PR 30, 36,39,40,51,70, and 150
(75FR43865)

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Colorado Citizens Against ToxicWaste, Inc. • Natural Resources Defense Council • New Mexico Environmental Law Center • Physicians for Social Responsibility • Powder River Basin Resource Council • Sheep Mountain Alliance • Wyoming Outdoor Council

September 27, 2010

Via Electronic and First Class Mail

Secretary, U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudications Staff
Washington, D.C. 20555-0001
Electronic Mail: Rulemaking.Comments@nrc.gov

Re: Comments on the NRC's Proposal to Amend Its Regulations by Revising the Provisions Applicable to the Licensing and Approval Processes for Byproduct, Source and Special Nuclear Material Licenses, and Irradiators. Docket ID: NRC-2010-0075.

The Natural Resources Defense Council (NRDC), Powder River Resource Council, New Mexico Environmental Law Center, Wyoming Outdoor Council, Physicians for Social Responsibility, Colorado Citizens Against ToxicWaste, Inc., and the Sheep Mountain Alliance appreciate the opportunity to comment on the Nuclear Regulatory Commission's (NRC) proposed changes to the definitions of "construction" and "commencement of construction with respect to material licensing actions instituted under the NRC's regulations, 75 Fed. Reg. 43865 (July 27, 2010).

The NRC's proposed rule change would allow a materials license applicant – e.g., under 10 CFR § 40 an In Situ Leach (ISL) uranium mining company or under 10 CFR § 70 an applicant for a "Domestic License for Special Nuclear Material" – to undertake activities which would have significant environmental impacts with no oversight or environmental review. Roads could be constructed, wells drilled, waste sites excavated, components ordered and built, and indeed, even entire buildings erected. The large and inter-connected framework of entire uranium milling, mining, and enrichment sites could be prepared prior to undergoing a single iota of meaningful environmental analysis or safety oversight. Such a proposal is unlawful and the NRC has presented no persuasive legal or technical basis for such an alteration of its responsibilities. Moreover, the proposed rule would allow for significant financial and structural investment on the part of the industry that would assuredly prejudice any subsequent licensing challenges (or, for that matter, licensing conditions that the agency might deem appropriate). The proposed rule has no technical merit and is plainly contradicts long-established law. 42 U.S.C. § 4321, et seq. The NRC should withdraw this proposed rule.

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Comments

I. Background

In October 2007, NRC published its "Limited Work Authorization" (LWA) final rule for nuclear power plants. 72 Fed. Reg. 57416, 57427 (October 9, 2007). The rule exempts many traditional construction activities from the definition of "construction" used in nuclear power plant licensing. The rulemaking was undertaken at industry's urging and NRC quickly fell in line with industry's faulty reasoning that the National Environmental Policy Act (NEPA) and the Atomic Energy Act (AEA) do not compel NRC to regulate significant construction aspects of proposed reactor projects. In the response to comments on this rule, NRC states:

> The industry submitted what is essentially a petition for rulemaking seeking changes to the LWA process, reflecting those lessons learned and their understanding of the current state of NEPA law. The NRC has reviewed the applicable law, and for the reasons stated elsewhere in this SOC, agrees with the petitioner that the current definition of construction and the current LWA requirements in § 50.10 are not compelled by NEPA or the Atomic Energy Act (AEA) of 1954, as amended. While the agency's regulations on construction and LWAs were a reasonable implementation of NEPA as understood in 1972, the NRC believes that, with more than 30 years experience in implementing NEPA and the evolving jurisprudence, the time is appropriate for reconsideration and revamping of these NRC requirements.

72 Fed. Reg. 57416, 57420.[1]

Coming to a different conclusion for the material licensing process (for reasons we think will be self-evident in the rest of our comments), in March 2009 the NRC issued a regulatory issue summary (RIS) to inform the uranium recovery industry of the NRC's policy regarding pre-licensing construction activities at proposed uranium recovery facilities. 74 Fed. Reg. 13484 (March 27, 2009). One of the sections that will be altered under today's proposed rule, 10 CFR § 40.32, "*General requirements for issuance of specific licenses*," was the subject of NRC's RIS on the pre-licensing construction activities. Subsection (e) of 10 CFR § 40.32 sets out several licensing requirement, includes a definition of "commencement of construction," and makes a clear statement that to commence construction *prior* to obtaining a license could be grounds for denial of an application.

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[1] The issuance of the LWA precipitated some significant controversy. A former Commissioner began working for one of the direct corporate beneficiaries of the rule change. See, http://www.pogo.org/pogo-files/alerts/government-corruption/gc-rd-20070925.html.

