

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO Court Address: 2nd Judicial District Denver City & County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202</p> <p>Phone Number: (720) 865-8301</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>PLAINTIFF: Colorado Citizens Against ToxicWaste, Inc. v. DEFENDANTS: Steve Tarlton, in his official capacity as Manager, Radiation Control Program, Colorado Radiation Management Unit; Colorado Radiation Management Unit; Colorado Hazardous Materials and Waste Management Division; Colorado Department of Public Health and Environment; And, INDISPENSIBLE PARTY: Cotter Corporation</p>	
<p>ATTORNEYS FOR PLAINTIFF: Attorneys: Travis Stills, #27509 Energy Minerals Law Center Address: 1911 Main Avenue, Suite 238 Durango, Colorado 81301 Phone Number: (970)375-9231 Fax Number: (970)382-0316 Email: stills@frontier.net</p> <p>Attorneys: Jeffrey C. Parsons, #30210 Roger Flynn, #21078 Western Mining Action Project Address: P.O. Box 349, Lyons, CO 80540 Phone Number: (303) 823-5738 Fax Number: (303) 823-5732 Email: wmap@igc.org</p>	<p>Case Number:</p> <p>Div: Courtroom:</p>
<p>COMPLAINT</p>	

Plaintiff, Colorado Citizens Against ToxicWaste, Inc. (CCAT), by and through their undersigned legal counsel, hereby states and avers the following as its Complaint for relief against the Defendants, Steve Tarlton, Manager, Radiation Control Program, Colorado Radiation Management Unit, Colorado Radiation Management Unit, Colorado

Hazardous Materials and Waste Management Division, and Colorado Department of Public Health and Environment.

PARTIES, JURISDICTION AND VENUE

1. CCAT is a Cañon City, Colorado-based local volunteer grass roots organization formed in 2003 in response to ongoing and substantial radioactive and heavy metal groundwater and surface contamination caused by the Cotter Corporation Cañon City, Colorado uranium milling facility. The organization is a diverse volunteer group of educators, business professionals, health care workers, business owners, county and state employees, retirees, homemakers, students and others.

2. The mission of CCAT is to educate the community on the local industrial uranium milling operations and to ensure that any threats to local water supplies, community health, the local economy, or tourism are addressed. CCAT conducts these educational activities by providing information via the local media, special meetings, newsletters, a website, and local events.

3. CCAT's members and volunteers live in close proximity and regularly use and enjoy lands, waters, air and other natural resources that are affected by the Cotter Corporation's uranium milling facility. CCAT's members use lands directly affected by the proposed operations for hiking, nature and wildlife study, spiritual and aesthetic enjoyment, photography, and other recreational and conservation purposes. CCAT members and volunteers use ground and surface waters impacted by the Cotter Corporation uranium mill for irrigation and domestic purposes. These uses would be adversely affected should the mill not be fully reclaimed, should any delay occur in the decommissioning and reclamation of the facility, or should the State of Colorado lack sufficient funds to conduct a full and complete decommissioning, reclamation, and remediation of the ground and surface water contamination associated with, and caused by, the facility.

4. CCAT, and its members and volunteers, have legally-cognizable interests which are threatened and directly injured as a result of the decision of the Defendants in setting a financial surety amount insufficient to effectuate a complete and comprehensive decommissioning and remediation of the affected lands and waters.

5. Defendant Steve Tarlton is the Manager of the Radiation Control Program for Defendant Radiation Management Unit, which has direct regulatory authority over the Cotter Corporation Cañon City, Colorado uranium mill. This authority includes the authority to regulate the activities at the mill, including all decommissioning and remediation activities, as well as the authority to set and ensure adequacy of the required financial surety necessary to effectuate complete decommissioning and remediation of contamination from the facility.

6. Defendant Colorado Hazardous Materials and Waste Management Division is the bureaucratic location of the Radiation Management Unit. The Hazardous Materials and

Waste Management Division, through the Radiation Management Unit, is the regulatory Division with authority to implement the Colorado Radiation Control Act, C.R.S. §§ 25-11-101, et seq. The Colorado Radiation Control Act is the statutory mechanism through which the State of Colorado implements the federal Atomic Energy Act, which sets forth the regulatory requirements for the processing of radioactive materials, including those activities conducted at the Cotter Corporation Canon City, Colorado uranium milling facility.

