.* Ms. Badback fears that breathing radon from the Mill will make them sick, a fear that has

gotten worse since she learned the Mill was violating Subpart W. Ex. 39 ¶ 6. Both worry about breathing the air and try to stay inside. Ex. 39 ¶¶ 6–7; Ex. 40 ¶ 4. 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. Ex. 39 ¶¶ 9–12; Ex. 40 ¶ 6.

Similarly, Bill Crowder and Ann Leppanen live part time in Bluff, a little less than 20 miles from the Mill. Ex. 41 ¶¶ 1–2; Ex. 42 ¶ 1. They made a sizable investment building their house in Bluff, eager to retire to the area, enjoy the surrounding natural environment, and create a place for their family to visit for generations. Ex. 41 ¶¶ 2–3, 9; Ex. 42 ¶¶ 3, 9. They frequently camp and explore the landscapes around their home and the Mill. Ex. 41 ¶¶ 4–6; Ex. 42 ¶¶ 5–6. 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. Ex. 41 ¶¶ 7–9; Ex. 42 ¶¶ 7–9. Because of the Mill's Subpart W violations, both have curtailed and continue to curtail how they use the area near the Mill. *Id.* For example, they both avoid camping, hiking, and searching for archeological features and rock art in areas close to the Mill. Ex. 41 ¶ 7; Ex. 42 ¶ 7.

The diminished use and enjoyment of the natural environment that these Trust members have suffered, along with the loss of enjoyment in their homes and land, satisfies the injury-in-fact standard. *See Concerned Citizens*, 686 F. Supp. 2d at 671 ("[Plaintiff's] members … may demonstrate a cognizable injury by showing that breathing, smelling and being reasonably concerned about the health effects of polluted air diminish their use and enjoyment of their property."); *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001) ("[A] credible threat to the plaintiff's physical well-being from airborne pollutants falls well within the range of injuries to

cognizable interests that may confer standing."). Indeed, the very purpose of Subpart W's 20 pCi/(m^2-sec) limit and work-practice standard is to prevent the significant cancer risk that arises when tailings piles dry out and remain uncovered. *See* 54 Fed. Reg. at 51,680–81. Trust members are injured by being directly confronted with that risk, worrying about it, altering their recreational and other day-to-day activities, and therefore getting less enjoyment out of the surrounding environment and their homes. *See Covington*, 358 F.3d at 637–641 (on Clean Air Act and other environmental claims, plaintiffs who lived near defendants' landfill and whose "enjoyment of life and security of home" was "directly confronted with the risks that [federal law] sought to minimize" were injured in fact).

B. These injuries are fairly traceable to the activities challenged in this lawsuit.

The Trust's members' injuries are fairly traceable to the Mill's operations and radon emissions. Those injuries have arisen directly from the Mill's radon emissions, including those exceeding Subpart W's numeric limit, and from Energy Fuels' operation of more than two impoundments. *See, e.g.*, Ex. 39 ¶ 4–7, 10, 12; Ex. 40 ¶ 2–4, 6; Ex. 41 ¶¶ 7–9; Ex. 42 ¶¶ 7–9. The Mill's operations, including its violations of Subpart W, thus cause the members' injuries. *See Sierra Club v. Tri-State Generation & Transmission Ass'n, Inc.*, 173 F.R.D. 275, 280 (D. Colo. 1997) ("Plaintiff's allegations—that defendants' emissions impair its members' ability to breathe clean air and view natural scenery and wildlife—clearly satisfy [the causation] requirement."); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 556–57 (5th Cir. 1996) (holding that it was sufficient for plaintiff to show that defendant's discharge of wastewater into Galveston Bay "*contributes* to the pollution that impairs [their] use of the bay"); *Sierra Club v. Envtl. Prot. Agency*, 762 F.3d 971, 977–78 (9th Cir. 2014) (plaintiffs' impending respiratory-

health injuries were fairly traceable to proposed permit to emit air pollutants where "remedying such injuries is exactly the purpose and function of these particular emissions limits, and more broadly, the Clean Air Act.").

C. The Trust's members' injuries are redressable.

A favorable order from the Court would redress the Trust's members' injuries. An injunction requiring the company to properly measure and report radon flux and comply with the numeric limit and work-practice standard under Subpart W will force Energy Fuels to limit its radon emissions, eliminating the concern that has driven the Trust's members' diminished enjoyment of their homes and natural environment around the Mill. *See Envtl. Prot. Agency*, 762 F.3d at 977–78; *Tri-State*, 173 F.R.D. at 281 ("Because plaintiff alleges that defendants' emissions impair its members' ability to breathe clean air and view natural scenery and wildlife, it necessarily follows that a reduction in the emissions would reduce the impairments plaintiff's members allegedly suffer."). Moreover, an injunction prohibiting Energy Fuels from using more than two impoundments is likely to curtail the Mill's operations, reducing emissions from unreclaimed cells, emissions from the rest of the Mill, the Mill's chemical stench, dust, truck traffic, harm to wildlife, and other impacts that negatively affect the Trust's members. Indeed, Energy Fuels readily admits it needs more than two cells to run the Mill as it has historically run. Ex. 9 at 85:21–86:17, 90:11–92:14 (explaining need to maintain "water balance"—i.e., enough room in the tailings impoundments to hold wastes and evaporate solutions—and explaining that the Mill could not have continued to run in 2010 if Cell 4B had not been put into service).

Civil penalties likewise would redress the Trust's members' injuries. Those penalties, even if paid to the U.S. Treasury, eliminate the economic incentive a company has to avoid or

delay compliance with the law. *Laidlaw*, 528 U.S. at 185–86 ("To the extent that [civil penalties] encourage defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct."); *Covington*, 358 F.3d at 641 ("Such [Clean Air Act] fines and penalties can cause [the defendant] to bring the landfill into compliance with the [Act]."). Ordering Energy Fuels to pay civil penalties will deter the company from violating Subpart W and is thus likely to alleviate the Trust's members' injuries relating to radon emissions, unreclaimed impoundments, excessive truck traffic, harms to wildlife and plants, and dust and chemical odors. Moreover, up to $100,000 of civil penalties may be pledged to a "beneficial mitigation project" to "enhance the public health or the environment," which can also redress those injuries. *See* 42 U.S.C. § 7604(g)(2).

The Trust has standing to pursue injunctive relief and civil penalties on all of its claims.

IV. Energy Fuels has repeatedly violated Subpart W's numeric emission limit.

A. Claim 1: Energy Fuels violated Subpart W by letting radon emissions from Cell 2 exceed Subpart W's numeric limit in 2012 and 2013.

Subpart W provides that "[r]adon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m^2-sec)…." 40 C.F.R. § 61.252(a). Energy Fuels violated this standard in 2012 and 2013 by letting average annual radon-222 emissions from Cell 2 exceed 20 pCi/(m^2-sec).

1. Cell 2 was an "existing uranium mill tailings pile" in 2012 and 2013.

Cell 2 was an "existing uranium mill tailings pile" subject to the 20-picocurie emission standard in 2012 and 2013. An "existing impoundment" is "any uranium mill tailings impoundment which is licensed to accept additional tailings and is in existence as of

December 15, 1989." 40 C.F.R. § 61.251(d).[92] Cell 2 was built before December 15, 1989. First. Am. Compl. ¶ 33, ECF No. 29; Defs.' Answers ¶ 33, ECF Nos. 33, 34. And it has been licensed to accept additional tailings since the 1980s. Ex. 14 at EFR43529. Indeed, in its 2012 and 2013 Subpart W reports, Energy Fuels stated under penalty of perjury that Cell 2 was an "'existing impoundment' as defined in 40 CFR 61.251." Ex. 26 at GCT8876; Ex. 29 at GCT8232. And during its deposition in February 2016, Energy Fuels confirmed that Cell 2 was an "existing impoundment." Ex. 16 at 62:15–63:3. Subpart W's 20-picocurie emission limit thus applied to Cell 2 in 2012 and 2013.

2. Radon-222 emissions from Cell 2 exceeded 20 pCi/(m^2-sec) in 2012 and 2013.

There is no dispute that Energy Fuels reported to the Utah Air Quality Division and EPA that Cell 2's radon emissions exceeded Subpart W's annual emission limit of 20 pCi/(m^2-sec) in 2012 and again in 2013. Ex. 26 at GCT8875 ("The result of the 2012 radon-222 flux monitoring for Cell 2 was 25.9 pCi m^{-2} s^{-1} …. The measured radon flux from Cell 2 in 2012 therefore exceeded the standard set out in 40 CFR 61.252 of 20 pCi m^{-2} s^{-1}."); Ex. 29 at GCT8228 ("The result of the 2013 radon-222 flux monitoring for Cell 2 was 20.4 pCi/(m^2 -sec) … which exceeds the 20 pCi/(m^2-sec) set out in 40 CFR 61.252(a) for the year."). Based on those reports, the Air Quality Division concluded that Energy Fuels violated Subpart W in 2012 and again in 2013. Ex. 26 at GCT8871 ("Status: In violation. The annual report indicated that Cell #2 exceed[ed] the 20 pCi m^2 -s of radon-222 in June, 2012."); Ex. 29 at GCT8226 (same for 2013).

Energy Fuels' self-reported violations of Subpart W's radon-emission limit in 2012 and

[92] The phrase "existing uranium mill tailings pile" is not in Subpart W's definitions, but "existing impoundment" is. And the preamble to Subpart W is clear that EPA intended the 20-picocurie limit to apply to "existing impoundments." 54 Fed. Reg. at 51,680 (using the words "impoundment" and "pile" synonymously).

2013 are conclusive admissions that Energy Fuels is liable on the Trust's first claim for relief. *See Concerned Citizens*, 686 F. Supp. 2d at 679–80 (granting summary judgment to plaintiffs in Clean Air Act citizen-suit based solely on defendant's reports that it made unauthorized discharges); *St. Bernard Citizens v. Chalmette Refining*, 354 F. Supp. 2d 697, 706–07 (E.D. La. 2005) (same); *Sierra Club v. Pub. Serv. Co. of Colo., Inc.*, 894 F. Supp. 1455, 1458–61 (D. Colo. 1995) (granting summary judgment to citizen-plaintiff based on defendants' emission reports that were undisputed evidence of Clean Air Act violations); *Friends of the Earth v. Potomac Elec. Power Co.*, 419 F.Supp. 528, 533 (D.D.C. 1976) (finding no issue of fact as to 24 visible-emission incidents reflected in defendant's records).

The Court should enter summary judgment for the Trust on its first claim for relief.

B. Claim 5: Cell 3's radon emissions exceeded Subpart W's numeric limit in 2013.

When the radon flux from Cell 3 in 2013 is calculated properly, Energy Fuels violated Subpart W's numeric emission limit by letting the average annual radon emissions from Cell 3 exceed 20 pCi/(m^2-sec).[93] *See* 40 C.F.R. § 61.252(a)

During 2013, only in June did Energy Fuels take valid radon-flux measurements from Cell 3. Though Energy Fuels took more radon-flux measurements in September and December, as explained below in Sections IV.C. and IV.D. (pp. 38–42), those measurements were invalid because they were improperly scheduled and because Energy Fuels sampled only the cover region and not the beach. When the company reported the results to the Air Quality Division, it calculated a faux average radon flux for September and December by combining the June beach

[93] Cell 3 was an "existing impoundment" subject to Subpart W's 20 pCi/(m^2-sec) numeric emission standard in 2013. Ex. 17 at 13–14 ("Energy Fuels Resources admits Cell 3 was an existing impoundment as of December 15, 1989 and remains to this day licensed to accept additional tailings."); Ex. 43 at 10 (same); Ex. 29 at GCT8232.

measurement with the September and December cover measurements. *See infra* Section IV.D. (pp. 40–42). Those calculations were invalid. They relied on impermissible measurement events and incomplete sampling during those events, and they were thus not representative of the pile's total radon flux.

Because the September and December radon-flux calculations are invalid, the properly conducted June measurement of 22.7 pCi/(m^2-sec), Ex. 30 at GCT8293, is the annual average radon flux for the cell in 2013. This self-reported violation of Subpart W's numeric radon-emission limit is a conclusive admission that Energy Fuels is liable on the Trust's fifth claim for relief. *See* cases cited *supra* Section IV.A.2. (p. 37). The Court should thus enter summary judgment against Energy Fuels on the Trust's fifth claim for relief.

C. Claim 3: Energy Fuels violated Subpart W's sampling-schedule requirements.

Uranium-mill owners and operators who plan to sample radon flux more than once in a year must send EPA "a schedule of the measurement frequency to be used." 40 C.F.R. § 61.253. "The schedule may be submitted to EPA prior to or after the first measurement period." *Id.* Energy Fuels violated this requirement in 2013 by sending EPA three sampling schedules for Cell 3: one in April that said Energy Fuels would perform an "annual sampling event" in June; and then, after the June sample yielded a result above 20 pCi/(m^2-sec), a second schedule in July and a third in September that included two more sampling events later in the year.

Under the plain language of 40 C.F.R. § 61.253, mill owners and operators are not allowed to submit more than one radon-flux-sampling schedule for each calendar year. That section of Subpart W calls for submission of "a schedule"—meaning a single schedule—setting out the "measurement frequency to be used" for the year. 40 C.F.R. § 61.253. True enough,

"[t]he schedule" may be submitted before or after the first measurement period. *Id.* But that does not allow submission of one schedule before the first measurement period and a second, different schedule after the first measurement period. The phrase "before *or* after the first measurement period" is disjunctive; the schedule may be submitted before or after the first measurement period, but not both. *See Chevron Oil Co. v. Barlow*, 406 F.2d 687, 692 (10th Cir. 1969).

This one-schedule limitation in Subpart W makes sense. After all, letting operators change already submitted sampling schedules whenever they get noncompliant results would allow them to manipulate the annual sampling results by taking more and more samples in an attempt to bring down the average. Subpart W's measurement protocol plainly expects operators to sample at regularly planned intervals: weekly, monthly, quarterly, or annually. Method 115 § 2.1.1. And making operators live with the results of the schedule they choose creates an incentive for them to regularly monitor and control radon emissions.

Energy Fuels did not sample Cell 3 at regularly planned intervals in 2013. Instead, it scheduled one annual sample, and only after getting a noncompliant result, scheduled two more. On April 11, 2013, Energy Fuels submitted to the Air Quality Division and EPA a measurement schedule for Cell 3 that notified the agencies that Energy Fuels would perform an "[a]nnual sampling event" between June 10 and June 13, 2013. Ex. 31 at EFR35264. Energy Fuels took those samples as planned and got a result of 22.7 pCi/(m^2-sec). Ex. 32 at EFR24924. Since this result was "a little above the standard," the company's radon-flux contractor made a suggestion:

> [I]f it is permissible, I think we could do some spot cleanup in a few areas and then resample just the involved sample locations. … If we can get the radon flux at these 6 locations down to 20 pCi/m2-s, the Cell 3 average would drop to around 17.4 pCi/m2-s.

Ex. 32 at EFR24924. So Energy Fuels decided to take more samples. *See* Ex. 30 at GCT8318.[94] The company sent two more schedules to the Division and EPA adding two more sampling events to the 2013 schedule. Ex. 33 at EFR992–93; Ex. 34 at EFR1067. Energy Fuels ultimately took radon-flux samples from Cell 3 in September and December 2013 and used the results in calculating the average annual radon flux for Cell 3. Ex. 30 at GCT8318, GCT8351.

Energy Fuels indisputably changed its 2013 sampling schedule for Cell 3 after getting a result in June above 20 pCi/(m^2-sec). That was a violation of Subpart W. *See* 40 C.F.R. § 61.253. Liability under the Clean Air Act is strict. *See Pound v. Airosol Co.*, 498 F.3d 1089, 1097 (10th Cir. 2007). The Court thus should grant the Trust summary judgment on its third claim for relief.

D. Claim 4: Energy Fuels violated Subpart W's sampling methods in 2013.

Every time mill owners and operators measure radon flux, they are required to sample all regions of each impoundment except for water-covered areas and dikes that are made of dirt. Energy Fuels violated this requirement in 2013 by failing to take radon-flux measurements from the beach region of Cell 3 in September and December 2013.

Compliance with Subpart W's 20 pCi/(m^2-sec) limit must be determined using Method 115. 40 C.F.R. § 61.253. Method 115 says that "*[a]ll* radon measurements shall be made as described in paragraphs 2.1.2 through 2.1.6…" of the method. Method 115 § 2.1.1 (emphasis added). Those paragraphs include the mandate that radon-flux measurements be made "within

[94] It is obvious the company scheduled extra samples in an attempt to bring the annual average radon flux below 20 pCi/(m^2-sec). Ex. 30 at GCT8318 (observing that June 2013 radon flux was over 20 pCi/(m^2-sec), "and in response, Energy Fuels has begun conducting radon flux measurements for Cell 3 covered region on a quarterly basis…."); Ex. 16 at 95:12–96:17 (confirming that this statement accurately describes the company's position). Ex. 49 at GCT11820 (e-mails from Air Quality Division confirming the company "fail[ed] the first test" and conducted more tests to "average out the high test").

each region on the pile, except for those areas covered with water." Method 115 § 2.1.3. Regions are "clearly defined areas of the pile" that include water-covered areas, water-saturated areas (beaches), dry top-surface areas (a.k.a. "cover"), and sides (except those made of earthen material). Method 115 § 2.1.2. Taken together, these provisions require that, for all radon measurements that are made throughout the year, radon flux must be measured for each region on the pile, except water-covered areas and sides built of dirt.

This requirement is reinforced by how Method 115 requires the annual average radon flux to be calculated. Annual radon flux is the average of "the mean radon flux for each measurement period." Method 115 § 2.1.1. That is, to get the pile's average annual radon flux, Method 115 says to first calculate the mean radon flux for each measurement period. This step is done by averaging the radon flux from each region, weighted by region size, like this:

$$(\text{measurement period radon flux}) = \frac{(\text{beach radon flux})(\text{beach size}) + (\text{cover radon flux})(\text{cover size})}{(\text{total size of the impoundment})}$$

Method 115 § 2.1.7(b); Method 115 § 2.1.2 (requiring the mean radon flux to "be determined for each individual region of the pile"). This calculation is *impossible* without measuring every region of the pile. If measurements from one region are not taken, the radon flux for that region is an unknown quantity in the equation. And without that number, the average for the period simply cannot be calculated.

Requiring measurements from every region during all sampling events is also sound policy. It ensures that radon-flux sampling is consistent and representative whenever it is performed and prohibits the sort of selective sampling that Energy Fuels' contractor proposed in 2013 to get Cell 3's average to drop. That forces mill operators not just to reduce radon flux from

out-of-compliance regions but to keep in-compliance regions from rising above 20 pCi/(m^2-sec), and ultimately to reduce radon-222 emissions from the *whole pile* to 20 pCi/(m^2-sec).

During September and December 2013, Energy Fuels took radon-flux measurements only from Cell 3's covered region (the "dry top surface") and did not sample the beach. Ex. 30 at GCT8318, GCT8320, GCT8351, GCT8353. The company then calculated Cell 3's radon flux for September and December by combining the June beach measurements with the September and December cover measurements. Ex. 30 at GCT8318, 8351. Failing to sample the beach region during September and December 2013 violated Method 115's requirement that the cover and beach regions both be sampled during every sampling event. *See* Method 115 §§ 2.1.1 to 2.1.3. That violated Subpart W, both in September and again in December. *See* 40 C.F.R. § 61.253 (requiring compliance with Method 115). Summary judgment for the Trust therefore should be entered on the Trust's fourth claim for relief.

V. Claim 2: Energy Fuels has been violating Subpart W by operating more than two impoundments.

Uranium mill owners and operators who build (and license) tailings impoundments after December 1989 and manage their impoundments using "phased disposal" are allowed to have only two impoundments, including existing impoundments, in "operation" at any given time. 40 C.F.R. § 61.252(b)(1).[95] Energy Fuels triggered this limit, at the latest, when it finished building Cell 4B on November 11, 2010. Ex. 17 at 6. The company has been violating it ever since by operating Cells 1, 2, 3, 4A, 4B, and Roberts Pond (at least until March 2014).

A. Cells 3 and 4A have been in "operation" since at least November 11, 2010.

Energy Fuels has admitted that Cells 3 and 4A are impoundments that have been in

[95] Energy Fuels uses "phased disposal" at the Mill. Defs.' Answers ¶ 33, ECF Nos. 33, 34.

"operation" under Subpart W since at least the beginning of 2009. Ex. 12 at 26 ("Energy Fuels Resources admits that Cell 3 [and Cell 4A are] tailings impoundment[s] as defined by Subpart W in operation since February 1, 2009."); Ex. 44 at 16 (same).

B. Cells 1 and 4B have been in "operation" since the day Energy Fuels first put "process solutions" into those cells.

Cells 1 and 4B are also in "operation" under Subpart W because Energy Fuels places process solutions in those cells. "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 C.F.R. § 61.251(e). "Tailings" and "uranium byproduct material" are defined synonymously to mean "the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content." 40 C.F.R § 61.251(g).

Energy Fuels has been placing process solutions into Cell 1 since 1981, Ex. 14 at EFR43535, and it began placing them into Cell 4B on January 31, 2011. *See supra* p. 5.

1. Process solutions are "tailings" under Subpart W.

Energy Fuels admits that "process solutions" are "wastes produced by the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for its uranium content." Ex. 12 at 21 ("All impounded substances … are tailings or wastes produced by the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed materials) processed primarily for its uranium content."); *id.* at 19–20 ("Process solutions that are discharged to the mill's tailings impoundments or evaporation ponds are solutions that emanate from the extraction or concentration of uranium at the mill from any ore (including conventional ores and alternate feed

materials) processed primarily for its uranium content and that are not tailings, as defined in Energy Fuels Answer to Interrogatory No. 14."); Ex. 44 at 12, 13 (same); Exs. 45, 46 at 3 (defining "[i]mpounded substance" to include process solutions).

The "process solutions" that the company has been pumping into Cells 1 and 4B are therefore "tailings" under the plain language of Subpart W. *See* 40 C.F.R § 61.251(g). Cells 1 and 4B accordingly have been in "operation" under Subpart W since the day Energy Fuels first put process solutions into them. *See id.* § 61.251(e). And, by having Cells 1, 3, 4A, and 4B in operation, the company has been violating Subpart W's two-impoundment limit since it triggered the phased-disposal work-practice standard by building Cell 4B in November 2010. *See id.* 40 C.F.R. § 61.252(b). For this reason alone, the Trust is entitled to summary judgment on its second claim for relief, though as explained in Sections V.C. and D. (pp. 49–54) below, Cell 2 and Roberts Pond also have been in operation after November 11, 2010.

2. "Tailings" are not just "sand-like wastes."

Energy Fuels argues that the word "tailings" in Subpart W really means only the "sand-like wastes that result from the processing of uranium ore at the … Mill [that] are conveyed in slurry form through the tailings pipelines for disposal in the operating tailings impoundments…." Ex. 15 at 7. From that premise, the company argues that Cells 1 and 4B do not hold "tailings" and thus are not in "operation." This is wrong for at least five reasons.

First, it contradicts the plain language of Subpart W. Tailings are "the waste," not just the "sand-like waste," that is produced by extracting or concentrating uranium from ore. 40 C.F.R. § 61.251(g). EPA first adopted Subpart W's definition of "tailings" in the 1986 final Subpart W rule, which imposed a work-practice standard with the same two-impoundment limit that is in

the 1989 standard.[96] At the time, EPA knew how to describe tailings as "sand-like wastes" if it wanted to. Yet in a background document supporting the 1986 rulemaking, EPA was crystal clear that it meant "tailings" to refer to *all* wastes left over from processing uranium ore, including process solutions:

> With the exception of the uranium extracted during milling, the dry weight of the tailings represents the total dry weight of the processed ore. Ore contains only about 0.l percent uranium; therefore, the tailings consist of 99.9 percent of the ore, including all the radioactive decay products. The tailings discharge is composed of three fractions: (1) the sands, which consist of solids greater than 200 mesh (74 mm); (2) the slimes, which consist of solids less than 200-mesh; and (3) *the liquid solution containing milling reagents and dissolved ore solids.*

Ex. 50 at GCT525 (emphasis added); *id.* at GCT535 ("Tailings include the barren crushed ore material *plus process solutions*. … Evaporation ponds used to contain excess liquid from tailings impoundments also contain suspended and dissolved tailings and are included in this analysis.") (emphasis added). This background document makes clear that EPA intended for its definition of "tailings" in Subpart W to have the plain meaning EPA assigned to that term: all "waste" produced by processing uranium.

Second, in the 1986 Subpart W rulemaking record, EPA described the "process solutions" in Cell 1 at the Mill as "tailings." EPA explained that about 550,000 tons of "*tailings* are contained in three cells of a proposed six-cell disposal system" at the Mill. Ex. 50 at GCT564 (emphasis added). The only cells the Mill had in 1986 were Cells 1, 2, and 3. Ex. 16 at 183:7–15. And, given that Energy Fuels says it has never put anything in Cell 1 except process solutions, *see* Ex. 14 at EFR43535, EPA's statement that there were "tailings" in Cells 1, 2, and 3, means that EPA considered the process solutions in Cell 1 to be "tailings."

[96] "Tailings" has the same definition in the 1986 and 1989 standards. 51 Fed. Reg. at 34,066.

Third, EPA still interprets Subpart W's two-impoundment limit to apply to "evaporation ponds," like Cells 1 and 4B. As EPA said in a 2014 proposed rulemaking to revise Subpart W: The "evaporation ponds located at conventional mills … contain uranium byproduct material, either in solid form or dissolved in solution, and therefore their emissions are regulated under Subpart W." 79 Fed. Reg. 25,388, 25,397 (May 2, 2014). *See also id.* at 25,391 (explaining that conventional milling "produces both solid and liquid wastes (i.e., uranium byproduct material, or 'tailings')…"); *id.* at 25,394 (stating that the hazardous air pollutant emissions from Cell 1 at the Mill are currently regulated by Subpart W "[t]o the extent [it] contains byproduct material.").