The industry asserted that 10 CFR § 40.32(e) is not applicable to in-situ leach (ISL) uranium mining facilities and applies only to conventional mills. Then, following on that line of logic, the industry asserted that ISL applicants should be allowed to build out most of their facilities in three tiers, only one of which is subject to NRC licensing. Our comments on the RIS are partially reiterated here and attached in their entirety. See, Attachment 1.

In contrast to its position with the LWA, the NRC Staff disagreed with industry's interpretation of 10 CFR § 40.32(e). First, the NRC Staff stated that 10 CFR § 40.32(e) does, in fact, apply to the ISL industry. See 74 Fed. Reg. 13484-13485. The NRC Staff cites the definitions of "uranium milling" and of "byproduct material" as the basis for the application of 40.32(e) to ISL facilities. Specifically, the NRC stated:

> NRC staff does not agree with industry's interpretation of 10 CFR 40.32(e). This regulation uses the terms "uranium milling" and "byproduct material," each of which is specifically defined in 10 CFR 40.4. The term "uranium milling" means "any activity that results in the production of byproduct material as defined in this part." The term "byproduct material" means the "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes."

74 Fed. Reg. 13484-13485.

Just over a year ago, NRC staff was not in agreement with the ISL industry, yet now NRC is proposing a rule which largely concedes industry's position – that it should be free of the constraints of § 40.32(e). Rather than strengthening what has been heretofore an inadequate regulatory scheme,[2] the NRC's proposed change to the definition of "construction" and "commencement of construction" potentially eviscerates meaningful environmental review. As discussed below, NRC's about face is arbitrary and capricious and a violation of the National Environmental Policy Act.

II. The Proposed Rule Change Violates the Law

Currently, the regulation applicable to materials license applicants provides, "the term 'commencement of construction' means any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site." 10 CFR § 40.32(e). Under the guise of creating harmony with the LWA, the NRC proposes to remove the following activities from the definition of "construction" for materials licensing:

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[2] NRDC and others noted numerous inadequacies of the regulatory system in public comments on Lost Creek SEIS, NUREG-1910 Supplement 3, Docket ID NRC-2008-0391; Moore Ranch SEIS, NUREG-1910, Supplement 1, Docket ID NRC 2009-0364; Nichols Ranch SEIS, NUREG-1910, Supplement 2, Docket ID NRC 2008-0339 submitted on March 3, 2010.

1. Changes for temporary use of the land for public recreational purposes;
2. Site exploration, including necessary borings to determine foundation conditions or other preconstruction monitoring to establish background information related to the suitability of the site, the environmental impacts of construction or operation, or the protection of environmental values;
3. Preparation of the site for construction of the facility, including clearing of the site, grading, installation of drainage, erosion and other mitigation measures, and construction of temporary roads and borrow areas;
4. Erection of fences and other access control measures that are not related to the safe use of, or security of, radiological materials subject of this part;
5. Excavation
6. Erection of support buildings for use in connection with the construction of the facility;
7. Building of service facilities
8. Procurement or fabrication of components or portions of the proposed facility occurring at other than the final, in-place location at the facility; or
9. Taking any other action that has no reasonable nexus to:
    a. Radiological health and safety, or
    b. Common defense and security.

75 Fed. Reg. 48865, 43867 (July 27, 2010).

Removing this sizable list from the definition of "construction" will allow for significant environmental impacts without oversight, review, analysis, or even opportunity to halt harms before they happen. Such a rule change effectively cedes a wide area of the NRC's meaningful regulatory authority over material licensing. NRC activities fall under the National Environmental Policy Act's (NEPA) wide umbrella. In considering this change to the definition of "construction", NRC must fully consider the authority and constraints placed upon NRC and other federal agencies by the mandates of NEPA.

A. NRC has a duty to regulate pre-mining construction activity under NEPA.

NEPA was enacted to ensure that environmental impacts are fully considered and mitigated to the maximum extent before any major federal action is undertaken. In the Congressional declaration of national environmental policy, the policies and goals section of NEPA, Congress expressly recognizes "resource exploitation" (such as uranium mining currently regulated by NRC under 10 CFR§ 40.32(e)) as an activity which has a profound influence on the natural environment. 42 U.S.C. § 4331(a). NEPA confers upon agencies within the federal government:

> Continuing responsibility...to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may:
>
> (1) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

> (2) Assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
>
> (3) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) Preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;
>
> (5) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

42 U.S.C. § 4331(b).

NRC must fully consider the broad scope of this act before undertaking a rule change which will substantially impair NRC's ability to fulfill the responsibilities listed above. NRC's "continuing responsibility" under NEPA includes the responsibility to regulate all aspects of the exploitation of uranium, including pre-mining construction activities. NRC's narrow view of NEPA is in direct conflict with Congress's stated goal of the act. "The Congress authorizes and directs that, to the **fullest extent possible**: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act" 42 U.S.C. § 4332 (emphasis added). Instead of using its authority to the fullest extent possible to undertake the environmental protection goals of NEPA, NRC proposes to abdicate jurisdiction over certain construction activities.

