

Status of Rulemaking on 40 CFR 192

February 20, 2013

***Jonathan Edwards, Director
Radiation Protection Division
Environmental Protection Agency***

40 CFR 192 Rulemaking

- ***EPA intends to propose updates to health and environmental protection standards for uranium and thorium mill tailings***
- ***Focus will be on groundwater protection and restoration at in-situ recovery facilities***
- ***Appreciate the assistance of NRC***

***Generic Environmental Impact Statement
& Supplemental EISs for In-situ Leach
Uranium Milling Facilities***

EPA NEPA/309 Reviews

***Cliff Rader
Environmental Protection Agency
Office of Federal Activities
Director, NEPA Compliance Division***

February 20, 2013

Recent Progress

- Strong inter-agency relationship (EPA Denver Regional Office and NRC)
 - Facilitated by regular meetings on SEIS scheduling, policy and technical issues

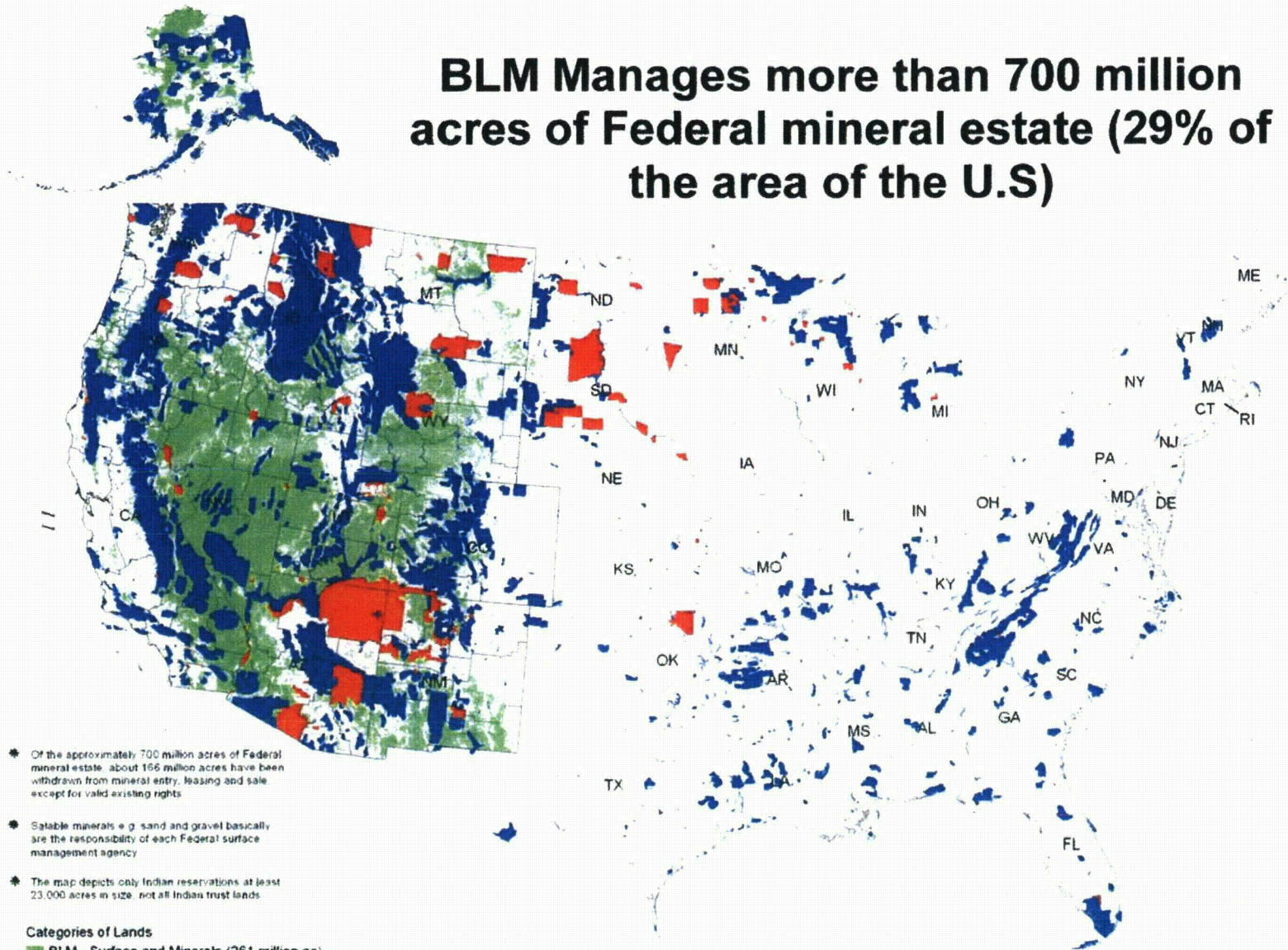
Looking Forward

- Areas for Improvement for SEISs
 - Ensuring facility pond designs meet EPA regulatory requirements (*40 CFR Part 61 Subpart W, National Emission Standards for Radon Emissions From Operating Mill Tailings*)
 - Providing comprehensive groundwater monitoring plans and air quality modeling, as warranted
- Continuing close coordination & open dialogue prior to publication of SEISs

***The Status of the BLM-NRC MOU
Modification to Enhance Coordination,
Define Roles and Promotes
Information Sharing***

***Benjamin F. (Frank) Martin
Deputy Chief
Division of Solid Minerals
Minerals and Realty Management Directorate
Bureau of Land Management
Washington, DC
February 20, 2013***

BLM Manages more than 700 million acres of Federal mineral estate (29% of the area of the U.S)



- * Of the approximately 700 million acres of Federal mineral estate, about 166 million acres have been withdrawn from mineral entry, leasing and sale except for valid existing rights
- * Salable minerals e.g. sand and gravel basically are the responsibility of each Federal surface management agency
- * The map depicts only Indian reservations at least 23,000 acres in size, not all Indian trust lands

Categories of Lands

- BLM - Surface and Minerals (261 million ac)
- Other Federal Lands - Minerals (380 million ac)
- Non-Federal Surface (includes 58 million ac of Split - Estate Federal Minerals)
- Indian Trust Lands (56 million ac) except Mineral Operations for Osage Minerals
- BLM Administration Boundaries

BLM manages all Federal minerals onshore, regardless of Surface Management Agency

Mining Claim Regulation – Surface Use

- **Casual use** – negligible disturbance not requiring mechanized equipment nor notification of BLM – No NEPA
- **Notice level operations** – disturb 5 acres or less – requires notification of BLM and reclamation bonding only – No NEPA
- **Plan of Operations – Larger surface disturbances or other circumstances – BLM approval, EA/EIS and full Reclamation Bonding required**

GAO-12-544

***Report to the Ranking Member,
Committee on Natural Resources, House
of Representatives
March 17, 2012***

•Recommendation:

- The Secretary of the Interior and the Chairman of the Nuclear Regulatory Commission should enhance their coordination on financial assurances for ISR operations through the development of a memorandum of understanding that defines roles and promotes information sharing.

IMPLEMENTATION OF THE RECOMMENDATION

In the past year the NRC and BLM have revised the existing Memorandum of Understanding to

- (1) strengthen interagency communication,
- (2) improve the facilitation and the sharing of special expertise and information, and to
- (3) coordinate the review of financial assurances within the boundaries of existing regulatory authorities.

Strengthen Interagency Communication

- The MOU has been modified to include actions under Section 106 of the National Historic Preservation Act to ensure that historical sites are catalogued and protected contemporaneously with the necessary actions and investigations under NEPA
- Thorium has been added to uranium bring all mining and processing of potentially fissionables under the MOU
- Strengthened MOU language to require each agency to provide the other with the opportunity to participate in all NEPA and Section 106 actions and to combine such actions as much as possible to elimination duplication and improve efficiency

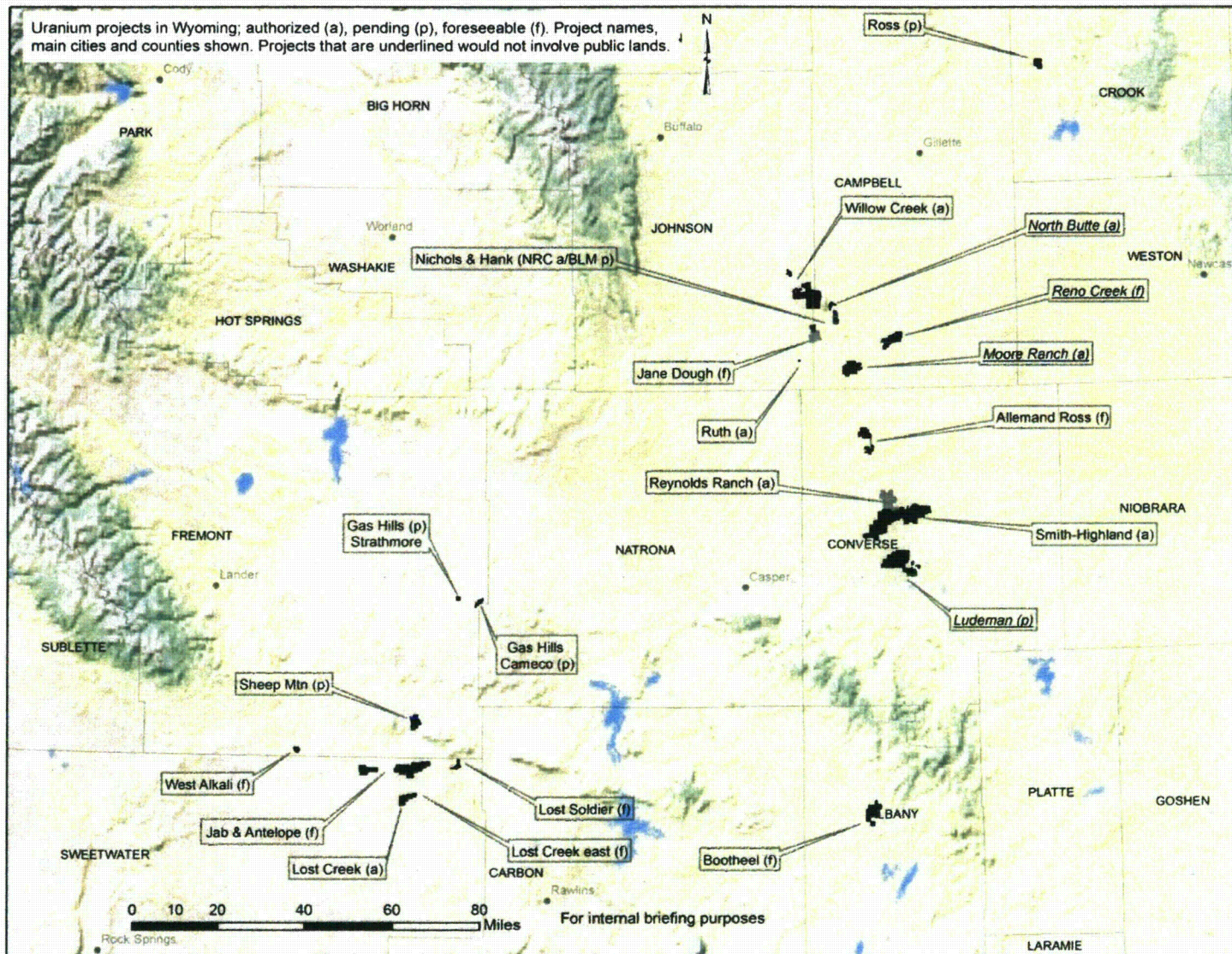
Improve the Facilitation and the Sharing of Special Expertise and Information

- MOU changes encourage both agencies to join together in cooperating on NEPA tasks such as environmental assessments and environmental impact statements will encourage interaction of our respective experts with attendant cross-fertilization of ideas and information sharing
- The Steering Committee Charter requires technical expertise be available and shared where needed to strengthen each agencies capabilities

Coordinate the Review of Financial Assurances within the Boundaries of Existing Regulatory Authorities

- The Charter of the Steering Committee has been revised to include the improvement of oversight of financial assurances
- This change will focus oversight to avoid any inadvertent gaps in coverage for financial assurance and eliminate any overlap or redundancies in financial assurance so that:
 - The Government will be protected, from loss
 - The companies will not be paying for excess coverage
 - Reclamation funding will always be sufficient to restore the environment

- BLM Wyoming has nine authorized and nine pending Plans of Operations (mine plans) and 22 authorized and one pending Notices to explore for uranium.



We look forward to continued close cooperation with the NRC in the future as we work together to deliver safe, efficient, and environmentally responsible energy to America

Thank You!

NRC PRESENTATION

February 20, 2013

Nancy Nuttbrock

Administrator

Wyoming DEQ/LQD

Discussion Points

- ***Status of state permit reviews***
- ***Interactions with NRC on Uranium Recovery Applications***
- ***Potential for Process Improvement***
- ***LQD/Uranium Industry WorkGroup***

Status of WY Permit Reviews

- ***AUC – Reno Creek***
- ***Strathmore – Lower Gas Hills***
- ***Strata – Ross***
- ***UR Energy – Lost Creek***
- ***Uranium One – Ludeman***
- ***Uranium One – Willow Creek***
- ***Uranerz – Hank Nichols Ranch***
- ***Cameco – Smith Ranch, Highland, Reynolds combo***

Interactions with NRC on Uranium Recovery Applications

- ***Quarterly Conference Calls***
- ***Project Specific Involvement***
- ***General LQD-NRC Interests***

Potential for Process Improvement

- ***NRC Program located in Wyoming or regionally***
- ***LQD Uranium Coordinator***
- ***DEQ/LQD – NRC MOU***

LQD / Industry Uranium WorkGroup

- ✓ Uranium One
- ✓ Cameco
- ✓ UR Energy
- ✓ Uranerz
- ✓ Rio Tinto
- ✓ AUC, LLC
- ✓ Strata Energy
- ✓ Wyoming Mining Association
- ✓ 7 LQD Staff

LQD / Industry Uranium WorkGroup

- Topics to Address
 - ✓ PLUGGING & ABANDONING PRODUCTION / DELINIATION / EXPLORATION HOLES
 - ✓ HISTORIC DRILING HOLES
 - ✓ PUMPTEST WATER DISCHARGE
 - ✓ AQUIFER EXEMPTIONS
 - ✓ GUIDELINE 4
 - ☐ NONCOAL CHPT 11 INSITU
 - ☐ BEST PRACTICABLE TECHNOLOGY FOR GW RESTORATION
 - ☐ TOPSOIL HANDLING
 - ☐ SURETY CALCULATIONS – OVERALL ISL OPERATIONS
 - ☐ WELL ACCEPTANCE
 - ☐ ANNUAL / QUARTERLY REPORT FORMAT
 - ☐ NRC – LQD MOU – Bonding
 - ☐ NOV's – How are these issued?

Closing Message

Wyoming's Uranium industry is thriving; the LQD is actively collaborating with Operators to focus its regulatory efforts on minimizing environmental impacts, while supporting development of Wyoming's resources.

Uranium Recovery Briefing

February 20, 2013

Katie Sweeney
National Mining Association
General Counsel



Addressing Resource Constraints

- **NRC Staff Review Priorities ¹**

- Operating Facility Inspections and Operating License Reviews
- New License Applications
- Guidance Development

- **Streamlining Regulatory Processes ²**

- GEIS
- NRC/BLM MOU
- Performance Based Licensing

- **Risk-informed Performance-Based Commission Policies ³**

- Focus on significant risks
- Shouldn't be limited to regulations but also extended to licensing actions, development of policy and identification of inspection/enforcement priorities

NRC Billing Practices & Fees ⁴

- **Level of Invoice Detail**
 - Staff
 - Contractors
- **Use of Cost Estimates**
- **Use of Flat Fees for Routine Activities**

National Historic Preservation Act Section 106 Process ⁵

- **NRC Tribal Protocol**
- **Improvements to Implementation of Section 106 process**
 - Timeframes/Milestones
 - Guidelines
 - Thresholds for substantive consultation
- **NMA Recommendation for a Programmatic Agreement**
 - Foster cooperation between the agencies, tribes and industry and develop a standardized approach
 - Include the Northern Plains area
 - Include potentially interested parties (e.g., Industry, NRC, BLM, SHPOs, Tribal Leadership/THPOs, ACHP)

EPA's Subpart W Rulemaking⁶

- **Took a fatally flawed legal position that evaporation ponds at uranium facilities need to be regulated under 40 CFR Part 61 (Radon NESHAPS)**
 - Administrative rulemaking record directly contradicts current legal position
- **Demanding approval of evaporation pond construction at new facilities -- NRC should be involved in the development of these regulations to ensure no duplicative regulatory oversight**
 - Parallels to Subpart I and T
- **Proposed rule anticipated in 2013**

Pre-Licensing Site Construction ⁷

- **Clarification of Final Rule is Needed**
 - Question: What Constitutes Grounds for Denial of License
 - Relevance of *Nuclear Fuel Services* decision
 - Activities that can be undertaken without a license
 - Activities that might be prohibited

Endnotes

- 1. Slides from K. McConnell 2012 NMA/NRC Workshop Presentation (Attachment 1)**
- 2. See NMA FY2012 Fee Comments (Attachment 2)**
- 3. See NMA Comments on Incorporation of Risk Management Concepts in Regulatory Programs Proposal (Attachment 3)**
- 4. See Attachment 2**
- 5. NMA 8-3-12 Letter to NRC CFO James Dyer (Attachment 4)**
- 6. A. J. Thompson 2012 NMA/NRC Workshop Presentation on NHPA Section 106 (Attachment 5)**
- 7. See NMA White Paper on Subpart W (Attachment 6)**
- 8. See NMA Comments on 40.32(e) (Attachment 7)**

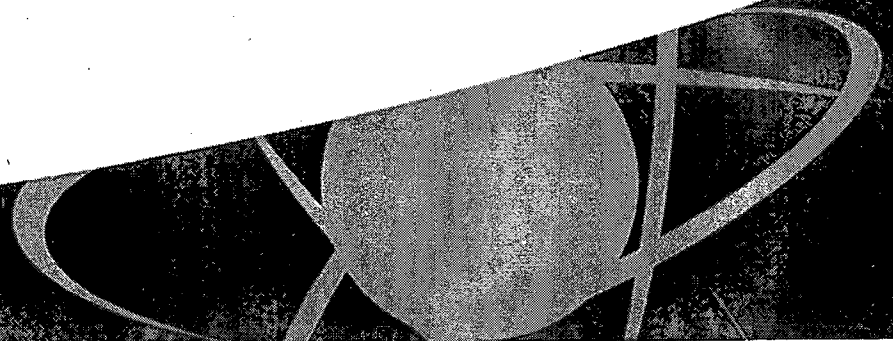
Overview of NRC Uranium Recovery New Licensing Activities: Past, Present and Future

Keith I. McConnell, Ph.D.
**Deputy Director, Division of Waste
Management and Environmental
Protection**
U.S. Nuclear Regulatory Commission

Current Licensing Activities (Review Priorities)



- Review Priorities:
 - Inspection of Operating facilities
 - Operating license reviews (e.g., renewals, amendments, etc.)
 - New License applications (e.g., new facilities, major expansions)
 - Guidance development
- New License Review Priorities:
 - First accepted, first reviewed



Current Licensing Activities U.S.NRC

United States Nuclear Regulatory Commission

Protecting People and the Environment

• Operating License Reviews

- Willow Creek, PRI, Crow Butte and HRI renewals
- Willow Creek – increased flow; Lost Creek – Dryer amendment
- Exemption request for ground water restoration (Cameco)

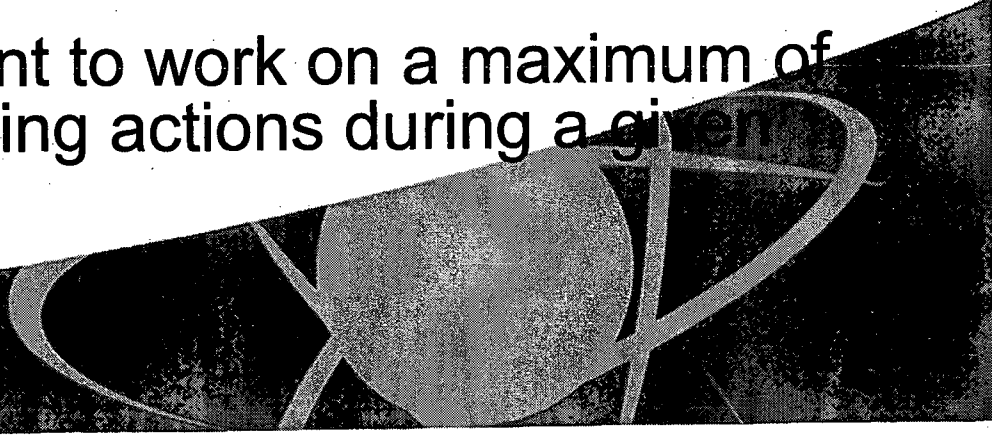
• New Licensing Reviews

- North Trend, Strata, Ludeman, Dewey-Burdock

• Guidance and Programmatic Document Development

- Conventional and Heap Leach Standard Review Plan
- NUREG-1569 (delayed)
- Reg. Guide 8.30 (delayed)
- NUREG-1757, Vol. 4

Bottom Line: Resources sufficient to work on a maximum of approximately 8-10 major licensing actions during a given year





April 16, 2012

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-001

Dear Sir/Madam:

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) proposed revisions to the licensing, inspection and annual fees for Fiscal Year (FY) 2012. 77 Fed. Reg. 15,530 (March 15, 2012). NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. These comments are submitted by NMA on behalf of its member companies who are current or prospective NRC licensees and who are adversely affected by the NRC fee regulations. These members include the current and prospective owners and operators of uranium mills and mill tailings sites and *in situ* uranium production facilities.

NMA has commented extensively in the past on NRC's fee allocation system. NMA acknowledges that the 1999 amendments (NRC Fairness in Funding Act) to the Omnibus Budget Reconciliation Act of 1990 (OBRA) addressed some of NMA's fairness and equity concerns regarding charging licensees for activities that provide licensees no direct benefit. Yet NMA remains concerned about NRC fees, particularly rising hourly rates, lack of cost containment measures, mounting delays, and inadequate billing details. Together, NRC and industry must find some solutions to these problems.

Annual Fees

Under the proposed rule, the annual fees for all categories of uranium recovery activities decrease slightly. The annual fees decrease as follows:

- Conventional and heap leach mills – from \$31,900 in FY 2011 to \$23,600;
- Basic *in situ* recovery facilities – from \$30,300 in FY 2011 to \$29,900;
- Expanded *in situ* recovery facilities – from \$34,300 in FY 2011 to \$33,800;
- *In situ* recovery resin facilities – from \$28,800 in FY 2011 to \$28,300;

- 11e.(2) disposal incidental to existing tailings sites – from \$10,400 in FY 2011 to \$10,200; and
- Uranium water treatment – from \$7,200 in FY 2011 to \$7,100.

NMA supports the decrease in the annual fee category but notes that these costs pale in comparison to the hourly fees. Admittedly, in years past NMA's fee comments focused primarily on annual fees because (1) the level of UR activity was such that for most companies the annual fees overshadowed hourly fees and (2) NRC was less vigilant about assessing hourly fees for certain licensee-specific actions. As the pace of activity has increased and the percentage of fees recovered for UR activities through hourly rates nears 90 percent, our concerns logically have shifted to the hourly fees. As explained below, however, while the actual hourly rate is important, it is the number of hours charged and lack of cost containment that trouble industry the most.

Hourly Fees

While the increase in the new hourly rate is slight, from \$273 in FY2011 to \$274, it continues the steady increase in hourly rates over the last decade. NMA understands that without additional legislative changes, NRC is required by existing law to collect 90 percent of its budget through fees. Applicants and licensees are well aware they must pay for NRC services that convey an identifiable benefit to them but in return, applicants and licensees expect fair, efficient and timely results. NRC may not be able to completely control the budget amount it must recover through fees, but the agency certainly should be able to exercise better management and oversight of the hourly fees and investigate ways to reduce those fees by streamlining regulatory processes.

To the extent that lack of NRC staff resources limits NRC's ability to provide timely results or accomplish streamlining efficiencies, NMA is prepared to assist the agency in future budgeting initiatives. From industry's perspective, it appears as if the agency is attempting a juggling act between processing new applications and performing needed actions related to existing licenses including license renewals. Unfortunately for NRC, both types of actions must be able to move forward in a timely manner otherwise companies are left in limbo, unable to plan and budget and vulnerable to losing investment backing. If resource constraints are forcing NRC to favor processing of new licenses over existing license maintenance or vice versa, NRC needs to seek additional resources with appropriate expertise to allow the agency to perform its job. NMA is willing to speak to the commission or contact Congress to advocate for additional resources for uranium recovery activities. Though first, the agency should ensure that it is wisely using the resources it does have.

- Streamlining Processes

As NRC has recognized, streamlining of processes can maximize efficient use of agency resources. An added benefit is reduction in hourly fees and maximizing use of

licensee or applicant resources. Three examples of streamlining efforts NRC initiated in the uranium recovery area are preparation of a "Generic Environmental Impact Statement (GEIS) for *In Situ* Leach Uranium Milling Facilities" (GEIS), performance based licensing and establishment of a Memorandum of Understanding (MOU) between the Commission and the Bureau of Land Management (BLM) regarding cooperation on environmental analyses. NMA strongly supported all of these efforts as ways to contain costs for licensees/applicants and save NRC resources. In fact, NMA spent near three-quarter of a million dollars to provide technical information to support the GEIS and allocated resources to support the MOU. As promising as both these efforts are, they have not been as effectively implemented as needed to achieve the desired results.

The intent of the GEIS is to streamline licensing actions for *in situ* recovery (ISR) operations by using the GEIS as the starting point for site-specific environmental reviews of license applications for new ISR facilities, as well as applications to renew or amend existing ISR licenses. Specifically, the GEIS addresses common environmental issues associated with the construction, operation, and decommissioning of ISL facilities, as well as the ground water restoration at such facilities, if they are located in particular regions of the western United States. In the press release announcing the GEIS, NRC indicated:

The GEIS will improve the efficiency of the agency's environmental reviews of these applications by serving as a starting point for site-specific environmental reviews of these applications. The agency expects to complete most licensing reviews within two years, subject to available resources.

NRC June 4, 2009 Press Release, No. 09-103.

The promised efficiencies have yet to be realized – the most recently licensed facilities experienced lengthy and unexpected delays as have licensees engaged in expansion or license renewal. Not all these delays are attributable to NRC but some significant delays have been. NRC needs to redouble its efforts to capitalize on the GEIS, more expeditiously review licensing actions and better allocate its time and resources.

Similarly, the NRC/BLM MOU has not resulted in the promised efficiencies. The MOU outlines how the agencies will coordinate on environmental analyses related to development of uranium resources on public lands. While obviously, NRC cannot alone, without the BLM, take full advantage of the MOU, NRC could do more to ensure better implementation.

