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July 21, 2004

Via Facsimile (303) 691-7702 and U.S. Mail

Mr. Douglas H. Benevento
Executive Director
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, CO 80246-1530

Re: *Notice of Appeal of the June 21, 2004 Correspondence Regarding Remediation of the CSMRI Site*

Dear Mr. Benevento:

Introduction

This firm represents Colorado School of Mines (School) in the above-referenced matter. On behalf of the School, this letter appeals certain decisions made by the Colorado Department of Public Health and Environment (CDPHE) in a June 21, 2004 letter signed by Mr. Jeff Deckler and Mr. Joe Schieffelin and sent to Mr. Linn Havelick of the School with respect to the CSMRI Site remediation (the Letter). This letter also petitions CDPHE to repeal its decisions. A copy of the Letter is enclosed.

This letter relates to both the Colorado School of Mines Research Institute (CSMRI) Specific Radioactive Materials License No. 617-01 (the "License"), as amended, and the CSMRI Site in Golden, Colorado. The License covers CSMRI's Golden facility located at the west end of 12th Street, Golden, Colorado (Site). The School is not the licensee, but it is undertaking a remedial action at the Site.

Before discussing the legal appeal issues, I would like to address CDPHE's administrative process. The School commenced a remedial action at the Site a few months ago. It was anticipated that only a maximum of 10,000 cubic yards of contaminated soil would have to be removed from the Site for off-site disposal. Of the 10,000 cubic yards, only approximately 500 cubic yards, maximum, were expected to be transported to a RCRA facility in Idaho, at a relatively higher unit cost of disposal than for the unit rate of disposal at a RCRA facility near Golden, Colorado; the Foothills Landfill. The vast majority of the 10,000 cubic yards of soil was expected to be disposed

of at the Foothills Landfill. While the School had objected to taking any soil to Idaho, as requested by CDPHE, it had agreed to do so as a compromise to keep the project moving forward without delays. However, the School had reserved the right to revisit the disposal options if the actual volumes were different than estimated.

Unfortunately, several months ago, the School's contractor excavated 2,000 cubic yards that were slated for disposal in Idaho. Instead of transporting the 2,000 yards to Idaho, the material has been left at the Site. In addition, the School's contractor stated that there could be an additional several thousand cubic yards that would have to be disposed of in Idaho, under the work plans requested by CDPHE. If so, disposal in Idaho would exceed the School's budget and leave contamination remaining at the Site. As a result, the School suspended excavation at the Site to develop a solution to this problem.

On June 2, 2004, Mr. Havelick and I attended a School-initiated meeting at CDPHE to discuss the recent developments. We requested a dialogue to develop a mutually beneficial plan to resolve the remedial problems created by the unexpected discovery of additional volumes of contaminated soil at the Site. We specifically asked that CDPHE avoid letters taking non-workable adversarial positions that do not resolve the problems. In spite of the School's requests, CDPHE issued its Letter that closes the door on the constructive dialogue initiated by the School, escalates the problems, and places the School in the undesirable position of having to protect its interests, and the interests of the taxpayers of this State, by commencing this appeal. CDPHE's actions and approach appear to be driven by political fears rather than by science, reasonable judgment, and the law. Its public policies are unsound and not protective of public health and the environment.

Notice of Appeal

The School appeals CDPHE's use of guidance documents and terms (such as TENORM) not found in Colorado regulations, CDPHE's interpretation of its own regulations, and CDPHE's application of these to the License and the materials addressed by the School's proposed Site remediation. CDPHE's actions act, in effect, as a limitation and modification of the License, as well as the licensing of materials not appropriately subject to licensing. In addition, the School appeals CDPHE's determination that prohibits solid waste from being disposed of at landfills that may safely manage solid waste.

Concurrently with sending this letter and commencing an administrative appeal, the School is commencing a declaratory relief action in State Court. The issues raised in this administrative appeal are brought as an alternative to the declaratory action. If the court were to decide that any one of the issues should not have been raised in the declaratory relief action, but should have instead been raised in the administrative appeal process, then this letter would satisfy the requirement of raising it in the administrative appeal context. Moreover, the attachment of the declaratory relief

complaint to this letter is not intended to constitute service of the complaint upon CDPHE. Again, the School prefers to resolve these matters informally, but it believes that CDPHE has placed the School into this involuntary position of appealing CDPHE's Letter.

