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SUBJECT: Wyoming Mining Association--comments on NRC on NRC Regulatory Issue Summary 2009-05

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WYOMING MINING ASSOCIATION

June 3, 2009

Chairman Jaczko
Commissioner Lyons
Commissioner Klein
Commissioner Svinicki

In care of:

Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
Mail Stop O-16G4
Washington, DC 20555-0001

Dear Chairman Jaczko:

Subject: Wyoming Mining Association - Comments on 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 dated Wednesday, April 29, 2009

The Wyoming Mining Association (WMA) is an industry association representing mining companies, contractors, vendors, suppliers and consultants in the State of Wyoming. Among its mining industry members are uranium recovery licensees, including in-situ and conventional uranium recovery operators, several companies planning new uranium recovery operations and at least two (2) companies conducting final reclamation/restoration operations. WMA has reviewed the April 29, 2009 Regulatory Issues Summary (RIS) and has the following comments on it and specifically on the application of 10 CFR Part 40 Appendix A criterion 5B to uranium in-situ recovery operations:

Major Regulatory Change and the Need for Public Comment

The use of 10 CFR Part 40 Appendix A Criterion 5B, as a standard applicable to groundwater restoration at in-situ uranium recovery facilities is a major regulatory change. The Regulatory Issues Summary (RIS) states:

A notice of opportunity for public comment on this RIS was not published in the Federal Register because this RIS is informational and does not represent a departure from current regulatory requirements. This RIS pertains in part to an administrative aspect of the regulatory process that involves the voluntary submission of information on the part of addressees.

WMA believes that this Regulatory Issues Summary (RIS) is far more than merely *informational* and that it contains a major regulatory change that should have been noticed in the Federal Register and made available for public comment prior to implementation. While the portions of the RIS that deal with the process for scheduling licensing reviews are administrative in nature, the application of 10 CFR Part 40 Appendix A standards as currently written to groundwater restoration at in situ uranium recovery facilities is a significant change that should be subject to the rulemaking process. In fact, the Staff is currently working on a rulemaking that would revise 10 CFR Part 40 Appendix A to include groundwater restoration at in situ uranium recovery facilities. The RIS states that "...the NRC, in consultation with the Environmental Protection Agency (EPA), is in the process of revising the regulations in 10 CFR Part 40, Appendix A, to clarify the groundwater restoration standards for ISR facilities. In the interim, pending issuance of the proposed ISR 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..." in the RIS. Staff states in the RIS that they expect that a draft of the proposed revisions to Appendix A will be published for public comment in 2010, which is a further delay from the previously announced rulemaking schedule. Furthermore, as discussed below, WMA believes that the RIS does not provide "clarification" of how Appendix A as currently written should apply to ISR groundwater restoration.

It is deeply disturbing to the uranium recovery industry that they are not being included in the decision making process. The industry has been included in the process on previous policy changes.

The NRC Staff itself admits that this change is inconsistent with existing guidance stating:

The staff recognizes that NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications," provides guidance that is not consistent with the requirements in Criterion 5B of Appendix A discussed above. In particular, the NUREG-1569 discussion of groundwater restoration to "pre-operational class of use" as being a secondary standard is not accurate, and is not an appropriate standard to use in evaluating license applications. Criterion 5B contains the appropriate standards that will be applied to groundwater restoration at ISR facilities.

The existing guidance, NUREG-1569, was only finalized after acceptance and review of public comments. Staff states in the RIS that "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." Any change to NUREG-1569 should also require a public comment period and consideration of public input. In the interim, the RIS fails to provide any guidance related to applying the current Appendix A requirements to ISR groundwater restoration.

