

January 2, 2001

Mr. Richard L. Lawson  
President and Chief Executive Officer  
National Mining Association  
1130 17<sup>th</sup> Street, NW  
Washington, D.C. 20036-4677

Dear Mr. Lawson:

I am responding to your letter of September 18, 2000, in which you raised several concerns related to Commission decisions on uranium recovery activities, including staff efforts to develop a new 10 CFR Part 41. Your specific comments will be considered in the staff's efforts to develop a final rulemaking plan. However, I will address several concerns raised in your letter.

The Commission understands, and is sympathetic to, your concern regarding potential cost impacts that developing a new Part 41 could have on the domestic uranium industry. You note that the number of licensees that would bear the costs of this rulemaking is small and expected to decrease. As a result, the Nuclear Regulatory Commission (NRC) staff will evaluate the appropriateness of proceeding with this rulemaking during development of the final rulemaking plan. After receiving comments from all stakeholders, the Commission will reevaluate, if necessary, its direction to staff to proceed with Part 41.

You also expressed concern that the Commission's decision to treat all *in situ* leach (ISL) effluents as 11e.(2) byproduct material could pose a barrier to reducing duplicative regulation over ISL wellfields. Although we recognize and agree that the potential for dual regulation may occur, dual regulation is not a result of a Commission decision, but is a matter of statutory requirements. Dual regulation in wellfields stems, in part, from overlapping authorities granted by two separate public laws -- the Atomic Energy Act (AEA), which gives authority to the NRC, and the Safe Drinking Water Act (SDWA), which gives authority to the U.S. Environmental Protection Agency (EPA) and the EPA-authorized States. The recent Commission decision concerning non-Agreement State jurisdiction over the non-radiological aspects of 11e.(2) byproduct material did not address the issue of dual Federal regulation and does not impact potential NRC reliance on an EPA or EPA-authorized State program to fulfill NRC statutory obligations under the AEA. Consistent with our past practice, the NRC will recommit itself to working with EPA and those States acting under an EPA-authorized program to lessen the likelihood and extent of dual regulation of 11e.(2) byproduct material. The only other option is to seek legislation that would address the overlap between the AEA and SDWA authority, an option the Commission rejected because of the small likelihood of progress on such a matter.

The recent Commission decision did address the potential for overlapping State/Federal jurisdiction, concluding that under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), a non-Agreement State was preempted from regulating the radiological and non-radiological hazards associated with 11e.(2) byproduct material. This decision should serve to reduce overlapping State regulation. However, State laws may also be in play with respect to matters not involving source or 11e.(2) byproduct material. The need for complementary State and Federal programs is probably inevitable if the Commission is to exercise jurisdiction over any aspect of ISL operations. As a result, the Commission is also committed to seeking to harmonize any overlapping jurisdiction with the affected States to the extent possible.

You also questioned the Commission decision to classify ISL effluents as 11e.(2) byproduct material. In effect, the decision would make National Pollutant Discharge Elimination Standards (NPDES) permits inapplicable to ISL effluents because 11e.(2) byproduct material is exempt from the Clean Water Act of 1977. See 40 C.F.R. §122.2. Your letter asserts that the Commission decision requires licensees to comply with potentially stricter NRC requirements for surface discharges of uranium, rather than the more lenient limits in current Clean Water Act NPDES permits. This concern may reflect some misunderstanding of the flexibility in the NRC's regulations. Two alternatives now exist for licensees discharging 11e.(2) byproduct material to the surface water -- one is to comply with the limits in Table 2 of Appendix B of Part 20, and the other is to demonstrate that the discharges are in compliance with the dose limits for individual members of the public. See 10 C.F.R. § 20.1302(b). The second option merely prescribes that surface discharges comply with nationally recognized dose standards for protection of public health and safety -- a key responsibility of any facility responsible for the safe disposition of nuclear material. We would expect that the second approach might often allow a higher concentration than provided in Table 2.

Your letter states that it appears from the Commission voting record that the only basis for treating the restoration fluids as 11e.(2) byproduct material is that some uranium continues to be removed in an ion-exchange vessel from the restoration fluids. Although this fact was one basis for the Commission's decision to regulate all waste streams associated with ISL activities as 11e.(2) byproduct material, the decision also was based on the fact that an ISL operation is an integrated set of related activities. To create an artificial distinction between those waste streams seen to be "directly" involved with uranium extraction and those that are not would result in a complex, burdensome, and technically suspect regulatory scheme. In fact, the history of NRC actions reveal various unsuccessful attempts to draw defensible distinctions among the continuum of activities that constitute ISL operations. The NMA was justifiably concerned about the effects of these past actions. We believe that our recent decision clarifies the NRC's regulatory authority over various aspects and phases of ISL activities in an unambiguous way and should help to bring some stability to this area of regulatory activity.

Finally, let me address your concern that the logical extension of the Commission's decision is that wastes resulting from efforts to dewater a conventional mine (activities in which water is treated to remove uranium so that it may be discharged under a NPDES permit) should be viewed as 11e.(2) byproduct material. The Commission's decision to treat all waste streams associated with ISL activities as 11e.(2) byproduct material does not necessitate such a conclusion. Although the Commission has comprehensive regulatory authority over waste derived from uranium and thorium extraction activities, that authority does not extend to

uranium mining. See Kerr-McGee v. NRC 903 F.2d 1, 7 (D.C. Cir. 1990).<sup>1</sup> The Commission continues to believe that, although ISL activities are frequently referred to as mining, they are not mining in the conventional sense, but instead represent extraction of source material from of an ore body in a fashion that is in many respects akin to processing. This fact is the fundamental basis for NRC regulation of ISL facilities. Consequently, wastes from dewatering a conventional mine, although perhaps being processed in the same manner as restoration waters at an ISL facility, are not subject to NRC regulation because they are a function of mining, not an aspect of the processing of ore for the express purpose of the extraction of source material. See International Uranium Corporation (USA), 51 NRC at 15-16.

Let me note in conclusion that the Commission is committed to reducing dual regulation in this and other program areas. In its efforts to define an acceptable regulatory framework for uranium recovery activities, the NRC will continue to work with all stakeholders to ensure that its actions are protective of public health and safety and the environment, minimize the potential for and extent of dual regulation, and are cost-effective.

From your letter and other correspondence, I sense there may be concern that the Commission may not fully understand the impact of certain of its decisions. I believe it may be appropriate to conduct a formal Commission briefing to discuss various options for the contemplated rulemaking. We will be in touch with you about the scheduling.

Sincerely,

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Richard A. Meserve

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<sup>1</sup>See also International Uranium (USA) Corp., CLI-00-1, 51 NRC 9, 18 (2000) citing Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 11698, H.R. 12229, H.R. 12535, H.R. 13049, and H.R. 13650 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce, 95th Cong. 400 (1978) (statement of Joseph M. Hendrie, Chairman, NRC).