As a primary administrative appeal matter, the Letter on its face does not appear to be issued pursuant to your agency's authority under either C.R.S. § 25-11-101 *et. seq.* (the "Radiation Control Act") or C.R.S. § 30-20-100.5 *et seq.* (the "Solid Waste Disposal Act") to issue notices of violation or compliance orders. However, to the extent the Letter is intended in any way to act as a notice of violation under the Radiation Control Act or a compliance order under the regulations enacting the Solid Waste Act, the School hopes to resolve the matters raised herein informally as contemplated by those Acts and/or the regulations implementing the same. *See* C.R.S. § 25-11-107(5)(c) and 6 CCR 1007-2 1.9.2(C)(1), respectively.

To the extent that such informal discussions cannot be undertaken in a prompt fashion and/or to the extent that the time frame for such discussions is inapplicable or not practicable, please be advised that this correspondence shall serve as a request for an adjudicatory hearing pursuant to the provisions of the Colorado Administrative Procedure Act, C.R.S. § 24-4-101 *et. seq.* (the "APA"). Such demand for a hearing is sanctioned under the APA at C.R.S. § 24-4-104, to challenge any modification of the previously issued License or the *de facto* issuance of a license to the School, and C.R.S. § 24-4-103(8.2)(b), to contest the validity of rule making as contained in the Letter, and by the APA Section 103 for failure to comply with its provisions when CDPHE interpreted law to establish new agency policies and procedures that are intended to bind the School, as such actions are arbitrary and capricious, unsupported by evidence, and in violation of applicable law. In addition, the School's request for an adjudicatory hearing is made pursuant to the Solid Waste Act Regulations contained in CCR 1007-2 (1.9.3) and the Radiation Control Act at C.R.S. § 25-11-107 to appeal the final agency decisions in CDPHE's Letter. Finally, the School is petitioning, in the alternative, for CDPHE to repeal its new rules pursuant to C.R.S. § 24-4-103(7).

Appeal Issue No. 1. CDPHE's position that it may authorize a cut-off value of 3 pCi/g Ra-226/228 for disposal at a solid waste facility without additional risk assessment is unauthorized by law, arbitrary and capricious, and constitutes unauthorized rule making.

CDPHE has adopted, as a rule, a non-governmental guidance for Surface and Volume Radioactivity Standards For Clearance, ANSI/HPS N13.12-1999 (the "ANSI Standard"). Not only has CDPHE inappropriately applied the ANSI Standard to the Site, but it has adopted it as a *de facto* regulation without following rulemaking procedures. There are many problems with this, in addition

to the obvious one of failure to comply with the APA. For example, CDPHE admits[1] that the ANSI Standard is the equivalent of a dose of 1 mrem/yr to a member of the public.[2] However, CDPHE's regulations state that the Site may be cleared for unrestricted uses if the dose is 25 mrem/yr. This means that material equivalent to 25 mrem/yr may be left at the surface of the Site. However, CDPHE now says, in effect, that material with the equivalent of only 2 mrem/yr may not even be **buried** at a landfill. This makes no sense and is contrary to CDPHE's own regulations. Furthermore, the ANSI Standard is not applicable to the materials at the Site intended for off-site disposal and CDPHE may not apply it as such. For example, CDPHE states that the soils are TENORM, but the ANSI Standard says it is not applicable to NORM. Moreover, the ANSI Standard is intended to be a screening tool, not a final standard for disposal of materials at a solid waste landfill. These are just several reasons why the guidance is inapplicable, even if it were a regulation.

