

**STAFF EVALUATION OF PUBLIC COMMENTS RECEIVED ON PROPOSED GENERIC COMMUNICATION, DRAFT REGULATORY ISSUE SUMMARY 2009-12, “PRE-LICENSING CONSTRUCTION ACTIVITIES AT PROPOSED URANIUM RECOVERY FACILITIES” (74 FR 13483)**

No.	Subject	Comment and Associated Commenters	Response
1.	Pre-Licensing Construction would cause environmental damage.	<p>Several commenters expressed opposition to pre-licensing construction authority because of concerns about environmental damage that the commenter stated would occur due to uranium recovery.</p> <p>Deyon Boughton, Jeri Fry, Powder River Basin Resource Council, New Mexico Environmental Law Center (NMELC).</p>	<p>The purpose of exemptions to 10 CFR 40.32(e) would be to allow applicants to undertake certain tasks defined as “not construction” under 10 CFR 51.4. This section specifies what is and is not construction, and is used by the NRC staff in its implementation of the NRC’s National Environmental Policy Act (NEPA) regulations. Those activities not considered construction are those activities that the NRC possesses no authority to regulate. The NRC would not grant exemptions for activities that have a nexus to public health and safety. The Regulatory Issue Summary (RIS) has been revised to list those activities for which an exemption would not be granted, and to clarify that environmental reviews will be performed for all exemption requests per the requirements of 10 CFR 51.21. Additionally, a further site specific supplemental environmental impact statement (SEIS) will be issued prior to any issuance of an in situ recovery (ISR) facility license.</p>
2.	Pre-licensing construction exemptions would prejudice the future application review.	<p>Several commenters expressed opposition to pre-licensing construction authority because of concerns that allowing pre-licensing construction puts the NRC in an untenable position regarding the denial of a license to a company that has spent millions in pre-licensing construction.</p> <p>Colorado Citizens Against Toxic Waste (CCAT), Colorado Department of Public Health and Environment (CDPHE), Natural Resources Defense Council (NRDC), Powder River Basin Resource Council, Biodiversity Conservation Alliance, Southwest Research and Information Center (SRIC), Information Network for Responsible Mining. NRDC, Powder River Basin Resources Council, Biodiversity Conservation Alliance, SRIC, and Information Network for Responsible Mining are referred to herein as the Consolidated Commenters.</p>	<p>The NRC staff will not issue a license until the full application is reviewed and all regulatory requirements have been met. Also, as stated in the RIS, any pre-licensing construction activity will be performed at the applicant’s risk.</p>
3.	Allowing construction prior to performing an environmental review.	<p>Several commenters opposed the granting of pre-licensing construction exemptions prior to performing an environmental review.</p> <p>CDPHE, CCAT, Consolidated Commenters,</p>	<p>As stated above in response to Comment 1, the RIS has been revised to clarify that environmental reviews will be performed for all exemption requests as required by 10 CFR 51.21.</p>

