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United States Nuclear Regulatory Commission
Attn: James Shepherd, Project Manager
Decommissioning and Uranium Recovery Licensing Directorate
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and Environmental
Management Programs
11545 Rockville Pike
Rockville, MD 20852

Dear Mr. Shepherd:

On behalf of Western Nuclear, Inc. (WNI), Thompson & Pugsley, PLLC hereby submit these comments on the long-term surveillance and monitoring plan (LTSP) submitted by the United States Department of Energy (DOE) on April 12, 2012, for final site closure and license termination of WNI's United States Nuclear Regulatory Commission (NRC) License No. SUA-56 for the former Split Rock conventional uranium mill site in the State of Wyoming. WNI has reviewed the non-proprietary portions of the 2012 draft LTSP and has identified a section of the draft requiring significant revisions due to a potential misinterpretation of NRC regulatory requirements for uranium recovery site closure at 10 CFR Part 40, Appendix A.

WNI's review of Section 3.7.1.3 of the 2012 draft LTSP focused specifically on the DOE-proposed language regarding the implementation of alternate concentration limits (ACL) at the Split Rock site for constituents including nitrates. While the DOE-proposed language specifically states that "DOE will not consider continued nitrate concentrations in excess of the ACL...under long-term monitoring to be a regulatory out-of-compliance event..." this language does not provide a sufficient regulatory frame of reference demonstrating why this condition is, in effect, in compliance with 10 CFR Part 40, Appendix A. Therefore, WNI recommends that NRC direct DOE to include the following language in Section 3.7.1.3 of the 2012 draft LTSP:

"Based on the complexity of the groundwater system and legacy contamination at the Split Rock site, WNI proposed a multi-layered plan to protect public health and safety and the environment at the proposed LTSP and point of exposure (POE). The foundation for this plan can be found in the language of NRC's uranium recovery regulations in 10 CFR Part 40, Appendix A and its Preamble. The Appendix A Preamble states that a uranium recovery licensee is entitled to propose "alternatives" to any requirement in Appendix A and its Criteria. This proposition is further described in and supported by the Atomic Energy Act of 1954 (AEA), as amended by the

Uranium Mill Tailings Radiation Control Act (UMTRCA) and its legislative history, where Congress' intended program for LTSM of 11e.(2) byproduct material is found.

Pursuant to the amendments to the AEA provided for in UMTRCA for the safe containment and management of 11e.(2) byproduct material, NRC regulations at 10 CFR Part 40 were amended to include Appendix A Criteria. 45 Fed. Reg. 65,521 (1980). (Footnote: In accordance with Section 275 of the AEA, NRC amended these Appendix A Criteria to conform them to the Environmental Protection Agency's (EPA) generally applicable standards in 40 CFR Part 192). In addition to certain mandated requirements in these Criteria including a broad requirement that no ongoing active maintenance be needed to preserve the tailings isolation, the Preamble to Appendix A also expressly promoted "flexibility" in satisfying its requirements. In 1983, Congress enacted amendments to UMTRCA significantly reinforcing the necessity for "flexibility" in satisfying Appendix A Criteria. In the 1983 NRC Authorization Bill, Section 84(c) was added to the AEA in which Congress expressly stated, "a licensee may propose alternatives to specific requirements adopted and enforced by the Commission under this Act." Pub. L. No. 97-415, Section 20. Decisions regarding proposed "alternatives" require equivalent or greater protection in the context of whether the proposed alternative is "practicable" or "reasonably achievable," which are treated as equivalent terms. Thus, such decisions take into account "the state of technology, and the economics of improvements to in relation to benefits to public health and safety, and other societal and socioeconomic considerations and in relation to the utilization of atomic energy in the public interest." 10 CFR Part 40, Appendix A, Preamble.

This flexibility to propose alternatives was reflected in the amendment's legislative history. For example, several Senators were concerned about the costs associated with rigid enforcement of NRC standards on the industry long after the initial construction and subsequent operation of uranium mills and the need for Agreement States to be able to flexibly apply their NRC compatible regulations in light of specific regional and site-specific concerns. Eventually, NRC issued a statement stating that the Appendix A Criteria were merely "performance objectives" because the problem of tailings management is so highly site-specific that significant regulatory flexibility is needed. 97 Cong. 12 (1981) at 140.

While it is typical for a licensee to transfer full title to land within the LTSB to DOE or the resident state for LTSM, an example of an alternative is WNI's Commission-approved permission to transfer other enforceable, durable institutional controls such as easements or covenants that run with the land. These durable institutional controls are transferred for good and valuable consideration and are commonplace in real estate law and, in the case of WNI, are enforceable by either the licensee or the entity to which these instruments are transferred (i.e., DOE).

With respect to WNI's Split Rock site, the licensee proposed a package of mechanisms for its final site closure plan that embody proposed ACLs and "alternatives" pursuant to UMTRCA Section 84 and Appendix A Criteria. WNI proposed, and the Commission approved, a series of durable institutional controls comprised of easements and covenants that run with the land to control access to groundwater from members of the public within the LTSB during the LTSM post-closure period. Further, WNI proposed, and the Commission approved, ACLs for a number of constituents, including nitrates, for the area within the approved LTSB. With respect to nitrates, this constituent now is associated with a secondary source term created by concentrations that already passed beyond the NRC-approved point of compliance (POC) wells

before the ACL application was submitted and approved; accordingly, the term “legacy contamination” is used in the this LTSP (i.e., nitrate concentrations at the secondary source term passed the POC prior to the ACL application and, potentially before WNI’s installation of its initial groundwater corrective action program).

Since NRC Staff has concluded that nitrate concentrations at the POE will be adequately protective of public health and safety based on a site-specific evaluation of the Split Rock site, NRC’s conclusions should be considered to have satisfied Appendix A requirements for a “nitrates alternative” and, thus, in compliance with applicable NRC regulations.”

WNI believes that inclusion of this language in the final LTSP will ensure that an adequate explanation of the regulatory basis for NRC Staff’s and the Commission’s decision to approve WNI’s proposed site closure plan, including site ACLs and groundwater monitoring plan for nitrates. If you have any questions regarding these comments, please do not hesitate to contact me at your convenience.

Respectfully Submitted,



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