CDPHE's imposition of the ANSI "guidance" document is tantamount to State "rule making" without following the requisite State administrative rulemaking procedures set forth in C.R.S. § 24-4-103. In general, guidance documents cannot be mandated upon licensees or any other person because it would render them to be, in effect, binding regulations, not non-binding guidance documents. *Appalachian Power Company v. EPA,* 208 F.3d 1015 (D.C. Cir. 2000); *General Electric Co. v. EPA*, 2002 U.S. App. Lexis 9507 (D.C. Cir. May 17, 2002); *Tabb Lakes Ltd. v. United States*, 715 F. Supp. 726 (E.D. Va. 1988). Guidance documents are non-binding. To create regulations, CDPHE must follow the Colorado Administrative Procedures Act. CDPHE does not have the authority to create regulations by adopting or inserting non-binding guidance documents into a license as mandatory conditions. Unauthorized licensing actions related to Colorado radioactive materials licenses are void. *Western Colorado Congress v. Colorado Department of Health*, 844 P.2d 1264 (Colo. App. 1992). The purposes of the APA are to ensure rational and fair government decisions, preserve personal freedom with an institutional check on arbitrary government action, improve agency decision-making by ensuring stakeholder participation, and create an administrative record to allow for judicial review. CDPHE's Letter fails to meet any of the APA purposes.

Furthermore, during the development of the work plans for the remedial action at the Site, CDPHE and the School agreed to apply the ANSI Standard as a screening tool for solid waste landfill disposal without additional risk assessment, as the Letter admits. Now, however, CDPHE has changed its position. CDPHE now asserts that even with an additional risk assessment, no

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[1]August 21, 2002 CDPHE letter to Mr. Krumberger of New Horizons, at p. 2. This 2002 letter forms a basis of the Letter, according to CDPHE's response to my recent Open Records Act request.

[2]This discussion assumes above-background levels.

materials above the ANSI Standard may go to a municipal solid waste landfill. This position is arbitrary and capricious, without supporting evidence, and contrary to law.

Appeal Issue No. 2. CDPHE's position that it "will not approve [the Foothills Landfill] use for the Class I materials" is unauthorized by law, unsupported by evidence, arbitrary and capricious, and constitutes unauthorized rule making.

The definition of Class I material is based on the ANSI Standard. CDPHE's position is objectionable for the same reasons stated above. Moreover, CDPHE has not performed any site specific risk assessment of this landfill to reach this determination. CDPHE has not evaluated the risks posed by any of the methane venting systems at the Foothills Landfill for materials that may be taken there from the Site. In fact, several years ago, CDPHE stated that the former stockpile that was the subject of the EPA removal action at this Site could go to the BFI Foothills Landfill consistent with Colorado radiation control and solid waste regulations pursuant to a risk assessment performed for the Foothills Landfill. The former stockpile contained concentrations in excess of the ANSI Standard.

Appeal Issue No. 3. CDPHE's position that the CSMRI Site cleanup is "regulated by radioactive materials license 617-01" is unauthorized by law and constitutes unauthorized amendment to the License at issue.

This position is objectionable for the reasons stated above. The School is proposing to remediate soils that are <u>not</u> regulated by radioactive materials license number 617-01. The School's position is explained in the Remedial Investigation and Feasibility Study for the CSMRI Site, January 21, 2004, and the Record of Decision for the Site, March 31, 2004, both of which are incorporated by reference. CDPHE's position is unauthorized and is an unauthorized amendment to the License at issue by expanding the scope of the License. The License at issue does not cover the materials that the School has planned to remediate. Alternatively, CDPHE's action effectively issues a radioactive materials license to the School for the materials the School seeks to remediate.

Appeal Issue No. 4. CDPHE's positions taken in subsection (a) on page 3 of the June 21 letter are unauthorized by law, unsupported by evidence, arbitrary and capricious, and constitute unauthorized rule making.

The CDPHE's positions are objectionable for the reasons stated above. CDPHE's position that any materials exceeding the ANSI Standard may not go to any municipal sold waste (MSW) landfill in Colorado is objectionable for all of the above-referenced reasons. CDPHE's position that any materials in excess of the ANSI Standard "pose an unacceptable risk" if they were to be disposed

of in any MSW landfill is arbitrary and capricious, unsupported by evidence, and unauthorized rulemaking. CDPHE has not conducted any risk assessment in support of this position.

Appeal Issue No. 5. CDPHE's positions taken in subsection (b) on page 3 of the June 21 letter are unauthorized by law, unsupported by evidence, arbitrary and capricious, and constitute unauthorized rule making.