Performance Based Licensing was instituted for uranium recovery licensees over a decade ago. Licensees have yet to realize substantial benefits from this policy as NRC has made too many operational activities at licensed sites subject to license

conditions. Therefore, licensees are required to submit relatively minor changes to NRC for approval, thereby subjecting the action to NRC review, time delays and excessive fees.

Expansion of Performance Based Licensing and the increased use of Safety and Environmental Review Panels (SERPs) would help in reducing review costs. Expansion of the use of Performance Based Licensing is justified due to the very low risks posed by uranium recovery licensees considering the low specific activity of the materials that they handle. Contrary to this approach, staff has restricted actions that can be approved by a SERP in recent draft licenses.

Another process contributing to licensing delays is the National Historic Preservation Act section 106 process. It is NMA's understanding that NRC is developing a draft protocol to guide the agency's section 106 process. We urge NRC to move forward quickly to provide a draft for public comment so the process can be implemented smoothly. NRC should also look to other federal agencies, such as BLM, that more routinely and proficiently conduct section 106 reviews for examples of best practices.

- Better Management and Oversight

NRC should revise the proposed rule to require more efficient processing of services subject to hourly fees. As currently written, the rule fails to promote opportunities for cost containment. NRC should establish typical timeframes for activities and promote use of deadlines and cost estimates. Deadlines are particularly important for documents where fees are calculated on a case-by-case basis and NRC should be required to provide at least a preliminary cost estimate. These are standard practice in industry. Not only would such efforts likely reduce hourly fees they would have the added benefit of encouraging more timely actions by NRC.

Another way for NRC to provide greater certainty regarding fees would be to establish more flat fees for activities at uranium recovery operations. NRC may not yet have the needed information and experience on number of hours and typical timeframes to establish flat fees but NRC's goal should be to move to flat fees for routine activities. While the flat fees would fluctuate as hourly rates are recalculated each fiscal year, flat fees would at least result in a better ability to plan and budget. This idea was discussed at the NMA/NRC 2011 workshop but, as yet, have not been acted upon.

Improved oversight of NRC staff by managers also would provide an opportunity to ensure proper allocation of resources. Managers need to review staff responses to applicants and licensees to ascertain that requests for additional information are pertinent, consistent with NRC regulations and policies and not duplicative.

- Invoices

NRC Fee Comments
April 16, 2012
Page TwoFive

While improvements have been made over the last decade, NRC needs to continue its efforts to provide invoices that contain more meaningful descriptions of the work done by staff and especially contractors. With proposed hourly rates at \$274 per hour, the agency should be held to at least the same standard of accountability to its licensees as a private sector consultant is to its clients. In the private sector, adequate explanations, dates and time are provided to clients in order for clients to fully understand what was done, when it was done and how long it took. This type of billing system allows costs to be specifically identified. Enhanced billing details also would better allow NRC to review bills with an eye toward cost-containment and gaining information necessary to determine appropriate flat fees for certain activities. Again, this issue was discussed at the last NMA/NRC workshop but never acted upon.

In conclusion, NMA believes that NRC needs to not only make sure the agency is using its resources effectively but needs to evaluate alternative approaches that would maximize efficiencies, minimize costs, and establish accountability. NMA appreciates this opportunity to provide comments. If you have any questions, please contact me at 202/463-2627.

Sincerely,



January 6, 2012

Cindy Bladey
Chief, Rules, Announcements & Directives
Mail Stop TWB-05-B01M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

**Re: Incorporation of Risk Management Concepts in Regulatory Programs
Docket ID NRC-2011-0269**

Dear Ms. Bladey:

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) request for comment regarding the development of a strategic vision to better incorporate risk management concepts in to its regulatory programs. 76 Fed. Reg. 72220 (Nov. 22, 2011). NMA strongly supports NRC's efforts to fully realize its goal to move toward more risk-informed, performance based approaches in its regulatory programs.

NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. These comments are submitted by NMA on behalf of its member companies who are current or prospective NRC licensees engaged in the business of uranium recovery (UR).

Risk-Informed Performance-based Regulatory Approaches Are Good Public Policy

Risk-informed performance based regulation is good public policy as it promotes efficient use of already limited agency, licensee and other stakeholder resources. Because it requires a focus on higher risk Atomic Energy Act licensed activities, a risk-informed performance-based approach results in a more efficient and effective regulatory program that optimizes protections of public health, safety and the environment.

Risk-informed, performance based approaches have the potential to better educate and inform the public about risks associated with activities regulated by NRC. It is not the

role of NRC to promote nuclear energy, however, the agency does have a duty to maintain a defensible regulatory oversight program that reassures the public regarding the protection of public health, safety and the environment. A regulatory oversight program that accurately portrays potential risks to the public can assist in clearing up misperceptions about potential risks related to radiation from AEA-licensed activities. NMA endorses the comments of the Wyoming Mining Association, which reference many scientific studies related to the potential for low-level, low-risk exposures from AEA-licensed activities generally, but also specifically illuminate the low risk nature of UR activities.

NMA has participated in and supported NRC's efforts to become more risk-informed, performance-based since NRC, in response to the 1993 Government Performance and Results Act (GPRA), developed a strategic plan in which the agency committed to move toward risk-informed, performance-based regulation. As a result of that strategic plan, when NRC proposes a new regulation, alternatives considered must include a performance-based alternative that enhances the focus on the effectiveness of the agency's regulatory programs. Over the years, NRC has continued to advance the risk-informed performance based regulation concept. See e.g., Staff Requirements - COMSECY-96-061 - *Risk Informed, Performance-Based Regulation* (DSI-12), April 15, 1997; *Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities; Final Policy Statement*, 60 Fed. Reg. 42622 (August 16, 1995); SECY-98-144, *White Paper on Risk-informed and Performance Based Regulation* (June 22, 1998)

NMA strongly supports NRC's establishment of the task force for "Assessment of Options for More Holistic Risk-Informed, Performance-Based Regulatory Approach" and the current effort to gather input for the task force to consider in its work. NMA believes there are many opportunities to identify and prioritize those areas that are either now, or can be made, with minimal additional effort/resources, amenable to a risk-informed, performance-based approach. We appreciate that this effort is not limited just to regulations but applies more broadly to regulatory programs. The risk-informed, performance-based approach should apply to licensing actions, development of policy and identification of inspection/enforcement priorities. NMA would be happy to provide a more detailed briefing to the Task Force or the Commission on our views.

Application of Risk Informed Performance Based Approach in the Uranium Recovery Arena

The Atomic Energy Act of 1954, as amended (AEA) mandates consideration of risk for management of byproduct material such as is produced by UR facilities. Thus, Section 84(a)(1) of the Act specifically states management of 11e.(2) byproduct material, and by implication, UR operations, is to be carried out in such a manner as the Commission deems appropriate to protect the public health and safety and the environment from radiological and non-radiological hazards associated with the processing and with the possession and transfer of such material **taking into account the risk to the public health, safety, and the environment**, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate.

Additionally risk-informed, performance-based regulatory oversight approaches are well suited to the low risk nature of UR activities. If risk-informed, performance-based regulation is appropriate for licensed nuclear reactors, which pose the highest potential risk to public health, safety, and the environment in the nuclear fuel cycle, it is even more appropriate for the licensed fuel cycle facilities posing the lowest potential risks (i.e., conventional and ISR UR facilities). As explained in NUREG/CR-6733:

Regulatory programs that are RIPB [risk-informed, performance-based] consider, among other factors, the degree of risk associated with specific operations in defining the nature of the applicable regulatory requirements. In general, operations that pose a high risk to public health and safety or the environment would be subject to more stringent regulatory requirements. Conversely, those operations that pose a low risk to public health and safety or the environment would be regulated less stringently. Risk considerations may also help determine which aspects of a facility should be regulated. RIPB regulatory programs typically identify performance measures as the basis for regulatory requirements.

The Commission itself has acknowledged the low risk nature of ISR facilities in NUREG-1910, the *Generic Environmental Impact Statement for In Situ Uranium Milling Facilities*. This programmatic assessment of ISR operations provides, in significant detail, an analysis of the potential impacts/risks associated with ISR facilities and concludes most are considered small.

- Early Success Story: Performance Based Licenses for UR Licensees

Performance-based licenses were first raised in the context of UR in 1993 when the impending closure of the NRC uranium recovery field office (URFO) in Denver, Colorado led to the formation of a Transition Oversight Team (TOT) at NRC headquarters. The TOT met with the uranium industry numerous times to discuss transfer of URFO's responsibilities to NRC headquarters. Many of these discussions focused on ways to reduce regulatory burdens and streamline licensing activities. Performance-based licenses, modeled after 10 CFR 50.59, were discussed as an appropriate way to assist in achieving those goals.

Through the TOT process, and NRC's increased emphasis on risk-informed, performance-based approaches, NRC and industry developed generic performance based license conditions that, while allowing licensees more flexibility to make certain changes at their facilities without license amendments, still maintained in place necessary regulatory controls (i.e., mandatory license conditions) to protect public health and safety and the environment. Performance-based licensing has become the norm as most UR facilities moved to licenses that incorporate performance-based license conditions. This accepted practice is explicitly referenced in NUREG-1569, *Standard Review Plan for In Situ Leach Uranium Extraction License Applications*.

The Commission has noted the benefits of the performance-based licensing in several instances. For example, SECY-98-144, indicates:

A performance-based requirement relies upon measurable (or calculable) outcomes (i.e., performance results) to be met, but provides more flexibility to the licensee as to the means of meeting those outcomes. A performance-based regulatory approach is one that establishes performance and results as the primary basis for regulatory decision-making, and incorporates the following attributes: (1) measurable (or calculable) parameters (i.e., direct measurement of the physical parameter of interest or of related parameters that can be used to calculate the parameter of interest) exist to monitor system, including licensee, performance against clearly defined, objective criteria; (2) licensees have flexibility to determine how to meet the established performance criteria in ways that will encourage and reward improved outcomes; and (3) a framework exists in which the failure to meet a performance criterion, while undesirable, will not in and of itself constitute or result in an immediate safety concern. The measurable (or calculable) parameters may be included in the regulation itself or in formal license conditions, including reference to regulatory guidance adopted by the licensee. *This regulatory approach is not new to the NRC.*

See SECY-98-144, *White Paper on Risk-Informed and Performance-Based Regulation* (June 22, 1998) (emphasis added).

The Commission further recognized the value of performance-based licensing in the Hydro Resources, Inc. administrative litigation:

The use of this licensing concept in HRI's license is consistent with well-publicized Commission direction to the Staff to employ risk informed and performance based concepts in NRC regulatory activities. It is sensible regulatory policy to allow licensees on their own to make minor adjustments and modifications that have little safety or environmental impact. To require license amendments for all changes, no matter how inconsequential, would burden both licensees and NRC, to no good end.... It [performance based licensing] is simply an additional means through which the NRC can decrease the administrative burden of regulation while ensuring the continued protection of public health and safety.

See In the Matter of Hydro Resources, Inc., CLI-99-22

Furthermore, performance-based licensing is entirely consistent with the performance-oriented structure of Appendix A's Criteria. As the preamble thereto suggests, since "flexibility is provided in the criteria to allow achieving an optimum...program on a site-specific basis" licensees can propose alternatives to any regulatory requirement that take into account local or regional geology, topography, hydrology, and meteorology. See 10 CFR Part 40, Appendix A (Preamble) (2011) (emphasis added).

- Recent Success Story: RIS on Equivalent Feed

A recent example of NRC using a risk-informed, performance-based approach in the UR area relates to NRC's draft Regulatory Issue Summary (RIS) on receipt and processing, without a license amendment, of equivalent feed at NRC and Agreement State-licensed UR sites, either conventional, heap leach, or ISR. The draft RIS is risk-informed regulation at its best. In response to queries from UR licensees and uranium water treatment suppliers/operators, NRC staff took a second look at the applicability of earlier RIS, RIS 00-23 *Recent Changes to Uranium Recovery Policy*, to resin media. Under RIS 00-23, uranium loaded ion-exchange resin is treated as an alternative feed that could not be processed at a UR facility without a license amendment. In the draft RIS, NRC staff recognize that treating uranium loaded resin as alternate feed is not a risk-informed approach since the resin is essentially the same in physical form and radiological content as the source material that is normally processed at a UR facility. Thus, the draft RIS logically designates such resins as "equivalent feed." As such, uranium loaded resins can be processed at a licensed UR facility without a license amendment so long as the uranium annual production limits are not exceeded, the currently licensed process operation does not require changes, and there are no anomalous constituents in the equivalent feed. NMA has expressed strong support for this common-sense, risk-informed approach.

- Issues that Would Benefit from a Risk-informed, Performance-based Approach

- Remediation/Restoration of UR Facilities

NRC should commit to a more risk-informed, performance-based approach to remediation and restoration at both ISR and conventional UR facilities. Too often, the cleanup focus is on meeting numerical criteria for individual constituents rather than ensuring that cleanup is sufficient to protect public health, safety and the environment. For example, at ISR facilities, the emphasis appears to be on getting constituents back to baseline even when for other reasons, such as natural conditions, would prevent the water from being a source of drinking water or used for other purposes. Similarly, at mill tailing facilities, that are deeded to the federal government post-reclamation, it makes no sense to needlessly clean to drinking water standards when no completion of water wells would even be permitted in those areas. The same arguments apply for cleanup of soils in areas where the background levels are is high due to naturally occurring radioactivity.

- Application of Timeliness in Decommissioning Rule to ISR Wellfields

There is disagreement between industry and NRC regarding the applicability of 10 CFR 40.42 to ISR facilities, especially as restoration water is considered 11e.2 byproduct material. But even beyond that legal distinction, application of the timeliness rule does not make sense given the requirement to complete decommissioning within 24 months. While the regulations authorize the Commission to grant a request to delay or postpone initiation of the decommissioning process, it is not a risk-informed, performance-based

approach since the 24 months is generally recognized as insufficient for ISR facilities. As recognized in NRC's latest decommissioning report: "for ISR facilities with well-field restoration, 24 months is usually insufficient, because remediation of groundwater contamination is more time-consuming than remediation of surface contamination." SECY-11-0159, Status of the Decommissioning Program – 2011 Annual Report, Nov. 10, 2011. If the 24 months is insufficient for ISRs, the timeframe should either not apply or should be amended. Licensees should not be required to go through a submission for an alternate schedule as a substitute for a risk-informed, performance based regulation.

- Health Physics Issues Raised at April 2011 Meeting

On April 11, 2011, a meeting between representatives of the UR industry and NRC staff was held to discuss certain health physics issues that have emerged during the review of license applications for new uranium recovery facilities and expansions. All issues raised in the April 2011 Health Physics meeting are examples of issues that could use a risk informed approach. See attached meeting summary for additional details but the genesis of every item on the meeting agenda was fundamental disagreement between NRC staff and industry over risk. The issues discussed had been coming up repeatedly through the request for additional information (RAI) process and in negotiation of draft license conditions with applicants and as compliance matters with the licensees. These issues were ones that industry believed were previously settled, either by guidance, policy or past agency practice but were now being "reopened" by NRC staff without any showing that reopening was necessitated by potential or actual risk.

- NHPA Section 106 Process

The UR industry recognizes that NRC has obligations under the Section 106 of the National Historic Preservation Act (NHPA), in that NRC must attempt to identify historic properties within the area of potential effects for proposed UR facilities. As the Advisory Council on Historic Preservation (ACHP) regulations implementing NHPA section 106 explain, the agency needs to make a "**reasonable and good faith**," as opposed to exhaustive, effort to identify Indian tribes to be consulted to determine existence of historic properties. To ensure a risk-informed, and frankly common sense approach to the section 106 process, NRC must not ignore the "reasonable and good faith" clause and engage in exhaustive, expensive and resource intensive consultation efforts.

Conclusion

In conclusion, the NMA strongly supports any NRC effort to risk-informed approach to regulation and makes sense from the public policy perspective by promoting efficient use of resources, streamlining processing and providing much needed flexibility without jeopardizing the environment, public health and safety. We appreciate NRC's recognition that deterministic and prescriptive approaches can limit the flexibility of industry and NRC to respond to lessons learned from operating experience and support

the adoption of improved designs or processes. If you have any questions regarding NMA's comments, please contact me at 202/463-2627.

Sincerely,

A handwritten signature in cursive script that reads "Kate Doemey". The signature is written in black ink and is positioned below the word "Sincerely,".



KATIE SWEENEY
General Counsel

August 3, 2012

Mr. James Dyer, Chief Financial Officer
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738

Dear Mr. Dyer:

Recently, Christopher Pugsley and I met with you, Michael Weber, and Mark Satorius on behalf of the National Mining Association (NMA) regarding a variety of uranium recovery industry regulatory issues. One key issue discussed relates to the format and content of the Nuclear Regulatory Commission's (NRC) invoices to uranium recovery licensees and license applicants. This letter is directed specifically at our members' issues and concerns with such invoices.

Over the years, NMA members have expressed significant concerns regarding the lack of adequate information on invoices received from NRC. After much discussion and a key meeting in October 1994, NRC modified the format and content of its invoices in a manner that licensees and license applicants considered to be an improvement. Unfortunately, over time, this progress has eroded away and the current invoice format and content lacks sufficient detail and explanation to provide licensees and license applicants with little more than a simple dollar amount to be paid.

At our June 2012 meeting, you indicated that your office had sent inquiries to licensees seeking feedback on invoice format and content with the most recent billing statement. NMA has been unable to identify any uranium recovery member company that received such inquiry. You noted at our meeting that an opportunity for comment and feedback was still available if a letter was prepared and submitted by NMA to your office. Accordingly, by this letter, NMA hereby provides the following comments:

- (1) NRC invoices should identify the specific NRC Staff member(s) by name charging a particular uranium recovery company for time spent on licensee/license applicant matters;
- (2) NRC invoices should provide an explanation of the nature and subject of the work performed;
- (3) NRC invoices should provide a numerical total of the time spent on a particular date on such work;

Name of Recipient

Date

Page Two

- (4) NRC invoices should break down work done on specific reviews of licensing action into subsets (e.g., time spent on the National Historic Preservation Act (NHPA) Section 106 Tribal Consultation process under the ambit of NRC Staff's environmental review);
- (5) NRC invoices should provide any relevant explanation of unusual or abnormally large amounts of time/dollars spent on any project or subset thereof.

NMA members also respectfully request that NRC contractors prepare and submit their invoices in the same format and with the same content as NRC invoices. NMA believes that adding such a requirement to the basic government contracts awarded to these entities should be a simple matter. While we recognize that this may need to be done via change order for projects under current review, it should be relatively straightforward to impose such a requirement on project reviews in the future.

The above-referenced invoicing practices are (and have been for decades) standard in the private sector for consultants, accountants, attorneys, etc. Given that NRC's hourly rates for its staff rival or exceed the rates for many of the service providers for NMA's members noted above, it is unreasonable for NRC to provide less detail for its oversight and the work of its contractors. Indeed, to the extent that NRC's contractors work with the private sector, they are providing the requisite detail. Without this detail, it makes developing budgets (which include estimates for regulatory review) difficult, if not impossible, for both licensees and license applicants and NRC Staff. It also makes it virtually impossible for a licensee or license applicant to dispute an invoice or part thereof as unreasonable which they can do with their consultants, accountants, and attorneys.

NRC expects and requires detailed and thorough license or license amendment applications which must pass initial acceptance review prior to detailed technical and environmental review. Licensees/license applicants should be able to expect the same quality and detail from NRC in its invoices which can range into the hundreds or thousands or millions of dollars. Indeed, given the very large numbers NMA uranium recovery members are experiencing in their invoices, anything significantly less than what is requested herein will be deemed unacceptable and likely will require NMA seeking solutions with other entities including potentially the Office of Management and Budget (OMB) and relevant Congressional delegations.

NMA's uranium recovery members appreciate your time and the opportunity to provide comments on the current status of NRC's invoicing practices, and we would be happy to discuss such matters with you in greater detail at your convenience. Thank you once again for your time and attention in this matter and please do not hesitate to contact me at 202/463-2627 to discuss these issues.

Sincerely,



Katie Sweeney

NATIONAL HISTORIC PRESERVATION
ACT AND THE SECTION 106 PROCESS:
ISSUES IN NRC LICENSING

Prepared for the 2012 NMA/NRC Conference

Presented by Anthony J. Thompson, Esq.
Thompson & Pugsley, PLLC

INTRODUCTION

- **The National Historic Preservation Act (NHPA) Has a Profound Effect on Federal Agency Licensing;**
- **The Nuclear Regulatory Commission's Endeavor to Review and/or Approve Proposed Licensing Actions Are No Different;**
- **It Has Been Unclear to Industry Why The Section 106 Process is So Inefficient But An Understanding of the Statute and Its Implementing Regulations & Requirements Serves As Useful Background**

NHPA STATUTORY LANGUAGE

- **NHPA Section One:**
- **Purpose:**
 - **The Congress finds and declares that:**
 - ***The historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;***
 - ***The increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development***

NHPA STATUTORY LANGUAGE

- NHPA Section One:

- “It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to:
 - “Use measures, including financial and technical assistance, to foster *conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.*”

NHPA REGULATIONS: 36 CFR PART 800

- **Purpose:**
- - Section 106 of the National Historic Preservation Act requires Federal agencies to take into account *the effects of their undertakings* on historic properties and afford the Council a reasonable opportunity to comment on such undertakings;
 - The procedures in this part define how Federal agencies meet these statutory responsibilities;
 - *The Section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings* through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning.

NHPA REGULATIONS: 36 CFR PART 800

- The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to *avoid, minimize or mitigate any adverse effects* on historic properties;
- Timing: the agency official must complete the Section 106 process “prior to the approval of the expenditure of any Federal funds on the undertaking *or prior to the issuance of any license*”

NHPA REGULATIONS: 36 CFR PART

800: WHAT IS THE PROBLEM?

- With all this said, what is the scope and focus of these statutory and regulatory provisions?
 - The Section 106 process is not intended to *unnecessarily* impede or halt “undertakings” but rather to assure that appropriate **procedural steps** are followed:
 - To make a “reasonable” effort to identify eligible or potentially historic/cultural properties for inclusion in the National Register;
 - To assess any potentially “adverse” effects/impacts on such historic/cultural properties if eligible (i.e., “area of potential effect” (APE);
 - If no such properties are identified, proceed with conditions;
 - If “adverse” effects/impacts are identified, “to minimize harm to the maximum extent possible

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **NRC, as the licensing entity under the Atomic Energy Act (AEA), is the “lead” agency for uranium recovery license applications in non-Agreement States;**
- **NRC fulfills its NHPA responsibilities to assess a proposed licensing action or “undertaking” through its environmental review regulations at 10 CFR Part 51;**
- **However, a lack of experience in this process on NRC’s part has manifested itself in the following manner:**
 - Lack of clear understanding and decisiveness in the Section 106 process at each step, especially in the identification of historic properties stage;
 - Confusion as to whether a recent Tribal meeting was a “government-to-government meeting, a Section 106 consultation/working meeting or a planning meeting;
 - Leading to consistent delays in the licensing process

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **As the “lead” agency for NHPA matters for AEA licensing actions/undertakings, NRC must set forth:**
 - **A coherent process within the context of NRC’s jurisdictional authority under the AEA:**
 - Most Federal and State agencies have little understanding of NRC’s licensing process, much less the potentially affected Tribes;
 - Thus, NRC must clearly explain its processes and where they differ from other federal agencies to all consulting parties, particularly Tribes with little or no exposure thereto;
 - NRC also must endeavor to seek expert input and advice from agencies with extensive experience in the Section 106 process and, to the best of their ability, utilize lessons learned and tools from such agencies to improve their own process

NRC AND THE SECTION 106 PROCESS

RECONCILED?

- **Tribal authorities are not burdened merely with proposed NRC licensing actions/undertakings:**
 - Tribal organizations are overburdened with consultation efforts (e.g., 1,000-1,500 for a single Tribe)
- **Thus, NRC must construct a simple, critical path with expectations and timeframes so that:**
 - License applicants and licensees know what is expected of them and can communicate to their personnel, experts, and shareholders reasonable timelines for licensing;
 - Tribes can effectively manage the numerous consultation efforts they currently deal with every year

CHALLENGES FOR NRC IN THE SECTION 106 PROCESS

- NRC's licensing process is less than ideal regarding a smooth functioning Section 106 effort:
 - NRC cannot act until it receives a license or license amendment application; Tribes have talked about involvement in projects at the "exploration" stage which is not possible as NRC has no jurisdiction then;
 - NRC wants a Class III archaeological study with the application and tribes are reluctant to work directly with applicants (i.e., not government-to-government);
 - So NRC tribal consultation process starts late --- a conundrum that seems to have few readily apparent answers!;
 - Completing EAs and EISs/SEISs with a confusing Section 106 process can slow the license process to a crawl or outright stop it even if SER is complete; **NB: No hearing challenge can go forward until there is a FEIS**
 - One thought that has surfaced to avoid bottlenecks that cause unacceptable delays in completing NRC's environmental review process (draft and final EAs and EIS/SEISs) is to development some standard (at least as a starting point) Programmatic Agreement (PA) format(s).

CHALLENGES FOR NRC IN THE SECTION 106 PROCESS: SOLUTIONS?

- **Some logistical mechanisms exist in the 36 CFR Part 800 regulations that can assist in the Section 106 process:**
 - **Memoranda of Understanding (MOU):**
 - Possible where consulting parties are relatively fewer in number or when mandated by an existing PA or other authority;
 - Where the proposed license boundary is already extensively affected by past development activities
 - **Programmatic Agreement (PA):**
 - Based on “phased” activities, such as ISR projects as described in the HRI litigation
 - **De-Coupling from the Part 51 process:**
 - Necessary when the Section 106 process becomes unduly delayed

TRADITIONAL CULTURAL PROPERTIES

- **NHPA Section 101(d):**

- (A) Traditional religious and cultural properties may be eligible for listing in the National Register;
- (B) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register;
- (C) In carrying out its responsibilities under section 106 of this Act [NHPA], a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A)

TRADITIONAL CULTURAL PROPERTIES

- Only properties that are listed or eligible require the full Section 106 procedural gamut;
- Lead agency must make a “reasonable and good faith” effort to identify relevant tribes;
- So-called TCPs can be facilities, natural locations/areas/features considered sacred or culturally significant;
- So-called TCPs currently seem to be the major and most difficult Section 106 issue in the NRC licensing context

KEY QUESTIONS TO BE ADDRESSED BY

EXPERTS

- **Questions to Be Addressed:**
 - **What is the True Legal Definition of “Reasonable and Good Faith Effort?”;**
 - **If a Tribe Shows No Interest in a Licensing Action, What Legal Standard Requires Them to Be “Kept in the Loop?”;**
 - **How Does the Agency Determine What Tribal Request(s) is “Reasonable?”;**
 - **How Does the Agency Define a TCP Without a Federal Definition?;**
 - **Why Can the Agency Not Issue a License With Conditions If the Section 106 Process is Not Completed at a Portion of a Proposed Project Site?;**
 - **What About Increased Coordination in the Process Such as MOUs Between Reviewing Agencies?**

Application of United States Environmental Protection Agency 40 CFR Part 61, Subpart W Regulations to Uranium Recovery Facilities

I. INTRODUCTION

The United States Environmental Protection Agency (EPA) appears to be taking the position that the **work practice standards** in its 40 CFR Part 61, Subpart W *National Emissions Standards for Radon Emissions from Operating Mill Tailings* apply to evaporation ponds at conventional and in situ uranium recovery (ISR) sites licensed by the Nuclear Regulatory Commission (NRC) or its Agreement States. This memorandum evaluates the legal and regulatory bases for any potential applicability of the EPA's 40 CFR Part 61, Subpart W regulations to evaporation ponds at currently operating and future operating uranium recovery facilities, including specifically ISR facilities.