B. NRC is required to begin the NEPA process at the earliest possible time.

We focus on a hypothetical ISL uranium mine as an example, but our comments should apply to all of the sections that are proposed to be altered by the draft rule. The NRC's responsibility does not arise solely at the late stages of a potential ISL mining company's licensee application. Rather, the NRC's oversight should encompass all stages of the uranium mining process including the license applicants site preparations like clearing and grading the site, erecting fences, excavation of sites for waste pits or processing plants, or the building of service facilities. These activities bear a clear nexus to resource exploitation and yet, under NRC's proposed rule, it would cease to regulate them.

Congress declared that the purpose of NEPA is to, "to promote efforts which will prevent or eliminate damage to the environment." 42 U.S.C. § 4321. By only choosing to regulate license applicants after they have already begun to affect and in many cases,

damage, the environment, NRC's proposed rule contravenes the purpose of NEPA. As NRC is well aware, the Council on Environmental Quality (CEQ) – an agency within the Executive Office of the President – has promulgated NEPA implementing regulations that are "binding on all federal agencies." 40 CFR § 1500.3. Those regulations make it absolutely clear that agencies must complete the NEPA process "before decisions are made and before actions are taken." Id. § 1500.1(b); see also id. § 1500.5(f) (requiring NEPA review "early in the process"). Id.§ 1501.2 ("Apply NEPA early in the process") (emphasis added). By noting precisely that NEPA analysis must happen "early" in the proceeding, the law plainly requires that entire facilities are not constructed before the agency has an opportunity to evaluate any license application and associated environmental and public health impacts. The NEPA process must be completed "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." Id. 1502.5 (emphasis added). The rulemaking's suggested deletion of construction activities from the definition of "construction" runs counter to decades of established law and would clearly prejudice any licensing proceeding. As the Supreme Court has summarized, "NEPA ensures that important effects will not be . . . discovered [only] after the die [is] otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (emphasis added).

In order to insure that an agency's NEPA analysis "serve[s] practically as an important contribution to the decision-making process, 40 CFR 1502.5, NEPA review must be conducted "before decisions are made and before actions are taken." Id. § 1500.1(b) (emphasis added). Thus, as the binding CEQ regulations make absolutely clear, an agency may not use the NEPA process simply to "rationalize or justify decisions already made." Id. § 1502.5 (emphasis added).

As the D.C. Circuit succinctly explained in Sierra Club v. Peterson, "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." 717 F.2d at 1415 (emphasis added). Consequently, "the appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options." Id. at 1414 (emphasis in original); see also, Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977); Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 229 (D.D.C. 2003); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1129 (9th Cir. 1998); accord Sierra Club v. Lujan, 716 F.Supp. 1289, 1293 (D.Ariz. 1989) ("post hoc compliance with NEPA is unlawful"); Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) ("The rationale behind this rule is that inflexibility may occur if delay in preparing an EIS is allowed: 'after major investment of both time and money, it is likely that more environmental harm will be tolerated.'").

It is clear that NEPA review must start at the beginning of the uranium mining process, with initial construction. Shifting its regulatory responsibilities to begin at a time long

after environmentally meaningful decisions have been made violates the spirit and letter of NEPA and the ample case law interpreting it.

C. The Atomic Energy Act gives NRC authority to regulate pre-licensing activities.

NRC argues that NEPA is a procedural statute that does not expand the Commission's authority under the Atomic Energy Act (AEA). While we view the NRC's perspective – founded in its earlier rationale for the LWA rule – as unnecessarily cramped, the NRC conveniently fails to acknowledge that Congress explicitly provided NRC the authority to regulate all aspects of materials licensing – not just those aspects that deal specifically with radiological hazards.

In the AEA, Congress states: "The Commission shall insure that the management of any byproduct material, as defined in section 11e.(2), is carried out in such manner as the Commission deems appropriate to protect the public health and safety and the environment from radiological **and non-radiological** hazards associated with the processing and with the possession and transfer of such material taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate." 42 U.S.C. § 2114(a)(1) (emphasis added). Congress has spoken directly to the NRC and stated the clear breadth of its radiological and non-radiological obligations. In fact, NRC's authority is so broad in this arena, that Congress grants NRC authority over even those exempted from licensing by section 81 of the AEA where NRC deems it, "necessary or desirable to protect health or to minimize danger to life or property, and in connection with the disposal or storage of such byproduct material." Id.