These positions are objectionable for the reasons stated above. CDPHE has no reasonable basis to take the position that a "non-municipal solid waste landfill" may accept materials in excess of the ANSI Standard from the Site. CDPHE has not indicated any risk assessment comparison of MSW landfills with non-MSW landfills to assess the risks posed by the potential disposal of materials in excess of the ANSI Standard in either of these types of facilities. There is no design difference among solid waste landfills that can be reasonably relied upon for this position by CDPHE. The venting of methane would actually reduce the future radon risk at an MSW landfill, not increase it. Thus, the radon risk would be greater at a non-MSW landfill than at an MSW landfill.

Appeal Issue No. 6. CDPHE's position that it will not recommend that the Foothills Landfill accept materials greater than 3 pCi/g Ra-226/228 (page 4 of the June 21 letter) is unauthorized by law, unsupported by evidence, arbitrary and capricious, and constitutes unauthorized rule making.

This position is objectionable for the reasons stated above.

Appeal Issue No. 7. CDPHE's position that a recreational use scenario is not appropriate for this Site because it would not be adequately protective is unauthorized by law, unsupported by evidence, arbitrary and capricious, and constitutes unauthorized rule making.

This position is objectionable for the reasons stated above. In addition, it is objectionable because CDPHE has not performed a risk assessment to support this conclusion, and because CPDHE's own regulations allow for restricted uses to decommission this Site.

Conclusion

The School has relied on many prior CDPHE determinations for years at this Site. CDPHE may not change the rules and its own prior determinations without basis and due process in the middle of the School's effort to remediate the Site.

This letter provides a summary of the main reasons for this appeal. The School reserves the right, and does not waive any right or defense, to clarify, elaborate, and add other reasons before the administrative hearing.

The School prefers to resolve these issues without going through a formal appeal process. We welcome CDPHE's informal efforts to do so. Please have your representatives call the School to arrange a meeting, if CDPHE desires such a resolution. However, in the meantime, in order to protect the School's substantial interests with respect to this matter, the School reluctantly commences this administrative appeal, and the declaratory relief action, as necessary and unavoidable under the circumstances. Thank you for your consideration.

Very truly yours,

Asimakis (Maki) P. Iatridis

API/kat
cc (via U.S. Mail):
Linn Havelick
Robert Moore
Anne Walker
Dave Harmon
Lori Potter
Jerry Goad
Jeff Deckler
Joe Schieffelin
Phil Egidi
Phil Stoffey
Jon Spencer
Howard Roitman
Gary Baughman
Division of Administrative Hearings (via facsimile)

STATE OF COLORADO

Bill Owens, Governor
Douglas H. Benevento, Executive Director

Dedicated to protecting and improving the health and environment of the people of Colorado

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Colorado Department
of Public Health
and Environment

June 21, 2004

Mr. Linn Havelick
Colorado School of Mines
1500 Illinois St.
Golden, Colorado 80401-1887

RE: Remediation of the CSMRI Creekside Site

Dear Mr. Havelik,

On June 2, 2004, we met with you and Mr. Maki Iatridis of Berg Hill Greenleaf and Ruscitti, LLP. At the meeting, you and Mr. Iatridis provided a status report on the remediation being performed at the CSMRI Creekside site. In summary, we were informed that much more Class I (>3 pCi/g $^{226/228}$Ra) contaminated soil had been discovered than had been originally estimated and that, therefore, insufficient budget was available to complete the project. At this point, the project has been indefinitely suspended and the contractor is stabilizing the site.

This turn of events is very disappointing to the Department. This letter is intended to provide the Colorado School of Mines (CSM) with our position on several matters so that you can factor this information into your future decision-making regarding the CSMRI Creekside site.

First, the Department has tried to work closely with CSMRI to save money and yet be protective of public health and the environment. Here are some examples where our staff has been innovative and precedent-setting on the Creekside cleanup:

- When the risk assessment provided by CSMRI showed that a "family farm" scenario was overly conservative and yielded clean-up values that would be difficult to quantify, the Department agreed to change the scenario such that the final cleanup values were measurable, yet still protective. The Department could have held CSMRI to the original scenario, but agreed to be flexible. This has resulted in considerable savings in the volume of soils that need to be remediated, and in savings for analytical costs. The Department does not think a recreational use scenario is appropriate for this site as it would not be adequately protective.