A. Atomic Energy Act of 1954 and the Uranium Mill Tailings Radiation Control Act of 1978

1. Statutory and Regulatory Program

Currently, uranium recovery facilities and the 11e.(2) byproduct material (mill process tailings and other related wastes)¹ that they produce are actively regulated by NRC under the Atomic Energy Act of 1954, as amended by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). As a general proposition, the AEA was intended to promote the expeditious and efficient recovery of source material for the purposes of national defense and, later, a domestic nuclear power industry. To oversee its implementation, the AEA granted broad regulatory authority to the Atomic Energy Commission (AEC) (now NRC) to regulate source material (uranium) recovery processes after the removal of the source material from its place in nature by surface or underground uranium *mining*.

As concerns about the potential hazards from uranium recovery wastes developed, the AEC/NRC determined that it had no authority to regulate the wastes generated by uranium recovery (i.e., uranium milling) upon the cessation of active recovery operations as such wastes no longer qualified as *licensable* source material under the AEA (i.e., they contained less than 0.05%, by weight, uranium and/or thorium). As a result of this and the potential radiological and *non*-radiological hazards associated with such wastes, in 1978, Congress enacted UMTRCA with two specific intentions: (1) to facilitate the remediation of abandoned "inactive" mill tailings sites that were no longer operated under an active AEA license (Title I) and (2) to provide AEA statutory authority to regulate the management and disposal of wastes from the uranium recovery processing at active (licensed) uranium recovery facilities (Title II).

¹ See also 42 U.S.C. § 7911 (UMTRCA definition of "residual radioactive material").

In order to address the management and control of wastes located at such facilities, UMTRCA created a new category of AEA material known as 11e.(2) byproduct material, which it defined as, "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed *primarily* for its source material content." 42 U.S.C. § 2014(e)(2) (2007).

UMTRCA outlined a comprehensive, multi-agency regulatory oversight process by which appropriate regulations governing the safe management and containment of 11e.(2) byproduct material were to be promulgated and implemented. UMTRCA assigned EPA the authority to promulgate standards of general applicability (for both Title I and Title II programs) addressing both the radiological and *non*-radiological hazards of uranium mill tailings and related wastes. For the *non*-radiological hazards, these generally applicable standards were to provide protection equivalent to that provided by Subtitle C of the Solid Waste Disposal Act (SWDA), which is better known as the Resource Conservation and Recovery Act (RCRA). EPA purposely was not given any enforcement or implementation authority over 11e.(2) byproduct material under RCRA or UMTRCA.

In 1983, pursuant to Congress' mandate in UMTRCA, EPA promulgated its final regulations for active uranium mill tailings facilities at 40 CFR Part 192. UMTRCA directed the Commission (NRC) to implement and enforce the generally applicable standards developed by EPA through its regulations and licenses.² Although required to conform its general regulatory requirements to EPA's 40 CFR Part 192 regulations, UMTRCA also granted NRC expanded authority to develop its own requirements for the management of 11e.(2) byproduct material to protect public health, safety, and the environment. Specifically, Section 84(a) of the AEA (Section 205 of UMTRCA) directs NRC to ensure that any 11e.(2) *byproduct material* is managed in a manner:

that the Commission deems appropriate to protect health, safety, and the environment from the potential *radiological* and *non-radiological* hazards associated with such materials....

42 U.S.C. § (2007).

Thus, UMTRCA amended the AEA to provide EPA/NRC with express authority to regulate both the radiological and the *non*-radiological hazards associated with 11e.(2) byproduct material, whether in the soil, in the air or in the groundwater. The primary concern, however, was the uncontrolled tailings solids (i.e., sands and slimes).³

It should also be noted that uranium mills are subject to additional EPA AEA regulation for radiation dosage to members of the public and the general environment, *excluding radon*, as a result of *operations*. Pursuant to its

² 42 U.S.C. § 2022(d).

³ Tailings solids (sands) had been used in construction activities which generated radiation exposure concerns.

Reorganization Plan No. 3 of 1970 authority, EPA developed a dose limit applicable to *all* AEA fuel cycle facilities, including uranium mills, of 25 mrem/year to the nearest receptor from all potential pathways, excluding the dose from radon. The annual dose to the entire body of a human being must not exceed 25 millirems, 75 millirems to the thyroid, and 25 millirems to any other organ of a member of the public. These standards apply to doses associated with the milling of uranium *ore* as of December 1, 1980. Since 40 CFR Part 190 excludes radon, as a practical matter, its provisions primarily address radioactive particulate emissions from mill facilities, including (1) yellowcake dust and (2) windblown tailings. Thus, there are both EPA and NRC regulations that address the radiological and *non*-radiological effluents from active uranium mills and an EPA fuel cycle standard that addresses what effectively is airborne radiological particulate contamination from such mills.⁴

These requirements have been in place since the early 1980s and have evolved over time to create a robust regulatory program for the safe and effective management of uranium mill tailings facilities. As a necessary part of this regulatory evolution, NRC and its licensees sought to further define the extent of NRC's authority to regulate 11e.(2) byproduct material, particularly with respect to the extent of EPA and State authority over *non*-radiological aspects of 11e.(2) byproduct material. Given that 11e.(2) byproduct material contains both radiological and *non*-radiological constituents and that there were potentially significant conflicts between NRC and EPA/States relating to regulatory authority over the latter, it was inevitable that jurisdictional authority over 11e.(2) byproduct material needed to be defined more precisely.

As a general proposition, NRC has preemptive regulatory authority to address the potential *radiological* hazards associated with AEA licensed facilities, including uranium recovery facilities, their tailings impoundments, evaporation ponds, and other site facilities. In 1980, NRC's Office of Executive Legal Director "(OELD)" issued an advisory legal opinion concluding that the AEA, as amended by UMTRCA, did not preempt the exercise of *non*-Agreement State authority over the *non-radiological* components of 11e.(2) *byproduct material*. In reaching this conclusion, OELD conceded that:

the question is *so close* that the Commission *could reasonably choose either interpretation*, but that *the better legal view* is that *non*-Agreement States and the NRC have concurrent jurisdiction to regulate the *non-radiological* hazards of mill tailings, both before and after the November 8, 1981 date upon which the Mill Tailings Act becomes fully effective.⁵

⁴ It is important to note that, prior to the enactment of UMTRCA, *non*-radiological (hazardous) contaminants at AEA-licensed facilities typically were regulated by the States.

⁵ Memorandum from Howard K. Shapar, Executive Legal Director, NRC, to Chairman Ahearne, NRC re: OELD Legal Opinion on Two Questions Relating to the Operation of the Uranium Mill Tailings Radiation Control Act of 1978, Attachment B, 2-3 (April 28, 1980) (emphasis added).

After careful consideration of the uranium recovery industry's analysis of this "concurrent jurisdiction" issue in NMA's White Paper entitled *Recommendations for a Coordinated Approach to Regulating the Uranium Recovery Industry* disputing the OELD opinion and the position of NRC Staff in SECY-99-277⁶ supporting the OELD opinion, in 2000, the Commission determined that the OELD opinion should be overturned and that the Commission, indeed, exercises exclusive jurisdiction over both the radiological and non-radiological aspects of 11e.(2) byproduct material.⁷ As a result, implementation and enforcement of relevant AEA regulatory programs for licensed uranium recovery operations is under the exclusive authority of NRC and its Agreement States, including mill facility construction and operations, tailings impoundment construction, operations, and final closure, and associated uranium recovery facilities such as evaporation ponds.

B. Clean Air Act of 1977 and Implementing Regulations (40 CFR Part 61)

In addition to the authority vested in EPA under UMTRCA, Congress granted EPA additional authority to regulate certain aspects of uranium recovery facilities. In 1977, Congress enacted the Clean Air Act (CAA) under which EPA was directed to address potentially hazardous *radiological* air emissions at a variety of facilities, including uranium mills. In response to this statutory mandate and pursuant to Section 112 of the CAA, EPA promulgated 40 CFR Part 61 to address radiological air emissions from such facilities.

40 CFR Part 61, Subpart T *National Emission Standards for Radon Emissions from the Disposal of Uranium Mill Tailings* were promulgated by EPA to address potential hazardous air pollutants (e.g., radon as particulate emissions were addressed effectively under the above-noted 40 CFR Part 190 fuel cycle regulations) at mill tailings facilities regulated under Title II of UMTRCA, which were *no longer operational*. Subpart T stated, in pertinent part:

Radon-222 emissions to the ambient air from uranium mill tailings pile that are no longer operational shall not exceed 20 pCi/(m² -sec) (1.9 pCi/(ft² -sec)) of radon-222.

Subsequently, after challenges to Subpart T were filed in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), Subpart T was the subject of settlement discussions between the American Mining Congress (now NMA), EPA, NRC, and environmental groups, with NRC and Agreement States monitoring as interested, but not formally litigating, parties. These negotiations ultimately led to NRC revising its mill tailings regulations to require licensees to achieve enforceable "milestones" leading to accelerated placement of radon barriers at *non-operational*

⁶ United States Nuclear Regulatory Commission, *Concurrent Jurisdiction of Non-Radiological of Uranium Mill Tailings*, SECY-99-277 (December 2, 1999).

⁷ United States Nuclear Regulatory Commission, Staff Requirements Memorandum, *Concurrent Jurisdiction of Non-Radiological of Uranium Mill Tailings*, SECY-99-277 (August 11, 2000).

(i.e., no longer actively milling or on standby) Title II mill tailings disposal sites⁸ to satisfy EPA's and the environmental groups' concerns that the potential threat from radon emissions be addressed by the prompt placement of radon barriers over disposal areas.⁹ After NRC finalized its revisions to 10 CFR Part 40, Appendix A in accordance with this settlement, EPA rescinded Subpart T of its 40 CFR Part 61 regulations and, as such, its requirements no longer apply to operating uranium mills.¹⁰

40 CFR Part 61, Subpart W entitled *National Emission Standards for Radon Emissions from **Operating Mill Tailings*** was promulgated to address radon emissions at *active* (including standby) uranium mill tailings facilities. Thus, Subpart W applies to operators of uranium mill tailings facilities while they are processing uranium/thorium ores and creating 11e.(2) byproduct material:

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*. This subpart does not apply to the disposal of *tailings*.

New tailings impoundments constructed after December 15, 1989 must comply with one of two *work practice* standards:¹¹ (1) *phased disposal* in lined impoundments of forty (40) acres and meet the requirements of 40 CFR § 192.32(a) with no more than two impoundments in operation at one time; or (2) *continuous disposal* of tailings that are dewatered and immediately disposed of with no more than ten acres uncovered at one time. EPA's radon measurement Method 115 requires measurement of the different "regions" of tailings disposal facilities except those covered by water.¹²

⁸ 59 Fed. Reg. 28,220 (1994).

⁹ EPA was clearly concerned with prompt placement of radon barriers over tailings piles and EPA, thus, indicated that the primary purpose of the settlement was:

"to ensure that owners of uranium mill tailings disposal sites ... bring those piles into compliance with the 20 pCi/m²s flux standard as expeditiously as practicable considering technological feasibility ... with the goal that all current disposal sites be closed and in compliance with the radon emission standard by the end of 1997, or within seven years of the date on which existing operations and standby sites enter disposal status.

59 Fed. Reg. 36,280, 36,282 (1994).

¹⁰ See 61 Fed. Reg. 68972 (December 30, 1996) (emphasis added).

¹¹ 40 CFR § 61.252(a) (2007).

¹² The Response to Comments to EPA's Final Rule on radon-222 emissions from licensed mill tailings demonstrates that EPA considered an emission standard and determined that "boundaries could be changed to comply with an emission standard which is not an acceptable practice under the Clean Air Act. Also, methods to determine emissions from tailings piles also have not been sufficiently developed to provide accurate and consistent measurements of radon emissions." United States Environmental Protection Agency, Office of Radiation Programs, *Final Rule for Radon-222 Emissions from Licensed Uranium Mill Tailings*, Response to Comments (August, 1986).

C. Application of Subpart W Work Practice Standards to Conventional and ISR Facilities

Whether Subpart W's work practice standards apply to other than *active* mill tailings impoundments at uranium recovery facilities is informed by review and analysis of the regulatory records associated with both Subparts T and W, since both were promulgated at the same time and, as these Subparts' titles suggest, were intended to address only uranium mill tailings disposal facilities.

1. Promulgation of Subpart T Regulations and Subpart W Work Practice Standards (Proposed Rule): March 7, 1989

On March 7, 1989, EPA issued a Proposed Rule for the regulation of hazardous air pollutants at uranium milling facilities, both active and inactive. First, 40 CFR Part 61, Subpart T entitled *National Emission Standards for Radon Emissions From the Disposal of Uranium Mill Tailings* were promulgated by EPA to address potential hazardous air pollutants (e.g., radon) at mill tailings facilities regulated under Title II of UMTRCA, which were no longer operational. Subpart T stated, in pertinent part:

Radon-222 emissions to the ambient air from uranium mill tailings pile *that are no longer operational* shall not exceed 20 pCi/(m² -sec) (1.9 pCi/(ft² -sec)) of radon-222.

Second, 40 CFR Part 61, Subpart W entitled *National Emission Standards for Radon Emissions from Operating Mill Tailings* addresses radon emissions at *active* (including standby) uranium mill tailings facilities. Subpart W covers the owners and operators of uranium mill tailings facilities while they are processing uranium/thorium ores and creating 11e.(2) byproduct material:

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. This subpart does not apply to the disposal of tailings.

Neither the titles of these two Subparts nor the language of the Proposed Rules provide any indication that they were intended to apply to anything other than uranium mill tailings impoundments, as opposed to impoundments used solely as evaporation ponds.

2. Promulgation of Subpart T Regulations and Subpart W Work Practice Standards (Final Rule, Response to Comments, and Analysis): December 15, 1989

As noted above, on March 7, 1989, EPA proposed a new set of CAA regulations to reduce potential radon-222 emissions from inoperative uranium mill tailings

impoundments and new work practice standards for active tailings impoundments constructed after the Rule's effective date.

On December 15, 1989, EPA published a Federal Register notice promulgating its final Section 112 NESHAP standards governing radon emission standards for *non-operational* and operational uranium mill tailings impoundments, as well as future impoundments, analyzing the risks associated with radon emissions from such impoundments, and discussing the potential effects of the newly proposed 20 pCi/m²-s standard on such impoundments. The final rule makes no reference whatsoever to evaporation ponds at uranium mill sites, but did explicitly reference the types of radon source terms to which Subparts T and W were intended to apply. For example, when describing the process of uranium milling, EPA states:

The process of separating uranium from its ore creates waste material called uranium mill tailings....These tailings are collected in impoundments that vary in size from 20 to 400 acres....For the current radionuclides NESHAP rulemaking, EPA is promulgating rules for three different subcategories that deal with mill tailings: operating mill tailings—existing *piles*, operating mill tailings—new technology, and disposal of uranium mill tailings (as a separate source category....Existing mill tailings *piles are large piles of wastes that emit radon*.

As discussed below, the use of the term mill tailings *piles* in this notice is consistent with the language used by Congress when defining "tailings" in UMTRCA:

the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted."¹³

This notice also reinforced a commonly accepted premise that would suggest that an evaporation pond would not be a significant radon source term because, as EPA states, "[r]adon emissions from these piles are retarded by the presence of water. However, if operations cease, and the pit is allowed to dry out, emissions can increase significantly."¹⁴ Thus, EPA expressly recognized that the presence of water *in tailings* will significantly retard radon emission from given source terms. Accordingly, evaporation ponds which are constructed and used to contain significant amounts of process or waste water presumably would not represent a significant potential source of radon emissions.

3. Rescission of 40 CFR Part 61, Subpart T (Proposed Rule): December 31, 1991

On December 31, 1991, EPA proposed to rescind 40 CFR Part 61, Subpart T "as

¹³ It is also common sense that a uranium mill tailings *pile* would not be an evaporation pond, because water generally does not collect and remain in a *pile*.

¹⁴ 54 Fed. Reg. 51654 (December 15, 1989).

it applies to owners and operators of uranium mill tailings disposal sites that are licensed by the Nuclear Regulatory Commission (NRC) or an affected NRC Agreement State....¹⁵ EPA's proposed rescission notice included a section specifically devoted to the question of "whether the requirement extends to the evaporation pond thereby jeopardizing the other remedial aspects of the UMTRCA program."¹⁶ This discussion recognized that evaporation ponds play an important role in the UMTRCA remedial action programs at uranium mill tailings sites:

The regulations contemplated by this notice seek to control the emission of radon-222 by requiring the installation of an earthen cover over the disposal piles as expeditiously as practicable considering technological feasibility. However, there are other aspects to the UMTRCA regulatory scheme, including the long-term maintenance of the piles (once controlled) against erosion, and the reclamation and maintenance of groundwater....*These actions entail the use of evaporation ponds that in some instances....have been placed directly upon the disposal site.*¹⁷

After discussing whether evaporation ponds were to be subject to its 40 CFR Part 61, Subpart T standard, EPA concluded:

EPA does not intend that the expeditious radon cover requirement extend to the areas where evaporation ponds are located, even if on the pile itself, to the extent that such evaporation pond is deemed by the implementing agency (NRC or an affected Agreement State) to be an appropriate aspect to the overall remedial program for the particular site involved.¹⁸

Indeed, EPA's Proposed Rule prescribed an approach to evaporation pond remediation as follows: "the evaporation pond area may be covered to control radon *after it is no longer in use and ready for covering.*"¹⁹ EPA supported this conclusion by reasoning that:

the ponds themselves serve as an effective radon barrier, thus this decision is bolstered by the absence of any evidence that there is a significant public health risk presented by the radon emissions from

¹⁵ 56 Fed. Reg. 67561. This language demonstrates that EPA acknowledges that evaporation ponds are not to be considered as part of the class of facilities known as "uranium mill tailings piles."

¹⁶ *Id.*

¹⁷ *Id.* (emphasis added). The fact that evaporation ponds could be (and had been) located on top of an inoperative tailings piles to de-water piles and assist in groundwater corrective action was made known to EPA by American Mining Congress (AMC) negotiators during the settlement negotiations that ultimately led to the rescission of Subpart T.

¹⁸ *Id.*

¹⁹ 56 Fed. Reg. 67561 (emphasis added).

these evaporation ponds during the period they are employed as part of the overall remediation of the site.²⁰

Based on this determination, EPA concluded:

EPA believes the overall public health interest in comprehensively resolving the problems associated with each site is best served by requiring that the radon cover be expeditiously installed in a manner that does not require interruption of this other aspect of remediation....Rather, EPA believes that provided all other parts of the pile are covered with the earthen cover, compliance with the 20 pCi/m² standard will result....²¹

EPA's conclusions about the potential radon source term from evaporation ponds being actively used in uranium mill tailings site reclamation efforts are no less valid for such ponds being actively used during uranium recovery operations at an operational facility subject to Subpart W work practice standards.

4. Rescission of Subpart T (Final Rule): December 30, 1996

Five years after the issuance of its Proposed Rule for the rescission of Subpart T, EPA released its Final Rule declaring that Subpart T was indeed rescinded and noted that Subpart W work practice standards continued to apply to uranium mill tailings facilities constructed after December 15, 1989.²² EPA's Final Rule contained no statements indicating any change in its interpretation of the scope of these standards, as offered in the Proposed Rule.

5. Amendments to EPA Mill Tailings Regulations (Final Rule): November 15, 1993

On November 15, 1993, EPA promulgated a Final Rule containing amendments to its regulations applicable to operational NRC/Agreement State licensed uranium mill tailings facilities. In this Federal Register notice/Final Rule, EPA responded to a number of public comments, including comments related to the application of Subpart W requirements to evaporation ponds. As stated by EPA:

*EPA reiterates that the Agency does not intend the expeditious radon cover requirement to extend to areas where evaporation ponds are located, even if on the pile itself, to the extent that such evaporation pond is deemed by the implementing agency...to be an appropriate aspect of the overall remedial program for the particular site.*²³

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ 56 Fed. Reg. 67561 (emphasis added).

Essentially, in this Final Rule, EPA restated its conclusion in the Subpart T rescission regulatory record that active evaporation ponds do not represent a significant potential radon source term.²⁴

6. Current Statutory and Regulatory Language

On the face of it, while fluids can be 11e.(2) byproduct material if they are no longer to be used in process operations, such fluids deposited in evaporation ponds do not qualify as "tailings" as the term is generally understood under any relevant regulatory definitions. As demonstrated by a variety of statutory and regulatory materials, despite the fact that evaporation pond fluids contain some fines from mill processing that are either suspended in the fluids or that have settled on the liner of the pond as such fluids have evaporated (which can be considered "tailings-like" 11e.(2) byproduct material), neither the fluids with entrained solid fines nor the fines themselves typically would be considered "tailings" in a pond used solely for evaporation purposes during *active* or closure operations. An *active* tailings pile/impoundment is one into which tailings (a mixture of sands, slimes, and fluids) are placed during uranium recovery. The sands and slimes constitute the bulk of the material (typically 70% plus).

First, UMTRCA's definition of "tailings," as incorporated by EPA in 40 CFR Part 61 from UMTRCA, indicates: "[t]he term 'tailings' means *the remaining portion of a metal-bearing ore after some or all of such metal, such as uranium, has been extracted.*"²⁵ Water stored in an evaporation pond from either active recovery operations or groundwater corrective action is not consistent with the UMTRCA definition of "tailings" as the water is added to the processing circuit for the ore (or removed from the groundwater), and is not part of "the remaining portion of the metal-bearing ore from which uranium was extracted." Given that EPA's regulations in 40 CFR Part 61, Subpart T incorporate the UMTRCA definition of "tailings,"²⁶ EPA arguably has accepted the distinction between tailings in a tailings pile or impoundment and water related to uranium milling in an evaporation pond that may have resulted either from processing or from a groundwater corrective action program.

Second, as discussed above, EPA's 40 CFR Part 61, Subpart W regulations consistently utilize the terms "tailings pile" and "tailings impoundment" when discussing the site facilities that are covered by Subpart W work practice standards, which, on its face, does not apply to a liquid storage facility. For example, 40 CFR § 61.221 states in pertinent part:

²⁴ *Id.*

²⁵ 42 U.S.C. § 7911(8)

²⁶ It should be noted that Subpart W's definition of "uranium byproduct material or tailings" adopts essentially the same definition of "11e.(2) byproduct material in Section 11(e) of the AEA, as amended by UMTRCA.

As used in this subpart, all terms not defined here have the meanings given them in the Clean Air Act or subpart A of part 61. The following terms shall have the following specific meanings:

(a) *Long term stabilization* means the addition of material on a uranium mill *tailings pile* for the purpose of ensuring compliance with the requirements of 40 CFR 192.02(a). These actions shall be considered complete when the Nuclear Regulatory Commission determines that the requirements of 40 CFR 192.02(a) have been met.²⁷

In addition, when prescribing the 20 pCi/m²-s standard in Subpart T, EPA states:

(a) Radon-222 emissions to the ambient air from uranium mill *tailings pile* that are no longer operational shall not exceed 20 pCi/(m² -sec) (1.9 pCi/(ft² -sec)) of radon-222.

(b) Once a uranium mill *tailings pile or impoundment* ceases to be operational it must be disposed of and brought into compliance with this standard within two years of the effective date of the standard. If it is not physically possible for an owner or operator to complete disposal within that time, EPA shall, after consultation with the owner or operator, establish a compliance agreement which will assure that disposal will be completed as quickly as possible.²⁸

EPA's Subpart W regulations use both the term "tailings impoundment" and "tailings pile" when discussing the facilities to which Subpart W's 20 pCi/m²-s radon emission standard applies and the work practice standards for operational and potential future tailings facilities.²⁹ The use of the term "pile" is consistent with prior practices at uranium mill tailings sites where mill tailings were routinely placed in a "pile" rather than the current practice of placing mill tailings in an "impoundment." However, the random use of the terms "pile" and "impoundment" suggests that as technology was transforming, the terms were being interchangeably applied to mill "tailings" disposal facilities. As a result, Subpart W appears to apply to "tailings" as described in EPA's rulemaking materials, whether the term "piles" or "impoundments" is used.

Additional evidence for the positions espoused above can be found in EPA's background and guidance documents on NESHAPs, its Final Rule on Subpart W work practice standards, and their application to uranium mill tailings piles/impoundments and the appendix setting out Method 115 entitled *Monitoring*

²⁷ 40 CFR § 61.221(a-b).

²⁸ 40 CFR § 61.222(a-b).

²⁹ Compare 40 CFR § 61.252(a); 40 CFR § 61.252(b-c). This is entirely consistent with the history of the development of uranium mill tailings disposal facilities in that the older uranium mills constructed "piles" for disposal of tailings; but by the time that EPA's CAA regulations were being developed and promulgated, the technology had advanced to use "impoundments" which were, and are, more stable and controllable in both the short and long-term context than the old "piles."

for Radon Emissions. Initially, EPA's NESHAP documents expressly recognize that the scope of the Subpart W work practice standards was intended to reach *tailings* stored in on-site tailings piles/impoundments *and not* to other site facilities such as evaporation ponds:

As with any ore-processing operation, uranium milling produces large quantities of waste rock. Uranium mill wastes, *or tailings*, are usually stored in an impoundment located on the mill site.³⁰

Further, EPA's guidance on work practices includes a discussion of potential work practice procedures for controlling radon emissions from milling operations that result in tailings. These practices include the use of "earthen covers" to be applied to tailings to reduce potential fugitive emissions such as radon:

Earth covers which consist of layered soil approximately 3 meters deep are frequently used on waste piles, reclaimed lands, or inactive surface mining areas to reduce both particulate and radon emissions.³¹

However, the use of an earthen cover to retard radon emissions from an evaporation ponds rather than a mill tailings pile/impoundment is unnecessary because the water in the pond retards such emissions, and EPA's recognition that, when the pond is no longer actively used, it will be dried and covered.

