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ONE HUNDRED FOURTEENTH CONGRESS

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RANKING MINORITY MEMBER

Congress of the United States

House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
2157 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6143
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MINORITY (202) 225–5051
http://oversight.house.gov

October 6, 2015

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, D.C. 20460

Dear Administrator McCarthy:

On January 26, 2015, the Environmental Protection Agency issued a proposed rule titled "Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings," which set groundwater protection standards for uranium in-situ recovery facilities.[1] The proposed rule would add a new subpart to EPA's regulations that implement the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). While EPA establishes health and environmental standards of general applicability associated with uranium processing, the Nuclear Regulatory Commission (NRC) is responsible for implementing and enforcing those standards. The Committee recently learned that the NRC has concerns with the scope and breadth of the proposed rule, and that, as written, the proposed rule oversteps EPA's authority under the Atomic Energy Act.[2]

In a July 28, 2015 letter to the EPA's General Counsel, the NRC's General Counsel stated, "the EPA's proposed rule may encroach upon the Nuclear Regulatory Commission's (NRC) authority."[3] The letter further stated:

> Our concern with the proposed 95 percent confidence level is that such a level does not equate to reasonable assurance but to essentially, absolute assurance. In essence the proposed rule goes beyond establishing a general standard such that it affects how the standard is met—a role reserved for the NRC. Moreover, a 95 percent confidence level is extremely difficult to demonstrate, leaving virtually no room for margin of error. Given the difficulty in demonstrating compliance with a 95 percent confidence level,

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[1] Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings, 80 Fed. Reg. 4155 (Jan. 26, 2015).
[2] Letter from Margaret M. Doane, Gen. Counsel, Nuclear Regulatory Comm'n, to Avi S. Garbow, Gen. Counsel, Envt'l. Prot. Agency (July 28, 2015).
[3] *Id.*

> the provision may not be implementable in a meaningful way, and as such, the NRC may not be able to grant a final alternate concentration limits.[4]

The NRC also expressed concern that the proposed rule's 30-year monitoring period "may be longer than needed to assure protection for groundwater resources."[5]

Documents obtained by the Committee show NRC staff also raised concerns that EPA did not provide accurate information to the Science Advisory Board (SAB) regarding these regulations. The staff believed EPA's presentation to the SAB was factually incorrect at times, which prompted the SAB to request answers from NRC at the last minute. NRC staff also believed EPA's presentation omitted key information that NRC provided specifically for the SAB's benefit. When asked why EPA staff did not provide this information to the SAB, they stated that the "documents were too large."[6]

NRC staff also stated concerns that EPA's proposed regulations may be "requirements" instead of "general standards," in which case NRC questioned whether EPA should be promulgating these regulations at all.[7]

To better understand the EPA's process for developing the proposed rule, please provide all documents and communications referring or relating to the proposed rule, prior versions of the rule, and related guidance, including, but not limited to, documents and communications between and among EPA and NRC personnel, as soon as possible, but no later than 5:00 p.m. on October 20, 2015.

When producing documents to the Committee, please deliver production sets to the Majority staff in room 2157 of the Rayburn House Office Building and the Minority staff in room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format. An attachment to this letter provides additional information about responding to the Committee's request.

The Committee on Oversight and Government Reform is the principal investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate "any matter" at "any time."

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[4] *Id.*
[5] *Id.*
[6] "Notes on EPA SAB meeting July 18-19, 2011," Nuclear Regulatory Comm'n, on file with Committee staff.
[7] Email from Joan Olmstead, Nuclear Regulatory Comm'n, to Melissa Zudal, Nuclear Regulatory Comm'n, *et al.*, Dec. 5, 2012.

Please contact William McGrath or Ryan Hambleton of the Committee staff at (202) 225-5074 with any questions about this request. Thank you for your cooperation in this matter.

Sincerely,

Jason Chaffetz
Chairman

Cynthia M. Lummis
Chairman
Subcommittee on the Interior

Jim Jordan
Chairman
Subcommittee on Health Care,
Benefits and Administrative Rules

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member

The Honorable Brenda L. Lawrence, Ranking Member
Subcommittee on the Interior

The Honorable Matthew Cartwright, Ranking Member
Subcommittee on Healthcare, Benefits and Administrative Rules

The Honorable Ken Calvert, Chairman
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations

The Honorable Betty McCollum, Ranking Member
Subcommittee on Interior, Environment, and Related Agencies
Committee on Appropriations

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.

2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.

3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.

4. Documents produced in electronic format should also be organized, identified, and indexed electronically.

5. Electronic document productions should be prepared according to the following standards:

   (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.