- Technically enhanced naturally occurring radioactive material (TENORM) can be solid waste based on statute (CRS 25-11-20x). As such, the Department must determine if a concentration of TENORM can be safely disposed in a licensed radioactive waste facility or in a facility permitted under RCRA C or RCRA D. Based on experience in Colorado and a relatively new ANSI standard (N13.12, 1999), the Department authorized a cut-off value of 3 pCi/g $^{226/228}$Ra that would allow for disposal in a solid waste facility without additional risk assessment. CSM agreed to this standard. The Creekside site is the first site with such a determination in Colorado, and this determination significantly lowered the cost of the Creekside cleanup. Without this determination, all contaminated soils at the Creekside site would have had to go to the US Ecology facility in Idaho at very high expense.
- The terms Class I and Class II are actually taken from the Multi-Agency Radiological Site Survey and Investigation Manual (MARSSIM). Using MARSSIM protocols, Class I areas are those that are anticipated to exceed the cleanup criteria for the site, and as such are not released until they meet the cleanup objectives. Class II areas are those that had contamination, but would not exceed the cleanup critera on average. Having these areas "stacked" atop one another is a novel application that the Department was willing to implement to save CSM money, since these areas have different survey densities. We are not aware of this approach being implemented anywhere else.
- The Department also set precedent when it approved the use of field equipment for release of soils with only 20% of the samples also being analyzed in a laboratory for quality control. CSMRI requested the use of this equipment, called ISOCS, in order to save money. The Department is aware of the ISOCS being used for characterization and monitoring of the progress of cleanups, but it is standard practice that all analytical results for release of the site be through a laboratory. Nonetheless, the Department tried to work with CSMRI on this to save funds. As of this writing, there are not enough samples back from the laboratory to verify if the ISOCS is representative or not. The Department may cancel the use of this equipment if the laboratory results are not favorable.
- Disposition of radioactive materials at CSMRI is addressed by license condition 14, which states that the material must go to a properly licensed facility, or a facility granted special dispensation by the Division through license condition. The Idaho facility was approved through plans for the Class I materials. Foothills was approved through the plans for the Class II materials only, and the Department will not approve its use for the Class I materials.
- For many documents, CSM wanted short review periods by Department staff. We made every effort to accommodate your requests so that downtime for the athletic fields could be minimized.

Second, it has been and remains our position that the CSMRI Creekside cleanup is regulated by Radioactive Materials License 617-01. Because of this, we will ensure that any site stabilization that occurs with the shutdown of remedial activities is compliant with license requirements. A key requirement in the license to note is License Condition 11, which states, "Radioactive material authorized by License Condition 6 of this license shall be stored in a manner that will preclude use by unauthorized personnel." Given the situation at the remediation site, we would interpret this to mean that no unauthorized personnel or member of the public can access any of the radioactive materials. The site must be properly fenced and posted.

Mr. Phil Egidi of our staff visited the site on June 9, 2004 following the recent heavy rains. He noted that there were some areas where further rain could cause sediment to be released from the site. He also noted that the soil stabilizer held up well in some areas, but not in others. We will continue to ensure that any remedial activities at the site are conducted in a manner compliant with the license.

Third, from our perspective, better site characterization should be accomplished before concluding that available funds are insufficient to accomplish the currently planned cleanup. Only when more is known about the relative volumes of Class I and Class II materials can accurate cleanup options and cost estimates be developed. Regardless of the cleanup options considered, the Division will continue to require a cleanup that is completely protective of public health and the environment.

Concerning the budget, other than the general information we received during the June 2 meeting, we have very little information on, or understanding of, the funds available for the Creekside cleanup. We believe that CSM had budgeted about $2 million for contaminated soil removal, and had reserved about $1.5 million for rebuilding the athletic fields and reclaiming the site. We do not understand how this funding allocation was determined, but it seems that making some or all of the $1.5 million allocated to reclamation available for site remediation might be reasonable and might increase the number of cleanup options available.

