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Guidance for Conducting the Section 106 Process of the National Historic Preservation Act for Uranium Recovery Licensing Actions

Comment On: NRC-2014-0142-0001

Conducting the Section 106 Process of the National Historic Preservation Act for Uranium Recovery Licensing Actions

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Comment on FR Doc # 2014-14276

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Submitter Information

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Name: Anonymous Anonymous

Submitter's Representative: Jonathan Downing

Organization: Wyoming Mining Association

General Comment

See attached file(s)

Attachments

WMA Comments NRC 2014-0142-0001

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Add= J. Diaz Toro (DDT1)



WYOMING MINING ASSOCIATION

August 25, 2014

Cindy Bladey, Chief
Rules, Announcements, and Directives Branch (RADB)
Office of Administration
Mail Stop: 3WFN-06-44M
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Subject: Wyoming Mining Association (WMA) Comments on the GUIDANCE FOR CONDUCTING THE SECTION 106 PROCESS OF THE NATIONAL HISTORIC PRESERVATION ACT FOR URANIUM RECOVERY LICENSING ACTIONS - Draft Report for Comment - June 2014 (NRC-2014-0142-0001 - June 18, 2014 - Notices)

Dear Ms. Bladey:

The Wyoming Mining Association (WMA) is an industry association representing mining companies, contractors, vendors, suppliers and consultants in the State of Wyoming. Among its mining industry members are uranium recovery licensees, including in-situ and conventional uranium recovery operators, several companies planning new uranium recovery operations and several companies conducting final reclamation/restoration operations. WMA has reviewed the *GUIDANCE FOR CONDUCTING THE SECTION 106 PROCESS OF THE NATIONAL HISTORIC PRESERVATION ACT FOR URANIUM RECOVERY LICENSING ACTIONS - Draft Report for Comment* and has the following comments:

National Historic Preservation Act Section 106 Process

This process is of serious concern to the uranium recovery industry as it is a source of delay and increased costs in the permitting process. The draft document states:

Over the past several years, an increase in the number of licensing actions for in situ uranium recovery (ISR) facilities has resulted in an increase in the NRC's Section 106 activities. In addition, the complexity of the Section 106 reviews associated with the ISR licensing actions has grown significantly.

It also states in Appendix A:

For example, the siting of proposed uranium recovery facilities in areas known to be the aboriginal homelands of federally-recognized Indian Tribes (Tribes) or near sites sacred to Tribes can affect the Section 106 process duration and complexity. A large number of parties interested in participating as consulting parties due the proposed project location can also affect the Section 106 process duration and complexity.

This is true. However, the draft document indicates that the Section 106 process could take up to three (3) years to complete. This is an exorbitant amount of time for consultation process as it is cumbersome, time consuming and costly for the uranium recovery industry. The Section 106 process should be conducted as quickly and efficiently as possible.

This issue was discussed in a letter dated January 7, 2013 from Ms. Sweeney (General Counsel of the National Mining Association (NMA)) to Chairman Macfarlane of the Commission. Regarding the Section 106 process, she stated:

Second, NRC's conduct of the National Historic Preservation Act's (NHPA) Section 106 process has become a source of great concern within the uranium recovery industry. Industry understands that the Section 106 process is mandatory for new operating facilities and for some other licensing actions and has attempted to assist the Agency in conducting this process.

The GUIDANCE FOR CONDUCTING THE SECTION 106 PROCESS OF THE NATIONAL HISTORIC PRESERVATION ACT FOR URANIUM RECOVERY LICENSING ACTIONS - Draft Report for Comment continues by stating:

The NRC staff should also consider the number of individuals that would conduct the fieldwork, the scope and level of effort of fieldwork, and factors that may affect the scheduling of the field work. Weather will influence the time of year when the parties can conduct the fieldwork. In determining the scope of work and level of effort for the fieldwork, the NRC staff should work with consulting parties who plan to participate in the survey to identify the equipment, vehicles, maps, and tools needed to conduct the fieldwork. The NRC staff should also consult with the SHPO to identify state survey standards.