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4.	Allowing pre-licensing construction would conflict with regulations.	The CDPHE stated that the RIS may be in conflict with the well construction requirements in the proposed amendments to 10 CFR 40 that are in the draft ISR rule shared with the states last year. Those draft rule requirements would have strict construction and testing requirements for the wells. CDPHE expressed concern that the wellfields could be constructed prior to the licensing review being completed and before compliance with the construction and testing requirements is confirmed.	The RIS has been revised to list those activities for which an exemption would not be granted. Installing production wells, injection wells, and the monitoring well network are included in that list, due to their nexus to safety.
5.	Allowing construction prior to a license could result in a reclamation liability.	The CDPHE stated that allowing construction of these facilities prior to the license being issued could result in a reclamation liability should the license not be granted with full financial assurance in place.	As indicated in the response to the preceding comment, installation of production and injection wells are included within the list of activities for which an exemption would not be granted. The staff therefore does not agree with this comment. Nonetheless, the staff notes that companies installing wells for ISR facilities establish bonds for each well drilled with state regulators under well drilling permits or permits to conduct operations.
6.	Preoperational groundwater baseline or background characteristics.	The CCAT stated that there is concern about adequate characterization of pre-operational background or baseline groundwater quality during a normal licensing process. CCAT questions whether these issues will be relegated to the back of the licensing process from the application of staff resources to reviews of exemption requests for pre-licensing construction activities.	Preoperational groundwater characterization will still be required and the data collected will be thoroughly reviewed for its adequacy before any license is issued, regardless of whether or not exemption requests are submitted.
7.	Burden on NRC staff.	CCAT questioned whether allowing pre-licensing construction would place an added regulatory burden on the NRC and Agreement States. CCAT states that additional staff resources will be needed if normal licensing activities are proceeding at the same time inspections will be needed to oversee pre-licensing construction.	While some additional review time will be required to process exemption requests, the costs of these reviews are borne by the applicant, not the taxpayer. The NRC, being a fee recoverable agency, charges an hourly rate to review applications and any associated exemption requests. The staff plans to have adequate resources available to satisfy anticipated licensing burdens.
8.	Pre-licensing construction exemptions will not comply with the NEPA process.	The NMELC states that the exemption proposal would have a potential major impact upon the NEPA process.	See response to Comment No. 1.
9.	Compliance with other regulations.	The US Environmental Protection Agency (EPA) states that, depending on the proposed pre-licensing construction activity, NRC staff should emphasize that other (i.e., non-NRC) regulatory requirements still apply. This includes activities such as permitting for construction of injection wells and responsibilities related to the Safe Drinking Water Act, Uranium Mill Tailings Radiation Control Act, Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act.	This RIS governs NRC programs only, and does not affect non-UMTRCA requirements that are implemented by the EPA and/or the States. Furthermore, §20.2007 requires that licensees comply with all other Federal, State, and local regulations.
10.	Financial assurance.	The EPA states that the NRC staff should also consider requiring applicants to include a site redress plan similar to that for Limited Work Authorizations (LWAs) in the reactor program. This should also include information about the financial assurance mechanism that will be used in the event of a denial of the license. EPA's UIC bonding,	Concepts such as a site redress plan are part of the reactor program and are not applicable to 10 CFR part 40 licensees. Furthermore, as stated in the final RIS, exemption requests

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		for example, covers only the injection wells, not the producing wells or infrastructure.	pertaining to installation of the production, injection, or monitoring wells (as part of the monitoring network) will not be granted prior to license issuance.
11.	Disagreement over applicability of §40.32(e).	<p>Several commenters expressed their disagreement with the NRC staff's position that 10 CFR § 40.32(e) applies to in situ recovery (ISR) facilities in the same fashion that it does to conventional uranium milling facilities. They further state that the staff's legal position on the application of Part 40.32(e) to ISR facilities does not comport with the Commission's legal interpretations of uranium milling.</p> <p>Uranerz Energy Corporation and National Mining Association.</p>	The reference to "the Commission's legal interpretations" is vague. But as stated in the RIS, 10 CFR § 40.32(e) uses the terms "uranium milling" and "byproduct material." As defined in 10 CFR Part 40, these terms include ISR operations within their scope.
12.	Length of time to prepare RIS, lack of guidance, and prejudging the rulemaking.	<p>Several commenters expressed their "extreme disappointment" in the length of time required to prepare and issue the draft RIS. They expressed frustration that the RIS required 4 months to issue and did not include any guidance related to the preparation and submittal of exemption requests. The commenters also stated that the staff appears to contradict itself by using the information gathered from this RIS to support development of a rulemaking at the same time the staff does not want to prejudge the rulemaking.</p> <p>Uranerz Energy Corporation and National Mining Association.</p>	The staff regrets the length of time required to issue this RIS. The staff notes that specific guidance was not included in the RIS to avoid prejudging the rulemaking effort. However, we have revised the RIS to include specific guidance for preparing and submitting exemptions and a discussion of those actions the staff would not approve under an exemption. The collective comments received from all commenters through the voluntary submittal process described in the draft RIS will be considered in the rulemaking related to the change in the definition of "construction" in Part 40.32(e). Contrary to the commenter's understanding, the staff is not using information gathered from specific exemption requests to support the rulemaking.
13.	Utilization of regulations in other parts of Title 10.	<p>Several commenters maintained that LWA regulations and other reactor program regulations (10 CFR Part 50.59, "Changes, tests, and experiments") could provide the rationale and bases for permitting certain performance-based construction activities for ISR facilities in the absence of specific LWA regulations in Part 40.</p> <p>Uranerz Energy Corporation and National Mining Association.</p>	The attempt to link the LWA regulations and guidance to 10 CFR 50.59 and the use of performance-based licensing is not persuasive. In this regard, LWA provisions were introduced into Part 50 when 10 CFR 50.10 was substantially revised in 2007. As indicated, this rulemaking pertained to reactors governed by part 50, and did not address ISR operations. The NRC staff is not aware of any subsequent Commission policy or precedent directing it to incorporate wholesale into part 40 the part 50 LWA regulations and guidance. While a Commission ISR adjudicatory decision (CLI-99-22) cited 10 CFR 50.59 in endorsing the use of performance-based licensing for ISR operations (50 NRC at 15-16), no connection is shown between this 1999 decision and the 2007 rulemaking action.
14.	Ability to	The Wyoming Department of Environmental Quality (WDEQ) expressed the view that	The NRC staff does not agree with this