The AEA further states that, "regulation by the United States of the production and utilization of atomic energy **and of the facilities used in connection therewith** is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public." 42 U.S.C.A. § 2012(e) Support buildings and service facilities clearly fall under the definition of "facilities used in connection therewith," yet NRC's proposed rule would exempt these facilities from any pre-mining review and allow them to be constructed without any agency oversight or environmental review.

NRC is not at liberty to ignore the sections of the AEA that it does not wish to enforce. It is a fundamental canon of statutory construction that Courts must "interpret the statute 'as a symmetrical and coherent regulatory scheme' and 'fit, if possible all parts into a harmonious whole.'" Food and Drug Admin. v. Brown and Williamson Tobacco Co., 529 U.S. 120, 133 (2000). Wherever possible, statutes should be read in harmony. See, U.S. v. Trident Seafoods Corp., 92 F.3d 855 862 (9th Cir. 1996) ("[T]o the extent that statutes can be harmonized, they should be, but in case of irreconcilable inconsistency between them the later and more specific statute usually controls the earlier and more general one.").

To accept the NRC's interpretation that the AEA has no application to nonradiological hazards renders the words in Section 84 of the Act surplus. See Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 834 (9th Cir. 1996); see also Biodiversity Legal Foundation v. Badgely, 309 F.3d 1166, 1174 (9th Cir. 2002) (courts construing statutes presume that Congress intended to enact each section of the statute, and always prefer an interpretation that gives effect to each section).

Clearly, NRC has the authority under the AEA to regulate all aspects of construction undertaken by materials license applicants that bear a relationship to mining, milling, processing, or enrichment activities. NEPA directs NRC – as early as possible in the process before major federal decisions are made – to meaningfully review all environmental impacts of a proposed action. Yet NRC has chosen to propose a rule that does not utilize its full breadth of its AEA authority and violates the strictures of NEPA.

IV. NRC's proposed rule change is arbitrary and capricious.

NRC's arbitrary and capricious interpretation of its authority and the strictures of NEPA do not pass the common sense test. NRC proposes to allow license applicant to make irrevocable commitments of resources *before* any environmental analysis, oversight, and certainly any approval process conducted by NRC. Under NRC's proposed definition of "construction" and "commencement of construction," a license applicant would be at liberty to substantially develop, for example, a mining site prior to any determinations by NRC.

Suppose a license applicant, in preparation for materials license related to uranium mining and in anticipation of NRC granting its license application, builds several buildings, some outer fencing, and a road which connects the building and eventually leads to a main highway. In reviewing the license application, NRC determines that there are several sage grouse leks near the parameter of the property. Now NRC must determine whether the sage grouse, a threatened species, are better protected by the removal of the fence and/or the construction of a new fence or allowing the fence to remain. But of course, the damage to the sage grouse has already been done and this duplicative action (building and then tearing down and re-building) increases the impact felt by threatened or endangered species, and in fact, any wildlife living near the property.

A similar scenario would be true for the prospects of excavated waste disposal pit. Suppose, for example, the NRC determines the waste site is ill placed for critical habitat, aquifer recharge, or any other likely problem, and should instead be placed elsewhere on the site. Excavating a second waste disposal pit destroys twice the habitat, potentially jeopardizes historic or culturally important site, and demands an unlikely level of scrutiny from the regulator and the public. NRC would be faced with the choice of forcing the license applicant to undertake a larger environmental impact (building an additional pit) or allowing the license applicant to move forward when the large construction projects would have been more safely situated elsewhere. These unnecessary impacts would have been prevented had NRC undertaken an environmental assessment early in the process.

These are not far flung hypotheses. These are real conditions that the NRC currently considers when deciding whether to approve a license. These considerations are precisely the reasons that a license application must be considered as a whole. Cumulative impacts include not just impacts from the actual operations of a facility licensed under these provisions, but the impacts from all of the activities NRC proposes to remove from its definition of "construction" for materials licensing.

And not only do the cumulative activities have a significant impact on the environment, construction of facilities can foreclose options such as protective conditions in licenses. As just one example, if a drilling pad is constructed in a certain manner, that might preclude a different construction that Staff, the State, or an appropriately versed independent consultant might deem necessary to provide for proper operation. Additionally, in terms of creating prejudice to the "future review" that will constitute the application process, a commitment of resources will have the effect of making it more difficult for the NRC to deny a license or impose different conditions because of the equities involved. That is, the NRC staff may feel pressure not to require a company to do things differently if the company has spent several million dollars on construction already. Further, many of these activities covered under materials licensing will cause significant surface or subsurface disturbance. These disturbances will need to be accounted for in effective closure plans and under financial assurance. Construction before licensing or even environmental review will, at minimum, complicate and in even some instances prevent the establishment of effective closure plans and financial assurance. Under the current scheme, NRC can catch possible environmental damage early and thereby lessen the impact. NRC's attempt to rid itself of this responsibility is inconsistent with NEPA.

