RE: Docket No. 40-9068; NRC-2009-0391

Dear Mr. Cohen:

I tried to submit these comments through www.regulations.gov, but for some reason it would not accept my submittal there. So I am sending them to you directly.

Thank you.

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Since 1967 the Wyoming Outdoor Council has worked to protect Wyoming's environment and quality of life for future generations. We envision a Wyoming thriving with abundant wildlife, healthy landscapes, clean air and water, strong communities, and sustained by renewable energy. We need your help. Join us today at http://www.wyomingoutdoorcouncil.org/join/index.php

From: Steve Jones [steve@wyomingoutdoorcouncil.org]
Sent: Thursday, December 10, 2009 12:00 AM
To: Cohen, Stephen
Subject: Comments on Lost Creek ISR project
Attachments: WOC LostCreekcomments.doc; ATT00002.txt

Importance: High

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Message-ID: <E38BD936-CCF1-4C36-861E-532B3D96097E@wyomingoutdoorcouncil.org>
From: Steve Jones <steve@wyomingoutdoorcouncil.org>
To: stephen.cohen@nrc.gov
Content-Type: multipart/mixed; boundary="Apple-Mail-40-793616997"
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Date: Wed, 9 Dec 2009 21:59:34 -0700
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Return-Path: steve@wyomingoutdoorcouncil.org

December 9, 2009

Stephen Cohen
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RE: Draft Environmental Assessment for Exemption Request for Lost Creek ISR, LLC, Sweetwater County, WY, Docket ID NRC-2009-0040-9068, 74 Fed. Reg. 57712, *et seq.*

Sent by electronic mail on December 9, 2009

Dear Mr. Cohen:

These comments are made on behalf of the Wyoming Outdoor Council. Thank you for this opportunity to submit comments on the draft Environmental Assessment referenced above (hereinafter "the EA")

Since 1967 the Wyoming Outdoor Council has worked to protect Wyoming's environment and quality of life for future generations. We envision a Wyoming thriving with abundant wildlife, healthy landscapes, clean air and water, strong communities, and sustained by renewable energy.

The NRC should not allow the proposed action identified in the EA to go forward, but should instead choose the no action alternative, which was the only other alternative identified. Allowing companies to proceed with construction activities prior to issuance of a license would create significant impacts to public health and the environment and would prejudice the overall NEPA process that the NRC is engaged in with respect to this project.

As identified in the Federal Register notice for the environmental assessment, Lost Creek ISR, LLC ("LCISR") submitted an application for a NRC license on March 28, 2008 and that application "is still under NRC review." The activities that LCISR has requested that it be allowed to go forward with, prior to issuance of the uranium mining license, include the following:

1. Leveling and surfacing of the area around the plant and maintenance building[s].
2. Construction of the plant and maintenance buildings.

3. Installation of household septic systems for the plant and maintenance buildings.
4. Installation of fencing around the plant and building area.
5. Upgrading of existing road access from the west to the plant.
6. Upgrading of existing road access from the east to the plant.
7. Installation of the fence for an "early wellfield area."
8. Installation of power lines to the plant and maintenance buildings and drillers shed.
9. Drilling and casing (is "vase" a typographical error?) of up to four deep wells.
10. Construction of a drillers shed and staging area.

The NRC proposes to allow all of these activities except item 9 above, and the "plant construction" in item 2 above.

We offer the following comments on the EA analyzing the impacts of approving these activities.

A. The impacts of the proposed action have not been analyzed.

The EA is only 4 pages long. There are only two paragraphs addressing the impacts of the proposed action. This does not constitute an analysis of the impacts of the proposed action. There is merely a discussion in those two paragraphs of whether the activities being considered for approval constitute "construction" as defined by 10 CFR 51.4. The EA even states this explicitly, in Section 8.0 of the EA: "The impacts of those activities allowed by this exemption, ... are not evaluated in this EA."

Whether the activities proposed in the EA come under the exemption provisions of 10 CFR 51.4 is a separate legal question, which we address below. But there remains a need, in any event, to evaluate the impacts of the proposal. The activities are not exempt from environmental analysis. It does not help that the NRC staff "plans to condition any exemption approval so as to protect endangered species and cultural and historic resources from the effects of site preparation activities." That may be laudable, but it does not conform to the requirements of NEPA, which are to evaluate environmental impacts before they are approved.

In the second paragraph of Section 8.0 it states: "The impacts of all site preparation activities will be evaluated as cumulative impacts in the supplement environmental impact statement (SEIS) being prepared for this site." While we commend the NRC for meeting this requirement of the National Environmental Policy Act (NEPA), the evaluation must occur before the activities are authorized for it to have any meaning within the law.

