
From: Sweeney, Katie [KSweeney@nma.org]
Sent: Wednesday, May 06, 2009 12:56 PM
To: Bill VonTill; Stephen Cohen
Cc: cpugsley@athompsonlaw.com; Glenn Catchpole
Subject: Comments on Pre-Licensing Construction Activities Generic Communication
Attachments: signed final preconstuction ris comments.pdf

Bill, Steve,

Attached are the joint comments of Uranerz Energy Corporation and the National Mining Association on NRC's "Proposed Generic Communication; Pre-Licensing Construction Activities at Proposed Uranium Recovery Facilities." Please contact me if you have any questions.

Katie Sweeney

General Counsel
National Mining Association
101 Constitution Avenue, NW
Washington, DC 20001

202/463-2627

ksweeney@nma.org

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Thread-Index: AcnOa5NPAIBMikp1SqmeQwTBdao8ug==

From: "Sweeney, Katie" <KSweeney@nma.org>

To: <Bill.VonTill@nrc.gov>,

"Stephen Cohen" <Stephen.Cohen@nrc.gov>

CC: <cpugsley@athompsonlaw.com>,

"Glenn Catchpole" <gcatchpole@uranerz.com>

Return-Path: KSweeney@nma.org

May 6, 2009

United States Nuclear Regulatory Commission
Attn: Mr. Bill von Till, Chief
Uranium Recovery Licensing Branch
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and Environmental
Management Programs
Mail Stop T-8F5
Washington, DC 20555-0001

Dear Mr. von Till:

By this letter, the National Mining Association (NMA) and Uranerz Energy Corporation (Uranerz) (hereinafter the “undersigned”) hereby submit comments on the United States Nuclear Regulatory Commission’s (NRC’s) *Proposed Generic Communication; Pre-Licensing Construction Activities at Proposed Uranium Recovery Facilities* (hereinafter the “RIS”). NMA is the national trade association representing the producers of most of America’s coal, metals, including uranium, industrial and agricultural minerals; the manufactures of mining and mineral processing machinery, equipment and supplies; and engineering, transportation, financial and other businesses that serve the mining industry. NMA’s uranium recovery members include current conventional and/or in situ leach uranium recovery (ISL) licensees, as well as potential future conventional and/or ISL license applicants. Uranerz is listed as a separate signatory to these comments as it is not a member of NMA.

The following comments of the draft RIS will be divided into three (3) sections: (1) Introduction and Background; (2) General Comments; and (3) Specific Comments.

I. INTRODUCTION AND BACKGROUND

Prior to the issuance of this draft RIS, on November 18, 2008, members of the uranium recovery industry met with NRC Staff and presented a White Paper and accompanying slide presentation demonstrating that, based on the administrative rulemaking record and associated historical factors at the time they were developed, NRC regulations governing pre-licensing site construction at 10 CFR § 40.32(e) were not intended to apply to in situ leach uranium recovery (ISL) facilities. First, the administrative rulemaking record for Part 40.32(e) very specifically addressed conventional uranium milling facilities as the Part 40 *uranium recovery* facilities that would not be permitted to engage in pre-licensing site construction due to the potentially

significant long-term impacts associated with facility construction. The potentially significant long-term impacts addressed included the “irrevocable and irretrievable” commitments associated with uranium mill tailings impoundments as low-level waste disposal sites subject to perpetual governmental oversight and control. Second, industry noted that, at the time Part 40.32(e) was promulgated, ISL operations were not conceived of as a significant contributor to domestic uranium production and, thus, were not the subject of any uranium recovery rulemaking or significant agency analyses, including specifically the analyses contained in NRC’s NUREG-0706 entitled *Generic Environmental Impact Statement on Uranium Milling*, which provided the analytical support for Part 40, including Part 40.32(e), and Appendix A uranium milling regulations.¹ Third, as a practical matter, ISL operations are the lowest risk licensed activity in the nuclear fuel cycle and do not result in any potentially significant long-term impacts to public health and safety or the environment, much less *any* potential “irrevocable and irretrievable” impacts. Indeed, at the time of license termination, ISL project sites are decommissioned and decontaminated (D&D) for unrestricted use. Accordingly, industry offered NRC Staff a *rationale* for approving certain types of pre-licensing site construction similar to that used in 10 CFR Part 50 for limited work authorization (LWA) permits for nuclear power reactors. While industry *did not* argue that the Part 50 LWA regulations directly applied to Part 40 facilities, industry asserted that an LWA-like rationale utilizing three “tiers” of activities could be employed, each of which would require different authorizations: (1) Tier 1 activities require no NRC approval; (2) Tier 2 activities require NRC Staff approval; and (3) Tier 3 activities would not be permitted prior to the issuance of a license.

At that November meeting, NRC Staff stated that it was their conclusion that, as matter of law, Part 40.32(e) does apply to pre-licensing site construction at ISL facilities, because the definition of “uranium milling” in 10 CFR § 40.4 applies to any activity that creates 11e.(2) byproduct material. Further, NRC Staff stated that, since Part 40 does not have any regulatory provisions for an LWA process, such a process could not be used and an applicant would be required to request a specific exemption pursuant to 10 CFR § 40.14(a) for any pre-licensing site construction activities beyond the site suitability and pre-construction environmental monitoring permitted by Part 40.32(e).