EPA's background document for its Subpart W work practice standards contains additional evidence to support the conclusion that such standards do not apply to evaporation ponds. When describing what is encompassed by the term "tailings," EPA states:

Tailings include the barren crushed ore material plus process solutions. These tailings consist of mixtures of sands and slimes (coarse and fine tailings). *Evaporation ponds used to contain excess liquid from tailings impoundments also contain suspended...tailings....*³²

This statement appears to support the fact that the term "tailings" is intended to apply to the materials in a site's active mill tailings impoundments and not to fluids in impoundments used solely as evaporation ponds, as evaporation ponds are considered a separate point of analysis from mill tailings impoundments. EPA's

³⁰ United States Environmental Protection Agency, *Radionuclides: Background Information Document for Final Rules*, Volume I at 4-29 (October, 1984).

³¹ United States Environmental Protection Agency, *Final Rule for Radon-222 Emissions from Licensed Uranium Mill Tailings: Background Information Document* at 7-2 to 7-3 (August, 1986).

³² *Id.* at 3-19. In addition, the statement following this quote further demonstrates that EPA considered fluids in evaporation ponds to not be a radon source term: "If exposed, these solids are assumed to emit radon-222 at the same specific flux as tailings impoundments." The low nature of tailings covered by water is also noted by EPA in Volume I of its Background Information Document on *Radionuclides*: "When tailings impoundment areas are almost completely covered by water, radionuclide emissions will be low."

Response to Comments also includes evidence that the work practice standards were not intended to apply to evaporation ponds due to their minimal radon emissions:

Recent technical assessments of radon emission rates from tailings indicate that radon emissions from tailings covered with less than one meter of water, or merely saturated with water, are about 2% of emissions from dry tailings. *Tailings covered with more than one meter of water are estimated to have a zero emissions rate. The Agency believes this calculated difference between 0% and 2% is negligible. The Agency used an emission rate of zero for all tailings covered with water or saturated with water in estimating radon emissions.*³³

Additionally, as Method 115, paragraph 2.1.3 states, "radon flux measurements shall be made within each region on the pile, *except for those areas covered with water.*" Paragraph 2.1.3(a) also states, "Water covered area--no measurements required as radon flux assumed to be zero."³⁴

Finally, significantly, EPA also discusses the relatively small amount of radon potentially emitted from on-site impoundments at *in situ* uranium recovery (ISR) sites: "A small amount of radon is released from the waste impoundments use to store contaminated liquids from the operation." Further, EPA's Background Information Document on *Radionuclides* states regarding ISR projects: "The radioactive emissions from this source are small compared to the other sources."³⁵ These statements are bolstered by EPA's response to comments on its final NESHP for underground uranium mines rule:

The Agency has not ignored the risks from surface and *in situ* uranium mining...Standards were not proposed for either of these technologies as the maximum ground level air concentrations of radon emitted from these activities are significantly lower than those which result from underground mining.³⁶

Thus, the records in the Subpart T, Subpart W, and Subpart B proceedings and EPA's Method 115 rationale and proceedings suggest strongly that evaporation

³³ United States Environmental Protection Agency, *Final Rule for Radon-222 Emissions from Licensed Uranium Mill Tailings: Response to Comments* at 11 (October, 1984).

³⁴ Emphasis added. See also Method 115, Paragraph 2.1.6 *Radon Flux Measurement*...The radon collector is placed *on the surface* of the pile area to be measured and allowed to collect radon for a time period of 24 hours. The detailed measurement procedure provided in Appendix A of EPA 520/5-85-0029(1) shall be used to measure the radon flux on the uranium mill tailings except the *surface of tailings* shall not be penetrated by the lip of the radon detector as directed in the procedure, rather the collector shall be carefully positioned *on a flat surface* with soil or tailings used to seal the edge.

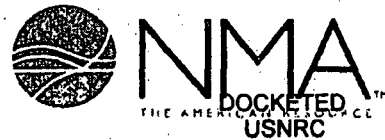
³⁵ See United States Environmental Protection Agency, *Radionuclides, Background Information Document for Final Rules*, Volume II, p. 5-2 (October, 1984).

³⁶ United States Environmental Protection Agency, *Radionuclides: Response to Comments for Final Rules*, Volume I at 87 (October, 1984).

ponds at conventional uranium milling facilities, much less those at ISR facilities do not warrant the application of work practice standards to control radon emissions.

D. Conclusions

Therefore, based on the foregoing discussion, it appears that EPA's 40 CFR Part 61, Subpart W work practice standards do not apply to evaporation ponds at uranium recovery facilities.



November 30, 2010 (9:15am)

November 29, 2010

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

United States Nuclear Regulatory Commission
Attn: Office of the Secretary, Rulemakings and Adjudications Staff
Washington, DC 20555-0001

RE: National Mining Association's Comments on Docket No. NRC-2010-0075 Regarding Proposed Rule for Licenses, Certifications, and Approvals for Material Licensees

Dear Sir or Madam:

By this letter, the National Mining Association (NMA) hereby submits its comments on the United States Nuclear Regulatory Commission's (NRC) Proposed Rule published in the Federal Register on July 27, 2010. See 75 Fed. Reg. 43865 (July 27, 2010). Initially, the comment period for the Proposed Rule expired on September 27, 2010. However, due to requests from several interested stakeholders, including NMA and the Nuclear Energy Institute (NEI), the comment period was extended to November 29, 2010.

NMA is the national trade association representing the producers of most of America's coal, metals, including uranium, industrial and agricultural minerals; the manufactures of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. NMA's uranium recovery members include current conventional and/or in situ leach uranium recovery (ISR) licensees, as well as potential future conventional and/or ISR license applicants.

The following comments of the Proposed Rule will be divided into two (2) sections: (1) Introduction and Background; and (2) Comments.

I. INTRODUCTION AND BACKGROUND

With the re-emergence of the nuclear power industry, all stages of the commercial nuclear fuel cycle are experiencing a resurgence; but this resurgence may be threatened by global economic issues and domestic regulatory inefficiencies. As a result, there is a need for prompt, efficient licensing actions for new domestic sources of uranium production that avoid unnecessary and burdensome delays. The resurgence has prompted, uranium recovery companies to seek regulatory approval from agencies such as the United States Nuclear Regulatory Commission (NRC) and its Agreement States for new uranium recovery project sites, the vast

majority of which will be uranium recovery using the in situ recovery (ISR) technique. Where uranium deposits are ISR-amenable, this technique is the lowest-impact, most environmentally protective, technologically cost-efficient form of uranium recovery. As such, the ISR technique has become the predominant form of uranium recovery in the United States.

Traditionally, ISR projects are developed in a "phased" manner involving a variety of project-specific steps, including pre-licensing exploration and site development and post-licensing site construction, production, and ultimately final site decommissioning and decontamination (D&D) including groundwater restoration. At the completion of the developmental stages, ISR project sites typically have two types of facilities: (1) subsurface facilities in the form of wellfields sequentially developed over an identified underground uranium ore body(ies) and (2) surface facilities including, but not limited to, a central processing facility with ion-exchange columns, yellowcake drying and packaging circuits, and storage pads and various other structures and infrastructure including offices, laboratories, storage warehouses, roads and power lines. The development of the subsurface and surface facilities at ISR project sites can be regulated by a number of overlapping regulatory regimes depending on the geographic location of the proposed site (i.e., State in which it is located) and the ownership status of the land (lands supervised by Bureau of Land Management (BLM), United States Forest Service (USFS), States, Native American Tribes, private entities, etc.) on which ISR operations are to occur.

Currently, the construction activities related to development of ISR projects is governed, in part, by 10 CFR § 40.32(e). NRC promulgated this regulation in 1980 as a component of the uranium recovery regulations developed in response to the enactment of the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) and its definition of 11e.(2) byproduct material. Specifically, § 40.32(e) was promulgated to address the need for environmental review of potentially significant and long-lasting environmental impacts from construction activities at *conventional uranium mills* and the potential "irrevocable and irretrievable" commitments associated with long-term, low level radioactive waste disposal at uranium mill tailings facilities, including their eventual transfer to the United States Department of Energy (DOE) or the resident State for mandatory long-term surveillance and monitoring in perpetuity as a general licensee of NRC. Consistent with (1) Congressional intent in enacting UMTRCA to protect public health and safety from the potential impacts of *uranium and thorium mill tailings* and the facilities at which such tailings are generated, managed, and stored, (2) the 1980 Generic Environmental Impact Statement on Uranium Milling (NUREG-0706) scope, analyses and conclusions, and (3) the administrative record associated with the promulgation of 40.32(e), it is apparent that NRC intended to apply Part 40.32(e)'s pre-licensing site construction requirements *only* to conventional uranium mills with attendant 11e.(2) byproduct material disposal facilities and not to ISR facilities. As the newly released GEIS for ISR Facilities entitled *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (NUREG-1910) demonstrates, the potential public and worker health and safety or environmental impacts associated with the construction of ISR facilities are short-term and minimal, at worst and, at best, essentially non-existent.

Given the fact that ISR facilities pose little potential threat of significant and long-lasting environmental impacts and no "irrevocable and irretrievable" resource commitments NMA

suggested in the attached White Paper (that has previously been submitted to NRC), that 10 CFR § 40.32(e) should be applied to ISR facilities using a "three-tiered" model framework similar to that employed by NRC Staff for power reactor sites when determining whether pre-licensing site construction activities at such sites should be permitted. Further, NMA's White Paper reasoned that given the emerging need for short and long-term domestic uranium production and the low risk associated with ISR operations, NRC should use its "discretion" to allow maximum flexibility for pre-licensing site construction decisions. Such flexibility would better enable ISR projects to advance quickly to active uranium recovery operations after a license is granted, result in savings of millions of dollars of financial resources and encourage of financial investment in such domestic uranium production. Additionally, NMA emphasized that a "flexible" risk-informed NRC policy on pre-licensing site construction activities merely provides such operators with the "option" of engaging in such activities based on their internal assessment of whether site-specific circumstances dictate that such activities make good sense.

Based on these generic issues, NMA prepared the attached White Paper outlining the legal and regulatory issues associated with the language and interpretation of the provisions of 10 CFR § 40.32(e), as well as a detailed accounting and analysis of the administrative rulemaking record for Part 40.32(e). This White Paper concludes that the limitations on pre-licensing site construction imposed by Part 40.32(e) are directly applicable only to conventional uranium recovery facilities due to the potential irreversible and irretrievable impacts associated with the construction of uranium mill tailings impoundments and the long-term requirements for containment and management of 11e.(2) byproduct material in the form of mill tailings.

Given the inapplicability of § 40.32(e) the White Paper specifically recommended that NRC Staff develop a three-tiered approach to pre-licensing site construction encompassing all required ISR site construction activities, including installation of wellfields with associated monitoring well networks and construction of central processing plants. The White Paper proposed that this three-tiered approach follow the conceptual approach designed by NRC Staff in creating the limited work authorization (LWA) program for nuclear power reactors.

After providing NRC Staff and the Commission with a detailed briefing on the substance of the White Paper, NMA submitted the White Paper for NRC Staff's consideration in an effort to develop an *LWA-like approach* to pre-licensing site construction for ISR sites in the same manner that NRC Staff has copied 10 CFR § 50.59's performance-based licensing requirements to Part 40 uranium recovery facilities even though Part 40 contains no Part 50.59-like regulatory provisions. After reviewing the White Paper, NRC Staff issued a legal memorandum stating that the NMA recommendations would not be permissible under the current regulatory scheme because ISR operations constitute "milling" and, therefore, fall under the scope of Part 40.32(e), including its express limitations. However, NRC Staff did state that ISR license applicants can submit an application under 10 CFR § 40.14 for a specific exemption from NRC's 10 CFR Part 40 licensing requirements. Since this pronouncement, at least one NMA member (Lost Creek, LLC) has successfully applied for and received a specific exemption for limited pre-licensing site construction.

Given that it is not Commission policy to regulate by exemption, NRC Staff has initiated this rulemaking to harmonize the definitions of "construction" and "commencement of

construction" so that NRC license applicants, including those applying for licenses to construct and operate ISR projects, can have clarity as to what pre-licensing site construction activities are permissible at proposed project sites. As will be shown in the comments below, with respect to Part 40 licensees, it is NMA's position that NRC Staff's legal/regulatory position on this Proposed Rule is significantly flawed in that it is inconsistent with current law and Commission precedent and the Part 40.32(e) administrative rulemaking record which, as interpreted by NRC Staff in its RIS and Proposed Rule, relies on *post hoc rationalization* that is at odds with the Part 40.32(e) administrative rulemaking record which essentially never mentions ISR facilities.

II. GENERAL COMMENTS

1. As a general proposition, NRC Staff's legal position respecting pre-licensing site construction is that the current version of 10 CFR Part 40.32(e) permits only "site exploration" activities (i.e., "roads necessary for site exploration, borings to determine foundation conditions, or other preconstruction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values") at proposed ISR facilities but does not permit "non-safety or non-security related site preparation activities" (i.e., "clearing land, site grading and erosion control, and construction of main access roadways, non-security related guardhouses, utilities, parking lots, or administrative buildings not used to process, handle or store classified information."). See SECY-10-0018 at 1. Based on this legal position, NRC Staff's determined that no facility used to conduct licensed operations, including wells, central processing plants (e.g., foundations, internal equipment, and external structures), and other administrative facilities (e.g., laboratories, offices, storage sheds, etc.) may be constructed under the current Part 40.32(e) without a specific exemption granted by the Commission.

Based on the Commission's determination that ISR operations are essentially "milling underground" (see United States Nuclear Regulatory Commission, SRM-SECY-99-0013, *Recommendations on Ways to Improve the Efficiency of NRC Regulation at In Situ Leach Uranium Recovery Facilities*, NRC Staff concludes that anything beyond site exploration in Part 40.32(e) is not permitted without a license or a specific exemption. In support of this decision, NRC Staff notes:

"the NRC amended its regulations in Parts 30, 40, 70, and 150 to require that an environmental review be completed by the NRC prior to commencement of construction of a mill which produces byproduct material."

75 Fed. Reg., 43865, 43866 (July 27, 2010).

NRC also notes that, "in reaching this decision:

[M]illing results in the production of large quantities of byproduct material as tailings per year. When construction of a mill commences, nearly irrevocable commitments are made *regarding tailings disposal*. Given that each mill tailings pile constitutes a *low-level waste burial site containing long-lived radioactive materials*, the Commission believes that prudence requires that specific methods of tailings disposal, mill decontamination,

site reclamation, surety arrangements, and arrangements to allow for transfer of site and tailings ownership be worked out and approved before a license is granted.”

Id. at 43866-43867, *quoting* 45 Fed. Reg. 65521, 65529 (October 3, 1980) (emphasis added).

NRC Staff’s simplistic reliance on the definition of “milling” ignores the entirety of NRC’s Part 40.32(e) rulemaking record and the intent of the Commission in that rulemaking which differentiates between conventional uranium mills with mill tailings, as noted above, and ISR facilities which do not involve low-level waste burial sites containing long-lived radioactive materials and which are released for “unrestricted use” in their entirety. When it was finalizing NUREG-0706,¹ NRC sought to develop amendments to 10 CFR Parts 40 and 150 (for Agreement States) to reflect the Congressional mandates set forth in UMTRCA for the management of *uranium mill tailings*. On August 24, 1979, NRC published both effective and proposed rules in the Federal Register “to implement the requirements of UMTRCA and the conclusions reached in the draft GEIS on uranium milling.”² More specifically, as stated in the Final Rule for these amendments:

“The amendments to Part 40 and 150 take into account the conclusions reached in a final generic environmental impact statement on uranium milling [NUREG-0706] and the requirements mandated in the Uranium Mill Tailings Radiation Control Act of 1978, as amended, public comments received on a draft generic environmental impact statement on uranium milling, and public comments received on proposed rules published in the Federal Register.”³

The need for these regulations was described in the Final Rule’s response to comments:

“A number of commenters took the position that there is no great sense of urgency for regulations on uranium mill tailings management and mill operations. However, each year new mills are proposed and *many millions of tons of tailings are generated at existing mills*. As new mills are constructed and more tailings are generated, the options for dealing with tailings disposal become fewer. It is critically important that the siting and design criteria of the regulations be implemented for new facilities so that mistakes of the past are not repeated.”⁴

The Final Rule thus promulgated 10 CFR § 40.32(e) to deal directly with the extent to which a proposed conventional uranium mill project site could be developed and constructed pursuant to these “siting and design criteria” prior to the issuance of a uranium milling license. Part 40.32(e) imposed a requirement on NRC to make “a positive finding on an applicant’s proposed plans as meeting the requirements and objectives in Appendix A *prior to*

¹ United States Nuclear Regulatory Commission, NUREG-0706, *Generic Environmental Impact Statement on Uranium Milling*, (1980).

² 45 Fed. Reg. 65521 (October 3, 1980).

³ *Id.*

⁴ *Id.* (emphasis added).

commencement of construction of a mill which produces byproduct material [i.e., uranium mill tailings].”⁵ As a result, Part 40.32(e) states:

“In the case of an application for a license for a uranium enrichment facility, or for a license to possess and use source and byproduct material for uranium milling, production of uranium hexafluoride, or for the conduct of any other activity which the Commission determines *will significantly affect the quality of the environment*, the Director, Office of Federal and State Materials and Environmental Management Programs or his designee, before commencement of construction of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values.”⁶

Based on this requirement, the Commission concluded in the regulation that “[c]ommencement of construction prior to this conclusion is grounds for denial of a license to possess and use of source and byproduct material in the plant or facility.”⁷ Therefore, “the denial of applications for licenses where construction is started before the appropriate environmental appraisals are completed and documented” is required.⁸

However, it is crystal-clear from NRC’s accompanying explanatory language that this requirement is to be imposed only on a conventional “mill which produces byproduct material” as tailings, where it states:

“Construction activities are likely to result in significant and long lasting environmental impacts, the propriety of which cannot be ascertained until these environmental appraisals are completed and documented.”⁹

Moreover, NRC adds that:

“The Commission also notes in this regard that milling results in the production of large quantities of byproduct material as tailings each year. When construction of a mill begins, *including its tailings disposal area*, irrevocable commitments are made regarding tailings disposal.”¹⁰

Finally, NRC concludes that:

⁵ 45 Fed. Reg. at 65521.

⁶ 10 CFR § 40.32(e). (emphasis added). This rule’s current language incorporates amendments and administrative revisions added in 1984, 1992, and 2008; however, the substance of the regulation has not changed since its finalization in 1980.

⁷ *Id.*

⁸ 45 Fed. Reg. at 65521.

⁹ *Id.*

¹⁰ *Id.*

"Given that each mill tailings pile constitutes a low-level waste burial site containing long lived radioactive materials, the Commission believes that prudence requires that specific methods of tailings disposal, mill decontamination, site reclamation, surety arrangements, and arrangements to allow for transfer of site and tailings ownership be worked out and approved before a license is granted."¹¹

NRC's description of "milling" in the context of the Final Rule is entirely consistent with NUREG-0706 and the Congressional mandate articulated in UMTRCA. The primary goal of UMTRCA is the safe management and disposal of *uranium mill tailings*, including short-term management in accordance with EPA and NRC regulatory requirements and long-term management in accordance with Section 83's requirements for transfer of all 11e.(2) byproduct material to a mandatory long-term custodian for perpetual long-term surveillance and monitoring.¹²

This description of "milling" is, however, entirely inconsistent with the generic construction parameters for ISR facilities for a number of reasons. First, as stated above by NRC in NUREG-0706 and discussed in NRC's recently released NUREG-1910, ISR facilities do not generate large quantities of uranium mill tailings and do not require (and indeed, currently, are not permitted to have on-site 11e.(2) disposal facilities) *any* tailings disposal areas for the operation of the facility or the closure of the site after cessation of operations and groundwater restoration. Initially, ISR-generated 11e.(2) byproduct material management pursuant to 10 CFR Part 40, Appendix A, Criterion 2 requires the disposal of such materials at licensed 11e.(2) disposal facilities, including existing conventional uranium milling facilities. Liquid wastes classified as 11e.(2) byproduct material at such facilities can be disposed of using a Class I UIC deep-disposal well, if available, or by the use of evaporation ponds for liquid disposal with the resulting 11e.(2) sediment ultimately transported to a licensed 11e.(2) disposal facility for disposal. In either case, ISR facilities do not require tailings management facilities with potentially significant environmental impacts that could be considered an "irrevocable and irretrievable resource commitment" in the form of a "low-level waste burial site" as contemplated by NRC when promulgating the current Part 40.32(e) requirements.

With respect to the threat of significant long-lasting environmental impacts and "irrevocable and irretrievable resource commitments," title transfer requirements for 11e.(2) byproduct material under Section 83 of the AEA do not apply to ISR facilities.¹³ Conventional uranium milling facilities typically require tailings management facilities that are conservatively

¹¹ *Id.*

¹² It is important to note that NRC likened the potential "irrevocable and/or irretrievable commitments" associated with conventional uranium milling facilities to those presented by facilities "in which source materials are possessed and used for the production of uranium hexafluoride and commercial waste disposal by land burial" and amended Part 40.32(e) to include such facilities. Once again, these facilities present potential significant impacts that are more similar to *conventional uranium milling facilities* and not at all similar to ISR facilities.

¹³ See 10 CFR Part 40.4 (depleted underground ore bodies resulting from ISR operations are not considered 11e.(2) byproduct material).

designed surface impoundments with liner and leachate collection and detection systems to ensure that no leakage of 11e.(2) byproduct material occurs and that require a licensee to disturb large portions (i.e., 40-80 acres) of a proposed site. Further, these impoundments also serve as the future repository for other materials at the site including, but not limited to, parts of the mill itself, windblown tailings, and other discrete 11e.(2) surface wastes and groundwater corrective action residuals. However, while conventional uranium milling facilities are specifically designed to control and manage these materials and for eventual transfer to a mandatory long-term custodian, ISR facilities are released for *unrestricted use* after completion of operations, site D&D, including groundwater restoration and, therefore, do not contain any residual, long-lived radioactive materials above NRC-mandated regulatory levels.¹⁴ Thus, since ISR facilities do not require the tailings management and disposal facilities required by conventional uranium milling facilities for operations and post-operational long-term control of 11e.(2) byproduct material on-site, NRC's promulgation of Part 40.32(e) was not intended to apply to ISR facilities.

The potential impacts associated with construction activities at ISR sites already have been assessed in the ISR GEIS and have been found to pose "low" levels of potential impacts. For example, the ISR GEIS states with respect to land use impacts:

"Ecological, historical, and cultural resources could be affected, but would be protected by careful planning and surveying to help identify resources and avoid or mitigate impacts. For all land use impacts except ecological, historical and cultural resources, the potential impacts would be SMALL."¹⁵

In addition, along with these minimal potential impacts, the construction of surface and subsurface facilities at ISR sites are largely, if not completely, standardized and pose essentially the same potential impacts at every ISR site. As a result, the programmatic assessment of the construction of these facilities should provide the necessary viable regulatory bases for all proposed pre-licensing site construction activities. Additionally, the amount of land area that potentially could be disturbed as a result of pre-licensing site construction activities generally is much less than the ten (10) percent of a proposed site which NRC Staff notes is the amount of a proposed site that would be disturbed as a result of *all* ISR operations, *including wellfields*.¹⁶ As a matter of fact, the construction of an ISR project's surface facilities generally results in a disturbance of a minimal portion of the total site area. Thus, the potential for significant or long-term impacts from pre-licensing site construction at ISR facilities is negligible. Indeed, there is no potential for any potential adverse radiological impacts from such pre-licensing construction activities as no AEA-licensed material is produced, possessed or used at the site prior to issuance of an NRC license.

¹⁴ In addition, the aquifer in the recovery zone at an ISR site must be an "exempted" aquifer under EPA regulations which mandates that such aquifer cannot now nor ever in the future serve as a source of public drinking water. Thus, so long as the recovery zone aquifer is restored in accordance with applicable regulatory requirements, then such aquifer will also be returned to its status prior to ISR operations.

¹⁵ NUREG-1910 at xxxviii. It is important to note that NMA's comments on NUREG-1910 stated that ecological, historical, and cultural resource impacts should not be analyzed in the land use impact section of its analysis. However, in either scenario, land use impacts were found to be "SMALL."

¹⁶ See NUREG-1910 at xl.

Further, NRC also considered financial assurance arrangements,¹⁷ including the availability of funds for long-term surveillance and monitoring after transfer of the site to the mandatory long-term custodian, when promulgating Part 40.32(e). In addition to the lack of a need for funds for title to transfer at ISR sites, the largest portion of financial assurance associated with ISR facilities is groundwater restoration. However, groundwater restoration is not necessary until an ISR operator commences and then completes active uranium recovery operations that generate source material in a given wellfield pursuant to an NRC license and has no relationship to pre-licensing site construction of ISR surface or subsurface facilities, including wellfields. As a result, ISR sites do not represent the same types of potential impacts related to financial assurance as the long-term commitment of resources contemplated for conventional uranium milling facilities by NRC in the Part 40.32(e) rulemaking.

Finally, in many cases, ISR operators may have additional financial assurance in place to address any pre-licensing site construction, since they may require additional permits from other regulatory entities such as States, BLM, and USFS. These regulatory entities frequently require some form of environmental review such as an environmental assessment (EA) and a financial assurance mechanism for a variety of structures and facilities such as office buildings, roads, storage warehouses, and wells. For example, the Wyoming Department of Environmental Quality (WDEQ) currently requires ISR operators to obtain a State Permit to Mine, which is accompanied by a financial assurance requirement for all activities on lands in the State, including the drilling of wells.¹⁸ BLM has a similar financial assurance requirement pursuant to its regulations for obtaining an approved Plan of Operations for ISR site activities on BLM lands.¹⁹ Thus, if a license is not granted, there still will be no significant adverse environmental impacts from pre-license wellfields, monitor well networks or UIC-permitted deep disposal wells, much less *any* potential adverse radiological impacts from AEA materials of which there will have been none.

2. NMA also believes that the Proposed Rule and NRC Staff's current interpretation of Part 40.32(e)'s provisions are inconsistent with existing Commission precedent regarding its jurisdiction pursuant to the AEA and the National Environmental Policy Act (NEPA). NRC Staff's current legal position is that pre-licensing site construction activities that have a *reasonable nexus* to public health and safety will not be permitted in the absence of a license or a specific exemption. The Proposed Rule reflects this position with a recognition that the definition of construction, as revised, will permit specific types of activities defined as outside the scope of construction because the AEA does not authorize NRC to require an applicant to obtain the Commission's permission prior to undertaking site preparation activities "that do not implicate radiological health and safety or the common defense and security." This is reflected in the Commission's October 9, 2007 rule for LWAs which recognized that, as stated above, the AEA does not authorize the Commission to require an applicant to obtain permission to conduct

¹⁷ See 10 CFR Part 40, Appendix A, Criteria 9 & 10.

¹⁸ As a practical matter, NRC has no authority over wellfields prior to the injection of lixiviant pursuant to an AEA uranium recovery license; prior to beginning active uranium recovery operations, all ISR site wells (injection, production, monitoring) are nothing more than water wells with a State (or other agency) bond in place to assure that such wells are reclaimed.