Fourth, as a matter of practice, "process solutions" and "sand-like" tailings are not distinct waste streams at the Mill. The "process solutions" in Cell 4B have come *solely* from the tailings slurry discharged into Cell 4A from the counter-current-decantation circuit. Ex. 9 at 25:8–26:24. After the slurry is in Cell 4A, liquids sort of ooze toward one side of the cell, leaving the solids (or most of them) on the other side. Ex. 9 at 29:15–30:22; Ex. 16 at 162:3–164:14. When enough liquid builds up, Energy Fuels starts a siphon built into the dam between the cells to suck the liquid into Cell 4B. Ex. 9 at 30:23–32:9. And *presto*, according to Energy Fuels, "tailings" become "process solutions" that are no longer regulated by Subpart W.

As Energy Fuels reads Subpart W, the company transmutes tailings into process solutions by moving them into Cell 1 too. To keep cells from getting too full, Energy Fuels often pumps solutions among impoundments. Ex. 9 at 59:4–14. Thus, at least some solutions in Cell 1 were once part of the tailings slurry that went into Cells 3 and 4A. *See, e.g.*, Ex. 51 at EFR9046 ("transfer sol. from C3 into C1"), EFR9050 ("transferring solutions from C3 & C4A into C1.").

The Court should reject this regulatory alchemy. The tailings that Energy Fuels puts into

Cell 4A are no less tailings because they go through a low-tech gravity separation and are sucked through a tube into Cells 1 or 4B. Indeed, day-to-day the company often calls process solutions "tailings." *See* citations *supra* p. 5. The Court should do the same in interpreting Subpart W.

Fifth, as a matter of policy, the word "tailings" should not be construed to exempt "evaporation ponds" from Subpart W's two-impoundment limit. The whole point of Subpart W was to minimize the surface area of radon-emitting wastes that could dry out and pose "dramatically" increased health risks. 54 Fed. Reg. at 51,680. There is no dispute that solutions in evaporation ponds contain dissolved solids, including uranium and its radioactive decay products like radium-226, which decays into radon-222. Ex. 9 at 40:5–41:5, 120:21–24; Ex. 16 at 147:8–148:11, 160:15–162:2. There is also no dispute that, after enough evaporation, dissolved solids eventually precipitate out of process solutions, settling in the form of "raffinate crystals" on the bottom of the ponds, much like relict salt deposits from Lake Bonneville. Ex. 9 at 49:22–50:8, 63:18–64:16, 115:1–116:2. And there is no dispute that those ponds can at least partially, if not fully, dry out while in operation. After all, in 1990, Energy Fuels used Cell 4A for about a year to dispose of process solutions, but then let those solutions evaporate, leaving somewhere around 100,000 cubic yards of dried out raffinate crystals on the bottom of the cell for the next *fifteen years*. Ex. 9 at 61:7–64:16; Ex. 16 at 151:16–152:23, 155:15–25; Ex. 8 at EFR647. Similarly, enough solution has evaporated from Cell 1 on at least one occasion to partially expose the bottom of the cell. Ex. 9 at 112:14–113:16, 229:12–231:11; Ex. 52. Thus, it makes perfect sense that EPA would use Subpart W's work-practice standard to limit the size and potential risks posed by "tailings-sands" impoundments and "evaporation ponds" alike.

For all these reasons, the Court should reject the idea that the word "tailings" in

Subpart W means only "sand-like wastes" and instead adopt the plain definition EPA gave that word: "the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content." 40 C.F.R. § 61.251(g).

3. Energy Fuels disposes of "sand-like wastes" in Cells 1 and 4B.

Because sand-like wastes precipitate out of the solutions in Cells 1 and 4B when solutions evaporate, even under Energy Fuels' interpretation of the word "tailings," the company is disposing of tailings in Cell 1 and Cell 4B. As explained above in Section V.B.2. (p. 47), Energy Fuels admits that dissolved solids, including uranium, eventually precipitate out of the solutions in Cells 1 and 4B and settle as "raffinate crystals" on the bottom of those impoundments. *See supra* p. 47. Placing these dissolved solids that become sand-like wastes into Cells 1 and 4B is enough to put those cells in "operation" under Subpart W.

It is true that raffinate crystals do not come straight out of the counter-current-decantation circuit like "sand-like" tailings. But that distinction is trifling. When Energy Fuels dug up the raffinate crystals that sat on the bottom of Cell 4A from about 1990 to 2006, it buried them in Cell 3 because they were contaminated with uranium. Ex. 9 at 64:4–65:13; Ex. 3 at 48:12–18. Similarly, when Cell 1 is retired, Energy Fuels has estimated that up to 140,000 cubic yards of raffinate crystals will be left behind—enough to cover 26 football fields a yard deep. Ex. 16 at 139:22–144:3. The company plans to get rid of those contaminated crystals in any open cell that holds sand-like tailings. Ex. 9 at 157:4–158:24; Ex. 22 at EFR6407. So the company ultimately treats these sand-like raffinate crystals exactly the same as sand-like tailings that go into Cells 3 and 4A. The Court consequently should treat the "evaporation ponds" that hold those incipient crystals as impoundments being used for the continued placement of tailings. For this reason too,

Cells 1 and 4B are in "operation" under Subpart W.

C. Cell 2 is in "operation" because its "final closure" has not begun.

An impoundment is in "operation" under Subpart W "from the day that tailings are first placed in the impoundment until the day that final closure begins." 40 C.F.R. § 61.251(e). When using phased disposal under Subpart W, impoundments that are filled must be "immediately dried and covered to meet all applicable Federal standards." 40 C.F.R. § 6.251(g). Federal reclamation standards (which Utah has adopted), require mill operators to carry out an approved reclamation plan that meets specified criteria and has deadlines for certain steps in the closure process. 10 C.F.R. Pt. 40, Appx. A ("Appendix A"); 40 C.F.R. § 192.32; Utah Admin. Code R313-24-4 (incorporating pertinent parts of Appendix A by reference). Energy Fuels' reclamation plan does not meet these requirements. The company therefore cannot have begun "final closure" of Cell 2. Indeed, the Mill's groundwater discharge permit *prohibits* Cell 2's closure until Energy Fuels' cover design will comply with an approved reclamation plan and *additional* performance requirements that have not been met. The cell thus remains in operation.

The Nuclear Regulatory Commission, EPA, and State of Utah have all adopted regulations specifying how final closure of tailings impoundments must be accomplished. *Id*. Those regulations require mill operators to expeditiously cover nonoperational impoundments with a "final radon barrier" designed with "reasonable assurance" to work for at least 200 years and to limit average releases of radon-222 to 20 pCi/(m^2-sec). *See* Appendix A, Criteria 6 & 6A; 40 C.F.R. § 192.32(a)(3)(i), (b)(1). Deadlines for finishing the final radon barrier, retrieving windblown tailings, and stabilizing the tailings pile (including dewatering the pile) are to be established in a reclamation plan and as conditions of each mill's radioactive materials license.

See Appendix A, "Reclamation Plan" and Criterion 6A.

Although the Nuclear Regulatory Commission and Radiation Division have "approved" a few versions of Energy Fuels' reclamation plan in the past two decades, none of those plans includes deadlines for completing the final radon barrier or any other steps in the cell-closure process. When Energy Fuels stopped putting wastes in Cell 2 in 2008, the Mill's Radioactive Materials License required "final reclamation" to be in accordance with Reclamation Plan Revision 3.0. Ex. 37 at EFR617. But neither that License nor Plan Revision 3.0 had any deadlines for cell closure. Ex. 37; Ex. 53 at EFR53587–611, 53645 ("Placement of cover materials will be based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations."); Ex. 9 at 188:7–14.

In fact, back in 2008, the Division and Energy Fuels were still working out the Plan's design specifications for the final radon barrier. More than a decade ago, the Division ordered Energy Fuels to submit an infiltration-and-contaminant-transport-modeling report so that the final radon barrier could be designed to meet "minimum performance requirements" to minimize buildup of precipitation in the cell and protect groundwater quality. Ex. 9 at 168:1–169:25; Ex. 54 at GCT5547. But the Division still has not approved that report. Ex. 9 at 174:9–21.

And the Mill's whole reclamation plan is still being revised. Ex. 9 at 166:25–167:22, 128:2–129:23; Ex. 16 at 171:13–23. Since 2008, the Division has approved minor revisions to version 3.0. Ex. 9 at 73:18–74:1. The currently "approved" version of the Plan—Revision 3.2 – Final—also lacks deadlines for any steps in the closure process. Ex. 22 at EFR6398–424, EFR6457; Ex. 9 at 188:7–14. And even as that revision was being "approved," the Division and the company were working on more changes to the Plan. Ex. 16 at 171:24–173:12. They are now

up to Revision 5.0, which the Division also has not yet approved. Ex. 16 at 171:13–23.

Because Energy Fuels' reclamation plan is still being revised to update the final-radon-barrier design and the plan lacks required deadlines, the company cannot begin "final closure" of Cell 2. It simply is not possible for Energy Fuels to expeditiously place a final radon barrier whose design is still being worked out using a plan that is still being revised. And the lack of deadlines in the company's plan is not just a harmless error. Deadlines are to be included in reclamation plans so that tailings cells are closed quickly. *See* Appendix A, Criterion 6A; 40 C.F.R. § 192.32(a)(3)(i). They can be extended, but only after allowing public participation, only after finding that radon-222 releases from the impoundment are less than 20 pCi/(m^2-sec) on average, only if radon-222 emissions are monitored annually during the period of delay, and if an extension for placing the final radon barrier is sought based on cost, only after even more criteria are met. *See* Appendix A, Criterion 6A(2). Without any closure deadlines, Cell 2 has been sitting mostly full of tailings since the mid-to-late 1980s and may yet take a decade or more to close. That is totally contrary to the expeditious-closure regime set up by federal law.

Furthermore, the Mill's groundwater discharge permit *prohibits* Energy Fuels from closing "any tailings disposal cell" until the company has ensured that the "final design, construction, and operation of the cover system at each tailings cell will comply with all requirements of an approved Reclamation Plan" and meet additional "minimum performance requirements" for protecting groundwater. Ex. 21 at EFR721–22 (closed-cell-performance requirements). Because the company's "approved" reclamation plan is being revised, Energy Fuels has not complied with this requirement, for it cannot show that whatever final cover system is ultimately adopted will comply with the requirements of whatever reclamation plan is

ultimately approved. Regardless, since the Division has not yet approved Energy Fuels' infiltration-and-contaminant-transport-modeling report, the company has not ensured that the cover system will meet the additional minimum performance requirements. And, for that reason alone, Energy Fuels has not begun closing and cannot close Cell 2. *See* Ex. 16 at 173:13–174:6.

It is not as if the company has properly closed Cell 2 despite the inadequacies in its reclamation plan. Instead, in March 2008, the company finished covering the cell with a four-foot layer of soil that it had been slowly advancing over the cell since the late 1980s. Ex. 16 at 166:13–167:6. Because the cell must stabilize by drying out before Energy Fuels places the six-foot "final radon barrier," Ex. 9 at 179:19–180:12, around 2007 or 2008, the company started pumping excess liquid out of the cell. Ex. 16 at 168:7–17; Ex. 55 at 6–7. It will probably to take about ten years, maybe more, to pump most of the liquid out of Cell 2. Ex. 16 at 33:10–34:16; Ex. 56 at GCT11759–60 (dewatering estimate referenced in deposition testimony). No doubt, some of these tasks, like dewatering and placing an initial layer of cover, *might* ultimately be part of Cell 2's final closure. But it is hard to see how starting them could initiate "final closure" when there is no final reclamation plan to check them off against. Dewatering, for example, is not even mentioned in the "approved" Plan Revision 3.2. Ex. 22 at EFR6398–424. And because the final radon barrier is still being redesigned, Ex. 9 at 128:2–129:23, 166:2–168:25, there is no guarantee that what Energy Fuels has done so far to cover Cell 2 will be up to snuff when a final plan is approved.

Because final closure of Cell 2 has not begun, the cell is still in "operation" under Subpart W. *See* 40 C.F.R. § 61.251(e). The Court therefore should enter summary judgment for the Trust on the grounds that Energy Fuels has had Cells 1, 2, 3, 4A, and 4B in operation in

violation of the two-impoundment limit since at least November 11, 2010.

D. Roberts Pond was in "operation" until at least March 2014.

At least until Energy Fuels dug up Roberts Pond, it was also in "operation" under Subpart W because Energy Fuels regularly put wastes from the uranium-extraction process in the pond. As explained above (p. 6), solutions that spilled or were intentionally diverted out of the Mill's process circuits due to problems were routinely pumped to Roberts Pond. Ex. 9 at 193:23–195:10. In April 2012, for example, a big tank in the counter-current-decantation circuit called the "claricone" fell apart, spilling a nearly 28,000-gallon mixture of water, sulfuric acid, and uranium salts. Ex. 47 at EFR21568–72. Energy Fuels pumped about 2,100 gallons of that spill into Roberts Pond. Ex. 47 at EFR21570. Solutions from spills like this soaked into sediment that built up in the Pond, contaminating it with uranium. Ex. 9 at 200:12–201:1, 204:21–206:15.

Energy Fuels will argue that Roberts Pond was just "part of the mill's process operations…" and the process solutions and other materials that went into it were not wastes. Ex. 12 at 18–19. But Energy Fuels' own account of how it managed the substances in Roberts Pond belies that argument. First off, Energy Fuels' Executive Vice President of Operations—a senior officer of the company who has been involved with the Mill since helping to design it in the 1970s—called the muck the company dug out of Roberts Pond in 2012 "dirt / tailings." Ex. 19 at EFR23930. Second, the company let that "dirt / tailings" sit on the bottom of Roberts Pond for ten years, from 2002 until 2012. Ex. 10 at EFR21069. If it was "part of the mill's process operations," why not process it for a full decade? Third, though the company claims some uncertainty about what it did with the "dirt / tailings" it dug out of Roberts Pond in 2012, Energy Fuels' contemporaneous records say the company disposed of at least some of it in

Cell 3. Ex. 48 at EFR14063. Those records even describe the "dirt / tailings" as "sands." *Id.* ("[U]tility crew is cleaning out sands in roberts pond and disposing it into Cell 3."). Energy Fuels does not dispute this fact. According to the company, it probably processed some of the "dirt / tailings" and got rid of the rest in one of the tailings disposal cells. Ex. 16 at 176:24–177:25.

Placing waste process solutions in Roberts Pond was enough to put the pond in "operation" under Subpart W. *See supra* pp. 43–44; 40 C.F.R. § 61.251(g). But regardless, the company indisputably let contaminated "dirt / tailings" build up in the pond before eventually burying at least some of them with other "sand-like tailings" in Cell 3. That means the solid substances in Roberts Pond were Subpart W "tailings," even under Energy Fuels' warped interpretation of that term. *See* 40 C.F.R. § 61.251(g). Indeed, *only* waste produced by extracting or concentrating uranium from ore may be put in the tailings cells. Ex. 21 at EFR709, 721 (authorizing disposal only of "11.e.(2) by-product material … in the tailings ponds," which is defined as waste produced from extracting uranium from ore). The Pond was accordingly in "operation" under Subpart W from at least November 11, 2010, until at least March 2014. Summary judgment thus should enter for the Trust on its second claim for relief on the grounds that Roberts Pond was in operation, along with Cells 1, 2, 3, 4A, and 4B.

CONCLUSION

The Court should reject Energy Fuels' efforts to shoehorn its noncompliant operations into Subpart W's requirements by stretching Subpart W's language beyond its limits. Applying the plain language of Subpart W to Energy Fuels' admitted conduct yields but one conclusion: Energy Fuels is liable on all the Trust's claims. Summary judgment therefore should enter for the Trust on all five of its claims against EFR USA and EFR White Mesa.

Respectfully submitted this 27th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2016, I electronically filed the foregoing **GRAND CANYON TRUST'S MOTION FOR SUMMARY JUDGMENT AGAINST ENERGY FUELS RESOURCES (USA) INC. AND EFR WHITE MESA LLC** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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

GRAND CANYON TRUST, Plaintiff, v. ENERGY FUELS INC., ENERGY FUELS HOLDINGS CORP., EFR WHITE MESA LLC, and ENERGY FUELS RESOURCES (USA) INC., Defendants.	Case No. 2:14-cv-00243-CW-BCW **GRAND CANYON TRUST'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** **ORAL ARGUMENT REQUESTED** **JUDGE CLARK WADDOUPS**

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Exhibit 78 E-mail from D. Turk, Manager Environmental Health & Safety, Energy Fuels, to D. Cooper, Tellco Environmental and attachment thereto (Apr. 2, 2014).

INTRODUCTION

A straightforward application of the law to a handful of undisputed material facts entitles the Grand Canyon Trust to summary judgment on all its claims. There is no dispute about how Energy Fuels measured radon-222 emissions in 2012 and 2013 from the waste impoundments at the White Mesa Mill. And there is no dispute about the results. The few material facts on those matters are laid out in certified reports the company made to the government. A simple comparison of those reports and the Clean Air Act's radon-emission standards—which are set out in the regulation the parties call Subpart W—reveals that the company violated the standards. Energy Fuels is thus liable on the Trust's emissions-limit and radon-sampling claims (claims 1, 3, 4 and 5). *See* Pl.'s Mot. Summ. J. at 46–53, ECF 67 ("Pl.'s Mot.").[1]

It is also undisputed that Energy Fuels is putting uranium-milling wastes in more than two impoundments at the Mill, and it is indisputable that those wastes are "tailings" under Subpart W's plain definition of that term. And there is no dispute that Energy Fuels and state regulators are still drafting a plan for closing the Mill's impoundments. It follows under federal law that no impoundment's "final closure" has begun. Taken together, because impoundments are "in operation from the day that *tailings* are first placed in [them] until the day that *final closure* begins," 40 C.F.R. § 61.251(e) (emphasis added), Energy Fuels has more than two impoundments in operation. Because Subpart W prohibits Energy Fuels from operating more than two impoundments, summary judgment should enter for the Trust on its excessive-impoundment claim (claim 2). Pl.'s Mot. 53–65.

Energy Fuels' cross motion for summary judgment, ECF 60 ("Defs.' Mot."), tangles this

[1] Pinpoint citations to the summary judgment motions are to the pages in the ECF header.

uncomplicated reasoning, raising arguments that are often vague, superficial, and slipshod on the law, if not directly contradicted by it. Waste "solutions" produced by extracting uranium, the company claims, are not "waste produced by the extraction or concentration of uranium…," otherwise known as "tailings." 40 C.F.R. § 61.251(g). The company, so its argument goes, has been closing one of the Mill's impoundments according to plan since 2008, even though its closure plan does not comply with federal law and is being overhauled. Energy Fuels now says it confessed to violating the Clean Air Act by mistake, even though it believed otherwise for six years, until just weeks after being notified of this lawsuit. Because state regulators have no problem with any of this, Energy Fuels argues, neither should the Court. If there is a problem, Energy Fuels contends that four affirmative defenses shield it from liability.

Many of these arguments are controverted by the text of either Subpart W or the Clean Air Act. The five-year statute of limitations, for example, cannot bar the Trust's excessive-impoundment claim, which was filed in 2014 and accrued in 2010 when the company kept operating more than two impoundments after it built a new one. *See* 40 C.F.R. § 61.252(b). The law and undisputed facts do not back up the remaining arguments. State regulators, for instance, cannot bar citizen suits just because they are satisfied with monthly radon monitoring.

Though Energy Fuels' statement of material facts is brimming with immaterial facts that the Trust disputes, the truly material facts are undisputed, and they entitle the Trust to summary judgment on all its claims. The Court should deny the company's motion and enter summary judgment against Energy Fuels.

RESPONSE TO STATEMENT OF ELEMENTS AND UNDISPUTED MATERIAL FACTS

I. Number of Tailings Impoundments: Claim 2

The Trust's second claim for relief asserts that Energy Fuels has been violating Subpart W's two-impoundment limit, 40 C.F.R. § 61.252(b)(1), by operating more than two impoundments at the Mill every day since November 11, 2010, when the company finished building Cell 4B.

On this claim, Energy Fuels' Statement of Elements and Undisputed Material Facts lumps together citations to four distinct sources of law—the provisions of Subpart W, the statute of limitations, laches, and administrative exhaustion—and then presents 38 paragraphs, spanning 13 pages, of "undisputed material facts" that the company claims are "necessary" to prove its defenses, *see* DUCivR 56-1(b)(2)(C) ("Under each element, a concise statement of the material facts necessary to meet that element as to which the moving party contends no genuine issue exists. Only those facts that entitle the moving party to judgment as a matter of law should be included in this section."). *See* Defs.' Mot. 13–28. The company identifies no "elements" of the defenses that are implied by the legal authorities it cites.

To give some organization to its response, the Trust responds separately below to each of Energy Fuels' four arguments—liability on the merits and its three affirmative defenses. For each argument, the Trust: (1) quotes and then responds to the legal authority cited by Energy Fuels; (2) responds to the company's statement of material facts; (3) lays out any additional material facts; and (4) sets out any additional elements. *See* DUCivR 56-1(c)(2).

A. Subpart W (Liability on the Merits)

1. Legal Authority Cited by Defendants

"The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time." Defs.' Mot. 13 (citing 40 C.F.R. § 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.'" Defs.' Mot. 13 (citing 40 C.F.R. § 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." Defs.' Mot. 13 (citing 40 C.F.R. § 61.251(f)).

The Trust's Response

In its summary judgment motion, the Trust identified three elements of its second claim for relief: (1) Element 1 – construction of an impoundment after December 15, 1989; (2) Element 2 – use of phased disposal; and (3) Element 3 – operation of more than two impoundments. *See* Pl.'s Mot. 34–39. Of the three elements the Trust identified, it appears, based on the legal authority that Energy Fuels cited, that the parties agree that Element 2 (use of phased disposal) and Element 3 (operation of more than two impoundments) are elements of the Trust's claim. *Compare* Pl.'s Mot. 34–35 *with* Defs.' Mot. 13. Below, the Trust accordingly addresses Element 1 (construction of an impoundment after December 15, 1989) under Item No. 4 (additional elements).

2. Material Facts that Energy Fuels Claims Are Undisputed

Energy Fuels' statement of material facts includes immaterial facts, legal conclusions, and sporadic argument. *See* Defs.' Mot. 14–28. It is impossible to discern which "facts" pertain to which of the company's four defenses, let alone which facts pertain to which elements of each defense. Because any other approach would require the Trust to second guess the facts the company believes it needs to prove to prevail on summary judgment, the Trust has responded to every factual assertion in the order set out by defendants in Appendix A.

Though the Trust disputes many assertions made by Energy Fuels, the Trust does not contend that there are genuine disputes over truly material facts that would preclude the Court from rejecting the company's arguments on summary judgment and entering summary judgment for the Trust.

3. Additional Material Facts

Set out below are material facts that: (1) are relevant to show that an element of Energy Fuels' defense has not been met; and (2) the company did not include in its statement of material facts. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

Element 3: Operation of more than two impoundments

Only the theory of liability that the Trust called "Alternative B" in its motion for summary judgment is addressed below because the Trust believes the company has admitted in its statement of material facts all the facts necessary to adjudicate the other alternative theories of liability (i.e., the material facts set out in the Trust's motion, Pl.'s Mot. 36–39).

Alternative B (final closure of Cell 2 has not begun)

1) 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.[2]

2) 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.[3]

3) 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.[4]

4. Additional Elements and Material Facts

Although the elements and material facts identified by the Trust in its motion for summary judgment, *see* Pl.'s Mot. 34–39, are all technically "additional legal elements not stated by [Energy Fuels]," DUCivR 56-1(c)(2)(D), the Trust does not contend that those elements "preclude summary judgment" or involve "additional material facts that create a genuine issue for trial…," *id.* Rather, the Trust takes the view that the facts set out in its motion are undisputed.

Though the Trust believes the following element is undisputed and therefore does not preclude summary judgment and does not need to be listed under DUCivR 56-1(c)(2)(D), for the sake of clarity, and because Energy Fuels omitted this element from its statement of legal authority, the Trust identifies the following additional element:

Element 1: Construction of an impoundment after December 15, 1989

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."[5]

[2] ECF 68-22 at EFR6398–424, EFR6457 (placement of cover will depend on "settlement data, piezometer data and equipment mobility considerations."); ECF 68-9 at 188:7–14.
[3] ECF 68-9 at 166:25–167:22, 128:2–129:23; ECF 68-16 at 171:13–23.
[4] ECF 68-9 at 168:1–169:25, 174:9–21; ECF 68-21 at EFR721–22 (closed-cell-performance requirements).
[5] 40 C.F.R. § 61.252(b).

MATERIAL FACTS

1) Energy Fuels finished building Cell 4B on November 11, 2010.[6]

B. STATUTE OF LIMITATIONS

1. Legal Authority Cited by Defendants

"A CAA citizen suit is subject to the 5-year statute of limitations established in 29 U.S.C. § 2462." Defs.' Mot. 13 (citing *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.'" Defs.' Mot. 13–14 (citing 29 U.S.C. § 2462).

The Trust's Response

The Trust agrees that Clean Air Act citizen suits seeking civil penalties are subject to the statute of limitations established in 28 U.S.C. § 2462, which provides: "Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

Below the Trust sets out Energy Fuels' statute-of-limitations defense as a single element and cites additional legal authority necessary to determine when the Trust's second claim for relief "first accrued." *See* 28 U.S.C. § 2462.

Element 1: The claim first accrued more than five years before suit was commenced.

ADDITIONAL 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."[7]

"The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time."[8]

[6] ECF 68-17 at 3 ("Construction of Cell 4B was completed on November 11, 2010.").
[7] 40 C.F.R. § 61.252(b).
[8] 40 C.F.R. § 61.252(b)(1).

"*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."[9]

"*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."[10]

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix A.

3. Additional Material Facts

Set out below are material facts that: (1) are relevant to show that an element of Energy Fuels' statute-of-limitations defense has not been met; and (2) the company did not include in its statement of material facts. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

Element 1: The claim first accrued more than five years before suit was commenced.

