

From: Travis Stills <emlc@frontier.net>
To: "Jeff Parsons" <wmap@igc.org>, <URLGEIS@nrc.gov>
Date: 11/30/2007 3:38:39 PM
Subject: GEIS Comments

Dear Chief,
Please find attached (in pdf format) public scoping comments on the NRC's "Generic Environmental Impact Statement For Uranium Milling Facilities."

Please confirm your receipt of this e-mail and your ability to open the attached comments. Upon your request, I can also provide a paper copy for your records.

Should you have any questions or would like to discuss this matter further, please do not hesitate to call.

Sincerely,
Travis Stills

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by e-mail attachment (pdf)

Chief, Rules Review and Directives Branch

Mail Stop T-6 D59

U.S. Nuclear Regulatory Commission

Washington, D.C. 20555-0001

urlegeis@nrc.gov

RE: Scoping Comments on Generic Environmental Impact Statement

Dear Chief:

These scoping comments are filed on behalf of the following organizations and individuals, with the contact person indicated in parenthesis:

Biodiversity Conservation Alliance (Suzanne Lewis)
Center for Native Ecosystems (Megan Corrigan)
Center for Water Advocacy (Harold Shepherd)
Colorado Citizens Against ToxicWaste, Inc. (Sharyn Cunningham)
Colorado Environmental Coalition (Chad Kennard)
Cole and Kara-Lynn Crocker-Bedford
EARTHWORKS (Gwen Lachelt)
Information Network on Responsible Mining (INFORM) (Brian Farnsworth)
Red Rock Forests (Terry Shepherd)
San Juan Citizens Alliance (Mark Pearson)
Western Colorado Congress (Robert M. Bradway)
Wyoming Outdoor Council (Bruce Pendery)

Full addresses and contact information for each group is provided in Appendix A.

Each of these public interest organizations (and their members) is impacted by the Nuclear Regulatory Commission's ("NRC") loosely defined rulemaking and/or licensing actions that are cryptically identified in the August 21, 2007 scoping notice. *See* 72 Fed. Reg. 50414 (*revised* September 27, 2007, 42 Fed. Reg 54947). Although the proposed agency actions are not clearly defined, what does appear clear is that the NRC contemplates issuing full and partial approvals for several major federal actions pursuant to the NRC (and/or Agreement State) authority and control set forth in the Atomic Energy Act, among other laws. However, these "numerous license applications" are not identified with any specificity, leaving the public to hypothesize on what action may be taken under the "GEIS." As set forth in more detail below, the NRC has

proposed a patently unlawful NEPA process which should be terminated before any further public resources are wasted.

Although the NRC has proposed taking some action, the vague scoping notice does not support the NRC's initiation or completion of any decisionmaking process that complies with the reasoned decisionmaking requirements of the Administrative Procedures Act and the procedural requirements of the National Environmental Policy Act, Atomic Energy Act, Federal Land Policy and Management Act, National Forest Management Act, Endangered Species Act, Clean Air Act, Clean Water Act, Safe Drinking Water Act, or any other substantive provision of federal law meant to address, minimize, and eliminate unnecessary impacts to the environment. Further, although much of NRC's loosely defined federal action is likely to take place in the Western United States, the scoping notice improperly ignores potential impacts to unique conditions of land tenure - split estate lands, public lands, and Indian Country – that dominate the Western landscape.

Because the current GEIS process fails to initiate a legally tenable NEPA process, these organizations respectfully request that the NRC withdraw the existing notice and publish a new scoping notice that identifies the actual federal actions that are under consideration, the actual location of such proposals, and the purpose/need for such federal actions. By identifying the actual licenses, potential rulemaking, and other decisions currently being considered by NRC for inclusion in a programmatic NEPA process (or processes), a reasoned decisionmaking process that complies with applicable law can ensure that the Atomic Energy Act is implemented in a manner that serves the public interests and the federal environmental policies identified in NEPA and other federal, tribal, state, and local laws.

Actions Potentially Under Review

The GEIS scoping notice is quite vague on what “federal action(s)” the NRC may be considering within this NEPA process. However, the NEPA regulations require that all “[a]gencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined.” 40 C.F.R. §1502.4(a). Without some identification of the NRC's actual purposes and the need for these vaguely defined agency actions in the GEIS notice, it is impossible for the general public to submit informed comments. *See* 10 CFR§ 51.27 (ii)(requiring that the scoping notice describe the proposed action). Thus, the vague scoping notice provided by NRC is contrary to NEPA regulations, which require information to be provided early in the NEPA process and in a manner that promotes informed public involvement. 40 CFR § 1501.2, 1501.7.