NRC Staff then indicated its intent to publish a RIS to present its interpretation of the regulations governing pre-licensing site construction for Part 40 licensees and to solicit public comment on such interpretation. The industry representatives then volunteered two observations: (1) the impetus for the industry White Paper and meeting regarding the application of Part 40.32(e) was based on NRC informing three new license applicants that final decisions on their applications would be delayed until they could be tiered off the final Generic Environmental Impact Statement (GEIS) for ISL facilities (ISL GEIS). Accordingly, allowing certain types of pre-licensing site construction activities on a timely basis would provide significant timing and cost benefits for ISL license applicants dealing with short construction seasons in geographic locations, such as Wyoming and South Dakota and (2) that, to be useful, the RIS should provide some

¹ United States Nuclear Regulatory Commission, NUREG-0706, *Generic Environmental Impact Statement on Uranium Milling*, (1980).

generic guidance to potential applicants for an exemption for pre-licensing site construction activities. As a result, industry understood upon leaving the meeting that NRC Staff was going to move expeditiously to publish an RIS and that it was agreed that it would be a good idea to provide generic guidance for use by potential Part 40.14(a) specific exemption applicants.

In December of 2008, the Commission scheduled a briefing on uranium recovery issues at which time NRC Staff presented testimony on a variety of such issues, including industry and NRC Staff views on pre-licensing site construction. At this briefing, NRC Staff reiterated its position that Part 40.32(e) applies to ISL facilities and that ISL license applicants must obtain a Part 40.14(a) specific exemption prior to engaging in pre-licensing site construction activities. In response to NRC Staff's position, the Commission suggested that it was worth exploring a potential rulemaking to amend Part 40 to include provisions for an LWA-like approach to pre-licensing site construction. Further, while regulation by exemption is not encouraged, the Commission stated that allowing pre-licensing site construction activities under a specific exemption would be an acceptable approach given NRC Staff's current legal position on Part 40.32(e).² Subsequently, the Commission issued a Staff Requirements Memorandum (SRM) in which it stated that, "[t]he staff should budget resources to provide the Commission with a proposed rulemaking to revise 10 CFR 40.32 to determine whether limited work authorization provisions are appropriate for in-situ uranium facilities."

Then, on March 27, 2009, NRC Staff issued a Federal Register notice requesting public comment on the draft RIS. The draft RIS proposes that NRC Staff address requests for approval to proceed with pre-licensing site construction using NRC regulations at 10 CFR § 40.14(a) for specific exemptions because, as stated above, NRC Staff disagrees with industry's argument that 10 CFR § 40.32(e) does not apply to ISL facilities, and an LWA-like approach cannot be applied to uranium recovery facilities, because there are no Part 40 regulations authorizing such an approach. The draft RIS states that a uranium recovery license applicant must submit an application for a specific exemption and must "specify the particular activity, the purpose and need for the activity, the duration of the activity, and the potential impacts to human health and the environment."³ The draft RIS also specifies that certain proposed activities in an application for a pre-licensing site construction specific exemption may be subject to an environmental assessment (EA) pursuant to 10 CFR Part 51 and applicable guidance. In addition, the draft RIS states that, "any construction activities performed by the applicant

² For example, during the briefing, Chairman Klein stated, "I think exemptions have a place in our policies and that is we shouldn't...rule by exemptions. But on the other hand, we should not rule them out because we're not so robotic that we can't think and can't take actions on specific requests." In addition, Commissioner Lyons stated that, "[r]ecognizing that rulemaking will take a long time, however, I don't object to doing it on an exemption basis until rulemaking could be accomplished." See United States Nuclear Regulatory Commission, *12/11/08 Commission Meeting: Briefing on Uranium Recovery*, (December 17, 2008).

³ See United States Nuclear Regulatory Commission, *Draft Regulatory Issue Summary 2009-xx, "Pre-Licensing Construction Activities at Proposed Uranium Recovery Facilities* at 7 (March 27, 2009).

under an exemption and prior to the issuance of a license are performed at the applicant's risk."⁴ Other than these statements, neither the Federal Register Notice nor the draft RIS provide potential specific exemption applicants with *any* guidance regarding the content of specific exemption requests.

After the release of the draft RIS, members of industry participated in a telephone conference with NRC Staff during which it was stated that the draft RIS could not offer any specific guidance as to what should be included in any Part 40.14(a) specific exemption application or what types of activities would be authorized under such exemptions because they did not want to "prejudge" the proposed rulemaking requested by the Commission. When asked what relevance industry's comments on the draft RIS would have in order not to "prejudge" the anticipated rulemaking, NRC Staff nevertheless requested that industry to submit comments pursuant to the aforementioned Federal Register notice. Pursuant to that Notice, the undersigned hereby submit the following comments.

II. GENERAL COMMENTS

A. In keeping with both the philosophy of *flexibility* built into the 10 CFR Part 40, Appendix A Criteria and the Commission's explicit policy of employing risk-informed regulatory oversight throughout NRC's entire regulatory regime, regulation of the lowest risk activity in the nuclear fuel cycle should not be based on rigid interpretations of regulatory requirements. The entire discussion of the scope of Part 40.32(e) is a part of a broader and increasingly important and relevant series of issues associated with the application of Part 40 requirements, including Appendix A Criteria, to ISL licensees. It cannot be questioned that the analyses in the 1980 GEIS and the Appendix A Criteria promulgated based thereon were aimed at conventional uranium milling facilities and not ISL facilities, whether such ISL facilities engage in licensed activities that the Commission now defines as "uranium milling" or not.⁵ It also cannot be questioned that NRC has applies Part 40 requirements and Appendix A Criteria, as relevant and appropriate, to various aspects of ISL operations through license conditions. (e.g., Criterion 9 regarding financial assurance). The result of this case-by-case application of Part 40 and Appendix A to ISL facilities has been and probably will continue to be a certain amount of regulatory confusion and inconsistency on the part of both NRC Staff