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

2) The Trust filed its second claim for relief on April 2, 2014.[12]

4. Additional Elements and Material Facts

None

C. LACHES

1. Legal Authority Cited by Defendants

"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.'" Defs.' Mot. 14 (citing *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1091 (10th Cir. 2014)).

[9] 40 C.F.R. § 61.251(e).
[10] 40 C.F.R. § 61.251(g).
[11] ECF 68-17 at 3 ("Construction of Cell 4B was completed on November 11, 2010.").
[12] Compl., ECF 2 at ¶¶ 38–42 (Apr. 2, 2014).

The Trust's Response

Laches cannot bar claims that are filed within the statutory limitations period.[13] But if Energy Fuels' defense of laches is not precluded as a matter of law, the Trust agrees that Energy Fuels would be required to prove: (1) the Trust delayed unreasonably in bringing suit, and (2) Energy Fuels has been prejudiced by the delay. Below, the Trust cites additional legal authority for these two elements.

Element 1: Unreasonable delay in bringing suit

LEGAL AUTHORITY

"An environmental action may be barred by the equitable defense of laches if (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been prejudiced by the delay."[14]

"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."[15]

"The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time."[16]

"*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."[17]

"*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."[18]

Element 2: The party asserting the defense has been prejudiced by the delay.

LEGAL AUTHORITY

"An environmental action may be barred by the equitable defense of laches if (1) there has been unreasonable delay in bringing suit, and (2) the party asserting the defense has been

[13] *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).
[14] *Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987) *overruled on other grounds by* 956 F.2d 970 (10th Cir. 1992).
[15] 40 C.F.R. § 61.252(b).
[16] 40 C.F.R. § 61.252(b)(1).
[17] 40 C.F.R. § 61.251(e).
[18] 40 C.F.R. § 61.251(g).

prejudiced by the delay."[19] "A lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense."[20]

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix A.

3. Additional Material Facts

Set out below are material facts that: (1) are relevant to show that an element of Energy Fuels' laches defense has not been met; and (2) the company did not include in its statement of material facts. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

Element 1: Unreasonable delay in bringing suit

1) Energy Fuels finished building Cell 4B on November 11, 2010.[21]

2) The Trust filed its second claim for relief on April 2, 2014.[22]

Element 2: The party asserting the defense has been prejudiced by the delay.

1) Energy Fuels has not incurred costs as a result of litigation delay after November 2010.[23]

2) Energy Fuels has generated revenue by operating the Mill while using more than two impoundments after November 2010.[24]

4. Additional Elements and Material Facts

None

[19] *Park Cty.*, 817 F.2d at 617.
[20] *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988–89 (9th Cir. 2004); *see also Deer Valley Resort Co. v. Christy Sports, LLC*, 2010 WL 1065940, *3 (D. Utah Mar. 23, 2010) (unpublished).
[21] ECF 68-17 at 3 ("Construction of Cell 4B was completed on November 11, 2010.").
[22] Compl., ECF 2 at ¶¶ 38–42 (Apr. 2, 2014).
[23] *See* ECF 61 at ¶ 32.
[24] *See* Pl.'s Ex. 57 at 2 (the Mill made over 1 million pounds of yellowcake per year, on average, between 2007 and 2014); *id.* at 8 ("The Company's source of conventional uranium recovery is the White Mesa Mill, which generates revenue through conventional processing, alternate feed material processing, and toll processing agreements…."); *id.* at 12 ("The Mill's most recent vanadium recovery occurred in 2013 when it recovered 1.5 million pounds of vanadium.").

D. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1. Legal Authority Cited by Defendants

"The legal doctrine of exhaustion of administrative remedies requires litigants to 'exhaust available administrative remedies prior to seeking judicial review.'" Defs.' Mot. 14 (citing *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 743 (10th Cir. 1982) and *Park Cty. 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.'" Defs.' Mot. 14 (citing *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); and *U.S. v. Solar Turbines, Inc.*, 732 F.Supp. 535, 539-40 (M.D. Pa. 1989)).

The Trust's Response

Neither the Clean Air Act nor any other statute requires plaintiffs to exhaust administrative remedies before filing Clean Air Act citizen suits.[25] Nonetheless, if Energy Fuels' administrative-exhaustion defense is not precluded as a matter of law, then the company must prove that the Trust inexcusably failed to exhaust prescribed administrative remedies before filing its lawsuit. Below the Trust cites additional legal authority for this one-element formulation of the company's administrative-exhaustion defense.

Element 1: Inexcusable failure to exhaust prescribed administrative remedies

LEGAL AUTHORITY

"This Court long has acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts."[26]

"[A]dministrative remedies need not be pursued if the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further."[27] Thus,"[a]n administrative remedy may be inadequate," among other circumstances, "because of some doubt as to whether the agency was empowered to grant effective relief."[28] "This circuit has held that the improbability of obtaining

[25] *See* 42 U.S.C. § 7604; *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 180 F. Supp. 2d 1062, 1086 (C.D. Cal. 2001). *Cf. Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995); *Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111, 1119 (9th Cir. 1996) ("[Though] there were procedures available … to appeal the [state order] within the state system, this action does not challenge [the order] but rather seeks to enforce the requirements of the Clean Water Act.").
[26] *McCarthy v. Madigan*, 503 U.S. 140, 147 (1992), *superseded by* 42 U.S.C. § 1997e.
[27] *Id.* at 146 (internal quotation omitted).
[28] *Id.* at 147 (internal quotation omitted).

adequate relief by pursuing administrative remedies justifies dispensing with the exhaustion requirement."[29]

"In *McKart v. United States*, 395 U.S. 185, 89 S. Ct. 1657, 23 L.Ed.2d 194 (1969), the Supreme Court articulated several rationales supporting the exhaustion doctrine, including (1) avoidance of premature interruption of the administrative process, (2) deference to bodies possessing expertise in areas outside the conventional experience of judges, (3) recognition of executive and administrative autonomy, and (4) development of a factual record. When these interests would not be promoted by application of the exhaustion doctrine, it is error to indiscriminately dismiss in its name."[30]

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix A.

3. Additional Material Facts

Set out below are material facts that are relevant to show that an element of Energy Fuels' administrative-exhaustion defense has not been met and that the company did not include in its statement of material facts. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

Element 1: Inexcusable failure to exhaust prescribed administrative remedies

1) The Utah Division of Air Quality did not notify the public of its May 3, 2010, letter approving Energy Fuels' application to construct Cell 4B.[31]

2) The Utah Division of Air Quality did not hold a public-comment period before issuing its May 3, 2010, letter approving Energy Fuels' application to construct Cell 4B.[32]

3) There are no ongoing administrative proceedings concerning the matters at issue in the Trust's excessive-impoundment claim.[33]

4) A factual record has been developed through discovery in this litigation.[34]

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[29] *Park Cty.*, 817 F.2d at 619 (internal citations omitted).
[30] *Id.* (internal citations omitted).
[31] ECF 63-16. *See also* 40 C.F.R. §§ 61.07–08.
[32] ECF 63-16. *See also* 40 C.F.R. §§ 61.07–08.
[33] *See, e.g.*, ECF 63-2 (administrative determination completed on June 26, 1989); ECF 63-16 (administrative determination completed May 3, 2010).
[34] *See, e.g.*, Exs. 68-1 to 68-56 and Exs. 63-1 to 63-46.

4. Additional Elements and Material Facts

None

II. Cell 2 Radon Emissions: Claim 1

The Trust's first claim for relief asserts that Energy Fuels violated Subpart W's numeric radon-222 emission standard, 40 C.F.R. § 61.252(a), in 2012 and 2013 by failing to keep radon-222 emissions from Cell 2 below 20 pCi/(m^2-sec).

In its Statement of Elements and Undisputed Material Facts for Claim 1, Energy Fuels cites to parts of Subpart W and mootness case law and then presents fourteen paragraphs of "undisputed material facts." *See* Defs.' Mot. 28–33. The company again identifies no elements of the defenses that are implied by the legal authorities it cites.

The Trust responds in the same manner as it did for Claim 2, by addressing separately the company's argument that it is not liable on the merits and its affirmative mootness defense.

A. Subpart W (Liability on the Merits)

1. Legal Authority Cited by Defendants

"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.'" Defs.' Mot. 28 (citing 40 C.F.R. § 61.252(a)).

"An existing tailings impoundment is subject to the 20 pCi-emissions limitation only if the impoundment is in operation." Defs.' Mot. 28 (citing 40 C.F.R. §§ 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.'" Defs.' Mot. 28 (citing 40 C.F.R. § 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.'" Defs.' Mot. 28 (citing 40 C.F.R. § 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." Defs.' Mot. 28 (citing 40 C.F.R. § 61.254(b)).

The Trust's Response

In its summary judgment motion, the Trust identified two elements of its first claim for relief: (1) Element 1: Existing uranium mill tailings pile; and (2) Element 2: Radon-222 emissions over 20 pCi/(m^2-sec). *See* Pl.'s Mot. 28–29. Based on the legal authority that Energy Fuels cited, it appears that the parties agree that both elements the Trust set out are elements of the Trust's claim.

It appears that Energy Fuels believes that there is one additional element of the Trust's first claim for relief: operation of the existing uranium mill tailings pile. And it appears that the company asserts an affirmative defense on the argument that it complied to the State of Utah's satisfaction with Subpart W's monthly radon-monitoring requirements. The Trust disagrees that operation of the existing uranium mill tailings pile is an element of its claim. The radon-flux limit in 40 C.F.R. § 61.252(a) applies to existing uranium mill tailings piles without regard to whether they are in operation.[35] The Trust also disagrees that compliance with Subpart W's monthly radon-monitoring requirements to the government's satisfaction is a defense to a citizen suit. Neither the U.S. Environmental Protection Agency (EPA) nor the state may preclude citizen suits by concluding that a source has complied with Subpart W's monthly reporting requirement.[36]

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix B.

3. Additional Material Facts

Though the Trust disputes that an impoundment must be in "operation" to violate Subpart W's numeric radon-flux standard, set out below are material facts that: (1) the company did not include in its statement of material facts; and (2) are relevant to show that this purported element of Energy Fuels' defense has not been met, *i.e.*, that Cell 2 was indeed in "operation" during 2012 and 2013. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

[35] 40 C.F.R. § 61.252(a).

[36] *See* 42 U.S.C. § 7604(b)(1)(B) (citizen suits are precluded when EPA or a state "has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order…").

Energy Fuels' "Element 3": Existing uranium mill tailings pile is in operation

1) 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.[37]

2) 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.[38]

3) 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.[39]

4. Additional Elements and Material Facts

None

B. MOOTNESS

1. Legal Authority Cited by Defendants

"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.'" Defs.' Mot. 28–29 (citing *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.'" Defs.' Mot. 29 (citing *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.'" Defs.' Mot. 29 (citing *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) and *WildEarth Guardians*, 690 F.3d at 1185).

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[37] ECF 68-22 at EFR6398–424, EFR6457 ("Placement of cover materials will be based on a schedule determined by analysis of settlement data, piezometer data and equipment mobility considerations."); ECF 68-9 at 188:7–14.
[38] ECF 68-9 at 166:25–167:22, 128:2–129:23; ECF 68-16 at 171:13–23.
[39] ECF 68-9 at 168:1–169:25, 174:9–21; ECF 68-21 at EFR721–22 (closed-cell-performance requirements).

"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.'" Defs.' Mot. 29 (citing *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) and *S. Utah Wilderness Alliance*, 110 F.3d at 727).

The Trust's Response

By citing to a discussion of the voluntary-cessation exception to mootness in *Rio Grande Silvery Minnow*, 601 F.3d at 1115, Energy Fuels appears to take the position that its voluntary conduct has mooted the Trust's first claim. The Trust agrees that the voluntary-cessation exception would apply if its claims were moot (which they are not). The Trust disagrees, however, that the legal authority Energy Fuels cited accurately states the burden of proof that the company must meet to show that: (1) the Trust's first claim is moot; and (2) the claim should be dismissed despite the voluntary-cessation exception in mootness jurisprudence. The Trust therefore contends that the correct elements of Energy Fuels' mootness defense are as follows.

Element 1: The Court can grant the Trust no effectual relief whatever.

LEGAL AUTHORITY

"A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[40]

Element 2: It is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

LEGAL AUTHORITY

"[T]he standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[41]

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix B.

[40] *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (internal quotation marks omitted); *see also S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (explaining that the standard is "essentially the same" for constitutional and prudential mootness).
[41] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000); *see also Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 222 (2000).

3. Additional Material Facts

Set out below are material facts that are relevant to show that: (1) an element of Energy Fuels' mootness defense has not been met; and (2) the company did not include in its statement of material facts for claims three, four, and five. *See* DUCivR 56-1(c)(2)(C). The Trust maintains that the material facts listed below are undisputed.

Element 1: The Court can grant the Trust no effectual relief whatever.

1) 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.[42]

2) Neither EPA nor the State of Utah have issued an injunctive order or assessed fines or other penalties against Energy Fuels for violating Subpart W's numeric radon-flux limit in 2012 and 2013.[43]

Element 2: It is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

1) Cell 2 will continue to emit radon for hundreds of thousands of years.[44]

2) During 2012, Energy Fuels took no action to try to reduce radon emissions from Cell 2.[45]

3) Neither EPA nor the State of Utah have issued an injunctive order or assessed fines or other penalties against Energy Fuels for violating Subpart W's numeric radon-flux limit in 2012 and 2013.[46]

4. Additional Elements and Material Facts

None

III. Cell 3 Radon Emissions: Claims 3, 4 and 5

Energy Fuels combines the Trust's third, fourth, and fifth claims into a single section in its Statement of Elements and Undisputed Material Facts. Defs.' Mot. 33–38.

[42] ECF 68-39 ¶¶ 1–12; ECF 68-40 ¶¶ 1–6; ECF 68-41 ¶¶ 1–9; ECF 68-42 ¶¶ 1, 3–9.
[43] Defs.' Answers ¶ 32 (Oct. 31, 2014), ECF 33, 34.
[44] ECF 68-50 at GCT517.
[45] Pl.'s Ex. 58 at 66:20–23.
[46] Defs.' Answers ¶ 32 (Oct. 31, 2014), ECF 33, 34.

The Trust's third claim asserts that Energy Fuels violated the sampling-schedule requirements in 40 C.F.R. § 61.253 in 2013 by revising its previously submitted radon-flux sampling schedule after the first measurement period.

The Trust's fourth claim asserts that, in 2013, Energy Fuels violated the sampling-methodology requirements in 40 C.F.R. § 61.253 and Method 115 by failing to take radon-flux measurements from both Cell 3's cover region and beach region during all measurement events and thus calculating the average annual radon flux by combining the June 2013 beach results with the September and December 2013 cover results.

The Trust's fifth claim asserts that Energy Fuels violated the numeric radon-222 emission standard in 40 C.F.R. § 61.252(a) in 2013 by failing to keep radon-222 emissions from Cell 3 below 20 pCi/(m^2-sec).

In its Statement of Elements and Undisputed Material Facts, the company again cites to provisions of Subpart W and mootness case law, and then presents eleven paragraphs of "undisputed material facts." Defs.' Mot. 28–33. The Trust, again, responds by addressing Subpart W and mootness separately, and by responding to Energy Fuels' statement of facts in Appendix C.

A. SUBPART W (LIABILITY ON THE MERITS)

1. Legal Authority Cited by Defendants

"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.'" Defs.' Mot. 34 (citing 40 C.F.R. § 61.252(a)).

"Compliance with the 20 pCi-limit is determined annually through radon flux monitoring." *Id.* (citing 40 C.F.R. § 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.* (citing 40 C.F.R. § 61.253).

"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.* (citing 40 C.F.R. § 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.* (citing 40 C.F.R. 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.* (citing 40 C.F.R. Part 61, Appendix B, § 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.* (citing 40 C.F.R. Part 61, Appendix B, § 2.1.2).

"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.* (citing 40 C.F.R. Part 61, Appendix B, § 2.1.1).

"The selection of representative conditions is subject to DAQ review and approval." *Id.* (citing 40 C.F.R. Part 61, Appendix B, § 2.1.1).

The Trust's Response

The Trust's interpretation of the elements of its third, fourth, and fifth claims for relief is set out in the Trust's motion for summary judgment. *See* Pl.'s Mot. 29–34.

Third Claim for Relief. Based on the legal authority that Energy Fuels cited, it appears the parties agree that both elements the Trust set out (Element 1: Existing uranium mill tailings pile, and Element 2: Revision of a previously submitted radon-flux sampling schedule after the first measurement period) are elements of the Trust's claim. *Compare* Pl.'s Mot. 31 *with* Defs.' Mot. 34 ("Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) of radon-222. Compliance with the 20 pCi-limit is determined annually through radon flux monitoring. 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. 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.").

Fourth Claim for Relief. Based on the legal authority that Energy Fuels cited, it appears the parties agree that both elements the Trust set out (Element 1: Existing uranium mill tailings pile, and Element 2: Failure to take radon-flux measurements from each region on the pile during each sampling event) are elements of the Trust's claim. *Compare* Pl.'s Mot. 32–33 *with* Defs.' Mot. 34 ("Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) of radon-222. … 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. 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."). However, the Trust cites the following additional legal authority for the second element.

Element 2: Failure to take radon-flux measurements from each region on the pile during each sampling event

ADDITIONAL LEGAL AUTHORITY

"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."[47] "Radon flux measurements shall be made within each region on the pile, except for those areas covered with water."[48]

Fifth Claim for Relief. Based on the legal authority that Energy Fuels cited, it appears the parties agree that both elements the Trust set out (Element 1: Existing uranium mill tailings pile, and Element 2: Radon-222 emissions over 20 pCi/(m^2-sec)) are elements of the Trust's claim. *Compare* Pl.'s Mot. 29–30 *with* Defs.' Mot. 34 ("Radon-222 emissions to the ambient air from an existing uranium mill tailings pile shall not exceed 20 pCi/(m2-sec) of radon-222.").

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix C.

3. Additional Material Facts

None (*i.e.*, none that are relevant to show that an element of Energy Fuels' defense has not been met and that the company did not include in its statement of material facts. DUCivR 56-1(c)(2)(C)).

4. Additional Elements and Material Facts

None

B. MOOTNESS

1. Legal Authority Cited by Defendants

"The legal doctrines of constitutional and prudential mootness were previously provided in the Statement of Elements for Plaintiff's First Claim of Relief." Defs.' Mot. 34 (citing Defs.' Mot. 28–29).

[47] 40 C.F.R. Pt. 61, Appx. B ("Method 115") § 2.1.2.
[48] Method 115 § 2.1.3.

The Trust's Response

The Trust's statement of the elements that Energy Fuels must prove to prevail on its mootness defense are set out above (pp. 14–15).

2. Material Facts that Energy Fuels Claims Are Undisputed

See Appendix C.

3. Additional Material Facts

Element 1: The Court can grant the Trust no effectual relief whatever.

1) 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.[49]

2) Neither EPA nor the State of Utah have issued an injunctive order or assessed fines or other penalties against Energy Fuels for violating Subpart W's numeric radon-flux limit, sampling-schedule requirements, or measurement methodology in 2013.[50]

Element 2: It is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

1) Cell 3 will continue to emit radon for hundreds of thousands of years.[51]

2) Energy Fuels has not promised not to alter its schedules for sampling radon flux from the Mill's impoundments in the future.[52]

3) Energy Fuels has not promised to sample all regions of the Mill's impoundments during every radon-flux sampling event in the future.[53]

4) Neither EPA nor the State of Utah have issued an injunctive order or assessed fines or other penalties against Energy Fuels for violating Subpart W's numeric radon-flux limit, sampling-schedule requirements, or measurement methodology in 2013.[54]

[49] ECF 68-39 ¶¶ 1–12; ECF 68-40 ¶¶ 1–6; ECF 68-41 ¶¶ 1–9; ECF 68-42 ¶¶ 1, 3–9.
[50] Defs.' Answers ¶ 32 (Oct. 31, 2014), ECF 33, 34.
[51] ECF 68-50 at GCT517.
[52] Defs.' Mot. 35–38 (making no assertion that Energy Fuels will not alter its radon-flux sampling schedules in the future).
[53] Defs.' Mot. 35–38 (making no assertion that Energy Fuels will sample all impoundment regions during every radon-flux sampling event in the future).

5) On May 4, 2012, Energy Fuels sent a schedule for the 2012 radon-flux measurements for Cells 2 and 3 to the Utah Air Quality Division and EPA stating that the company planned to perform those measurements between June 11 and June 15, 2012.[55]

6) On August 3, 2012, Energy Fuels sent the Air Quality Division and EPA a radon-flux measurement schedule for Cell 2 stating that the company would perform a second measurement event between September 8 and 9, 2012, and a third measurement event in late November or early December.[56]

4. Additional Elements and Material Facts

None

[54] Defs.' Answers ¶ 32 (Oct. 31, 2014), ECF 33, 34.
[55] ECF 68-23 at EFR35271–72.
[56] ECF 68-25 at EFR35273–75.

ARGUMENT

I. Claim 2: Energy Fuels has been violating the two-impoundment limit since 2010.

Energy Fuels began violating Subpart W's two-impoundment limit when the company built Cell 4B in 2010 while operating more than two other impoundments. *See* Pl.'s Mot. 53–65. That limit is set out in Subpart W's phased-disposal work-practice standard. *See* 40 C.F.R. § 61.252(b)(1) ("The owner or operator shall have no more than two impoundments, including existing impoundments, in operation at any one time."). And the work-practice standard kicks in when mill operators build new impoundments after December 15, 1989:

> 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 … [or] (2) Continuous disposal….

40 C.F.R. § 61.252(b) (emphasis added).

Cells 1, 2, 3, 4A and Roberts Pond were all built before December 15, 1989. Defs.' Mot. 17–20, 26. So, Energy Fuels was first required to comply with the two-impoundment cap once Cell 4B was built, in November 2010. ECF 68-17 at 3. At that point, the company began violating the cap because more than two impoundments were already in "operation." *See* 40 C.F.R. § 61.251(e) ("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."); *see also* Pl.'s Mot. 53–65. Cell 2 was in "operation" because its "final closure" had not begun, and Cells 1, 3, 4A, and Roberts Pond were in "operation" because they were being used for "the continued placement of new tailings." *See* Pl.'s Mot. 53–65.

Energy Fuels argues that it is entitled to summary judgment on the Trust's excessive-

impoundment claim because the statute of limitations, laches, and administrative exhaustion bar the claim and the company is not liable on the merits. *See* Defs.' Mot. 38–52. Each of these defenses either contorts or partially ignores the plain language of Subpart W, its history, or its application to the Mill, and they are unsupported in the law to boot.

A. The statute of limitations does not bar the Trust's claim.

The Trust filed its excessive-impoundment claim within the statutory limitations period. Claims for civil penalties, like the Trust's claim, must be filed within five years after they first accrue, *see* 28 U.S.C. § 2462, that is, when the plaintiff has a "complete and present cause of action." *Sierra Club v. Okla. Gas & Elec. Co.*, 816 F.3d 666, 673 (10th Cir. 2016).

The Trust first had a complete and present cause of action when Energy Fuels built Cell 4B while operating more than two other impoundments. *See supra* p. 22. According to Energy Fuels, "[c]onstruction of Cell 4B was completed on November 11, 2010." ECF 68-17 at 3. The Trust filed suit less than five years later, on April 2, 2014. *See* ECF 2. The statute of limitations thus does not bar the Trust's claim. *See* 28 U.S.C. § 2462.

Energy Fuels argues that the Trust's claim first accrued on December 15, 1989, because the company was already operating Cells 1, 2, 3, 4A and Roberts Pond when the 1989 version of Subpart W took effect. Defs.' Mot. 47. But this argument totally ignores the condition that triggers the two-impoundment limit: "After December 15, 1989, *no new tailings impoundments can be built*…." 40 C.F.R. § 61.252(b) (emphasis added). Because Cells 1, 2, 3, 4A and Roberts Pond were all built before December 15, 1989, Defs.' Mot. 17–20, 26, only after Cell 4B was built in November 2010 did the Trust have "a complete and present cause of action," *Okla. Gas*,

816 F.3d at 673. That is when the Trust's claim "first accrued." *Id.*[57]

Regardless, Energy Fuels is wrong to claim that the holding in *Oklahoma Gas* bars the Trust's excessive-impoundment claim. Defs.' Mot. 46–48. It is not the act of "constructing," 816 F.3d at 672, but the act of "operating" more than two impoundments after building a new one that is unlawful, 40 C.F.R § 61.252(b)(1). And that act is not simply the "inertial consequence[] of some pre-limitations action." 816 F.3d at 672. It is a new affirmative act each time more tailings are put in an impoundment, and that yields a new Subpart W violation, which begins a new limitations-period clock—it is a "repeated violation" in the *Oklahoma Gas* taxonomy. *See id.* at 671 and n.5; *see also United States v. Marine Shale Processors*, 81 F.3d 1329, 1357 (5th Cir. 1996) (daily civil penalties for the five-year limitations period were recoverable for unlawfully operating minor sources even though unlawful operation began outside the period).[58]

B. Energy Fuels' laches defense is legally barred and meritless anyway.

Though a recent Supreme Court case clarifies that compliance with the statute of limitations precludes the defense of laches, and though laches is to be invoked sparingly in environmental cases, Energy Fuels asks the Court to invoke it and toss out the Trust's excessive-impoundment claim on the erroneous assertion that the Trust "wait[ed] more than two decades"

[57] This would be true even if Energy Fuels had begun violating the two-impoundment cap more than five years before the Trust sued. By undertaking "affirmative conduct within the limitations period" to build and operate Cell 4B, *Okla. Gas*, 816 F.3d at 672, Energy Fuels set off a new violation within the limitations period, even if the company had already been violating the cap.