Distribution of a Regulatory Issues Summary (RIS) related to in-situ uranium recovery operations for public comment has been previously proposed by Staff and accepted by a vote of the Commission. In *STAFF REQUIREMENTS - SECY-03-0186 - OPTIONS AND RECOMMENDATIONS FOR NRC DEFERRING ACTIVE REGULATION OF GROUND-WATER PROTECTION AT IN SITU LEACH URANIUM EXTRACTION FACILITIES* the Commission states:

The Commission has approved the staff's recommendation in Option 2a. The staff should proceed with development of a Regulatory Issue Summary to inform the public about this proposal and then proceed to develop a memorandum of understanding with each appropriate State.

Option 2a of *SECY-03-0186* states in part,

"If the Commission approves this approach to Option 2, the staff would issue a RIS for comment..."

Clearly if the Commission planned to make the RIS related to deferring active regulation of ground water protection at in-situ uranium recovery operations available for public comment prior to final release, then this document should, given the fact that its content is related, have been released for public comment as well.

Use of the current 10 CFR Part 40 Appendix A as a Standard Applicable to Groundwater Restoration at In-Situ Uranium Recovery Facilities

Original Intent and Purpose of 10 CFR Part 40 Appendix A

10 CFR Part 40 Appendix A which is entitled *Criteria Relating to the Operation of Uranium Mills and the Disposition of Tailings or Wastes Produced by the Extraction or Concentration of Source Material From Ores Processed Primarily for Their Source Material Content* was intended solely for the regulation of conventional uranium mills, mill tailings and tailings impoundments. It was not intended for the regulation of in-situ uranium recovery operations. The introduction clearly states:

Every applicant for a license to possess and use source material in conjunction with uranium or thorium milling, or byproduct material at sites formerly associated with such milling, is required by the provisions of § 40.31(h) to include in a license application proposed specifications relating to milling operations and the disposition of tailings or wastes resulting from such milling activities. This appendix establishes technical, financial, ownership, and long-term site surveillance criteria relating to the siting, operation, decontamination, decommissioning, and reclamation of mills and tailings or waste systems and sites at which such mills and systems are located.

This appendix was initially added on October 16, 1985 (50 Federal Register 41862) in response to the passage by Congress of the Uranium Mill Tailings Radiation Control Act (UMTRCA). The purpose of UMTRCA, which was passed by Congress in November 1978, is clear. It is stated in the preamble of the Act (§ 7901. Congressional findings and purposes) as follows:

(a) The Congress finds that uranium mill tailings located at active and inactive mill operations may pose a potential and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment and to prevent or minimize other environmental hazards from such tailings.

(b) The purposes of this chapter are to provide—

(1) in cooperation with the interested States, Indian tribes, and the persons who own or control inactive mill tailings sites, a program of assessment and remedial action at such sites, including, where appropriate, the reprocessing of tailings to extract residual uranium and other mineral values where practicable, in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public, and

(2) a program to regulate mill tailings during uranium or thorium ore processing at active mill operations and after termination of such operations in order to stabilize and control such tailings in a safe and environmentally sound manner and to minimize or eliminate radiation health hazards to the public.

The above history is succinctly summarized in *Recommendations for a Coordinated Approach to Regulating the Uranium Recovery Industry: A White Paper Presented By the National Mining Association* as follows:

First, the AEA, as amended by UMTRCA, establishes a pervasive federal scheme for the regulation of uranium mill tailings and related wastes. No less than three federal agencies play an active role in regulating mill tailings. Pursuant to section 274 of UMTRCA, the U.S. Environmental Protection Agency (EPA) has issued detailed, generally applicable standards to address both radiological and non-radiological hazards (i.e., groundwater) associated with mill tailings that are closely modeled after its Resource Conservation and Recovery Act (RCRA) regulations. In turn, NRC has incorporated these regulations into its criteria for the management and closure of mill tailings sites, set forth at 10 C.F.R. Part 40, Appendix A. In addition, NRC plays the key role in overseeing closure of active uranium mill tailings sites and final disposal of the tailings themselves. Finally, the Department of Energy (DOE) completes the circle of federal oversight of uranium mill tailings by acting as the permanent custodian and perpetual licensee of sites used for the disposal of tailings under Title II of UMTRCA, as well as exercising primary responsibility for selecting and overseeing the remediation of inactive uranium mill tailings sites under Title I of UMTRCA.