⁴ *Id.*

⁵ *See generally* Industry White Paper. In addition, NRC's July 9, 2007, COMSECY-07-0015 specifically states, "NRC conforming regulations are in 10 CFR Part 40, Appendix A. Both 10 CFR Part 40, Appendix A and 40 CFR Part 192 *focus primarily on conventional mills, with little reference to ISL uranium facilities. As a result, NRC has been regulating groundwater protection at ISLs primarily through license conditions.*" (emphasis added). In addition, the Commission direction in an SRM regarding SECY-99-011 to NRC Staff for the development of a new Part 41 for ISL uranium recovery only serves to re-emphasize the point of this general comment. *See* United States Nuclear Regulatory Commission, Staff Requirements Memorandum, SECY-99-011, *Draft Rulemaking Plan: Domestic Licensing of Uranium and Thorium Recovery Facilities - Proposed New 10 CFR Part 41* (July 13, 2000).

and licensee/applicants regarding the scope of these regulatory provisions to ISL operations now and in the future.⁶

As a result, it is particularly inappropriate for NRC Staff to take a rigid approach to interpreting the proper scope of such requirements to ISL licensing. It is even more inappropriate to do so when addressing activities with no significant nexus to radiological health and safety associated with AEA materials or the common defense and security, which define the scope of NRC's jurisdiction to regulate. In other words, where the only issue(s) to be addressed are potential impacts in the context of fulfilling NEPA procedural mandates, then risk-informed flexibility would appear to be warranted if not mandated. Indeed, where there are no potentially significant long-term impacts as is the case with ISL operations, NRC Staff should exercise the maximum flexibility appropriate to a license applicant's demonstrated ability to mitigate pre-licensing site construction impacts (e.g., any pre-licensing/pre-production activities including drilling wells that are bonded for reclamation present no risk of significant potential impacts).

B. In accordance with the general comment above, the undersigned continue to disagree with NRC Staff's position that 10 CFR § 40.32(e) applies to ISL facilities in the same fashion that it does to conventional uranium milling facilities. NRC's Federal Register notice and draft RIS do not, in other than a conclusory statement, attempt to refute industry's position that the administrative rulemaking record for Part 40.32(e) very specifically refers to significant, long-term impacts associated with conventional uranium mill tailings facilities which are not relevant in any way to ISL facilities. Although NRC's draft RIS specifically references industry's citations to the administrative rulemaking record showing that the focus of Part 40.32(e) was conventional uranium mills and their mill tailings impoundments, the draft RIS does not address the undeniable validity of these citations to the record. Moreover, the draft RIS does not and, indeed, could not point to any potentially significant, long-term "irrevocable or irretrievable" commitments or impacts associated with ISL facilities. Additionally, the draft RIS does not address the fact that ISL operations were only peripherally mentioned in the 1980 GEIS for reasons of "completeness." As a result, NRC Staff's legal position in the draft RIS appears to be arbitrary and conclusory.

Further, NRC Staff's legal position on the application of Part 40.32(e) to ISL facilities does not comport with the Commission's legal interpretations of uranium milling. NRC Staff's legal position relies on the definitions of "uranium milling" and "byproduct material" in 10 CFR § 40.4. These definitions were implemented in 1980 pursuant to the regulatory program implementation process mandated by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) that was based on the 1980 GEIS and resulted in changes to Part 40 and Appendix A. This implementation process needed to include a new definition of "byproduct material" as Congress had revised that statutory category by creating 11e.(2) byproduct material. However, in concert with the broader rulemaking to address long-term control of 11e.(2) byproduct material, including

⁶ The proposed rulemaking associated with ISL facilities specifically recognizes the need to address appropriate application of Part 40, Appendix A, Criterion 5b(5) to groundwater at ISL sites.

specifically mill tailings, the Commission also addressed pre-licensing site construction, which was cited by industry in its White Paper as focusing on conventional uranium mills and not even mentioning ISL facilities. Given that these definitions were promulgated as part of the same UMTRCA implementation process as Part 40.32(e), it makes common sense that the Commission's definitions of "uranium milling" and "byproduct material" should be considered in the same context when interpreting Part 40.32(e).⁷

With that said and even assuming that the Commission *at that time* considered the "discrete surface wastes" from ISL operations to be uranium milling wastes and, thereby, 11e.(2) byproduct material, NRC Staff's legal position still fails to account for the express language of the Part 40.32(e) administrative rulemaking record. Assuming *arguendo* that ISL operations are considered under the ambit of "uranium milling," NRC Staff still does not offer any legal, regulatory or practical explanation why the Part 40.32(e) administrative rulemaking record completely omits ISL facilities and why every example of the potential impacts associated with pre-licensing site construction at uranium recovery facilities addressed in the administrative rulemaking record are associated only with conventional uranium mills and their mill tailings impoundments. In addition, the 1980 GEIS, on which many of the Commission's conclusions in the Part 40.32(e) rulemaking were based, does not even offer a technical or environmental analysis of ISL facilities to determine what their potential impacts to public health and safety or the environment could be.⁸ Thus, it is apparent that the Commission did not intend Part 40.32(e) to apply to ISL facilities because the administrative rulemaking record and the technical/environmental analyses offered to inform the development of that section of Part 40 does not account for ISL operations, except to provide *completeness* to the 1980 GEIS' categories of uranium recovery operations in the United States.