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	develop wellfields under pre-licensing construction.	pre-licensing construction of injection, production, and monitoring wellfields could be authorized under a Part 40.14(a) exemption request. WDEQ also stated that NRC's authority under the Atomic Energy Act does not extend to the construction of wells at ISR facilities. WDEQ opined that NRC should be more flexible with the types of construction activities that can be performed during the pre-licensing period.	comment. As clarified in the final RIS, and as indicated above in response to Comment 1, the NRC has authority to regulate actions having a nexus to radiological safety. Such actions include the construction of wells in proposed ISR wellfields, because this directly affects how byproduct material will later be controlled during licensed ISR operations.
15	Applicability of Part 40.32(e) to ISR facilities.	<p>Several commenters do not believe that the NRC staff has provided sufficient legal justification in the RIS to conclude that Part 40.32(e) applies to ISR facilities. The commenters believe that the NRC staff has not adequately considered the Part 40.32(e) rulemaking record.</p> <p>Uranerz Energy Corporation and National Mining Association.</p>	Notwithstanding explanatory or supporting statements made in a "rulemaking record" (e.g., those made in a rule's preamble), only the regulatory wording itself is legally binding and controlling. Here, the Part 40 definition of "byproduct material," established in 1979, is not ambiguous regarding its coverage of ISL operations, and this defined term is used in 10 CFR 40.32(e). There is thus no need to examine any underlying record to construe this regulation's meaning.
16.	Application of LWAs to Part 40 licensees	<p>Several commenters advocated the use of an LWA-like tiered approach to determine which pre-licensing site construction activities could be allowed without NRC authorization and which activities required NRC authorization. Commenters suggest there is ample precedent for applying the rationale of Part 50.59 as a basis for making the above determinations.</p> <p>Uranerz Energy Corporation and National Mining Association.</p>	There is no persuasive legal basis for applying an LWA-like approach to the authorization of certain construction activities at ISR facilities. Applicants are bound by the requirements of Part 40.32(e). Exemption from the requirements of Part 40.32(e) may be requested under Part 40.14. The RIS has been revised to describe those activities for which exemptions will not be granted. The requirements in Part 50.59 apply to previously approved and licensed reactors. The rationale on which 50.59 is based, and the process for performing facility modifications, tests, or experiments on licensed reactors, is not applicable to pre-licensing construction activities for proposed ISR operations.