The most clear statement of the scope of the “GEIS” is found on an NRC website which states that: “The NRC is preparing a generic environmental impact statement in anticipation of numerous requests for in-situ leach(ISL) uranium milling facilities.” (nrc.gov/materials/fuel-cycle-fac/licensing.html – October 16, 2007). However, publicly available internal NRC records also indicate that the NRC staff, with considerable consultation and advice from the regulated industry and industry trade groups, have coordinated some type of undisclosed broader plan for the currently-noticed NEPA process. The possible federal actions that the NRC might use the GEIS to demonstrate NEPA compliance, as indicated in the internal NRC records, include:

- rulemaking on *in situ* leaching (“ISL”) processes
- rulemaking on so-called “alternate feed” definitions
- rulemaking to create a tiered decisionmaking process on ISL licensing decisions
- blanket approval of approximately fourteen to nineteen pending or expected ISL license applications
- blanket approval of approximately four conventional mill restart requests
- rulemaking to coordinate NRC’s environmental programs
- rulemaking regarding groundwater standards
- Establishment of a National Source Tracking System (NSTS)

The vague statement of agency action in the scoping notice, when compared with the list of actions being discussed among NRC staff and the regulated industry in the NRC’s publicly available agency records, is inconsistent with the informed and open decisionmaking process required by NEPA. In any event, because the scoping notice does not identify any federal action or define any proposal with specificity, the scoping notice must be withdrawn and reissued in a manner that identifies proposed actions, including: 1) rulemaking proposals, 2) licenses under consideration, 3) other agency actions requiring NEPA analysis.

As NRC has long recognized, only the first category – broad rulemaking – is eligible for consideration in a “generic” EIS, and only then with significant bounding on the scope of the analysis and future use of the GEIS in the NEPA process. A scoping notice that describes the agency actions with the required specificity will likely reveal that a programmatic/cumulative EIS - with subsequent site-specific NEPA analysis in further EISs - is required for many, and perhaps all, of the agency actions being contemplated by the NRC’s vague scoping notice.

GEIS v Programmatic EIS

The NRC scoping suggests that future NEPA analyses of actual license proposals will be satisfied and/or foreclosed by the “generic” EIS. This abstract/generic approach to making site-specific licensing decisions has been rejected by the NRC, as confirmed by the Supreme Court. Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87 (U.S. 1983). As the Supreme Court observed when reviewing a series of NRC rules that abandoned a set of NRC interim rules that would have foreclosed future analysis and consideration of certain environmental, socioeconomic, cumulative effects, and health effects by AEA licensing boards:

The key requirement of NEPA, however, is that the agency consider and disclose the actual environmental effects in a manner that will ensure that the overall process, including both the generic rulemaking and the individual proceedings, brings those effects to bear on decisions to take particular actions that significantly affect the environment.

Congress did not enact NEPA, of course, so that an agency would contemplate the environmental impact of an action as an abstract exercise. Rather, Congress intended that the “hard look” be incorporated as part of the agency’s process of deciding whether to pursue a particular federal action.

Balt. Gas & Elec. Co. v. NRDC, 462 U.S. 87 (U.S. 1983)(*emphasis added*). The currently noticed GEIS is exactly the abstract exercise that the Supreme Court and the NRC have rejected as failing to adhere to NEPA.

First, the CEQ regulations implementing NEPA do not contemplate the use of a “generic” NEPA analysis to analyze NRC staff’s undeveloped regulatory changes or industry’s undisclosed project proposals, opting instead for tiering concepts and programmatic (comprehensive) EISs. 40 C.F.R. § 1502.4 NRC’s reliance on hypothetical analysis where actual proposals exist is problematic and should be abandoned in favor of well-established NEPA procedures for conducting and completing the “NEPA process” based on actual proposals and alternative courses of action.

Second, it appears that the NRC is attempting to address the NEPA requirements related to actual industry plans and foreseeable license applications in the abstract, separate from the actual site-specific conditions that are revealed in the lists compiled by NRC’s staff to track pending and likely license applications.

However, the scoping notice asserts a generic approach that is not recognized in context of industry requests for NRC approval of specific license applications which have been discussed with NRC staff:

Because there are environmental issues common to ISL milling facilities, the NRC staff will be addressing these common issues generically to aid in a more efficient environmental review for each separate license application, if and when these applications are submitted.