The NRC staff will determine the need for a field survey and the appropriate methodology to use, after consultation with the parties.

There is no regulatory requirement that field surveys be conducted by consulting parties, 800.4(b)(1) includes field surveys as a potential means to carry out identification efforts. Field surveys are one approach that may be implemented in those cases where a site's eligibility has not been determined by either the archeological survey or in consultation with the SHPO/THPO.. Conducting a survey of the area with consulting parties, to collect more data after the project applicant has already conducted surveys per NRC regulations, and NEPA requirements, is a waste of the project proponents' time and money. Additionally, it is a burden to the tax payer by having money spent by the NRC to do duplicative work that was already done by the project applicant. The document should therefore discuss the criteria in determining the need for a field survey before assuming that one will be required for every project and discussing the specifics of how the surveys will be carried out. Further, Section 6.2.3, page 10 of the draft document states "Tribal Survey teams can also provide recommendations on possible measure(s) to limit adverse effects on historic properties." If the NRC in consultation with the SHPO/THPO has made a determination that an undertaking will have an adverse effect on an eligible site that determination will be made at the beginning of the Section 106 process when the proponent's survey data has been submitted for review. Consulting parties will then have the opportunity to review and comment on any mitigation measures proposed to limit the adverse effect. Additionally, if field surveys are going to be performed the document should include language that the field surveys "... shall be reasonable in scope and duration and be strictly limited to the effort required to complete the field work within a reasonable interval of time."

The WMA also requests that the document include guidance on fees. The NRC should keep in mind that the purpose of Section 106 is to provide Tribes the opportunity to get their interests and concerns before the NRC and allow them to advocate the outcome with regard to areas of historical significance

to tribes which is through consultation and does not require approval. According to the ACHP (<http://www.achp.gov/regs-fees.html>) when the NRC or applicant is seeking the views (i.e. consultation) of an Indian tribe to fulfill the NRC's legal obligation to consult with the tribes under specific provision of ACHPs regulation, the agency or applicant is not required to pay the tribe for providing its views. If payment is requested for any aspect of tribal or other consulting party participation, the NRC as the federal agency has met its obligation and is free to move to the next step in the Section 106 process

In a letter dated January 6, 2012 to Cindy Bladey entitled *Incorporation of Risk Management Concepts in Regulatory Programs* Katie Sweeney, General Counsel of the National Mining Association (NMA) stated:

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 effort," 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.

WMA agrees with this statement. This issue is a serious one for the uranium recovery industry in Wyoming. The guidance document should more fully discuss what will be a "reasonable and good faith effort" so that the Section 106 process is not unnecessarily delayed.

Open-endedness of the Process

The process as described in *GUIDANCE FOR CONDUCTING THE SECTION 106 PROCESS OF THE NATIONAL HISTORIC PRESERVATION ACT FOR URANIUM RECOVERY LICENSING ACTIONS - Draft Report for Comment* must have clearly defined limits. The document states in *Section 6.1.3 Letters initiating Consultation*:

If a Tribe that attaches religious and cultural significance to historic properties requests in writing to be a consulting party, the NRC staff will designate the Tribe as does not respond for an extended period, the NRC would discontinue sending it further information until the NRC staff receives a request (e.g., an e-mail or phone call from an official to an NRC project manager) indicating the party wants to be a consulting party. In such cases, the NRC staff would start consulting with the party from the current step of the Section 106 process at the time of its request. If a party responds that it does not want to participate in the Section 106 process, or does not respond for an extended period, the NRC would discontinue sending it further information until the NRC staff receives a request (e.g., an e-mail or phone call from an official to an NRC project manager) indicating the party wants to be a consulting party. In such cases, the NRC staff would start consulting with the party from the current step of the Section 106 process at the time of its request.

This language creates problems for the process in that it fosters delay and lack of closure. A tribe may decide not to be part of the process, only to decide to join the process at a later date, possibly at a point when the parties involved believe the process to be almost complete thereby delaying a conclusion. The process must include clearly defined deadlines and milestones including deadlines for when a group must decide whether to participate or not.

