

**National Mining Association**

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Legal & Regulatory Affairs

May 2, 2000

Mr. Thomas H. Essig,
Uranium Recovery Branch Chief
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Dear Tom:

Enclosed please find the National Mining Association's comments on two Agreement State Guidances relating to Termination of Uranium Recovery Licenses.¹ Comments on these guidances were solicited from Agreement States with authority to regulate uranium recovery operations. Given the Commission's focus on improving communication with stake-holding groups (e.g. November 9, 1999 Commission Meeting with Stakeholders on Nuclear Materials and Waste Activities, No. 99-239), NMA finds it strange that, at a minimum, comment was not sought from *affected licensees* in such Agreement States, not to mention other interested or potentially affected parties. NMA is, therefore, taking the liberty of submitting these comments based on the assumption that the failure to solicit comments from stakeholders other than Agreement States was an oversight rather than an exercise in "selective" stakeholder input and that the Commission will want to improve its Guidance, even at this date. If you have any questions, please contact me at 202/463-2627.

Sincerely,

Katie Sweeney

¹ Guidance to Terminate Agreement State Uranium Recovery Licenses under Requirements of 10 CFR 150.1a(a) and Section 274c. Secy-99-025 (January 25, 1999). OSP Procedural Approval, Termination of Uranium Mill Licenses in Agreement States; SA-900 (April 20, 1999).

**NATIONAL MINING ASSOCIATION (NMA) COMMENTS ON
THE NUCLEAR REGULATORY COMMISSION'S (NRC)
GUIDANCE REGARDING TERMINATION OF URANIUM
RECOVERY (UR) LICENSES IN AGREEMENT STATES**

The Nuclear Regulatory Commission (NRC) published Agreement State Guidance (Guidance)¹ addressing NRC's policy for review and approval of uranium recovery (UR) licenses terminated by Agreement States in accordance with 10 CFR 150.15a(a) and Section 274c of the Atomic Energy Act, as amended. NRC previously stated at numerous NMA/NRC public meetings that its policy was based on the concept that, if NRC Agreement State oversight determined that a State program was in good standing, NRC would not *second guess* a uranium recovery (UR) license termination decision unless it contained obvious and significant flaws or deficiencies. Both Agreement States and licensees were satisfied with that policy.

This policy was apparently challenged by an attorney in the Office of General Counsel (OGC) on the grounds that Section 83 of the Atomic Energy Act (AEA) allegedly requires NRC to review detailed "site specific information" before granting approval of an Agreement State UR license termination decision. NMA finds this interpretation to be somewhat mystifying, since nothing in Section 83 or its legislative history suggests that NRC must review detailed site specific information in order to satisfy the Commission's oversight responsibilities with respect to Agreement State UR license terminations. Moreover, notwithstanding the requirements of Section 274c, in the absence of a more specific directive from Congress, NMA would assume that the Commission has considerable flexibility to set guidelines for its oversight of such Agreement State actions where the Commission has relinquished its jurisdiction to an Agreement

¹ Guidance to Terminate Agreement State Uranium Recovery Licenses under Requirements of 10 CFR 150.1a(a) and Section 274c. Scy-99-025 (January 25, 1999). OSP Procedural Approval, Termination of Uranium Mill Licenses in Agreement States; SA-900 (April 20, 1999).

State. The concept of *relinquishing* federal authority is distinguishable from that of *delegating* federal authority which carries with it the connotation of close oversight and the retention of more responsibility. On the basis of this distinction NRC argued that Agreement State Uranium Mill Licensing was not "a major federal action" requiring a NEPA analysis.² Although Section 274c necessarily diminishes the normal scope of Agreement State Authority in the interests of "a uniform national program" for uranium mills and mill tailings,³ it still does not imply NRC involvement in Agreement state UR license determination decisions on a scale that results in duplicative regulation. Any such involvement in Agreement State regulatory decisions would run counter to longstanding NRC policy and practice. NRC recently explained this in a response to Congressional inquiries regarding NRC/Agreement State authority to regulate the release of slightly contaminated material for unrestricted use, as follows:

"It has never been the Commission's intent, or practice, to place itself into the position of regulating such activities conducted by Agreement State licensees. Any change of policy in this area would require the pervasive involvement by NRC in specific Agreement State licensing activities. This would run afoul of one of the purposes of § 274 of the AEA, which is to promote an orderly pattern of regulation between the Commission and the States in a manner which will avoid dual or concurrent regulation."⁴

In any event, it was determined that the guidance was necessary to define the level of detail the Commission would require for its review of Agreement State license termination decisions. The dilemma posed by the policy shift was to determine how much information and NRC staff review would be necessary to satisfy the statutory requirement in Section 274c

² The Uranium Mill Tailings Radiation Control Act of 1978 and NRC's Agreement State Program; Ellsa J. Grammer, *Natural Resources Lawyer*, Vol. XIII, No. 3 at p. 501.