72 Fed. Reg. 50414. Because NRC has been alerted to many actual applications and imminent plans to submit ISL license applications, these applications must be identified with specificity in a “comprehensive EIS” scoping notice that recognizes that these proposals must be analyzed as part of a comprehensive NEPA analysis. As a matter of fairness to those members of industry and the public who have not been part of the day-to-day NRC planning of this GEIS, a new scoping notice should include these known proposals while also inviting the industry and the public to submit license applications (and other proposals) for examination in a “comprehensive EIS” that analyzes the site-specific and cumulative impacts of these federal actions in a single, comprehensive analysis.

In contrast to the abstracted, generic approach proposed by the NRC, the Supreme Court recognized that a comprehensive EIS may be required in a situation such as is described in the scoping notice:

"[NEPA] may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. [...] By requiring an impact statement Congress intended to assure such consideration during the development of a proposal or--as in this case--during the formulation of a position on a proposal submitted by private parties. A comprehensive impact statement may be necessary in some cases for an agency to meet this duty."

Kleppe v. Sierra Club, 427 U.S. 390, 409 (1976). (footnote omitted). In determining whether a comprehensive NEPA document—also known as a programmatic EIS—is necessary, the Court considers "the extent of the interrelationship among proposed actions and practical considerations of feasibility." *Id.* at 412. Because NRC must conduct the NEPA-required "hard look" for these proposals (individually and cumulatively), reducing the necessary NEPA process to merely "addressing the common issues generically" and in the abstract is unlawful. Although the NRC does have options to address the feasibility and allocation of licensee expenses, the resulting NEPA analysis must comport with the NRC's "hard look" duties, as mandated by NEPA.

Also, the NRC should consider initiating a rulemaking that incorporates a NEPA "tiering" concept to examine certain, well-defined aspects of the NRC's program-level decisions in a programmatic EIS and which then takes a "hard look" at the pending and anticipated license decisions. Proper use of a tiering concept may delay the analysis until a site-specific NEPA process can be completed for each license application. Of course, whether these "tiered" site-specific decisions will require an EA or an EIS will be based on whether or not a particular project includes "significant" impacts. Nevertheless, in order to satisfy the public participation requirements of the NEPA process, the second NEPA tier will require meaningful opportunities for public participation and comment on the scope of the analysis and on a draft site-specific NEPA document.

In sum, the NRC and Agreement States may not use a GEIS to examine these issues in the abstract, but may use the "tiering" concept to connect a programmatic NEPA examination of licenses to subsequent NEPA analyses in order that each NEPA tier may "focus on issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe." 40 C.F.R. § 1508.28. In contrast to the NRC's GEIS proposal, Court's regularly recognize careful use of "tiering" as a legitimate NEPA concept.

Tiering of a national program like the repository at Yucca recognizes the reality that its completion involves many separate sub-projects and will take many years. The agency evaluates each sub-project as it becomes ready and that evaluation can be done with "subsequent narrower statements or environmental analyses." 40 C.F.R. § 1508.28.

Nevada v. DOE, 372 U.S. App. D.C. 432 (D.C. Cir. 2006)(analyzing whether site-specific factual setting required EIS or EA). Unfortunately, it appears that the NRC has already violated NEPA by pre-determining the outcome of the second tier by announcing that "site-specific environmental assessments" will be tiered to the GEIS and "issued for public comment." 72 Fed. Reg. 54947. The NRC announcement is consistent with numerous agency records that reveal a coordinated attempt between NRC staff and the industry to avoid the preparation of any further site-specific EISs.

Regardless of the actual federal actions that may be under consideration by the NRC and industry in the present NEPA process, the NRC cannot lawfully determine that all future ISL licensing decisions will be conducted under the rubric of this GEIS followed by a EA/FONSI that fails to include public review at the scoping and drafting stages. Appropriate levels of site

specific analysis and “hard look” must take place at both the program and site-specific NEPA tiers in order to address both the cumulative impacts and the site specific impacts of the actual, pending federal actions. The current NRC formulation of GEIS/EA/FONSI would violate the need to make a determination at each NEPA tier as to whether or not the actual proposal and the site specific factors of any particular license would meet the “significance” threshold and would disregard the fact that even where an EA is used, it must satisfy those substantive and procedural aspects of the NEPA process that were not addressed with particularity in the programmatic EIS.

