



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

Name of Recipient

Date

Page Four

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

Name of Recipient

Date

Page Six

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.

Name of Recipient

Date

Page Eight

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".

Katie Sweeney