



KATIE SWEENEY  
General Counsel

January 9, 2014  
Mr. Hubert Bell  
Inspector General  
United States Nuclear Regulatory Commission  
Washington, DC

Dear Mr. Bell:

This letter provides the views of the National Mining Association (NMA) and its member uranium recovery industry companies on your August 20, 2013 audit report entitled *Audit of NRC's Compliance With 10 CFR Part 51 Relative to Environmental Impact Statements: OIG-13-A-20* (hereinafter "IG's Report"). The report evaluated the actions of NRC Staff with respect to 10 CFR Part 51 environmental reviews for, among others, new uranium recovery operating licenses. NMA and its members have reviewed the report and disagree with many of its conclusions. Overall, NMA believes the report is substantially flawed as well as factually and legally indefensible. Specifically, the report fails to accurately reflect the processes currently employed by NRC Staff to enhance public participation in the context of "tiering" of supplemental environmental impact statements (SEIS) off of NRC's NUREG-1910 entitled *Generic Environmental Impact Statement for In-Situ Leach Uranium Milling Facilities* (NUREG-1910).

## **GENERAL COMMENTS**

1. Initially, the tone and narrow focus of the IG's Report reflects a lack of understanding on the part of your auditors regarding NRC's complex regulatory processes for review of uranium recovery license applications, especially those for new *in situ* uranium recovery (ISR) operating licenses. NRC has implemented a comprehensive environmental review program involving the use of SEISs tiered off the aforementioned NUREG-1910. Tiering is a process that is expressly endorsed in existing Council on Environmental Quality (CEQ) regulations (40 CFR 1508.28). Prior to the preparation of NUREG-1910, NRC recognized that ISR processes, specifically including the technology used to extract uranium from a subsurface ore body, are largely standardized and, accordingly, could be evaluated generically with any site-specific deviations analyzed separately. NRC indicated that it would be inefficient to

require full environmental impact statement (EIS) documents for each requested operating license.<sup>1</sup> Thus, NRC staff advised the Commission that a programmatic or generic EIS would be preferable and result in more efficient ISR license application reviews.

In order to prepare NUREG-1910, NRC determined that *scoping* meetings on its form and substance would be required. As a result, three scoping meetings were held in the different regions to be analyzed in NUREG-1910 (i.e., Wyoming West, Wyoming East, etc.). The meetings provided an opportunity for oral public comment and an extended written comment period was provided on the draft version of NUREG-1910. Comments received during the scoping meetings and the comment period were responded to in the final NUREG-1910. This extensive public participation process provided all interested stakeholders with ample opportunity to participate in the document's preparation.

The final version of NUREG-1910 laid the foundation for site-specific environmental reviews of each proposed new ISR site. NUREG-1910 addressed essentially all potential aspects of a proposed ISR site ranging from potentially significant impacts associated with ground and surface water, land use, historic and cultural resources, and financial assurance to potentially positive impacts on socioeconomics and jobs. The analyses therein reflect NRC Staff's regulatory expertise on ISR facilities and over 30 years industry experience. This entire document, including the response to comments, serves as the starting basis for NRC Staff's Part 51 environmental review of site-specific ISR operating license applications.

As made clear at scoping meetings and in the final the NUREG-1910, applications for new ISR facilities would not avoid separate site-specific analyses. As endorsed in the CEQ regulations cited above, NRC developed a review process under which SEISs are tiered off NUREG-1910. This process allows NRC to analyze site-specific environmental issues and determine whether they fit within the scope and analyses/conclusions developed in NUREG-1910 or require further analysis in the SEIS document. As such, each tiered SEIS has been labelled as an Appendix to NUREG-1910. Moreover, under this process, the public is provided an opportunity to comment (typically 45-60 days) on each draft SEIS. Further, interested stakeholders have the opportunity to litigate issues associated with specific license applications under NRC's 10 CFR Part 2 adjudicatory process. Thus, in the full context of the ISR licensing process, *scoping* is a relatively minor segment of the extensive opportunity for public participation associated with using NUREG-1910 and tiered site-specific SEISs for 10 CFR Part 51 environmental reviews.