Fourth, CSM has gone through a very exhaustive remedial decision-making process for the CSMRI Creekside site using the NCP process as a model. Many different cleanup scenarios were evaluated in that process and the removal of the contaminated soil now being implemented was chosen as the best option. We believe it is still the best option. The public, the PRPs, and the Department all wanted cleanup to unrestricted use. Getting agreement from these parties on a restricted-use cleanup may now be difficult.

A fifth issue of concern to the Department is ground water contamination. If the site is left stabilized and not completely remediated for some time, further contamination of ground water could result, and further migration of contaminated ground water could occur. We are likely to require further characterization of the ground water if a lengthy delay occurs. As you know, if the cleanup plans change and contaminated soil is left on-site, CSM will incur long-term liability for operations, sampling, and analytical costs of ground water monitoring.

Lastly, during the meeting, we committed to get CSM additional information regarding the possibility of taking more of the contaminated soils to a solid waste landfill, including some or all of the Class I materials. After reviewing this option, the Division has determined that:

a. No Class I materials from CSMRI may go to any municipal solid waste landfill in Colorado. As stated previously, in allowing the Class II materials to go to the Foothills landfill, which is a municipal landfill, the Division has already taken a significant step towards CSM in trying to keep remedial costs low. The concern in sending any radioactive materials to a municipal solid waste landfill is the possibility of radioactivity in leachate and groundwater, radon emissions associated with methane gas venting during closure and post-closure of the municipal landfill, as well as future monitoring, liability and ownership issues. We believe that the Class II materials do not pose a risk in this regard, but the Class I materials would pose an unacceptable risk.

b. Class I materials may be able to go to a non-municipal solid waste landfill in Colorado providing that the landfill has performed a Division-approved risk assessment. This risk assessment must consider the total inventory of radionuclides planned to be placed in the landfill, including the Class I material from CSMRI, and must show that no unacceptable risks are presented during operations and during closure and post-closure of the landfill. The Division is currently working with one facility in Colorado on such a risk assessment, but it is not clear when or if that risk assessment will be approved.

c. Any use of a landfill for the disposition of these materials must be in conjunction with agreement from the permitting authority (usually the County) since the facilities are regulated by the State and the local permitting authority. The Department will not recommend that Foothills accept materials greater than 3 pCi/g $^{226/228}$Ra for reasons cited above.

In summary, we are very concerned that a good remedial decision, on which all parties and the interested public worked very hard, and that we believe could still be accomplished with the available budget, may be vacated. This may cause a significant delay in the cleanup of the Creekside site, substantive changes in the approach to cleanup, and an overall increase in cleanup costs. We urge CSM to consider the information included in this letter and use available funding to make immediate remedial progress at the CSMRI Creekside site.

If you have any questions please feel free to call me at 303-692-3356.

Sincerely,

Joe Schieffelin
Compliance Program Manager
Hazardous Materials and Waste Management Division

Jeff Deckler
Remedial Program Manager

cc: Robert Moore, CSM, VP for Finance and Operations
Anne Walker, Esq., CSM, General Counsel
Howard Roitman, CDPHE-EDO
Gary Baughman, HMWMD
Jeff Deckler, HMWMD
Phil Stoffey, HMWMD
Phil Egidi, HMWMD
Jerry Goad, AGO
Mr. Maki Iatridis, Esq., Berg Hill Greenleaf and Ruscitti, LLP

DISTRICT COURT, CITY AND COUNTY OF DENVER 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiff: COLORADO SCHOOL OF MINES, an agency of the State of Colorado v. **Defendant:** COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, an agency of the State of Colorado	**▲ COURT USE ONLY ▲** Case Number:
Attorney for Plaintiff Asimakis P. Iatridis, #22915 BERG HILL GREENLEAF & RUSCITTI LLP 1712 Pearl Street Boulder, Colorado 80302 Phone No: (303) 402-1600 Fax No: (303) 402-1601	Div./Ctrm.:

COMPLAINT FOR DECLARATORY RELIEF

Plaintiff, Colorado School of Mines, states the following:

I. JURISDICTION, VENUE AND PARTIES

1. Plaintiff, Colorado School of Mines (the "Plaintiff" or the "School") is an agency of the State of Colorado located at 1500 Illinois Street, Golden, Colorado 80401.

2. Defendant, the Colorado Department of Public Health and Environment (the "Defendant" or the "Department") is an agency of the State of Colorado located at 4300 Cherry Creek Drive. S., Denver, Colorado 80246.