7. Defendant Colorado Department of Public Health and Environment is the Colorado regulatory Department with jurisdiction over the Colorado Hazardous Materials and Waste Management Division and the Radiation Management Unit.

8. Cotter Corporation is a General Atomics (GA) affiliate headquartered in Denver, Colorado. Originally incorporated in 1956 in New Mexico as a uranium production company, Cotter was purchased by and became a wholly owned subsidiary of Commonwealth Edison in 1975. GA acquired Cotter in early 2000. Cotter Corporation is the entity which holds the Radioactive Materials License at issue in this case (License No. 369-01). Because Cotter is likely to claim an interest in the subject matter of this litigation, Cotter is included as an indispensable party.

9. This Court has jurisdiction in this case pursuant to the Colorado Administrative Procedure Act, C.R.S. § 24-4-106.

10. Venue is proper in this Court pursuant to C.R.C.P. 98(b), as this action is brought against public entities whose offices are in Denver, and the decisions and actions at issue in this case occurred in the City and County of Denver. (*See* C.R.S. § 24-4-106(4) (“The residence of a state agency for the purposes of this subsection (4) shall be deemed to be the city and county of Denver.”)).

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

11. At issue in this case are the Defendants’ actions (and inactions) in failing to adequately maintain or follow legally-mandated procedures to properly set the required financial assurances for the Cotter Corporation Cañon City, Colorado uranium milling facility. These financial assurance requirements must be implemented by Defendants in a manner at least as strict as federal law, consistent with Colorado Law, and meeting standards set by the Nuclear Regulatory Commission (“NRC”):

The objective of NRC’s financial assurance requirements is to ensure that a suitable mechanism for financing the decommissioning of licensed facilities is in place in the event that a licensee is unable or unwilling to complete decommissioning.

NUREG-1757, Vol. 3 at 4-1.

12. Cotter Corporation has begun decommissioning activities at its Cañon City, Colorado uranium milling facility. A significant amount of the decommission costs will

involve cleaning up and remediating groundwater contamination from the radioactive tailings disposal cells known as the Primary and Secondary Impoundments. Decommissioning activities will require tens (perhaps hundreds) of millions of dollars of work to stabilize the tailings and remediate groundwater contamination from the Mill.

13. The Defendants' most recent detailed estimate of decommissioning and decontamination costs exceeds \$43 million. Yet, to date, Defendants have required Cotter Corporation to post only a fraction of that amount, approximately \$20.2 million. The resulting deficiency leaves the State of Colorado, and the local citizens, including CCAT and its members, at significant financial and environmental risk, as the funds necessary for decommissioning and decontamination of the facility are insufficient to accomplish these required closure activities.

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

15. UMTRCA Title I clean-up at the Cotter Corporation Cañon City, Colorado uranium milling facility was avoided by virtue of Cotter Corporation's assertion of an intent to continue operations at the site. The Cañon City, Colorado uranium milling facility operated sporadically from 1958 until now. The site was placed on the National Priorities List (NPL) of Superfund sites on September 21, 1984 due to ground water contamination resulting from leakage of liquid wastes containing radionuclides and heavy metals (primarily uranium and molybdenum) from the facility into the groundwater beneath the Lincoln Park neighborhood bordering the facility. The unincorporated community of Lincoln Park has approximately 3,000 residents in the Sand Creek drainage, which runs through the Lincoln Park community to the Arkansas River.

16. Despite the intervening 25 years, the site remains on the NPL, and the ground water contamination beneath the neighborhood of Lincoln Park persists. Indeed, additional uranium-tainted ground water contamination in excess of state ground water quality standards has been detected from the facility spreading beneath the local community golf course, also adjacent to the facility. This second contamination plume resulted in a formal Notice of Violation from the Colorado Department of Public Health and Environment on July 25, 2008. To date, over two years after the Notice of Violation, while Cotter Corporation has commenced some groundwater characterization activities, no clean up of this second plume has commenced.