Based on the legislative intent of UMTRCA and the subsequent intent of the regulations promulgated to carry out its intent it is clear that 10 CFR Part 40 Appendix A was not intended or designed to regulate in-situ uranium recovery operations as written.

The applicability of 10 CFR Part 40 to in-situ uranium recovery was discussed in *COMJSM-06-0001 REGULATION OF GROUNDWATER PROTECTION AT IN SITU LEACH URANIUM EXTRACTION FACILITIES*. In it, Commissioner Merrifield stated the following regarding regulation of in-situ uranium recovery:

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.

Unfortunately the Commission has now imposed new requirements without notice or the opportunity for comment.

Specific Language in 10 CFR Part 40 Appendix A and Criterion 5B that is Inapplicable to In-situ Uranium Recovery Operations, Applicable only to Conventional Uranium Mill Tailings Sites and/or conflicts with Existing Regulations and/or Guidance

10 CFR Part 40 Appendix A could be used to regulate in-situ uranium recovery with modifications through rulemaking. As noted, Staff is currently in the process of working with EPA on a rulemaking to revise Appendix A to apply to in situ uranium recovery. However, specific language currently in Appendix A as described below is inapplicable to in-situ uranium recovery and the RIS fails to provide any guidance to industry on the acceptable application of Appendix A to groundwater protection at these facilities.

10 CFR Part 40 Appendix A defines point of compliance as follows:

Point of compliance is the site specific location in the uppermost aquifer where the ground-water protection standard must be met.

Criterion 5B states that the point of compliance will be determined as follows:

“...The Commission will also establish the point of compliance and compliance period on a site specific basis through license conditions and orders. The objective in selecting the point of compliance is to provide the earliest practicable warning that the impoundment is releasing hazardous constituents to the ground water. The point of compliance must be selected to provide prompt indication of ground-water contamination on the hydraulically downgradient edge of the disposal area.

40 CFR 192.02 defines point of compliance as follows:

(4) Point of compliance: The point of compliance is the location at which the groundwater concentration limits of paragraph (c)(3) of this section apply. The point of compliance is the intersection of a vertical plane with the uppermost aquifer underlying the site, located at the hydraulically downgradient limit of the disposal area plus the area taken up by any liner, dike, or other barrier designed to contain the residual radioactive material.

In order to use Criterion 5B for the regulation of in-situ uranium recovery wellfields, it must be made clear that the applicable points of compliance are the monitor wells surrounding the wellfield. This is not clear in Criterion 5B or in the Regulatory Issues Summary (RIS). The reason that it is not clear in Criterion 5B is of course the fact that Criterion 5B was written for uranium mill tailings impoundments.

The point of compliance as defined above is at the “*hydraulically downgradient limit of the disposal area*” If Alternate Concentration Limits (ACLs) are to be applied to in-situ uranium recovery operations and the point of compliance is the monitor well ring, then it should be made clear that licensees would be allowed in their Alternate Concentration Limit (ACL) application for release following groundwater restoration, to move the point of compliance up to 500 meters outside of the monitor well ring. This is based on 40 CFR Part 192.32(a) 2(iv) which states:

(iv) *The regulatory agency may establish alternate concentration limits (to be satisfied at the point of compliance specified under §264.95) under the criteria of §264.94(b), provided that, after considering practicable corrective actions, these limits are as low as reasonably achievable, and that, in any case, the standards of §264.94(a) are satisfied at all points at a greater distance than 500 meters from the edge of the disposal area and/or outside the site boundary...*

The following is specific language in Criterion 5B that is clearly inapplicable to in-situ uranium recovery operations:

5B(1)--Uranium and thorium byproduct materials must be managed to conform to the following secondary ground-water protection standard: Hazardous constituents entering the ground water from a licensed site must not exceed the specified concentration limits in the uppermost aquifer beyond the point of compliance during the compliance period. Hazardous constituents are those constituents identified by the Commission pursuant to paragraph 5B(2) of this criterion.