Surveys on Private Lands

Some uranium recovery license applicants possess substantial leased land holdings that are on private property (fee ground). The document states:

The NRC staff has used an open-site approach for conducting field surveys for tribal site identification. Other federal agencies have also used the open-site approach. This approach involves providing access to the proposed project site during a specific period for the purpose of site identification. Each consulting party may choose its surveyors to conduct the fieldwork and would prepare and submit a survey report documenting the survey's findings. The NRC staff, however, should use the open-site approach as a starting point and begin communication with the consulting parties on the survey approach to be used.

As stated above, there is no requirement for field surveys, let alone utilization of the open-site approach, as the sole source for identification and should not automatically be referred to when leased land holdings are on private property. These private land holdings held by uranium recovery license applicants may be lands leased from individuals who expressly forbid individuals other than company employees from entering upon their property. These leases may contain conditions that limit access only to very select groups of individuals. In such a situation, how would tribal members be able to access the lands to perform surveys? This could create an untenable situation.

The WMA would also like to stress that private landowners have exclusive rights to any artifacts found on their land and that the *Archaeological Resources Protection Act* covers public lands to "... include lands owned and administered by the United States as part of the National Park Service, National Wildlife Refuge System or National Forest System; all other lands to which fee title is held by the United States; Indian lands; land held in trust by the United States; and land subject to the restriction against alienation imposed by the United States." It does not include private lands.

The document should expressly address the issue of field surveys on private lands and issues related to the completion of the process in the event that private landowners forbid access by tribal survey teams.

Section 6.1

The section states:

The NRC staff should also consider whether the project involves other federal agencies and whether to designate a lead federal agency to carry out the Section 106 process.

The document cites 36 CFR 800.1(a)(2) which is incorrect and should be 36 CFR 800.2(a)(2). While there is no requirement for notification when agencies decide on lead agency arrangements. It would be a best practice to notify the consulting parties of the decision. Without that designation early in the process roles and responsibilities tend to become blurred.

Section 6.2.4 Determination of Eligibility

This section states:

The criteria for eligibility are found in 36 CFR 60.4, "Criteria for evaluation." The criteria for eligibility are:

- (A) association with events that have made a significant contribution to the broad patterns of history*
- (B) association with the lives of persons significant in the past*
- (C) embodiment of distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic*

*values, or that represent a significant and distinguishable entity whose components may lack individual distinction
(D) have yielded, or may be likely to yield, information important in prehistory or history*

To be eligible for listing, the property must meet one of the National Register criteria and exhibit integrity of location, design, setting, materials workmanship, feeling, and association. The site condition is an important factor in the assessment of site integrity.

The document should clearly state that these criteria will be stringently interpreted.

Section 6.4 Resolution of Adverse Effects

The section states:

The invited signatory would have the same rights with regard to seeking an amendment or termination of the agreement.

Applicants are noted to be invited signatories, 800.6(c)(2)(iii) in the document and as such are afforded the flexibility to request amendments 800.6(c)(2)(i). The document should provide guidance on how a request for an amendment will be dealt with such that the applicant is not sidestepped in the process.

Consideration of Other Documents and Information Sources

WMA requests that the Commission consider documents and programs from other agencies such as the Bureau of Land Management's (BLM's) 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 dated February 2012.

WMA also recommends that in the process of preparing guidance, the NRC staff consider the information contained in NEPA and NHPA - A Handbook for Integrating NEPA and Section 106. This handbook was released on March 5, 2013 by the ACHP and the White House Council on Environmental Quality (CEQ) and is designed to help coordinate the required review processes under the NHPA and the National Environmental Policy Act (NEPA).