17. In 1988, the State of Colorado settled a lawsuit for natural-resource damages with Cotter Corporation. As part of the settlement, the State and Cotter agreed on how the Site would be cleaned up further at Cotter's expense. EPA and the State signed a Memorandum of Understanding (MOU) giving the State the lead role in overseeing the cleanup of the Site. Cleanup takes place under the joint authorities of the Radiation Control license, the Court Ordered settlement of a Natural Resource Damage Suit, and the Superfund NPL program. Cleanup plans for both on-site, i.e. Operable Unit 1 (the "OU") and off-site i.e. OU2 areas are documented in the Remedial Action Plan (the "RAP"). The RAP requires Cotter to perform cleanup actions in OU1 and OU2, monitor groundwater and air, and to conduct additional studies. The RAP is incorporated into the Federal Consent Decree (CD) for Civil Action No. 83-C-2389. The RAP was also incorporated into Cotter's Radioactive Materials License in 1987. Remedial action and monitoring under the RAP began in 1988, but to date this clean up has not been completed.

18. Cotter Corporation has not processed mined uranium ore at the Cañon City, Colorado site since at least 2005. Ore mined in 2005 from uranium mines located on Cotter Corporation's federal uranium lease tracts remains stockpiled at the mill. Cotter Corporation ceased production at its mines in November 2005. On information and belief, unresolved problems with the mill circuit at Cotter prevent economic processing of thousands of tons of industrial wastes which are currently stockpiled at the mill.

19. The Cotter Corporation uranium milling facility is currently subject to a radioactive materials license issued by Defendants. The licensee is bound by the license until it is terminated. License termination may not take place until clean-up activities are conducted and lands containing the stabilized tailings are transferred, by title, to the Department of Energy ("DOE"). The financial surety must be set in an amount sufficient to cover all costs which may be required in order to transfer title to the DOE. An additional bond is set to cover long term care costs which are expected to be incurred after the facility is transferred to the United States for perpetual care.

20. On some date before June 18, 2009, the Radiation Management Unit recognized that the federal standards had been updated. On or before June 18, 2009, Defendants confirmed that the financial surety at the Cotter facility failed to meet federal standards and was inadequate, particularly with respect to the required clean-up of contaminated ground water on and off site. This finding was based on a review of financial surety at the Cotter facility in light of state regulations and the NUREG 1757 standards for financial surety, which are established by the U.S. Nuclear Regulatory Commission.

21. In 2009, Defendants conducted an undocumented review which confirmed that the total amount of financial surety of was inadequate. The decommissioning warranty was based on an outmoded estimate of \$17,402,821. Cotter provided a financial instrument for \$2,623,623, which is required by both the Consent Decree and state surety requirements. Cotter submitted a separate financial instrument to cover the remaining \$14,770,189, which is covered solely by state surety laws. No actual cost estimate was made for long term care costs.

22. Colorado's authority to license uranium mills and the radioactive tailings is derived from the Agreement State Program of the Atomic Energy Act. The State implementation of the program is by regulation (C.C.R. 1007-1) and statute. C.R.S. § 25-11-101, *et seq.*(Radiation Control Act ("RCA")). The state program must be implemented in a manner which is at least as stringent as the federal program. 42 U.S.C. § 2021.

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

24. On June 30, 2009, a mandatory annual report was due from Cotter regarding financial surety. On information and belief, no such annual report was filed in 2009. On information and belief, no such annual report was filed between 2003 and 2009.

25. An annual report and review of the financial warranty are mandated by state regulations. The annual review requirements are as follows:

3.9.5.6 The licensee shall provide in writing to the Department, no later than June 30th of each calendar year, any licensee-proposed changes to the financial assurance warranties, including updated decommissioning funding plans, cost estimates, or the type of warranty.

3.9.5.7 Each licensee's financial assurance warranties shall be subject to review annually by the Department to assure the continued adequacy of each warranty.

6 C.C.R. 1007-1 § 3.9.5.

26. In 2010, the Colorado Legislature examined existing and proposed uranium milling activities in Colorado. In response, the Legislature strengthened the annual reporting and review procedures for financial surety by adopting HB10-1348. By this amendment, the RCA was amended to add a mandatory public notice and public comment opportunity to the existing June 30 annual reporting requirement in existing regulations. HB10-1348 was signed into law on June 8, 2010. The 2010 annual report was due June 30, 2010 and subject to the strengthened annual review procedure. The plain language and intent of HB10-1348 was to immediately correct serious problems with the implementation of the financial surety requirements. To this end, the legislature included a provision in the bill to specifically make HB 10-1348 effective immediately

upon signature of the Governor, rather than the typical July 1 date marking the start of the State's new fiscal year.