Moreover, the current regulatory scheme already provides an allowance for pre-licensing construction via the exemption request process under 10 CFR 40.32(e). Any such exemption request must specify the particular activity, the purpose and need, the duration, and the potential impacts to human health and the environment. Depending on the aforementioned list, the NRC staff's review may include at least an environmental assessment conducted pursuant to the agency's NEPA requirements (see 10 CFR Part 51) and are reviewed by Staff on a case-by-case basis. It is this waiver process, which includes analysis by Staff, which should govern pre-license construction and not the absence from pre-mining environmental review that NRC proposes.

Finally, discontinuing regulation of construction activities at issue here will have a significant impact necessitating an environmental assessment (EA) or environmental impact statement (EIS). NRC has done neither. This rulemaking does not fall within the categorical exclusions described in 10 CFR § 51.22(c)(1), (c)(2) and (c)(3)(1). It is not merely administrative in nature – the proposed rule would have the effect of de-regulating a substantial amount of construction activity related to materials licensing.

This type of environmental impact must be assessed through an EA or EIS. As the NRC is well aware, agency "actions" to which NEPA applies includes "new or revised agency

rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a). "Federal actions" are further defined to include "[a]doption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq. 40 C.F.R. § 1508.18(b)(1). The APA defines "rulemaking" as an "agency process for formulating, amending, or repealing a rule," 5 U.S.C. § 551(5), and further defines "rule" as the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

The case law further confirms that regulations are "federal actions" to which NEPA applies. See, e.g., Scientists Institute for Public Information v. AEC, 481 F.2d 1079, 1091 (D.C. Cir. 1973) ("The range of actions covered by NEPA . . . is exceedingly broad"), Id. at 1088 ("The legislative history of the Act indicates that the term 'actions' . . . includes 'project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs'") (quoting S. Rep. 296, 91st Cong., 1st Sess. 20 (1969)); American Public Transit Ass'n v. Goldschmidt, 485 F. Supp. 811, 832-33 (D. D.C. 1980) (nationwide regulations governing mass transit access by disabled persons required EIS), relying upon Kleppe v. Sierra Club, 427 U.S. 390 (1976); National Wildlife Federation v. Babbitt, 835 F. Supp. 654, 670-71 (D. D.C. 1993) ("once the rulemaking has been completed, the Secretary must either prepare an EIS or state on the record the reasons why an EIS has not been prepared [through issuance of an EA and "Finding of No Significant Impact" or application of a CE]."). Compare Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1243 (D.C. Cir. 1980) (agency inaction is not a "federal action" triggering the application of NEPA). In addition to the plain language of the regulations and the case law, CEQ explained:

> An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedures Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS.

"Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations," 46 Fed. Reg. 18,033 (March 23, 1981) (Answer to Question 24a).

Conclusion

In sum, pre-operation construction is an integral part of the environmental impact assessment conducted on any site. The definition of "construction" should not be changed to allow for substantial development to go forward without environmental review.

We appreciate the opportunity to comment and look forward to working with you. If you have any questions, please do not hesitate to contact Geoff Fettus at (202) 289-6868 or gfettus@nrdc.org.

Sincerely,

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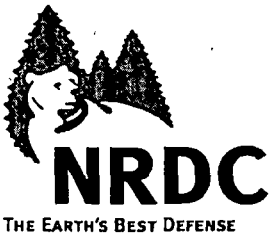
Attachment 1



May 11, 2009

Via Electronic and First Class Mail

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Re: Comments on the NRC's Proposal to Issue a Regulatory Issue Summary on Pre-Licensing Construction Activities at Proposed Uranium Recovery Facilities

The Natural Resources Defense Council (NRDC), the Powder River Basin Resource Council, the Biodiversity Conservation Alliance, Southwest Research and Information Center, and the Information Network for Responsible Mining, (collectively, "environmental organizations") appreciate the opportunity to comment on the Nuclear Regulatory Commission's (NRC) *Proposed Generic Communication: Pre-Licensing Construction Activities at Proposed Uranium Recovery Facilities*, 74 Fed. Reg. 13483 (March 27, 2009).

Background

Presenting the issue of pre-licensing construction activities for public comment is appropriate and of environmental concern, especially considering the significant number of potential applications for new or expanded uranium recovery licenses that may be before the NRC over the next few years. As explained in the Federal Register Notice, the uranium recovery industry (conventional mills, heap leach, and in-situ leach ("ISL" or "ISR") facilities, collectively "industry") has requested information and regulatory positions from NRC Staff on a range of issues, summarized briefly below.

