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**Docket:** NRC-2012-0235  
Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement

**Comment On:** NRC-2012-0235-0001  
Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement

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## General Comment

See attached file(s)

## Attachments

Tribal Protocol Comments Final WMA

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April 1, 2013

March 24, 2013  
Cindy Bladey, Chief  
Rules, Announcements, and Directives Branch (RADB)  
Office of Administration  
Mail Stop: TWB-05-B01M  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

**Subject: Wyoming Mining Association (WMA) Comments on the *Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement* Docket ID NRC-2012-0235 (Federal Register Volume 77, Number 198 - Friday, October 12, 2012 - Notices)**

Dear Ms. Bladey:

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 several companies conducting final reclamation/restoration operations. WMA has reviewed the *Draft Tribal Protocol Manual and Scoping for Proposed Policy Statement* and has the following comments:

#### **National Historic Preservation Act Section 106 Process**

This process is of serious concern to the uranium recovery industry, as it is a source of delay and increased costs in the permitting process. The Federal Register notice states:

*Recently, a heightened interest in uranium recovery development and new nuclear reactor construction has resulted in a significant increase in the number and complexity of consultations between the NRC and Native American tribes in order to address the obligations and requirements of Section 106 of the National Historic Preservation Act (NHPA).*

This is true. The problem is that the process as currently implemented by NRC is too cumbersome, time consuming and costly for the uranium recovery industry. The WMA requests that the Tribal Protocol Manual include guidance on fees that tribes may charge to evaluate lands for cultural significance. The uranium recovery industry requires consistency and predictability in charges in order to adequately plan and budget.

In a letter dated January 6, 2012 to Cindy Bladey entitled *Incorporation of Risk Management Concepts in Regulatory Programs* Katie Sweeney, General Counsel of the National Mining Association (NMA) stated:

#### **NHPA Section 106 Process**

*The UR industry recognizes that NRC has obligations under the Section 106 of the National Historic Preservation Act (NHPA), in that NRC must attempt to identify historic properties within the area of potential effects for proposed UR facilities. As the Advisory Council on Historic Preservation (ACHP) regulations implementing NHPA Section 106 explain, the agency needs to*

*make a "reasonable and good faith," as opposed to exhaustive, effort to identify Indian tribes to be consulted to determine existence of historic properties. To ensure a risk-informed, and frankly common sense approach to the Section 106 process, NRC must not ignore the "reasonable and good faith" clause and engage in exhaustive, expensive and resource intensive consultation efforts.*

WMA agrees with this statement.

This issue was discussed in a second letter dated January 7, 2013 from Ms. Sweeney to Chairman Macfarlane of the Commission. Regarding the Section 106 process she stated:

*Second, NRC's conduct of the National Historic Preservation Act's (NHPA) Section 106 process has become a source of great concern within the uranium recovery industry. Industry understands that the Section 106 process is mandatory for new operating facilities and for some other licensing actions and has attempted to assist the Agency in conducting this process. However, industry is deeply concerned with the lack of a standardized process or protocol, perhaps a regional programmatic agreement, for the Section 106 process and with the failure of NRC Staff to be more decisive in its role as the "lead agency" in its licensing process. NMA believes an open discussion on this issue will allow all interested stakeholders to better understand how the process can be improved and can lead to more efficient licensing.*

WMA agrees with this statement as well. The Draft Tribal Protocol Manual does nothing to standardize or simplify the process.

