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Submitter Information

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General Comment

Attached please find the comments of the National Mining Association in response to the Nuclear Regulatory Commission's (NRC) request for comment regarding its review of administrative rules. 83 Fed. Reg. 19464 (May 3, 2018).

Attachments

Final NRC Reg Review comments

KATIE SWEENEY
General Counsel

July 2, 2018

Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555-001

ATTN: Rulemakings and Adjudications Staff

Dear Sir/Madam:

RE: Review of Administrative Rules

The National Mining Association (NMA) submits these comments in response to the Nuclear Regulatory Commission's (NRC) request for comment regarding its review of administrative rules. 83 Fed. Reg. 19464 (May 3, 2018). NMA supports NRC's efforts to identify outdated or duplicative administrative requirements that may be eliminated without an adverse effect on public health or safety, common defense and security, protection of the environment, or regulatory efficiency and effectiveness. NMA believes, however, that the scope of the review is overly narrow as "it is limited to identifying outdated or duplicative, non-substantive administrative regulations."

NRC's regulatory review should be broadened to incorporate the criteria outlined in Executive Order 13777, 82 Fed. Reg. 12,285 (Mar. 1, 2017). That order directed federal agencies to focus review on regulations that: (1) eliminate jobs, or inhibit job creation; (2) are outdated, unnecessary; or ineffective; (3) impose costs that exceed benefits; (4) create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (5) use secret science; and (6) derive from or implement other Presidential directives that have been rescinded or modified. Similarly, E.O. 13783, "Promoting Energy Independence and Economic Growth," specifically directs agencies to review existing regulations that may burden domestic energy resources with an eye to suspending, revising, or rescinding regulations that "unduly burden" energy resources. While these orders technically do not apply to independent agencies, such agencies are encouraged to comply. Indeed, in the past NRC has voluntarily complied with similar orders including E.O. 13579, "Regulation and Independent Regulatory Agencies," issued by President Obama in 2011. NMA believes a more robust regulatory review, as contemplated by these orders will help NRC better realize its goal to move toward more risk-informed, performance based approaches in its regulatory

programs. A risk-informed performance-based approach to regulations results in a more efficient and effective regulatory program that optimizes protections of public health, safety and the environment.

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. These comments are submitted by NMA on behalf of its member companies who are current or prospective NRC licensees engaged in the business of uranium recovery (UR). In addition to regulations that should be repealed or modified, these comments identify guidance and policies with similar legal effect that should be considered for review.

- Environmental Protection Agency (EPA) Rulemaking on Groundwater Standards for *in Situ* Recovery (ISR) Facilities

In 2015, EPA proposed a new Subpart to 40 CFR 192 to establish groundwater restoration and monitoring requirements at ISR facilities. Industry identified numerous legal and technical flaws with the proposal including the agency's (1) violation of its authority under the Atomic Energy Act (AEA) as amended by the Uranium Mill Tailings Radiation Control Act (UMTRCA); (2) failure to conduct any risk assessment demonstrating the rule is justified; (3) failure to use best available science; (4) failure to conduct an adequate cost-benefit analysis and (5) significant underestimation of compliance costs and impacts to small businesses.

Ultimately, during the review process conducted by the Office of Management and Budget (OMB), EPA did withdraw the 2015 version of the rule. However, nearly simultaneously, the agency announced it was proposing a new version that was published in the *Federal Register* on Jan. 29, 2017. Unfortunately, any changes EPA made to the rule were superficial and did not cure its fundamental and fatal flaws. A major concern is that EPA does not have the statutory authority to regulate ISR facilities in the manner proposed and that regardless, the rule is simply unnecessary since any potential risks to sources of drinking water are already adequately addressed by federal and state agencies. NRC has expressed significant concerns regarding the proposal indicating the "proposed rule relies on arguments that are not fully supported, encroaches upon NRC's jurisdiction and includes requirements that are not technically feasible or are unreasonably burdensome on both NRC and Agreement State licensees without providing any equivalent benefit."[1] NMA urges NRC to continue its engagement with EPA with the objective of having this unnecessary and duplicative regulation formally withdrawn.