Second, NRC Staff's legal position as articulated in the draft RIS fails to account for the timing of the promulgation of the Commission's definitions of "uranium milling" and "byproduct material" versus its interpretation that ISL operations constitute "milling underground." NRC Staff states that the 1979 definitions of "uranium milling" and "byproduct material" demonstrate that the Commission's intent was to apply Part 40.32(e) to ISL facilities. However, the Commission did not fully classify ISL operations as "milling underground" until the year 2000 when it determined that, in addition to discrete surface production wastes, restoration fluids constitute 11e.(2) byproduct material.⁹ This fact is further evidenced by NRC Staff's revised position on the

⁷ It is also important to note that the proper context of the Commission's broad definition of "uranium milling" is based on the 1980 GEIS' concerns that there be no 11e.(2) byproduct material "orphaned" from mobile mills and heap leach facilities. See 1980 GEIS at A-66.

⁸ Indeed, the 1980 GEIS states with respect to its scope: "[t]o assess the nature and extent of the environmental impacts of *conventional uranium milling*. . . . Conventional uranium milling as used herein refers to the milling of ore mined primarily for the recovery of uranium. . . ." 1980 GEIS at 2-3 (emphasis added).

⁹ See United States Nuclear Regulatory Commission, Staff Requirements Memorandum, SRM-SECY-99-0013, *Recommendations on Ways to Improve the Efficiency of NRC Regulation at In Situ Leach Uranium Recovery Facilities*, (July 26, 2000).

application of its 10 CFR Part 51 requirements for environmental impact statements (EISs) to newly proposed ISL facilities. Prior to this revised interpretation regarding restoration fluids, newly proposed ISL facilities merely required EAs to complete the NEPA process, and the use of such EAs had never been contradicted by NRC Staff or in an administrative hearing. Thus, NRC Staff cannot reasonably conclude that the definition of "uranium milling" can apply to the entirety of ISL operations when the Commission did not even rule on that issue until twenty-one years after the promulgation of the definition of "uranium milling."

Furthermore, NRC Staff's legal position does not account for the fact that, even NRC Staff can somehow construe the administrative rulemaking record of Part 40.32(e) in order to back-fit it to ISL facilities, the Commission's determination that a license *must be denied* if a license applicant engages in impermissible pre-licensing site construction could not have been intended to address ISL facilities. As stated in industry's White Paper, the Commission specifically noted that the reason for mandatory license denial was the potential long-term significant and "irrevocable and irretrievable" commitments and impacts associated with conventional uranium mill tailings impoundments, which ISL facilities do not utilize. By not addressing the obvious intent expressed in the administrative rulemaking record, NRC Staff fails to leave any flexibility to interpret the actual language of Part 40.32(e) which states that engaging in "commencement of construction" "shall be grounds" for denial of a license (rather than "shall result in denial of a license") in circumstances, such as in the case of ISL facilities, where there will be no significant long-lasting impacts. As noted above, in the first general comment above, the post-rulemaking application of Part 40.32(e) (or any other requirements in Part 40 and Appendix A) to ISL licensing is, by definition, a "grey area" that requires risk-informed flexibility as NRC Staff and license applicants/licensees address these issues, in some cases, for the first time.

C. The undersigned would like to note its extreme disappointment in the length of time required to prepare and issue the draft RIS. Industry submitted its White Paper and met with NRC Staff in mid-November of 2008. NRC Staff indicated that it was preparing the draft RIS for release approximately one month later, but the draft was not issued until the very end of March, 2009. In addition, not only did it take NRC Staff approximately four months to complete the draft RIS, but the lack of any guidance or detail for potential specific exemption applicants beyond what was discussed at the November meeting, suggests that the draft could have been issued the day after the meeting. NRC Staff understood well in advance that, due to the fact that some currently proposed ISL facilities are to be located in States where the long winter season results in a short construction season, even with an NRC license, expeditious issuance of the draft RIS could be critical to some license applicants. As a result, the late issuance of the RIS only serves to diminish its usefulness this calendar year, even if the draft RIS did contain any guidance for those seeking an exemption(s).

D. As noted previously, the draft RIS does not provide specific exemption applicants with any guidance as to what an application should contain. First, NRC Staff does not offer any type of a description of the regulatory provisions or guidance that a pre-

licensing site construction specific exemption application should follow. The draft RIS only offers a brief description of the types of information an application must contain including what the proposed action is and what the potential impacts would be. NRC Staff does not, however, offer any formatting guidance or any description of the level of detail that is necessary for a complete, “high-quality” application. For example, NRC guidance typically encourages license applicants to incorporate by reference provisions of other documentation, to the extent practicable, to make the review process more efficient. Given that many pre-licensing site construction specific exemption applications will be requesting approval for activities already described and assessed in existing ISL facility applications, NRC Staff needs to offer applicants insight as to whether they can incorporate provisions of their applications by reference. This also applies to future applicants that seek to submit specific exemption requests simultaneously with full ISL or other Part 40 facility license applications. Moreover, NRC Staff’s failure to provide specific guidance as to the issues that need to be addressed in specific exemption applications potentially could lead to requests for additional information (RAI) that would further delay the review process. Since timing is a critical issue, the undersigned believe that the lack of specific guidance as to the content of specific exemption applications is a fundamental flaw in the draft RIS.¹⁰