27. As amended, the RCA explicitly requires public notice and comment on the annual report and public involvement in the annual review of financial surety at uranium mills in Colorado. C.R.S. § 25-11-110(5).

28. Based on this annual review, the full amount of the financial warranty must be established in a financial instrument within 60 days of the annual review determination. The RCA requires the licensee to dispute the findings, if at all, by formal appeal conducted under C.R.S § 24-4-105. Any such formal appeal requires a hearing to be conducted by persons other than the original decisionmaker, with appropriate prohibitions against ex parte discussions with the appeal officer.

29. On June 30, 2010, Cotter filed a statement concerning the financial warranty for its Cañon City, Colorado uranium milling facility. The June 30 Report proposed changes to the financial warranty. The June 30 Report purported to confirm an oral agreement between Mr. Tarlton and Cotter Corporation made on June 11, 2010 concerning an increase in financial surety for the entire facility to a total amount of \$20.8 million. The June 30, 2010 letter was not published in a local newspaper of general circulation. No public comment was solicited or received pertaining to the purported agreement reached between the Radiation Management Unit and Cotter Corporation on June 11, 2010. The June 11, 2010 agreement was not published in a local newspaper of general circulation. On information and belief, the June 30, 2010 letter was not posted on the Radiation Management Unit website until mid-July, 2010.

30. On information and belief, the June 30, 2010 letter is the June 30 annual report required by regulation and expanded procedural requirements.

31. During July and August 2010, Defendants conducted its 2010 annual review based on the June 30 Report and surety amounts, but did not fulfill public notice, comment, agency review, and formal appeal procedures while conducting the 2010 annual department review.

32. The 2010 review was completed on August 20, 2010 via an exchange of letters issued between Steve Tarlton and Cotter Corporation. The letters identified an "agreement" which purported to set the financial surety at \$20.8 million. On the same day, Cotter provided copies of an executed financial surety document which increased the financial surety from \$14.7 million to \$16.7 million. According to the terms of the purported agreement, the remaining \$4 million was to be provided by work-credit and installment payments. A condition was set which allowed deferral of some surety, based on Cotter' intent to complete unspecified activities at the site. The letter cites no authority which allows a financial warranty to be established in this manner.

33. The current financial warranty instrument is a letter of credit underwritten by Westchester Fire Insurance Company dated August 10, 2010 in the amount of \$16.7 million. The previous amount was \$14.7 million.

34. A second surety instrument involves an instrument held pursuant to the terms of the Consent Decree and RAP in the amount of \$2,632,632. The RAP activities must be completed before transfer to DOE. The Colorado Radiation Control Act and its implementing regulations require adequate surety to cover costs established by the “decommissioning warranty.” Estimated costs which must be included in the decommissioning warranty include all of the groundwater contamination remediation work contemplated in the RAP, among other things. Thus, while in practice the Radiation Management Unit divides the decommissioning financial warranty for the Cañon City facility into two parts, such a division is not recognized by the governing statute.

35. The two instruments together establish the current amount of \$19,332,632 in financial surety for the decommissioning warranty. The total amount of these two instruments was \$17,332,632 before the surety was increased on August 20, 2010.

36. A third surety instrument is the long term care cash fund account in the State Treasury in the amount of \$920,000. This amount was set without conducting a cost estimate.

37. The August 20, 2010 revision results in a total surety at the facility, as of the date of this filing, in the amount of \$20,252,632. The current amount of surety covers less than half of the April 2010 cost estimate of \$43,754,099, which excluded several major cost categories from the estimate.

38. The current financial instruments for the entire facility fall \$4 million short of the \$24,393,160 asserted as an appropriate amount by Cotter Corporation. Cotter Corporation’s estimate was reviewed and rejected by Defendants’ April 2010 cost estimate.

