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Submitter Information

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General Comment

Attached for your information are the comments of the National Mining Association regarding the NRC Guidance on the Section 106 Guidance for Uranium Recovery Licensing Actions

Attachments

final NRC 106

SUNSI Review Complete
Template = ADM – 013
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Add= Diana Diaz Toro (ddt2)

KATIE SWEENEY
Senior Vice President, Legal Affairs & General Counsel

November 17, 2014

United States Nuclear Regulatory Commission
Attn: Office of the Secretary, Rulemakings and Adjudications Staff
Washington, DC 20555-0001

RE: National Mining Association Comments on the Interim Staff Guidance for Conducting the Section 106 Process of the National Historic Preservation Act for Uranium Recovery Licensing Actions

Dear Sir/Madam:

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) request for comments on its draft "Interim Staff Guidance for Conducting the Section 106 Process of the National Historic Preservation Act for Uranium Recovery Licensing Actions." 79 Fed. Reg. 34,792 (June 18, 2014) (hereinafter referred to as "Section 106 guidance" or "guidance"). NMA represents producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral processing machinery and supplies; transporters; financial and engineering firms; and other businesses related to coal and hardrock mining. NMA's uranium recovery members include the current and prospective owners and operators of uranium mills and mill tailings sites and *in situ* uranium production facilities. The following comments provide general overarching comments on the draft guidance as well as specific comments on key provisions.

NMA appreciates the NRC's efforts to develop much-needed Section 106 guidance; however, more needs to be done to ensure the clarity and effectiveness of the proposed draft guidance.

I. GENERAL COMMENTS

1. As a potential lead agency in the review of applications triggering the National Historic Preservation Act's (NHPA) Section 106 Consultation process, NRC must act to set limits and boundaries on the various consultation efforts undertaken by the lead agency. The general tone of the guidance indicates an ongoing level of indecisiveness on NRC's part and leads NMA to believe that future Section 106 efforts undertaken after finalization of this guidance may be just as burdensome to the applicant as those

undertaken on the first five (5) new 10 CFR Part 40 uranium recovery licenses issued since 2011. NRC Staff should revise the guidance to include timeframes for the various steps in the consultation process to provide a reasonable level of assurance that future Section 106 processes will be handled in an effective and efficient manner. Timeframes can always be extended or relaxed for "good cause" shown if necessary. It is important for NRC Staff to understand the critical nature of this issue because it is the license applicant/licensee that is paying hourly fees to NRC for this process, as well as paying for allowing access and survey of its project site(s).

2. The guidance should omit use of the word "should" and replace it with the word "will" to demonstrate that the guidance is NRC policy and will be followed by NRC Staff project managers and consultants.

3. The guidance should acknowledge that the Section 106 regulations provide for the agency to delegate Section 106 responsibilities to the applicant, while remaining responsible for all required findings and determinations, and that such delegation may be appropriate in certain circumstances (such as where some or all of the consulting parties agree to the delegation).

4. The guidance should go beyond mere recitation of the regulatory requirements, and provide specifics as to how and when NRC will comply with the regulations. For example, the guidance simply states that "NRC staff will seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties" without providing any guidance on how this will actually be accomplished.

Similarly, the guidance states that the NEPA and NHPA processes may be coordinated, without identifying any specific actions or documents that could be coordinated. At a minimum, the guidance should make favorable reference to the ACHP guidance on integration of NEPA and the NHPA and encourage NRC staff to make use of this guidance in coordinating the two reviews.