Of the different aspects of the affected environment that will be affected by the LCISR project, most of them will, or could potentially be, affected by the construction activities that LCISR has requested to begin before the actual licensing of the project. These include:

1. Land use impacts
2. Transportation impacts
3. Impacts to geology and soils
4. Impacts to surface water and wetlands
5. Ecological impacts (to plants, animals and aquatic life)
6. Air quality impacts

7. Water quality impacts
8. Noise impacts
9. Impacts to historical, cultural, and paleontological resources
10. Impacts to visual and scenic resources
11. Socio-economic impacts
12. Public and occupational health and safety impacts

None of these impacts are addressed in the EA. The EA is therefore inadequate in that it fails to analyze or address these impacts. These are not de minimus activities. These activities are part and parcel of the larger uranium mining project sought to be authorized by LCISR. Simply put, LCISR is simply seeking to get a head start on the construction phase of this project before the NRC authorizes it.

B. Commencement of construction prior to license issuance is not allowed

Pursuant to 10 CFR 40.32, it is clear that the construction activities proposed in the EA cannot be allowed by the NRC prior to issuing the license for the project. It provides:

> (e) In the case of an application for a license for a uranium enrichment facility, or for a license to possess and use source and byproduct material for uranium milling, production of uranium hexafluoride, or for the conduct of any other activity which the Commission determines will significantly affect the quality of the environment, the Director of Nuclear Material Safety and Safeguards or his designee, before commencement of construction of the plant or facility in which the activity will be conducted, on the basis of information filed and evaluations made pursuant to subpart A of part 51 of this chapter, has concluded, after weighing the environmental, economic, technical and other benefits against environmental costs and considering available alternatives, that the action called for is the issuance of the proposed license, with any appropriate conditions to protect environmental values. Commencement of construction prior to this conclusion is grounds for denial of a license to possess and use source and byproduct material in the plant or facility. As used in this paragraph, the term ``commencement of construction'' means any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site. The term does not mean site exploration, roads necessary for site exploration, borings to determine foundation conditions, or other reconstruction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values. [emphasis added]

It is clear that the construction activities contemplated by LCISR are not for site exploration or monitoring or testing of the site that might be required to provide adequate information necessary to prepare the SEIS. Clearly the proposed activities constitute site preparation for the eventual granting of the license by the NRC. The regulation clearly prohibits such construction activities prior to the granting of the license itself.

Given the fact that the draft SEIS has already been published (comments are due on Feb. 1, 2010), it does not make sense to authorize this request for pre-permitting construction in advance of the license issuance itself. The public interest in not being served by this rush to begin

construction. There is no emergency that can justify approving the proposed construction activities, and the NRC's own regulations do not allow for it.

While the EA itself cites an "inconsistency" between 10 CFR 40.32(e) and 10 CFR 51.4, it is clear that it is the more restrictive language of 10 CFR 40.32(e) that must apply here, where that latter regulation specifically deals with a "license to possess and use source and byproduct material for uranium milling...." The more specific must control over the more general. The provisions of 10 CFR 51.4 deal with all "domestic licenses." As the EA itself points out, that latter regulation grew out of limited work authorization (LWA) regulations for nuclear power plants. The drafters of that regulation were obviously thinking of nuclear power plant facilities when they carved out certain exceptions to the definition of "construction." But as 10 CFR 40.32 makes clear, those exceptions simply do not apply to uranium mining and milling operations. Furthermore, as will be discussed more fully below, any inconsistency between the regulations on this point should be resolved in favor of an interpretation that is also consistent with other federal requirements, such as NEPA and the Council on Environmental Quality (CEQ) regulations promulgated thereunder.

C. The proposed action, which would authorize project activities prior to NRC licensing, violates NEPA.

Generally, NEPA requires agencies "to consider environmentally significant aspects of a proposed action, and, in so doing, let the public know that the agency's decision-making process includes environmental concerns." Utahns for Better Transportation v. United States Dep't of Transportation, 305 F.3d 1152, 1162 (10th Cir.2002). All federal agencies are required to take a "hard look" at the environmental consequences of a proposed action where the action could have a significant effect on the environment. Id. at 1162-63. (In this case the NRC has already determined that the LCISR project will have a significant effect on the environment.) An EA, on the other hand, is a document that, under NEPA, provides "sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a). (The EA prepared for the proposed action in this matter does not measure up to that standard.) If the environmental assessment results in a finding of no significant impacts, an EIS is not required. 40 C.F.R § 1508.13. But in this case there cannot be a finding of no significant impact. That finding has been made and as a result a Supplemental EIS has been prepared. The NRC has determined that approval of the Lost Creek uranium mining project is a significant federal action that requires the preparation and completion of a Supplemental EIS analyzing and evaluating the impacts of that project on the natural and human environment.

Yet the proposed action in this EA would strip out part of the construction phase of the project and allow LCISR to commence construction prior to the NRC making a decision on whether or not to issue the NRC license for this uranium in situ recovery project. This is not allowed under NEPA. The project must be evaluated and analyzed as a whole, and cannot be separated into smaller portions that, thereby, get a waiver from NEPA requirements. (The exemption provisions of the NRC's construction regulations, 10 CFR 51.4, cannot override NEPA requirements.)