[58] *See also Nat'l Parks Conserv. Ass'n, Inc. v. Tenn. Valley Auth.*, 480 F.3d 410, 418–19 (6th Cir. 2007) (violations recurred each day of operation when applicable requirements were ongoing); *Nat'l Parks & Conserv. Ass'n, Inc. v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326 (11th Cir. 2007) (timely operating-violation claims are not barred even if construction-violation claims are barred); *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008, 1014 (8th Cir. 2010) (same); *United States v. EME Homer City Gen., L.P.*, 727 F.3d 274, 284 (3d Cir. 2013) (same); *United States v. Midwest Gen., LLC*, 720 F.3d 644, 647 (7th Cir. 2013) (same).

to sue the company. *See* Defs.' Mot. 49. This defense should be dismissed out of hand.

1. Laches is not an available defense.

The Supreme Court's holding in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014), rules out Energy Fuels' laches defense. In *Petrella*, a federal Copyright Act case, the Court held that a laches defense cannot preclude adjudication of claims for legal relief that are filed within the statutory limitations period, and only in "extraordinary circumstances" may laches be invoked before the remedial stage to limit equitable relief on such claims. *Id.* at 1967.

Petrella's holding applies here. The relevant statutes of limitations are materially the same. *Compare* 28 U.S.C. § 2462 *with* 17 U.S.C. § 507(b). And Clean Air Act defendants, like copyright infringers, are exposed to fines only for the five-year statutory limitations period, *see Marine Shale*, 81 F.3d at 1357. Thus, in 28 U.S.C. § 2462, Congress adopted a window for civil penalties that already accounts for the possibility of delay and found that five years is not unreasonable delay. *See Petrella*, 134 S. Ct. at 1969–70, 1973.

Because the Trust filed its excessive-impoundment claim within the statutory limitations period (*see supra* pp. 23–24), laches cannot bar the Trust's claim for civil penalties, which are a form of legal relief. *See Petrella*, 134 S. Ct. at 1974; *Okla. Gas*, 816 F.3d at 675 (noting that claim for civil penalties is a legal claim). And there are no "extraordinary circumstances" that could justify a restriction on equitable relief at this stage of the case, *see Petrella*, 134 S. Ct. at 1967, for Energy Fuels has not been put at any disadvantage by the lapse of time after the Trust's claim accrued in November 2010. *See infra* pp 26–27.

2. The company has not met its burden of establishing laches.

Even if the defense is not legally barred, to prove laches, Energy Fuels must show both

(1) an "unreasonable delay in bringing suit," and (2) that it has been "prejudiced by the delay." *Park Cty. Res. Council, Inc. v. U.S. Dep't of Agric.*, 817 F.2d 609, 617 (10th Cir. 1987) *overruled on other grounds by* 956 F.2d 970 (10th Cir. 1992). In environmental cases, laches is disfavored because "ordinarily the plaintiff will not be the only victim of alleged environmental damage." *Id*. Three critical defects sink the company's laches defense under these standards.

First, the company's argument that the Trust waited more than two decades to sue, Defs.' Mot. 49, erroneously assumes the Trust had a claim to assert in December 1989. But again, the Trust's claim first accrued when the company built Cell 4B in November 2010. *See supra* p. 23. Energy Fuels does not argue that the Trust delayed unreasonably in filing suit after that date.

Second, Energy Fuels' prejudice argument wholly fails to account for the company's windfall profits from operating more than two impoundments during any period of "delay." *See Grand Canyon Trust v. Tucson Elec.*, 391 F.3d 979, 988 (9th Cir. 2004) ("A lengthy delay, even if unexcused, that does not result in prejudice does not support a laches defense."). The Mill could not have run without operating all the cells after 2010. ECF 68-9 at 85:21–86:17, 90:11–92:14. And running the Mill generates revenue. *See* Pl.'s Ex. 57 at 2, 8 (the Mill made over one million pounds of yellowcake per year, on average, from 2007 to 2014). Any "delay" was thus a boon for Energy Fuels rather than a burden, for it let the company cash in on a bigger waste system than the Clean Air Act allows. *Tucson Elec.*, 391 F.3d at 988–89 (holding that citizen-suit defendant benefitted by recovering capital investments by operating during the period of delay); *Deer Valley Resort Co. v. Christy Sports, LLC*, 2010 WL 1065940, *3 (D. Utah March 23, 2010) (unpublished) (defendant "realized a net gain from the delay" by running a business unlawfully).

Third, every amount on the company's "delay-induced" bill of costs, Defs.' Mot. 49, was

incurred before the Trust's claim accrued in 2010. The money for "the initial construction and operation of the Mill facility…," Defs.' Mot. 49, was spent almost a decade before the U.S. Environmental Protection Agency (EPA) even issued Subpart W. The "continued use of Cell 1," *id.*, is not a cost; operating it has benefitted Energy Fuels. *See* ECF 68-9 at 85:21–86:17, 90:11–92:14. The cost to reline Cell 4A was incurred in 2008 or so, *see* ECF 68-9 at 63:18–64:3, before the Trust had a claim to sue on (*see supra* p. 23). So too for the cost to build Cell 4B, since that was the very act that gave rise to the Trust's claim. And the company had been "developing the Rec Plan and associated bonding," Defs.' Mot. 49, since at least 2000. ECF 68-9 at 73:18–74:1. Because Energy Fuels is *required* to plan for the Mill's cleanup, it would incur planning costs regardless of when or whether the Trust sued the company. *See* 10 C.F.R. § 40.31(h); 10 C.F.R. Pt. 40, Appx. A, Criteria 6, 6A (reclamation-plan requirements) and 9 (surety requirements).

If *Petrella* does not bar the defense outright, the company has not carried its burden of showing that this is one of the "rare cases" where laches may shorten the statutory limitations period, *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1208 (10th Cir. 2001), especially since it is an environmental case, *Park Cty.*, 817 F.2d at 617.

C. Dismissal for lack of administrative exhaustion would be unjustified.

Energy Fuels argues that the Court should seize on administrative-exhaustion principles to grant the company summary judgment on the Trust's excessive-impoundment claim. Defs.' Mot. 49–52. This argument asks for an illogical, unprecedented, and inequitable ruling.

As a "general rule," parties must "exhaust *prescribed* administrative remedies before seeking relief from the federal courts." *See McCarthy v. Madigan*, 503 U.S. 140, 144–45 (1992) (emphasis added). Sometimes exhaustion may be required as a matter of judicial discretion, but

that discretion must be exercised with "appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in a federal court…." *Id.* Because courts have a "virtually unflagging obligation to exercise the jurisdiction given them," *id.* at 146, there are many circumstances in which "it is error to indiscriminately dismiss" in the name of the exhaustion doctrine, *Park Cty.*, 817 F.2d at 619; *McCarthy*, 503 U.S. at 146–49.

Here, dismissing the Trust's excessive-impoundment claim for lack of exhaustion would contravene congressional intent and the interests underlying the exhaustion doctrine.

First, the Clean Air Act imposes no administrative-exhaustion prerequisite on citizen suits. *See* 42 U.S.C. § 7604. And courts have held under the Act and other environmental laws that an exhaustion mandate is precluded by 60-day notice requirements, *see, e.g.*, *Cmtys. for a Better Env't v. Cenco Ref. Co.*, 180 F. Supp. 2d 1062, 1086 (C.D. Cal. 2001), *cf. Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1578 (N.D. Ga. 1995), or is inapplicable to citizen-suit claims seeking to enforce environmental laws directly against those who violate them, *Citizens for a Better Env't v. Union Oil Co.*, 83 F.3d 1111, 1119 (9th Cir. 1996) ("[Though] there were procedures available … to appeal the [state order] within the state system, this action does not challenge [the order] but rather seeks to enforce the requirements of the Clean Water Act.").

Second, there were no available, let alone "prescribed," administrative remedies that the Trust could have exhausted. The June 1989 state approval order authorizing the company to build Cells 4A and 4B, Defs.' Mot. 50, was issued seven months *before* the 1989 version of Subpart W was adopted. In June 1989, there was no legal violation of the December 1989 rule for the Trust to appeal, and the company's claim that the June 1989 order addressed "what facilities were impoundments covered by section 61.252(b)(1)…," Defs.' Mot. 50, is nonsense.

The Trust likewise could not have pursued its claim as an administrative appeal of the Air Quality Division's May 3, 2010, letter approving the company's application to build Cell 4B. *See* Defs.' Mot. 50. There is no evidence that anyone but Energy Fuels even knew about that letter, let alone had a chance to comment on it. *See* ECF 63-16.[59] And the Division made no findings in the letter that some impoundments were not subject to Subpart W's two-impoundment cap; the letter says nothing about "final closure" or whether "evaporation ponds" hold "tailings." *Id.* The Trust therefore had neither a chance nor reason to appeal the letter.[60] *Cf. Dine Citizens Against Ruining Our Env't v. Klein*, 676 F. Supp. 2d 1198, 1210–11 (D. Colo. 2009) (issue-exhaustion requirements waived when "the plaintiff was not properly notified of the administrative remedies available [or] provided a meaningful opportunity to participate in the administrative process").

Regardless, the pre-construction approval the Air Quality Division gave in its May 3, 2010, letter does not "[r]elieve an owner or operator of legal responsibility for compliance with any applicable provisions of [40 C.F.R. Part 61] … or [p]revent the [EPA] from implementing or enforcing this part or taking any other action under the Act." 40 C.F.R. § 61.08(e); Utah Admin. Code R307-214-1. *See Tenn. Valley*, 480 F.3d at 418–19 (citing comparable provision to hold that defendant "may not rely on any preconstruction approval to justify its post-construction failure to comply with [an ongoing operating requirement]"). In contrast, a "Title V" operating permit—which Energy Fuels does not have, *see* ECF 68-20 at EFR683—could insulate the company from liability in a citizen suit. *See* 42 U.S.C. §7661c(f).

Third, imposing a discretionary exhaustion requirement would not serve the doctrine's

[59] The regulations under which the Division issued the letter do not have any public notice or comment requirements. *See* 40 C.F.R. §§ 61.07–08.

[60] The company also does not explain how the Trust could have appealed the letter under the state-law provisions it cites. Defs.' Mot. 50.

rationales. Because the Trust is not challenging an agency's decision, there is no ongoing proceeding for this lawsuit to interfere with. *See McKart v. United States*, 395 U.S. 185, 193–94 (1969). Discovery has produced an extensive factual record. *Id*. The questions before the Court are matters of regulatory interpretation that do not require the special expertise or discretion of Utah regulators to answer. *Id.* at 197–99.[61] And an administrative appeal could not have yielded the relief the Trust seeks—civil penalties and an injunction prohibiting the company from operating more than two impoundments—which is another reason to waive exhaustion requirements. *See Park Cty.*, 817 F.2d at 619. If the Trust had sued the Air Quality Division under the Utah Administrative Procedure Act to challenge the Division's decision to let Energy Fuels build Cell 4B, the remedy would have been to vacate and remand that decision, not to issue an injunction against someone other than the government. *See Intermountain Healthcare v. OtpumHealth*, 363 P.3d 539, 543 and n.4 (Utah Ct. App. 2015) (vacating and remanding agency decision and declining to order a third party to provide the relief plaintiff sought).

Energy Fuels cites not one case in which a court has dismissed a citizen suit for failure to exhaust administrative remedies. *See* Defs.' Mot. 49–52. The "collateral attack" cases it points to, *id.* at 51, were not about exhaustion. They held, as a matter of statutory interpretation, that the Clean Air Act's citizen-suit and other enforcement provisions did not authorize the claims asserted and thus described them as improper collateral attacks on previously issued permits. *See, e.g.*, *Nucor Steel-Ark. v. Big River Steel*, 93 F. Supp. 3d 983, 988–990 (E.D. Ark. 2015).[62]

[61] Regardless, the Air Quality Division has stated its view on the relevant questions through declarations that the Court may consider. *See* ECF 64 ¶¶ 12, 14; ECF 65 ¶ 6.

[62] The same goes for the other two cases Energy Fuels cites. In *United States v. AM Gen. Corp.*, 34 F.3d 472, 474 (7th Cir. 1994), the court held that section 113(b)(5) of the Act allowed EPA to sue those who modify air-pollution sources *after* a finding of violation "has been made" by EPA

As the Eighth Circuit said of the district court's collateral-attack statements in *Nucor Steel*:

> [T]he court merely noted that the [Clean Air Act] does not authorize a collateral attack on a facially valid state permit—stated another way, § 7604(a)(3) does not authorize preconstruction citizen suits against parties that either have obtained a permit or are in the process of doing so.

Nucor Steel-Ark. v. Big River Steel, LLC, --- F.3d ---, 2016 WL 3184491, *5 (June 8, 2016).[63]

In contrast, the Trust's second claim is explicitly authorized by the Act's citizen-suit provision. *See* Pl.'s Mot. 40–41; 42 U.S.C. §§ 7604(a)(1), 7604(f)(1), 7604(f)(3). The claim is thus not an impermissible collateral attack on Energy Fuels' pre-construction approvals. *See Wildearth Guardians v. Lamar Utilities Bd.*, 2010 WL 3239242, *4 (D. Colo. 2010) (unpublished) (Clean Air Act citizen suit was not an impermissible collateral attack on a state construction permit when plaintiffs sought to enforce a separate requirement of the Act).

D. The company has not complied with Subpart W's two-impoundment cap.

Energy Fuels claims it has complied with Subpart W's two-impoundment cap because: (a) only "solid" waste pumped into Cells 2, 3, and 4A are Subpart W "tailings" (so Cells 1, 4B, and Roberts Pond have not been in "operation"); and (b) "final closure" of Cell 2 began before Cell 4A was put into "operation." *See* Defs.' Mot. 38–46. Throughout, the company argues that what it calls "Utah's interpretation" of Subpart W is owed deference. *Id.* These arguments raise three main questions. Are "tailings" just "solid" wastes? Is Cell 2 in "final closure"? And is

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but not those who modify sources *before* a finding of violation. And the last case reasoned in *dicta* that "a citizen suit may be brought against a polluter violating a standard or limitation [but not] to challenge an emission standard or limitation…," meaning that defendants may be sued for operating violations but not to attack the legality of an operating limit. *Nat'l Parks Conserv. Assoc. v. Tenn. Valley Auth.*, 175 F. Supp. 2d 1071, 1078–79 (E.D. Tenn. 2001).

[63] The same is true of the district court's holding under 42 U.S.C. § 7604(a)(1), though it was affirmed on other grounds. *See* 2016 WL 3184491 at *4. That holding interpreted the phrase "emission standard or limitation" to bar the claims asserted. *Nucor Steel*, 93 F. Supp. 3d at 988.

deference due to the State? To all three questions, the answer is no.

1. Subpart W's unambiguous definition of "tailings" should control.

"Tailings" are defined as "the waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content." 40 C.F.R § 61.251(g). By its plain terms, this definition includes *all* wastes produced by milling uranium—whether mostly solid or mostly liquid. Indeed, the company admits that both the "solid" wastes it has pumped into Cells 3 and 4A since 2010 and the "process solutions" it has pumped into Cells 1 and Cell 4B since 2010 are wastes produced by milling uranium. *See* Pl.'s Mot. 53–55; ECF 68-12 at 8; ECF 68-45 at 4; ECF 68-46 at 4. Because impoundments are in "operation" under Subpart W from the moment "tailings" are first placed in them, 40 C.F.R. § 61.251(e), Cells 1, 3, 4A, and 4B therefore have all been in "operation" simultaneously since Cell 4B was built, in November 2010. And because the company put waste "process solutions" in Roberts Pond too, it was also in operation until at least March 2014. *See* Pl.'s Mot. 65.

Energy Fuels makes no claim that Subpart W's definition of "tailings" can be read to reach the conclusion that "process solutions" are not "tailings." Defs.' Mot. 39. Rather, it uses a medley of *other* sources to defend the distinction Utah regulators have made between "tailings solids" and "process solutions." *Id.* at 40–41. These arguments do not hold water.

First, the company says the State's solids-versus-solutions distinction was "instructed by the way EPA has characterized tailings in the rulemakings associated with Subpart W." *Id.* at 40. But for that claim, Energy Fuels cites just one sentence in just one EPA rulemaking—a 1994 revision of Subpart T, not Subpart W, of 40 C.F.R. Part 61—in which the preamble described tailings as "sand-like." 59 Fed. Reg. 36,280, 36,280 (July 15, 1994). Energy Fuels implies that

EPA must have intended the word "tailings" in Subpart W to mean "sand-like wastes" too. But EPA had a perfectly good reason to describe "tailings" differently in the 1994 rulemaking.

There, EPA revised Subpart T so that it would no longer impose deadlines for closing tailings impoundments at operating mills but would continue to impose closure deadlines at nineteen specifically identified non-operating mills. *See id.* at 36,280, 36,289–90. At that point, Subpart T's purpose was to ensure that the solid tailings at these defunct sites were properly reclaimed. *Id.* So, EPA narrowed Subpart T's definition of "tailings" to match that rule's newly narrowed scope. *Id.* at 36,301 (defining tailings as "the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted," 42 U.S.C. § 7911(8)). *See also id.* at 36,296 (explaining that the definition of "tailings" was changed so that the rule would apply only to non-operating sites). Given the rulemaking's purpose, it is no wonder that EPA described "tailings" as "sand-like" in the rule's preamble. It does not follow that EPA also intended the word "tailings" in Subpart W to mean only "sand-like" tailings.[64]

Equally infirm is the company's contention that "EPA confirmed"—in a single sentence plucked from a 1991 compliance order—"that the Mill had two operating impoundments." Defs.' Mot. 41. EPA issued that order to enforce not Subpart W's two-impoundment cap, but its numeric radon limit after Cell 2's radon flux exceeded 20 pCi/(m^2-sec) in 1990. ECF 63-5 at 109 (DEQ240). At the time, the Mill was not yet subject to the two-impoundment limit because the

[64] The distinction between "process solutions" and "tailings" in the December 21, 1989, amendment to the company's source material license, Defs.' Mot. 40, also had nothing to do with Subpart W's definition of "tailings." The amendment allowed Energy Fuels to discharge "byproduct material" into Cell 4A. ECF 63-3 at EFR380, 389–90 (¶¶ 10, 51). And the definition of "byproduct material" under the Atomic Energy Act distinguishes between "tailings" and other uranium-milling wastes, unlike Subpart W's definition of "tailings." *See* 42 U.S.C. § 2014(e)(2) (Byproduct material means "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.").

company had not yet built a new impoundment after 1989. *See supra* p. 22. Thus, whether Cells 1, 4A, and Roberts Pond were in "operation" for purposes of the cap was not at issue.

The company's last two arguments about Subpart W's "overall language," Defs.' Mot. 41, also ring hollow. Though it claims otherwise in its brief, Defs.' Mot. 41, Energy Fuels has admitted that evaporation ponds can be "filled, … dried and covered." *See* Pl.'s Ex. 59 at EFR43774 (arguing that proposed regulation "may force an operator to shut down an evaporation pond much earlier, to the extent the pond fills with sediment…"); *see also* ECF 68-16 at 146:19–:23; ECF 68-9 at 159:22–161:14 (the reclamation plan for Cell 1 includes *covering* ten acres of the cell). And the claim that "Subpart W does not define or expressly apply to evaporation ponds…," Defs.' Mot. 41, ignores the plain definition of "tailings," through which EPA did in fact expressly apply Subpart W to evaporation ponds that hold waste solutions. *See* 40 C.F.R. § 61.251(g). Indeed, Subpart W's rulemaking history confirms that EPA intended for the two-impoundment limit to apply to "evaporation ponds." In an environmental impact statement supporting the rule, EPA explained that "[t]he licensed uranium mill tailings source category comprises the tailings impoundments and evaporation ponds created by conventional acid or alkaline leach processes at [licensed] uranium mills…." Pl.'s Ex. 60 at 4-1. *See also* Pl.'s Mot. 55–56 (EPA's statements in 1986 Subpart W rulemaking that "tailings" include liquid).

The plain meaning of the word "tailings" should control.

2. "Final closure" of Cell 2 has not begun.

"Final closure" of Cell 2 did not, as Energy Fuels contends, begin in or before 2008. Defs.' Mot. 41–43. Impoundments must be closed to "meet all applicable Federal standards," 40 C.F.R. § 61.251(f), and federal standards require mill operators to carry out an approved,

deadline-driven reclamation plan for building a "final radon barrier." *See* 10 C.F.R. Pt. 40, Appx. A; 40 C.F.R. § 192.32(a)(3) & (b); Utah Admin. Code R313-24-4. In 2008, as now, the company did not have a deadline-driven reclamation plan, though the law requires one. Pl.'s Mot. 60–64. Then, as now, the design for Cell 2's final radon barrier was incomplete, though a cell cannot be reclaimed without one. *Id.* Then, as now, Energy Fuels had not complied with groundwater-protection requirements in the Mill's groundwater-discharge permit, though the company *must* comply before closing Cell 2. *Id.* Cell 2 is thus not yet in "final closure" under Subpart W. *Id.* And because "operation" under Subpart W continues until "the day that final closure begins," 40 C.F.R. § 61.251(e), Cell 2 remains in operation.

It is unclear what triggers "final closure" in the company's view—whether it is enough to stop putting waste in an impoundment, or whether it takes something more to "transition[] into the closure process." Defs.' Mot. 42–43.[65] But the parties agree that the Nuclear Regulatory Commission's regulations, 10 C.F.R. Part 40, Appendix A, specify how "final closure" is to be accomplished. *Id.*, Pl.'s Mot. 60–61. And the company cannot begin to comply with Appendix A without a final reclamation plan with a final-radon-barrier design and deadlines for closing Cell 2. *See* Pl.'s Mot. 60–62. The claim that "closure work"—adding platform fill, dewatering, and monitoring settlement—"is being done under the provisions of the Rec Plan … that apply to cells in closure," Defs.' Mot. 43, is nothing more than the company's say-so. Even if those tasks, in some form, ultimately may contribute to reclaiming Cell 2, they are not being done under a reclamation plan that complies with Appendix A because the company has no such plan. *See*

[65] Because the Trust agrees that "operation" ceases "the day that final closure begins," 40 C.F.R. § 61.251(e), Subpart W does not create the multi-year, forced-shutdown problem that Energy Fuels imagines, Defs.' Mot. 43.

Pl.'s Mot. 62–63; ECF 63-38 at UTAH767 (Utah Radiation Division July 2014 letter stating that Energy Fuels "will be required to implement whichever version of the closure plan is approved at the time of *final closure*") (emphasis added).

That is no less true simply because Utah regulators, according to Energy Fuels, have "explained" that Cell 2 stopped operating in 2008. Defs.' Mot. 43. If by making that assertion and then launching into a general argument that the Air Quality Division is owed deference, Defs.' Mot. 43, Energy Fuels is trying to say that the Court should defer to this "explanation," the company is mistaken. Utah regulators have made no "interpretation" of the phrase "final closure" for the Court to defer to. They have simply said in various documents that they believe Cell 2 was closed in 2008. ECF 65 ¶ 6; ECF 65-1 at DAQ307; ECF 64 ¶ 15; ECF 64-6 at UTAH773. Regardless, as explained below (pp. 36–39), state regulators are owed no deference.

3. No deference is due to the Air Quality Division's interpretation of Subpart W.

"[S]ubstantial deference" is not owed to the Air Quality Division's "interpretations and application of subpart W," Defs.' Mot. 43, for two principal reasons.

First, even if the Air Quality Division could be owed deference (which it cannot, *see infra* pp. 37–39), courts may not defer to agencies' regulatory interpretations if "an alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *see also Decker v. Nw. Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013). The Air Quality Division says that "liquid waste[s]," are not Subpart W "tailings." *See* ECF 64-6 at UTAH773; ECF 64 ¶ 15. But that interpretation of the term "tailings" is contradicted by its plain definition and EPA's intent in promulgating it. *See supra* pp. 32–34. The Division's

interpretation is therefore owed no deference at all. *See Shalala*, 512 U.S. at 512.

Second, state agencies' interpretations of federal law simply should not receive the sort of deference Energy Fuels argues for. Federal courts usually give "substantial deference"—often called *Auer* deference—to federal agencies' interpretations of their *own* regulations. *See Decker*, 133 S. Ct. at 1337; *Auer v. Robbins*, 519 U.S. 452 (1997). Energy Fuels has not cited a single case in which a state agency's interpretation of a federal regulation has received *Auer* deference.[66] And, at least when it comes to interpreting and determining compliance with federal statutes, numerous courts have held that state agencies are not entitled to the same deference afforded federal agencies. *See, e.g.*, *Amisub (PSL), Inc. v. Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 795–96 (10th Cir. 1989); *Sw. Bell Tel. Co. v. Apple*, 309 F.3d 713, 717 (10th Cir. 2002).

There are good reasons federal courts do not defer to state agencies. Federal agencies draft and have expertise in interpreting federal regulations; state agencies do not. *See Turner v. Perales*, 869 F.2d 140, 141 (2d Cir. 1989). Deferring to states, whose interpretations may diverge, could undermine uniformity in federal law. *Id.* And deference would be impossible if state and federal interpretations are in conflict, for the federal interpretation must control. *See MCI Telecomm. Corp. v. Bell Atl. Penn.*, 271 F.3d 491, 516 (3d Cir. 2001); *cf. Marine Shale*, 81 F.3d at 1355; *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 485–86 (2004) (holding that EPA may override state's unreasonable determination that a particular pollution-

[66] The cases the company cites, Defs.' Mot. 43–44, involved deference to a federal agency's *subdivision*, not a state. *MCImetro Access Trans. Servs., v. BellSouth Telecomm.*, 352 F.3d 872, 880 n.8 (4th Cir. 2003); *Ind. Bell Tel. Co., Inc. v. McCarty*, 362 F.3d 378, 385–86 (7th Cir. 2004). As *MCImetro* itself said, 352 F.3d at 876, federal courts do not give any deference to *state* commissions exercising delegated arbitration authority. *See GTE S., Inc. v. Morrison*, 199 F.3d 733, 745 (4th Cir. 1999); *Orthopaedic Hosp. v. Belshe*, 103 F.3d 1491, 1495 (9th Cir. 1997).

control technology would meet the Clean Air Act's requirements).[67]

Indeed, EPA disagrees with the Air Quality Division's view that "process solutions" are not "tailings." *See* 79 Fed. Reg. 25,388, 25,397–98, 25,402 (May 2, 2014) (citing Subpart W's definition of tailings and explaining, that "emissions for the [evaporation] ponds at uranium recovery facilities that contain either uranium byproduct material in solid form or radionuclides dissolved in liquids are regulated under Subpart W"). So, giving the Division deference would give it a veto over EPA when the opposite should be true. After all, EPA is a federal agency, it drafted Subpart W, it is primarily responsible for making rules under the Clean Air Act, 42 U.S.C. § 7601(a)(1), and it maintains authority to enforce Subpart W. *See Or. State Pub. Interest Research Grp., Inc. v. Pac. Coast Seafoods Co.*, 361 F.Supp. 2d 1232, 1241 (D. Or. 2005) (federal agency's interpretation prevails over state's interpretation); *MCI Telecomm.*, 271 F.3d at 516–17 (same); 42 U.S.C. § 7412(l)(7) (EPA retains concurrent enforcement authority); 40 C.F.R. § 63.90(e) (same); 60 Fed. Reg. 13,912-01, 13,912 (Mar. 15, 1995) (same).

