

NUCLEAR REGULATORY COMMISSION

**Proposed Generic Communication; Pre-Licensing Construction Activities
at Proposed Uranium Recovery Facilities**

[NRC-2009-0138]

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of opportunity for public comment.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to issue a regulatory issue summary (RIS) to present its interpretation of the regulations governing the commencement of construction found in 10 CFR 40.32(e). This *Federal Register* notice is available through the NRC's Agencywide Documents Access and Management System (ADAMS) under accession number **ML083470668**.

DATES: Comment period expires [**30 days after *Federal Register* notice is published**]. Comments submitted after this date will be considered if it is practical to do so, but assurance of consideration cannot be given except for comments received on or before this date.

ADDRESSEES: Submit written comments to the Chief, Uranium Recovery Licensing Branch, Division of Waste Management and Environmental Protection, Office of Federal and State Materials and Environmental Management Programs, U.S. Nuclear Regulatory Commission, Mail Stop T-8F5, Washington, DC 20555-0001, and cite the publication date and page number of this *Federal Register* notice. Written comments may also be delivered to NRC Headquarters,

11545 Rockville Pike (Room T-8F5), Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

FOR FURTHER INFORMATION CONTACT: Mr. Stephen J. Cohen at 301-415-7182 or by email at stephen.cohen@nrc.gov.

DRAFT REGULATORY ISSUE SUMMARY 2009-XX, “PRE-LICENSING CONSTRUCTION ACTIVITIES AT PROPOSED URANIUM RECOVERY FACILITIES”

ADDRESSEES

All holders of operating licenses for uranium recovery facilities and all companies that have submitted applications to construct new uranium recovery facilities of all types (conventional mills, heap leach, and in situ recovery (ISR) facilities) or letters of intent to submit such applications.

INTENT

The U.S. Nuclear Regulatory Commission (NRC) is issuing this regulatory issue summary (RIS) to inform addressees of the NRC’s policy regarding pre-licensing construction activities at proposed uranium recovery facilities. The NRC is issuing this RIS in response to industry inquiries regarding the activities that applicants may undertake prior to receiving a license.

BACKGROUND

In relation to the applications for new uranium recovery facilities currently under review and those applications expected over the next several years, the NRC has been queried by the

uranium recovery industry about those construction activities that would be permissible at proposed uranium recovery facilities before a license is granted. The industry has requested information on such pre-licensing construction activities, including the potential use of limited work authorizations (LWAs) as provided in the reactor program, in the interest of minimizing the lead time from receipt of a license to the initiation of uranium recovery operations.

SUMMARY OF ISSUE

The NRC's regulations in 10 CFR 40.32(e) state that "commencement of construction" of a uranium recovery facility prior to issuance of a license is grounds for license denial. The term "commencement of construction" means "any clearing of land, excavation, or other substantial action that would adversely affect the environment of a site." The term does not mean "site exploration, roads necessary for site exploration, borings to determine foundation conditions, or other preconstruction monitoring or testing to establish background information related to the suitability of the site or the protection of environmental values." Such activities may thus be conducted before a license is granted.

In a Staff Requirements Memorandum (SRM)-M081211, the Commission directed the staff to budget resources to develop a proposed rulemaking to revise 10 CFR 40.32(e) to determine whether a limited work authorization provision is appropriated for in-situ uranium facilities. Information gathered through the process described in this RIS will be used to support development of such a proposed rulemaking.

ISR Industry representatives, through their legal counsel, presented their opinions to staff regarding the applicability of 10 CFR 40.32(e) to ISR facilities during a meeting on November 18, 2008. Industry's position is that 10 CFR 40.32(e) is not applicable to ISR facilities, based on the rulemaking history of this regulation as reflected in the 1980 *Federal*

Register notice publishing the final rule. In a November 18, 2008 White Paper, the ISR industry argues as follows:

This 1980 final rule promulgated and finalized a number of UMTRCA-specific regulations, including what the Commission referred to as “siting and design criteria” for newly proposed conventional uranium milling facilities (October 3, 1980; 45 FR 65521). One of these regulations was a newly proposed 10 CFR 40.32(e) that dealt directly with the extent to which a proposed conventional uranium mill project site could be developed and constructed pursuant to these “siting and design criteria” prior to the issuance of a uranium milling license. This new 10 CFR 40.32(e) imposed a requirement on the Director of NRC’s then-named Office of Nuclear Material Safety and Safeguards (NMSS) (now Office of Federal and State Materials and Environmental Management Programs) to make “a positive finding on an applicant’s proposed plans as meeting the requirements and objectives in *Appendix A prior to commencement of construction of a mill which produces byproduct material.*”

Industry further stated the following:

Based on this requirement, the Commission concluded in the regulation that “[c]ommencement of construction prior to this conclusion is grounds for denial of a license to possess and use source and byproduct material in the plant or facility.” (10 CFR 40.32(e)). Therefore, “the denial of applications for licenses where construction is started before the appropriate environmental appraisals are completed and documented” is required. However, it is crystal-clear from NRC’s accompanying explanatory language

that this requirement is to be imposed only on a conventional “mill which produces byproduct material” as tailings, where it states: “Construction activities are likely to result in significant and long lasting environmental impacts, the propriety of which cannot be ascertained until these environmental appraisals are completed and documented.”