¹⁹ See 43 CFR § 3809 *et seq.*

site preparation activities "that do not implicate radiological health and safety or common defense and security considerations." See 75 Fed. Reg. at 43866.

Taking into account the comments discussed in Item II(1) above and the Commission's current responsibilities under the AEA, NEPA, and its risk-informed, performance-based regulatory approach, NRC Staff's legal position on Part 40.32(e)'s applicability to ISR operations is not sustainable. Currently, as stated by NRC Staff, its NEPA obligations and responsibilities arise only when NRC undertakes a "Federal" action. See 75 Fed. Reg. at 43867. Accordingly, NRC Staff determined that certain items excluded from the definition of "construction" in the LWA program which "do not have a reasonable nexus to radiological health and safety or the common defense and security...were 'non-Federal actions.'" SECY-10-0018 at 4. Further, NRC states that "because these site preparation activities lacked a reasonable radiological nexus to radiological health and safety or common defense and security, and did not require NRC approval or oversight, these activities were non-Federal activities within the context of NEPA (they were not an environmental effect of the federal action being reviewed)." *Id.* As such, NRC determined that the "effects of these non-Federal activities would only be considered in the agency's environmental review to that extent necessary to establish an environmental baseline against which the incremental effect of the NRC's subsequent major Federal action (i.e., issuance of a license) would be measured." *Id.* citing 72 Fed. Reg. 57416, 57247 (October 9, 2007). This approach projected over the entire fuel cycle, NRC believes, will "provide for a more efficient and effective licensing process." *Id.*

However, NMA argues that that this approach is far too narrowly interpreted in the context of ISR facilities which results in significant inconsistencies with Commission precedent and policy. As a preliminary matter, the AEA charges the Commission with the responsibility of protecting public health and safety from *significant* risks to radiological health and safety and the common defense and security and not just any risk thereto.²⁰ As has been stated by NMA on several occasions, uranium recovery facilities (including conventional uranium mills), as compared with nuclear power reactors (for which the LWA program was created), are the lowest risk components of the nuclear fuel cycle by orders of magnitude. Further, ISR facilities pose even lower potential risks due to the fact that they carry with them even fewer potentially significant radiological risks to public and worker health and safety. For example, as stated above, ISR facilities do not create conventional uranium mill tailings and create only small amounts of 11e.(2) byproduct material for off-site disposal. Accordingly, ISR facilities are released for unrestricted use at the conclusion of operations, groundwater restoration, and surface reclamation and *no 11e.(2) byproduct material is left on-site* above NRC regulatory limits (e.g., 10 CFR Part 40, Appendix A, Criterion 6). But rather than acknowledge these differences in potential risk levels and long-term resource commitments between conventional uranium mills and ISR facilities, NRC Staff instead chooses to rely on its unsubstantiated conclusion that ISR operations are "milling" operations and, thus, are subject to the same stringent pre-licensing site construction requirements as those prescribed for conventional uranium mills in 1980. To make matters worse, NRC Staff's fundamental basis for this position is to consistently cite to language from the Part 40.32(e) administrative rulemaking record regarding milling facilities generating significant quantities of mill tailings and the *irrevocable commitments and irretrievable impacts*

²⁰ See e.g., *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980); see also *Natural Resources Defense Council, Inc. v. U.S. EPA*, 824 F.2d 1146 (July 28, 1987).

of utilizing disposal facilities (impoundments or piles) for the resulting tailings and other 11e.(2) byproduct material that essentially constitute low level waste disposal facilities. See 75 Fed. Reg. at 43867. This position, on the facts, is incorrect and arbitrary.

3. The Proposed Rule perpetuates the conclusion that a NEPA review is necessary prior to any construction of facilities as if NEPA has some jurisdictional significance in addition to the AEA's jurisdictional grant. Indeed, the Proposed Rule states:

"Currently, 10 CFR § 40.32(e) *prohibits* an applicant for a license...to possess and use source material, or for any other activity requiring NRC authorization from commencing construction of *the plant or facility* in which the activity will be conducted before NRC's decision to issue the proposed license...Similar *prohibitions* on construction exist with respect to 10 CFR Parts 30, 36 and 70."

75 Fed. Reg. at 43,865-43,866 (emphasis added).

Such a statement contradicts legal precedent. As stated in *NRDC v. EPA*,

"NEPA, as a procedural device, does not work broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance."

822 F.2d 104 (D.C. Cir. 1987).

Similarly, in *NFS*, interpreting 10 CFR §§ 51.101(a) and 70.23, the Commission decided that since no statute or regulation required any NRC permit to begin construction activities, the authority to *halt or prohibit* such activities would be questionable.²¹ The Commission reasoned that the above-noted regulatory provisions only "*contemplate* that construction...should not begin until NRC has completed its environmental review."²² The Commission read Part 70.23 as *discouraging* rather than *prohibiting* construction prior to the completion of NRC's NEPA review of proposed activities involving highly radioactive special nuclear materials. Thus, NFS was permitted to construct three new facilities on its site to produce low-enriched uranium (LEU) oxide, receive and store LEU nitrate, down-blend HEU to LEU, and convert LEU nitrate to LEU oxide as the agency had no AEA authority to license construction in the first place. In other words, while the AEA and NRC regulations require a license to conduct operations involving AEA materials, neither statute nor regulations prevents the applicant from beginning construction of project buildings and facilities at its own risk prior to issuance of a license. It is difficult to understand how the RIS and the Proposed Rule could be published in light of the aforementioned *NFS* decision. It appears that the mechanism to do so could be the so-called "reasonable nexus" to health and safety and common defense and security cited in both documents. NMA is aware that NRC Staff have ruled that complete wellfield packages (i.e., wellfields and monitor well networks), deep disposal wells, and the central processing plant (CPP) have such a "reasonable nexus to health and safety and common defense and security."

²¹ See *Nuclear Fuel Services, Inc.* (Erwin, Tennessee), CLI-03-03, 57 NRC 239, 246 citing AEA § 185, 42 U.S.C. § 2235 (construction permits for production and utilization facilities).

²² *Id.* (footnotes omitted).

However, it seems obvious in light of the *NFS* decision that if there can be no "reasonable nexus" until licensed activities begin, then it is patently obvious that there can be no such "reasonable nexus" with pre-licensing site construction of installation wellfields, monitor well networks, and deep disposal wells, etc until a license is granted (i.e., lixiviant is injected, source material is recovered from wellfields, and 11e.(2) byproduct material is generated).

4. Based on the comments in Item II(3) above, NMA argues that NRC Staff's current interpretation of Part 40.32(e), as well as the revised language in the Proposed Rule, omits a substantial amount of ISR site construction activities from the list of activities permitted prior to receiving a license. The following list discusses all potential ISR site construction activities that have *no* "reasonable nexus" to radiological health and safety much less the common defense and security:

a. **Wellfields**

NMA believes that the installation of injection, production/extraction, and monitor well networks does not have a reasonable nexus to radiological health and safety or the common defense and security. The installation of ISR wells typically are directed by the State Engineer's Office and specific requirements for construction and maintenance are required. Prior to the commencement of licensed ISR operations, each of these wells could just as easily serve as private drinking (although it is unlikely an injection or production/extraction well could serve as a drinking water well due the elevated radionuclide levels), industrial, irrigation or stock watering well. It is the subsequent injection of lixiviant that makes the use of these wells have a reasonable nexus to radiological health and safety. Thus, the installation of these wells alone cannot be deemed to have a reasonable nexus to public health and safety.

Further, there are no irrevocable commitments or irretrievable impacts associated with installation of a complete wellfield, including monitor well network, because all a license applicant would be required to do in the event of failing to get a license would be to plug and abandon each installed well in accordance with State Engineer's office requirements. Even though NRC likely cannot enforce this requirement pre-license issuance, the State regulatory agencies certainly can. Indeed, as stated above, these wells are fully bonded with State agencies, BLM, USFS, and the like; so, there is no threat of wells going unplugged in the event an NRC license is not obtained.

Moreover, deep disposal wells permitted under the Safe Drinking Water Act (SDWA) by EPA or "primacy" States follow the same analysis above. Deep disposal wells carry no reasonable nexus to public health and safety until production bleed or restoration fluid (both 11e.(2) byproduct material) are put into the well for final disposition. Thus, these wells are no different from injection, production/extraction or monitor wells and even after operations during an ISR project's lifecycle do not result in irrevocable impacts and irretrievable commitment of resources.

b. **Administrative and Other Buildings and Site Roads and Infrastructure**

NMA also believes that the construction of the administrative and other buildings and site roads and associated infrastructure do not have a reasonable nexus to public health and safety and, thus, should not be prohibited under the current Part 40.32(e), thus negating the need for a rulemaking. Construction of office buildings, warehouses, and other administrative buildings will require a concrete slab or foundation; but, the size and scope of the construction of such facilities as compared to power reactor construction activities is negligible. Installation of power lines and site roads also does not require significant scope of construction. Given that none of these buildings will handle AEA materials *until the ISR process is licensed*, such activities have no "reasonable nexus" to public health and safety much less the common defense and security. If a license were denied, such structures would not require any D&D of AEA materials, because no licensed operations would have taken place. Thus, NRC should allow pre-licensing construction of such facilities because their potential environmental impacts will be limited in scope and can easily be redressed in the event an NRC license is not issued.

c. **Central Processing Plant**

NMA also believes that the construction of the foundation and outer shell of the CPP building does not have a reasonable nexus to public health and safety and, thus, should not be prohibited by the current Part 40.32(e). Similar to the buildings discussed in Item II(3)(c), the foundation and outer shell of the CPP will only require the laying of a foundation and the erection of a simple outer structure. Indeed, storing the equipment in the CPP pending installation also has no "reasonable nexus" to health and safety much less the common defense and security. Thus, NRC should allow pre-licensing construction of such facilities because their potential environmental impacts will be limited in scope and can easily be redressed in the event an NRC license is not issued.

5. **CONCLUSION**

In conclusion, the *NFS* decision makes clear that NRC has no AEA jurisdiction under 10 CFR Part 40.32(e) to *prohibit* pre-licensing site construction of ISR facilities and buildings as stated in the Proposed Rule. Such activities have no "reasonable nexus" to health and safety or the common defense and security until after the license is issued. If an ISR license applicant undertakes pre-license site construction of the types of facilities discussed above, NRC still has the flexibility to deny a license that is lacking appropriate health and safety or environmental safeguards or to impose site-specific license conditions regarding any such facilities, therefore, the license applicant/licensee constructs such facilities at their own risk. In any event, construction of such facilities and buildings pose no significant potential adverse environmental risks for the reasons noted above even if NRC had jurisdiction to prohibit their construction pre-license issuance. Finally, NMA finds that NRC Staff's failure to mention (much less discuss or attempt to distinguish) the Commission's decision in *NFS* in either its RIS or the Proposed Rule is a critical omission in this rulemaking.

NMA appreciates the opportunity to provide these comments on the proposed rule. If you have any questions regarding this submission, please contact me at (202)463-2627 or ksweeney@nma.org.

Sincerely,

Kate Sweeney

U.S. DEPARTMENT OF THE INTERIOR BUREAU OF LAND MANAGEMENT

Print Page

PROGRAMMATIC AGREEMENT

AMONG

THE BUREAU OF LAND MANAGEMENT,
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND
THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS
REGARDING
THE MANNER IN WHICH THE BLM WILL MEET ITS RESPONSIBILITIES

UNDER THE NATIONAL HISTORIC PRESERVATION ACT

February 2012

Preamble

Bureau of Land Management. The Bureau of Land Management (BLM), consistent with its authorities and responsibilities under the Federal Land Policy and Management Act of 1976 (FLPMA), is charged with managing public lands principally located in the states of Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, and Wyoming in a manner that will "protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values," and "that will provide for outdoor recreation and human occupancy and use."

The BLM also has specific responsibilities and authorities to consider, plan for, protect, and enhance historic properties and other resources that may be affected by its actions, in compliance with the National Environmental Policy Act (NEPA), the National Historic Preservation Act of 1966 (NHPA) and implementing regulations of Section 106 of the NHPA at 36 CFR part 800, the Archaeological Resources Protection Act, the Native American Graves Protection and Repatriation Act, the Historic Sites Act of 1935, the Antiquities Act, the American Indian Religious Freedom Act, the Religious Freedom Restoration Act, Executive Order (EO) 13007 ("Indian Sacred Sites"), EO 13287 ("Preserve America"), EO 13175 ("Consultation and Coordination with Indian Tribal Governments"), and related authorities.

In carrying out its responsibilities specific to the NHPA, the BLM has: (1) developed policies and procedures through its directives system (BLM Manual Sections 8100-8170); (2) executed a national programmatic agreement (PA) in 1997 to help guide the BLM's planning and decision making as it affects historic properties as defined in the NHPA; and (3) assembled a cadre of cultural heritage specialists to advise the BLM's managers and to implement cultural heritage policies consistent with the BLM's statutory authorities.

State Historic Preservation Officers. State Historic Preservation Officers (SHPO) are represented by the National Conference of State Historic Preservation Officers (NCSHPO) for the purpose of negotiating and executing this agreement, and have responsibilities under state law as well as under Section 101(b) of the NHPA that include:

§ "advise and assist as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;"

§ "maintain inventories" of historic properties in cooperation with Federal and state agencies; and

§ "consult with the appropriate Federal agencies in accordance with [the NHPA] on Federal undertakings that may affect historic properties, and the content and sufficiency of any plans developed to protect, manage, or to reduce or mitigate harm to such properties."

In addition, under Section 110(a)(2)(D) and Section 110(a)(2)(E) of the NHPA, Federal agencies are required to consult with the SHPO to identify and evaluate historic properties for listing in the National Register of Historic Places (National Register), and on the development and implementation of agreements regarding the means by which adverse effects on such properties will be considered.

In certain cases, others may be authorized to act in the place of the SHPO. Where the Secretary of the Interior has approved an Indian tribe's preservation program pursuant to Section 101(d)(2) of the NHPA, a Tribal Historic Preservation Officer (THPO) may perform some or all SHPO functions with respect to tribal lands, defined as all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities, consistent with 36 CFR 800.16(x). A certified local government acting through the chief local elected official may fulfill some SHPO-delegated functions, where the Secretary has certified the local government pursuant to Section 101(c)(1) of the NHPA, and its actions apply to lands in its jurisdiction. Pursuant to the regulations implementing Section 106 of the NHPA (36 CFR 800.3(c)(4)), the Advisory Council on Historic Preservation (ACHP) may at times act in lieu of the SHPO.

Advisory Council on Historic Preservation. The ACHP has the responsibility to:

(1) administer the process implementing Sections 106, 110(f), and 111(a) of the NHPA; (2) to comment with regard to Federal undertakings subject to review under Sections 106, 110(f), and 111(a) of the NHPA in accordance with its implementing regulations (36 CFR part 800); and (3) "review the policies and programs of Federal agencies and recommend to such agencies methods to improve the effectiveness, coordination, and consistency of those policies and programs with the policies and programs carried out" under Section 202(a)(6) of the NHPA.

Indian Tribes. This agreement is entered into pursuant to the NHPA, which specifically requires that agencies consult with federally recognized tribes as defined in that Act so that these Indian tribes may: (1) identify their concerns about historic properties, including those of traditional religious and cultural significance to them; (2) advise agencies on the identification and evaluation of historic properties; (3) articulate their views on the potential effects of an undertaking; and (4) participate in resolving adverse effects. The BLM consults with Indian tribes on a government-to-government basis consistent with the Department of the Interior's tribal consultation policy. While the BLM may initiate consultation under multiple authorities at one time, this agreement governs compliance with the NHPA and in no way supersedes the BLM's other treaty, trust, and consultation responsibilities to Indian tribes under multiple other authorities.

Consulting Parties. Consulting parties include representatives of local governments, applicants, and certain individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties (36 CFR 800.2(c)(3-5)). In consultation with the SHPO/THPO, the BLM shall identify consulting parties and invite them to participate in consultation and shall consider all written requests of individuals and organizations to participate as consulting parties (36 CFR 800.3(f)).

The Public. The views of the public are essential to informed Federal decision-making, and the BLM shall seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties. The BLM must also provide the public with information about an undertaking and seek public comment and input (36 CFR 800.2(d)). Pursuant to 36 CFR 800.2(d)(3), the BLM may use its agency procedures as contained in the BLM-SHPO protocols or BLM NEPA procedures to involve the public.

The BLM, NCSHPO, and the ACHP—in consultation with Indian tribes and interested parties—now wish to ensure

BLM Preservation Board
Preservation Board Members
Preservation Board Charter
National Programmatic Agreement
Meeting Notes
Heritage Resources Home
Historic Preservation
Tribal Consultation
BLM Preservation Board
Data Sharing Partnership
Heritage Education
Scientific Research
Paleontology
Museum Collections
BLM and NAGPRA
Fire and Heritage Resources
Publications
Links
Staff Directory
National Fossil Day

that the BLM will organize its programs to operate efficiently, effectively, according to the spirit and intent of Section 106 of the NHPA, and in a manner consistent with 36 CFR Part 800. The parties also wish to ensure that the BLM will integrate its historic preservation planning and management decisions with other policy and program requirements to the maximum extent. The BLM, the SHPOs, and the ACHP desire and intend, in the public interest, to streamline and simplify procedural requirements, reduce unnecessary paperwork, and emphasize the common goal of planning for and managing historic properties under the BLM's jurisdiction and control.

Basis for Agreement

Proceeding from these responsibilities, goals, and objectives, the parties acknowledge the following basis for agreement:

WHEREAS the BLM's management of lands and mineral resources may affect historic properties as defined by the NHPA; and

WHEREAS, among other things, the BLM's historic preservation program, established in response to Section 110(a)(2) of the NHPA and related authorities provides a systematic basis for: (1) identifying, evaluating, and nominating historic properties under the BLM's jurisdiction or control to the National Register of Historic Places (National Register); (2) managing and maintaining properties listed in or eligible for the National Register in a way that considers the preservation of their archaeological, historical, architectural, and cultural values and the avoidance of adverse effects in consultation with Indian tribes, local governments, consulting parties, and the interested public; and (3) giving special consideration to the preservation of such values in the case of properties designated as having national significance; and

WHEREAS the BLM's program is also intended to ensure that the bureau's preservation-related activities will be carried out in consultation with Indian tribes, other Federal agencies, local governments, consulting parties, and the interested public; and

WHEREAS the BLM's program also is intended to: (1) ensure that the bureau's procedures for compliance with Section 106 of the NHPA are consistent with current regulations issued by the ACHP pursuant to Section 211 of the NHPA (36 CFR part 800, "Protection of Historic Properties"); (2) provide a process for the identification and evaluation of historic properties for listing in the National Register and the development and implementation of agreements, in consultation with SHPOs, Indian tribes, local governments, consulting parties, and the interested public, as appropriate, regarding the means by which adverse effects on such properties will be considered and resolved; and

WHEREAS the BLM recognizes that the 1997 PA and resulting internal BLM formal guidance do not incorporate the current 36 CFR Part 800 definition of "adverse effect" and role of "consulting parties" in the NHPA Section 106 process, and the BLM will initiate revision of the relevant manual sections upon execution of this agreement; and

WHEREAS individual SHPOs, particularly those in states containing a high percentage of public land under the BLM's jurisdiction and control, have a great interest in forming a cooperative relationship with the BLM to facilitate a more effective and efficient Section 106 consultation process, and promote activities of mutual interest, and;

WHEREAS the BLM acknowledges that Indian tribes possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them in accordance with 36 CFR Part 800.4 (c)(1), and;

WHEREAS the BLM's programs benefit from consultation with Indian tribes in BLM's identification and management of properties of religious and cultural significance and will ensure that its NHPA Section 106 procedures recognize the interests of Indian tribes in historic properties potentially affected by BLM decisions and afford tribes participation in the process leading up to a BLM decision, in accordance with 36 CFR Part 800; and

WHEREAS this agreement will not apply to proposed BLM undertakings located on or affecting historic properties on tribal lands, with respect to which the BLM will comply with the regular Section 106 process under 36 CFR 800.3 through 800.7, the process under 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14, and;

WHEREAS, for undertakings not on tribal lands, the BLM employs the basic principles of government-to-government consultation with Indian tribes under cultural resources authorities including the NHPA as reflected in this PA; and consults with the tribal representatives designated by the tribal governments for the purpose of identifying properties of religious and cultural significance that may be eligible for listing on the National Register and to understand tribal concerns; and

WHEREAS Indian tribes, especially those whose present or ancestral lands are located in areas where the BLM has surface or subsurface management responsibilities, may enter into formal or informal agreements with the BLM regarding consultation procedures under the NHPA Section 106 and that some tribes may want to form a cooperative relationship with the BLM in a manner consistent with the purposes of this agreement to achieve a more effective and efficient Section 106 consultation process; and

WHEREAS the parties intend that efficiencies in the NHPA Section 106 process, realized through this agreement, will enable the BLM, SHPO, and ACHP staffs to devote a larger percentage of their time and energies to proactive work, including: (1) analysis and synthesis of data accumulated through decades of Section 106 compliance; (2) historic property identification where information is needed, not just in reaction to proposed undertakings; (3) long-term preservation planning; (4) National Register nominations; (5) planning- and priority-based historic resource management; (6) creative public education and interpretation; (7) more efficient and effective BLM, SHPO, tribal, and ACHP coordination, including program monitoring and dispute resolution; and (8) other activities that will contribute to readily recognizable tribal and public benefits; and

WHEREAS the BLM has consulted with the Indian tribes and the interested public regarding ways to ensure that the BLM's planning and management will be more fully integrated and consistent with the above authorities, requirements, and objectives;

NOW, THEREFORE, the BLM, the ACHP, and the NCSHPO mutually agree that the BLM, consistent with the provisions of Component 1 of this PA below, will meet its responsibilities under the NHPA through this agreement as provided for in 36 CFR 800.14(b), rather than by following the procedure set forth in 36 CFR 800.3 through 800.7. The BLM will integrate the manner in which it meets its historic preservation responsibilities as fully as possible with its other responsibilities for land-use planning and resource management under FLPMA, National Environmental Policy Act (NEPA), other statutory authorities, and executive orders and policies.

The BLM shall ensure that the following components are carried out:

Components of Agreement

1. Applicability

This agreement supersedes the 1997 PA. Existing state-specific BLM-SHPO protocols under the 1997 agreement will remain in effect until the respective BLM state director executes a successor BLM-SHPO protocol with each state per Component 6 of this agreement or until terminated. No existing informal and formal agreements between the BLM and an Indian tribe or tribes will be altered by this agreement. Any state not operating under a BLM-SHPO protocol will operate under 36 CFR 800.3 through 800.7, 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14.

2. BLM Consultation Responsibilities with SHPOs and the ACHP under this Agreement

a. This agreement encourages:

- (1) BLM state directors and SHPOs to develop mutually agreed upon two-party BLM-SHPO protocols regulating their relationship and how consultation will take place;
- (2) BLM state directors and SHPOs to establish streamlined (as opposed to case-by-case) consultation on evaluation of cultural resources for National Register eligibility and for no-historic-properties-affected, no-adverse-effect, and adverse-effect determinations when BLM and SHPO reach agreement on resolving the adverse effect(s);
- (3) BLM state directors to make a schedule of pending actions, including land exchanges, available to the public and Indian tribes on a regular basis;
- (4) BLM state directors to contact on a regular basis Indian tribes affected by undertakings within his or her jurisdiction and develop tribe-specific procedures for tribal consultation; and
- (5) BLM state directors to use phased identification and evaluation as described in 36 CFR 800.4(b)(2) as a strategy for meeting the BLM's NHPA Section 106 responsibility for programs implemented through a phased decision making process beginning with land use planning designations that may affect large land areas. A phased compliance process requires that the bureau demonstrate that it has taken some steps to take into account the effect of the undertaking on potentially eligible sites in each phase, and that until a reasonable effort has been made to identify all potentially eligible sites, the bureau retains the ability to modify the project, if necessary, e.g., through no-surface-occupancy or other stipulations, or specific permit restrictions or covenants.

b. This agreement requires:

- (1) the BLM to follow the process at 36 CFR 800.3 through 800.7, 36 CFR 800.8(c), or another applicable program alternative under 36 CFR 800.14, for undertakings within any state that does not have a BLM-SHPO protocol under this agreement and for undertakings on or affecting tribal lands;
- (2) the BLM to consult with the relevant SHPO, Indian tribes (see Component 6.c), and other consulting parties for all undertakings that will adversely affect properties that are eligible for listing in the National Register, and for the development of any procedures such as project-specific PAs;
- (3) the BLM to invite the ACHP to participate in consultation when undertakings meet the thresholds in Component 5 of this agreement; and
- (4) the BLM to follow the process at 36 CFR 800.6(b)(2) or 800.14(b) to resolve adverse effects whenever the ACHP formally participates in the resolution of adverse effects for an undertaking.

3. Operation of the BLM's Preservation Board

- a. The BLM Director will maintain a Preservation Board to advise the BLM Director, assistant directors, state directors, and district and field office managers in the development and implementation of the BLM's policies and procedures for NHPA implementation.
- b. The Preservation Board will be chaired by the BLM's Federal Preservation Officer (FPO) designated under Section 110(c) of the NHPA, and will include a professionally qualified Deputy Preservation Officer (DPO) from each state office and the BLM national Tribal Coordinator as ex officio members. Field management will be represented by at least four line managers (i.e., officials who are authorized by the Director's or state directors' delegation to make land-use decisions). Field office cultural resource specialists will be represented by two members. Line manager and field office cultural resource specialist positions will be term positions.
- c. The Preservation Board will perform primary staff work and make recommendations to the BLM Director and state directors concerning policies and procedures (Component 4 below), bureau-wide policy implementation (Component 4 below), training (Component 7 below), certification and decertification of district or field offices (Component 9 below), monitoring of district and field offices' historic preservation programs (Component 10 below), and responses to public inquiries (Component 10 below).
- d. In addition, the Preservation Board shall meet with the ACHP and NCSHPO on a regular basis. In coordination with individual BLM DPO(s) and/or BLM Tribal Coordinator(s), as appropriate, the Preservation Board will address formal communications it receives from the ACHP and the NCSHPO, individual SHPOs, local governments, preservation and professional associations, individual tribes, and other tribal entities that have identified themselves to the Board as interested parties, regarding recurrent problems or concerns with state, regional, or national practice, and will otherwise seek to create opportunities to advance the purposes of this agreement.

4. Cultural Resource Management Procedures for Consideration of the Effects of the BLM's Undertakings on Historic Properties

As required by the NHPA Section 106 process and this agreement, the field manager—with the assistance of qualified professional staff and in consultation with the SHPO according to the process in the BLM-SHPO protocol, and with Indian tribes and consulting parties—identifies, evaluates, and assesses effects of the BLM's proposed actions on historic properties. This Component sets out the alternative framework, which, at a minimum, must be reflected in BLM-SHPO protocols or reflected with respect to individual projects utilizing this agreement to comply with Section 106.