Second, NRC Staff’s conclusion that the rationale for LWA regulations and guidance cannot be applied to ISL license applications, because Part 40 contains no LWA regulatory provisions is plainly erroneous based on Commission precedent. NRC has utilized provisions of other NRC regulatory programs in the Part 40 context on prior occasions without the need for specific regulations permitting their use. Most notably, virtually all, if not all, current uranium recovery licenses contain performance-based license conditions based on the rationale and format associated with 10 CFR § 50.59. In this instance, Part 40 regulations do not include any express provisions that allow for the use of performance-based license conditions; however, pursuant to Commission policy, the use of performance-based license provisions using Part 50.59 as a model has been continuously used by NRC Staff for Part 40 uranium recovery facilities and 11e.(2) disposal facilities such as Energy Solutions’ Clive, Utah facility.¹¹ Thus, the LWA

¹⁰ NRC’s new RIS entitled *NRC Regulatory Issue Summary 2009-05: Uranium Recovery Policy Regarding: (1) The Process For Scheduling Licensing Reviews of Applications for New Uranium Recovery Facilities and (2) The Restoration of Groundwater at Licensed Uranium In Situ Recovery Facilities*, Page 4 of 5 (April 29, 2009) specifically states that “[i]n the interim, pending issuance of the proposed ISL rule for public comment, this RIS provides clarification of NRC’s existing groundwater restoration standards in Appendix A. *However, it should be recognized that the ongoing rulemaking process and consultation with EPA may lead to changes in requirements that could be inconsistent with the Appendix A clarifications that are discussed below.*” (emphasis added). This statement offers an approach that could have been taken by NRC Staff to clarify its existing Part 40.14(a) specific exemption requirements as they pertain to Part 40 facilities pending issuance of a proposed rule on potential LWA applications to such facilities as directed by the Commission.

¹¹ See *In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-99-22, (July 23, 1999). (“The use of performance based licensing concepts in the HRI license does not reverse any long established Commission policy on the use of such regulatory mechanisms. *Indeed, it is consistent with the Commission’s approach to reactor licensing in 10 C.F.R. ’50.59.*”)

guidance, while not specifically applying to Part 40 licensed facilities, should be used to develop a rationale for determining what types of pre-licensing site construction activities at ISL facilities have some significant relation to radiological health and safety and which would not, as well as advising which would require some form of NEPA review and which would not. NRC Staff would be well-advised to utilize the LWA rationale, to the extent practicable, to determine what activities at a proposed ISL facility pose similar risks and should be permitted with or without a specific exemption. Any useful information derived from applying the LWA-like rationale to pre-licensing site construction specific exemption requests at ISL facilities will inform the development of future regulations.

E. As noted above, the draft RIS does not provide potential applicants with *any* guidance as to the potential NEPA implications of a pre-licensing site construction specific exemption application for an ISL facility. NRC Staff's statement that proposed activities under such an application *may* require an EA pursuant to 10 CFR Part 51 is insufficient for potential applicants to properly determine whether a specific exemption is cost-effective and worthwhile for ISL facilities. First, NRC Staff has not indicated whether there are any guidelines by which applicants can determine whether a proposed activity would require an EA such as whether or not the proposed activity has a nexus to public health and safety. The draft RIS does not provide any such guidance other than to say that an EA *may be required*. However, the Part 50 LWA guidance provides potential applicants with express guidelines on what types of activities do and do not require NRC Staff approval. Further, this guidance also specifically informs potential applicants as to what activities will not be authorized either with or without an LWA permit, so that such applicants do not waste their time and resources applying for permission to conduct activities which NRC Staff already has determined will not be authorized. Thus, this is another aspect of the draft RIS that the undersigned believe is wholly deficient.

F. As noted above, NRC Staff stated that the draft RIS does not provide more detailed guidance on pre-licensing site construction specific exemption requests, because it is concerned that it would "prejudge" the substance of an anticipated rulemaking regarding potential application of LWA principles to Part 40 facilities. The undersigned believe that this statement is inconsistent with Commission practice regarding LWA regulations and guidance in other contexts.

Initially, as stated throughout these comments, the uranium recovery industry members that prepared the aforementioned White Paper did not argue that NRC's 10 CFR Part 50 and applicable guidance related to the LWA program is directly applicable

*It does not run counter to any agency mandate contained in the Atomic Energy Act or any established Commission regulation. If anything, the use of license conditions such as 9.4 is entirely consistent with the Commission's efforts over the years to allow reasonable flexibility in its regulatory framework. It is simply an additional means through which the NRC can decrease the administrative burden of regulation while ensuring the continued protection of public health and safety. In addition, the NRC Staff has provided a clear, reasoned basis for the employment of this concept in the *in situ* leach mining context, a rationale that we agree with and hereby adopt.") (emphasis added).*

to Part 40 facilities. Industry merely stated that an LWA-like, three-tiered approach could be utilized by NRC Staff to review and approve requested pre-licensing site construction activities at ISL facilities. NRC Staff should make clear that this was industry's position in its response to comments.