Thus, if any agency is entitled to deference, it is EPA. And EPA's interpretation of Subpart W is not, as Energy Fuels claims, a "new reading" by "some EPA employees" that is "contradicted" by EPA's original interpretation of the rule. Defs.' Mot. 45. It was a formal interpretation laid out in a rulemaking, which EPA itself explained was not new at all: "EPA has consistently maintained that [evaporation ponds] meet the existing applicability criteria for regulation under Subpart W." 79 Fed. Reg. at 25,402 (rejecting Energy Fuels' argument). *See*

[67] Energy Fuels argument about *GTE International Inc. v. Hunter*, 649 F. Supp. 139 (D. Puerto Rico 1986), is misplaced. The question there was whether the federal government had arbitrarily reversed a decision made by a Puerto Rican agency. 649 F. Supp. 144–48. The opinion did not mention deference to the Puerto Rican agency's interpretation of federal law, and the Court did not hesitate to render its own interpretation. *Id.* at 146–47 (concluding that the Puerto Rican agency did not abuse its discretion in waiving bid-bond requirement as a minor irregularity).

also supra p. 34; Pl.'s Mot. 55–56 (citing evidence that EPA's interpretation has not changed).

II. Claim 1: Energy Fuels' self-reported violations should not be excused.

Energy Fuels does not dispute that the average annual radon emissions from Cell 2 in 2012 and 2013 were more than 20 pCi/(m^2-sec). ECF 60-2 at 2. Nor does it dispute that Cell 2 is an "existing uranium mill tailings pile." Defs.' Mot. 18 (¶ 11) (Cell 2 was in existence and receiving tailings as of December 15, 1989). The company thus violated Subpart W's numeric emissions limit in both years and is liable on the Trust's first claim for relief. Pl.'s Mot. 46–48.

The company disclaims liability on two grounds. One, it says it made a mistake when it reported violations to the State (under penalty of perjury), now arguing that the numeric radon limit applies only to operating impoundments, and Cell 2 was no longer operating by 2008 (even though the company submitted radon-flux reports for Cell 2 for six more years). Defs.' Mot. 52. Two, it says that the company complied with Subpart W's "presumptive remedy"—monthly radon-flux monitoring—to the State's satisfaction, barring the Trust's citizen-suit claim. Defs.' Mot. 52–53. Neither argument stands up to scrutiny.

A. Energy Fuels did not err in its admissions and should be held liable all the same.

The company was not mistaken when it concluded that Cell 2 was subject to Subpart W's numeric limit during 2012 and 2013. Only in February 2014, a few weeks after the Trust sent its notice of intent to sue, ECF 68-35, did the company begin claiming that Subpart W's numeric limit applied only to operating impoundments and that Cell 2 had not been operating in 2012 and 2013. *Compare* Pl.'s Ex. 61 at EFR1217, 1229 *with* Pl.'s Ex. 62 at EFR7338, 7341. And not until July 2014 did the State take the position that Subpart W no longer applied to Cell 2 because it was not in operation, *see* ECF 63-38 at UTAH767; Pl.'s Ex. 58 at 109:13–18 (testifying that the

State had not previously taken the position that Cell 2 was not operating). Just months before, in April 2014, the Air Quality Division concluded that Cell 2 was not only "[o]perating" but subject to and "[i]n violation" of Subpart W's numeric radon limit. ECF 68-29 at GCT8226. So, assuming *arguendo* that Subpart W's numeric limit applies only to operating impoundments, as explained above and in the Trust's motion for summary judgment, Cell 2 was in fact in "operation" during 2012 and 2013. *See supra* pp. 34–36; Pl.'s Mot. 60–64.

Regardless, Subpart W's numeric limit applies to "existing uranium mill tailings pile[s]," and does not exempt non-operating piles. 40 C.F.R. § 61.252(a). For its claim that the limit applies only to "operating" impoundments, Defs.' Mot. 52, Energy Fuels cites Subpart W's *reporting* requirements, *id.* § 61.254. But requiring results for operating impoundments to be reported is not the same as exempting non-operating impoundments from the limit.

Furthermore, the company should not be allowed to now impugn its own admissions of liability under any circumstance. Polluters are required to submit precise emissions-monitoring reports. *See* 40 C.F.R. § 61.254(a)(4) (reports must be signed under penalty of perjury); 40 C.F.R. § 61.13 (detailed emissions-test requirements); 40 C.F.R. Pt. 61 Appx. B (same); 42 U.S.C. § 7413(c) (criminal penalties for knowing failures to report). And Congress expected judicial enforcement of the Clean Air Act to involve a simple comparison of defendants' reports with EPA's emissions standards. *See* S. Rep. No. 91-1196 at 38 ("[T]he factual basis for enforcement of standards would be available at the time enforcement is sought, and the issue before the courts would be a factual one of whether there had been compliance. The information and other disclosure obligations required throughout the bill are important to the operation of this provision."). Relying on similar self-reporting duties and legislative history in the Clean Water

Act—whose citizen-suit provision was modeled on that of the Clean Air Act—courts have forbidden citizen-suit defendants from later re-litigating self-reported violations, reasoning that Congress did not mean for courts to spend "countless additional hours" resolving "complicated factual questions." *Sierra Club v. Union Oil Co.*, 813 F.2d 1480, 1492 (9th Cir. 1987) *rev'd on other grounds by* 485 U.S. 931 (1988); *see also Conn. Fund for the Env't v. Upjohn Co.*, 660 F. Supp. 1397, 1417 (D. Conn. 1987) (The "defense has no basis as a matter of law."). 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.

B. Subpart W's monthly reporting requirement does not bar citizen suits.

Complying with Subpart W's post-violation, monthly monitoring requirement to the government's satisfaction cannot preclude later citizen suits. The company's argument to the contrary, for which it cites no legal support, Defs.' Mot. 53, is controverted by the Clean Air Act. The Act specifies the *only* circumstance under which the government can preclude citizen suits—when it diligently prosecutes the defendant in court. *See* 42 U.S.C. § 7604(b)(1)(B); *Friends of the Earth v. Carey*, 535 F.2d 165, 172–73 (2d Cir. 1976) (summarizing legislative history of citizen-suit provision as a supplement to government enforcement). "EPA itself has recently affirmed that the independent enforcement authority furnished by the citizen-suit provision cannot be displaced by a permitting authority's decision not to pursue enforcement." *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2445 (2014). Thus, citizen suits cannot be barred simply because the government is content with monthly monitoring.

And EPA doubtlessly did not mean to abolish the Clean Air Act's other remedies, including citizen suits, by demanding more post-violation, radon-flux monitoring. The text of the

monthly monitoring requirement does not say it is an exclusive remedy. *See* 40 C.F.R. § 61.254(b). In fact, it suggests the opposite by contemplating that "a judicial or administrative enforcement decree" may also be issued. *Id.* at § 61.254(b)(2). And preserving the Act's other remedies on top of monthly reporting makes good policy sense. Injunctions can require a source to come into compliance, whereas monthly monitoring cannot. Indeed, that is exactly why EPA issued its 1991 order to the company. ECF 63-5 at 109–110 (DEQ240–41) (ordering the company to submit a compliance schedule and follow it). And civil and criminal penalties provide relief and have deterrent effects that increased monitoring does not.

The company's admitted violations of Subpart W should not be excused.

III. Claims 3–5: The State's lack of enforcement does not preclude the Trust's claims.

Energy Fuels tampered with its radon-flux measurements from Cell 3 in 2013 to avoid reporting a violation of Subpart W's numeric limit. Pl.'s Mot. 48–53. It thereby violated Subpart W by altering the sampling schedule it had submitted to the State, by failing to sample all regions of Cell 3 during each sampling event, and according to the only valid measurements it took, by letting radon flux from Cell 3 exceed 20 pCi/(m^2-sec). *Id.*

The company contends that it is not liable on the Trust's third, fourth, and fifth claims because the Air Quality Division "accepted" the company's 2013 report. Defs.' Mot. 54. But this argument is just another way of claiming that lack of enforcement action against Energy Fuels bars the Trust's citizen suit, which non-enforcement cannot do. *See* 42 U.S.C. § 7604(b)(1)(B); *supra* p. 41. And regardless, the Court should not defer to any interpretations of Subpart W the Division may have made when "accepting" the company's reports. *See supra* pp. 36–39.

For the reasons set out in the Trust's summary judgment motion, the Court should find

the company liable on the Trust's third, fourth, and fifth claims. *See* Pl.'s Mot. 48–53.

IV. The Trust's radon-flux claims are not moot.

The company last argues that all the Trust's radon-flux claims (claims 1, 3, 4, and 5) are moot because radon emissions from Cells 2 and 3 have not topped 20 pCi/(m^2-sec) for two years, "[o]ngoing compliance … is a matter better left … in the hands of the [State] agencies," and thus, there is no longer any "meaningful relief to be had." Defs.' Mot. 55–58.

The burden to prove mootness is lofty, and Energy Fuels has not met it. A claim is not moot unless "it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (emphasis added); *S. Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) (the standard is "essentially the same" for constitutional and prudential mootness). And when defendants purport to stop violating the law voluntarily, even otherwise moot claims cannot be dismissed unless a yet higher burden of proof is met: that it is "*absolutely* clear the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constr., Inc. v. Slater*, 528 U.S. 216, 222 (2000).

Because the Court can grant the Trust meaningful relief, its radon-flux claims are not moot. An injunction requiring Energy Fuels to properly measure radon flux (claims 3 and 4) and to comply with Subpart W's numeric radon limit (claims 1 and 5), and an assessment of civil penalties, would provide the Trust relief by compelling the company to keep each impoundment's radon emissions below 20 pCi/(m^2-sec). That would be meaningful relief because it would eliminate or at least reduce the concern that has caused the Trust's members' to get less enjoyment out of their homes and surrounding environment. *See* Pl.'s Mot. 45–46.

History shows that this sort of judicial relief would be an added incentive for Energy

Fuels to comply with Subpart W. The company first violated the radon-flux standard in 1990. ECF 63-5 at 105–112 (DEQ236–243). Despite EPA's enforcement order—which included neither monetary fines nor penalty-backed injunctive relief—Energy Fuels violated the limit again in June 2012. ECF 68-26 at GCT8875, 8878. The company did *nothing* the rest of the year to try to reduce radon emissions from Cell 2. *See* Pl.'s Ex. 58 at 66:20–23. It just impermissibly scheduled and took more samples to avoid reporting a violation. *See* Pl.'s Mot. 22. From May to August 2013, the radon emissions from Cell 2 were still routinely above 20 pCi/(m^2-sec), *see* ECF 60-2 at 2, and the emissions from Cell 3 broke 20 pCi/(m^2-sec) in June 2013 (and likely in September and possibly December, though complete measurements are lacking), *see* ECF 60-3 at 2. Not until over a year after its June 2012 violation did the company carry out its interim-cover *tests* on Cell 2, *see* Defs.' Mot. 30 (¶ 42); ECF 68-29 at GCT8235, and not until late 2013 and early 2014 did the company extend those tests to other parts of Cell 2. *See* Defs.' Mot. 30.

Then, in July 2014, after the Trust filed this lawsuit, after the company asked for permission to stop monthly radon-flux testing because it claimed to have the problem under control, ECF 63-35 at EFR1360, just days before the State acquiesced to that request, ECF 63-38 at UTAH767, and *less* than two years ago, *contra* Defs.' Mot. 57, the radon flux from Cell 2 exceeded 20 pCi/(m^2-sec) yet again. Defs.' Mot. 31 (¶ 47); Pl.'s Ex. 63.

Two critical points emerge from this history. First, Energy Fuels was in no rush to voluntarily reduce radon emissions from Cell 2 when it first violated the 20-picocurie standard in June 2012. Second, keeping radon emissions from Cells 2 and 3 below 20 pCi/(m^2-sec) demands vigilant, consistent, and accurate monitoring and fastidious cover maintenance. This is particularly true given that radon emissions rise when impoundments dry out, from drought or

dewatering. ECF 68-26 at GCT8877–8881 (explaining that drought could increase radon flux, though attributing increase primarily to dewatering). Because judicial relief would create an incentive for the company to properly monitor and promptly respond to increasing radon flux, such relief would be meaningful, and the Trust's claims are not moot.

Prudential mootness principles do not suggest otherwise. Under that doctrine, Energy Fuels must still show that there is no longer "any occasion for meaningful relief." *See Smith*, 110 F.3d at 727. But here, the Trust not gotten *any* of the relief it seeks, for the State has declined to fine Energy Fuels or issue an enforcement decree requiring the company to comply with Subpart W. And for that reason, the company errs when it implies that this case is like *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012), Defs.' Mot. 56–57. In *Winzler*, the *only* relief the plaintiff could get from the court was an order requiring Toyota to notify its cars' owners that the cars had defects and to fund repairs. 681 F.3d at 1209. Because the plaintiff would doubtlessly get *all* that relief in an ongoing administrative-recall action, her case was moot. *Id.* at 1211. This would not have been true had there been even some "cognizable danger" that the plaintiff would not get "complete relief" in the recall process. *Id.* at 1211–12.

Prudential mootness usually applies to claims for an injunction against the government after the government promises to provide all the relief sought. *See id.* at 1210. Yet here, the State has made no special promise, backed by the force of law, to make sure that Energy Fuels does not violate Subpart W again. It has simply said that it expects Energy Fuels to comply with the numeric radon limit and Subpart W's sampling requirements in the future. *See* ECF 65 at ¶ 12; ECF 66 at ¶ 16; ECF 63-38 at UTAH768. But the State presumably had the same expectation *before* Energy Fuels violated Subpart W's emissions-limit and sampling requirements. A return

to the *status quo* provides the Trust no relief at all, much less "complete relief," as would be necessary for prudential mootness to apply. *Winzler*, 681 F.3d at 1211.

Even if the Trust's claims were moot because Energy Fuels has taken steps to reduce the radon flux from Cells 2 and 3, the voluntary-cessation exception to the mootness doctrine would preclude dismissal of those claims. The company has not carried its "formidable burden," especially on summary judgment, "of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 193–94 (2000).

Radon-flux violations from Cells 2 and 3, as well as sampling deviations, could easily recur. No matter what the company does, those impoundments will be radioactive for "hundreds of thousands of years." ECF 68-50 at GCT517. Radon flux rises when impoundments are improperly covered, especially if they dry out. *See* ECF 68-26 at GCT8877–8881, 8883. And the company's historic violations of the 20-picocurie standard show that assiduous monitoring and cover upkeep are essential for keeping radon emissions in check.

These are not trivial and inexpensive activities that the company can be expected to voluntarily and reliably carry out. *See* ECF 68-29 at GCT8235 (over a year lapsed before the company placed any cover in response to its June 2012 radon-flux violation); Pl.'s Ex. 64 (estimating cost of $100,500 to place cover on Cell 3 in 2013). And neither the company nor the Air Quality Division has promised that the company will not tamper with its radon-flux monitoring practices in the future. *See* Defs.' Mot. 57–58; ECF 65 at ¶ 12 (declaring that the Division would entertain requests to change sampling procedures in the future). Indeed, neither believes that it is even impermissible to alter already submitted radon-flux sampling schedules or

to sample less than all impoundment regions during every sampling event, ECF 65 at ¶¶ 7–10; Defs.' Mot. 54, meaning that there is no assurance that the company will not do so in the future.

A fitting example of the demanding burden that Energy Fuels must meet, and has not met, is described in *WildEarth Guardians v. Lamar Utilities Bd.*, 932 F. Supp. 2d 1237 (D. Colo. 2013). In that case, the defendants' voluntary compliance did not moot the plaintiff's Clean Air Act claims, among other reasons, because the facility was "physically capable" of emitting a pollutant at levels that could lead it to "violate the terms of its construction permit…." *Id.* at 1249–50. There is no doubt that Cells 2 and 3 are "physically capable" of emitting more than 20 pCi/(m^2-sec) of radon and that the company could choose to schedule and take radon-flux samples in ways that violate Subpart W. Energy Fuels thus has not shown that it is "absolutely clear" that the violations at issue in the Trust's radon-flux claims "could not reasonably be expected to recur." *Laidlaw*, 528 U.S. at 190, 193–94 (holding that citizen suit should not necessarily be dismissed even though polluting facility had closed).

The company's mootness defense should not foreclose summary judgment in the Trust's favor on its radon-flux claims.

CONCLUSION

The company's arguments routinely forsake any careful application of the legal principles they assert to the facts of this case, and they stake claims that the cases, statutes, and regulations rule out. The Court should deny the company's motion for summary judgment and enter summary judgment against Energy Fuels on all the Trust's claims.

Respectfully submitted this 30th day of June, 2016.

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APPENDIX A[68]

Number of Tailings Impoundments: Claim 2	
¶ 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." Defs.' Mot. 14. **Undisputed**
¶ 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." Defs.' Mot. 15. **Undisputed**
¶ 2.	"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." Defs.' Mot. 15. **Disputed:** To the extent that this statement implies that "evaporation ponds" are not "tailings impoundments" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust disputes each and every statement throughout Energy Fuels' statement of material facts that implies that "evaporation ponds" are not "tailings impoundments." The Trust does not otherwise dispute this statement.
¶ 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)." Defs.'

[68] The Trust has organized its response to Energy Fuels' statement of facts by repeating, in order, the assertions made by Energy Fuels, and to the extent possible, grouping together the sentences within each numbered paragraph of Energy Fuels' statement, according to whether the Trust disputes or does not dispute them as a group. Thus, for example, the Trust does not dispute the first two sentence of Paragraph 2 but does dispute the third sentence of Paragraph 2, as shown in the rows labeled ¶ 2.

	Mot. 15. **Disputed:** To the extent that this statement implies that Cells 1, 2, and 4B are not "active tailings impoundment[s]" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–64, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"); ECF 68-9 at 166:25–167:22, 128:2–129:23 (reclamation plan is being revised); ECF 68-16 at 171:13–23 (same); ECF 68-53 at EFR53587–611 (reclamation plan lacks deadlines for cell closure); ECF 68-21 at EFR721–22 (prohibiting closure until meeting closed-cell-performance requirements). To the extent that the assertion that Cell 2 is a "tailings impoundment in closure" implies that its "final closure" has begun under Subpart W, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust disputes each and every statement throughout Energy Fuels' statement of material facts that implies that Cell 2's "final closure" has begun. The Trust does not otherwise dispute this statement.
¶ 4.	"The waste stream exiting the Mill consists of two basic components: tailings solids and process solutions." Defs.' Mot. 15. **Disputed:** "Tailings solids" and "process solutions" are not independent components of the Mill's waste stream. They are combined in a slurry that exits the counter-current-decantation circuit, *see* ECF 68-9 at 27:8–23, and process solutions containing dissolved solids are discharged from the Mill's solvent-extraction circuits, *see* Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust disputes each and every statement throughout Energy Fuels' statement of material facts that implies that "process solutions" do not contain "tailings solids" or that "tailings solids" do not contain "process solutions." The Trust does not otherwise dispute this statement.
¶ 4.	"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." Defs.' Mot. 15. **Disputed:** To the extent that this statement implies that "[t]he tailings solids" are discharged only from the pipeline exiting counter-current-decantation circuit, the Trust disputes that statement. Dissolved tailings solids are also discharged in process solutions that exit the Mill's solvent-extraction circuits. *See* Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10.

¶ 4.	"The tailings slurry is placed in tailings impoundments, where the solids settle out from the liquid portion." Defs.' Mot. 15. **Disputed:** Some solids "settle out" from the tailings slurry in the Mill's tailings impoundments, and some solids remain suspended and dissolved in the solution in those impoundments. *See* Defs.' Mot. 16 ("The process solutions contain dissolved solids that may precipitate, under certain chemical conditions, to the bottom of the evaporation ponds."); ECF 68-16 at 163:16–164:14; Pl.'s Ex. 66 at EFR4403 ("The skimming bucket, located beneath the barge, is designed so only water flowing over the top edge or lip of the bucket may be pumped [to the evaporation pond from the slimes pool in the tailings cell]. This will reduce the amount of suspended solids pumped to the evaporation cell. … The pipes will be acid and corrosion resistant to prevent damage from the water and suspended solids."). The Trust does not otherwise dispute this statement.
¶ 4.	"Process solutions, called raffinate or S/X (solvent extraction) solutions, are also separately conveyed by a different pipeline into an evaporation pond." Defs.' Mot. 15. **Disputed:** The Trust does not dispute that "process solutions," called raffinate or solvent-extraction solutions, are discharged through a pipeline into Cell 1. But process solutions are also discharged in the slurry that exits the counter-current-decantation circuit and is currently pumped to Cell 4A. *See* ECF 68-9 at 27:8–23. And to the extent that this statement implies that "evaporation ponds" are not "tailings impoundments" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not otherwise dispute this statement.
¶ 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." Defs.' Mot. 15. **Disputed:** To the extent that this statement asserts that Energy Fuels has placed interim cover over all of the Mill's tailings impoundments, the Trust disputes that assertion. The company has not placed interim cover over Cells 1, 4A, or 4B. *See* ECF 68-7; Pl.'s Ex. 67 at 277:23–278:11. To the extent that this statement asserts that placing interim cover on the Mill's tailings impoundments begins "final closure" of those impoundments under Subpart W, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 63.

	The Trust does not otherwise dispute this statement.
¶ 5.	"As a result, an operating tailings impoundment can have three basic areas: covered areas, beaches (uncovered tailings) and solutions." Defs.' Mot. 15–16. **Disputed.** None of the Mill's impoundments contain solutions "as a result" of Energy Fuels' placement of interim cover or platform fill over impoundments. Impoundments hold solutions because they are discharged as wastes from the counter-current-decantation circuit, *see* ECF 68-9 at 27:8–23, the solvent-extraction circuits, *id.* at 33:17–34:24, or from other parts of the Mill's processing circuits, *id.* at 193:23–195:3. The Trust does not dispute that operating impoundments can have areas that are covered, liquid-saturated beaches, and liquid areas.
¶ 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." Defs.' Mot. 16. **Disputed:** To the extent that this statement implies that "evaporation ponds" are not "tailings impoundments" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not otherwise dispute this statement.
¶ 6.	"The Mill is a zero-discharge facility, which means that any waters or solutions not used in the process must be evaporated." Defs.' Mot. 16. **Disputed:** To the extent that calling the Mill a "zero-discharge facility" implies that it does not discharge any liquids into the environment, the Trust disputes that assertion. The Trust also disputes the assertion that "any waters or solutions not used in the process must be evaporated." Energy Fuels is required to ensure that contaminant concentrations in groundwater beneath the Mill stay below compliance limits established in its groundwater discharge permit, *see* ECF 63-20 at EFR709–711, and the company is required to build and operate the Mill's impoundments according to technological standards set out in the permit, *id.* at EFR713–726. As a result of these restrictions, waste liquids from Mill processes generally must evaporate or be contained in the Mill's impoundments, but some may be released into the environment.
¶ 6.	"This requires the Mill to actively manage process solutions by transferring solutions between the tailings impoundments and the evaporation ponds." Defs.' Mot. 16.

	Disputed: Energy Fuels is not required but chooses to transfer process solutions among the Mill's cells. If the Mill were to process less uranium ore and other feed material, it would discharge less waste and would need less waste-disposal space. *See* ECF 68-9 at 87:2–25 (approximately two tons of waste solutions are generated per ton of ore). The Trust does not dispute that Energy Fuels transfers solutions among the Mill's cells.
¶ 6.	"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." Defs.' Mot. 16. **Undisputed**
¶ 6.	"At full operation, the Mill discharges approximately 600 gallons a minute to the tailings management system which must be evaporated." Defs.' Mot. 16. **Disputed:** Not all liquid wastes from the Mill evaporate. Some liquids infiltrate into the Mill's impoundments. *See* ECF 68-9 at 130:3–132:10, 170:8–23.
¶ 6.	"The amount of required evaporative surface area is therefore dictated by this discharge rate and the net rate of evaporation in the Blanding area." Defs.' Mot. 16. **Disputed:** The Mill's discharge rate at full operation does not "dictate" any particular amount of "required" evaporative surface area. If the Mill runs at less than its full operational capacity, it discharges less waste liquids and needs less evaporative surface area. *See* ECF 68-9 at 87:2–25 (approximately two tons of waste solutions are generated per ton of ore).
¶ 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." Defs.' Mot. 16. **Undisputed**
¶ 7.	"However, the Mill has not observed significant amounts of precipitated solids or raffinate crystals in the evaporation ponds: Cell 1 and Cell 4B." Defs.' Mot. 16. **Disputed:** The Trust does not dispute the assertion that Energy Fuels has observed some precipitated solids or raffinate crystals in Cells 1 and 4B. Nor does it dispute that Energy Fuels characterizes the amounts as insignificant, though the Trust does not agree with that characterization. To the extent that this statement implies that Cells 1 and 4B are not "tailings

	impoundments" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds").
¶ 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." Defs.' Mot. 16–17. **Disputed:** Reclamation Plan Revision 3.2 – Final dated January 28, 2011, does not provide for "burying everything" in the "tailings impoundments." *See* ECF 68-22 at EFR6410 ("Uncontaminated equipment structures and waste materials from Mill decommissioning may be disposed of by sale, transferred to other company-owned facilities, transferred to an appropriate off-site solid waste site, or disposed of in one of the tailings cells."). To the extent that this statement implies that "evaporation ponds" are not "tailings impoundments" under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not otherwise dispute this statement.
¶ 8.	"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." Defs.' Mot. 17. **Disputed:** To the extent that this statement implies that the only materials to be excavated from Cell 1 when it is reclaimed are the liner, sediments, and impacted soils, the Trust disputes that assertion. Raffinate crystals will also be excavated from the cell. ECF 68-16 at 139:22–144:3; ECF 68-22 at EFR6407 ("The synthetic liner and raffinate crystals will then be removed and placed in tailings Cells 4A or 4B."). To the extent that this statement implies that Cell 1 is not "one of the tailings cells," the Trust disputes that assertion. *See* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not otherwise dispute this statement (i.e., that this is what Reclamation Plan Revision 3.2 – Final provides for).