5. The Tribal guidance gives NRC Staff unreasonable amounts of time to initiate and complete various steps in the process (e.g., fourteen (14) months/six (6) months) to fulfill its responsibilities, while noting that State Historic Preservation Officers (SHPO) and the Advisory Council on Historic Preservation (ACHP) have tight timeframes (e.g., thirty (30) days). Additionally, NRC sets forth no timeframes for potential consulting parties to signal their intent to participate (e.g., notify NRC of their intent to participate within sixty (60) days and, if no response is received, NRC will make another attempt to involve the party, but if there still is no response within fifteen (15) days, NRC should consider the party not to be interested). Failure to include such timeframes is further evidence of NRC's ongoing failure to assert control of NHPA issues in its licensing process, which has been evident based on several examples, two of which resulted in significant delays between finalization of 10 CFR Part 51 environmental review

documents (e.g., FSEISs) and issuance of licenses (e.g., Uranerz Energy Corp.'s Hank and Nichols Ranch ISR license). NRC Staff has stated repeatedly that it has improved its understanding of its responsibilities under the NHPA but, at this time, no one in the licensee/license applicant community believes that this is the case. Thus, it is imperative that NRC set forth clear-cut procedures and timeframes in this guidance so that all license applicants/licensees know what they are getting into when they submit an application that triggers the Section 106 process.

6. The opening explanation of NRC's regulatory responsibilities and program is inadequate and poorly organized (e.g., the second and third paragraphs under Section 6.1 should be moved to the first page after explanation of NRC authority and process). NRC should include in this guidance a complete explanation of how the Atomic Energy Act of 1954, as amended (AEA), defines its regulatory program and should utilize language from a variety of documents already in its possession such as NUREG-1910 and its supplements. In several instances, there have been allegations levied against the Section 106 process conducted by NRC Staff from a legal perspective such as the requirements to satisfy the National Environmental Policy Act (NEPA) and how that process is conducted in coordination with or parallel to the Section 106 process. NRC Staff must take care to properly address legal requirements. NRC Staff also must provide a complete rundown of NHPA requirements at 36 CFR Part 800 *et seq.* and how they are integrated into NRC Staff's environmental review requirements, including NUREG-1748 environmental report guidance and subsequent Part 51 NEPA reviews.

7. A term generally associated with the Section 106 process and that has been actively debated in both the regulatory and litigation context is "government-to-government." Thus far, interested parties to a particular Section 106 process, including but not limited to, Tribes, licensees/license applicants, NRC, and the ACHP all appear to have different definitions of this term. However, "government-to-government" interaction during the Section 106 process is the hallmark of the relationship between the lead agency and Tribal governments. Thus, NRC must ensure that it is clear on what constitutes a "government-to-government" interaction so that *all* interested stakeholders understand NRC's position on this issue and there is no question should a party seek to litigate the issue.

8. NRC should actively solicit input specifically from the ACHP on development of this guidance. As the uranium recovery industry has recently experienced, interested stakeholders consistently raise questions about the viability and binding nature of NRC guidance, especially those that are developed for specific AEA licensing actions. As is the case with NUREG-1569, Commission legal precedent indicates that it is not binding on a licensee or an adjudicatory body, but that typically such guidance should be accorded special weight and treatment. In that vein, Section 106 processes, including agreement documents such as programmatic agreements (PA) and memoranda of agreement (MOA), that are executed by the ACHP are considered to be prima facie evidence that an agency's responsibilities for the Section 106 process have been

satisfied. Thus, it stands to reason that substantial input, if not tacit endorsement, of the Tribal guidance by the ACHP would make the guidance much more viable in the eyes of the license applicant/licensee and potential consulting parties. NMA believes NRC Staff should actively pursue this course of action.

9. NRC should develop an on-line database where documents developed pursuant to the Section 106 process can be accessed by the consulting parties, and include a requirement in the guidance for such documents to be made available by NRC. A centralized repository would provide a more transparent regulatory process, would provide a record of NRC's consultation efforts, and would facilitate NRC's compilation of the administrative record. Concerns with confidentiality could be addressed in a variety of ways, including restricting access to some or all of the database to certain users.

II. SPECIFIC COMMENTS

1. Page 3, Section 6.1: NRC Staff's anticipated completion of the initiation of the Section 106 process (i.e., six (6) months) is far too long. NMA believes this period should be no longer than sixty (60) days. In addition, NMA believes NRC Staff needs to be specific as to what the "initiation" of the Section 106 process entails.