Again, this criterion applies only to the “*uppermost aquifer*”. In-situ uranium recovery does not generally occur in the uppermost aquifer. In-situ uranium recovery operations generally mine in a given aquifer with other aquifers above and below the one being mined. This is why *NUREG-1569 Standard Review Plan for In Situ Leach Uranium Extraction License Applications* states:

NUREG/CR-6733 (NRC, 2001, Section 4.3.3) established that significant risks for vertical excursions may exist if monitor wells are randomly located, given the typical criteria for spacing of vertical excursion monitor wells at licensed in situ leach facilities {e.g., one well per 1.6 ha [4 acres] for overlying aquifers; one well per 3.2 ha [8 acres] for underlying aquifers}. Thus, location of vertical excursion monitor wells within the well field should be such that the likelihood of detecting a vertical excursion is maximized.

Clearly Criterion 5B cannot be applied to in-situ uranium recovery facilities since it only applies to the “*uppermost aquifer*” when in-situ uranium recovery operations operate in deeper aquifers, which is why monitoring of overlying and underlying aquifers is currently required.

5B(1) continued: The Commission will also establish the point of compliance and compliance period on a site specific basis through license conditions and orders. The objective in selecting the point of compliance is to provide the earliest practicable warning that the impoundment is releasing hazardous constituents to the ground water. The point of compliance must be selected to provide prompt indication of ground-water contamination on the hydraulically downgradient edge of the disposal area.

This language applies to disposal areas (tailings impoundments) and not to in-situ uranium recovery wellfields. Tailings impoundments are designed to contain 11(e).2-byproduct material. This language is meant to address downgradient contamination from impoundments holding 11(e).2-byproduct material. This criterion cannot apply to in-situ uranium recovery wellfields since “*Underground ore bodies depleted by such solution extraction operations do not constitute "byproduct material" within this definition.*” (10 CFR Part 40.4 – Definitions) Given this fact Criterion 5B should not be used to regulate them.

The language in Criterion 5B also establishes regulation “*on a site-specific basis through license conditions and orders*”. This approach flies in the face of current and accepted regulatory policy specifically the development of *NUREG-1910 - Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities – Draft Report for Comment*. The regulatory approach taken by the Commission to date is exemplified by *NUREG-1910*, that being to take a generic approach to licensing of in-situ uranium recovery facilities given their overall similarities.

Outdated Requirements in 10 CFR Part 40 Appendix A

10 CFR Part 40 Appendix A was last updated on April 12, 1999, over a decade ago. Criterion 5B references drinking water limits in paragraph 5C stating, “...*the drinking water limits in paragraph 5C state acceptable hazards...*” These limits, which are based on Maximum Concentration Limits (MCLs) promulgated by EPA as primary drinking water standards, are not current. Specifically the following limits are not current:

- ♦ Arsenic is listed as 0.05 milligrams per liter. The current standard is 0.010 milligrams per liter as of 01/23/06.
- ♦ Barium is listed as 1.0 milligrams per liter. The current standard is 2.0 milligrams per liter.
- ♦ Cadmium is listed as 0.01 milligrams per liter. The current standard is 0.005 milligrams per liter.