³ *Id.* at 519.

⁴ Requests and Questions for the Nuclear Regulation Commission, Answer to Question 3A.

without involving the staff in so much detail that the review process essentially "reinvents the wheel" and amounts to blatant second guessing of Agreement State decisions.

The resulting Guidance generally does not appear to require unreasonably burdensome NRC review of Agreement State decisions, even if the OGC interpretation of AEA Section 83 does appear to be a bit of a stretch. It is not unreasonable as a policy matter for NRC to take its Agreement State oversight role seriously in light of the statutory requirement for NRC concurrence in Agreement State UR license termination decisions. If that is what the Commission intends, then the Guidance seems to have identified a reasonable level of review. However, there appear to be some errors or deficiencies that NMA has identified in the Guidance which could lead to confusion or misunderstandings if they are not corrected or clarified. NMA addresses these errors and/or deficiencies in the following specific comments:

- A. In the "Conclusion" section of SECY-99-025, the document states that:
- "[The] Staff will request review and comments on Attachment 3 from *Agreement States* with authority to regulate uranium recovery operations." (emphasis added)
- Given the Commission's focus on improving communication with stake-holding groups (e.g. November 9, 1999 Commission Meeting with Stakeholders on Nuclear Materials and Waste Activities, No. 99-239), NMA finds it strange that, at a minimum, the Staff would not also seek comment from *affected licensees* in such Agreement States, not to mention other interested or potentially affected parties. NMA is, therefore, taking the liberty of submitting these comments based on the assumption that the failure to solicit comments from stakeholders other than Agreement States was an oversight rather

than an exercise in "selective" stakeholder input and that the Commission will want to improve its Guidance, even at this date.

B. The SA-900 Procedure is entitled: "Termination of Uranium Mill Licenses in Agreement States." This title is incorrect or at least ill conceived since SA-900 addresses *in situ* leach (ISL) UR operations which, although having some elements in common with portions of conventional milling, do not share the bulk of the potential health and safety issues associated with uranium mills and uranium mill tailings. This mischaracterization is compounded by the reference in Section III.A of the SA-900 document to the Commission's oversight determination being applicable to "material as defined in 10 CFR. 150.3(c)(2) (*i.e. uranium mill tailings*)" (emphasis added). The regulations at 10 C.F.R. § 150.3(c)(2) pertain to 11e.(2) byproduct material, and the Guidance document itself proceeds to address "11e.(2) byproduct material." Byproduct material as defined in AEA Section 11e.(2) includes uranium mill tailings, of course, but it also includes other wastes that are not *tailings* and that do not pose similar potential threats to public health and safety. This raises the question: is the Guidance attempting to draw a distinction between uranium mill tailings versus other kinds of 11e.(2) byproduct material, or is this merely careless use of terminology on the part of NRC?

NMA suggests that to avoid confusion or misunderstanding within the regulated community and among the interested or affected elements of the public at large, SA-900 and any accompanying SECY documents should distinguish between

uranium mill tailings and other forms of 11e.(2) byproduct material which, as the discussion hereafter will demonstrate, are not necessarily subject to the same disposal requirements⁵. To further facilitate this distinction, the guidance documents should refer to both conventional and ISL facilities as uranium recovery (UR) facilities. For example, SECY-99-025 in the "Background" section refers to a "*non-conventional uranium mill*." Presumably this phrase is intended to refer to an ISL facility; however, it could also be read as referring to a secondary, non-fuel cycle UR operation at a phosphate or other type of mineral recovery facility, which does not generate 11e.(2) byproduct material and does not implicate requirements pertaining either to the transfer of land or the transfer to and disposal of byproduct material in licensed uranium tailings impoundments.