3. The Court has jurisdiction in this matter pursuant to C.R.C.P. 57, C.R.S. § 13-51-101, *et seq.*, C.R.S. § 24-4-103(8.2)(b), and/or C.R.S. § 24-4-106 and because the relief sought herein arises out of actions performed by Defendant in the City and County of Denver.

4. Pursuant to C.R.C.P. 98, venue is proper in the City and County of Denver because this action is brought pursuant to the Administrative Procedure Act (the "Colorado APA"), C.R.S. § 24-4-106, and because Plaintiff and Defendant are state agencies, which under the Colorado APA, are officially located in the City and County of Denver.

II. GENERAL ALLEGATIONS

5. The School is in the process of remediating a parcel of property near and in the City of Golden, Jefferson County, Colorado. The property is located at the west end of 12th Street, on the south side of Clear Creek and is referred to herein as the "Site."

6. The Site has been used for metallurgical research activities for many years. The Site is now inactive, as environmental cleanup is underway.

7. After an environmental field investigation of the Site, the School prepared a Remedial Investigation and Feasibility Study (the "RIFS"). The RIFS concluded that the contaminated soils at the Site were solid waste, pursuant to Colorado law. The RIFS also concluded that the contaminated soils were not subject to a radioactive materials license held by a tenant at the Site.

8. The RIFS also proposed a cleanup plan that would remove contaminated soil from the Site and dispose of the soil at landfills in Idaho or Colorado authorized to accept the solid waste.

9. After review and comment of the proposed cleanup plan by Defendant, who supported removal and disposal of the soil in these landfills, the School issued a Record of Decision that adopted the proposed cleanup plan.

10. Ths School's environmental consultant then prepared a series of work plans that designed the details of the School's cleanup, including identification of two landfills that would accept the solid waste. The workplans were approved by Defendant.

11. After several weeks of implementing the cleanup, the School determined that the amount and characterization of the subsurface soils appear to be considerably different than that originally estimated and described by the School's consultant in the RIFS. Due to this discovery, anticipated remediation cost projections were revised to amounts in excess of the School's budget for the cleanup. The School therefore suspended the excavation of the soils.

12. On June 2, 2004, representatives of the School met with representatives of the Department to resolve the remedial problems associated with the discovery of additional soils. Part of the discussion focused on disposal criteria for soil in solid waste landfills in Colorado, and modifying the cleanup plan to respond to the new circumstances.

13. In response to that meeting, on June 21, 2004, the Department issued a letter to the School which was intended "to provide [the School] with [the Department's] position on several matters so that [the School] can factor this information into [the School's] future decision-making regarding the [Site]" (the "Position Letter"). A copy of the Position Letter is attached hereto as **Exhibit A**.

14. The Position Letter contains purportedly binding statements of general applicability and future effect implementing, interpreting and declaring law and policy, and setting forth the procedural and practice requirements of the Department (the "Policy Statements"), including, but not limited to, the following:

a. the Department establishes a cut-off value for disposal of soil at a solid waste facility without additional risk assessment based upon a non-governmental guidance for Surface and Volume Radioactivity Standards for Clearance, ANSI/HPS N.13.12-1999 (the "ANSI Standard");

b. the Department prohibits a local landfill from receiving soil that exceeds the ANSI Standard;

c. the Department prohibits any municipal solid waste landfill in Colorado from receiving soil that exceeds the ANSI Standard;

d. the Department requires that soil that exceeds the ANSI Standard may only be sent to a non-municipal solid waste landfill in Colorado only if the landfill has performed a Department-approved risk assessment;

e. states the Site is not appropriate for recreational use because it would not be adequately protective; and

f. states the soil that is the subject of the School's cleanup is regulated by the tenant's radioactive materials license.

15. The Policy Statements enacted in the Position Letter were promulgated by the Department without following the rule-making procedures outlined in the Colorado APA at C.R.S. § 24-4-103, and are thereby unlawful and without force and effect. The Policy Statements are inconsistent with the standards, policies, and regulations promulgated by the Department.

16. The declaratory relief sought herein will terminate the controversy between the School and the Department related to the Policy Statements contained in the Position Letter.