2. Page 4, Section 6.1.1: NRC Staff needs to be clear on what constitutes an undertaking and what the criteria for such a determination are—presumably a license or license amendment application. The language in this Section is awkward and should be re-worded. NMA also believes NRC Staff should explore ways to initiate the Section 106 process prior to the actual submission and acceptance of a license application. There are no legal requirements precluding NRC Staff from initiating the process upon reasonable assurance that a license application will be submitted. Moreover, during a pre-submission audit and the post-submission acceptance review, NRC Staff still bills the license applicant/licensee. Thus, there are no legal or resource issues associated with starting the process earlier, and it will be the licensee/license applicant that would assume the financial risk of starting the process earlier.

3. Page 4, Section 6.1.1: NRC Staff should provide a complete discussion of what 10 CFR Part 51 NEPA documents will trigger the Section 106 process and why. Given that uranium recovery licensing actions may encompass several types of Part 51 documents (i.e., EIS, SEIS, and EA), a further discussion of this should be provided. This might also be an appropriate place to discuss how NEPA and the Section 106 process can be integrated and/or separated.

4. Page 4, Section 6.1.2.: The identification of potential consulting parties should only refer to "federal agencies" as States are not subject to the NHPA. Only the SHPO's office is a State-based office that should be identified here.

5. Page 5, Section 6.1.2.: NRC (rather than "the federal agency") should determine whether the undertaking takes place on federal, State, Tribal, and/or private property as this determination will trigger differing requirements in the Section 106 process and will implicate different potential issues. Each of these differing requirements and issues should then be discussed separately. For example, undertakings that involve Tribal reservation lands render that Tribe a mandatory party to a Section 106 agreement document. Projects taking place on private property may result in issues related to access for tribal surveys and other types of identification efforts.

In addition, Footnote 13 on page 5 states that NHOs will not be further addressed in the guidance, but the guidance continues to make reference to NHOs.

6. Page 6, Section 6.1.2: Similar to the list provided for identifying Tribes, the guidance should identify specific means (e.g., direct mailing to neighboring landowners within X miles of the APE, publication in local newspapers, etc.) by which the public will be notified. The guidance should also identify specific points in time during the Section 106 process when the public will be notified and provided an opportunity to consult, rather than simply making a generalized statement that the public will be notified. This portion of the guidance may also be an appropriate place to discuss NHPA/NEPA coordination/substitution process.

7. Page 6, Section 6.1.3: This portion of the guidance is yet another example of inexact timeframes for completion of activities associated with the Section 106 process. As stated above, NRC Staff needs to implement timeframes for consulting parties to respond and to become involved in the process. It is unreasonable to leave response to initial consulting efforts open, because this could result in significant delays in the process. The identified affected parties should bear the responsibility of contacting NRC to participate in the Section 106 process within 30 days after NRC attempts to contact them. NRC should not continue attempts to consult after a set timeframe at the license applicant's/licensee's expense.

On Page 7, the vague term "extended period" is used and is a good example of where NRC needs to take the lead and define the regulatory landscape with clear procedures and timeframes. 30 days is an adequate period of time to await a response. As the guidance notes, should a party contact the NRC after the 30 day response period, they may still be permitted to join the Section 106 process at its current stage.

8. Page 7, Section 6.2: NRC's reference to a potential fourteen (14) month period for completion of identification efforts is unreasonable. NRC is given a Level III archaeological survey to facilitate initial identification efforts, which goes a long way toward identifying where potential historic and cultural resources may be located at a project site. Then, NRC can set a reasonable timeframe for conducting Tribal field/traditional cultural property (TCP) surveys, if requested, which consulting parties

should consider binding absent requests for extension based on good cause shown. While any prescribed timeframes can be extended for good cause, it is unreasonable for NRC Staff to propose such a long timeframe for completion of the process, all of which is billed to the license applicant/licensee. Reasonable timeframes also may allow NRC to include much larger historic and cultural resource databases in its draft Part 51 document for public comment, thus alleviating any complaints from interested stakeholders regarding opportunities to comment on the process. Certainly it is understood that project and site-specific circumstances may influence these timeframes such as the size of the area of potential effect (APE), the number of consulting parties, and existing knowledge of nearby TCPs such as the Pumpkin Buttes or Devil's Tower in the State of Wyoming.