Because the current GEIS scoping notice is unlawfully vague and has unlawfully pre-determined that NRC will rely upon EAs at the site-specific tier, the current notice must be pulled and reformulated in accordance with well-accepted NEPA procedures. Until the NRC proposes actual rulemaking and/or identifies the site-specific and program-level decisions under consideration, there is no opportunity for meaningful public participation on any NEPA tier or possible rulemaking EIS that may be under consideration by NRC. That said, a cumulative or programmatic EIS that analyzes pending and anticipated industry license applications and actual NRC proposals for rulemaking to address problems posed by ISL would be a welcome approach to remedy the problems with NRC’s outmoded and untenable regulations and decisionmaking processes related to the current wave of nuclear fuel cycle activities, including pending ISL licenses and proposals for production of uranium yellowcake from a variety of questionable materials by a number of questionable means (alternate feed, mobile leaching, etc.).

In sum, should the NRC decide to pursue a lawful NEPA process, a new scoping notice is required to alert the public, Agreement States, and other governmental entities of the specific “federal actions” under consideration and the manner in which NRC intends to complete the NEPA process for each federal action.

Scope of NEPA Analysis

In contrast to the NRC’s proposed GEIS, the Colorado and Utah and other Agreement State Programs, the NRC’s direct regulation under the AEA in New Mexico and Wyoming, and the interested public throughout the Western United States would benefit from a programmatic EIS that fully analyzes the ISL technology in context of the pending applications and NRC’s reasonably foreseeable development scenario.

As stated above, new scoping notice(s) must be issued for the specific program-level federal actions under consideration, along with comprehensive analysis of ISL license requests. Any such NEPA process must identify the following concerns, along with alternatives and mitigation measures that address each of these concerns:

- the suitability of ISL, conventional mining and other technologies by District Major Uranium Play Districts in the United States
- a reasonably foreseeable development scenario for federally-owned uranium deposits
- impacts of each type of ISL technology currently used and under development
- transportation impacts
- how licensing costs will be distributed to licensees

- coordination and inclusion of relevant government agencies, including federal agencies, Tribal governments, state agencies, agencies charged with carrying out Agreement State programs, county governments, local governments, etc.
- issues associated with “agency capture” and the Federal Advisory Committee Act
- problems associated with NRC’s fee-based regulatory structure
- existing impacts on groundwater, including actual data and analysis of the existing impacts of ISL licensees on groundwater
- impacts of processing uranium-bearing solutions
- impacts of processing resins
- protocol for establish background levels for all radiological and hazardous constituents according to relevant medium (i.e. water, air) and exposure pathway
- NRC’s existing list of companies that intend to pursue either ISL and/or conventional licenses
- NRC’s existing list of companies that intend to pursue restart licensing
- procedures for considering licensing requests that span two states
- levels of coordination, analysis, and public outreach required for completion of the NEPA process for individual license decisions (currently identified and future applications)
- personnel and resources required to do site-specific environmental impact statements for all of the expected ISL uranium recovery applications
- reasonable estimates of time required for licensing decisions based on the NRC’s current budget and staffing levels
- need for clean-up, decontamination, and reclamation
- definitions of “remoteness” for use in mill and ISL licensing proceedings
- anticipated total amount of permanent federal oversight required by current applications
- impacts of surface disturbance and infrastructure on wildlife and vegetation, particularly threatened, endangered and sensitive species

Because scoping is meant to identify pertinent issues and include interested government and the public as soon as possible during the NEPA process, the NRC staff is welcome to use these comments in re-issuing scoping notice(s) with the required specificity regarding the federal action(s) under consideration. At such time, comments will be provided that address the NRC’s concrete, reviewable proposals for agency action(s). Again, the NRC must halt expending resources in hypothetical exercises where real impacts exist that demand real analysis.

Conclusion

Although the vaguely NRC actions and proposals are at the early NEPA scoping stage, the public deserves (and NEPA requires) the NRC to publish a lawful scoping notice that identifies the federal actions that the NRC is considering within this NEPA process. As stated above, the purposes and policies of NEPA, including informed decisionmakers and public participation, are best served by withdrawing the vague notice. Instead of an unlawful and abstracted examination of the pending ISL proposals and numerous other issues that have been discussed between NRC staff and the regulated industry, a concrete notice that identifies actual license actions and rulemaking proposals must be provided.

Please feel free to contact me, or any of the groups on whose behalf these comments have been submitted, if you have any questions regarding these comments.

Sincerely,

s/Travis E. Stills

Travis Stills
Managing Attorney
Energy Mineral Law Center

s/Jeff Parsons

Jeff Parsons
Senior Attorney
Western Mining Action Project

APPENDIX A – CONTACT INFORMATION

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