17. The School is a party adversely affected or aggrieved by the Department's actions in issuing Policy Statements contained in the Position Letter. The costs of the School's cleanup will be substantially higher if the Policy Statements are allowed to remain in effect and bind the School.

18. The Policy Statements are in conflict with current Colorado law, are not supported by substantial evidence, are arbitrary and capricious, are in excess of statutory jurisdiction, and constitute an abuse of, or clearly unwarranted exercise of discretion.

19. Because the Position Letter does not cite any authority for the Department's issuance of the Policy Statements, contemporaneously herewith, the School has alternatively filed an administrative appeal with the Department to challenge such actions under the Colorado Administrative Procedure Act, to the extent that the Court finds that administrative review is first warranted for any one of the Policy Statements at issue.

III. FIRST CLAIM FOR RELIEF

(Declaratory Relief Pursuant C.R.C.P. 57 and C.R.S. § 13-51-101, *et seq.*)

20. Plaintiff incorporates the allegations of paragraphs 1-19 of the Complaint as though fully set forth herein.

21. Under the Colorado Declaratory Judgment Law, C.R.S. § 13-51-101, *et seq.*, and C.R.C.P. 57, any person whose rights, status or other legal relations are affected by a statute, may have determined any question of construction or validity arising under such statute and may obtain a declaration of rights, status, or other legal relations thereunder.

22. Plaintiff seeks declaratory relief, pursuant to the Colorado Declaratory Judgments Law and C.R.C.P. 57 that the Defendant's Policy Statements as contained in the Position Letter constitute unauthorized rule-making by a state agency in violation of the mandates of Colorado APA, that the issuance of the Position Letter exceeds the Departments authority under the Colorado APA and its powers as enumerated under the Colorado APA for the regulation of licenses, and that the Policy Statements are contrary to Colorado law, not supported by substantial evidence, arbitrary and capricious, in excess of statutory jurisdiction or an abuse or clearly unwarranted exercise of discretion.

23. In requesting this declaratory relief, Plaintiff is requesting an interpretation of the rights, legal status and relationship of the parties under the law and facts contained herein.

24. Such interpretation is appropriate under the provisions of the Colorado Declaratory Judgment Law and C.R.C.P. 57, as there exists a legal controversy relating to the legal rights and duties of the parties this action.

25. All necessary parties under C.R.C.P. 57(j) are before the Court and the declaratory relief sought herein shall not prejudice the rights of persons not parties to this proceeding.

26. No other remedy at law exists.

IV. SECOND CLAIM FOR RELIEF

(Review Pursuant to C.R.S. § 24-4-101, *et seq.* in the Alternative)

27. Plaintiff incorporates the allegations of paragraphs 1-26 of the Complaint as though fully set forth herein.

28. Under C.R.S. § 24-4-101, *et. seq.*, persons or parties adversely affected by final agency actions are entitled to judicial review of such actions.

29. The Position Letter constitutes a final agency action and/or rule making or a licensing determination under the Colorado APA and the Policy Statements contained therein adversely affect and aggrieve Plaintiff.

30. The Policy Statements contained in the Position Letter either constitute unlawful rule-making in violation of the Colorado APA, and/or were unauthorized, not supported by substantial evidence, arbitrary and capricious, in excess of statutory jurisdiction under the APA, or an abuse or clearly unwarranted exercise of discretion.

WHEREFORE, Plaintiff, Colorado School of Mines, requests that the Court enter an order which finds that the Colorado Department of Public Health and Environment's Policy Statements, as contained in the Position Letter, constitute unauthorized rule-making in violation of the Colorado APA, and that the Policy Statements are unauthorized, not supported by substantial evidence, arbitrary and capricious, in excess of statutory jurisdiction under the APA, or an abuse or clearly unwarranted exercise of discretion, and that the Policy Statements contained in the Position Letter are of no force and effect, and for all other relief to which Plaintiff may be entitled.

Dated this 21st day of July, 2004.

BERG HILL GREENLEAF & RUSCITTI LLP
[*Original Signature on File at the offices of Berg Hill Greenleaf & Ruscitti LLP*]
/s/ Asimakis P. Iatridis

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