- C. In the same vein, SECY-99-025 and SA-900 both state that "*non-conventional*" uranium mill licensee decommissioning documents must demonstrate that "all contaminated materials have been removed from the site." This statement is incorrect for either type of UR licensee (i.e., either "conventional" or "non-conventional" licensees). Criterion 6(b) of 10 C.F.R. Part 40, Appendix A, provides that site soils which do not contain in excess of 5 picocuries per gram (pCi/g) of radium-226 in the first 15 centimeters (cm) or 15 pCi/g in the second 15 cm and succeeding 15 cm

⁵ For example, NRC states several times in the Generic Environmental Impact Statement (GEIS) for Uranium Milling that the land transfer requirements in §83 only apply to *uranium mill tailings* piles or impoundments (rather than other types of 11e.(2) waste), presumably because long term custodial oversight is not necessarily required for more limited contamination such as that normally found at ISL sites or, more accurately, on *portions of ISL sites*. *Final Generic Environmental Impact Statement on Uranium Milling*, Vol. II (NUREG-0706) at A-118; A-123 (September 1980). See also, *Id* at A-103 ("Also the permanency and size of areas devoted to tailings disposal make the problem of radon exhalation quite different than that from relatively thin layers of contamination, which are expected to dissipate through natural processes in any case.")

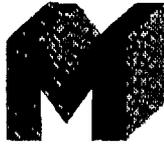
soil horizons (the so-called 5/15 rule), may be released for unrestricted use. If soil levels satisfy this standard without remediation then no such contaminated material (i.e., 11e.(2) byproduct material) need be removed from the site. The recent modifications to Criterion 6 (6) contained in Radiological Criteria for License Termination of Uranium Recovery Facilities (64 Fed. Reg. 17506 (April 12, 1999)) also make it clear that uranium or thorium wastes from production activities may or may not have to be removed from the site.

- D. Additionally, the Guidance here, and elsewhere, fails to reflect the licensee's statutory (§ 84(c)) and regulatory (Introduction to Appendix A) right to propose *alternatives* that provide equivalent or greater protection than NRC, Agreement State or even EPA requirements. For example, homogenizing soils where there is limited surface contamination and appropriate soil and topographic conditions may provide an acceptable *alternative* to removal and disposal based on an appropriate site-specific ALARA analysis. *See, e.g.,* Dr. Elaine Brummett, U.S. NRC Division of Waste Management "Regulatory Approach to Soil Cleanup Verification at Decommissioning Uranium Mill Sites," Waste Management '97 (March 2-6, 1997), ("Staff has also given tentative approval to a proposal to till soil contaminated by windblown tailings in order to meet the Ra-226 cleanup standard. The constraints set by the staff include: fairly flat terrain, uniform low-level surface contamination, and a test plot with extensive surface and subsurface samples to demonstrate that compliance can be achieved.") An ALARA analysis also could be based on

justifications such as those contained in the *supplemental standards* for soil cleanup set forth in 40 C.F.R. 192.21 for Title I sites. *See, e.g.,* memorandum to Robert D. Martin from Hugh L. Thompson, Jr. dated June 27, 1989 regarding Use of Title I Supplemental Standards for Title II Sites; (“We concur that use of criteria like Title I Supplemental Standards established by EPA (40 C.F.R. 192.21) provides an acceptable basis to make the finding [that public health and safety and the environment will be protected.]”)

- E. A comment similar to that set forth in paragraph C., above, is applicable to the statement in the Guidance that a “*non-conventional*” licensee must indicate that the subject site “meets unrestricted release requirements.” This may not be correct, depending on site specific circumstances. For example, NRC’s new “Radiological Criteria for Decommissioning” rule (D&D rule), 62 Fed. Reg. 39058, July 21, 1997, explicitly provides for restricted use limitations as a control component on potential public exposures (10 C.F.R. § 20.1403)⁶.

⁶ UR licensees could propose land use or water use restrictions as a licensee proposed *alternative* in lieu of removal and disposal or in conjunction therewith (e.g., removal and disposal of hot spots and restricted use of large areas of land with lower, more uniform contaminant concentrations). Further, by allowing an Agreement State to waive a fundamental safety component of its low level waste regulations in 10 C.F.R. Part 61.14 for a *commercial low level waste disposal facility*, (i.e., in the case of the Envirocare facility in Utah, the requirement for a long term, government custodian), NRC has gutted the old presumption that the term “decommissioning” means cleaning up for “*unrestricted use*” – particularly for low risk fuel cycle components like ISL UR operations.



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Facsimile Cover Sheet
plus 8 pages

Date: 5/2/00

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