- a. Consultation with Indian tribes and the SHPO at the outset of land use planning is a vital part of identification and management of historic properties. Involving tribal governments and SHPOs closely at this level of resource consideration will greatly facilitate coordination and consultation at later stages of planning and project development and will afford the best opportunity to foresee and avoid potential conflicts between BLM-authorized land uses and significant historic properties. District and Field office managers will seek information in accordance with BLM land use planning and environmental review processes and the tribal consultation policies outlined in Section f of Component 4 below, from Indian tribes and other parties likely to have knowledge of or concerns with historic properties in the area to:

- (1) Identify properties of religious and cultural significance that may be eligible for listing in the National Register of Historic Places;
- (2) Understand tribal and other parties' concerns sufficiently to better understand the effects that potential future Federal undertakings might have on eligible properties; and
- (3) Consider comments provided in making decisions on the land use plan, and notify consulted parties of the relevant final land use planning decisions.

- b. Prior to initiating or authorizing a proposed action that meets the definition of "undertaking" in 36 CFR 800.16 (y) and is a type of activity that generically has the potential to cause effects to historic properties (with the assumption that historic properties are present), the responsible district or field office manager shall:

- (1) Determine the undertaking's area of potential effects;

- (2) Review existing information on historic properties potentially affected by the undertaking, including documentation of previous tribal consultation;
- (3) Seek information in accordance with BLM land use planning and environmental review processes from Indian tribes and other parties likely to have knowledge of or concerns with historic properties, particularly properties of traditional religious and cultural significance, in the area;
- (4) Determine the need for further actions, such as field surveys and predictive modeling to identify historic properties in the area;
- (5) Make a reasonable and good faith effort to identify historic properties that may be affected by the undertaking as described in 36 CFR 800.4(b)(1); and
- (6) Determine if any properties within the area of potential effect, including properties of traditional religious and cultural significance to an Indian tribe, meet one or more eligibility criteria specified in 36 CFR 60.4 (association with events; association with lives of significant persons; embodiment of distinctive characteristics of a type, period, or method of construction or possessing high artistic value; have yielded or are likely to yield important data), while acknowledging that a formal determination of eligibility may be requested from the Keeper of the National Register pursuant to 36 CFR 800.4(c)(2) and 36 CFR part 63.
 - (i) If the BLM field manager determines, consistent with the process in the State's BLM-SHPO protocol, that a property does not meet the eligibility criteria in 36 CFR 60.4, he or she will provide documentation to the SHPO according to the reporting schedule in the State's BLM-SHPO protocol, and the property shall be considered not eligible for listing in the National Register and therefore not subject to further consideration under Section 106 and this PA.
 - (ii) If the field manager determines, consistent with the process in the State's BLM-SHPO protocol, that a property meets one or more eligibility criteria in 36 CFR 60.4, the property shall be considered eligible for listing in the National Register for purposes of complying with Section 106 of the NHPA and this PA (i.e., an "historic property").

c. The field manager, upon determining that National Register-listed or eligible historic properties may be affected by an undertaking, shall determine whether those properties may be affected, giving consideration to the views of the interested public and any consulting parties, including, but not limited to Indian tribes.

- (1) If the field manager finds that the undertaking will not affect those characteristics of the property that qualify it for listing in the National Register, the field manager will document this finding, proceed with the undertaking, and provide documentation of "no historic property affected" to the SHPO in accordance with the reporting schedule specified in the State's BLM-SHPO protocol.
- (2) If the field manager finds that the undertaking may affect those characteristics of the property that qualify it for listing in the National Register, the field manager will apply the Criteria of Adverse Effect to determine whether the proposed undertaking may alter, directly or indirectly, those characteristics in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association (36 CFR 800.5(a)(1)) and will document this finding. If the field manager finds that the effect is not to be adverse or the undertaking is modified to avoid adverse effects, per 36 CFR 800.5(b), and does not meet the threshold for case-by-case review in the State's BLM-SHPO protocol or the threshold for ACHP notification, the field manager will document this finding, proceed with the undertaking, and report it to the SHPO according to the BLM-SHPO protocol.

d. When a proposed agency decision or undertaking meets the threshold for case-by-case review in accordance with the BLM-SHPO protocol and/or the threshold for ACHP notification as specified in this PA (see Component 5), the field manager shall consult with the SHPO to determine the specific process to be followed in that case including, as appropriate:

- (1) Additional actions necessary to identify historic properties;
- (2) National Register-listed or eligible historic properties affected by the undertaking;
- (3) Effects the undertaking would have on National Register-listed or eligible historic properties; and
- (4) Methods for avoiding, minimizing, or mitigating adverse effects.

e. If the field manager finds the effect to be adverse and decides to proceed with the undertaking, he or she shall make a reasonable and good faith effort to avoid, minimize, or mitigate adverse effects to the most reasonable and fitting extent, in consultation with the SHPO, Indian tribes, and other consulting parties, considering the nature of the effects and the characteristics and qualities that lend the property its significance.

f. The special legal status of tribal governments requires that the BLM's official interactions with them, including consultation, will be carried out in accordance with government-to-government procedures to ensure that tribal participation occurs pursuant to the statutory and regulatory directives in Sections 101(d)(6) and 110(a)(2)(E) of the NHPA and 36 CFR 800.2(c)(2). Consistent with those directives and Department of the Interior tribal consultation policy, the BLM will consult with the tribal government's official designee in accordance with the following policies.

- (1) BLM State directors, and district and field office managers, as appropriate, shall represent the United States in government-to-government meetings with Indian tribes.
- (2) District and/or field managers shall establish working relationships with tribal officials comparable to their working relationships with State and local government officials.
- (3) District and/or field managers and staffs shall recognize that traditional tribal practices and beliefs are an important, living part of our Nation's heritage and seek to avoid to the degree possible under existing law and regulation their potential disruption as a consequence of a proposed BLM land use decision.
- (4) District and/or field managers and staffs shall protect from disclosure to the public sensitive and confidential information about traditional tribal practices and beliefs, and the locations with which they are associated, to the greatest degree possible under law and regulation. District and field offices shall maintain the confidentiality of sacred sites to the degree possible under existing law and regulation.
- (5) District and/or field managers and staffs shall consider and consult with Indian tribes regarding whether a proposed undertaking may inhibit or destroy tribal access to public lands for the purposes of religious use and other traditional uses, such as gathering natural resources, and, shall, consistent with Executive Order 13007, seek to accommodate access to and ceremonial use of sacred sites, as well as avoid unnecessary interference with or adverse effects to traditional religious and cultural properties.
- (6) District and/or field managers and staffs shall consult with affected Indian tribes to identify and consider tribal concerns related to the identification and management of historic properties in BLM land use planning and decision-making, and shall document all consultation efforts.
- (7) District and/or field managers and staffs shall ensure that information on tribal religious and cultural issues receives good faith consideration during decision-making, and that, to the extent consistent with the law, BLM decisions do not substantially burden the pursuit of traditional religious and cultural practices.

5. Thresholds for ACHP Notification

- a. The BLM procedures will identify specific circumstances and conditions that, when met, call for the ACHP's notification.
- b. At a minimum, the BLM will request the ACHP's participation in the following classes of undertakings:
 - (1) nonroutine interstate and/or interagency projects or programs;
 - (2) undertakings adversely affecting National Historic Landmarks;
 - (3) undertakings that the BLM determines to be highly controversial; and
 - (4) undertakings that will have an adverse effect and with respect to which disputes cannot be resolved through formal agreement between BLM-SHPO, such as a memorandum of agreement.
- c. The development and approval of program alternatives, including project-specific PAs, will follow the process under 36 CFR 800.14.
- d. The ACHP reserves the right to participate, on its own initiative or at the request of the SHPO, an Indian tribe, a local government, an applicant or other consulting party, in any proceeding taking place in fulfillment of the BLM's NHPA Section 106 responsibilities under the regulations, this agreement, or BLM-SHPO protocols, in a manner consistent with its role under 36 CFR Part 800 and the criteria under Appendix A of 36 CFR Part 800 and will notify the responsible BLM state director, and/or district or field office manager and the Director when it decides to participate.

6. Cooperation and Enhanced Communication

This section establishes how the BLM will implement the alternate process afforded by Component 4 above with respect to potential and/or existing BLM-SHPO protocols. It also establishes how the BLM will develop cooperation and enhanced communication with the States and with Indian tribes potentially affected by BLM undertakings.

- a. Information on the Web. The BLM will ensure the following information is available on the national BLM web site and will widely publicize this availability:
 - (1) copy of this revised agreement;
 - (2) reference copy of the existing BLM internal guidance, including Manual Sections and Manual Handbooks related to "Cultural Resource Management;"
 - (3) copy of existing BLM-SHPO protocols under the 1997 agreement, used by the BLM within an individual state office's jurisdiction;
 - (4) current list of Preservation Board members;
 - (5) list of BLM DPOs and BLM tribal contacts for each state office;
 - (6) map of each state showing BLM district and field office boundaries;
 - (7) annual BLM Washington Office reports; and
 - (8) BLM's Preserve America Section 3 report.

b. BLM-SHPO Protocols

Within 12 months of execution of this agreement, each BLM state director or his/her designee will meet with each relevant SHPO to review and consider the need for changes in the BLM-SHPO protocol for that state to meet the minimum requirements specified in this component and notify the ACHP of the results of their review. The state director may request ACHP assistance in identifying specific changes needed in the State's BLM-SHPO protocol prior to the state director initiating any changes associated with implementation of this agreement. BLM-SHPO protocols determined to require revision must be changed within 24 months of the date of this agreement.

The SHPO or BLM state director may ask the NCSHPO, the Preservation Board, and/or the ACHP to assist at any stage in revising BLM-SHPO protocols. The Preservation Board and the ACHP will be kept informed of the progress of protocol review and revision, and the BLM state office will provide the ACHP an opportunity to review and comment on revised protocols before execution. The state director will also provide the Preservation Board, ACHP, and NCSHPO with an information copy of any signed revision and post it on the BLM web site for that state.

Recognizing that BLM-SHPO protocols implement this agreement, any revisions to BLM-SHPO protocols that alter the process for complying with Section 106 specified in this agreement and any BLM-SHPO protocol that was executed or last revised 10 or more years prior to the date of this agreement, will be subject to consultation requirements as set forth in 36 CFR 800.14, including, in particular, the tribal consultation requirements under 36 CFR 800.14(f).

At a minimum, BLM-SHPO protocols will incorporate the framework outlined in Component 4 of this agreement and address the following:

- (1) a means for making a schedule of pending undertakings, including land transfers, available to the public and Indian tribes on a regular basis
- (2) a commitment to fulfill tribal consultation obligations;
- (3) the manner in which public participation is addressed for protocol-guided compliance processes;
- (4) the manner in which the involvement of consulting parties is addressed for protocol-guided compliance processes;
- (5) data sharing, including information resource management development, support and security—at a minimum annual transmittal of all site forms and project reports;
- (6) data synthesis, including geographical and/or topical priorities for reducing the backlog of un-synthesized site location and report information, and data quality improvement;
- (7) public education and community involvement in preservation;
- (8) preservation planning;
- (9) cooperative stewardship;

(10) agreement as to the types of properties for which BLM may determine ineligibility without seeking SHPO agreement. Eligibility determinations regarding possible traditional cultural properties will continue to require SHPO agreement and consultation with tribes.

- (11) agreement as to types of undertakings and classes of affected properties that will trigger case-by-case review, including all undertakings that will have an adverse effect on historic properties, as well as any development of alternative procedures such as project-specific PAs, and how this review will proceed, consistent with Component 4 above;
- (12) manner in which the BLM will ensure that appropriate professional expertise will be obtained or made available for specific types of undertakings or historic properties;
- (13) provisions for resolving disagreements and amending or terminating the BLM-SHPO protocol;
- (14) circumstances under which the BLM and/or SHPO may choose to operate under 36 CFR 800.3 through 800.7 in place of the BLM-SHPO protocol;
- (15) the substance and format of supplemental information to the BLM annual report that the state director will prepare in satisfaction of Component 10b of this agreement and the manner in which the report will be made available to affected Indian tribes and the public via the state BLM website. Supplemental information shall include information on BLM actions relative to undertakings and classes of affected properties that did not trigger case-by-case review; and
- (16) training of a new manager or archaeologist with Section 106 responsibilities in a state that operates under this PA within 90 days of his or her report date in the procedures outlined in the PA and appropriate BLM-SHPO protocol.

c. BLM-Tribal Relations

BLM shall consult with Indian tribes on individual undertakings in the context of an ongoing government-to-government relationship sustained through regular periodic meetings supplemented by additional undertaking-specific consultation. Within 12 months following execution of this agreement, each state director will have begun contacting Indian tribes that are affected by BLM undertakings within his or her jurisdiction on a regular basis for the purpose of initiating a discussion about ways in which BLM and each Indian tribe can foster better communication. This discussion between the appropriate BLM and tribal representatives is an opportunity to establish effective methods for meeting tribal consultation requirements regarding identification and evaluation of historic properties, including traditional cultural properties, and for the resolution of adverse effects of undertakings. This process should be carried out in coordination with other state directors, as appropriate, and should seek to:

- (1) identify geographic areas, types of historic properties, and undertakings of concern to Indian tribes;
- (2) identify confidentiality issues;
- (3) answer questions on the existing BLM-SHPO protocol;
- (4) provide a tribal point of contact for the state office and each district and field office within his or her jurisdiction;
- (5) develop a process for providing information and schedules of pending actions, including land exchanges, permits, and approvals on a regular basis; and
- (6) offer Indian tribes the opportunity to establish a formal ongoing relationship through an agreement for conducting the consultation required under the NHPA Section 106 within the framework of the BLM's government-to-government relationship with Indian tribes and other authorities.

d. The state director, will seek, as appropriate, the active participation of SHPOs, Indian tribes, and the interested public in BLM land-use planning and associated resource management activities consistent with section 202 of FLPLMA, 43 U.S.C. § 1712, and implementing regulations at 43 CFR 1610.2. This participation will be sought so that historic preservation considerations may influence large-scale decisions and inform the analysis of cumulative effects of more routine decisions, before the BLM makes key commitments and its management options are limited.

e. If deemed helpful and appropriate by the Indian tribe and the BLM, the BLM will seek to establish agreements and/or other formalized working arrangements with Indian tribes, relative to identifying undertakings, identifying properties, evaluating properties, determining effects, and protecting historic properties. All existing project and special purpose agreements with Indian tribes will function normally according to their terms.

f. When potentially relevant to the purposes and terms of this agreement, the BLM FPO will forward to the ACHP and the NCSHPO, in a manner that allows for consultation at their request, information concerning the following:

- (1) major policy initiatives;
- (2) proposals for new BLM regulations;
- (3) proposals for organizational change potentially affecting relationships addressed in this agreement;
- (4) the Administration's budget proposal for BLM historic preservation activities, following its submittal to Congress;
- (5) relevant training opportunities; and
- (6) long range planning and regional planning schedules.

7. BLM Staff Training Program

The BLM will maintain an internal training program to: (a) instruct BLM line managers and cultural heritage specialists on the policies underlying and embodied in this agreement, including tribal consultation and state specific BLM-SHPO protocol implementation; and (b) enhance skills and knowledge of other BLM personnel involved with "Heritage Resource Management" activities, including land use planning and resource management staffs. In cooperation with the ACHP and NCSHPO, the BLM may identify partners, as appropriate, to assist in developing training programs. The BLM may seek the active participation of Indian tribes and individual SHPOs in training sessions.

8. Professional Development

a. The DPOs, in consultation with supervising line managers and cultural heritage specialists in their state, will document each district and field office's preservation professional staffing capabilities in their annual report to the SHPO. Documentation will include any recommended limitations on the nature and extent of authorized functions. Where a field manager's immediate staff does not possess the necessary qualifications to perform specialized preservation functions (e.g., historical architecture, historical landscape architecture, ethnography), the field manager will seek specialized expertise from outside the immediate staff.

b. The DPOs may request that the Preservation Board assist the supervising line manager and the cultural heritage specialist in assessing the manager's needs for special skills not presently available on the immediate staff, and the specialist's opportunities for professional development and career enhancement through training, details, part-time graduate education, and other means.

9. District or Field Office Certification and Decertification

a. The Preservation Board, in coordination with the appropriate DPO, SHPO, and the ACHP, and with consideration of tribal comments, may choose to review the status of a district or field office's certification to employ BLM-SHPO protocols developed pursuant to this agreement; or the district or field manager, the state director, the ACHP, or the SHPO, may request that the Preservation Board initiate a review of a district or field office's certification.

b. If a review is being conducted, the FPO, appropriate DPO(s), SHPO(s), the ACHP, and the Preservation Board will participate in the review, and the BLM may consider including other legitimate affected parties as participants in the review, as appropriate.

(1) If a district or field office is found not to have maintained the basis for its certification (e.g., lacks the professional capability needed to carry out these policies and procedures, or is proceeding in contravention of its BLM-SHPO protocol or BLM internal guidance), and the office's manager has not voluntarily suspended participation under this agreement, the Preservation Board will recommend that the state director decertify the district or field office. If a suspended or decertified district or field office is found to have restored the basis for certification, the Preservation Board will recommend that the state director recertify the district or field office.

(2) A state director may ask the Director to review the Preservation Board's decertification recommendation, in which case the Director may request the ACHP's participation in the review.

(3) The Preservation Board will notify the appropriate SHPO(s), the ACHP, and the review requestor, of the findings of the review, including any recommended changes to the certification status of the office.

(4) When a district or field office is suspended or decertified, the district or field manager will follow the procedures of 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14, to comply with Section 106.

c. If the Preservation Board receives a request to perform a review and decides not to conduct the review, it will provide a response to the requester, including the rationale for its decision.

10. Accountability Measures

a. It will be the Preservation Board's duty in accordance with Component 3.c and 3.d above to foster consistency and conformity with BLM policies and procedures. Where problems with implementation are found, it will be the Preservation Board's duty to move promptly toward effecting correction of the problems, in coordination with the individual DPO.

b. Each state director will prepare an annual report in consultation with the appropriate SHPO(s), outlining the preservation activities conducted under this agreement. The annual report will be consistent with the BLM's annual Washington Office reporting requirements, and will include supplemental information agreed upon by the BLM and SHPO. The state reports will be made available to the public via the BLM state web sites, and BLM will notify the ACHP of their availability via email.

c. Annually, each state director that maintains a BLM-SHPO protocol pursuant to this agreement or his/her designee will meet with the SHPO to review the implementation of that BLM-SHPO protocol.

d. The Preservation Board or the BLM Washington Office, in consultation with the ACHP and SHPOs, may select one or more certified state, district, or field offices for a detailed field review of this agreement's implementation. The FPO and the appropriate DPO(s), SHPO(s), and the ACHP will participate in the review and may include other parties as appropriate. Findings and recommendations based on this field review will be provided to the participants, the Director, the state director, and the Preservation Board for appropriate action.

e. The FPO and DPOs will prepare responses to public inquiries for the signature of the Director or a state director regarding inquiries about the BLM's exercise of its authorities and responsibilities under this agreement, such as the identification, evaluation, and management of resources. Responses will include establishing the facts of the situation and, where needed, recommendations to the Director or state director for corrections or revisions in a practice or procedure.

f. Each meeting of the Preservation Board will be documented by a report. The Preservation Board will post a copy of each report on the national BLM web site.

11. Reviewing and Changing the Agreement

a. The signatories to this agreement may agree to revise or amend it at any time. Changes that would affect the opportunity for public participation or tribal consultation will be subject to public notice and tribal consultation. An amendment will go into effect when signed by all the signatories.

b. Should any signatory to this agreement object to any matter related to its implementation, the signatories will meet to attempt to resolve the objection. If a signatory determines that such objection cannot be resolved, BLM will:

1. Forward all documentation relevant to the dispute, including the BLM's proposed resolution, to the other signatories. The signatories shall provide BLM with their response to the BLM's proposed resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, BLM shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the signatories, and provide them with a copy of this written response. BLM will then proceed according to its final decision.

2. If the signatories do not provide their advice regarding the dispute within the thirty (30) day time period, BLM may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, BLM shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories to the agreement, and provide them with a copy of such written response.

3. BLM's responsibility to carry out all other actions subject to the terms of this agreement that are not the subject of the dispute remain unchanged.

c. Any signatory to this agreement may terminate it by providing 90 days notice to the other signatory, provided that the signatory will meet during the period prior to termination to seek agreement on amendments or other actions that would avoid termination. In the event of termination, all state-specific BLM-SHPO protocols developed under the authority of this agreement and/or the 1997 PA will be terminated, and the BLM will comply with Section 106 through the process in 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or an applicable program alternative under 36 CFR 800.14.

d. Within 1 year of the execution of this agreement and every 2 years thereafter, the signatories to this agreement will meet to review its implementation.

e. Specific references to 36 CFR Part 800 are to the regulations that became effective on August 5, 2004. Generic references to 36 CFR Part 800 in this agreement may be read in the future as referencing the version that is in effect at the time of reading.

f. This agreement will be in effect for a period of 10 years from the date of execution, with an option for renewal in 2-year increments with agreement of its signatories.

Affirmation

The signatures below represent the affirmation of the Bureau of Land Management, the Advisory Council on Historic Preservation, and the National Conference of State Historic Preservation Officers that successful execution of the Components of this agreement will satisfy the BLM's obligations under Section 106 and serve as partial satisfaction of the BLM's obligations under Sections 110(f) and 111(a) of the National Historic Preservation Act.

Robert V. Abbey
Director, Bureau of Land Management

Date

John M. Fowler
Executive Director, Advisory Council on Historic Preservation

Date

Ruth Pierpont
President, National Conference of State Historic
Preservation Officers

Date

Last updated: 06-12-2012

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Uranium Recovery Program Commission Briefing

Mike Weber
**Deputy Executive Director Materials,
Waste, Research, State, Tribal and
Compliance Programs**
February 20, 2013

Overview of Uranium Recovery

**Mark A. Satorius, Director
Office of Federal and State Materials
and Environmental Management
Programs**

Discussion Topics

- **Overview of Uranium Recovery**
- **Uranium Recovery Licensing**
- **Safety Reviews**
- **Environmental Reviews**
- **Conclusion**

Uranium Spot Price



Source: The Ux Consulting Company, LLC, <http://www.uxc.com>

Uranium Recovery Licensing

**Andrew Persinko, Deputy Director
Division of Waste Management and Environmental
Protection/FSME**

Status of Licensing Actions

- **Accomplishments**
 - **Issued 3 new licenses for in-situ recovery**
- **Current Activities**
 - **Reviewing 9 new licensing actions**
 - **Expect to complete safety and environmental reviews for 4 sites in fiscal year 2013**
- **Future Activities**
 - **Workload increasing**
 - **Expect 2-3 hearings this fiscal year**

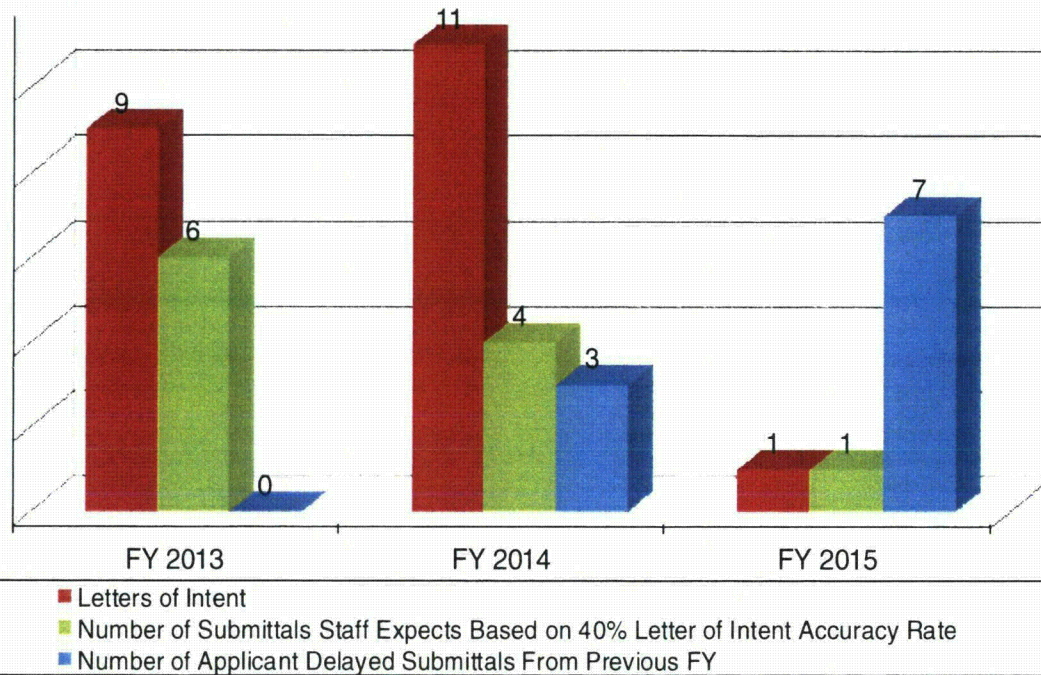
Program Enhancements

- **Pre-application reviews**
- **Timeliness of licensing reviews**
- **Generic Environmental Impact Statement**
- **Improved National Historic Preservation Act Section 106 consultations**

Priorities and Budget

- **Priorities- Safety**
 - **Licensed sites, then new licensing, then guidance**
 - **Perform safety and environmental reviews in parallel**
 - **New licensing reviews performed in order of acceptance**
- **Licensed sites and new licensing actions increasing**

Projections for Future Application Submittals

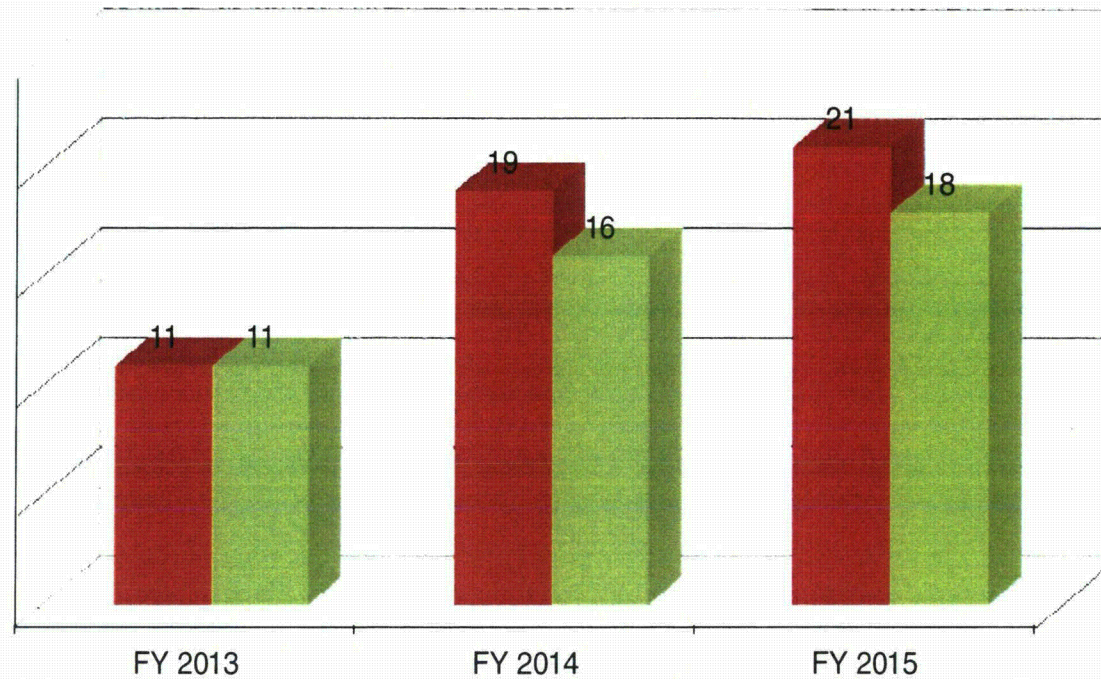


FY 13 letter of intent accuracy rate is higher than 40% to reflect higher certainty in submittals for this FY.

