November 2, 2004

Mr. Gary Janosko
U.S. Nuclear Regulatory Commission
MS F 842
Washington, DC 20555-0001

Re: MOU Approach on Groundwater Protection at ISL Facilities

Dear Gary:

As you know, the National Mining Association (NMA) has been extremely supportive of the approach outlined in the Nuclear Regulatory Commission's (NRC) Regulatory Issue Summary (RIS) 2004-02, "Deferral of Active Regulation of Groundwater Protection at *In Situ* Leach (ISL) Uranium Extraction Facilities." Pursuant to that approach, NRC would defer active regulatory oversight of groundwater protection at ISLs to individual states such as Nebraska and Wyoming by entering into memorandums of agreement (MOUs) with each state. NMA is writing this letter because we have heard that the MOU process may have hit a roadblock. Unable to confirm this, we are writing to ensure that if the roadblock exists, that NMA's concerns are heard in a timely manner prior to any final decision.

While the exact status of the MOUs is unclear, we have heard that NRC staff have identified a "legislative concern" during their reviews of the Wyoming and Nebraska state programs. This concern appears to be centered upon the question of whether the state must have a legislative mandate that the primary goal of restoration of the wellfield be restoration to baseline. If this indeed is the staffs' concern, it is unfounded because the water in the mining zone is exempted from consideration as a source of drinking water by the Environmental Protection Agency (EPA) under its underground injection control (UIC) regulatory program. The aquifer exemption is necessary because **the water is not now and cannot be a future source of drinking water due to the mineralization involved.** *See* 40 CFR 146.4. In the case of ISL uranium mines, the primary constituents of concern in the exempted aquifer are uranium, radium and radon. Typically, the levels of these naturally occurring radionuclides make the water in the mining zone unsuitable for use as a drinking water source, indeed, for any use other than mining, prior to mining and after restoration.

NRC appears to acknowledge this in NUREG 1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications" (ISL SRP) which notes:

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> In addition to the NRC license, the EPA Authorized States issue underground injection control permits for *in situ* leaching operations, after the EPA grants an exemption from ground-water protection provisions for the portion of the aquifer undergoing uranium extraction (the exploited ore zone in an aquifer). **The EPA aquifer exemption effectively removes that portion of the aquifer from any future consideration for ground-water protection**; however, the ground-water protection provisions are still in effect for the aquifer adjacent to the exempted area.

ISL SRP at 6-5 (emphasis added).

NRC needs to make the distinction as it does in the SRP between the exempted aquifer and adjacent aquifers. NRC's post-restoration concern regarding potential impacts on adjacent non-exempted drinking water sources is appropriate. It must be remembered however, that EPA or the authorized state agency in an UIC delegated state has the authority to require a licensee or a UIC permitee to remedy any adverse impacts on non-exempted adjacent drinking water sources. Thus, although UIC regulations do not require restoration and do not provide EPA with the authority to require restoration, the fundamental concern is addressed — that being, the protection of non-exempted adjacent drinking water sources.

It makes no sense to have a primary goal of restoration to baseline for an exempted aquifer. The ISL SRP states that "the primary purpose of restoring the ground-water quality in a well field after the completion of uranium extraction operations is to assure the protection of public health and the environment". ISL SRP at 6-5. As NMA has commented previously (including comments on the ISL SRP), given that once an aquifer is exempted by EPA, it is never going to be a drinking water source in the future, how does attempting to restore the exempted aquifer to baseline protect public health and the environment? How could such a requirement be risk-informed? NRC cannot rely on *potential* impacts to adjacent aquifers to bootstrap the position that exempted aquifers should be restored to baseline. As noted above, there are adequate existing methods to protect adjacent aquifers. Also, restoring to baseline may be exceedingly expensive with any corresponding benefits to public health and safety (e.g., as is the case where baseline is below EPA maximum contaminant levels). In addition, as NMA has conveyed previously, having regulatory "goals" is not good regulatory policy.

To the extent that NRC staff's concern arises from a comparison of the ISL SRP and the state programs, NRC must remember that "review plans are not substitutes for the Commission's regulations, and compliance with a particular standard review plan is not required." ISL SRP at xviii and 6-1. Therefore, the state programs should not have to be identical to the ISL SRP for a satisfactory MOU to be developed.

The MOUs are needed to eliminate unnecessary dual regulation of ISL facilities, as dual jurisdiction significantly increases the costs for uranium producers and is a waste of licensee, NRC, and state resources. But, if, in fact, NRC intends to condition MOU approval on states having a primary goal of restoration to baseline, NRC should consult with affected licensees to determine whether there is adequate support to continue with the MOU approach.

If you have any questions, please contact me at 202/463-2627.

Sincerely,

Katie Sweeney

Katie Sweeney
Associate General Counsel