9. Page 7, Section 6.2: The suggestion in the first paragraph of Section 6.2 that identification of historic properties must be completed prior to issuance of the draft NEPA document should be deleted. While keeping the two reviews coupled may be possible in many situations, for those in which it is not, delaying issuance of the draft NEPA document until all historic properties have been identified would result in unreasonable delay at the applicant's expense. There is no requirement in NEPA that all historic properties be identified in the draft NEPA document.

10. Page 8, Top Paragraph: The reference to "other statutes" should be further clarified in a manner consistent with NRC Staff discussions in 10 CFR Part 51 environmental review documents such as the past five (5) supplements to NUREG-1910. NRC Staff should lay out all associated statutes and explain their applicability. Failure to do this will be yet another example of the agency assuming the public understands its processes which, in fact, they do not. Failure to educate interested stakeholders has had adverse effects on the uranium recovery industry in the past and such mistakes should not be repeated.

11. Page 8, Section 6.2.1: Identification of the APE should include input from the license applicant. The applicant is often in the best position to understand the direct and indirect impacts of the project. The guidance should also acknowledge that the APE is not static, and may be revised during the Section 106 process based upon new or changed information.

12. Page 9, Section 6.2.2: There is no mention of the "government-to-government" status of consulting parties involved such as Tribes, federal agencies, SHPO/THPOs, Tribal contractor, etc.

13. Page 9, Section 6.2.2: Throughout the guidance, and including the second paragraph of Section 6.2.2, the NRC needs to make clear that confidentiality concerns do not excuse a consulting party from providing NRC the information it needs to determine whether a cultural resource is eligible for the NRHP. If NRC cannot obtain

adequate information of eligibility after reasonable consultation, then the cultural resource will be found ineligible.

14. Page 9, Section 6.2.2: Consulting parties cannot inform NRC staff of the presence of historic properties. The third paragraph of Section 6.2.2 should be revised to remove this sentence "After participating in site visits, consulting parties may be able to inform NRC staff of the presence of **cultural resources** within the **direct** APE ..." The guidance should state expressly that NRC will only consider effects to known historic properties within the indirect APE, and that any survey efforts will be limited to the direct APE.

15. Page 9, Section 6.2.3: The discussion here is far too limited and needs to be supplemented. NRC should include a discussion of surveys in the context of the land ownership status of properties within the APE, number of potential participants in surveys, finances/compensation, and other aspects of the survey process from a lessons learned review of recent "open-site" surveys. On Page 10, the guidance states that NRC Staff should use an "open site" approach as a starting point, but it does not take into account the potential for limited participation in surveys and pre-existing TCP knowledge, which could constitute more than enough information to complete the resource identification process.
The guidance assumes that a survey is required for every project and that is false. The regulations call out a survey as one potential option in obtaining information.

The purpose of Section 106 is to provide Tribes the opportunity to get their interests and concerns before the NRC and allow them to advocate the outcome (consultation not approval). When the NRC or applicant is seeking the views of an Indian tribe to fulfill the NRC's legal obligation to consult with the tribes under specific provision of ACHPs regulation, the agency or applicant is not required to pay the tribe for providing its views. If payment is requested for any aspect of tribal or other consulting party participation, the NRC as the federal agency has met its obligation and is free to move to the next step in the Section 106 process.

16. Page 10, Section 6.2.3: The guidance should more explicitly define what "findings of the survey" need to be included in the survey report as this information is critical to NRC's evaluation of the identified cultural resources for potential inclusion in the National Register. The guidance should also state that NRC will provide a template form to all survey participants that will be completed for each cultural resource identified, and be designed to elicit information relevant to the criteria for eligibility found in 36 CFR 60.4, "Criteria for evaluation," with special consideration given to the type of information needed by NRC to evaluate the eligibility of tribal sites.