   (b) Document numbers in the load file should match document Bates numbers and TIF file names.

   (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

   (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

   BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH, PAGECOUNT,CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE, SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM, CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE, DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD, INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION, BEGATTACH.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.

8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.

9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.

10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.

11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.

12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.

13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.

14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.

15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.

16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.

18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.

2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.

3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term “identify,” when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.

6. The term “referring or relating,” with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.

7. The term “employee” means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555–0001

GENERAL COUNSEL

July 28, 2015

Avi S. Garbow, General Counsel
Environmental Protection Agency
1200 Pennsylvania Avenue
Mail Code 2310A
Washington D.C. 20460

Dear Mr. Garbow:

My office has recently reviewed the Environmental Protection Agency's (EPA) January 26, 2015 proposed rule, "Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings," which sets forth groundwater protection standards for uranium in-situ recovery facilities. The proposed rule would add a new Subpart F to EPA's regulations at 40 CFR Part 192. EPA's Part 192 regulations implement EPA's responsibilities under the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA).

As explained below, we are concerned that, in certain respects, the EPA's proposed rule may encroach upon the Nuclear Regulatory Commission's (NRC) authority. Our agencies for many decades have worked closely together on EPA's rulemakings that pertain to the regulation of the commercial nuclear industry and we would like at an early date to meet with your staff to discuss our concerns.

As you know, section 275 of the Atomic Energy Act established a dual regulatory scheme over the uranium processing industry. EPA sets standards of general applicability for the protection of public health and the environment from the radiological and nonradiological hazards associated with uranium processing, and the NRC implements and enforces those standards. There are two provisions in EPA's proposed rule that we wish to discuss with you because they may encroach upon NRC's authority.

Proposed 40 CFR 192.52(c)(3)(i)-(ii) allows for the NRC or other regulatory agency (i.e., a NRC Agreement State) to establish "final alternate concentration limits" provided that groundwater stability, after uranium in-situ recovery operations had ceased, be demonstrated at a 95 percent confidence level, based upon quarterly sampling, for three consecutive years. This proposed provision appears to be beyond the UMTRCA authority to set general standards, as it can be construed as imposing either a management or an engineering method upon licensees. The very high statistical rigor (95 percent confidence level) imposed by the proposed provision relates to how the licensee will demonstrate compliance, which the NRC views as an implementation issue, and thus a NRC responsibility, rather than a general standard. In this regard, the NRC's statutory duty is to provide reasonable assurance. Reasonable assurance is not expressed in terms of a particular level of statistical rigor. Our concern with the proposed 95 percent confidence level is that such a level does not equate to reasonable assurance but to essentially, absolute assurance. In essence the proposed rule goes beyond establishing a general standard such that it affects how the standard is met – a role reserved for the NRC.

Moreover, a 95 percent confidence level is extremely difficult to demonstrate, leaving virtually no room for a margin of error. Given the difficulty in demonstrating compliance with a 95 percent confidence level, the provision may not be implementable in a meaningful way, and as such, the NRC may not be able to grant a final alternate concentration limits.

Proposed 40 CFR 192.53 establishes extensive monitoring requirements upon uranium in-situ recovery licensees. In particular, proposed 40 CFR 192.53(b) requires the monitoring of all constituents in the event an "excursion" is detected. Notably, the proposed provision does not account for the different speeds at which the various constituents may move through the aquifer—thus raising the question as to whether monitoring the slower-moving constituents is necessary. Similar to our concerns with the 95 percent confidence level requirement, this provision may be construed as imposing either a management or an engineering method upon licensees, and thus be beyond the scope of a general standard.

We also have substantive concerns with one provision. Following the three-year post-operational "stability phase" in which the licensee must demonstrate constituent stability at a 95 percent confidence level, the licensee must, under proposed 40 CFR 192.53(e)(iii), continue to monitor the site for an additional 30 years. Although establishing a monitoring period's term may be within the scope of general standard setting, a 30-year monitoring period may be longer than needed to assure protection of groundwater resources.

The NRC wishes to discuss its concerns more fully with your staff as part of EPA's development of a final rule. Please contact Andrew Pessin, of my office, at 301-415-1062. We look forward to working with you on this matter.