Specifically, the handbook provides advice on implementing provisions added to NHPA section 106 regulations in 1999 that address both coordination of the NEPA and NHPA section 106 reviews and the substitution of NEPA reviews for the section 106 process. The key concepts for integration of the NEPA and 106 procedures are outlined in the handbook:

- *Integrate the NEPA and section 106 processes as early as practicable.*
- *Educate stakeholders on the benefits of integrating the NEPA processes.*
- *Develop comprehensive planning schedules and tracking mechanisms to keep the NEPA and section 106 processes synchronized.*
- *Develop comprehensive communication plans that specify whether the agency will use coordination or substitution to maximize opportunities for public and consulting party involvement and minimize duplication of effort by agency staff.*
- *Use NEPA documents to facilitate section 106 consultation and use section 106 to inform the development and selection of alternatives in NEPA documents.*
- *Develop an integrated strategy to accomplish specialized studies to provide information and analysis needed under NEPA and section 106.*

- *Complete section 106 and the appropriate NEPA review (categorical exclusion, environmental assessment or environmental impact statement) before issuing a final agency decision.*

Source: Katie Sweeney – National Mining Association (NMA)

Appendix A - How Applicants Can Facilitate the Section 106 Process Prior to U.S. Nuclear Regulatory Commission (NRC) License Application Submittal

This appendix states in part:

Contact and engage the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), other federal (e.g., Bureau of Land Management), state, and local governmental agencies, and Tribal governments, to gather information about historic and cultural resources, as appropriate.

This language fails to acknowledge that tribes are sovereign entities and as such are not required to engage with applicant. According to the ACHP, an agency is allowed, in some circumstances to delegate to its applicants the responsibility to initiate consultation pursuant to the regulations; however, consultation does not apply to the initiation of consultation with Indian tribes unless expressly authorized by the Indian tribe to do so. Indian tribes may choose to meet with applicants that would like to initiate Section 106 early in project planning but they are not required to do so. However, the NRC cannot unilaterally delegate their tribal consultation responsibilities to an applicant nor presume that such discussions substitute for agency tribal consultation responsibilities. This issue should be clearly discussed in the document.

It was discussed in the *Draft Tribal Protocol Manual* when it provided a historical perspective on relationships with the tribes from 1608 to the present, a description of the government-to-government relationship that exists between the Nuclear Regulatory Commission (NRC) and the tribes. This document should be better coordinated with other existing Commission documents.

This appendix also states:

applicants to consider gathering information on historic and cultural resources of significance to Tribes, in addition to archeological resources, when developing the license applications.

Currently license applicants are required to submit this information per NUREG-1569 and NUREG-1748. It may be helpful to cite the requirements in this guidance to avoid duplicative work.

Wyoming Uranium Recovery Industry Suggestion Regarding a Path Forward - A Programmatic Agreement

In the February 20, 2013 Uranium Recovery Commission Briefing, Katie Sweeney, General Counsel of the National Mining Association (NMA), requested the following regarding the Section 106 Process:

- *Creation of a Programmatic Agreement that will:*
 - *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)*

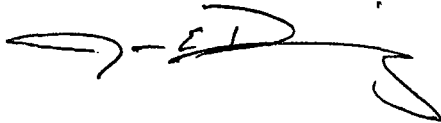
At the same meeting the National Historic Preservation Act and the Section 106 Process was discussed by Anthony J. Thompson of Thompson & Pugsley, LLC. In his presentation he stated:

- *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, shareholder reasonable timelines for licensing*
 - *Tribes can effectively manage the numerous consultation efforts they currently deal with every year.*

Mr. Thompson also discussed a Programmatic Agreement (PA) as a logistical mechanism that could assist in the Section 106 Process. The NRC has invited several tribes to a government-to-government meeting to discuss the licensing process and general uranium milling matters. It would be helpful if the NRC explored the idea of a Programmatic Agreement (PA) with them there as well as early involvement.

The Wyoming Mining Association (WMA) appreciates the opportunity to comment on this document. If you have any questions please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'J. Downing', with a stylized flourish at the end.

Jonathan Downing
Executive Director

Cc: Katie Sweeney – National Mining Association (NMA)