Next, current Interim Staff Guidance (ISG) on Part 50 LWA applications contains language demonstrating that "prejudging" a rulemaking precisely in the LWA context has not hindered the development of guidance in the face of a potential rulemaking. In its *Interim Staff Guidance on the Definition of Construction and on Limited Work Authorizations*, NRC Staff states that "[w]hile preparing RG 1.206, the NRC was considering significant changes to its regulations related to LWAs. Therefore, the NRC Staff agreed to prepare additional guidance related to LWAs...." In this instance, NRC Staff engaged in actions to revise guidance related to LWAs and other relevant Part 50 issues pending revision of existing regulations to comport with such guidance. Thus, this statement demonstrates that developing guidance to make the regulatory process more efficient does not "prejudge" a rulemaking.¹²

Finally, the Commission's actions with respect to the announced Part 40 rulemaking addressing groundwater restoration at ISL facilities demonstrate that policy initiatives/guidance can be pursued while a rulemaking is pending. In a Staff Requirements Memorandum (SRM), the Commission directed NRC Staff to pursue a rulemaking to conform the requirements of 10 CFR Part 40, Appendix A to ISL facilities and, at the same time, directed NRC Staff to continue with the process of developing memoranda of understanding (MOUs) with the States of Nebraska and Wyoming for deferral of regulatory authority over groundwater restoration at ISL facilities.¹³ On its face, this Commission action demonstrates that the Commission has determined that guidance does not "prejudge" a rulemaking. Moreover, the Commission Staff has sought to impose groundwater quality compliance requirements in 10 CFR Part 40, Appendix A, Criterion 5 on ISL operators despite the fact that those requirements are admittedly not applicable to ISL facilities and are, indeed, supposed to be the subject of a proposed rulemaking.

As stated above, the Commission has directed NRC Staff to pursue a rulemaking regarding potential application of LWA provisions to Part 40 facilities. As a precursor to this rulemaking, NRC Staff has decided to issue the draft, and presumably soon-to-be finalized, RIS to provide a regulatory pathway for Part 40 license applicants to pursue pre-licensing site construction activities. Based on this RIS, Part 40 licensees, most notably ISL applicants, could request Part 40.14(a) specific exemptions that will require

¹² Compare RIS 2009-05 at Page 4 of 5. ("The NRC expects that a draft of the proposed revisions to Appendix A will be published for public comment in 2010. Additionally, NUREG-1569 will be revised to correctly identify the standards for groundwater restoration at ISR facilities and to address the new requirements codified by the rulemaking."). However, this RIS offers program-specific guidance in the interim period *prior to the release and finalization of the new rulemaking*.

¹³ See United States Nuclear Regulatory Commission, COMJSM-06-0001, *Regulation of Groundwater Protection at In Situ Leach Uranium Extraction Facilities*, (January 17, 2006).

some form of Staff evaluation ranging from a simple technical review to a detailed technical and Part 51 environmental review. In any case, NRC will be required to render determinations as to what pre-licensing construction activities are permissible, what types of evaluations are necessary for such activities to be authorized, and what parameters must be set for each proposed activity. Even though each such determination will be site-specific, *in the aggregate* (e.g., as more than one is granted), there necessarily will be the potential for “prejudging” a rulemaking, because it would be inconceivable for NRC Staff to not use the analyses and conclusions in its review of pre-licensing site construction specific exemption requests to guide its development of a proposed rule on the same issue. Further, NRC Staff would be ill-advised to ignore such analyses and conclusions as it would result in a waste of agency resources and the potential contradiction of the proposed rule and prior agency decisions on specific exemption requests. These factors further demonstrate that NRC Staff’s concern regarding potential “prejudging” of a rulemaking is unfounded.

Lastly, NRC essentially will, in some sense, already “prejudge” the proposed rulemaking on pre-licensing site construction in its soon-to-be finalized ISL GEIS. Generally, NRC Staff’s purpose in requesting Commission authorization to prepare the ISL GEIS was to provide a programmatic review of the potential impacts on public health and safety and the environment at ISL facilities due to the fact that, as stated by NRC, ISL facility surface and subsurface processes and technology are largely standardized. As a result, NRC’s ISL GEIS will provide a comprehensive analysis of the potential environmental impacts associated with ISL site activities ranging from those currently permissible under Part 40.32(e), to those that would require a specific exemption and no Part 51 environmental review, to those that require a specific exemption and a Part 51 environmental review. Given that the potential impacts of pre and post-licensing site construction at ISL facilities *on radiological health and safety and the common defense and security* are negligible in the short or long-term from the lowest risk activity in the nuclear fuel cycle, the Commission’s oft-endorsed policy of risk-informed regulation argues that ISL applicants should be granted far more leeway in pre-licensing site construction activities than those permitted for Part 50 licensees.¹⁴ While it certainly is required to perform a “site-specific” review of a specific exemption request, in reality, for many of the pre-licensing site construction activities likely to be proposed by ISL license applicants, NRC Staff already will have pre-determined whether a proposed pre-licensing site construction activity should be authorized based on its generic assessment of the minimal potential for adverse environmental impacts.

NRC has no AEA jurisdiction over activities that lack a direct nexus to radiological health and safety or common defense and security. NRC’s Part 51 NEPA *regulatory* responsibilities do not extend its jurisdiction over construction activities that do not have the “nexus” noted above. Thus, to the extent that NEPA procedural requirements have been fulfilled by the FGEIS or the applicants environmental report (ER) *any* potential construction impacts (including drilling wellfields which do not come under NRC jurisdiction until lixiviant is injected and “uranium milling” begins) that the

¹⁴ Compare *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-99-22 (July 23, 1999).

applicant shows will be mitigated in the event a license is not issued should be permitted at the applicants risk. For example, if State/BLM financial assurance (bonds) requirements covers any and all facilities constructed, including wellfields or a central processing building, then there is no potential adverse environmental impact, much less a nexus with radiological health and safety and common defense and security.