In addition, to support its claim that 10 CFR 40.32(e) applies only to conventional mills, the ISR industry paper states:

Given that each mill tailings pile constitutes a low-level waste burial site containing long lived radioactive materials, ... prudence requires that specific methods of tailings disposal, mill decontamination, site reclamation, surety arrangements, and arrangements to allow for transfer of site and tailings ownership be worked out and approved before a license is granted.” (October 3, 1980; 45 FR 65521).

According to industry, ISR applicants, therefore, should be allowed to build out most of the facilities in three tiers. Tier 1 includes activities over which NRC would have no jurisdiction, such as

- laying foundations and construction of all support structures
- laying of foundations for processing facilities
- construction of ancillary facilities (i.e., roads, parking lots, access controls, power lines)
- installation of water and sanitary systems
- drilling of disposal wells

Tier 2 activities would include those requiring NRC approval, but not a license, such as the following:

- construction of processing facilities
- drilling of injection and production wells
- installation of wellfield pipelines

Tier 3 activities would not occur until a license is issued and would include construction of the evaporation ponds and engaging in uranium recovery operations.

NRC staff does not agree with industry's interpretation of 10 CFR 40.32(e). This regulation uses the terms "uranium milling" and "byproduct material," each of which is specifically defined in 10 CFR 40.4. The term "uranium milling" means "any activity that results in the production of byproduct material as defined in this part." The term "byproduct material" means "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes." These definitions were added to 10 CFR Part 40 in a 1979 final rulemaking that the ISR industry paper does not discuss.

The NRC's regulations in 10 CFR Part 50 (Domestic Licensing of Production and Utilization Facilities) include an LWA process that allows the NRC to approve the conduct of certain construction activities in advance of the issuance of a construction permit or combined license. However, there are no similar provisions in 10 CFR Part 40 for the use of LWAs in the licensing of uranium recovery facilities. Therefore, if an applicant wishes to perform pre-

licensing construction activities apart from those permitted under 10 CFR 40.32(e), an exemption request must be submitted for the staff's review. The exemption request must specify the particular activity, the purpose and need for the activity, the duration of the activity, and the potential impacts to human health and the environment. The request should include drawings that provide construction details and the location of the proposed activity.

Depending on the specific activities included in the exemption request, the staff's review may include an environmental assessment pursuant to the requirements of 10 CFR Part 51 (Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions), consistent with the guidance in NUREG-1748 (Environmental Review Guidance for Licensing Actions Associated with NMSS Programs). Exemption requests will be reviewed on a case-by-case basis and the granting of any exemptions does not ensure subsequent approval of a license. As such, any construction activities performed by the applicant under an exemption and prior to the issuance of a license are performed at the applicant's risk.

VOLUNTARY RESPONSE REQUESTED

All addressees and the public are requested to voluntarily submit comments regarding the pre-licensing policy presented in this RIS. To be of use to the NRC, responses should be submitted within 30 days of the date of this summary.

CONGRESSIONAL REVIEW ACT

This RIS is not a rule as designated in the Congressional Review Act (5 U.S.C. §§ 801-886) and, therefore, is not subject to the Act.

PAPERWORK REDUCTION ACT STATEMENT

This draft RIS does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Existing requirements were approved by the Office of Management and Budget, approval numbers 3150-0020 and 3150-0021.

PUBLIC PROTECTION NOTIFICATION

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection unless the requesting document displays a currently valid OMB clearance number.

CONTACT

This RIS requires no specific action or written response. If you have any questions about this summary, please contact the technical contact listed below.

Technical Contact: Stephen J. Cohen, DWMEP/URLB
(301) 415- 7182
E-mail: stephen.cohen@nrc.gov

Note: The NRC's generic communications may be found on the NRC public Web site, <http://www.nrc.gov>, under Electronic Reading Room/Document Collections.

END OF DRAFT REGULATORY ISSUE SUMMARY

Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, <http://www.nrc.gov/NRC/ADAMS/index.html>. If you do not have access to ADAMS or if you have problems in accessing the documents in ADAMS, contact the NRC Public Document Room (PDR) reference staff at 1-800-397-4209 or 301-415-4737 or by e-mail to pdr@nrc.gov.

Dated at Rockville, Maryland, this 20th day of March 2009.

FOR THE NUCLEAR REGULATORY COMMISSION

/RA/

Keith I. McConnell, Deputy Director
Decommissioning and Uranium Recovery
Licensing Directorate
Division of Waste Management
and Environmental Protection
Office of Federal and State Materials
and Environmental Management Programs