¶ 8.	"Cell 2 will be covered in place, as will Cell 3 and Cell 4A." Defs.' Mot. 17. **Undisputed** (i.e., that this is what Reclamation Plan Revision 3.2 – Final provides for)
¶ 8.	"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." Defs.' Mot. 17. **Disputed:** To the extent that this statement implies that Cell 4B is not already "being used as a tailings impoundment" the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not otherwise dispute this statement.
¶ 8.	"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." Defs.' Mot. 17. **Disputed:** "Tailings solids" have been placed in Cell 4B. *See* Pl.'s Mot. 57–60 (citing evidence that process solutions in Cell 4B have come solely from the tailings slurry in Cell 4A and contain dissolved solids that precipitate out of the solutions). To the extent that this statement implies that Cell 4B is not already "one of the Mill's tailings impoundments," the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds").
¶ 9.	"Rec Plan 3.2 calls for a multi-layered, six feet thick cover to be placed over the tailings disposal impoundments." Defs.' Mot. 17. **Disputed:** Reclamation Plan Revision 3.2 – Final calls for a multi-layered, six-foot thick cover to be placed over the "Cell 1-I Tailings Area," Cell 2, Cell 3, Cell 4A, and Cell 4B. *See* ECF 68-22 at EFR6405–6409.
¶ 9.	"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." Defs.' Mot. 17.

	Undisputed
¶ 9.	"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." Defs.' Mot. 17. **Disputed:** The platform fill described in Reclamation Plan Revision 3.2 – Final is not part of the "the final radon barrier" because the final radon barrier is still being designed. Defs.' Mot. 32 (¶ 50); ECF 68-9 at 128:2–129:23, 166:2–168:25. The Trust does not dispute the assertion that the Reclamation Plan Revision 3.2 – Final included the platform-fill layer in calculating the radon-flux attenuation for long-term disposal of the impoundment.
¶ 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." Defs.' Mot. 17. **Undisputed**
¶ 10.	"Cell 1 has been used only as an evaporation pond." Defs.' Mot. 17–18. **Disputed:** To the extent that this statement implies that Cell 1 is not a tailings impoundment under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds").
¶ 10.	"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." Defs.' Mot. 18. **Undisputed**
¶ 10.	"The tailings pipeline at the Mill has never been directed to discharge tailings solids into Cell 1." Defs.' Mot. 18. **Disputed:** Tailings solids have been discharged into Cell 1 in the form of dissolved solids that eventually precipitate out of the solutions discharged into Cell 1. *See* Pl.'s Mot. 59–60; Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust does not dispute that the pipeline that carries tailings slurry from the counter-current-decantation circuit has not been set up to empty intentionally into Cell 1.

¶ 10.	"Cell 1 remains in operation as an evaporation pond." Defs.' Mot. 18. **Disputed:** To the extent that this statement implies that Cell 1 is not a tailings impoundment under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not dispute that Cell 1 remains in operation.
¶ 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." Defs.' Mot. 18. **Undisputed**
¶ 11.	"Cell 2 operated as a tailings impoundment, receiving tailings solids from the tailings pipeline." Defs.' Mot. 18. **Disputed:** To the extent that this statement asserts that Cell 2 is no longer operating, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust does not dispute that Cell 2 received tailings slurry from the pipeline exiting the counter-current-decantation circuit.
¶ 11.	"Cell 2 was filled with tailings, and stopped receiving tailings from the tailings pipeline, sometime after the late 1980's but well before 2008." Defs.' Mot. 18. **Disputed:** Cell 2 was full, or nearly full, of tailings, and the company stopped sending the tailings slurry to that cell by the mid-to-late 1980s. *See* ECF 68-9 at 83:11–18; ECF 68-16 at 193:10–195:3; ECF 68-14 at EFR43535.
¶ 11.	"Cell 2 reached capacity and could no longer receive tailings solids or process solutions under the RML and GWDP." Defs.' Mot. 18. **Disputed:** The groundwater discharge permit, from at least 2008 through the present, has authorized Energy Fuels to dispose of "tailings" in "existing Tailings Cells 1, 2, and 3…." *See* Pl.'s Ex. 68 at DEQ910 ("[T]ailings disposal in existing Tailings Cells 1, 2, and 3 is authorized by this Permit as defined in Table 3 and Part I.D.1, above."); ECF 68-21 at EFR715 (same). The radioactive materials license has never prohibited disposal of byproduct material in any particular cell. *See, e.g.*, ECF 68-2 at EFR1501; ECF 68-37. *See also* ECF 63-36 at UTAH688 (statement by Utah Division of Radiation Control that "[t]he White Mesa Mill has five cells licensed and permitted to receive tailings.").
¶ 11.	"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." Defs.' Mot. 18. **Disputed:** The area of Cell 2 that remained open was open for disposal of on-site trash and contaminated material. *See* ECF 68-9 at 83:19–84:14; ECF 68-14 at EFR43542. The Trust does not otherwise dispute this statement.
¶ 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.' 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." Defs.' Mot. 18. **Undisputed**
¶ 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." Defs.' Mot. 19. **Disputed:** To the extent that the assertion that Cell 2 "entered the closure phase" implies that its "final closure" has begun under Subpart W, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust does not dispute that Energy Fuels has been dewatering Cell 2 since around 2008 and has been monitoring settlement plates on the surface of the platform fill. But neither the Reclamation Plan nor radioactive materials license require dewatering. *See* ECF 68-22; 68-2. And the groundwater discharge permit does not require monitoring of settlement plates. *See* ECF 68-21.
¶ 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." Defs.' Mot. 19. **Undisputed**
¶ 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." Defs.' Mot. 19. **Undisputed**
¶ 15.	"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." Defs.' Mot. 19. **Disputed:** To the extent that this statement asserts that Cell 4 was split in two to comply with the phased-disposal requirements in the 1989 version of Subpart W, the Trust disputes that claim. The two-impoundment design for Cell 4 was prepared in August 1988, before the 1989 version of Subpart W was in effect. *See* ECF 63-1 at DAQ2; 51 Fed. Reg. 34,056 (Sep. 24, 1986). The Trust does not dispute that Cell 4 was originally designed to be 80 acres and was subdivided into two 40-acre cells, likely to comply with the 1986 version of Subpart W.
¶ 15.	"Cell 4A included a more extensive liner system beneath it to protect groundwater, comprised of a synthetic liner and clay underlay." Defs.' Mot. 19. **Disputed:** Cell 4A included a liner system composed of a synthetic liner and clay underlay that was installed partly for the purpose of protecting groundwater (though the Trust does not concede that it actually protects groundwater). The Trust disputes the characterization that Cell 4A's liner system is "more extensive."
¶ 16.	"The 1989 application to EPA was made under the original 1986 Subpart W." Defs.' Mot. 19. **Undisputed**
¶ 16.	"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." Defs.' Mot. 19. **Disputed:** To the extent that this statement implies that Cell 1 was not "open to receive tailings," the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not dispute that Cells 1, 2, and 3 were operating in 1989.
¶ 16.	"The ongoing operation of Cell 1 as an evaporation pond was clearly stated on the face of the Cell 4 Design report." Defs.' Mot. 19–20.

	Disputed: The Cell 4 design report does not clearly state on its face anything about ongoing operation of Cell 1. *See* ECF 63-1. The Trust does not dispute that the Cell 4 design report states that, "[w]hen the cell is full, the slimes drain system will be activated and solutions will be pumped to Cell 1-I for evaporation." ECF 63-1 at DAQ20.
¶ 16.	"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." Defs.' Mot. 20. **Undisputed**
¶ 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.'" Defs.' Mot. 20. **Undisputed**
¶ 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.'" Defs.' Mot. 20. **Disputed:** To the extent that this statement asserts that "process solutions" are not "tailings," the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–59, and as a matter of fact, *see* Ex. Pl.'s 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust does not otherwise dispute this statement.
¶ 18.	"On March 1, 1990, the NRC approved a license amendment to allow Cell 4A to also receive tailings." Defs.' Mot. 20. **Disputed:** To the extent that this statement asserts that "process solutions" are not "tailings," the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–59, and as a matter of fact, *see* Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10.
¶ 18.	"However, Cell 4A was used for evaporation of process solutions (raffinate) only in 1990." Defs.' Mot. 20.

	Disputed: To the extent that this statement implies that "process solutions" are not "tailings," the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–59, and as a matter of fact, *see* Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust does not dispute that Energy Fuels placed process solutions in Cell 4A in 1990.
¶ 18.	"No tailings solids from the tailings pipeline were placed into Cell 4A at that time." Defs.' Mot. 20. **Disputed:** In 1990, tailings solids were discharged into Cell 4A in the form of dissolved solids that eventually precipitated out of the solutions discharged into the cell. *See* Pl.'s Mot. 58–60; ECF 68-9 at 61:7–64:16, 37:18–38:7, 40:15–41:1; ECF 68-16 at 151:16–152:23, 155:15–25; ECF 68-8 at EFR647; Pl.'s Ex. 58 at 125:21–25; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust does not dispute that the pipeline that carries tailings slurry from the counter-current-decantation circuit was not set up to empty intentionally into Cell 4A in 1990.
¶ 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." Defs.' Mot. 20. **Undisputed**
¶ 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." Defs.' Mot. 21. **Undisputed**
¶ 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.' 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.'" Defs.' Mot. 21.

	Undisputed
¶ 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." Defs.' Mot. 21. **Undisputed**
¶ 22.	"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." Defs.' Mot. 21. **Disputed:** To the extent that this statement asserts that Cell 1 and Cell 4A were not "operating tailings impoundments" in the 1990s, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). To the extent that this statement asserts that Cell 1 and Cell 4A did not receive tailings solids in the 1990s, the Trust also disputes that assertion. *See* Ex. Pl.'s 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10.
¶ 22.	"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." Defs.' Mot. 21–22. **Disputed:** The Trust disputes the assertions that "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" and that "Utah" had a common understanding with "EPA" that the Mill was "in compliance with the two cell maximum requirement." *See* 79 Fed. Reg. 25,388, 25,402 (May 2, 2014) ("EPA has consistently maintained that these non-conventional impoundments meet the existing applicability criteria for regulation under Subpart W. As defined at 40 CFR 61.251(g), 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. The holding or evaporation ponds located at conventional mills … contain uranium byproduct materials, either in solid form or dissolved in solution, and therefore their HAP emissions are regulated under Subpart W."); *id.* at 25,397 (The "evaporation

	ponds located at conventional mills … contain uranium byproduct material, either in solid form or dissolved in solution, and therefore their emissions are regulated under Subpart W."); *id.* at 25,391 (explaining that conventional milling "produces both solid and liquid wastes (i.e., uranium byproduct material, or 'tailings')…"); *id.* at 25,394 (stating that the hazardous air pollutant emissions from Cell 1 at the Mill are currently regulated by Subpart W "[t]o the extent [it] contains byproduct material."); Pl.'s Ex. 60 at 4-1 ("The licensed uranium mill tailings source category comprises … tailings impoundments and evaporation ponds…."); ECF 68-50 at GCT525 ("The tailings discharge is composed of three fractions: (1) the sands, which consist of solids greater than 200 mesh (74 mm); (2) the slimes, which consist of solids less than 200-mesh; and (3) the liquid solution containing milling reagents and dissolved ore solids.); *id.* at GCT535 ("Tailings include the barren crushed ore material plus process solutions. … Evaporation ponds used to contain excess liquid from tailings impoundments also contain suspended and dissolved tailings and are included in this analysis."). The Trust does not dispute the assertion that Bryce Bird believed he had a common understanding with some unidentified EPA employees that Cells 1 and 4B were not counted as part of the two-operating-cell maximum. ECF 64 at ¶ 8.
¶ 23.	"Cell 4A had not been used after 1990 and the liner became damaged from thermal stress due to exposure to direct sunlight." Defs.' Mot. 22. **Disputed:** Cell 4A has been used after 1990. *See* ECF 68-16 at 152:16–153:6. The Trust does not otherwise dispute this statement.
¶ 23.	"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." Defs.' Mot. 22. **Undisputed**
¶ 23.	"The relined Cell 4A was used initially to receive process solutions and thereafter started receiving tailings solids as Cell 3 filled up." Defs.' Mot. 22. **Disputed:** To the extent that this statement asserts that "process solutions" do not contain "tailings solids," the Trust disputes that assertion. Pl.'s Ex. 58 at 125:21–25; ECF 68-9 at 37:18–38:7, 40:15–41:1; Pl.'s Ex. 65 at 43:2–44:10; 46:5–10. The Trust does not dispute that the company placed process solutions in Cell 4A after relining it around 2008 and began pumping tailings slurry from the counter-current-decantation circuit into Cell 4A beginning in October 2008. ECF 68-12 at 23; ECF 68-16 at 153:4–9.

¶ 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." Defs.' Mot. 22. **Undisputed**
¶ 24.	"Cell 4B included an extensive two layer synthetic liner system beneath it plus a geo-clay layer to protect groundwater." Defs.' Mot. 22. **Disputed:** The Trust disputes the characterization that Cell 4B's liner system is "extensive." The Trust does not dispute that Cell 4B has a two-layer synthetic liner beneath it with a geo-clay layer that was installed partly for the purpose of protecting groundwater (though the Trust does not concede that it actually protects groundwater).
¶ 25.	"On April 13, 2010, the Mill also applied for approval for Cell 4B from DAQ pursuant to Subpart W." **Disputed:** The Mill did not apply for "approval for Cell 4B from DAQ pursuant to Subpart W." On April 13, 2010, Energy Fuels submitted to the Division of Air Quality an application for approval to construct Cell 4B under EPA's pre-construction notice-and-approval provisions for sources of hazardous air pollutants. *See* ECF 63-15; 40 C.F.R. § 61.07(a) ("The owner or operator shall submit to the Administrator an application for approval of the construction of any new source or modification of any existing source.").
¶ 25.	"The application was copied to EPA." Defs.' Mot. 22. **Undisputed**
¶ 25.	"The application explained in detail the history of the construction and operation of the cells." Defs.' Mot. 22. **Disputed:** The application explained when each cell had been constructed and how each cell generally had been operated until April 13, 2010. *See* ECF 63-15 at EFR646–647, 649–650. The Trust disputes the characterization that this explanation was detailed.
¶ 25.	"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." Defs.' Mot. 22–23. **Disputed:** The Trust disputes the characterization any of the assertions in this statement

	were clearly made in the application. The application stated, *inter alia*, that: • "As each cell is filled with tailings, solutions are separated from tailings solids and pumped to the evaporation pond (Cell 1) or to another tailings cell." ECF 63-15 at EFR650. • Cell 2 "has been filled and closed…." *Id.* at EFR649. • "Cell 4B will initially be used as an evaporation pond for solutions only. It will subsequently be used as a tailings disposal cell for the disposal of tailings solids, as operational needs warrant." *Id.* at EFR652. • "As required by 40 CFR 61.252(b)(l), Cell 3 will be filled and closed prior to disposal of tailings solids into Cell 4B." *Id.* at EFR653. • "[D]isposal of tailings into Cell 3 will cease and the cell will be filled and taken out of service, before tailings solids are disposed of in Cell 4B." *Id.* at EFR650.
¶ 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.'" Defs.' Mot. 23. **Disputed:** The Division of Air Quality did not "grant[] approval for Cell 4B." On May 3, 2010, the Division of Air Quality gave Energy Fuels approval under 40 C.F.R. § 61.08 to construct Cell 4B. *See* ECF 63-16; 40 C.F.R. § 61.08(a) ("The Administrator will notify the owner or operator of approval or intention to deny approval of construction or modification within 60 days after receipt of sufficient information to evaluate an application under § 61.07."). The Trust does not dispute that the May 3, 2010, letter from the Division stated that its "review determined that these facilities will not cause emissions in violation of the standard found in 40 CFR 61.252, if properly operated." ECF 63-16.
¶ 26.	"No one filed a challenge to DAQ's approval. EPA did not object to the approval." Defs.' Mot. 23. **Undisputed**
¶ 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." Defs.' Mot. 23. **Undisputed**
¶ 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.'" Defs.' Mot. 23. **Undisputed**
¶ 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." Defs.' Mot. 23. **Undisputed**
¶ 29.	"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." Defs.' Mot. 23–24. **Disputed:** The Trust disputes the assertion that EPA employees were advancing a "new" interpretation of Subpart W and only "now considered evaporation ponds to be subject to the phased disposal work practice." EPA has consistently maintained that evaporation ponds hold "tailings" and are subject to Subpart W's two-impoundment limit. *See* 79 Fed. Reg. 25,388, 25,402 (May 2, 2014) ("EPA has consistently maintained that these non-conventional impoundments meet the existing applicability criteria for regulation under Subpart W. As defined at 40 CFR 61.251(g), 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. The holding or evaporation ponds located at conventional mills … contain uranium byproduct materials, either in solid form or dissolved in solution, and therefore their HAP emissions are regulated under Subpart W."); *id.* at 25,397 (The "evaporation ponds located at conventional mills … contain uranium byproduct material, either in solid form or dissolved in solution, and therefore their emissions are regulated under Subpart W."); *id.* at 25,391 (explaining that conventional milling "produces both solid and liquid wastes (i.e., uranium byproduct material, or 'tailings')…"); *id.* at 25,394 (stating that the hazardous air pollutant emissions from Cell 1 at the Mill are currently regulated by Subpart W "[t]o the extent [it] contains byproduct material."); Pl.'s Ex. 60 at 4-1 ("The licensed uranium mill tailings source category comprises … tailings impoundments and evaporation ponds…."); ECF 68-50 at GCT525 ("The tailings discharge is composed of three fractions: (1) the sands, which consist of solids greater than 200 mesh (74 mm); (2) the slimes, which consist of solids less than 200-mesh; and

	(3) the liquid solution containing milling reagents and dissolved ore solids.); *id*. at GCT535 ("Tailings include the barren crushed ore material plus process solutions. … Evaporation ponds used to contain excess liquid from tailings impoundments also contain suspended and dissolved tailings and are included in this analysis."); 79 Fed. Reg. 25,388, The Trust does not dispute the assertion that Mr. Goble learned during conference calls with EPA employees that EPA employees considered evaporation ponds to be subject to the phased disposal work practice standard. Nor does the Trust dispute the assertion that Mr. Goble expressed concern about the enforceability of this interpretation. ECF 66 at ¶¶ 7–9.
¶ 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." Defs.' Mot. 24. **Disputed:** On February 19, 2014, Mr. Goble sent an email to an EPA employee confirming the Utah Division of Radiation Control's position that the Mill is "compliant with NESHAP guidelines." ECF 63-30 at DEQ1139.
¶ 30.	"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." Defs.' Mot. 24. **Disputed:** In regard to Cell 4A, Mr. Goble stated "Cell is active." Mr. Goble stated that Cell 1 and Cell 4B were "used for liquid management and no tailing have been placed in the cell; therefore, it is not considered operational under NESHAP guidelines." ECF 63-30 at DEQ1139.
¶ 30.	"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.'" Defs.' Mot. 24. **Disputed:** To the extent that this statement asserts that "final closure" of Cell 2 under Subpart W had in fact begun, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust does not dispute that Mr. Goble's February 19, 2014, e-mail to an EPA employee contained the statement that Energy Fuels quotes.
¶ 30.	"He explained that Cell 3 and 4A were the two active tailings cells in compliance with the phased disposal work practice." Defs.' Mot. 24. **Disputed:** Mr. Goble said that Cells 3 and 4A were "active" and that "the facility is compliant with NESHAP guidelines." ECF 63-30 DEQ1139.

¶ 31.	"On July 10, 2014, DRC issued a response to comments on a proposal by the Mill to process an alternate feed material." Defs.' Mot. 24. **Undisputed**
¶ 31.	"DRC explained in detail Utah's position on why the Mill was in compliance with the phased disposal work practice." Defs.' Mot. 24. **Disputed:** To the extent that this statement asserts that the Mill was in fact in compliance with Subpart W's phased disposal work practice standard, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 53–65. In the July 10, 2014, response to comments, the Division of Radiation Control explained its view that the Mill was in compliance with the phased-disposal work-practice standard. *See* ECF 63-36 at UTAH688. The Trust disputes the characterization that this explanation was detailed.
¶ 31.	"The response to comments pointed out the definition of tailings used by EPA as being 'sand like wastes.'" Defs.' Mot. 24. **Disputed:** The response to comments pointed out that "[i]n a separate NESHAPs rulemaking action regulating uranium mill tailings, EPA described uranium mill tailings [as] sand-like wastes…." ECF 63-36 at UTAH688.
¶ 32.	"On August 11, 2014, DAQ Director Bryce Bird sent an email to EPA regarding a CERCLA Off-Site Rule Determination for the Mill." Defs.' Mot. 24. **Undisputed**
¶ 32.	"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.'" Defs.' Mot. 24–25.

Disputed: The Trust disputes the assertion that Mr. Bird "explained the history and regulatory interpretations by Utah and EPA regarding the phased disposal limitation." EPA has consistently maintained that evaporation ponds hold "tailings" and are subject to Subpart W's two-impoundment limit. *See* 79 Fed. Reg. 25,388, 25,402 (May 2, 2014) ("EPA has consistently maintained that these non-conventional impoundments meet the existing applicability criteria for regulation under Subpart W. As defined at 40 CFR 61.251(g), 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. The holding or evaporation ponds located at conventional mills … contain uranium byproduct materials, either in solid form or dissolved in solution, and therefore their HAP emissions are regulated under Subpart W."); *id.* at 25,397 (The "evaporation ponds located at conventional mills … contain uranium byproduct material, either in solid form or dissolved in solution, and therefore their emissions are regulated under Subpart W."); *id.* at 25,391 (explaining that conventional milling "produces both solid and liquid wastes (i.e., uranium byproduct material, or 'tailings')…"); *id.* at 25,394 (stating that the hazardous air pollutant emissions from Cell 1 at the Mill are currently regulated by Subpart W "[t]o the extent [it] contains byproduct material."); Pl.'s Ex. 60 at 4-1 ("The licensed uranium mill tailings source category comprises … tailings impoundments and evaporation ponds…."); ECF 68-50 at GCT525 ("The tailings discharge is composed of three fractions: (1) the sands, which consist of solids greater than 200 mesh (74 mm); (2) the slimes, which consist of solids less than 200-mesh; and (3) the liquid solution containing milling reagents and dissolved ore solids.); *id.* at GCT535 ("Tailings include the barren crushed ore material plus process solutions. … Evaporation ponds used to contain excess liquid from tailings impoundments also contain suspended and dissolved tailings and are included in this analysis.").

The Trust does not dispute that Energy Fuels has accurately quoted part of Mr. Bird's August 11, 2014, e-mail to employees of EPA.