The IG Report's failure to recognize and acknowledge the full scope of these processes is its most fundamental flaw. As discussed above, the public had extensive opportunity to participate in the development of NUREG-1910 preparation as well as individual

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<sup>1</sup> New operating licenses for conventional uranium recovery facilities, including heap leach facilities, require full EIS document preparation.

SEISs tiered off NUREG-1910. NMA believes that this process satisfies the purpose of scoping and allowed all interested stakeholders ample opportunity to participate.

2. The IG's Report overstates the importance of NEPA's role within the context of NRC's complex and detailed licensing processes for new ISR operating license applications. As acknowledged in NRC's March 12, 1984 final NEPA implementation rule, the role of NEPA in NRC's licensing processes is merely procedural and does not confer any substantive jurisdiction. 49 Fed. Reg. 9381. Pursuant to NEPA's procedural requirements for environmental reviews, NRC must assess adequately the potentially *significant* impacts associated with a requested licensing action (e.g., new ISR operating license applications) for possession and use of AEA materials and the conduct of AEA operations. While the IG's Report alleges NRC's failure to adequately involve the public in these environmental reviews, in fact, the environmental reviews for ISR license applications have tended to exceed the proper scope of 10 CFR Part 51 reviews.

It is NMA's view that NRC, fails to follow the U.S. Supreme Court admonition in *Indus. Union Dept. v. Amer. Petroleum Inst.*, 448 U.S. 607 (1980), and distorted the license review process by placing too much emphasis on environmental reviews and, in particular, analysis of potential impacts that are not significant. To place such an overwhelming emphasis on a *purely procedural review process* appears to be unjustified and unnecessary considering NRC's primary mission is to protect public health and safety. Indeed, several NMA members have reported that the fees associated with environmental reviews for new ISR operating license applications have ranged between 50 and as much as 65 percent of the total license application review cost (NOTE: this cost includes fees associated with the National Historic Preservation Act (NHPA) Section 106 Tribal Consultation process). Given the finalization of NUREG-1910, the environmental analyses therein, and the availability of environmental analyses tiered off that document, NMA believes that environmental reviews should not necessitate such overly extensive, costly, and time-consuming emphasis and the devotion of so many agency resources.

3. Aside from the inaccuracies noted above, the IG's report is rife with other errors, most of which play key roles in the Report's conclusions. Many of these errors come from the Report's apparent lack of familiarity with NRC's designation as an independent regulatory agency, which allows a different approach to NEPA responsibilities as interpreted by the Commission in 10 CFR Part 51. This regulatory approach relies on regulations that have been developed with public participation (including EISs) and guidance documents that are issued for formal public comment and ultimately are approved by the Commission as formal *Commission guidance*. Commission Policy Statements and adjudicatory decisions also typically involve opportunities for public input. By not recognizing the full scope of this complex regulatory program, the IG's report lacks legal and regulatory credibility.

4. As a general matter, NMA agrees with NRC Staff's and the Office of the General Counsel's comments on the Report. Some of the specific comments below will mirror comments already registered with the IG's office by NRC Staff and OGC.

### **SPECIFIC COMMENTS**

1. The IG's Report fails to identify and assess the viability of opportunities for interested stakeholders to participate in the development of NUREG-1910 and site-specific SEISs in the context of new operating license applications. Generally, in the context of such license applications and given the currently available institutional knowledge and analyses, *scoping* is a relatively minor component of the licensing process. Indeed, per 10 CFR Part 51.92, *scoping* is not mandated for SEISs under NRC regulations. As such, it should not be considered a major factor in the case of ISR licensing, especially as NUREG-1910's development process included multiple scoping meetings in the regions where new ISR license applications have been sought. In the event that a new ISR operating license is sought outside these regions, additional "targeted scoping" meetings may be appropriate.