The industry first asserts that 10 CFR 40.32(e) is not applicable to ISR facilities and applies only to conventional mills. Then, following on that line of logic, the industry asserts that ISR applicants should be allowed to build out most of their facilities in three tiers, only one of which is subject to NRC licensing.

First, the industry asserts that in "Tier 1" – activities over which the NRC would have no jurisdiction whatsoever – would allow for:

- Laying the foundations and construction of all support structures;
- Laying of foundations for processing facilities;
- Construction of ancillary facilities (roads, parking lots, access controls, power lines);
- Installation of water and sanitary systems;
- Drilling of disposal wells.

Next, the industry asserts that "Tier 2" would require NRC approval, but not a license and would allow for:

- Construction of processing facilities;
- Drilling of injection and production wells;
- Installation of wellfield pipelines.

And finally, "Tier 3" activities – the construction of evaporation ponds and engaging in uranium recovery operations – would not occur until after a license is issued.

The NRC Staff disagreed with industry's interpretation of 10 CFR 40.32(e). First, the NRC Staff stated that 10 CFR 40.32(e) does apply to the ISR industry. See 74 Fed. Reg. 13484-13485. The NRC Staff cites the definitions of "uranium milling" and of "byproduct material" as the basis for the application of 40.32(e) to ISR facilities. Specifically, the NRC states:

NRC staff does not agree with industry's interpretation of 10 CFR 40.32(e). This regulation uses the terms "uranium milling" and "byproduct material," each of which is specifically defined in 10 CFR 40.4. The term "uranium milling" means "any activity that results in the production of byproduct material as defined in this part." The term "byproduct material" means the "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes." These definitions were added to 10 CFR Part 40 in a 1979 final rulemaking that the ISR industry paper does not discuss.

74 Fed. Reg. 13484-13485.[1]

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[1] While the NRC references the 1979 rulemaking, it does not cite the actual document. See 44 Fed. Reg. 50012, August 24, 1979, *NRC Uranium Mill Tailings Licensing, Final Regulations with request for comments*. In those Final Regulations – issued in a final form in response to the recently enacted Uranium Mill Tailings Radiation Control Act of 1978 – the NRC presented its legal interpretation of UMTRCA and clarified the application of its general license. Id. In the associated document that presents the new (and final) rules, the NRC is careful to note that "[d]iscrete above ground wastes from in-situ or solution extraction are covered by this definition [referring to 40 CFR 40.4 definition of byproduct material], although the underground ore bodies depleted by the extraction process are not covered." 44 Fed. Reg. 50015, at 50016 (August 24, 1979), *Criteria Relating to Uranium Mill Tailings and Constructions of Major Plants, Proposed Rules*.

Next, the NRC Staff stated that while 10 CFR Part 40 does not provide for limited work authorizations (LWA), such as those specifically authorized for nuclear power plants under 10 CFR Part 50, the current 10 CFR Part 40 regulations already provide an allowance for pre-licensing construction via the exemption request process under 10 CFR 40.32(e). Id. at 13485. And as the NRC noted, any such exemption request must specify the particular activity, the purpose and need, the duration, and the potential impacts to human health and the environment. Depending on the aforementioned list, the NRC staff's review may include at least an Environmental Assessment conducted pursuant to the agency's National Environmental Policy Act requirements (see 10 CFR Part 51) and are reviewed by Staff on a case-by-case basis. The NRC Staff concludes with noting that '[a]ny construction activities performed by an applicant under an exemption and prior to the issuance of a license are performed at the applicant's risk." Id.

Comments

Despite the numerous inadequacies of ISR regulation, in this instance the environmental organizations agree with NRC Staff that the industry interpretation of 10 CFR 40.32(e) is inaccurate.[2] The sections of the regulatory scheme in question – 10 CFR 40.32(a)-(g) – are the "General requirements for issuance of specific licenses" and subsection (e) sets out a great many of the licensing and safety requirements. Subsection (e) in particular includes a definition of "commencement of construction" and a clear statement that to commence construction prior to obtaining a license could be grounds for denial of an application.

The 1979 Final Rule that NRC Staff cites in support of its position clearly illustrates that the activities contemplated in the industry's request fall under the General Requirements for Specific Licenses, 10 CFR 40.32(a)-(g) by virtue of the 10 CFR 40.4. While we concur that industry's effort to reinterpret the rules to exclude ISR construction activities lacks merit, the "above the ground" distinction cited above in note 1 compels us to renew our objection to the splintered and inadequately protective regulatory regime for ISR mining.[3] Indeed, discussing related matters and the 1979 Final Rule just a few days ago, the NRC also stated:

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[2] NRDC and others noted numerous inadequacies of the regulatory system in public comments on the NRC's *Notice of Intent to Prepare a Draft Generic Environmental Impact Statement for Uranium Recovery,* which were submitted to the NRC on October 31, 2007.