39. The cost estimates must be conducted by the agency. The proper mechanism for a licensee to dispute a cost estimate is to file a formal appeal so that the matter adjudicated by persons other than those who conducted the cost estimate. C.R.S. § 25-11-110(5)(d) (“If the licensee disputes the amount of the required financial assurance warranties, the licensee may request a hearing to be conducted in accordance with section 24-4-105, C.R.S.”). The Consent Decree, which requires that full surety for remediation costs must be established and maintained at all times, also requires any disputes over the cost estimates be made in a formal setting: “If Cotter disputes the State's determination, the Parties shall proceed with dispute resolution before the Special Master . . .”

40. On June 30, 2010, Cotter Corporation specifically asserted that it disputed Defendants’ April 21, 2010 cost estimates. Despite Cotter Corporation’s objection to the method through which the Radiation Management Unit calculated the estimated costs for

the decommissioning warranty, Cotter Corporation did not seek review under the specific and mandatory formal dispute resolution process set out by either the Consent Decree or the Radiation Control Act. Instead, Cotter Corporation and the Radiation Management Unit engaged in an *ultra vires* informal dispute resolution negotiation process.

41. The August 20, 2010 letter from Steve Tarlton to Cotter Corporation is a final agency action establishing the decommissioning and long-term care financial warranties for the Cotter Corporation Cañon City uranium milling facility.

42. The final agency action lacks support in the record and was taken in violation of procedural requirements which apply to this uniquely regulated facility. CCAT is harmed by the Defendants' use of informal, private negotiations to conduct the 2010 review where a formal, public process is required by law. CCAT is harmed by Defendant's failure to require the statutorily required appeal, which denied CCAT's opportunity to intervene as a party in the appeal process.

43. In the alternative, Cotter failed to file a June 30 annual report in 2010. Defendants failed to conduct the required annual review, which must be based on the licensee's June 30 annual report and public comment on the annual report.

44. The financial surety established on August 20, 2010 does not correspond to the cost estimate released by the Defendants in April 2010.

45. On or about April 21, 2010, Defendants prepared a total cost estimate for decommissioning and long term care costs. The estimate was \$43,754,099.

46. CCAT and its members suffer ongoing harms by loss of use of groundwater for drinking, irrigation, and livestock watering. Federal studies have established that the mill poses a "public health hazard."

47. The state legislature has examined this problem as well:

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

C.R.S. § 25-11-301.

48. The April 21, 2010 cost estimate for the decommissioning warranty estimated that it would require an expenditure of \$42,834,099 to conduct all work necessary to decommission, close and otherwise prepare the licensed facility for transfer to the Department of Energy for perpetual care.

49. State law and NRC standards set out in NUREG 1757 require that the amount of the financial surety instruments must be increased immediately to correspond to the April 21, 2010 cost estimate, which would require financial surety instruments in the amount of

\$53,542,623.75. This \$53.5 million figure is calculated by taking the April 21, 2010 cost estimates and adding a 25% contingency factor. U.S. Nuclear Regulatory Commission standards require that the cost estimate be increased by a contingency factor of at least 25 percent added to the sum of all estimated costs.

50. Contrary to standards set by the Commission, Defendants reduced the amount of its cost estimate based on uncertainty. Reducing the amount of the cost estimate to account for uncertainty finds no support in state or federal law. Where uncertainty in the cost estimate of decommissioning exists, the financial surety posted by the licensee must be increased in an amount sufficient to protect the State of Colorado and the federal government from financial risks posed by such uncertainty.

51. UMTRCA Title I activities in at the other AEA-licensed mills in Colorado have ranged between approximately \$50 million and \$500 million. Approximately \$1 billion has been spent on uranium mill tailings clean-up in Colorado. The Department of Energy's Office of Legacy Management Unit carries out long term care, maintenance and monitoring at these facilities.

52. The April 21, 2010 cost estimate did not contain an estimate for long term care costs. The \$920,000 figure is based on statutory minimum amount. State regulation requires that the long term care fund be established based on an actual cost estimate:

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

CCR 1007-1§ 3.9.5.10(C)(4).

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

54. The Cotter Mill has also been declared a "Superfund" site. The "Superfund" remediation does not diminish the requirement that financial surety must be maintained pursuant to State laws.

The financial surety established pursuant to this Section shall be in addition to, and not in lieu of, financial surety and long-term care requirements of the Colorado Radiation Control Act and regulations promulgated thereunder.