- ◆ Chromium is listed as 0.05 milligrams per liter. The current standard is 0.1 milligrams per liter.
- ◆ Lead is listed as 0.05 milligrams per liter. The action level for lead (based on the treatment technique) is 0.015 milligrams per liter.
- ◆ Selenium is listed as 0.01 milligrams per liter. The current standard is 0.05 milligrams per liter
- ◆ Lindane is listed as 0.004 milligrams per liter. The current standard is 0.0002 milligrams per liter.
- ◆ Methoxychlor is listed as 0.1 milligrams per liter. The current standard is 0.04 milligrams per liter.
- ◆ Toxaphene is listed as 0.005 milligrams per liter. The current standard is 0.003 milligrams per liter.
- ◆ In addition, lindane, methoxychlor and toxaphene are not used in in-situ uranium recovery operations and do not apply to them. A number of the substances listed in 10 CFR Part 40 Appendix A are related to solvent extraction circuits at conventional uranium mills. In-situ uranium recovery operations do not contain solvent extraction circuits.

It is poor regulatory practice to reference standards that are not current. In addition, in situ uranium recovery facilities are currently required to restore groundwater based on an extensive list of parameters based primarily on Wyoming Guideline 8. There are no provisions in Appendix A as currently written for restoration of these additional chemical constituents.

Conflicts with COMSECY-07-0015 – PATH FORWARD FOR RULEMAKING ON GROUNDWATER PROTECTION AT IN SITU LEACH URANIUM EXTRACTION FACILITIES and Associated Staff Requirements Memorandum (SRM)

COMSECY-07-0015 (Staff Requirements) states in part,

The staff should actively engage interested stakeholders through public workshops and work closely and cooperatively with the Environmental Protection Agency (EPA).

The staff should remain diligent in working with EPA and appropriate States to establish appropriate standards to protect public health and safety and the environment and at the same time reduce, and preferably eliminate, dual regulation.

The issuance of this RIS without opportunity for public comment fails to meet the Commission’s requirement that the “...staff should actively engage interested stakeholders...”

COMSECY-07-0015 states in part: “*However, based on discussions with EPA, the regulations will conform to the standards in 40 CFR Part 192, and may contain relevant elements of the EPA’s SDWA-based UIC program. The codification of standards for groundwater protection at ISLs will address industry’s preference for predictability and stability in the regulatory process.*”

The issuance of this RIS without the opportunity for public comment fails to yield “*predictability and stability in the regulatory process*” and fails to meet the goals of COMSECY-07-0015. Staff explicitly recognized this by stating in the RIS that “...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...” in the RIS.

Conflicts with NUREG-1569, “Standard Review Plan for In Situ Leach Uranium Extraction License Applications

As previously noted, the staff recognizes that NUREG-1569 provides guidance that is not consistent with the requirements in Criterion 5B of Appendix A and the RIS constitutes a major change in regulation for in-situ uranium recovery. NUREG-1569 was prepared in coordination with the State UIC programs that govern in situ uranium recovery and implemented acceptance criteria that complimented the UIC programs. Section 6.1.3 of NUREG-1569 discusses this coordination of NRC and State standards:

Secondary Restoration Standards—In situ leach operations may cause permanent changes in water quality within the exploited production zone, because the in situ leach extraction process relies on changing the chemistry in the production zone to remove the uranium. The applicant may therefore propose returning the water quality to its pre-operational class of use (e.g., drinking water, livestock, agricultural, or limited use) as a secondary restoration standard. Applications should state the principal goal of the restoration program and that secondary standards will not be applied so long as restoration continues to result in significant improvement in ground-water quality. The applicant must first attempt to return ground-water quality to primary restoration standards before falling back on secondary restoration standards. License conditions should be set up such that a license amendment is necessary before the

applicant can revert to secondary goals. The applicant must commit to use reasonable efforts to reach primary restoration standards.

