

May 11, 2010

Ms. Katie Sweeney, Esq., General Counsel  
National Mining Association  
101 Constitution Avenue, NW, Suite 500 East  
Washington, DC 20001

Dear Ms. Sweeney,

I am writing in response to your letter to the Nuclear Regulatory Commission (NRC) dated June 1, 2009, regarding the NRC's Regulatory Issue Summary (RIS) 2009-05, pertaining to the restoration of groundwater at licensed uranium in situ recovery (ISR) facilities.

As we interpret your letter, the National Mining Association's (NMA) central comments are as follows:

- (1) The NRC violated the Administrative Procedure Act by imposing new substantive requirements in RIS 2009-05 without public notice or comment;
- (2) RIS 2009-05 specifically conflicts with prior statements in NUREG-1569, "Standard Review Plan for In Situ Leach Uranium Extraction License Applications;"
- (3) RIS 2009-05 generally conflicts with the NRC's long-standing interpretation of the applicability of 10 CFR Part 40, Appendix A; and therefore
- (4) Without a reasoned explanation for these conflicts, NRC should continue its current policy until the rulemaking on ground water protection at ISR facilities concludes.

We have looked into the concerns you have expressed, but respectfully do not agree with your point of view.

First, the RIS does not impose or alter any substantive regulatory requirements applicable to ISR facilities. As noted on page 4 of the RIS, it "is informational and does not represent a departure from current regulatory requirements." Rather, the RIS simply clarifies and reiterates the NRC's pre-existing requirements.

Second, the RIS recognizes and corrects a misstatement in the 2003 NUREG-1569 Standard Review Plan (SRP) that incorrectly suggested that the standards in 10 CFR Part 40, Appendix A Criterion 5B, were not applicable to ISR facilities. However, as noted on the first page of NUREG-1569, the SRP was developed primarily to guide NRC staff in conducting licensing

reviews, and not to provide the industry with binding interpretations of NRC regulations. While the NRC has historically made some SRPs available for public review and informational purposes, the agency did not intend to attribute any level of binding formality to them, as your letter seems to suggest. Indeed, page 3 of NUREG-1569 states expressly that “standard review plans cannot be used to promulgate regulatory requirements,” and that the NRC had “no intent to do so using NUREG-1569.”

Third, as explained in the RIS, the regulatory basis for the application of Criterion 5B to ISR operations dates back to 1979. A 10 CFR Part 40 rulemaking conducted then defined the term “byproduct material” to include “the tailings *or wastes* produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.” (emphasis added). This definition further included “discrete surface wastes resulting from uranium solution extraction processes.” Despite the unfortunate error in our 2003 SRP, the 1979 rulemaking, together with the NRC’s subsequent decision in 2000 that waste water generated by ISR operations is properly classified as byproduct material, constitutes a long-standing regulatory basis for the RIS’s statement in 2009 regarding the applicability of Criterion 5B to ISR operations. The RIS served as proper public notice and recognition of the SRP’s error.

Finally, it is not true that the NRC has not provided a reasoned explanation for applying Criterion 5B(5) (10 C.F.R. Part 40, Appendix A) to ISR facilities and has not sought public input. The NRC previously announced and discussed its long-standing view on the applicability of Criterion 5B(5) to ISRs in public meetings with NMA over the last several years.

For example, on March 15, 2007, in connection with our ongoing rulemaking on ground water protection, NRC and EPA staff members involved in the rulemaking met with you (and other NMA representatives) to elicit NMA’s views on the rulemaking. In that meeting, NMA stated its agreement that the Criterion 5 groundwater cleanup standards are appropriate for restoration of mining zones at ISR facilities. NMA stated that it wanted the rulemaking to permit the establishment of alternate concentration limits (ACLs) as a standard for groundwater restoration at ISRs. The NRC recognized that although NUREG-1569 discussed the use of ACLs — which are explicitly allowed in Criterion 5B(5)(c) — NMA preferred a rule specifically permitting the use of ACLs as a standard for groundwater restoration at ISRs. At this public meeting, NMA further stated its position that the NRC should consider a State’s class-of-use designation of an aquifer when the NRC reviews a proposed ACL for ISR groundwater restoration.

Additionally, in its April 30, 2008 presentation at the NMA/NRC Uranium Recovery Workshop, the EPA further discussed the requirements of the Uranium Mill Tailings Recovery Act (UMTRCA) — as implemented in 40 CFR Part 192, to which 10 CFR Part 40, Appendix A conforms — under which ground water at ISR facilities must be restored to either background, MCL, or ACL levels. Regarding the establishment of ACLs, the EPA explained that sole reliance on a State’s class-of-use standard was not permitted under UMTRCA, but that class-of-use could be considered as a factor when establishing ACLs.

The 2009-05 RIS simply reiterates the above discussions from 2007 and 2008. The RIS does not improperly amend the regulatory requirements applicable to ISR facilities, nor enact new requirements for ISRs.

Until the NRC staff finishes its work with the EPA to resolve groundwater protection issues at ISR facilities and revise 10 CFR Part 40, Appendix A accordingly, the staff will continue to apply the existing Appendix A requirements and Criterion 5B standards in evaluating ISR groundwater restoration plans. The agency will also revise NUREG-1569 to identify the correct standards for groundwater restoration at ISR facilities and to address any new requirements codified by the ongoing rulemaking.

Sincerely,

Bradley W. Jones */RA/*  
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for Reactor and Materials Rulemaking  
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