[1] NRC Staff July 18, 2017 comments at 1.

- Subpart W Uranium National Emissions Standards for Radon Emissions (NESHAPS)

EPA published a final rule regarding 40 CFR Part 61, Subpart W "National Emissions Standards for Radon Emissions from Operating Mill Tailings" on Jan. 17, 2017. While the final rule was significantly improved from the proposal, the rule imposes unnecessary burdens on the UR industry that are not justified by any substantiated risk. In fact, as demonstrated by recent scientific studies and data radon emission risk from these uranium mill tailings impoundments are minimal to none.

NMA believes that current NRC regulations adequately address all relevant concerns that are the focus of this rule. Given that there is essentially zero airborne radon risk of the specific facilities targeted, revised NRC regulations could be a vehicle to address any *viable* EPA concerns. Such an approach would mirror what occurred with the rescissions of 40 CFR Part 61 Subparts I and T. In that instance, NMA, NRC, EPA, and other interested parties all agreed to rescind these Subparts and for NRC to revise its regulations to reflect additional requirements so that dual licensing/permitting processes would not be necessary.

- Application of Timeliness in Decommissioning Rule to ISR Wellfields

There is disagreement between industry and NRC regarding the applicability of 10 CFR 40.42 to ISR facilities, especially as restoration water is considered 11e.2 byproduct material. But even beyond that legal distinction, application of the timeliness rule does not make sense given the requirement to complete decommissioning within 24 months. While the regulations authorize the Commission to grant a request to delay or postpone initiation of the decommissioning process, it is not a risk-informed, performance-based approach since the 24 months is generally recognized as insufficient for ISR facilities. As NRC has specifically recognized: "for ISR facilities with well-field restoration, 24 months is usually insufficient, because remediation of groundwater contamination is more time-consuming than remediation of surface contamination." SECY-11-0159, Status of the Decommissioning Program – 2011 Annual Report, Nov. 10, 2011. If the 24 months is insufficient for ISRs, the timeframe should either not apply or should be amended. Licensees should not be required to go through a submission for an alternate schedule as a substitute for a risk-informed, performance based regulation.

- Health Physics Issues

Industry has significant concerns regarding NRC staff positions on several health physics issues related to effluent monitoring and public dose calculations specific to Radon-222 and its decay products. Since at least 2008, industry and NRC staff have attempted, and failed, to resolve these issues in a realistic and technically appropriate manner. NRC staff have released several versions of draft guidance on these issues but all have continued to generate controversy.

NMA believes that not only are the staff positions legally flawed in that they deviate from existing Commission regulations, guidance and policy, the approaches advocated are not merited by the risks related to the emissions involved nor are they always technologically feasible due to conditions specifically related to radon including both high and variable background concentrations in air. While the draft guidances have not been finalized, NRC staff have been using the drafts to push industry to change historic commission-approved approaches to dose estimates and licensing. NMA urges NRC to either abandon its guidance attempts or start anew and works with industry and other stakeholders to ensure requirements related to effluent monitoring and public dose calculations are technically achievable and commensurate with risk.

- NHPA Section 106 Process

Industry recognizes that NRC has obligations under the Section 106 of the National Historic Preservation Act (NHPA) to attempt to identify historic properties within the area of potential effects for proposed UR facilities. NRC has spent several years attempting to develop much-needed Section 106 guidance; however, more needs to be done to ensure the clarity and effectiveness of the most recent proposed draft guidance. 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).

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. NRC must also give any findings of the ACHP substantial weight in determining whether its NHPA obligations have been met.