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

	Defs.' Mot. 25. **Disputed:** On October 29, 2014, the Division of Radiation Control sent comments to EPA on EPA's proposed rule to revise Subpart W. *See* ECF 63-41.
¶ 33.	"DRC copied DAQ Director Bryce Bird, who concurs in the comment." Defs.' Mot. 25. **Disputed:** The Trust disputes that Mr. Bird concurred "in the comment." The Division of Radiation Control copied Mr. Bird on the October 29, 2014, comment letter, and Mr. Bird has declared that he agrees with the statements in the letter regarding the history and implementation of Subpart W," including those that appear in "paragraph 5" of the letter. ECF 64 at ¶ 16. Paragraph 5 of the letter does not exist. *See* ECF 63-41.
¶ 33.	"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 nonconventional 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 longstanding or existing disposal management facilities. For these reasons, we support making the change explicit in the rule, as has been proposed.'" Defs.' Mot. 25–26. **Undisputed** (i.e., that Paragraph 4 under the heading *White Mesa Uranium Mill* in the Division's October 29, 2014, comment letter contains the statement quoted by Energy

	Fuels. *See* ECF 63-41 at EFR30363.)
¶ 34.	"At present, Cell 1 and Cell 4B continue to operate as evaporation ponds, while Cell 3 and Cell 4A operate as tailings impoundments." Defs.' Mot. 26. **Disputed:** To the extent that this statement asserts that Cell 1 and Cell 4B do not operate as tailings impoundments under Subpart W, the Trust disputes that assertion, both as a legal conclusion, *see* Pl.'s Mot. 54–60, and as a matter of fact, *see* ECF 68-9 at 44:24–45:18, 48:20–49:21 (calling Cell 1 a "tailings cell"), 72:18–73:2; ECF 68-16 at 149:3–151:8; Pl.'s Mot. 59–60 (citing evidence that "raffinate crystals" form in "evaporation ponds"). The Trust does not dispute the assertion that Cell 1, Cell 4B, Cell 3, and Cell 4A continue to operate.
¶ 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." Defs.' Mot. 26. **Undisputed**
¶ 35.	"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." Defs.' Mot. 26. **Disputed:** Energy Fuels at times put materials from Mill operations in Roberts Pond. *See* ECF 68-9 at 193:23–195:10. Some solutions were returned to the Mill process circuits. *See Id.* at 198:8–15. Some materials, such as solutions that soaked into sediment and ore sands, were not returned to the Mill process circuits. *See* ECF 68-9 at 204:21–206:15, 201:2–9; ECF 68-19 at EFR23930 ("They have managed to get a significant amount of dirt / tailings in Roberts Pond.").
¶ 35.	"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." Defs.' Mot. 26–27. **Undisputed**
¶ 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." Defs.' Mot. 27. **Disputed:** The existence and use of Roberts Pond was not documented in the 1988 Design Report, ECF 63-1, or the 2008 application to DRC to construct Cell 4B, ECF 63-10. The Trust does not otherwise dispute this statement.
¶ 36.	"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." Defs.' Mot. 27. **Undisputed**
¶ 37.	"The Mill has never been advised that Utah or EPA considered Roberts Pond to be subject to the phased disposal work practice standard." Defs.' Mot. 27. **Undisputed**
¶ 37.	"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." Defs.' Mot. 27. **Disputed:** Mr. Goble did not consider Roberts Pond to be an operating tailings impoundment and does not recall discussing Roberts Pond with representatives of the EPA's Office of Air and Radiation. ECF 66 at ¶ 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." Defs.' Mot. 27. **Disputed:** To the extent that this statement implies that the Mill needs to use more than two impoundments to dispose of and evaporate waste produced by extracting uranium, the Trust disputes that assertion. If the Mill were to process less uranium ore and other feed material, it would discharge less waste, and would need less waste disposal and evaporation space. *See* ECF 68 9 at 87:2–25 (approximately two tons of waste solution are generated per ton of ore).
¶ 38.	"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 relining 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." Defs.' Mot. 27. **Disputed:** The Trust disputes the assertion that Energy Fuels "expended resources … in reliance on the ability to use evaporation ponds to meet the design criteria for a zero-

	discharge facility." Energy Fuels has generated revenue by building the Mill, using Cell 1, relining Cell 4A, and building Cell 4B. *See, e.g.*, Pl.'s Ex. 57 at 2 (the Mill made over 1 million pounds of yellowcake per year, on average, between 2007 and 2014); *id.* at 8 ("The Company's source of conventional uranium recovery is the White Mesa Mill, which generates revenue through conventional processing, alternate feed material processing, and toll processing agreements…."); *id.* at 12 ("The Mill's most recent vanadium recovery occurred in 2013 when it recovered 1.5 million pounds of vanadium."). The Trust does not dispute that Energy Fuels built the Mill, operated the Mill, used Cell 1, relined Cell 4A, and built Cell 4B all while planning to use at least one cell mostly to evaporate solutions.
¶ 38.	"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." Defs.' Mot. 27–28. **Disputed:** The Trust disputes the assertion that Energy Fuels has "incurred extensive costs" developing the Mill's reclamation plan and associated bonding "based upon" being allowed to use an unlimited number of evaporation ponds. Energy Fuels is required to reclaim the Mill and post reclamation bonds regardless of how many "evaporation ponds" the Mill has. *See* 10 C.F.R. § 40.31(h) 10 C.F.R. Pt. 40, Appendix A, Criteria 6, 6A (reclamation-plan requirements) and 9 (surety requirements). The Trust does not dispute that Energy Fuels has incurred some costs developing the reclamation plan and associated bonding but does not agree with the characterization that those costs are "extensive."
¶ 38.	"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." Defs.' Mot. 28. **Disputed:** The "entire" Mill design, permitting and licensing, construction, operation, reclamation and bonding are based on numerous considerations. *See, e.g.*, Pl.'s Ex. 66 at EFR4366 ("The mill is designed to process uranium ore by an acid leaching operation into a yellow-cake uranium concentrate."); ECF 63-217 (describing reclamation plans); ECF 63-36 at UTAH663 (describing license amendment request by Energy Fuels to allow it to process waste "uranium material" from the Midnite Mine water-treatment plant.). The Trust does not dispute that Energy Fuels has pursued a design, operating, and licensing strategy at the Mill that includes evaporation capacity for the Mill to run continuously.

APPENDIX B

Cell 2 Radon Emissions: Claim 1	
¶ 39.	"The Mill began measuring radon flux from Cell 2 and Cell 3 in 1990." Defs.' Mot. 29. **Undisputed**
¶ 39.	"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." Defs.' Mot. 29. **Disputed:** The radon-flux figure of 56.6 pCi/(m^2-sec) reported in Exhibit 3 for Cell 3's beach during September and December 2013 is inaccurate. Energy Fuels did not sample the radon flux from the beach during September and December 2013. *See* ECF 68-30 at GCT8320, GCT8353. The radon-flux figure in Exhibit 2 of 23.1 pCi/(m^2-sec) for Cell 2's covered area in June 2013 is inaccurate. The correct figure is 23.2 pCi/(m^2-sec). Pl.'s Ex. 69 at EFR1012. Exhibit 2 omits the results of radon-flux samples that Energy Fuels took from Cell 2 during October 2014, *see* Pl.'s Ex. 70, and did not include in its 2014 radon-flux report to the Division of Air Quality. *See* Pl.'s Ex. 71 at EFR33586, 33719, 33723. The "Mean of the Mean of 7 Monitoring Tests" for 2014 in Exhibit 2 is inaccurate. ECF 68-2 at 2. There are 8 radon-flux tests listed for 2014 in Exhibit 2, and the average of those tests was 14.8 pCi/(m^2-sec). *Id.* If the October 2014 result of 17.3 pCi/(m^2-sec) is included, Pl.'s Ex. 70 at EFR40330, the average of the 9 tests during 2014 was 15.1 pCi/(m^2-sec). *Id.*; ECF 60-2 at 2. The total mean radon-flux figure in Exhibit 3 of 15.8 pCi/(m^2-sec) for Cell 3 in March 2014 is inaccurate. Energy Fuels reported a result of 15.8 pCi/(m^2-sec) to the Air Quality Division, *see* ECF 63-42 at EFR33587, 33601, but the correct figure was 17.5 pCi/(m^2-sec). *See* Pl.'s Ex. 72 (explaining that the draft report had been revised to update the region sizes and the mean radon flux rate); Pl.'s Ex. 73 at EFR42276, EFR42313 (distributing the final report for Cell 3 with a radon-flux result of 17.5 pCi/(m^2-sec)). Exhibit 3 omits the results of radon-flux samples that Energy Fuels took from Cell 3 during August 2014, *see* Pl.'s Ex. 76, and did not include in its 2014 radon-flux report to the Division of Air Quality, Pl.'s Ex. 71 at EFR33586–87, EFR33590. If the result of the August 2014 radon-flux test from Cell 3 (17.1 pCi/(m^2-sec), Pl.'s Ex. 76 at EFR40042, is added to the "Mean of the Mean of 4 Monitoring Tests" for 2014, the average of those 5 tests would be 16.6 pCi/(m^2-sec). *Id.*; ECF 60-3 at 2.

	The Trust does not otherwise dispute the summaries in Exhibits 2 and 3 to Energy Fuels' summary judgment motion.
¶ 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." Defs.' Mot. 29. **Disputed:** The average, annual radon flux from Cell 2 exceeded 20 pCi/(m^2-sec) in 1990. ECF 60-2 at 1. The Trust disputes the characterization that the radon-flux standard was exceeded only "briefly." During each year from 1991 until 2011, the average, annual radon flux from Cell 2 was under 20 pCi/(m^2-sec). ECF 60-2 at 1. In 2012, the average, annual radon flux from Cell 2 was 25.9 pCi(m^2-sec), based on four sampling events conducted that year. ECF 60-2 at 2.
¶ 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." Defs.' Mot. 30. **Undisputed**
¶ 41.	"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." Defs.' Mot. 30. **Disputed:** The Trust disputes the assertion that "the Mill concluded that the increase in radon flux in 2012 was the result of dewatering…." Energy Fuels concluded that the "increase in radon flux from Cell 2 in recent years … is most likely caused by the dewatering activities mandated by the Mill's [groundwater discharge permit]." ECF 68-26 at GCT8881. To the extent that this statement asserts that final closure of Cell 2 had begun under Subpart W, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust also disputes the assertion that "the Mill's RML and GWDP" require dewatering "as part of the reclamation and final closure of the cell…." The Mill's radioactive materials license does not require Energy Fuels to dewater Cell 2. *See* ECF 68-2. And the Mill's groundwater discharge permit does not state that it requires

	dewatering "as part of the reclamation and final closure of the cell." The permit includes dewatering requirements that are described as "performance criteria" to "minimize the potential for wastewater release to groundwater and the environment…." ECF 68-21 at EFR715–716. The Trust does not dispute that dewatering of Cell 2 is being done to ensure long-term stability of the cell before placing the final radon barrier.
¶ 41.	"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." Defs.' Mot. 30. **Undisputed**
¶ 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." Defs.' Mot. 30. **Undisputed**
¶ 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." Defs.' Mot. 31. **Disputed:** The additional cover placed between December 16, 2013, and February 6, 2014, was applied to the areas numbered Cover 4, 5, 6, and 7, *see* Pl.'s Ex. 77 at EFR27154, 27159, 27163–76, which do not overlap with the areas shaded in yellow on Exhibit 4 to Energy Fuels' motion, *see* ECF 60-4. In April 2014, Mr. Turk called the areas labeled Cover 6 and Cover 7 the "first lift" and the areas labeled Cover 4 and Cover 5 the "second lift." *See* Pl.'s Ex. 78 at EFR36684, 36686.
¶ 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." Defs.' Mot. 31. **Disputed:** The Trust disputes the assertion that "[t]he efforts by the Mill were successful…." The actions described in Paragraph 42 of Energy Fuels' statement of facts, Defs.' Mot. 30, did not consistently keep Cell 2's average radon flux below 20 pCi/(m^2-sec). *See* Pl.'s Ex. 63 ("The Cell 2 average [for July 2014] was 20.4 pCi/m2-sec…."); Defs.' Mot. 31 (¶ 47) ("[T]he results for July were … 20.4."). The Trust does not dispute that average radon flux from Cell 2 was below 20 pCi/(m^2-sec) from September 2013 through May 2014.
¶ 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." Defs.' Mot. 31. **Undisputed**
¶ 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." Defs.' Mot. 31. **Undisputed**
¶ 46.	"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." Defs.' Mot. 31. **Disputed:** The July 23, 2014, letter did not state that Cell 2 had been closed since at least 2008. ECF 63-38 at UTAH767. The letter stated that "Tailings Cell 2 is not in operation and is in closure. No additional radioactive materials of any sort or other waste have been added to the cell since 2008, and, with this letter I am formalizing that by ordering that no such materials may be added to the cell. … The Licensee will be required to implement whichever version of the closure plan is approved at the time of final closure." *Id.* To the extent that Paragraph 46 in Energy Fuels' brief asserts that the July 23, 2014, letter, implies that Cell 2 had not been covered by Subpart W since 2008, the Trust disputes that assertion. The letter states that "[b]ecause Tailings Cell 2 is no longer in operation (receiving tailings), the Division of Air Quality and the Division of Radiation Control agree that Subpart W NESHAPs requirements (40 CFR Part 61) no longer apply; however, at this phase of cell 2 closure activities, the requirements of 10 CFR Part 40, Appendix A, Criterion 6 do apply." *Id.* at UTAH767–68.

¶ 46.	"Even so, DRC required the Mill to continue semi-annual radon flux monitoring of Cell 2." Defs.' Mot. 31. **Undisputed**
¶ 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." Defs.' Mot. 31. **Disputed.** The July 2014 radon-flux monitoring result for Cell 2 was 20.4 pCi/(m^2-sec). ECF 60-2 at 2.
¶ 47.	"Upon learning this, DRC required more platform fill to be added to Cell 2." Defs.' Mot. 31. **Disputed:** The Division of Radiation Control did not require Energy Fuels to place platform fill on Cell 2. When the Division of Radiation Control learned that the average radon flux for Cell 2 was above 20 pCi/(m^2-sec) in July 2014, it stated that it expected Energy Fuels "to implement engineering controls on cell 2 so that the average radon flux result for the September sampling event is below the limit and as low as reasonably achievable (ALARA)." ECF 63-40 at UTAH821. The Division also asked Energy Fuels to place platform fill on Cell 2 that Energy Fuels had already placed several years earlier. *Id.*
¶ 47.	"The Mill placed this second lift of additional platform fill between August 26, 2014 and November 29, 2014." Defs.' Mot. 32. **Disputed:** Energy Fuels placed fill on Cell 2 between August 26, 2014 and October 29, 2014. *See* Ex. 74 at EFR16587 ("utility crew started adding dirt fill on Cell 2"), Ex. 75 at EFR17723 ("utility crew completed adding fill to Cell 2"). To the extent that this statement asserts that the "second lift" was placed on the areas highlighted in green and labeled "second lift" on Exhibit 4 to Energy Fuels' brief, the Trust disputes that assertion. Those areas do not match the company's records from April 2014 showing only the areas labeled Cover 4 and Cover 5 as the "second lift." *See* Pl.'s Ex. 78 at EFR36684, 36686.
¶ 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." Defs.' Mot. 32. **Undisputed**
¶ 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." Defs.' Mot. 32. **Disputed:** The assertions that Cell 2 had entered closure and stopped operating by 2008, that Energy Fuels was not required to continue sampling Cell 2 after that time, and that Energy Fuels could have ceased sampling Cell 2 are all legal conclusions that the Trust disputes. *See* Pl.'s Mot. 60–64. The Trust does not dispute that Energy Fuels sampled radon flux from Cell 2 and reported the results to the Utah Division of Air Quality under Subpart W after 2008.
¶ 49.	"The Mill continued sampling Cell 2 at the same time it sampled Cell 3 and reported the results to DAQ." Defs.' Mot. 32. **Disputed:** The Mill did not always sample Cell 2 at the same time it sampled Cell 3. During 2012, Energy Fuels sampled radon flux from Cell 2 but not Cell 3 in September, October, and November. *Compare* ECF 60-2 at 2 *with* ECF 60-3 at 2. During 2013, Energy Fuels sampled radon flux from Cell 2 but not Cell 3 in April, May, July, August, October, and November. *Id.* During 2014, Energy Fuels sampled Cell 2 but not Cell 3 in January, February, April, May, and July. *Compare* ECF 60-2 at 2 *with* ECF 60-3 at 2; *see also* Pl.'s Ex. 70 (October 2014 samples from Cell 2). Energy Fuels also sampled Cell 3 but not Cell 2 in August 2014. *See* Pl.'s Ex. 76. The Trust does not otherwise dispute this statement.
¶ 50.	"The Mill has been working with DRC/DWMRC to revise the Rec Plan." Defs.' Mot. 32. **Undisputed**
¶ 50.	"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." Defs.' Mot. 32. **Undisputed** (Though the Trust does not dispute this statement, for clarity's sake, the Trust states that the planned cover thickness that Energy Fuels describes in Paragraph 50 does not match the cover thickness described in the latest version of the Mill's reclamation plan that is available to the public.[69])
¶ 50.	"The Mill believes the ET cover will be more effective in drawing water out of the

[69] *See* http://www.deq.utah.gov/businesses/E/energyfuels/docs/2011/10Oct/recplan5_0.pdf at 3-5.

	cover that would otherwise infiltrate the riprap cover, and thus the ET cover will be more effective long-term in minimizing potential ground water impacts and other factors." Defs.' Mot. 32. **Disputed:** It is unclear what "other factors" refers to. The Trust does not otherwise dispute this statement about what "the Mill believes."
¶ 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." Defs.' Mot. 32. **Undisputed**
¶ 51.	"In that letter, DWMRC explained the ongoing process to renew the RML and GWDP, and to develop the new Rec Plan." Defs.' Mot. 32. **Disputed:** The September 21, 2015, letter from Mr. Anderson did not "explain" the "ongoing process to renew the RML and GWDP, and to develop the new Rec Plan." It is implicit in the letter that the Radiation Division is considering whether to renew the Mill's radioactive materials license and that the reclamation plan is being revised. *See* ECF 63-45. The only statement the letter makes about the groundwater discharge permit is that the Division "agrees that renewal of Energy Fuels' License and Ground Water Permit need to be completed as soon as possible and that they are subject both to notice and comment and to the procedures outlined in R313-l 7-4 of the Utah Administrative Code." *Id.* at DEQ1.
¶ 51.	"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." Defs.' Mot. 32. **Undisputed**
¶ 51.	"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." Defs.' Mot. 33. **Disputed:** The Radiation Division stated in the September 21, 2015, letter that the radioactive materials license and groundwater discharge permit would be subject to a public notice-and-comment period. *See* ECF 63-45 at DEQ1.
¶ 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." Defs.' Mot. 33. **Disputed:** To the extent that this statement asserts that final closure of Cell 2 has begun

	under Subpart W, that is a legal conclusion that the Trust disputes. *See* Pl.'s Mot. 60–64.
¶ 52.	"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." Defs.' Mot. 33. **Undisputed** (*i.e.*, that this statement describes Energy Fuels' plans. For clarity's sake, the Trust states that: (1) Energy Fuels' assertion provides no information on how long it will take to complete any of the work described as "Phase 1" and "Phase 2"; and (2) the Primary Radon Attenuation Layer (Layer 2) that Energy Fuels describes in Paragraph 52 does not match the specifications for that layer described in the latest version of the reclamation plan that is available to the public.[70])
¶ 52.	"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." Defs.' Mot. 33. **Disputed:** The Trust disputes the assertion that Cell 2 has over two years of radon-flux data below the standard. In July 2014, the radon flux measured from Cell 2 was 20.4 pCi/(m^2-sec). *See* ECF 60-2 at 2. The Trust also disputes the assertion that "Cell 2 will continue to remain below the standard." *See, e.g.*, Defs.' Mot. 30 (describing addition of cover to Cell 2 after exceeding radon-emission standard in 2012), ECF 60-3 (showing past radon-flux results from Cell 2 above 20 pCi/(m^2-sec), including most recently in July 2014, after cover was added). The Trust does not dispute that Energy Fuels may believe that adding more cover to Cell 2 will keep its radon flux below 20 pCi/(m^2-sec).
¶ 52.	"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." Defs.' Mot. 33. **Undisputed**

[70] *See* http://www.deq.utah.gov/businesses/E/energyfuels/docs/2011/10Oct/recplan5_0.pdf at 3-5.

APPENDIX C

Cell 3 Radon Emissions: Claims 3, 4 and 5	
¶ 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." Defs.' Mot. 35. **Disputed**. To the extent that this statement implies that the average annual radon flux from Cell 3 was below 20 pCi/(m^2-sec) in 2012, the Trust disputes that statement. *See* Pl.'s Mot. 48–53. The Trust does not dispute that, for each year from 1990 through 2012, the average, annual radon flux results for Cell 3 that were reported to the State and EPA were below 20 pCi/(m^2-sec).
¶ 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." Defs.' Mot. 35. **Undisputed**
¶ 54.	"The results from that sampling event were 22.7, slightly over the standard." Defs.' Mot. 35. **Disputed:** The radon-flux results from the June 2013 sampling event for Cell 3 were 22.7 pCi/(m^2-sec), which is over Subpart W's numeric standard.
¶ 54.	"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." Defs.' Mot. 35. **Undisputed**
¶ 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." Defs.' Mot. 35. **Undisputed**
¶ 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." Defs.' Mot. 35.

	Undisputed
¶ 56.	"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 retesting the cover areas." Defs.' Mot. 35–36. **Disputed:** The e-mails with David Cooper of Tellco Environmental in Defendants' Exhibit 23 (the only e-mails cited in support of Paragraph 56) do not discuss Energy Fuels' reasons for sampling only Cell 3's cover region and not the beach in September and December 2013. *See* ECF 63–23 at EFR53924–28, EFR37340–43, EFR45950–51. Those e-mails also do not "document" that Energy Fuels "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…." *Id.* Nor do the e-mails reflect that "it was determined that Method 115 … allowed the Mill to choose a single set of measurements for the beach areas, while retesting the cover areas." *Id.*
¶ 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.'" Defs.' Mot. 36. **Undisputed**
¶ 58.	"On March 27, 2014, the Mill reported the 2013 results to DAQ." Defs.' Mot. 36. **Undisputed** (i.e., that Energy Fuels reported radon-flux results from sampling Cell 3 to the Division of Air Quality on March 27, 2014.)
¶ 58.	"The Mill reported that it was in compliance with the standard, using the results averaged from the three sampling events." Defs.' Mot. 36. **Disputed:** Energy Fuels asserted in its radon-flux report dated March 27, 2014, that the company was in compliance with Subpart W's numeric radon-flux standard by averaging: (1) the June 2013 results; (2) the average (weighted by region size) of the September 2013 cover area radon-flux results and June 2013 beach radon-flux results; and (3) the average (weighted by region size) of the December 2013 cover area radon-flux results and June 2013 beach radon-flux results. *See* ECF 63-32 at EFR1254, 1262, 1267.
¶ 58.	"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." Defs.' Mot. 36. **Disputed:** The Trust disputes the characterization that the reports "clearly" showed that the June beach radon-flux results were used to calculate the average radon flux from Cell 3 in September and December 2013. Energy Fuels' March 27, 2014, radon-flux report for Cell 3 revealed that the company used the June 2013 beach radon-flux results to calculate the average radon-flux from Cell 3 in September on pages EFR1292 and 1294, and that the company used the June 2013 beach radon-flux results to calculate the total, average radon-flux from Cell 3 in December on EFR1324 and 1326. *See* ECF 63-32 at EFR1292, 1294, 1324, and 1326.
¶ 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." Defs.' Mot. 37. **Undisputed**

¶ 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. 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." Defs.' Mot. 37. **Undisputed**
¶ 60.	"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." Defs.' Mot. 37. **Disputed:** Jay Morris's decision that Energy Fuels met Subpart W's radon-flux standard in 2013 for Cell 3 was partly influenced by his view that Section 2.1.1 of Method 115 "reflects some degree of flexibility in the method and does not preclude the source from taking additional measurements focusing on a specific region of a tailings pile." ECF 65 at ¶ 10.
¶ 60.	"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." Defs.' Mot. 37. **Undisputed**
¶ 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." Defs.' Mot. 37. **Disputed:** Jay Morris "interpret[s] 40 CFR Section 61.253 as allowing more than one notice of schedule to be supplied, given the language says the 'schedule may be submitted' to the agency 'prior to or after the first measurement period.' ECF 65 at ¶ 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." Defs.' Mot. 38. **Undisputed**

¶ 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." Defs.' Mot. 38. **Disputed:** Beginning in March 2014, Energy Fuels has sampled Cell 3 quarterly (with the exception the third quarter of 2014, in which it sampled radon-flux from Cell 3 twice, *see* Pl.'s Ex. 76) and has sampled both the cover and beach areas of Cell 3 during each radon-flux sampling event. *See* ECF 60-3 at 2.
¶ 63.	"DAQ expects the Mill to continue sampling cover and beach areas, unless the Mill gets approval from DAQ to do otherwise." Defs.' Mot. 38. **Disputed:** The Air Quality Division expects Energy Fuels to continue sampling "both the cover and beach areas of Cell 3 in every sampling event" unless the Division approves other sampling procedures. ECF 65 at ¶ 12.
¶ 63.	"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." Defs.' Mot. 38. **Undisputed**

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2016, I electronically filed the foregoing **GRAND CANYON TRUST'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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

GRAND CANYON TRUST, Plaintiff, v. ENERGY FUELS INC., ENERGY FUELS HOLDINGS CORP., EFR WHITE MESA LLC, and ENERGY FUELS RESOURCES (USA) INC., Defendants.	Case No. 2:14-cv-00243-CW-BCW **GRAND CANYON TRUST'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** **JUDGE CLARK WADDOUPS**

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REGULATIONS

EXHIBIT LIST

Exhibit 79 E-mail from D. Cooper, Tellco Environmental, to D. Turk, Manager Environmental Health & Safety, Energy Fuels, and attachment thereto (Feb. 24, 2014) (produced by Energy Fuels).

Exhibit 80 E-mail from J. Massey, Regulatory Compliance Specialist, Energy Fuels, to B. Bird, Director, Utah Air Quality Division, and attachment thereto (Mar. 30, 2015) (produced by Energy Fuels).

Exhibit 81 E-mail from J. Massey, Regulatory Compliance Specialist, Energy Fuels, to B. Bird, Director, Utah Air Quality Division, and attachment thereto (Dec. 4, 2013) (produced by Energy Fuels).

Exhibit 82 E-mail from J. Massey, Regulatory Compliance Specialist, Energy Fuels, to B. Bird, Director, Utah Air Quality Division, and attachment thereto (Mar. 6, 2014) (produced by Energy Fuels).

Exhibit 83 E-mail from D. Frydenlund, V.P. Regulatory Affairs & Counsel, Energy Fuels, to L. Morton, Environmental Program Manager, Utah Division of Radiation Control, and attachment thereto (Apr. 23, 2009) (produced by Energy Fuels).

INTRODUCTION

The Clean Air Act's citizen-suit provision calls on federal courts to ensure that violations of the Act's plain terms do not go uncorrected. It would forsake that charge to leave the issues this lawsuit raises in the hands of state regulators, as Energy Fuels asks the Court to do in nearly all its arguments opposing the Grand Canyon Trust's Motion for Summary Judgment, ECF 67 ("Pl.'s Mot."). Though there are reasons federal courts sometimes should defer to state agencies, saying what the law is—which is what this lawsuit asks the Court to do—is not one of them.

It also would forsake jurisdiction given to the Court to side with the company's constitutional-standing argument. *See* Defs.' Opp. to Pl.'s Mot. Summ. J. 29–33, ECF 76 ("Defs.' Opp.").[1] It should be readily evident that the Trust has standing from one simple fact: Trust members live and use the area near the White Mesa uranium mill, and their quality of life suffers because the Mill has not complied with federal standards meant to protect the health of those who may be endangered by radiation from nearby uranium-milling wastes.