Larry W. Camper, Director Division of Waste Management and Environmental Protection replied to Ms. Sweeney in a letter dated February 12, 2013 stating:

***(2) National Historic Preservation Act (NHPA) Section 106 Process***

*Staff believes that it has improved its implementation of the NHPA Section 106 process over the last few years. For example, staff has been cooperating with the U.S. Department of the Interior's Bureau of Land Management (BLM) under the Memorandum of Understanding for both the proposed Dewey-Burdock and Ross projects by jointly preparing the supplemental Environmental Impact Statement and conducting the Section 106 review for each project, thus gaining efficiency and minimizing duplicative efforts. Staff also facilitated Tribal field surveys for four Crow Butte proposed projects so that the majority of the surveys were completed within four weeks.*

*Staff appreciates industry's assistance in NRC's Section 106 consultation process and is aware of NMA's interest in a standardized process, such as a regional programmatic agreement, for the Section 106 process. Staff recognizes the need for a predictable process for Section 106 reviews of uranium recovery projects that incorporates the experiences gained over the past few years so that these lessons can be applied to on-going or upcoming Section 106 reviews. To this end, the staff is in the process of developing a Section 106 guidance document. Based on feedback from the Advisory Council on Historic Preservation (ACHP) and staff's assessment, development of a Section 106 guidance document for uranium recovery would be more cost effective and timely, and may accomplish the same goals as those contemplated from a regional programmatic agreement. Staff will further explore the benefits of a regional programmatic agreement and remains open to NMA suggestions on this issue.*

*With respect to NMA's concern that NRC staff needs to be more decisive in its role as the "lead agency," the staff appreciates the feedback and is open to recommendations for process improvements. The staff notes that Tribes are sovereign governments and Tribal consultations must recognize a government-to-government relationship. Further, consulting parties, including Tribes, applicants, and State Historical Preservation Officers (SHPOs), all have legitimate interests that need to be acknowledged and considered. As discussed previously, BLM is a cooperating agency in certain projects and its views and input also needs to be considered and reflected in NRC's decision. In addition, the standard for conducting the Section 106 consultation process is to "make a reasonable and good faith effort" as outlined in the regulations issued by ACHP and codified in Title 36 of the Code of Federal Regulations (36 CFR), Part 800. In recent years there has been a significant increase in Tribes' requests for NRC to conduct field identification of historic properties of religious and cultural significance to the Tribes. To ensure that NRC continues to comply with the ACHP's regulations regarding proper implementation of Section 106 consultations and in light of the limited guidance that is available for Federal agencies to follow in these areas, staff has been regularly communicating with ACHP to receive its advice and guidance. Based on the experience gained over the past few years, staff believes that process improvements have been, and will continue to be made and applied to on-going and future projects.*

This issue is a serious one for the uranium recovery industry in Wyoming. WMA requests that the *Tribal Protocol Manual* and the proposed Section 106 guidance document be coupled. The *Tribal Protocol Manual* has probably achieved the limited purpose intended by NRC, specifically to serve as a diplomatic protocol for government-to-government relations with the tribes. More, however, is required, specifically detailed guidance.

#### **Draft Tribal Protocol Manual**

The *Draft Tribal Protocol Manual* fails to address any of the serious issues regarding the nature of the Section 106 process in a substantive manner. It provides a historical perspective on relationships with the tribes from 1608 to the present, a description of the government-to-government relationship that exists between the Nuclear Regulatory Commission (NRC) and the tribes, a generic guide to meeting with tribal members and etiquette information. WMA requests that the document be more substantial and contain information specifically relevant to the Section 106 process.

The document contains little information specific to uranium recovery merely stating, "*In February and April of 2009, NRC staff coordinated individual government-to-government meetings with representatives of the Navajo Nation, Pueblo of Zuni, All Indian Pueblo Council, Pueblo of Laguna, and Pueblo of Acoma, to share information related to the licensing of uranium recovery facilities. The meetings were structured to explain the licensing process, to address Native American concerns related to the licensing process, and to identify opportunities for Native American tribal governments to participate in the licensing process.*"

WMA requests that the document address uranium recovery issues specifically.

The Federal Register notice asks:

*Are there specific Tribal Policy Statements in other Federal agencies that could serve as a starting point for the NRC efforts?*

WMA requests that the Commission consider documents and programs from other agencies such as the Bureau of Land Management's (BLM's) *PROGRAMMATIC AGREEMENT AMONG THE BUREAU OF LAND MANAGEMENT, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND THE NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS REGARDING THE MANNER IN WHICH THE BLM WILL MEET ITS RESPONSIBILITIES UNDER THE NATIONAL HISTORIC PRESERVATION ACT* dated February 2012.