- Application of Alternate Concentration Limits to ISR Facilities

In 2009, NRC Staff issued Regulatory Issue Summary 2009-05 entitled 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. In this document, NRC Staff determined that, as a matter of law, 10 CFR Part 40, Appendix A, Criterion 5B(5) groundwater quality standards apply as restoration standards to ISR wellfields. As a result, should an ISR licensee be unable to restore constituents in wellfield groundwater

to primary restoration standards (i.e., Commission-approved background or a maximum contaminant level, whichever is higher), then such licensee must restore a given constituent to an alternate concentration limit (ACL). ACLs are derived from EPA's Resource Conservation and Recovery Act (RCRA) groundwater requirements and were implemented by the Commission in 10 CFR Part 40 pursuant to EPA generally applicable standards at 40 CFR Part 192 et seq. pursuant to the Uranium Mill Tailings Radiation Control Act of 1978.

As a result of this legal determination, NRC Staff has stated that ISR licensees must submit applications for ACLs in order to complete restoration and stabilization in a given wellfield. While NRC Staff has regularly approved restoration based on license conditions, now with a formal regulatory requirement in place, it would be vital to industry and to the agency, as well as to maintain transparency with interested stakeholders, to develop detailed guidance for ACL applications. This will increase efficiency with license amendment applications and will help to streamline the review process, as licensees will know exactly what is expected of them when applying for such approvals.

Further, with the major States where ISR occurs either having Agreement State status or obtaining it shortly, such guidance will assist the completion review report (CRR) process and eliminate the considerable delays and conflicts that have occurred with Title II UMTRCA sites recently such as Durita in Colorado. NRC Staff has multiple sources of information on this process based on existing Criterion 5B(6) ACL requirements, past approvals, and Agreement State experience. Therefore, NMA encourages the Commission to engage NRC Staff in the development of ACL guidance for ISRs and to solicit ANPR level comments from industry and interested stakeholders and then issue draft guidance for public comment, as well as possible public hearing or a Commission briefing on this issue.

- Standing and Admissible Contention Requirements Pursuant to 10 CFR Part 2

The current regulations at 10 CFR 2.309 unfairly allow intervenors to bring issues before the Licensing Board where standing or injury has not been demonstrated. As an example, in the Strata Energy, Inc. administrative litigation, the Licensing Board determined standing (injury-in-fact) was demonstrated for two issues, light pollution and dust from truck traffic. Alternatively, the board determined the intervenors did not demonstrate standing for groundwater migration and contamination to Intervenors' property. Despite that finding, the board admitted contentions based solely on National Environmental Policy Act (NEPA) issues related to groundwater.

Admitting contentions where no standing has been found adds significant costs to litigate, both for NRC and licensees. To address this fundamental flaw, NRC should re-write the 10 CFR Part 2 "admissible contention" requirement to prohibit contentions

based on subject-matters upon which no standing was granted (cannot argue a contention if you demonstrate no "injury-in-fact").

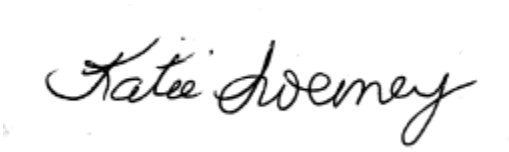
- License Renewals for Uranium Recovery Facilities

NMA appreciates and supports the Commission's recent decision to approve the staff recommendation to increase the maximum license term from 10 to 20 years for uranium recovery facilities. NMA, however, recommends that NRC issue additional guidance to ensure timely and efficient license renewals. The guidance for power plant license renewals (NUREG 1800 and 1801) are clear and concise and provide an excellent prototype. As such, power plant licensees and agency staff understand each step in the license renewal process and know what to expect, including types and forms of information required. While there is some mention of license renewal for ISR facilities in NUREG-1569, there is no comprehensive direction. The latest uranium recovery renewals have taken too long and cost too much.

NRC should issue additional guidance for uranium recovery license renewals. Such guidance is particularly important given the fact that at least five facilities will be facing license renewal within a five-year time horizon. Guidance will also provide Agreement States with much needed clarification on renewal practices and harmonize NRC and Agreement State expectations.

NMA appreciates the opportunity to submit these comments. If you have any questions, please contact me at ksweeney@nma.org or (202)463-2627.

Sincerely,



Katie Sweeney