



URANIUM PRODUCERS OF AMERICA

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The Honorable Scott Pruitt
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Docket ID No. EPA-HQ-SFUND-2015-0781

RE: Uranium Producers of America's comments on the U.S. Environmental Protection Agency's Proposed Rule on Financial Responsibility Requirements Under CERCLA Section 108(b) of Facilities in the Hardrock Mining Industry

Dear Administrator Pruitt:

The Uranium Producers of America (UPA) hereby submits its comments on the U.S. Environmental Protection Agency's (EPA) proposed rule regarding financial responsibility requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 108(b) of facilities in the hardrock mining industry. **In short, current State and Federal requirements for financial assurance make this rulemaking unnecessary, and the EPA fails to consider the low-risk profile of uranium recovery operations. In addition, the actions considered under this rule would be a contradiction of mandates set forth in Executive Orders 12866, 13771, and 13777.**

The UPA is a national trade association representing domestic uranium mining companies. UPA's mission is to promote the viability of the nation's uranium mining industry, while being good stewards of the environments in which we work and live. UPA members conduct uranium exploration, development, and mining operations in Arizona, Colorado, Nebraska, New Mexico, South Dakota, Texas, Utah, and Wyoming. Most of the uranium mining operations are performed via In-Situ Recovery (ISR). UPA members are permitting new uranium production facilities in the United States. UPA members operate valuable, high-grade uranium deposits that provide good, high paying jobs, tax revenues, and produce clean energy for the citizens of the United States.

Inclusion of Uranium Recovery Operations is Contrary to the Intent and Language of CERCLA

As proposed, the rule includes within its scope uranium recovery (UR) facilities licensed by the United States Nuclear Regulatory Commission (NRC or the Commission) and its Agreement

States under the Atomic Energy Act of 1954, as amended (AEA). UPA notes, however, that section 101(10) of CERCLA defines “federally permitted releases” as a broad category of releases that are generally exempt from CERCLA. Specifically, section 101(10)(k) includes within the scope of that definition, “any release of source, special nuclear, or byproduct material, as those terms are defined in the Atomic Energy Act of 1954, in compliance with a legally enforceable license, permit, regulation, or order issued pursuant to the Atomic Energy Act of 1954.” UR facilities generate AEA-licensed source and 11e.(2) byproduct material. This exemption is the broadest of the “federally permitted releases” pursuant to other statutes listed in CERCLA.

This exemption is further evidenced by a 1983 policy and a 2002 memorandum of understanding (MOU) between NRC and EPA regarding the treatment of AEA-licensed sites for the purposes of the CERCLA National Priorities List (NPL). Pursuant to the policy and MOU, EPA does not list AEA-licensed sites directly regulated by NRC on the NPL. While this MOU has not been read so broadly as to prevent Agreement State sites from being listed, its logic applies identically to Agreement State sites. Agreement States assume regulatory authority from NRC under Section 274 of the AEA but only NRC can authorize site closure and license termination for UR sites. As such, NRC continues to have enough of a direct regulatory role that the tenets of the MOU should apply to such sites. The MOU also addresses duplication of NRC and EPA efforts more generally. As stated in the MOU:

“The purpose of this MOU is to identify the interactions of the two agencies for the decommissioning and decontamination of NRC-licensed sites and to indicate the way in which those interactions will take place. Except for Section VI, addressing corrective action under the Resource Conservation and Recovery Act (RCRA), this MOU is limited to the coordination between EPA, when acting under its Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) authority, and NRC, when a facility licensed by the NRC is undergoing decommissioning, or when a facility has completed decommissioning, and the NRC has terminated its license. It continues a basic policy of EPA deferral to NRC decision-making in the decommissioning of NRC-licensed sites except in certain circumstances, and establishes the procedures to govern the relationship between the agencies in connection with the decommissioning of sites at which those circumstances arise.”

Furthermore, even prior to license termination, the AEA mandates that an Agreement State adopt and implement regulations that are both adequate to protect public health and safety and the environment (potentially more stringent than NRC’s) and compatible with NRC’s existing regulatory program. These Agreement States and their regulatory programs are monitored and inspected on a regular basis by NRC, thereby demonstrating that an Agreement State is doing nothing more than “standing in the shoes” of NRC. This fact is further evidenced by the language of AEA Section 274, which says that the Commission does not “cede” regulatory authority to an Agreement State; but rather, the Commission “discontinues” regulatory authority pending future action such as the Agreement State returning authority to the Commission or the Commission unilaterally taking it back. By implication, this means that Agreement States are implementing a regulatory program that is essentially NRC’s own program. These factors show that EPA has at least tacitly acknowledged that NRC regulations for these facilities, which include robust financial assurance, are adequate to protect public health and safety and the environment.