2. The IG's Report also ignores other opportunities interested stakeholders have to participate in the ISR licensing process, both in the past and in the future. The following examples illustrate NMA's belief that the Commission's commitment to transparency and public participation is more than adequately satisfied:

a. **Rulemaking proceedings:** NRC's rulemaking process provides a good example of a transparent process involving extensive opportunities for public participation. Typically, NRC Staff will notice proposed rules in the Federal Register in accordance with 10 CFR Part 2 regulations and provide all interested stakeholders with an opportunity to offer oral testimony and/or written public comments. NRC responds to these public comments in the context of any final rule. On occasion, NRC publishes advance notices of proposed rulemakings (ANPR) that provide interested stakeholders with an advance opportunity to register public comments on the concept and scope of a potential new rulemaking, especially one that may have a broad scope. Typically, all NRC rulemaking proceedings involve 10 CFR Part 51 environmental evaluations, specifically including an opportunity to comment on any draft EIS.

An example of rulemaking that is likely to occur in the future with respect to uranium recovery regulations is the soon-to-be proposed United States Environmental Protection Agency (EPA) revisions to 40 CFR Part 192, which EPA has publicly stated is likely to focus on ISR facilities. Pursuant to the Atomic Energy Act of 1954 (AEA), as amended by the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA), NRC is required to conduct a conforming rulemaking to bring its 10 CFR Part 40 regulations and Appendix A Criteria into conformance with such revisions, if necessary. This potential rulemaking will provide interested stakeholders with more than ample opportunity to

register public comments on the associated environmental analyses and proposed rules.

b. **Documents for Public Comment:** Typically, NRC's guidance and other regulatory interpretations are issued for public comment. These documents can range from NUREG series documents and other formal Staff guidance to regulatory interpretations in Regulatory Issue Summaries (RIS). NRC Staff has issued several ISR-specific guidance documents for public comment, including the 2001 NUREG-1569 entitled *Standard Review Plan for In Situ Leach Uranium Extraction License Applications*. Recently, NRC Staff issued a RIS regarding "equivalent feed" at uranium recovery facilities which was also made available for public comment. Furthermore, even if a document issued by NRC Staff is not made available for a formal public comment period, interested stakeholders are still free to register comments on the document. NRC plans to issue revisions to NUREG-1569 in order to update its provisions to conform to any EPA 40 CFR Part 192 rulemaking and a resulting conforming NRC rulemaking will provide yet another opportunity for public participation in the NRC licensing process.

c. **NRC Licensing Process:** NRC's entire licensing process for uranium recovery facilities is rife with opportunities for the public to participate. Initially, NRC's public meeting policy statement (59 Fed. Reg. 48340 (September 20, 1994)) indicates that the public must be allowed to attend (in person or via teleconference) any meetings between NRC Staff and license/license amendment applicants that include substantive decisions. This policy statement makes *all* such meetings, whether at the initial pre-licensing stage, requests for additional information (RAIs) stage or ongoing licensing phase, open to public participation.

During the licensing process, interested stakeholders have a variety of opportunities to participate and register their comments and concerns. Over the past few years, NRC Staff has adopted a policy of providing prospective license applicants with an opportunity for a pre-submission audit meeting. These meetings allow the applicant and NRC Staff reviewers to spend two to three days reviewing a proposed license application to determine whether it is sufficient to meet acceptance review criteria and whether potential RAIs can be avoided. These meetings are open to the public and provide interested stakeholders with an opportunity to better understand the scope of a site-specific license application. While these meetings are not mandatory, applicants are more frequently requesting such meetings and the public is receiving yet another opportunity to participate in the licensing process.