Energy Fuels has twice owned up to violating the radon-emissions limit in Subpart W, the U.S. Environmental Protection Agency's air-quality standard that the parties are arguing over. To avoid confessing yet another violation, Energy Fuels impermissibly tampered with its radon monitoring. And the company has let the cleanup of its radioactive wastes languish while it runs a bigger waste system than Subpart W allows.

The Court has jurisdiction, the plain text of Subpart W governs, and the company's affirmative defenses are meritless. Summary judgment should enter for the Trust on all claims.

[1] Pinpoint citations to all summary judgment filings are to the pages in the ECF header.

ARGUMENT

I. The Trust has standing.

The activities challenged in this lawsuit diminish the enjoyment Trust members get from their property and the surrounding area in two basic ways. First, radon emitted from the Mill's impoundments and the company's failure to clean up all but two impoundments impair the quality of life of Trust members who live near the Mill and suffer from the radon its wastes emit, along with other blights, like dust, bad odors, truck traffic, and smoke. *See* Pl.'s Mot. 42–45. Second, those same challenged activities elicit health and environmental-contamination fears that cause Trust members to curtail recreational and other uses of the area near the Mill. *See id.*

Energy Fuels argues that these are not injuries in fact on three grounds, Defs.' Opp. 29–33, and that the "Cell 3" claims are not redressable, *id.* at 37 n.7. Each argument lacks merit.

First, case law belies Energy Fuels' claim that Trust members must suffer health injuries to have standing. *See* Defs.' Opp. 30–31.[2] The Supreme Court's controlling word on the matter is that plaintiffs are injured when the challenged activity diminishes how much they enjoy an area they use. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 183–84 (2000). Health injuries thus are not essential for standing. *Concerned Citizens Around Murphy v. Murphy Oil USA*, 686 F. Supp. 2d 663, 671 (E.D. La. 2010) ("[Plaintiff's] members need not show that they suffer adverse health effects caused by [Defendant's] pollution.").[3]

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[2] The Trust did not "disclaim[] any health impacts from the Mill's operation…." Defs.' Opp. 31. In interrogatory responses, the Trust explained that it did not intend to rely on health injuries for standing but did not concede that its members' health was unaffected. *See* ECF 77-2 at 3.

[3] *See also LaFleur v. Whitman*, 300 F.3d 256, 269–71 (2d Cir. 2003) ("Likely exposure" to an air pollutant that "impairs human health" at "elevated concentrations" is enough to confer standing, even if concentrations stay below EPA standards since only an "identifiable trifle" need be shown.); *N.Y. Pub. Interest Res. Grp. v. Whitman*, 321 F.3d 316, 325–26 (2d Cir. 2003)

Second, when Energy Fuels says that Trust members have not been injured by the tailings system, Defs.' Opp. 31–32, it ignores the parts of the Trust's motion and standing affidavits explaining that members have been injured "[b]ecause of the Mill's Subpart W violations," Pl.'s Mot. 43, which are necessarily due to the tailings system. Mr. Crowder explained, for example:

> After I learned that the Mill had been violating federal legal limits on its emissions of radon and the number of mill ponds it's allowed to use, I began to curtail how I use the area surrounding the Mill due to concerns about being exposed to radon. … [S]ome of the value I get out of our home as a family legacy has been diminished by the Mill's lack of compliance with federal law.

ECF 68-41 ¶¶ 7, 9. *See also* ECF 68-42 (Leppanen) ¶¶ 7–9; ECF 68-39 (Badback) ¶¶ 5, 6.

True enough, Ms. Badback's and Ms. Whiskers' lives are plagued not only by radon from the impoundments but also by the Mill "in general." Defs.' Opp. 31–32. After all, they have lived by the Mill for over three decades, since the day it started churning out yellowcake, radiation, smoke, dust, odors, truck traffic, and wastes so toxic they kill wildlife. *See* ECF 68-39 ¶¶ 1, 4–7; ECF 68-40 ¶¶ 1–4, 8. But the company misses the point when it says those injuries are not connected to Energy Fuels' "challenged activities" (an issue of causation, not injury in fact). *See* Defs.' Opp. 31–32. Those injuries are fairly traceable to Energy Fuels' operation of more than two impoundments because the company admits it could not run the Mill, or would have to run it less, if only two impoundments could be used. *See* Pl.'s Mot. 45; ECF 68-9 at 85:21–86:17, 90:11–92:14 (testifying that, to keep the Mill running, Cell 4B had to be put into service).

Third, the injuries suffered by the Trust's members are no less "concrete and particularized" or "actual or imminent" just because some injuries arise from fears of radon

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(uncertainty about whether the challenged activities will expose plaintiffs to excess air pollution is an injury in fact); *Kelley v. Selin*, 42 F.3d 1501, 1509–10 (6th Cir. 1995) (ownership and use of property near proposed site for storage of spent nuclear fuel is enough to have standing).

exposure. *Contra* Defs.' Opp. 32–33. This is not a case beset with doubt about how imminent and particular a plaintiff's injury from some future action may be. Instead, a regulated source of radiation that has already violated the law[4] has inflicted definite, presently existing injuries on Trust members who live and use the area nearby.[5] As the Supreme Court has said:

> [T]he emission of non-natural radiation into appellees' environment would also seem a direct and present injury, given our generalized concern about exposure to radiation and the apprehension flowing from the uncertainty about the health and genetic consequences of even small emissions….

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 74 (1978).[6]

Energy Fuels has been violating a law established for the very purpose of preventing uranium mills from exposing people like the Trust's members to excess amounts of radon. *See* Pl.'s Mot. 17–18. And it is neither incredible nor unreasonable, *contra* Defs.' Opp. 32–33, that those members' quality of life would suffer from such violations. *See, e.g.*, *Duke Power*, 438 U.S. at 74 and cases cited *supra* n.3 & n.6; *Sierra Club v. Envtl. Prot. Agency*, 762 F.3d 971, 977–78 (9th Cir. 2014) (standing established where redressing possible health effects was "exactly the purpose [of these] emissions limits, and more broadly, the Clean Air Act.").

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[4] Courts "must assume the Plaintiffs' claim has legal validity" for standing purposes. *Initiative & Referendum Instit. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006).

[5] The company warps Mr. Crowder's deposition testimony to argue that radon from the Mill has not affected his "sensory experiences" because it is an "invisible gas." Defs.' Opp. 32. If radon could be seen, smelled, heard, felt, or tasted, that might be a reason *not* to worry about it, for the human senses could provide some signpost about whether an area is safe to use.

[6] *See also Nuclear Info. & Res. Serv. v. Nuclear Reg. Comm'n*, 509 F.3d 562, 567 (D.C. Cir. 2007) (plaintiffs living near proposed uranium-enrichment facility had standing due to "risk of injury from radiation generated by the facility," and "in particular, … the waste [that] will be stored at the facility site and will emit harmful radiation."); *Nuclear Energy Instit., Inc. v. Envtl. Prot. Agency*, 373 F.3d 1251, 1266 (D.C. Cir. 2004) ("Although radionuclides escaping from the Yucca [nuclear-waste] repository may not reach [plaintiff's] community for thousands of years, his injury is 'actual or imminent,' for he lives [18 miles from] the land where the Government plans to bury 70,000 metric tons of radioactive waste – a sufficient harm in and of itself.").

Fourth, *contra* Defs.' Opp. 37 n.7, because Energy Fuels' "Cell 3" violations (claims 3–5) had "present adverse effects" on Trust members when the Trust amended its complaint, those effects were (and remain) redressable. *See Ward v. Utah*, 321 F.3d 1263, 1269 (10th Cir. 2003). In 2013, Cell 3 emitted more radon than Subpart W allows, a violation that went unremedied, at least in part, because the company claimed to have complied with Subpart W's radon limit by improperly scheduling extra radon-flux samples and improperly measuring Cell 3's radon flux. The excess radon emissions from the Mill's impoundments have injured Trust members, and those injuries persisted and were redressable at the time the Trust amended its complaint. ECF 68-41 ¶¶ 7–10; ECF 68-42 ¶¶ 7–10; ECF 68-39 ¶¶ 5, 6, 14–15; ECF 68-40 ¶¶ 2–4, 7–9.

Regardless, not only were members of the Trust still injured when the Trust amended its complaint in November 2014, but the Cell 3 violations were ongoing too, *contra* Defs.' Opp. 37 n.7. It was not until March 2015 that Energy Fuels reported that Cell 3's annual average radon flux was once again below 20 pCi/(m^2-sec) (Claim 5). *See* ECF 63-42 at EFR33587. Not until March 2015 did it calculate Cell 3's radon flux using only sampling events that included samples from every region (Claim 4). *Id.* at EFR33590, 596, 628, 660, 692.[7] And not until the 2015 sampling year did Energy Fuels submit just one sampling schedule to the State (Claim 3). *See* Pl.'s Ex. 80 at EFR35315.[8] Thus, all the Cell 3 violations were ongoing when the Trust amended its complaint in November 2014, and the Cell 3 claims should not be dismissed for lack of redressability. This is especially true because Energy Fuels believes it did not violate the law. A

[7] The company again took samples from Cell 3 in 2014 that did not comply with Method 115, but it (properly) did not use them to calculate the annual average radon flux. *See* Pl.'s Ex. 79 (six "compaction-test" samples in February); ECF 79-20 (unscheduled samples in August).

[8] Energy Fuels again altered its Cell 3 sampling schedule for 2014 by submitting a schedule in December 2013 providing for one annual sample, Pl.'s Ex. 81 at EFR35235, and then another in March 2014 changing to quarterly sampling for the year, Pl.'s Ex. 82 at EFR35232.

declaratory judgment thus would give Energy Fuels direction about how to comply in the future, and an injunction and civil penalties would give it a compelling reason to do so.

II. Energy Fuels has repeatedly violated Subpart W's numeric radon limit.

A. The company is liable for Cell 2's excessive radon emissions in 2012 and 2013.

Energy Fuels argues that it should not be found liable for the Cell 2 radon-flux violations it reported to the State because it now claims that Subpart W's 20-picocurie limit applies only to operating impoundments and Cell 2 was not operating in 2012 and 2013. *See* Defs.' Opp. 33–34. This argument is groundless for the reasons set out in the Trust's opposition brief: (1) Cell 2 was in fact in "operation" in 2012 and 2013; (2) regardless, the 20-picocurie limit applies to "existing uranium mill tailings piles" and does not exempt non-operating impoundments, *see* 40 C.F.R. § 61.252(a); and (3) under any circumstance, the company should not be allowed to now contest its self-reported violations. *See* Pl.'s Opp. to Defs.' Mot. Summ. J. 50–52, ECF 78 ("Pl.'s Opp.").

Only two more points deserve emphasis here. First, the company relies on a July 23, 2014, letter from the State for the claim that Cell 2 was not in "operation" by 2012. *See* Defs.' Opp. 34. But that is not what the letter said. ECF 63-38 at UTAH767. It observed that the cell was "not in operation" as of July 2014. *Id.* Second, though the letter says that Cell 2 was "in closure" by 2014, it recognized that "final closure" had not yet begun, telling Energy Fuels it "will be required to implement whichever version of the closure plan is approved at the time of *final closure*." *Id.* (emphasis added).

The company's renewed "automatic-remedy" argument, Defs.' Opp. 34–36, fares no better. This time around, the company observes that citizen suits have been dismissed when their compliance goals have been achieved by other means. *Id.* But the cases Energy Fuels cites were

not about rejecting citizen suits when a defendant complies with post-violation reporting obligations, let alone some "automatic remedy." In *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987), the Supreme Court did not reject but remanded a Clean Water Act citizen suit after holding that the case should proceed, despite the defendant's claim to have stopped violating the Act during the 60-day notice period, if allegations of ongoing violations were made in good faith. *Id.* at 53–54, 64–67. And in the other cases, the government had taken comprehensive enforcement action against the defendant that accomplished the citizen suits' goals—by assessing civil penalties and issuing an order requiring the defendant to completely *replace* its polluting facility (*Ailor v. City of Maynardville*, 368 F.3d 587, 591–92, 599–601 (6th Cir. 2004)); by obtaining penalty-backed, judicially approved consent decrees (*Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 474–78 (6th Cir. 2004)); or by overseeing a multi-decade enforcement order and permit with comprehensive environmental-cleanup mandates (*Clean Harbors, Inc. v. CBS Corp.*, 875 F. Supp. 2d 1311, 1322–24, 1330–32 (D. Kan. 2012)).

Those cases provide no support—and there is none—for the idea that this citizen suit is barred because the company monitored Cell 2 monthly and the State decided *not* to take any enforcement action against it. *See* Pl.'s Opp. 52–53.

B. The State cannot pardon Energy Fuels' "Cell 3" violations.

Energy Fuels tampered with its Cell 3 radon measurements in 2013 by using improperly taken samples to calculate the cell's annual average radon flux (claims 3–5).[9] Its defense, at root, is that the State believes the company did not violate Subpart W. Defs.' Opp. 37–39; Defs.' Mot.

[9] Altering Cell 3's sampling schedule and calculating its radon flux with partial samples were independent transgressions. Each could have occurred without the other and without violating the 20-picocurie limit. Liability on Claim 5 thus does not preclude liability on Claims 3 and 4.

Summ. J. 53–54, ECF 60 ("Defs.' Mot."). But the unambiguous provisions of Subpart W and EPA's associated radon-flux test method, Method 115, control over the State's contrary view, and the State's decision not to take enforcement action cannot preclude this citizen suit.

1. The words "the schedule" mean one schedule, not "schedules."

Mill operators are to submit only one "schedule of the measurement frequency to be used" when sampling radon-flux each year. *See* 40 C.F.R. § 61.253; Pl.'s Mot. 49–51. Energy Fuels claims that Subpart W's plain language "does not fall in [the Trust's] favor" but does not say how it could be read any other way. Defs.' Opp. 37. Instead, it asks the Court not to second guess the Air Quality Division's interpretation of the law "within its area of expertise." *Id.* at 38.

But the Division's interpretation is contradicted by the plain text of Subpart W, which must govern. *See* Pl.'s Opp. 47.[10] Subpart W says this: "The schedule may be submitted to EPA prior to or after the first measurement period." 40 C.F.R. § 61.253. It does not matter to the Division that the subject of this sentence—"the schedule"—pairs the singular noun "schedule" with the definite article "the" to mean that there will be only one, particular schedule. *See Colo. v. Sunoco, Inc.*, 337 F.3d 1233, 1241 (10th Cir. 2003). Nor is the Division troubled by the disjunction "or" rather than conjunction "and" between the words "prior to" and "after," which implies one or the other, but not both. *See Chevron Oil Co. v. Barlow*, 406 F.2d 687, 692 (10th Cir. 1969). Applying its "expertise," the Division reads the sentence to say: "Schedules may be submitted to EPA prior to and after the first measurement period." But no amount of tortuous reasoning could equate that sentence to the one EPA actually put in Subpart W. And that being so, it must be true that Subpart W prohibits revision of already-submitted sampling schedules.

[10] Even if that were not so, the State would not be owed any deference. *See* Pl.'s Opp. 47–49.

Any other outcome would read EPA's rule to say that "schedules may be submitted to EPA whenever," which it plainly does not say.

2. All impoundment regions must be sampled during every sampling event.

Method 115 provides that "[r]adon flux measurements shall be made within each region on the pile, except for those areas covered with water," a requirement that applies to "[a]ll radon measurements" made. *See* 40 C.F.R. Pt. 61, Appx. B ("Method 115") §§ 2.1.1 and 2.1.3. Energy Fuels does not dispute that it calculated Cell 3's 2013 radon emissions based on measurements taken in September and December 2013 from only Cell 3's cover region and not the beach. *See* Defs.' Opp. 18. That violated Method 115. *See* Pl.'s Mot. 51–53.

Energy Fuels has but two replies. First, it implores the Court not to question the Air Quality Division's decision to accept the company's calculations. *See* Defs.' Opp. 38–39. But the reasoning flounders. Method 115's "introductory language" about sampling frequency, the Division says, "reflects some degree of flexibility in the method" and does not forbid taking extra measurements "focusing on a specific region…." ECF 65 ¶ 10. But Method 115's "flexible" provisions about *when* operators may sample do not alter its rigid requirements about *where* they must sample. And though Method 115 may not prohibit taking *extra* measurements "focusing" on one region, the measurements used to calculate an impoundment's annual average radon flux must comply with the method, *see* 40 C.F.R. § 61.253, which insists that all those measurements include samples from every region, Method 115 §§ 2.1.1 and 2.1.3. These requirements are not ambiguous, and the Division's interpretation is thus irrelevant, though it is not owed any deference anyway. *See* Pl.'s Opp. 47–49.

Second, the company points out that the Trust did not "identify any single, specific

provision that expressly required the Mill to test both the cover and beach regions during every monitoring test." Defs.' Opp. 39. But it cannot be true that a legal requirement is uncertain or unenforceable simply because it is set out in *two* provisions, to wit: (1) "[a]ll radon measurements shall be made as described in paragraphs 2.1.2 through 2.1.6…," Method 115 § 2.1.1; and (2) "[r]adon flux measurements shall be made within each region on the pile…," *id.* at § 2.1.3. If that were a winning argument, it would be hard to find a law that is enforceable.

III. Energy Fuels has been violating Subpart W's two-impoundment cap.

Energy Fuels has been violating Subpart W's two-impoundment limit since it built Cell 4B in November 2010 because it continued to place tailings in Cells 1, 3, 4A, 4B and Roberts Pond, and it did not begin "final closure" of Cell 2. *See* Pl.'s Mot. 53–65.

A. Energy Fuels has disposed of solid tailings in all the cells and Roberts Pond.

There is no genuine dispute that Energy Fuels has disposed of solid milling wastes after 2010 not only in Cells 3 and 4A (in the form of tailings slurry), but also in Cells 1 and 4B (in the form of dissolved solids that precipitate out of process solutions). Though Energy Fuels refuses to call those precipitates "sand-like wastes" and characterizes their volume as "insignificant," the company does not dispute that solid wastes do precipitate out of solutions in Cells 1 and 4B. *See* Defs.' Opp. 25; Defs.' Mot. 16 (¶ 7), 22 (¶ 23). This alone is enough to find the company liable on summary judgment on the Trust's second claim for relief. *See* Pl.'s Mot. 59–60.

That Energy Fuels got rid of solid wastes in Roberts Pond is also not genuinely disputed. At minimum, the company put uranium-laden solutions in the pond, which soaked into sediment on the pond bottom and then sat for years. Energy Fuels seems to say this sludge was not waste since pond materials "were often returned to the Mill process." Defs.' Opp. 48. But that claim is

belied by the undisputed fact that Energy Fuels got rid of some of the sludge in the cells it insists are reserved for "sand-like tailings." *See* Defs.' Opp. 27; Defs.' Mot. 26–27 (¶ 35). This too is a sufficient basis to find Energy Fuels liable on the Trust's second claim. *See* Pl.'s Mot. 64–65.

B. Liquid milling wastes are tailings in any event.

Regardless of whether solid tailings precipitate from "process solutions," those solutions are "tailings" under the plain language defining that term: they are "waste produced by the extraction or concentration of uranium from any ore processed primarily for its source material content." 40 C.F.R. § 61.251(g). Energy Fuels makes no argument that process solutions do not fit this definition, *see* Defs.' Opp. 40–45, and indeed admits they do. *See* Pl.'s Mot. 54–55; ECF 68-12 at 6–8; ECF 68-45 at 4. Because this definition of "tailings" is unambiguous, every single argument the company makes from the rulemaking history to claim that process solutions are not tailings, *see* Defs.' Opp. 41–45, is beside the point. Energy Fuels has been placing process solutions in Cells 1, 4B, and Roberts Pond while Cells 3 and 4A have been in operation. *See* Defs.' Opp. 22–23; ECF 68-17 at 5, ECF 68-13 at 3–4 (admitting Cells 1 and 4B have received process solutions since 2010). The company is thus liable on the Trust's second claim.

In any case, every part of the rulemaking history that Energy Fuels cites is consistent with the conclusion that the two-impoundment cap was meant to apply to "evaporation ponds," like Cells 1 and 4B. It is true, for example, that EPA's cost estimates assumed that phased-disposal operations would use an evaporation pond plus "a [series] of small impoundments." *See* Defs.' Opp. 42, 44. But that is perfectly consistent with construing Subpart W's two-impoundment cap to allow operators to simultaneously put tailings in just one evaporation pond and one other impoundment at a time in the "series of small impoundments." It is also true that "tailings are

deposited as a slurry in tailings impoundments." *See* Defs.' Opp. 42. But that does not mean that tailings are deposited *only* as a slurry and not also as liquids. EPA recognized that tailings take both forms. *See* ECF 68-50 at GCT525, GCT535. And last, it is true that EPA mentioned evaporation ponds in the 1986 proposed rule and comments but used only the terms "tailings impoundments" and "piles" in its final 1986 and 1989 rules. *See* Defs.' Opp. 42–44. But that does not mean that EPA chose not to regulate evaporation ponds in Subpart W. The opposite inference is just as cogent: EPA knew what evaporation ponds were, but its rule included no discussion of *exempting* them from Subpart W. The better analysis is that EPA acknowledged that evaporation ponds contain "tailings," ECF 77-6 at 6,389; ECF 68-50 at GCT525, 535, 564, and chose to regulate in Subpart W all impoundments, including evaporation ponds, that contain "tailings"—liquid and solid alike. *See* 40 C.F.R. § 61.251(g); *see also* ECF 79-4 at 4-1.

EPA's 2014 proposed rulemaking confirms that conclusion. True, EPA said in some places that the work-practice standards in the 1989 rule "limit[] the number of conventional impoundments operating at any one time to two," and so forth. Defs.' Opp. 45. But it does not follow that the rule's limit does not apply *also* to "non-conventional impoundments." Indeed, EPA specifically rejected the very argument that Energy Fuels makes in this lawsuit:

> Industry has argued … that Subpart W does not, and was never meant to, include these types of evaporation or holding ponds under the Subpart W requirements. … EPA has consistently maintained that these non-conventional impoundments meet the existing applicability criteria for regulation under Subpart W.

79 Fed. Reg. 25,388, 25,402 (May 2, 2014).

C. Cell 2 is in "operation" because its "final closure" has not begun.

The company's failure to begin "final closure" of Cell 2 while putting tailings slurry in Cells 3 and 4A (and process solutions in Cells 1, 4B, and Roberts Pond) is yet another sufficient

basis to find the company liable on the Trust's second claim. In response, Energy Fuels argues that the "closure process" for Cell 2 has begun because the company has stopped putting wastes in the cell,[11] covered it with "platform fill," and begun dewatering it. *See* Defs.' Opp. 46.

The fundamental problem with this argument is that Energy Fuels has taken these measures with no more than a general idea of what the "final closure" steps for Cell 2 should be and is only now claiming, to fight this lawsuit, that those measures are "being done under [Rec Plan Revision 3.2]." Defs.' Opp. 46–47. Indeed, neither the company nor the State has a firm idea of when final closure purportedly began or what the first step was, which only highlights that they are trying to backdate Cell 2's final closure to defend this lawsuit. *See* Defs.' Mot. 42–43; ECF 65 ¶ 6; ECF 66-3 at UTAH665; ECF 66-2 at DEQ1139 (suggesting variously that closure of Cell 2 may have begun anywhere from 2004 to 2008, when Energy Fuels stopped placing wastes in the cell, when dewatering and settlement began, or when interim cover was advanced over the whole cell).

Having no deadlines, Reclamation Plan Revision 3.2 does not require Energy Fuels to do anything to accomplish final closure of Cell 2. *See* Pl.'s Mot. 60–64. And the company was already overhauling that plan before it was ever submitted to and "approved" by the State in January 2011. *See* ECF 68-16 at 171:24–173:12. Indeed, by 2007, the company was proposing to change the design of the final cover that Revision 3.2 describes.[12] *See* Pl.'s Ex. 83 at EFR43477–78 (discussing cover design submitted in November 2007 report). When the company claims it

[11] Ceasing tailings placement cannot be enough to initiate final closure. Without taking closure steps, tailings placement could resume or an impoundment could sit unreclaimed indefinitely.
[12] Energy Fuels' claim that Revision 3.2 states that prior cover-design work had met "the performance criteria" in the groundwater discharge permit, Defs.' Opp. 48, is perplexing. The plan says not only that modeling to show compliance with those criteria was incomplete, but also that changes to the final cover design would probably be needed. ECF 63-17 at EFR6412–14.

has already built the "platform fill" layer of Revision 3.2's purportedly "final" cover, it is just applying a new label to the "interim cover" it has been advancing over the cell for pre-closure radon control since the 1980s. And that layer of dirt can be said to contribute to whatever final cover is ultimately built only because it is already there, not because the company has a truly final reclamation plan that calls for it to be built.

Similarly, the company is required to dewater Cell 2 under its groundwater discharge permit to "minimize the potential for wastewater release to groundwater and the environment…." ECF 68-21 at EFR715–717; *see also* ECF 63-17 at EFR6376–77. It cannot be true that dewatering is "being done under" Revision 3.2 because it is not a step in the plan's reclamation process, ECF 63-17 at EFR6398–424.[13] Dewatering ultimately may enable Cell 2's final closure, but it is because the company's groundwater discharge permit requires dewatering that it is underway, not because a final reclamation plan requires it.

Because Revision 3.2 impermissibly lacks closure deadlines, there is nothing except the fiat of state regulators to compel the company to take any steps at all in the plan. As a result, placing interim cover and dewatering the cell, just like Revision 3.2 as a whole, have simply postponed final closure of the cell while the company and state come up with the real closure plan. And that has kept Cell 2 in operation in violation of Subpart W's two-impoundment limit.

CONCLUSION

Energy Fuels and state regulators have not achieved compliance with Subpart W by "actively working together," Defs.' Opp. 5, but the opposite. And that calls out for a judicial remedy. The Court should grant the Trust summary judgment on all its claims.

[13] Dewatering is mentioned in the "existing facility" section as background, ECF 63-17 at EFR6376–77, but it is not a closure step in the "reclamation plan" section, *id.* at EFR6398–424.

Respectfully submitted this 22nd day of July, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 2016, I electronically filed the foregoing **GRAND CANYON TRUST'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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