Although its scope has been broadly interpreted for releases permitted under other federal statutes, CERCLA is not intended to supply any additional liability (S. Rep. 848, 96th Cong., 2nd Sess. at 46-47, 1980). Thus, pursuant to Section 107(j) of CERCLA, recovery for response costs and damages from “federally permitted releases” shall only be pursuant to existing law in lieu of this section. If interpreted otherwise, CERCLA’s sweeping liability would override permitted activities under other federal laws and retroactively, as well as prospectively, and penalize potentially responsible parties whose environmental discharges had been expressly authorized by other statutory programs, such as AEA-licensed UR facilities.

Congress’ intent to limit EPA’s authority to prevent duplicative regulation over UR facilities is further evidenced by the comprehensive statutory and regulatory program imposed on such sites by the AEA. Initially, under the 1970 Reorganization Act and subsequent Office of Management and Budget (OMB) decision, EPA was granted authority under the AEA to promulgate “generally applicable standards” for the protection of the environment outside of the controlled boundaries of licensed sites. Building on this grant of authority, Congress passed the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA) as an amendment to the AEA to address source material (uranium) mill tailings that were previously unregulated as an AEA material and to specifically address a new class of AEA materials known as 11e.(2) byproduct material.

Under UMTRCA, EPA was granted limited and indirect regulatory authority to propose generally applicable standards that would serve as the starting point for the NRC to promulgate regulations that would address such byproduct material and the process known as "uranium milling," which is defined by NRC at 10 CFR § 40.4 as any activity that generates 11e.(2) byproduct material. Importantly, while EPA can promulgate generally applicable standards, the agency has no authority to create the applicable regulations, to impose requirements on NRC's licensees, or to enforce NRC license requirements on such licensees. Section 275(d) of the AEA specifically provides that "implementation and enforcement of the standards promulgated [by EPA] pursuant to subsection (b) of this section shall be the responsibility of the Commission in the conduct of its licensing activities under this Act."

Thus, NRC, not EPA, was granted direct regulatory authority to implement and enforce appropriate regulations. Congress directed NRC to develop its own requirements for the management of 11e.(2) *byproduct material* to ensure that these materials are managed in a manner:

- (i) “that the Commission deems appropriate to protect health, safety, and the environment from the potential radiological and non-radiological hazards associated with such materials;
- (ii) that *conforms* with the generally applicable standards developed by EPA; and
- (iii) that conforms with the general requirements established by NRC, comparable to standards applicable to similar hazardous materials regulated under the Solid Waste Disposal Act [42 U.S.C. § 6901 et seq.]”

By way of example, NRC's 10 CFR Part 40, Appendix A, Criterion 5 incorporates the basic groundwater protection standards as promulgated by EPA in 40 CFR Part 192, Subparts D & E which, as noted above, incorporate RCRA standards in 40 CFR Part 264, *et. seq.*, and which apply

both during operations and to final closure. The *primary* standard in Criterion 5 focuses on the type of liner necessary to protect groundwater during the management of uranium or thorium mill tailings. Additionally, a *secondary* groundwater standard is provided requiring that hazardous constituents entering groundwater must not exceed concentration limits in the uppermost aquifer beyond the point of compliance during the compliance period. Criterion 5 prescribes a specific course of action for implementing *primary* and *secondary* groundwater standards which include provisions for ACLs, the classification of hazardous constituents, and whether they may be exempted from the regulation. But, EPA is not allowed to prescribe the requirements for obtaining an ACL from NRC and has conceded that point on multiple occasions.

An additional jurisdiction argument that EPA should not include UR facilities under the proposed rule stems from the Commission determination that it has exclusive, preemptive jurisdiction over all aspects (radiological and non-radiological) of 11e.(2) byproduct material and, hence, uranium milling. In the 1980s, the Commission determined that the active operational portion of such an operation constitutes uranium milling, and therefore falls under the provisions of UMTRCA. Later, in 2000, the Commission determined that restoration fluids from ISR operations are 11e.(2) byproduct material as well as determining that it had exclusive, preemptive federal jurisdiction under the AEA/UMTRCA over both the radiological and non-radiological aspects of 11e.(2) byproduct material and, thus by definition, uranium milling. As a result of this determination, which has never been challenged by EPA or any other entity, the Commission fully regulates all aspects of ISR operations, including but not limited to financial assurance. Therefore, EPA does not possess the requisite jurisdiction over 11e.(2) byproduct material or uranium milling to impose CERCLA-based financial assurance requirements.