III. SPECIFIC COMMENTS: (All page numbers refer to the draft RIS and not the Federal Register notice)

A. Attachment A: On April 9, 2009, NRC Staff issued a letter to the Wyoming Department of Environmental Quality (WDEQ) in response to inquiries regarding the permissibility of site-specific wellfield development prior to the issuance of an NRC license. More specifically, the letter determined that “the NRC staff would not allow applicants to *completely* develop any wellfield without a license. Wellfield development would include installing all injection and production wells, as well as the monitoring well network.” While the letter does not specifically prohibit authorization for such development pursuant to a Part 40.14(a) specific exemption, this letter appears to “prejudge” what types of activities may or may not be authorized by NRC Staff pursuant to such an exemption. Further, NRC Staff should not immediately rule out the possibility that such development could be authorized pursuant to a specific exemption, as NRC’s AEA authority does not extend to the drilling of wells at ISL facilities, especially in light of the fact that agencies such as WDEQ require technical and environmental review and financial assurance for such wells. The drilling of wells at ISL facilities prior to the injection of lixiviant is not an AEA-licensed activity as it does not generate licensable “source material”, it does not constitute “uranium milling,” and it does not generate “11e.(2) byproduct material.” Until lixiviant is injected into ISL site injection wells, all site wells are nothing more than water wells which are not part of NRC’s limited AEA jurisdiction. Thus, NRC Staff should be more flexible with the types of activities that can be permitted under a more flexible interpretation of Part 40.32(e), a Part 40.14(a) specific exemption or under a potential revision to Part 40.32(e) in the future.

B. Page 3: On Page 3 of the draft RIS, when describing the Commission’s directive to develop a proposed rulemaking on application of LWA provisions to 10 CFR § 40.32(e), NRC Staff states that the “[i]nformation gathered through the process described in this RIS will be used to support development of such a proposed rulemaking.”¹⁵ As stated in the General Comments, this statement expressly contradicts NRC Staff’s position as stated on its telephone conference with industry that it does not want to “prejudge” the anticipated rulemaking on this issue. This statement indicates that NRC Staff intends to use any information gathered from specific exemption applications submitted for technical and/or environmental review to determine how a potential Proposed Rule will be written. By indicating that they will use such information to inform its rulemaking, NRC Staff will be “prejudging” the anticipated rulemaking as the future Proposed Rule likely will permit pre-licensing site construction activities that are previously approved under Part 40.14(a) specific exemption requests.

¹⁵ Draft RIS at 3.

C. Pages 4-5: On Pages 4 and 5 of the draft RIS, NRC Staff references industry's White Paper regarding application of Part 40.32(e) to ISL facilities and its citations to express provisions of the regulation's administrative record that references conventional uranium milling facilities while not mentioning ISL facilities. The draft RIS and its response to industry's White Paper provides nothing more than a conclusory statement that it disagrees with industry's position and that its position is based on the definitions of "uranium milling" and "byproduct material" in 10 CFR § 40.4. As stated in the General Comments above, NRC Staff's legal position does not offer any kind of refutation of industry's express references to the administrative rulemaking record or the legal arguments offered based on such references. NRC Staff merely states that "[t]hese definitions were added to 10 CFR Part 40 in a 1979 final rulemaking that the ISR industry paper does not discuss."¹⁶ The undersigned do not believe that this is a sufficient legal justification to conclude that Part 40.32(e)'s provisions apply to ISL facilities. As noted, above, NRC Staff's legal position does not provide any evidence to contradict the Part 40.32(e) administrative rulemaking record's language specifically referencing potential "irrevocable and irretrievable" impacts associated with conventional mills and uranium mill tailings piles or impoundments (which ISL facilities so far have never used). It appears that NRC Staff's legal position ignored or failed to consider such references when developing such position.

D. Page 6: On Page 6 of the draft RIS, NRC Staff states that industry's White Paper fails to discuss the effects that the definitions of "uranium milling" and "byproduct material," which were added to 10 CFR Part 40, later Part 40.4, in a 1979 rulemaking, have on the interpretation of Part 40.32(e). It is the undersigned's position that this statement fails to account for the entirety of the Part 40.32(e) administrative rulemaking record and the timing of the Commission's interpretation of ISL operations as "uranium milling" as described in General Comment B above.

E. Pages 6-7: On Pages 6 and 7 of the draft RIS, NRC Staff states that, "[t]here are no similar provisions in 10 CFR Part 40 for the use of LWAs in the licensing of uranium recovery facilities." As a result, NRC Staff concludes that Part 40 licensees need a Part 40.14(a) specific exemption to conduct any pre-licensing site construction outside the scope of Part 40.32(e). The undersigned would like to make clear that, at no time, did industry's White Paper or its briefing for NRC Staff advocate the direct application of the Part 50 LWA program to Part 40 facilities. Industry merely advocated the use of an "LWA-like," three-tiered approach to determining which pre-licensing site construction activities could be allowed without NRC authorization and which required such authorization, whether through express NRC approval or the issuance of a uranium recovery license. In addition, as noted in General Comment ___ above, there is ample precedent associated with applying the rationale of Part 50.59 to ISL and conventional uranium mills without any parallel regulatory provisions in Part 40.

F. Page 7: On Page 7 of the draft RIS, NRC Staff states that, "[t]he exemption request must specify the particular activity, the purpose and need for the activity, the duration of the activity, and the potential impacts to human health and the environment."