Sincerely,

Margaret M. Doane

Margaret M. Doane
General Counsel

cc: Janet G. McCabe, Acting Assistant Administrator for the Office of Air and Radiation

Zudal, Melissa

From: Olmstead, Joan
Sent: Wednesday, December 05, 2012 7:05 AM
To: VonTill, Bill; Striz, Elise; Comfort, Gary
Subject: RE: 40 CFR 192.32

There is also the question if these provisions are "general standards" or "requirements." If they are not general standards there is a question on whether they should be promulgating these provisions at all for an ISR facility. I'm pulling the 10th Circuit case this morning and will see you in the lobby at 7:30. Joan

This message may contain Attorney Work Product and/or Attorney-Client Privileged Material. Please do not release without prior consent from the Commission.

NOTE: REQUESTS FOR OGC REVIEW OF DOCUMENTS **MUST** BE SENT TO THE OGC MAILROOM USING THE FOLLOWING EMAIL ADDRESS [redacted] FAILURE TO SEND TO THE OGC MAILROOM MAY MEAN REVIEW OF YOUR DOCUMENT WILL BE DELAYED.

From: VonTill, Bill
Sent: Wednesday, December 05, 2012 6:09 AM
To: Striz, Elise; Comfort, Gary; Olmstead, Joan
Subject: RE: 40 CFR 192.32

Good eye Elise,

Yes, these references directly to RCRA are problematic and I don't believe they were well thought out. EPA needs to develop standards that the NRC can fully implement without referencing sections where an EPA Administrator/Regional Administrator has a decision making function. I would suggest to them that if there are certain parts in 264 that they want used in the new Subpart F that they cut and paste them rather than referencing them – without the Administrator decision part. For excursion monitoring corrective action they need something more specific to that circumstance. Elise – you may think about what is the best language for excursion corrective actions after looking at NUREG-1569.

Thanks

From: Striz, Elise
Sent: Tuesday, December 04, 2012 6:26 PM
To: Comfort, Gary; VonTill, Bill; Olmstead, Joan
Subject: 40 CFR 192.32

I have been reading this 40 CFR192.32 regulations. These regulations incorporate a lot of other standards including all of 264.92, 264.93. 264.94, 264.95,. 264.98,264.221 which are very lengthy, reference other regs and are hidden from our review at this point. They include giving the Administrator of EPA authority over setting site specific standards for groundwater , detection, correction and monitoring. In 192.32a(2) (v) it clearly states EPA must concur on all ACLs.

I have substantial concerns with direct inclusion of these regulations in the EPA rulemaking. I do not believe the meet the bar of generally applicable standards.

Thanks,
Elise

Notes on EPA SAB meeting July 18-19, 2011

(1) EPA's presentation of information appeared to lead the SAB to conclude the absence of specific ISR regulations in 40 CFR Part 192 equates to an absence of the regulation of ISR sites. At one point the SAB said these sites appear poorly regulated and therefore a threat and EPA should take regulatory action immediately to correct the situation. The SAB also stated that it believed it was only "by luck" that these sites had not contaminated USDW. EPA did not make an effort to ensure the SAB understood that NRC regulation of these sites was comprehensive and effective using the ISR Standard Review plan in NUREG 1569 and license conditions.

(2) EPA's presentation contained numerous factual errors on specific definitions which are critical to SABs understanding of ISR operations. Some errors were very serious including a statement made by EPA that "an excursion was movement of ISR production fluids outside the exempted aquifer."

(3) EPA was not able to answer numerous technical and regulatory questions posed by SAB members. On the afternoon of the first day NRC staff was asked if they would be willing to answer questions from the SAB. NRC staff said they would answer technical questions to facilitate the process. NRC staff answered numerous technical and regulatory questions posed by the SAB. NRC staff attempted to correct the factual errors made by EPA in earlier presentations

(4) EPA allowed the SAB to state/conclude there was no or limited data available for the SAB to examine how a licensee determines baseline water quality to establish GWPS for restoration or data to demonstrate stability of restored ground water quality at ISR sties. Prior to the SAB meeting NRC had provided EPA with all the restoration reports/data for the three existing ISR sites where NRC has approved the restoration (over 20 files with all ML numbers). These reports included all of the baseline water quality and restored water quality stability data and analysis for all three NRC approved restorations. EPA did not provide these reports to the SAB and did not reference the majority of them in the EPA technical report provided to the SAB. When NRC staff stated all of these restoration reports and data had been provided to EPA, the SAB asked why EPA had not provided it to them. EPA responded that the files were too large.

(5) In its conclusions, the SAB stated EPA had not provided it with the information that was needed to answer the charge questions. It stated that it was apparent that a substantial amount of information was available and EPA had failed to provide the data or an analysis of the data to the SAB so that it could answer the charge questions. The SAB asked EPA to evaluate the data and to work with NRC.

(6) At no point was any mention made by EPA or NRC staff concerning NRC's ISR Rulemaking effort.