FY 15 submittal is a required license renewal document.

Staff anticipates additional letters of intent for FY 15 in the future.

Projections for Future Workload Scenarios



■ Applications in House if 60% are 6 Months Late

■ Applications in House if 60% are 1 Year Late

Applications in House includes items being worked on and anticipated letters of intent.

Licensing Outreach

- **Over 60 public meetings**
- **Tribal Government to Government meetings**
- **Workshops on both safety and environmental reviews to discuss lessons learned**

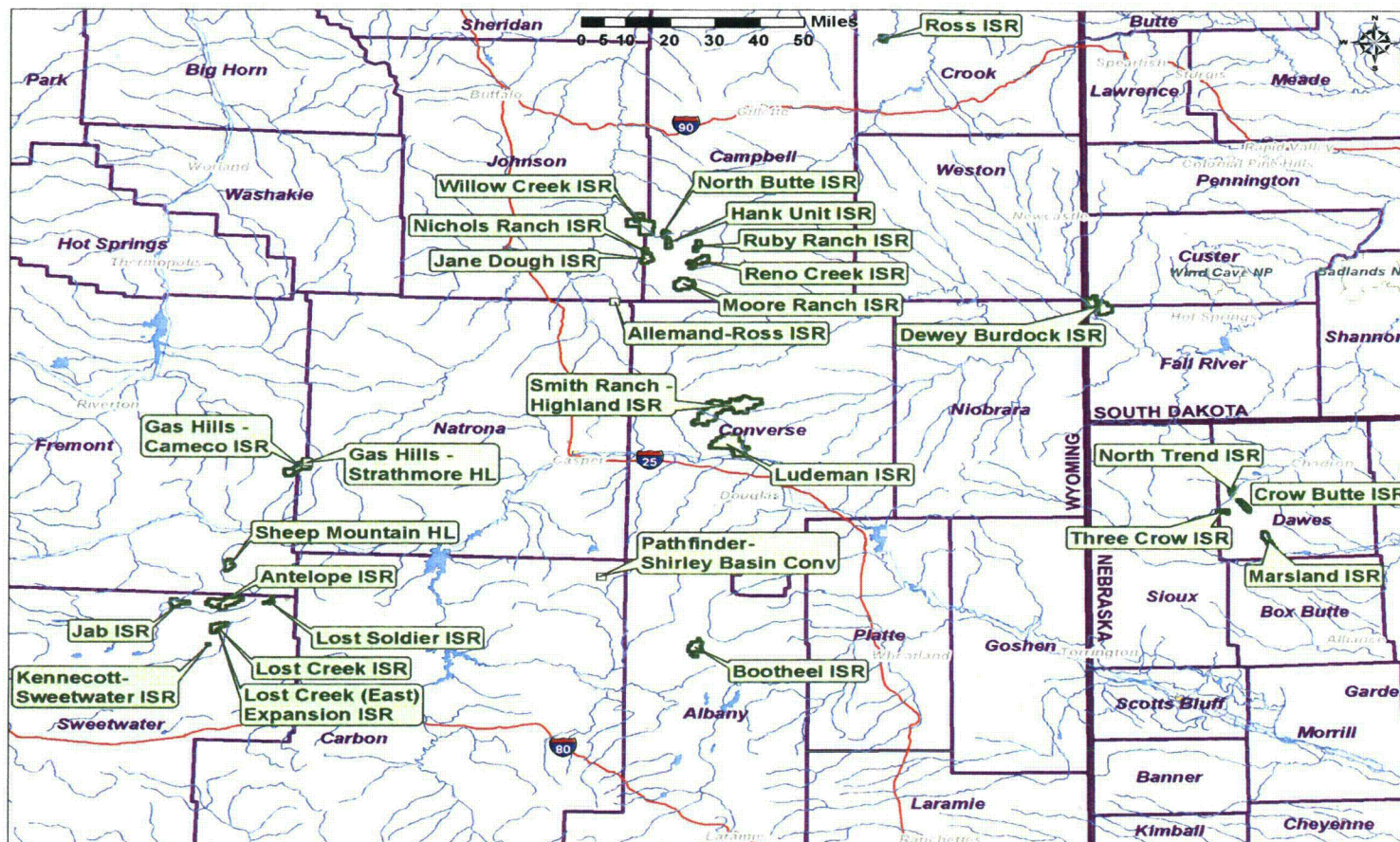
Safety Reviews

**William von Till, Chief
Uranium Recovery Licensing Branch
Division of Waste Management and Environmental
Protection/FSME**

Typical In-Situ Recovery Wellfield Located in Wyoming



Location of Uranium Sites



Major Licensing Actions

License Renewals	Expansions	New Facilities
Cameco – Crow Butte Resources¹	Cameco – Crow Butte North Trend	Powertech – Dewey Burdock³
Uranium One – Willow Creek	Uranium One – Ludeman²	Strata – Ross
Cameco – Smith Ranch	Cameco – Crow Butte Marsland	
	Lost Creek – Dryer Expansion	

Notes:

1 – issued final safety evaluation report

2 – issued request for additional information

3 – issued draft Supplemental Environmental Impact Statement

Ongoing Licensing Actions

New Additional Operating Sites since 2010

- **Willow Creek**
- **Lost Creek - construction**
- **Hank and Nichols Ranch - construction**

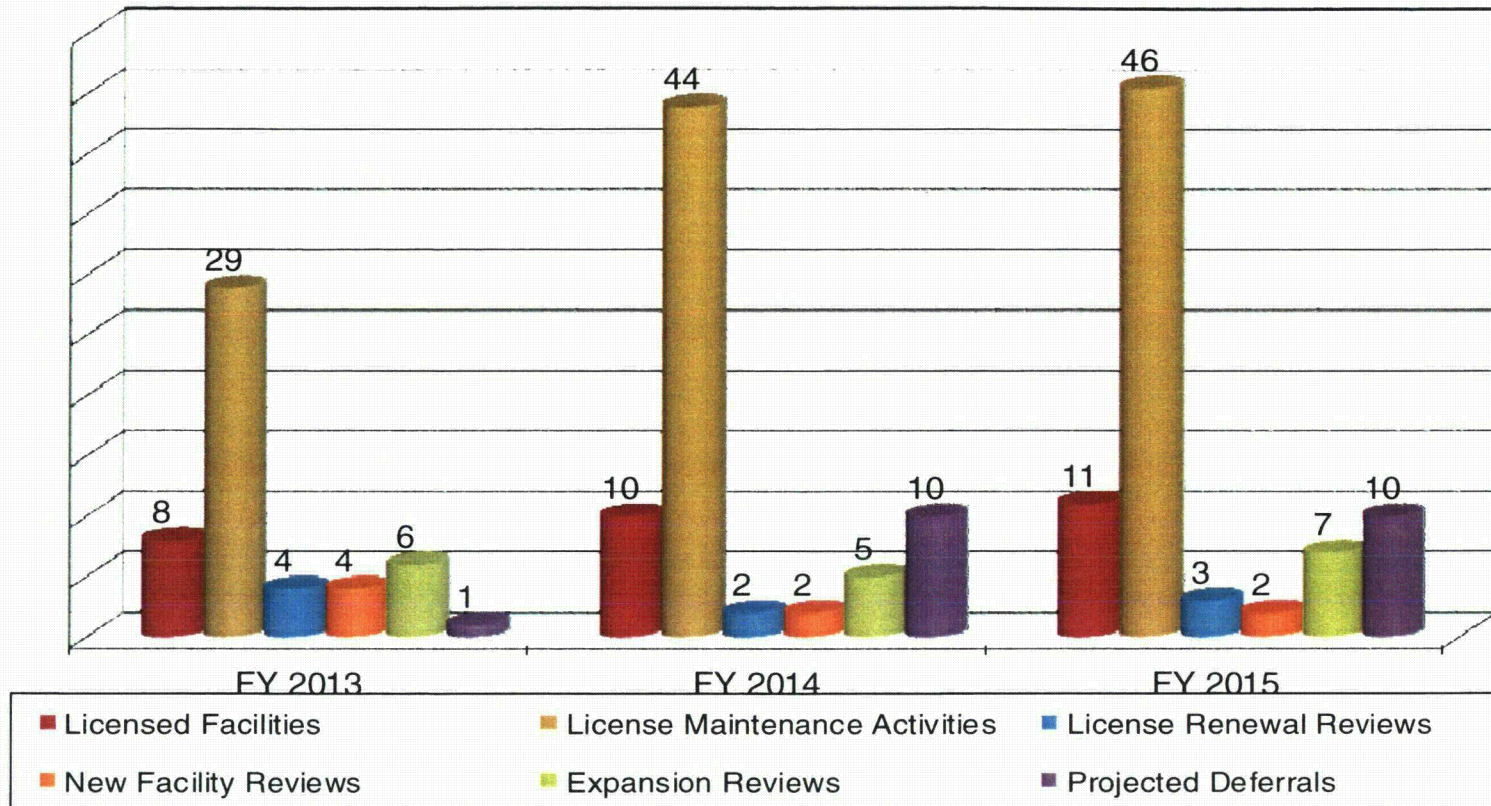
Operating Site Licensing Actions

- **License renewals**
- **Expansions**
- **Other actions**

Oversight and Inspection

- **Priority**
- **Increasing**

Projections for Future Workload



This chart assumes a 2.5 year review period for renewal, new facility, and expansion reviews. License maintenance activities are highly variable in scope and duration.

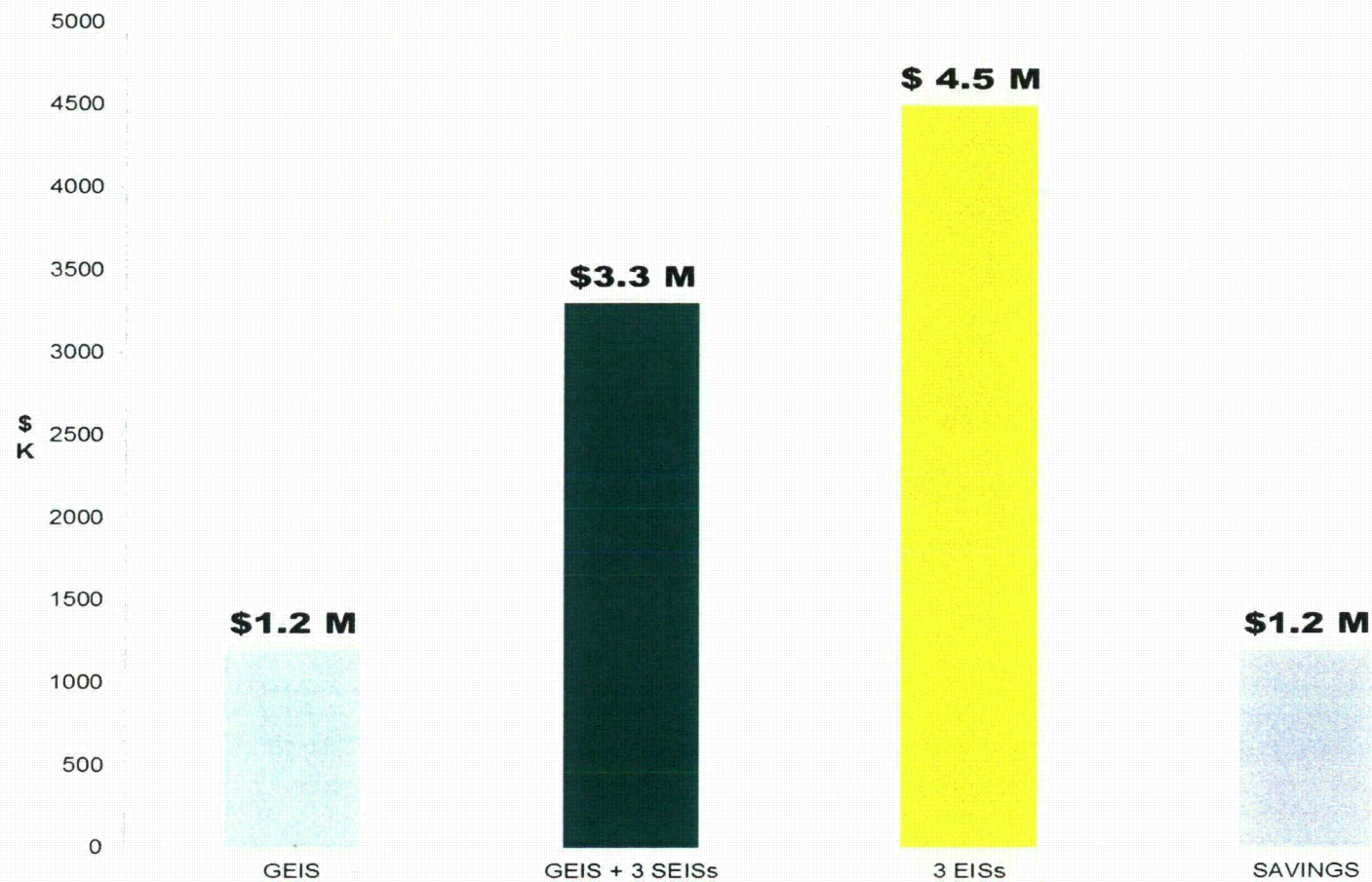
Environmental Reviews

**Kevin Hsueh, Chief
Environmental Review Branch
Division of Waste Management and Environmental
Protection/FSME**

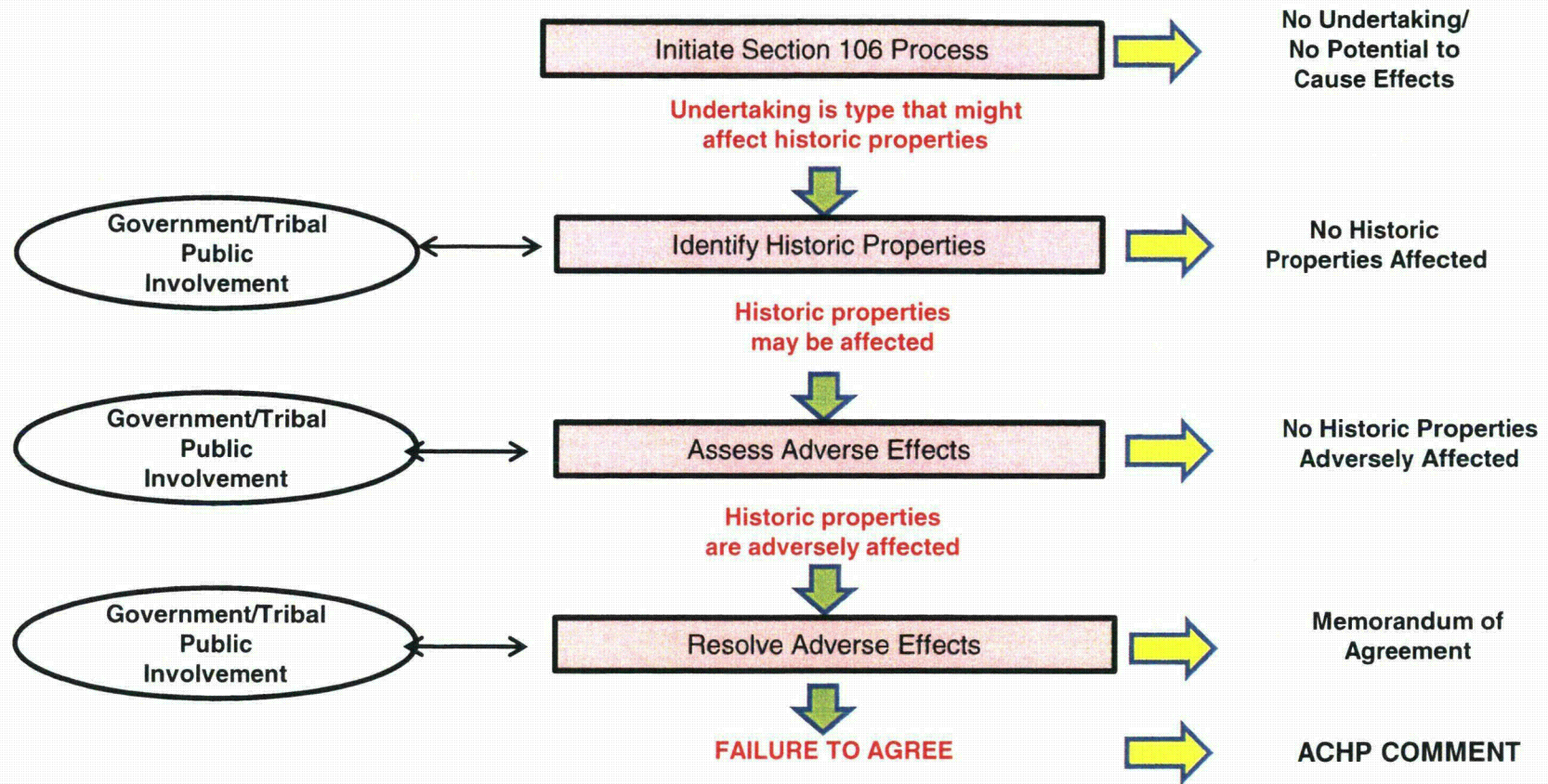
Generic Environmental Impact Statement

- **GEIS for In-Situ Leach Uranium Milling Facilities (NUREG-1910)**
- **Tier to site-specific SEISs**
 - **Incorporation by reference**
 - **Adoption of impact conclusions**
- **Issued 3 Final SEISs since March 2010**
- **Plan to issue 2 Final SEISs in 2013**

Efficiency Gains



The Section 106 Process



Section 106 Process Challenges

- **Large number of Native American Tribes**
- **Tribal requests for field surveys**
- **Section 106 process timeliness**

Section 106 Consultation Status

- **Completed 4 Section 106 reviews since March 2010**
- **8 reviews currently under way**
- **Plan to complete 3 reviews in FY 13 and 5 in FY 14**

Environmental Review Process Enhancements

- **Greater coordination with Environmental Protection Agency**
- **Implementation of the MOU with Bureau of Land Management**
- **Pro-active coordination with State Agencies and Advisory Council on Historic Preservation**
- **Increased Tribal outreach**
- **Earlier engagement of stakeholders**

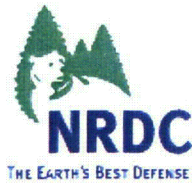
Environmental Review Process Enhancements (Cont.)

Section 106 Process Improvements

- **Training for staff**
- **Using experts to support our review**
- **Developing uranium recovery guidance**

Conclusion

- **Substantial Progress**
- **Program Enhancements**
- **Increasing Workload**



February 20, 2013

NRDC Statement before the Nuclear Regulatory Commission on Uranium Extraction and Processing

Introduction

Chairman McFarlane, members of the Commission, thank you for the opportunity to present the views of the Natural Resources Defense Council (NRDC) in today's "Briefing on Uranium Recovery." Our statement focuses on three significant problems in the Nuclear Regulatory Commission (NRC) regulatory regime regarding the first step toward producing nuclear fuel. First, in our experience, NRC staff often act as an adversarial party to public intervenors in uranium recovery licensing proceedings, preserving and replicating industry errors in the agency's Environmental Impact Statement (EIS). Per your directions, we will, of course, discuss no specific matters in litigation. Second, legal controls and applicable regulatory schemes over uranium recovery are not protective of public health and the environment. Third, NRC has not acted on its responsibility to proceed with sister agencies in formulating a groundwater protection rule for In-Situ Leach (ISL) uranium mining facilities. We note that NRDC has testified before the Commission on this matter and we find the unacceptable regulatory situation little changed with each passing year: in the area of uranium recovery, NRC protection of public health and the environment is not restrictive of harmful actions by industry.

Statement of Interest

NRDC is a national non-profit membership environmental organization with offices in Washington, D.C., New York City, San Francisco, Chicago, Los Angeles and Beijing. NRDC has a nationwide membership of over one million combined members and activists. NRDC's activities include maintaining and enhancing environmental quality and monitoring federal agency actions to ensure that federal statutes enacted to protect human health and the environment are fully and properly implemented. Since its inception in 1970, NRDC has sought to improve the environmental, health, and safety conditions at the nuclear facilities operated by DOE and the civil nuclear facilities licensed by the NRC and their predecessor agencies.

Current NRC Rules for Public Participation in Licensing Proceedings

I start with echoing key points made by my colleague Christopher Paine, Director of NRDC's nuclear program, in a public hearing before you on January 31, 2013. There NRDC observed that unlike many other federal agencies with statutory mandates that include the public—via citizen suit provisions—as a *partner* in achieving compliance with the statute, the Commission's

statutory authority does not assign a direct role to the public in enforcing its regulatory requirements, which by law must ensure adequate protection of the public health and safety against hazards from the licensed civilian uses of nuclear energy. Instead, the role envisioned under the Atomic Energy Act (AEA) is for members of the public, including representatives of state, local, and tribal governments, to bring their concerns regarding compliance with NRC's statutory mandate and regulatory requirements into the Commission's licensing and rulemaking processes, where these concerns are intended to be fairly adjudicated.

As my colleague pointed out, demonstrated by the Staff's close alignment with industry in opposing citizen petitions to intervene in licensing proceedings, the Commission today has strayed far from the intent of this statutory framework, which was designed to allow contending views of nuclear hazards and risks to be fully explored and adjudicated in a quasi-judicial proceeding. Regardless of whether the matter is power reactor relicensing or materials licensing, we've noticed little difference in how the agency and hearing process functions.

The many concerns voiced by my colleague apply directly to our experience with materials licensing, but National Environmental Policy Act (NEPA) concerns merit special mention. NEPA public participation and interdisciplinary study requirements were adopted along with a number of environmental control laws in the early 1970s. These laws were in place when the 1978 Uranium Mill Tailings Radiation Control Act was adopted to address serious problems with both state and federal management of the waste created by uranium extraction and yellowcake processing.

As the Commissioners are aware, when a draft or final EIS is produced by NRC Staff, parties to the proceeding may file new or amended contentions regarding this new document only to the extent that there are "data and conclusions in the NRC draft or final [EIS], environmental assessment, or any supplements relating thereto, that differ significantly from the data or conclusions in the applicant's documents." This provision fails to acknowledge that staff has a Congressionally-imposed duty to conduct its own independent analysis and to gather information for the purposes of involving the public and informing the relevant decision-maker.

The present NRC requirement places an *error-inducing* premium on the Staff's EIS to demonstrate *consistency* with what NRDC and many others have deemed to be an Applicant's flawed environmental report, thereby insulating the staff's Draft EIA and Final EIS from further challenges. In other words, staff acts as an adversarial party with an incentive to not reveal flaws in the applicant's environmental report in order to defeat contentions that may be brought by NRDC and others. Unless every potential flaw is identified by intervenors when first suggested by information in the ER, serious problems *may actually be preserved and replicated* in the EIS, with the official endorsement of the NRC's own rules and procedures.

We've witnessed such disputes incentives play out on matters of significant import such as baseline water quality and restoration requirements. We share the Commission's concern that specific matters in litigation not be discussed, so as a general matter we note that if public intervenors fail to satisfy the dysfunctional criterion just described, intervenors may file new or amended contentions "only with leave of the presiding officer," upon a showing that the

contention is based on information that was not “previously available,” is “materially different than information previously available,” and has been submitted “in a timely fashion based on the availability of the subsequent information.”¹

Not only does this run counter to the central purposes of NEPA - public participation and informed environmental decisionmaking - such a process constitutes an extraordinary shifting of burdens of providing information, careful analysis, and disclosure from the industry and regulator to the public. Such rules artificially constrain adjudication of the merits of environmental issues surrounding the start-up or extended operation of nuclear power plants and materials facilities. As Mr. Paine noted, a proliferation of procedural rules designed to bat away issues before they can be considered on their merits lends credence to the supposition that the Commission is unwilling to let Atomic Safety & Licensing Board judges do the work that Congress envisioned for them.

NRDC's Substantive & Regulatory Analysis

In order to suggest constructive improvements to the agency for the protection of public health and the environment with respect to uranium recovery, NRDC took an extensive look at uranium extraction and yellowcake processing and last year produced the report we provided to you today. For other interested readers, our uranium report can also be found on the web at <http://www.nrdc.org/nuclear/files/uranium-mining-report.pdf>.

The question we set out to examine was simple: are the current controls on both conventional hard-rock mining and milling, and alternative solution-mining techniques sufficient to prevent a new round of harms to the natural resources and communities of this region, which is already being heavily exploited for the extraction of oil, natural gas, coal, coal-bed methane, and now shale-gas?

The answer we found is that the controls and applicable regulatory schemes are not protective of public health and the environment. Concerns over matters such as long-term groundwater contamination, waste management and disposal, environmental justice, and basic scientific and engineering disputes over fundamental technical matters such as setting background water quality standards and appropriate decommissioning bonds appeared repeatedly. NRDC and the Southwest Research and Information Center (SRIC) extracted as much public data about the impact of ISL mining from NRC and state records as was readily available to both organizations. Though not comprehensive, the effort is consistent with the limited studies done by other entities. NRDC and SRIC did not find a single ISL operation where an aquifer was restored to its pre-mining state for all contaminants. The common practice for the NRC or the Agreement State to deem an aquifer “restored” despite elevated concentrations of uranium, radium-226, selenium, and other harmful constituents.