¹⁶ Draft RIS at 6.

While this statement offers some semblance of guidance as to how an applicant for a Part 40.14(a) specific exemption should craft its submission, it does not offer any discussion as to what guidance documents or portions thereof should be followed when preparing such a submission. Indeed, it does not even state that Part 40.14(a) specific exemption criteria apply to such submissions. Given that NRC Staff has informed industry on a number of occasions that the submission of complete “high-quality” license applications will lead to timely review of such applications, the undersigned believe that it is imperative that NRC Staff provide potential applicants with sufficient guidance to ensure that all future exemption applications are complete and of “high-quality.”

G. Page 7: On Page 7 of the draft RIS, NRC Staff states that “[d]epending on the specific activities included in the exemption request, the staff’s review may include an environmental assessment pursuant to the requirements of 10 CFR Part 51...consistent with the guidance in NUREG-1748....” While this statement provides some guidance as to what types of guidance should be followed with respect to potential specific exemption applications, it does not provide any guidance as to what activities will require an EA. This is a critical factor for a number of reasons. First, ISL project applicants are required to obtain additional licenses/permits/authorizations from other federal or State regulatory entities such as the Bureau of Land Management (BLM), United States Forest Service (USFS), and State agencies such as the Wyoming Department of Environmental Quality (WDEQ). Given that many of these regulatory agencies engage in environmental reviews of proposed activities under NEPA or similar State statutes, it is critical to ISL operators to have knowledge of what proposed activities require NRC environmental reviews to determine whether pursuit of a specific exemption is warranted.

Second, based on the failure of NRC Staff to provide guidance as to what potential pre-licensing site construction activities would require a NEPA review, specific exemption license applicants will not be able to submit applications that differentiate between activities requiring a review and activities that do not. As a result, it is not clear as to any specific exemption request whether NRC Staff will issue approvals for proposed activities not requiring NEPA reviews prior to reviewing activities that do require such reviews. Given the aforementioned timing issues, it is critical to such applicants that they understand the timeframes associated with NRC Staff review of its specific exemption applications and whether the ability to obtain approvals for activities that do not require NEPA reviews under the same application as those that require such reviews is available.

Third, NRC Staff has adopted a new practice for public participation in the EA review process for newly proposed ISL facilities. Previously, NRC Staff allotted thirty (30) days for review of draft EAs by federal and State agencies followed by issuance of a final EA. However, for newly proposed ISL facilities, NRC Staff has instituted a new system by which a draft EA will be issued for thirty (30) days of public comment by federal and State regulatory agencies, followed by revision of the draft EA for re-issuance for an additional thirty (30) days of public comment by other interested stakeholders. NRC Staff needs to make clear which system of public participation will be applicable to EAs associated with pre-licensing site construction specific exemption requests.

Lastly, NRC Staff does not provide industry with any guidance as to what extent the conclusions in the final ISR GEIS will apply to any future specific exemption requests. It appears that there are significant additional efficiencies that can be gained in the specific exemption review process by utilizing the conclusions in the final ISR GEIS to expedite the review process. Given that pre-licensing site construction specific exemption requests will be requesting approval to conduct activities that will have been requested under ISL facility license applications, NRC Staff should not “re-invent the wheel” in the specific exemption review process and should use *all* available information, including specifically the final ISL GEIS regarding such activities to inform its review.

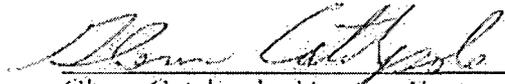
H. Page 7: On Page 7 of the draft RIS, NRC Staff states that, “any construction activities performed by the applicant under an exemption and prior to the issuance of a license are performed at the applicant’s risk.” Industry’s White Paper acknowledged this fact and did not contest such a requirement. Further, NRC Staff’s draft RIS provides no guidance as to what, if any, additional requirements will be imposed upon pre-licensing site construction to ensure that appropriate reclamation activities are completed to ensure that no potential impacts occur.

III. CONCLUSION

The undersigned appreciate the opportunity to provide these general and specific comments on the draft RIS. In summary, based on the general and specific comments offered herein, the undersigned request that NRC Staff engage in the following actions when issuing its final RIS: (1) reconsider the rigid interpretation of Part 40.32(e) in light of these comments and the general context noted above; (2) if Part 40.14(a) specific exemptions are still to be required, provide timely LWA-like guidance to inform the contents of such an application for pre-licensing site construction activities at proposed Part 40 sites; (3) provide more guidance regarding which pre-licensing site construction activities will require a NEPA review (i.e., EA); (4) provide additional discussion of what pre-licensing site construction activities require NRC approval in light of the current Part 51 definitions of “preconstruction” and “construction;” (5) provide additional discussion demonstrating that pre-licensing site construction activities at Part 40 ISL facilities eligible for specific exemptions should be more extensive than those for Part 50 facilities as Part 40 ISL facilities represent the lowest risk activity in the nuclear fuel cycle; and (6) provide additional discussion regarding the application of information gathered by NRC Staff in specific exemption requests to the future Part 40.32(e) rulemaking. The undersigned believe that its general and specific comments demonstrate that these requests are reasonable and will result in a more useful RIS on pre-licensing site construction.

If you have any questions or require any additional information, please do not hesitate to contact us. Thank you for your time and consideration in this matter.

Respectfully Submitted,



Glenn Catchpole, Uranerz Energy Corporation



Katie Sweeney, National Mining Association