Consent Decree at XB (F), *State of Colorado v. Cotter Corporation*, 83-cv-02389 (Colorado Federal District Court)(approved by Judge Carrigan, April 4, 1988). Where financial surety is established pursuant to the Superfund Response Consent Decree, the other financial surety instrument may be reduced by a like amount to minimize duplication of surety.

55. Although Defendants should *minimize* duplication of surety under the terms of the Consent Decree, there is no provision which allows the costs which would be incurred as part of the Superfund Response to escape the basic surety requirements of state law.

56. Unless and until an adequate Consent Decree-compliant surety instrument is executed, Consent-Decree related costs must be included within the cost estimate of the decommissioning warranty required by state law and adequate financial surety must be provided in the manner required by state law.

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

58. Colorado laws implementing the Agreement State program put the Colorado Department of Public Health and Environment in charge of carrying out regulation of radioactive materials in Colorado pursuant to the federally delegated “Agreement State” program.

59. Cotter is a subsidiary of General Atomics. On information and belief, Cotter has no identifiable source of income. On information and belief, Cotter relies entirely on General Atomics to fund its operations.

60. On September 9, 2010, Cotter sent a letter to Mr. Tarlton which purported to be an annual report pursuant to HB 10-1348. The letter does not meet timing requirements of regulations, which require an annual report be filed before July 30, 2010. The letter does not contain the information required by annual reporting requirements contained in HB 10-1348. The letter was not published in a paper of local circulation as required by HB 10-1348, although it does appear to have been noticed in the Denver Post on or about September 14, 2010. The September 9, 2010 letter confirmed that surety adjustment had already been established by Defendants’ letter of August 20, 2010 and Cotter’s letter of August 20, 2010 which provided copies of financial surety instruments. On or about March 2010, Cotter Corporation stated publicly that it may be in danger of going out of business.

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

Decommission Funding Plan (DFP). A document that contains a site-specific cost estimate for decommissioning, describes the method for assuring funds for decommissioning, describes the means for adjusting both the cost estimate and funding level over the life of the facility, and contains the certification of financial assurance and the signed originals of the financial instruments provided as financial assurance.

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

62. A current Decommissioning Funding Plan is also required by state regulation. CCR 1007-1 § 3.9.6.

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

Id. at 3.9.6.4

63. The requirement that estimates be adjusted no less than every three years, mainly to account for inflation, is supplemented by the annual reporting, public comment, and review procedures which were expanded and strengthened by HB10-1348. C.R.S. § 25-11-110(5).

64. On information and belief, a complete Decommissioning Funding Plan does not exist for the Cotter mill.

65. Cost estimates and proof of financial instruments which provide acceptable surety which are required for a lawful Decommissioning Funding Plan for the Cotter Facility have not been adjusted pursuant to a lawful review by Defendants since 2005.

66. On information and belief, Defendants have not prepared a document titled “Decommissioning Funding Plan” for the Cotter Facility.

PLAINTIFF’S CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF:

Financial Surety Set at \$20.2 Million Where Estimated Costs Exceed \$43.7 Million

67. CCAT incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

68. The rights and interests of CCAT, and of its members, are adversely affected by the Defendants' failure to establish and maintain financial surety for financial warranties for the Cotter Mill in the full amount of existing cost estimates. C.R.S. § 25-11-110(4)(a); *accord Id.* at 4b-4c CCR 1007-1§ 3.9.5.5-6 (decommissioning warranty); *accord Id.* at 4(d), CCR 1007-1§ 3.9.5.10(C)(4)(long term care warranty)

69. Publicly available documents show that the current financial surety instruments establish a total of \$20,252,632 million in surety where RMU estimated a \$43,754,099 million in financial warranty costs for the entire facility, including all decommissioning and long term care costs, and Cotter Corporation estimated all such surety should total \$24,223,160.

70. Defendants unreasonably reduced its cost estimate to account for uncertainty, whereas federal standards require a 25% contingency be added to the estimate to account for uncertainty.

71. The process used to establish financial surety in an amount less than half of the Defendants' cost estimates was *ultra vires* and contrary to law. C.R.S. § 25-11-110(5)(b-e).

72. Based upon the evidence in the record, the Defendants abused their discretion and acted in a manner that was arbitrary, capricious, unsupported by the record, *ultra vires*, and not in accordance with law, when it set the bond at an amount less than its own cost estimate of \$43,754,099.