The RIS unilaterally changes this criterion to one that uses 1) background concentrations, which pose no incremental hazards and are the principal goal under NUREG-1569, 2) the drinking water limits in paragraph 5C, which as previously noted are outdated and incomplete when compared with the standards in NUREG-1569, or 3) Alternate Concentration Limits (ACLs). ACLs are discussed in 10 CFR Part 40 Appendix A criterion 5B which states:

Alternate Concentration Limits that present no significant hazard may be proposed by licensees for Commission consideration. Licensees must provide the basis for any proposed limits including consideration of practicable corrective actions, that limits are as low as reasonably achievable, and information on the factors the Commission must consider. The Commission will establish a site specific alternate concentration limit for a hazardous constituent as provided in paragraph 5B(5) of this criterion if it finds that the proposed limit is as low as reasonably achievable, after considering practicable corrective actions, and that the constituent will not pose a substantial present or potential hazard to human health or the environment as long as the alternate concentration limit is not exceeded.

This change to groundwater restoration standards needs to be consistent with existing state standards, at least in the State of Wyoming. The current Wyoming CHAPTER 11 NONCOAL IN SITU MINING regulations require that "...operators returning all affected groundwater to the pre-mining class of use or better using Best Practicable Technology..."

The State of Wyoming Environmental Quality Act Chapter 11 Article 1 (General Provisions) states in the definitions:

"Groundwater restoration" means the condition achieved when the quality of all groundwater affected by the injection of recovery fluids is returned to a quality of use equal to or better than, and consistent with the uses for which the water was suitable prior to the operation by employing the best practicable technology;

This RIS creates conflicts the State of Wyoming Environmental Quality Act and existing State regulations. These conflicts could have been avoided if Staff had sought public comment for this RIS or maintained the current regulatory approach until the Part 40 rulemaking process is complete.

Impacts to Existing Licenses and to Pending Applications

A change of this magnitude may require substantial revisions to pending license applications submitted by WMA member companies and currently under review by NRC Staff, creating further delays in licensing, particularly since the Staff has provided no guidance on the acceptable application of these requirements to in situ uranium recovery. It will also require changes to existing licenses since the RIS states that these new requirements will apply to current operating licensees. Furthermore, Staff has not discussed how this RIS should apply at Agreement States with in situ uranium recovery licensees, such as Texas.

Conclusions

The following are WMA conclusions concerning this RIS:

The changes to groundwater restoration standards for in-situ uranium recovery operations described in this RIS constitute a major regulatory change that should have been subject to public notice and comment.

The use of 10 CFR Part 40 Appendix A criterion 5B as currently written is inappropriate for groundwater restoration at in-situ uranium recovery operations. The Uranium Mill Tailings Radiation Control Act (UMTRCA) and 10 CFR Part 40 Appendix A which was promulgated to implement UMTRCA were not originally intended to regulate in-situ uranium recovery. 10 CFR Part 40 Appendix A should not be used to regulate groundwater restoration at in situ uranium recovery licensees until the rulemaking process is complete. Many specific provisions of Appendix A cannot be applied to ISR facilities until revised.

The document is inconsistent with existing State of Wyoming regulations and the State's Environmental Quality Act as well as creates the potential for conflicts with current Underground Injection Control (UIC) regulations. These potential conflicts could have been avoided by following the public comment or rulemaking process.

The RIS is not in conformance with *COMSECY-07-0015 – PATH FORWARD FOR RULEMAKING ON GROUNDWATER PROTECTION AT IN SITU LEACH URANIUM EXTRACTION FACILITIES* and the associated Staff Requirements Memorandum (SRM).

Based on the problems enumerated above, WMA believes at a minimum that the RIS should be rescinded and interim guidance provided following public notice and an appropriate period for public comment. WMA prefers that the current regulatory approach of implementing generally applicable Part 40 Appendix A requirements through existing guidance and license condition be maintained until the Part 40 rulemaking process has run its course.

WMA appreciates the opportunity to comment on this Regulatory Issues Summary (RIS). If you have any questions please do not hesitate to contact me.

Sincerely yours,
WYOMING MINING ASSOCIATION

A handwritten signature in cursive script that reads "Marion Loomis".

Marion Loomis
Executive Director

Cc: Bill Von Till – NRC/DWME
Katie Sweeney – National Mining Association