WMA also recommends that in the process of preparing guidance, the NRC staff consider the information contained in *NEPA and NHPA - A Handbook for Integrating NEPA and Section 106*. This handbook was released on March 5, 2013 by the ACHP and the White House Council on Environmental Quality (CEQ) and is designed to help coordinate the required review processes under the NHPA and the National Environmental Policy Act (NEPA).

*Specifically, the handbook provides advice on implementing provisions added to NHPA section 106 regulations in 1999 that address both coordination of the NEPA and NHPA section 106 reviews and the substitution of NEPA reviews for the section 106 process. The key concepts for integration of the NEPA and 106 procedures are outlined in the handbook:*

- *Integrate the NEPA and section 106 processes as early as practicable.*
- *Educate stakeholders on the benefits of integrating the NEPA processes.*
- *Develop comprehensive planning schedules and tracking mechanisms to keep the NEPA and section 106 processes synchronized.*
- *Develop comprehensive communication plans that specify whether the agency will use coordination or substitution to maximize opportunities for public and consulting party involvement and minimize duplication of effort by agency staff.*
- *Use NEPA documents to facilitate section 106 consultation and use section 106 to inform the development and selection of alternatives in NEPA documents.*
- *Develop an integrated strategy to accomplish specialized studies to provide information and analysis needed under NEPA and section 106.*
- *Complete section 106 and the appropriate NEPA review (categorical exclusion, environmental assessment or environmental impact statement) before issuing a final agency decision.*

**Source:** Katie Sweeney – National Mining Association (NMA)

### **Specific Wyoming Uranium Recovery Industry Requests Regarding the Manual**

In the February 20, 2013 Uranium Recovery Commission Briefing, Katie Sweeney, General Counsel of the National Mining Association (NMA), requested the following regarding the Section 106 Process:

- *Creation of a Programmatic Agreement that will:*
  - *Foster cooperation between the agencies, tribes and industry and develop a standardized approach*
  - *Include the Northern Plains area*
  - *Include potentially interested parties (e.g., Industry, NRC, BLM, SHPOs, Tribal Leadership/THPOs, ACHP)*

At the same meeting the National Historic Preservation Act and the Section 106 Process was discussed by Anthony J. Thompson of Thompson & Pugsley, LLC. In his presentation he stated:

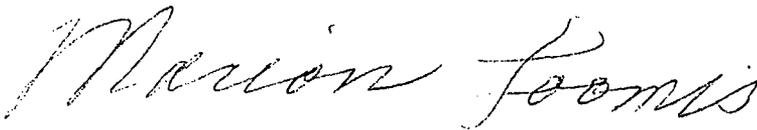
- *Thus, NRC must construct a simple, critical path with expectations and timeframes so that:*
  - *License applicants and licensees know what is expected of them and can communicate to their personnel, experts, shareholder reasonable timelines for licensing*
  - *Tribes can effectively manage the numerous consultation efforts they currently deal with every year.*

Mr. Thompson also discussed a Programmatic Agreement (PA) as a logistical mechanism that could assist in the Section 106 Process. The NRC has invited several tribes to a government-to-government meeting to discuss the licensing process and general uranium milling matters. It would be helpful if the NRC explored the idea of a Programmatic Agreement (PA) with them there as well as early involvement.

WMA requests that the NRC expedite the preparation of final detailed guidance regarding the Section 106 Process as the Tribal Protocol Manual. As it now stands it has only achieved the limited purpose of serving as a diplomatic protocol for government-to-government relations with the tribes.

The Wyoming Mining Association (WMA) appreciates the opportunity to comment on this draft manual. If you have any questions please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in cursive script that reads "Marion Loomis". The signature is written in dark ink and is positioned above the typed name and title.

Marion Loomis  
Executive Director

Cc: Katie Sweeney – National Mining Association (NMA)