All submitted license applications are made publicly available on NRC's ADAMS database and can be reviewed electronically by any interested stakeholder. Furthermore, NRC strongly encourages license applicants to make application documents available to the public by placing paper copies in places such as libraries or town halls. Interested stakeholders may comment on any or all portions of a specific

application. Indeed, in the case of Lost Creek, LLC's Lost Creek ISR license application, the Powder River Basin Resource Council (PRBRC) registered comments on the environmental report (ER) portion of the license application, and such comments were made part of the application's NRC administrative docket.

After the application is formally "docketed," the license application is noticed in the Federal Register and accompanied by an opportunity for an administrative hearing under 10 CFR Part 2. The opportunity for a hearing is open to any and all interested stakeholders including individual members of the public and non-governmental organizations (NGOs). Additionally, each administrative hearing is subject to multiple levels of judicial review beginning with NRC's Atomic Safety and Licensing Board which, as noted in the IG's Report by Chief Judge E. Roy Hawkins, is an independent adjudicatory body, the Commission on initial appeal, and the federal courts of appeals and potentially the Supreme Court. An example of this is the administrative hearing on HRI's Crownpoint ISR project which eventually reached the Supreme Court after multiple appeals to the Commission and an appeal to the United States Court of Appeals for the Tenth Circuit. Currently, there are four ongoing administrative hearings for three license/license amendment applicants. Lastly, as discussed in detail above, interested stakeholders are accorded a substantial public comment period on each draft SEIS issued for new ISR operating licenses or draft EISs for new conventional mill or heap leach facilities. Per NRC regulations, NRC Staff receives all public comments and adds an appendix to each SEIS or EIS with responses to such comments. Lastly, the remainder of the administrative docket, including all draft and final license conditions, safety evaluation report (SER), and RAI responses are made publicly available and can be commented on by interested stakeholders. Thus, the NRC licensing process provides extensive opportunities for public participation.

3. The IG's Report misstates and, in some cases, unduly over-emphasizes both NEPA's scope and purpose with respect to uranium recovery licensing:

a. Page i states that NEPA is designed to promote efforts that will *prevent or eliminate* damage to the environment. The report fails to mention, however, the obligation under NEPA to evaluate potential mitigation measures when potential impacts cannot be prevented or eliminated. Mitigation measure analyses are a substantial part of a Part 51 environmental review and any resulting analysis document, as well as in NUREG-1910. Thus, the Report effectively misstates the scope and purpose of NEPA in the uranium recovery licensing context or, for that matter, any other environmental evaluation context.

b. Similarly on Page i, in the paragraph entitled *NRC's NEPA Role* the Report states that NRC's typical environmental review includes an analysis of impacts to "property of historic, archaeological, or architectural significance." This statement is misleading as NRC's responsibility to address this subject matter is not imposed by NEPA; but rather, by the NHPA through its Section 106 process. While this process

can be integrated with NRC's Part 51 environmental review document (e.g., EIS or SEIS) per 36 CFR § 800.8, it does not have to be part of such review. As such, the IG's Report again misstates NEPA's scope in this paragraph.

c. On Page 1 of the Report entitled *Background*, as noted above, the IG's Report fails to mention mitigation as a significant component of a Part 51 environmental review document/NEPA evaluations and the Report implies that CEQ regulations apply directly to NRC without noting NRC's explicit statement regarding Part 51 regulations:

"It is the Commission's view that NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions."

This Commission statement affirms NMA's comments noted above that the NEPA process within the ambit of NRC's AEA statutory authority is purely procedural and, while an important component of agency regulatory processes involving *major* federal actions, is not the primary substantive responsibility of NRC and cannot interfere with the Commission's ability to perform its primary functions.

d. On Page 2 of the Report, as noted above, the IG's Report improperly ascribes NHPA responsibilities to NRC as part of its NEPA responsibilities. As stated above, this is an incorrect legal interpretation, as NHPA responsibilities are prescribed by an entirely separate federal statute and only involve NEPA under 36 CFR § 800.8 when such actions can be, by NRC's choice as the "lead agency," incorporated into a NEPA document such as an NRC Part 51 EIS or SEIS.