[3] As an example, see the Commission's discussion of the application of 10 CFR Part 40:

> In issuing the HRI license, the Staff appropriately did not insist that HRI meet Part 40 requirements across the board. We agree that those requirements in Part 40, such as many of the provisions in Appendix A, that, by their own terms, apply only to conventional uranium milling activities, cannot sensibly govern ISL mining. At the same time, there are a number of general safety provisions in Part 40, Appendix A, such as Criteria 2, 5A, and 9, that are relevant to ISL mining and, as such, have been appropriately reflected in the license ... Regulating the ISL facilities in the absence of specific regulatory requirements for ISL recovery activities has become increasingly problematic and more complicated for the staff, which has relied heavily on guidance documents and license conditions in this area, as the recovering uranium production industry seeks to expand ISL facility production and submits new applications for additional facilities.

The 1979 final rule's preamble further reflects the NRC's finding that, properly construed, UMTRCA covers the "above-ground wastes" from ISR operations as published in the Federal Register on August 24, 1979 (44 FR 50012). Additionally, in 2000, the NRC determined that all waste water generated during ISR operations would be classified as 11e.(2) byproduct material ...

The 10 CFR Part 40 definition of byproduct material is relevant to Criterion 5B of Appendix A, because this Criterion pertains uranium byproduct materials, and Sections (5) and (6) of Criterion 5B govern the setting of site-specific concentration limits of hazardous constituents for purposes of protecting and restoring groundwater quality at all uranium mill operations. Accordingly, the requirements in Criterion 5B of Appendix A apply to restoration of groundwater at uranium ISR facilities.

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*, at 3, April 29, 2009 (ML083510622) (citation omitted and emphasis added).[4] Depressingly, it has taken a mere 30 years for the NRC Staff to assert a relatively more comprehensive – if not adequately protective – set of jurisdictional coverage of ISR facilities and their myriad negative impacts to the environment and public health.

Additionally, the NRC Staff is correct that there already exists in the regulations adequate provision for the industry to conduct pre-licensing construction activities. Such action could happen via a request for exemption and an associated environmental review prior to the granting of any such exemption. Despite our many detailed concerns with the inadequate regulatory regime that currently exists, NRC Staff's position on this singular issue is well-grounded in the regulations and protective of public health and the

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> Until the Commission develops regulatory requirements specifically dedicated to the particular issues raised by ISL mining, we will have no choice but to follow the case-by-case approach taken by our Staff in issuing HRI's license. As the Presiding Officer concluded, the "principal regulatory standards governing this application for a license are 10 C.F.R. § 40.32(c) and (d), which mandate protection of the public health and safety.

In Re Hydro Resources, Inc., 50 NRC 3, **5 (1999) (emphasis added). Nearly a decade after this decision, we still await regulatory requirements that address the particular issues raised by ISL mining.

[4] The environmental organizations have had little opportunity to review NRC RIS 2009-05 – issued without notice or opportunity for public comment – and reserve the right to do so and will respond accordingly within a reasonable time period. Additionally, RIS 2009-05 states that the "staff is now working with the Environmental Protection Agency to resolve groundwater protection issues at ISR facilities and to revise Appendix A of 10 CFR Part 40 accordingly. The NRC expects that a draft of the proposed revisions to Appendix A will be published for public comment in 2010." RIS 2009-05 at 3, 4. The proposed groundwater protections have been in some version of a draft form for nearly a decade. In a December 2008 hearing before the NRC Commissioners we requested a copy of the most current draft and were denied on the grounds that to release the draft "might confuse the public." We respectfully beg to differ and assert that the public is well capable of understanding the issues presented. Thus, this day we renew our request for the most current draft of the proposed groundwater protection rules.

environment. And most important, consenting to industry's conclusions would have placed the NRC Staff in opposition to decades of established federal law.

If the NRC Staff were to have concurred with the industry's assertions, entire ISR facilities could (and would) be constructed and essentially be ready to go before the imposition of any meaningful licensing and associated environmental review. To recap, the industry has suggested with its "Tiers 1 and 2" that it be allowed to construct an entire ISR facility – a not insignificant undertaking by any measure – and essentially be almost ready to flip the switch before NRC jurisdiction would apply. Such a lax regulatory stance on the NRC's part would potentially allow for irreversible harms and, without question, strong prejudice to any licensing proceeding.

The activities contemplated in the industry's suggested "Tiers 1 and 2" include the drilling of numerous wells, construction of roads and power lines, construction of entire processing facilities, and even the installation of wellfield pipelines. Each of these activities on their own merit significant environmental review and the cumulative set of such activities require a strict, thorough appraisal.