73. Until Defendants complete a full and lawful review of the financial warranty which includes all decommissioning costs and long term care costs, this claim may be remedied by ordering Defendants to demand Cotter Corporation establish interim financial surety instruments in the amount of \$53.4 million.

74. This claim became ripe for adjudication under C.R.S. § 24-4-106 upon the issuance of the August 20, 2010 decision letter and remains an ongoing violation which accrues anew every day the financial surety remains deficient.

75. The remaining claims focus on remand for further proceedings to establish site specific cost estimates which meet procedural requirements, including a transparent public process which allows the CCAT to participate and provide useful information to establish the full amount of the financial surety.

SECOND CLAIM FOR RELIEF:

The 2010 Annual Review of Financial Warranties Violated Procedural Requirements

76. CCAT incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

77. Colorado law prescribes an annual review of the financial surety (6 CCR 1007-1 § 3.9.5.7) which commences with the June 30 filing by the licensee of any “licensee-proposed changes to the financial assurance warranties.” 6 C.C.R. 1007-1 § 3.9.5.6; C.R.S. § 25-11-110(5)(b).

78. Defendants have not conducted a lawful annual review of the financial surety since at least 2005.

79. The annual review was commenced in 2010 by Cotter Corporation’s filing of a letter regarding the financial surety amounts on June 30, 2010.

80. Notice of the June 30 Letter for 2010 was not published in a paper of local circulation. C.R.S. § 25-11-110(5)(c).

81. The Defendants did not publish public notice of a public comment period on its website. C.R.S. § 25-11-110(5)(c).

82. Final agency action was taken by the issuance of a decision, by letter dated August 20, 2010. The decision was communicated to Cotter Corporation on some previous date as the warranty instrument was executed on August 10, 2010 and communicated to Defendants by a letter dated August 20, 2010.

83. The amount of the Defendants’ existing cost estimate has been not been disputed by any appeal filed by Cotter Corporation. C.R.S. § 25-11-110(5)(d)(requiring disputes be resolved under appeal procedures set out “in accordance with section 24-4-105, C.R.S).

84. The rights and interests of CCAT, and of its members, are adversely affected by the denial of public comment periods, failure to adhere to mandatory appeals requirements before acting to conduct the annual review and update for the financial surety at the Cotter. C.R.S. § 25-11-110(5); 6 CCR 1007-1 § 3.9.5.6

85. The failure to conduct a lawful annual review has denied CCAT, its members, and the public, the opportunities and protections required by the statutorily prescribe process for annual review and establishment of financial surety. This misapplication of the law has further denied CCAT, its members, and the public the additional resource protections inherent in the annual consideration of surety amounts.

86. Defendants abused discretion and acted in a manner that was arbitrary, capricious, unsupported by the record, and not in accordance with law, when it issued its conducted its annual review, which resulted in a financial warranty determination on August 20, 2010.

87. Procedures used regarding financial warranty at the Cotter Mill are “not in accord with the procedures or procedural limitations of this article or as otherwise required by law.” C.R.S. § 24-4-106(7).

88. The failure to conduct a lawful annual review became ripe on August 20, 2010 with the issuance of the Defendants letter and is a continuing violation which accrues each day the annual review has not been completed.

THIRD CLAIM FOR RELIEF:

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

89. CCAT incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

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

91. The long term care fund must be based on an actual cost estimate. CCR 1007-1§ 3.9.5.10(C)(4).

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

93. The mandatory annual review of financial warranties requires the opportunity for public comment on the “adequacy of any financial assurance warranties,” which includes the long term care warranty. C.R.S. § 25-11-110(5)(c). No such opportunity was provided in the 2010 annual review which was completed on August 20, 2010.

94. The failure to calculate and establish a cost estimate for the long term care warranty is an ongoing violation which accrues each and every day that Defendants rely on a long term care warranty which is not based on an actual cost estimate of the long term care requirements for the Cotter facility. This violation was also committed by Defendants’ issuance of its August 20, 2010 decision.

95. Setting the long term care warranty at the statutory minimum, adjusted for inflation, is arbitrary, capricious, denies public involvement requirements, and violates requirements that financial surety at the Cotter be based on actual cost estimates.