Further, the combined impacts of uranium mining alongside the broad range of natural resource extraction techniques in the American West have remains nearly entirely unexamined at the state

¹ 10 C.F.R. § 2.309 (f) (2), (i) – (iii).

and federal level. Most concerning, we found a complete lack of analysis of cumulative impacts, where long-term impairment of freshwater aquifers is a major concern, compounded by population growth, prolonged dry weather conditions, and severe competition for water resources. In sum, we found the NRC has yet to conduct the thorough analysis of ISL groundwater restoration and results that we believe is necessary to continue final licensing of new mines. NRDC believes it is crucial that a detailed cataloging of ISL restoration history and analysis of its cumulative impacts with other resource extraction techniques take place so that informed decisions can be made regarding the efficacy of current techniques and adequacy of relevant standards. Fundamentally, we don't know enough about the extent or significance of the adverse impacts of ISL mining on mined and adjacent aquifers, as the NRC's final Generic EIS did not undertake such an analysis. Indeed, no entity we know of has conducted a thorough regulatory assessment to investigate the current state of aquifers in proximity to ISL operations.

Our report documents these and many other matters.

The Need for Rules

The neglect we found of uranium mining impacts by federal research and analysis can be attributed to the flawed framework responsible for regulating resource extraction. As evidenced by the parties at the table today, the NRC and EPA share jurisdiction for conventional milling and ISL mining regulation, with the NRC serving as the primary licensing body for many new and existing uranium recovery sites, applying environmental standards for uranium recovery set by the EPA. As we know the Commission is aware, these regulatory standards are faulty, outdated, and are not faithful to the Congressional action taken in the 1970s to address serious environmental problems. Federal and state regulations for uranium milling—or hard rock uranium recovery—have not been updated for more than two decades and do not match today's scientific understanding of the impact that radiation and heavy metals have on the environment and public health.

Since at least the late 1990s, the Commissioners have shown concern about the “complex and unmanageable” regulatory system under which ISL mines operate and groundwater restoration is currently managed. In 2003 the NRC sought to delegate regulation of groundwater protection to non-Agreement States through memorandums of understanding. This approach hit numerous roadblocks and was ultimately unsuccessful. In that same year, there was also a downturn in the market price of yellowcake, which contributed to the Commissioners' decision to defer a rulemaking for ISL facilities. In 2006, Commissioner Jeffrey Merrifield called for a rulemaking to solve the problems plaguing the regulation and protection of groundwater at ISL mining facilities. He stated,

While the staff has done its best to regulate ISL licensees through the generally applicable requirements in Part 40 and imposition of license conditions, our failure to promulgate specific regulations for ISLs has resulted in an inconsistent and ineffective regulatory program. We have been attempting to force a square peg into a round hole for years, and I believe we should finally remedy this situation through notice and comment rulemaking.

Subsequently the NRC Commissioners “directed the NRC staff to initiate a rulemaking effort specifically tailored to groundwater protection programs in the well-field production zone at ISL uranium recovery facilities.” In 2007 the NRC staff met several times with representatives of the EPA and the National Mining Association to “reach a consensus on a rulemaking strategy.” Though it has now been more than five years since the NRC Commissioners instructed staff to begin work on a groundwater protection rule for ISL uranium mining facilities, no such rule has been shared with the public in draft form or officially promulgated, despite repeated requests from the public for the issuance of a draft rule for public comment.

In March 2010, NRC staff testified before the commissioners at a briefing on uranium recovery that they “anticipate providing that rule to the Commission in draft form in April of this year.” In fact, we understand at the time that NRC formed a working group, “to revise Appendix A in 10 CFR Part 40 to clarify the regulations related to groundwater protection at in-situ leach uranium recovery facilities in order to improve regulatory efficiency.” It’s now 2013 and still no changes have been made, no draft rule has been shared with the public, and the NRC continues to review and grant ISL licenses and expansions.

Next Steps

The two reasons for the current regulatory morass bear repeating. First, the weak regulatory regime exists because ISL uranium mining was not in widespread use when conventional uranium mining was first subjected to any oversight beyond that of the federal government promoting and guaranteeing the viability of a nuclear fuels market. Laws to protect public health and the environment from uranium mining and milling impacts were not drafted and passed until several decades of harm had already been inflicted across the American West. Those laws that were passed have rarely been updated, were resisted by industry-captured portions of agencies, and have been haphazardly enforced, with little accountability for lax decisions and a decided unwillingness among regulators to enforce protective standards. The NRC, the EPA, the DOI, the DOE, and the Bureau of Indian Affairs (under its trust responsibility) all hold portions of accountability for the regulation of past, present, and future harm resulting from uranium recovery.

The second reason for the ongoing failure to address the impact of ISL mining is that the existing regulatory schemes are assembled from a dated set of jurisdictional concerns now overcome by events. NRC jurisdiction over uranium milling (and eventually ISL mining)—and not over conventional uranium mining—is founded on the perceived national need for the federal government to have full authority over nuclear materials in order to ensure the smooth operation of our National Security and commercial nuclear industries. The EPA’s authority, confirmed by Congress in 1978, has been superimposed on the NRC process, with at best grudging acceptance by the agency and industry. The result is an over-complicated and conflicting set of standards assembled from regulations intended for differing areas. In NRDC’s view, the focus for the federal government must now be to cure these deficiencies and swiftly develop a more protective regulatory framework for uranium recovery of all types, before even more public health and environmental damage is done.

Simply, both the EPA and the NRC should move swiftly to update the relevant environmental protections for uranium recovery as a whole. Such actions must, of course, include standards for ISL uranium mining. The sooner that improved standards can be put into effect, the sooner will public health and the environment will be protected.

The EPA, to its credit, several years ago commenced a revision of its health and environmental protection standards for uranium and thorium mill tailings. EPA's Science Advisory Board weighed in on the matter approximately one year ago, so we are hopeful that a draft rule is imminent. In contrast to EPA's as-yet unfulfilled promises to adopt new standards, as we discussed above, NRC has yet to move forward with reforming its own regulations. In fact, for several years the NRC has declined to publish a draft groundwater protection rule for ISL facilities, relying instead on a set of incomprehensible internal guidance documents.

Today we urge the Commissioners to commit to the following – immediately after the EPA issues its *draft* rulemaking, the NRC will commence work on its own ISL rulemaking to conform to EPA's new standards. We are aware that we are requesting NRC start its process before EPA's rules are final, but we think with the decades that have passed since meaningful action, incorporation of EPA's guidance is not beyond the capacity of the agency and can be adjusted as necessary throughout the rulemaking process.

Until that time when all parties have some measure of certainty regarding new standards, NRDC supports a moratorium on the final decisions with respect to the granting of new ISL uranium mining licenses. Moreover, the NRC should defer action on any new application for a uranium extraction or yellowcake processing license until there is federal adoption of, as just one example, key elements of Colorado's 2008 Land and Water Stewardship Act, which requires substantially more stringent protections than currently exist.

In closing, unless the federal government revises the regulatory scheme for ISL uranium mining and other forms of uranium extraction and yellowcake production, damage will likely continue as uranium ore will be recovered by both conventional and unconventional means well into the future. The time to rectify the inadequacies of the regulatory structure is today. ISL uranium mining has a troubled past of inflicting real harms that merits specific federal treatment and meaningful, protective standards.

Thank you for this opportunity and I look forward to answering your questions.

Geoffrey H. Fettus
Senior Attorney
Natural Resources Defense Council



KATIE SWEENEY
General Counsel

February 19, 2013

Mr. Mark Satorius, Director
Office of Federal, State Materials and
Environmental Management Programs
United States Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. Satorius:

On October 12, 2012, the United States Nuclear Regulatory Commission (NRC) released its draft *Tribal Protocol Manual* for its *Office of Federal, State and Environmental Management Programs* (hereinafter the "Tribal Protocol") for comment. 77 Fed. Reg. 62269. The National Mining Association (NMA) hereby submits comments on the draft Tribal Protocol as well as some additional comments on related Section 106 responsibilities and procedures of NRC. NMA is the national trade association representing the producers of most of America's coal, metals, including uranium, industrial and agricultural minerals; the manufactures of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. NMA's uranium recovery members include current conventional and/or in situ uranium recovery (ISR) licensees, as well as potential future conventional and/or ISR license applicants.

The comments on the draft Tribal Protocol and related National Historic Preservation Act (NHPA) Section 106 issues are divided into three sections: (1) Introduction and Background; (2) Recent Examples; (3) General Recommendations; and (3) Specific Recommendations.

I. BACKGROUND

As stated in the Notice releasing the draft Tribal Protocol, the intent of the draft is to help ensure NRC engages in meaningful consultation and coordination with Native American Tribes. In accordance with a 2009 Presidential Memorandum reaffirming Executive Order 13175 entitled *Consultation and Coordination with Indian Tribal Governments*, NRC released this draft manual and policy statement to assist in facilitating better relationships with Native American Tribes during NRC licensing

processes and to provide a discussion of etiquette and protocol for interacting with Tribal representatives. Included in this portion of the draft is a discussion of how to effectively communicate with Tribes and their representatives both in person and via written or verbal communication. The remainder of this Protocol references NRC points-of-contact and a how-to-guide for NRC reference and guidance documents. In short, the Protocol provides an overview of Tribal relationships with federal agencies, with a specific focus on NRC.

As discussed below, NMA's view of this draft Protocol is that it is useful for its general purpose but unfortunately does not address NMA's concerns with the current issues in NRC's NHPA Section 106 processes associated with uranium recovery licensing. Without standardized guidelines and procedures to instruct effective completion of site-specific Section 106 processes that satisfy the NHPA and the Advisory Council on Historic Preservation's (ACHP) 36 CFR Part 800 regulations, NRC Staff has proceeded on a "case-by-case basis," as noted in the Tribal Protocol, that has been ineffective despite NRC Staff's best efforts. As stated recently, NMA recommends more aggressive action by NRC to create a standardized approach to its Section 106 process, so that unreasonable delays and unnecessary administrative processes can be avoided in the future.

II. RECENT EXAMPLES

NMA's member companies have actively been seeking new uranium recovery licenses and amendments or expansions of existing licenses with NRC Staff for several years. An increasingly important component of these endeavors is successful and efficient completion of the Section 106 Tribal consultation process. Since the first three new uranium recovery license applications were filed and the issuance of the ISR Generic Environmental Impact Statement (GEIS) (NUREG-1910), NRC Staff has been struggling with the implementation of a coherent and consistent approach to its Section 106 process. A prolonged and exceedingly expensive process has resulted in unnecessary delays in Section 106 consultations and the issuance of new ISR operating licenses.

A first example is the now effective ISR license issued to Uranerz Energy Corporation (Uranerz) for its Hank and Nichols ISR project in the State of Wyoming near the identified traditional cultural property known as the Pumpkin Buttes. This ISR license application was one of the aforementioned "first three" ISR license applications submitted using the ISR GEIS. For this license application, NRC needed almost three years to complete the Section 106 Consultation process. Starting in July of 2008 and after eleven Tribes were identified by NRC Staff as potentially interested parties for Section 106 Tribal Consultation, NRC Staff engaged in the almost three-year long process, including a full twenty one months after issuance of the draft supplemental environmental impact statement (DSEIS). This process resulted in issuance of the final SEIS (FSEIS) in January of 2011 and an additional nine months of Section 106 process

Name of Recipient

Date

Page Three

time prior to completion of the process itself. Thus, NRC Staff required at least nine additional months after all technical (i.e., Safety Evaluation Report (SER)) and environmental (FSEIS) analyses were finalized to complete this process and actually issue a final license. This example provides the Commission with initial evidence that the Section 106 Tribal Consultation process is the "long pole in the tent" and requires an aggressive approach to make the licensing process more efficient, while at the same time fully satisfying its NHPA responsibilities.

A second example is the pending ISR license application from Powertech (USA) Uranium Corp for its proposed Dewey-Burdock ISR project in the State of South Dakota. This proposed project involves a large number of interested Tribes, including one (Oglala Sioux) that currently is a litigant in an NRC Subpart L administrative hearing before the Atomic Safety and Licensing Board Panel (ASLB). In addition, after the license application was filed, NRC Staff informed Powertech that they would be required to further supplement their extensive environmental reports, including a high quality Class III archaeological survey, with information on properties of religious and cultural significance, including traditional cultural properties (TCP). This Section 106 Tribal Consultation process is still ongoing and, unfortunately, is likely to result in delays similar to those experienced by Uranerz. Despite the difficulties in the licensing process, Powertech has actively been participating in the Section 106 process for at least two years, including participation in site tours, Tribal meetings, and conference calls. However, the Tribes refused to work directly with Powertech and, after approximately eighteen months, there has been little, if any, progress on identifying any historic and cultural resources. Currently, Powertech has extended an offer through NRC Staff to allow Tribes access to its project site, supported logistically and financially by the company, so that such resources can be identified by Tribal representatives. But, only one Tribe has accepted this offer and, even if this approach proves to be successful, NRC Staff will still be required to complete assessments of National Register eligibility, potential adverse effects and, if necessary, appropriate mitigation of such potential effects before the Section 106 process is complete. Accordingly, Powertech's process has lagged so significantly that NRC Staff and Powertech have agreed to "de-couple" the Section 106 process from NRC's Part 51 environmental review process so that the FSEIS can be issued when finalized without further delays. Although the current FSEIS issue date is May or June of 2013, there is the potential for additional lag time for license issuance, even after FSEIS completion, if swift and decisive measures are not taken.

A final example is the pending ISR license application from Strata Energy, Inc. for its proposed Ross ISR project in the State of Wyoming. This proposed project lies in the northeastern portion of Wyoming approximately 11 miles from the Devil's Tower Monument, a well-known and federally recognized TCP. Strata's license application, like Powertech's, was submitted after the "first three" and was the first license applicant to participate in the widely successful pre-submission audit program where, in a public meeting, NRC Staff reviews a pre-final license application to ensure that all acceptance

review criteria are met and to minimize or eliminate short or long-term requests for additional information (RAI). The result was such a high-quality application that NRC Staff could immediately commence the Section 106 process upon submission in December, 2010. Tribes were notified of the submission of this license application in February of 2011; however, the Wyoming SHPO was not notified of this until August of 2011, a full six months later. However, despite the "head start" afforded by this submittal and the lessons learned after the Uranerz and Powertech examples, the Section 106 process for this license application continues to be in limbo. Numerous attempts by Strata to obtain a final list of consulting parties for internal reference and company outreach have gone without success. Strata continues to work with NRC Staff to complete this process and its DSEIS is due out in March, 2013 and FSEIS due out in December, 2013. These milestone dates are critical to the licensing process/timeline and need to be met so that the project can move forward. Strata has prepared a draft timeline of actions, e-mails, telephone conferences, letters, and meetings documenting the erratic progress by NRC to complete its Section 106 process. Given that site access is limited by weather in Wyoming during the winter months, completion of this process this summer is critical, but the lack of a standardized process for Tribal Consultation lends continuing uncertainty to this project's licensing timelines.

III. GENERAL RECOMMENDATIONS

As can be seen from the case studies noted above, NMA's primary issue with the draft Tribal Protocol and NRC Staff's current approach to the Section 106 process, which the draft Protocol was not intended to address, is that there is no consistent, standardized approach to how the Section 106 process will be conducted by NRC in this region for these kinds of projects. This prevents NRC Staff as the "lead agency" from effectively concluding the process in reasonable timeframes. Each of these case studies provide different examples of how NRC has failed to create a process where communication with Tribes is accomplished in a timely manner, where government-to-government meetings, webinars, and other interactions with Tribes and other government officials that are part of NRC's licensing process are anticipated and understood by all interested parties and, where final decisions are made in a decisive manner in accordance with well-understood timetables. In some cases, a Tribe or Tribes may not agree with an NRC decision, but if they understand NRC's processes and their potential role therein, at least they will have the appropriate opportunity to make their case. Indeed, one case study discussed above does not account for the fact that one of the main consulting Tribes is an adverse litigant in a current NRC administrative hearing, which situation presumably should somehow be accounted for in any future standardized guidelines and procedures. This lack of standardized procedures for NRC Staff to follow in the Section 106 process has created intolerable delays in the licensing process. Accordingly, NMA recommends that the Commission focus more resources on more standardized procedures for the conduct of its Section 106 processes and not spend too

Name of Recipient

Date

Page Five

many more resources on broad overviews of general Tribal history and interaction policies.

NMA recommends that the draft Tribal Protocol address NRC's Atomic Energy Act (AEA) statutory mandate to efficiently and effectively regulate the possession, use, and transfer of AEA materials through its licensing processes and the relationship this mandate has to its obligations under the NHPA. Under the AEA, NRC's statutory mandate is to regulate the peaceful use of AEA materials, in this case Section 11(z) source material uranium, by protecting public health and safety from potentially significant risks associated with such materials. As part of this responsibility, the Commission fulfills its National Environmental Policy Act of 1969 (NEPA) obligations as implemented in its 10 CFR Part 51 regulations by reviewing potentially significant risks to the environment associated with such materials. The NHPA adds additional requirements to NRC's environmental reviews to include identification, evaluation, and resolution of any adverse effects to historic properties. Further, the issuance of Executive Order 13195 imposes additional requirements on federal agencies; however, as an independent regulatory agency and as noted by the Commission in the past, it is not directly subject to the terms of the Executive Order. Despite this fact, the Commission has stated it remains committed to the "spirit" of the Executive Order. Nevertheless, NRC cannot allow its NHPA responsibilities or commitments to subvert its primary responsibilities under the AEA and the timely execution of these responsibilities. While the agency has an obligation to protect both public health and safety and historic and cultural resources; it also has an obligation to its licensees and license applicants to ensure a timely, more predictable cost-effective licensing process.

IV. SPECIFIC RECOMMENDATIONS

Given that the current approach to Section 106 Tribal Consultation has been significantly problematic, NMA has been exploring potential options for a remedial solution. After careful evaluation of potential alternatives, NMA believes that NRC's uranium recovery licensing program would be best served by pursuing a regional programmatic agreement (PA), as provided for in 36 CFR 800.14(b)(2), for the non-Agreement States in the "Great Plains" area (e.g., South Dakota, Wyoming, Nebraska, North Dakota, Montana, etc.). Through the development of a PA the Section 106 Tribal Consultation process can be made more predictable and efficient for all concerned. By using this approach, NMA believes that NRC will avail itself of an opportunity to carry out more meaningful and effective interactions with Tribes while hopefully fostering better relationships between such Tribes and industry.

PAs are a proven mechanism used by federal agencies to facilitate a Section 106 Consultation process wherein interested parties work to codify standard guidelines, procedures and other generic aspects of a consultation process that works within the relevant legal or regulatory authority of an agency while still providing site-specific

analyses. PAs have been used on numerous occasions by a variety of federal agencies including but not limited to the United States Forest Service (USFS), the Bureau of Land Management (BLM), the Federal Communications Commission (FCC), and the Federal Highway Authority (FHWA). PAs also are expressly identified as viable mechanism for Section 106 Tribal Consultation under 36 CFR Part 800. While typically they are used for site-specific or project-specific actions, the regulation also provides for procedural PAs that govern Section 106 compliance for entire federal agency programs or for specific categories of actions such as licensing or permitting. For example, in February, 2012 BLM, with concurrence from ACHP and the National Conference of State Historic Preservation Officers (SHPO), finalized a national PA on how to conduct Section 106 processes for all undertakings on public lands under its management. A copy of this PA is attached hereto. While this type of PA is much broader than that NMA is proposing specifically for uranium recovery licensing within NRC's broader licensing purview, it is an appropriate reference for the type of mechanism NMA is proposing NRC use in this space.

NRC's recent history with Section 106 Tribal Consultation, as discussed in the three examples above, speaks for itself. Each process, whether currently completed or ongoing, has encountered unnecessary delays and indecision to the extent that existing licensees and license applicants have been forced to expend substantial financial and human resources for multiple site visits and significant amounts of NRC fees for continuing Staff meetings, reviews, and seemingly unending correspondence. As a result, licensees and license applicants have no ability to project costs or timing for any given uranium recovery project. Thus, a more programmatic approach is required to provide both NRC Staff project managers and industry members with enough regulatory certainty to make an informed decision as to whether to proceed with licensing a given project.

Additionally, a regional PA would help mitigate the contributing factors for these delays that NRC has not properly taken into account in addressing its current Section 106 process. First, as has been the experience of most, if not all, recent license applicants and current licensees, Tribes are unwilling to work with industry directly to assess historic and cultural resources, including specifically TCPs, during the pre-application stages of a given project. In several instances, industry members have performed outreach to attempt to engage potentially interested Tribes in site visits, surveys, and archaeological studies, the latter of which are mandatory for NRC license applications. While early engagement is a positive for developing license applications, Tribes have no real incentive to assist a license applicant in the preparation of such applications, especially if their interests are adverse to the proposed project's development.

Past experience suggests that Tribes also have no real incentive to work with NRC Staff in an efficient manner during the Section 106 Tribal Consultation process. While the timetable for licensing is important to a license applicant, it has no bearing on the potential concerns of any or all potentially interested Tribes, especially if their interests

Name of Recipient

Date

Page Seven

are adverse to the project's development. In addition, projects situated in the Great Plains area typically result in the involvement of between one and two dozen potentially interested Tribes due to the fact that many Tribes settled in and moved through the same geographic areas over long periods of time in the past. This results in a voluminous amount of correspondence between NRC and Tribes which, if unnecessarily duplicative or delayed due to indecisiveness, creates a logjam in the licensing process and merely passes more review fees and additional expenses on to licensees and license applicants. Without a standardized approach that provides potentially interested Tribes with advance knowledge of the guidelines and procedures that will be used by NRC Staff as the "lead agency" during its Section 106 Tribal Consultation process, no timetable for licensing can ever be developed by a licensee or license applicant or even by NRC itself.

As stated above, NRC has failed to account for Tribes with adverse interests in its Section 106 process. Due to the lack of a standardized approach, Tribes with adverse interests are given the opportunity to use delay tactics as a way to force industry members to expend more financial and human resources than is necessary for a project to be licensed. Since uranium recovery requires intensive front-end capital investment prior to generating cash flow, Tribes see this as an opportunity to force industry members to abandon projects, much less future development, thereby depriving the United States of the energy benefits derived from recovery of naturally occurring uranium resources. Unless the Section 106 process is consolidated and standardized, Tribes with adverse interests will continue to use the Section 106 process as a delaying tactic.

Based on these factors, NMA proposes that the Commission support the development of a regional PA for the "Great Plains" non-Agreement States as described above so that the Section 106 Tribal Consultation Process can have standardized guidelines and procedures that facilitate early involvement for Tribes that are willing to deal directly with licensees and license applicants and that establishes a protocol for consultation with Tribes not willing to participate prior to NRC involvement. The PA would prescribe a framework for site-specific assessments of historic and cultural resources. Under this proposal, NMA recommends that the Commission first identify the key stakeholders to be invited to consult, provide insight and recommendations and, if appropriate, be a signatory to a regional PA. This would include affected SHPOs, some Tribal Historic Preservation Officers (THPO) in the Great Plains area, industry members or a representative group, and the ACHP. The participation of these groups will demonstrate to potentially interested Tribes that industry and the government are focused on providing them with a well-understood opportunity to participate in the identification and protection of their historic and cultural resources. Further, these groups can identify and invite potentially interested Tribes within a given geographic area where uranium recovery projects are highly concentrated to be signatories to the regional PA if they so wish. This would make the PA itself and its development process much more efficient.

While the Commission is considering NMA's proposal and gauging the willingness of these entities to participate in such a process, NMA proposes to develop a detailed outline providing insight from industry experts, including former SHPOs, for use in development of the regional PA. NMA believes that the Commission will benefit from the years of experience these experts have to develop a high quality initial outline. Further, NMA believes that the Commission also should begin consulting other federal agencies that have had marked success with the Section 106 process such as BLM, the Department of Defense or FHWA to determine how the development of a PA would work.

After submission of this outline, NMA will assemble a group of industry members to act as its representatives during discussions with potentially interested parties. When and if the Commission deems it appropriate to pursue this option, NMA will participate in the development of a draft PA with these parties that can be submitted to the Commission for its consideration. NMA believes that the aforementioned parties should be able to create a PA that is consistent with past precedent approved for other federal agencies by such agencies, SHPOs, the ACHP, and other interested stakeholders. Given the importance of creating a workable, predictable Section 106 process that meets the reasonable and good faith standards for agency compliance, the Commission should involve itself in this process.

When considering this process, the Commission should recognize that the kinds of problems described in this letter likely cannot be resolved purely through the development of either internal agency guidance or guidance to licensees/license applicants. Such guidance typically is extremely helpful for items such as development of license applications, license renewals, and other unique policy initiatives (e.g., alternate feed guidance). However, the Section 106 process is a government-to-government process under federal statute that requires the participation of multiple parties, some of which must be signatories to a final document or approach under a licensing process. NRC guidance is "unilateral" from the Commission and, therefore, does not have the tacit or explicit concurrence of the other relevant parties (e.g., SHPOs, THPOs, ACHP, BLM, etc.). Even if the Commission were to "consult" these parties on the development of guidance, there still would be no formal agreement between these parties as to what the standardized guidelines and procedures would be for the Section 106 process. Given that ACHP members and SHPOs/THPOs change throughout the years, it would be to the Commission's advantage to have a formalized, enforceable agreement in the form of a PA that helps to define "how we do it here."

Guidance also may not carry the same weight as a PA because, while a guidance document would be required to go through senior management at NRC, such guidance may not necessarily be reviewed and commented on by similar senior management at the ACHP or SHPO/THPOs. However, a regional PA will require the active participation of senior officials for all interested parties and will allow for the any final agreement on

Name of Recipient
Date
Page Nine

the process to be based on decisions at the highest levels. This approach provides additional efficiencies for NRC Staff and ACHP or SHPOs/THPOs, as well as licensees and license applicants, because frequent and potentially endless phone calls and letters between entities (e.g., NRC to SHPOs, THPOs, ACHP—Tribes to SHPOs, ACHP, NRC, etc.) largely will be eliminated.

A regional PA also provides all the benefits of guidance such as clarification of the interaction process between Tribes and NRC under the NHPA and promotion of a better understanding of NRC's regulatory authority under the AEA, including the many safeguards afforded by NRC regulations and guidance and the broad extent of its Part 51 environmental review process under the Commission's 10 CFR Part 51 interpretation of its NEPA responsibilities. Like guidance, the PA also will standardize its process across all non-Agreement States and serve as "guidance" for future NRC licensing projects in other non-Agreement States. A regional PA also provides a level of stability for future licensing actions as it will be "signed off" on by relevant parties and cannot be unilaterally modified due to staff changes at any of the signatories.

A regional PA also will provide Tribes with the *opportunity* to "get on the ground early" with licensees or license applicants so that they can participate in Class III archaeological studies submitted with license applications/amendments thereby providing much-needed information on historic and cultural resources for submission to NRC Staff for review *prior* to formal initiation of NRC's Section 106 process. This information can be used by applicants in the development of site plans at an early stage when greatest flexibility is available. PA development will include government to government consultation throughout the process.

NMA appreciates the opportunity to provide these comments. If you have any questions, please contact me at (202)463-2627 or ksweeney@nma.org.

Sincerely,

A handwritten signature in cursive script that reads "Katie Sweeney". The signature is written in dark ink and is positioned below the word "Sincerely,".

Katie Sweeney