e. On Page 4, the Report's *Findings* section suggests that NRC's Part 51 environmental reviews will more clearly communicate results and involve the public more effectively if EISs are published in compliance with the format provided in 10 CFR Part 51, Appendix A. As NRC Staff acknowledged, Appendix A is merely guidance and is not a formal regulatory requirement. Therefore, the statement on Page 14 that such guidance "must be followed to standardize environmental reviews" is an incorrect statement. In addition, while overemphasizing Part 51, Appendix A, the Report fails to recognize the significance of other NRC guidance on environmental reviews and reports other than just listing such documents in a table (e.g., NUREG-1748 entitled *Environmental Review Guidance for Licensing Actions Associated with NMSS Programs*). Each of these documents are Commission-endorsed documents that provide applicants and interested stakeholders with NRC Staff's interpretation of 10 CFR Part 51 requirements for environmental reports (ER) relevant to their particular type of licensed activities and a detailed overview of what NRC Staff expects in license applications. Failure to identify and explain the significance of these guidance documents is a serious deficiency in the Report.

f. As noted in NMA's comments above, 10 CFR Part 51.92 explicitly states that *scoping* is not required for SEISs, and this regulatory provision is the centerpiece of the approach to the review of new ISR operating license applications. The Report continues to state that scoping is required for EISs tiered off a GEIS and, by doing so, simply refuses to accept the NRC Staff statement that ISR SEISs tiered off NUREG-1910 are, in fact, SEISs that address new, site-specific information that is relevant to a site-specific ISR license application.

4. The IG's Report repeats inaccurate assessments of NRC's public participation processes of which, in the grand scheme of NRC's licensing process, EIS scoping is a relevant, but relatively insignificant, component:

a. In its attempt to establish the importance of public involvement and interest in NRC-licensing actions, the Report states "that when opportunities are not available public skepticism is heightened." "For example, one public commenter about the generic EIS for in situ uranium recovery [NUREG-1910] reported feeling 'a little dubious' about the 'generic EIS' because it appeared to be 'a way to streamline a process and to keep the public out.'" This statement makes no sense in the context of the IG Report's conclusions as it ignores the Report's express recognition of CEQ's endorsement of the use of generic or programmatic evaluations and tiering off such evaluations to minimize unnecessary duplication in environmental reviews. Further, it completely ignores the myriad of opportunities for the public to participate in the NUREG-1910 development and NRC licensing processes noted by NMA above.

b. As NRC Staff's comments note, the purpose of scoping under NEPA analyses is to focus those analyses on aspects of the proposed action that may have potentially significant impacts while eliminating those issues that are not environmentally significant from detailed consideration. As noted above, NUREG-1910 incorporated over 30 years of regulatory and industry experience and addressed in detail the regions where ISR operations have been, are currently, and likely will be concentrated. Its conclusions focused primarily on these regions and the fundamental issues that are involved in ISR operations, as well as the standardized technologies used to engage in such operations. The *scope* of the "potentially significant impacts" is unlikely to change in any significant way in light of the foregoing. In the event that a significant change does occur or ISR operations begin to occur in regions not analyzed by NUREG-1910, an update to the document may be warranted and likely would be accompanied by additional scoping meetings in that region.

NMA appreciates the opportunity to provide these views on the IG Report. NMA believes that NRC has fully complied with the public participation requirements of NEPA for reviews of new uranium recovery licenses. In fact, the NRC licensing process for such facilities, as a whole, provides an extremely robust opportunity for stakeholder

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involvement that exceeds opportunities at many other federal agencies. If you have any questions, please contact me at (202)463-2627 or [ksweeney@nma.org](mailto:ksweeney@nma.org).

Sincerely,

A handwritten signature in cursive script that reads "Kate Sweeney". The signature is written in black ink and is positioned below the word "Sincerely,".