And not only do the cumulative activities have a significant impact on the environment, construction of facilities can foreclose options such as protective conditions in licenses. As just one example, if a drilling pad is constructed in a certain manner, that might preclude a different construction that Staff, the State, or an appropriately versed independent consultant might deem necessary to provide for proper operation. Additionally, in terms of creating prejudice to the "future review" that will constitute the application process, a commitment of resources will have the effect of making it more difficult for the NRC to deny a license or impose different conditions because of the equities involved. That is, the NRC staff may feel pressure not to require a company to do things differently if the company has spent several million dollars on construction already. And finally, many of the Tier 1 and 2 type activities identified by industry will cause significant surface or subsurface disturbance. These disturbances will need to be accounted for in effective closure plans and under financial assurance. Construction before licensing or even environmental review will, at minimum, complicate and in even some instances prevent the establishment of effective closure plans and financial assurance. In short, adoption of the industry's position would make a mockery of the agency's licensing and associated environmental review obligations, and NRC Staff is right to reject it.

As the NRC Staff is plainly well aware, the Council on Environmental Quality (CEQ) – an agency within the Executive Office of the President – has promulgated NEPA implementing regulations that are "binding on all federal agencies." 40 CFR 1500.3. Those regulations make it absolutely clear that agencies must complete the NEPA process "before decisions are made and before actions are taken." Id. § 1500.1(b); see also id. § 1500.5(f) (requiring NEPA review "early in the process"). Id.§ 1501.2 ("Apply NEPA early in the process") (emphasis added). By noting precisely that NEPA analysis must happen "early" in the proceeding, the law plainly requires that entire facilities are not constructed before the agency has an opportunity to evaluate any license application

and associated environmental and public health impacts. The NEPA process must be completed "early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made." Id. 1502.5 (emphasis added). The industry's suggestion that allowing for no NRC jurisdiction over the activities described in Tiers 1 and 2 runs counter to decades of established law and would clearly prejudice any licensing proceeding. As the Supreme Court has summarized, "NEPA ensures that important effects will not be . . . discovered [only] after the die [is] otherwise cast." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989) (emphasis added).

The NRC Staff is correct to reject the industry's assertions. Put simply, in order to insure that an agency's NEPA analysis "serve[s] practically as an important contribution to the decision-making process, 40 CFR 1502.5, NEPA review must be conducted "before decisions are made and before actions are taken." Id. § 1500.1(b) (emphasis added). Thus, as the binding CEQ regulations make absolutely clear, an agency may not use the NEPA process simply to "rationalize or justify decisions already made." Id. § 1502.5 (emphasis added).

As the D.C. Circuit succinctly explained in Sierra Club v. Peterson, "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." 717 F.2d at 1415 (emphasis added). Consequently, "the appropriate time for preparing an EIS is prior to a decision, when the decisionmaker retains a maximum range of options." Id. at 1414 (emphasis in original); see also, Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C. Cir. 1977); Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000); Fund for Animals v. Norton, 281 F. Supp. 2d 209, 229 (D.D.C. 2003); Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1129 (9th Cir. 1998); accord Sierra Club v. Lujan, 716 F.Supp. 1289, 1293 (D.Ariz. 1989) ("post hoc compliance with NEPA is unlawful"); Save the Yaak Committee v. Block, 840 F.2d 714, 718 (9th Cir. 1988) ("The rationale behind this rule is that inflexibility may occur if delay in preparing an EIS is allowed: 'after major investment of both time and money, it is likely that more environmental harm will be tolerated.'").

In sum, the NRC Staff was right to reject the industry's misreading of the regulations. We understand that other environmental organizations, including New Mexico Environmental Law Center and the Powder River Basin Resource Council, to name just two, are submitting additional comments on this matter and we hereby incorporate those comments by reference.

We appreciate the opportunity to comment and look forward to working with you. If you have any questions, please do not hesitate to contact us.

Sincerely,

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Rulemaking Comments

From: Lombard, Cori [clombard@nrdc.org]
Sent: Monday, September 27, 2010 5:38 PM
To: Rulemaking Comments
Subject: comments on Docket ID NRC-2010-0075
Attachments: Comments on construction definition rule change docket ID NRC-2010-0075.pdf

Attached please find the joint comments of Colorado Citizens Against ToxicWaste, Inc., Natural Resources Defense Council, New Mexico Environmental Law Center, Physicians for Social Responsibility, Powder River Basin Resource Council, Sheep Mountain Alliance, and Wyoming Outdoor Council on NRC's proposed rule changing the definition of construction, Docket ID NRC-2010-0075.

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