NEPA requires environmental review "before decisions are made and before actions are taken." 40 CFR 1500.1(b). The CEQ regulations, which govern all federal agencies with respect to NEPA compliance issues, provide in part that "Until an agency issues a record of decision as provided in 40 CFR 1505.2 ... no action concerning the proposal shall be taken which would ... [l]imit the choice of reasonable alternatives." 40 C FR 1506.1(a)(2). Those regulations go on to provide that "agencies shall not commit resources prejudicing selection of alternatives before making a final decision." 40 CFR 1502.2(f). The proposed action would violate both of these provisions of the CEQ regulations.

There are only three alternatives identified for "detailed analysis" in the SEIS. One of those is the no action alternative. The no action alternative would be prejudiced by the proposed action of the EA (referenced above) to allow nine of the ten activities requested by LCISR to go forward at this time, prior to the decision of the NRC with respect to licensing the entire LCISR project. Resources of LCISR will be committed, probably in the millions of dollars, and the agency (the NRC) will undoubtedly feel pressured to grant the licensee what it wants, namely the issuance of the license, so that it can go forward with the rest of the project.

Furthermore, and more importantly from the perspective of Wyoming Outdoor Council, the above construction activities (i. e. the proposed action) could potentially cause irreparable harm to many of the important air, water, land, wildlife and ecological resources in the project area, yet no reclamation is apparently going to be required for any of the impacted resources, should the license ultimately be denied by the NRC. At the very least, the EA gives us no such assurances that reclamation will be required.

Courts have held that agencies cannot take steps that would prejudge a decision yet to be made pursuant to NEPA analysis in an EIS. See Davis v. Mineta, 302 F. 3d 1104, 1112 (10th Cir. 2002). This case was recently followed in San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Service, --- F.Supp.2d ----, 2009 WL 2868818 (D. Colo., 2009). The law is, therefore, clear that the proposed action cannot go forward since to do so would violate NEPA requirements and prejudice the decision to chose one or more of the alternatives identified in the SEIS.

D. The EA fails to disclose environmental impacts of the proposed action.

The EA does not attempt to evaluate the impacts of the activities it proposes to authorize. Other than to simply lay out the request of LCISR to conduct various construction activities, it does not discuss where on the project site they will be conducted, or how many miles of roads, or where the roads will be constructed, or the type of material to be used, or how many miles of fencing will be built, or the type of fencing, or the type of power lines, or where they will be built, or how many miles of power lines will be constructed. The size and extent of the maintenance buildings is not discussed, nor the amount of vegetation or topsoil that will be removed in all of these endeavors. The EA is devoid of such discussions. As the EA states: "The impacts of those activities allowed by this exemption, ... are not evaluated in this EA."

How can the public be expected to comment intelligently on the EA when it is so devoid of useful information? As a result, this draft EA, only four pages long, fails to properly disclose

any of the impacts of the authorized site preparation activities. The NRC must meet its NEPA responsibilities, and therefore cannot authorize the proposed action until it has completed the SEIS and made an agency decision on the whole in situ uranium project.

"NEPA requires an agency to evaluate the environmental effects of its action at the point of commitment . . . to insure that the agency considers all possible courses of action and assesses the environmental consequences of each proposed action." *Sierra Club v. Peterson*, 717 F.2d at 1415 (emphasis added). NEPA requires that no development proceed until after a valid EIS is complete. See 40 C.F.R. § 1506.1(c)(3). The NRC must wait on approving these activities listed in the EA. It cannot approve the proposed action until it has completed the NEPA process, which in this case is the completion of the SEIS (which is, as of this writing, only in draft form, and is still awaiting public comment).

E. Some potential threats to wildlife and plants.

While, as mentioned, the EA does not discuss or evaluate impacts to the human and natural environment, we nevertheless note that the proposed action may have an impact on important wildlife and plant resources endemic to the area. These include the black-footed ferret (endangered), the Ute ladies' tresses (threatened), the mountain plover (sensitive) and the greater sage grouse (sensitive).

In particular we note that the greater sage grouse is considered to be in decline and is particularly sensitive to any disturbance or human activity near its leks or nesting sites. The EA does not disclose whether there are any sage grouse in the project area, or that whether the species would be affected by the proposed action. But it is important to note that the project area is within core sage grouse habitat as identified by the Wyoming Game and Fish Department. The governor of Wyoming has issued an executive order on the subject of protecting core sage grouse habitat. We believe that the proposed action could easily impact lands that are important to sage grouse habitat, and fragment or disrupt that habitat through construction of buildings and fences, and also create noise and other disturbance for sage grouse. Furthermore, authorizing construction of a power line (presumably overhead) is in direct conflict with WGFD recommendations.

Thank you for your time and for your careful consideration of these comments.

Sincerely,

/s/
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