17. Page 10, Section 6.2.3: Although the guidance states that tribal recommendations on the eligibility of tribal sites for listing on the NRHP is of "great value" to the NRC, tribal sites are simply a subset of cultural resources, and the

guidance should make clear that the views of all consulting parties will be considered in determining whether cultural resources identified by the tribes satisfy the regulatory Criteria for evaluation. It's is NRC's responsibility to determine eligibility. Should NRC staff lack the required expertise to evaluate eligibility of tribal sites, NRC should retain the expertise of an independent consultant.

18. Page 10, Section 6.2.3: The suggestion in the guidance that tribal survey teams should provide in their survey reports recommendations on possible measure(s) to limit adverse effects on "historic properties" puts the cart before the horse. The NRC should first identify all historic properties within the direct APE, provide an opportunity for comment from all consulting parties, make a determination of effect, provide an opportunity for comment, and then seek input on avoidance, minimization or mitigation efforts, with an additional opportunity for comment by all consulting parties. Attempting to combine steps at an early stage risks confusion, for example, between the boundaries of the cultural resource and the Tribes' proposed buffer. Moreover, requesting that the Tribes provide both an eligibility determination and proposed avoidance measures following the survey improperly suggests that the Tribes' opinion as to the NRHP eligibility of the cultural resource will simply be accepted carte blanche by the NRC. It also seems as if the guidance us suggesting going beyond consultation and into requiring approval of the Tribes in addition to allowing them to set the requirements.

19. Page 11, Section 6.2.4: This section is a prime example of where NRC should impose reasonable 30 and/or 60 day time frames on its own actions, similar to those imposed on the SHPO/THPO/ACHP and other consulting parties.

20. Page 12, Section 6.2.4: See comment #19. To state that NRC's determination of eligibility will be accomplished within six (6) months will be affording more than ample opportunity for unreasonable delay.

21. Page 12, Section 6.3: The suggestion in the first paragraph of Section 6.3 that assessment of adverse effects will be tied to issuance of the draft NEPA document should be deleted. As noted in Comment #9, there is no requirement in NEPA that all historic properties be identified in the draft NEPA document, and NRC should not insist on coupling the reviews at the applicant's time and expense.

22. Page 12, Section 6.3: In discussing visual effects, NRC should also consider whether the visual effects will be temporary or permanent, and whether the landscape has previously been altered from its original form.

23. Page 12, Section 6.3: The guidance should acknowledge that adverse effects from noise and/or emissions are not anticipated from *in situ* uranium mining projects.

24. Page 13, Section 6.3: This Section discusses what happens should NRC determine there are no adverse effects, but does not expressly identify the steps should NRC determine there are adverse effects. These discussions, and associated time frames for all parties, including NRC staff, should be written in parallel for all sections.

25. Page 14, Section 6.4: The suggestion that resolution of adverse effects must be completed prior to issuance of the final NEPA document should be deleted. While keeping the two reviews coupled may be possible in many situations, for those in which it is not, delaying issuance of the final NEPA document until resolution of adverse effects would result in unreasonable delay at the applicant's expense. There is no requirement in NEPA that adverse effects be resolved prior to issuance of the final NEPA document.

26. Page 14, Section 6.4: NRC should say up front that the license applicant is a mandatory party to a Section 106 agreement document. Furthermore, there should also be a discussion in the guidance regarding how NRC will deal with amendments to a MOA or PA.

27. Page 14, Section 6.4: NRC's discussion of PAs should involve a discussion of how ISR projects are "phased" by nature, so "phased identification" within the confines of the Section 106 process which is expressly permitted in ACHP regulations and endorsed by the Commission in the *Hydro Resources, Inc.* case is appropriate. NRC Staff can develop this section in response to recent challenges to the Section 106 process and "phased identification" in the Powertech proceeding.

NMA appreciates the opportunity to comment on the proposed guidance. NMA, however, believes that significant changes to the guidance are necessary to make the 106 process timely and efficient for both NRC and licensees. If you have any questions regarding these comments, please feel free to contact me at (202)463-2627 or ksweeney@nma.org.

Sincerely,

Katie Sweeney