FOURTH CLAIM FOR RELIEF

A Decommissioning Funding Plan Has Not Been Lawfully Prepared or Maintained

96. CCAT incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

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

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

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

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

99. The failure to prepare and maintain a lawful Decommissioning Funding Plan was explicitly recognized by the Defendants in June 2009.

100. CCAT was not provided an opportunity to comment on the Decommissioning Funding Plan during the 2010 annual review which commenced with the filing of Cotter Corporation's annual report on June 30, 2010.

101. The failure to act to adopt a lawful is a Decommissioning Funding Plan is an ongoing violation, which became subject to judicial review with Defendant's final action on August 20, 2010 when it updated the financial surety documents absent a valid Decommissioning Funding Plan. C.R.S. § 24-4-106.

102. This claim may be remedied by remand which directs Defendants to establish a draft Decommissioning Funding Plan within ninety days of such order, after the underlying cost estimates and surety instruments have been subjected to the public review and appeal procedures for financial warranties set out in the Radiation Control Act.

FIFTH CLAIM FOR RELIEF

Failure To Act

103. CCAT incorporates by reference each and every allegation contained in all other paragraphs of this Complaint.

104. In the alternative, CCAT pleads Claims One - Four pursuant to C.R.C.P. 106 and C.R.C.P 57 and respectfully requests judicial review and declaratory relief in a declaratory judgment order. C.R.C.P. 57.

PRAYER FOR RELIEF

WHEREFORE, CCAT respectfully requests that this Court examine the record and enter findings that Defendants violated the requirements of the Agreement State Agreement, Radiation Control Act (C.R.S. § 25-11-101 et seq.), and the Board of Health Regulations (C.C.R. 1007-1) in failing to maintain an adequate financial assurance amount for the Cotter Corporation Cañon City, Colorado uranium mill, and further

finding that the Defendants acted in an manner that was arbitrary and capricious, not in accord with the law, in excess of legal authority in determining and establishing the amount of the financial assurance, and by failing to adhere to the required public and administrative processes in setting the financial assurance amounts, and based on such findings provide the following relief:

1) direct by injunction that Defendants take all necessary actions to immediately to establish financial warranty instruments for estimated costs identified by Defendants on April 21, 2010 in the amount of \$ \$43,754,099, with directions that the Defendants add a 25% contingency to this amount to meet federal standards which require the cost estimate be increased to account for uncertainty;

2) direct by injunction that within 10 days of the order, based on existing information, Defendants provide a written estimate all categories of costs not included in April 2010 cost estimate and increase the bond by that amount within 30 days of the order;

3) direct by remand that all cost estimates and financial surety instruments be provided in a single document and noticed for public notice and comment within 30 days of such order;

4) direct by remand that within ninety days of such order, a Decommissioning Funding Plan be completed which includes all required cost estimates and financial surety instruments;

5) enjoin Defendants from further “negotiations” and “settlement” of cost estimates which do not provide CCAT and the public with the notice, comment, and appeal opportunities of state law;

6) retain jurisdiction over this matter until such time as the financial warranty is calculated and established based on required cost estimates and public involvement;

7) CCAT further prays that the Court grant their reasonable costs and attorneys fees, and for such other relief as the Court deems just and proper, including any injunctive and declaratory relief.

/s/ Jeffrey C. Parsons

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Defendant's Address:

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Radiation Management Unit
Hazardous Materials and Waste Management Division
Colorado Department of Public Health and Environment
HMWMD-RCP-B2
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Denver, Colorado 80246-1530

Radiation Management Unit
Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

Physical Location
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Denver, CO 80246-1530

Hazardous Materials and Waste Management Division
Department of Public Health and Environment
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Denver, Colorado 80246-1530

Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
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Indispensable Party's Address:

Gus M. Gaviotis, Registered Agent
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Greenwood Village, CO 80111

Physical Address of Facility:

Cotter Uranium Mill
0502 Fremont County Road 68
Cañon City, CO 81212

CERTIFICATE OF SERVICE

This is to certify that I shall cause the foregoing FIRST AMENDED COMPLAINT to be served upon all parties, as required by C.R.C.P.:

/S/ Travis E. Stills

Travis E. Stills

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