COMJSM-06-0001

January 17, 2006

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Jaczko
Commissioner Lyons

FROM: Jeffrey S. Merrifield ***/RA/***

SUBJECT: REGULATION OF GROUNDWATER PROTECTION AT *IN SITU* LEACH URANIUM EXTRACTION FACILITIES

Concerns regarding the dual regulation of groundwater protection programs at *in situ* leach (ISL) uranium recovery facilities have been debated at the Commission level since the late 1990's. The Commission's last significant direction to the staff on this issue was in response to SECY-03-0186, "Options and Recommendations for NRC Deferring Active Regulation of Ground-water Protection at *In Situ* Leach Uranium Extraction Facilities." In a Staff Requirements Memorandum dated November 19, 2003, the Commission directed the staff to pursue memoranda of understanding (MOU) that would allow the NRC to defer regulation of groundwater protection at ISLs to non-Agreement States[1] with appropriate groundwater protection programs as authorized by the U.S. Environmental Protection Agency (EPA). A recent series of memos from the staff indicate that such MOUs may be more difficult to achieve than originally anticipated.

It is my belief that the manner in which the NRC currently regulates this group of licensees is both complex and unmanageable. While the staff has done its best to regulate ISL licensees through the generally applicable requirements in Part 40 and imposition of license conditions, our failure to promulgate specific regulations for ISLs has resulted in an inconsistent and ineffective regulatory program. We have been attempting to force a square peg into a round hole for years, and I believe we should finally remedy this situation through notice and comment rulemaking. In developing a proposed rule, the staff should formulate a regulatory framework that is tailored specifically to this unique group of licensees. The staff should especially focus on eliminating dual regulation by the NRC and EPA of groundwater protection that is currently taking place. To achieve this, the NRC should retain its jurisdiction over the wellfield and groundwater under its Atomic Energy Act authority, but should defer active regulation of groundwater programs to the EPA or the EPA-authorized state through EPA's underground-injection-control permit program. During this rulemaking effort, the staff should actively engage interested stakeholders through public workshops and should request that EPA and EPA-

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[1]Non-Agreement States in this context refers to a State which does not have authority to regulate 11e(2) material through a specific agreement with NRC. It is possible to be an NRC Agreement State through agreements to regulate other materials areas and not have authority over 11e(2) material. Where such agreements exist, those states would be considered non-Agreement States for the purpose of this COMJSM.

authorized states work closely with the staff to ensure an acceptable outcome for all affected parties.

With this in mind, the staff should meet with licensees and other interested stakeholders to discuss the implementation of the following short term solution:

1) Pursue MOUs with Wyoming and Nebraska through which the states would agree to uphold current NRC regulations and license conditions, and

2) Exercise enforcement discretion to allow current licensees to meet state groundwater requirements in lieu of alternative conditions that may exist in their licenses. This will allow them sufficient time to prepare license amendment requests to revise or eliminate such conditions and provide an effective regulatory framework for states to assume oversight of ground-water protection programs.

I would expect the staff to keep the Commission informed regarding their progress on achieving this interim solution, as well as provide the Commission with a time line and resource estimates for completion of the suggested rulemaking. In addition, the staff should consider taking this rulemaking activity off of the fee base. While the cost of the rule would be passed onto a small group of our current licensees, the recent rapid rise in uranium prices and mining claims would indicate a significant future potential for new ISL facilities. I do not think it would be appropriate to require current licensees to subsidize an effort that may have substantially greater benefit for future licensees.