CERCLA 108(b) Rulemaking is Duplicative and NOT Necessary

According to the EPA, the intent of the rulemaking is to ensure owners and operators of hardrock mining facilities have sufficient financial assurance to cover any future liabilities under CERCLA. However, this rulemaking, which was initiated by the Obama Administration, is entirely unnecessary and duplicative of existing state and federal requirements. Current State and Federal Regulatory requirements for financial assurance meet the CERCLA §108(b) mandate, and no further regulatory requirements are necessary. As discussed above, NRC is the primary regulatory authority over uranium operators and its regulations include robust financial assurance requirements. As such, uranium operators are already required to provide adequate financial assurance for the operation and restoration of project sites, including assurance for potential bankruptcy or cases of operator abandonment. When Congress enacted CERCLA in 1980, there were few financial assurance requirements at the state or federal level, but that has long since changed. The NRC rules establish sufficient financial assurance requirements to meet the requirements of CERCLA §108(b) without any additional regulation. Those financial assurance requirements incorporate all current and future environmental risks, health assessments, and natural resource claims, a fact that was not addressed in the proposed CERCLA §108(b) rulemaking. Uranium recovery activities may also be subject to other financial assurance requirements imposed by states and federal land management agencies, including the Bureau of Land Management and the U.S. Forest Service.

An integral part of NRC's regulations applicable to UR facilities is financial assurance requirements to cover all possible decommissioning costs based on the condition and operational

status of the licensed site at that time. These requirements consist of two primary components. The first and most robust is the requirement for financial assurance at all stages of a project. Initially, NRC regulations require that a license applicant submit a decommissioning plan with associated costs with its application for NRC review and approval. After approval of the decommissioning plan and the conceptual financial assurance costs, a licensee may then proceed to construct its facility and prepare it for operations. However, a licensee cannot begin any operational activities until it has demonstrated to NRC that it has posted the appropriate financial assurance funds using an NRC-approved financial assurance instrument (e.g., surety bond, letter of credit, etc.). Only then can a licensee commence licensed operations. Further, NRC regulations at 10 CFR Part 40, Appendix A, Criterion 9 require that a UR licensee update its financial assurance annually to account for factors such as inflation, costs of equipment and manpower, and other economic factors.

These regulations also attach to ISR facilities through the 2000 NRC Commission decision in *Hydro Resources, Inc.* that requires the submission of a “restoration action plan” (RAP) and associated financial assurance cost estimates with a license application and the approval of such RAP by NRC staff prior to issuance of an operating license. Then, similar to conventional Title II sites, NRC requires that the approved financial assurance be posted using an acceptable financial assurance instrument prior to commencement of license operations.

The second component of NRC’s financial assurance program is found at 10 CFR Part 40, Appendix A, Criterion 10. Section 84 of the AEA requires that the Department of Energy take title to all 11e.(2) byproduct material absent a waiver from NRC. In that vein, Criterion 10 requires that a UR licensee seeking license termination to post \$250,000 in 1978 dollars into the General Treasury for long-term surveillance and monitoring (LTSM). This added component of financial assurance allows DOE to maintain control over all 11e.(2) byproduct material with adequate funding for the UMTRCA-mandated site closure period of 200 years and, to the maximum extent practicable, 1,000 years. Thus, NRC’s financial assurance program is more than adequate to protect public health and safety and the environment and imposition of additional financial assurance under CERCLA is unnecessarily duplicative.

With existing EPA and NRC financial assurance requirements under UMTRCA and the MOU, there are adequate regulatory requirements for financial assurance to meet the CERCLA §108(b) mandate, and **no further regulatory requirements are necessary for uranium recovery facilities already regulated by NRC.**

Uranium Recovery is Low-Risk

In addition to the legal arguments regarding EPA’s lack of authority to include UR facilities within the scope of its CERCLA 108(b) program, the low-risk nature of these facilities provides a separate basis for excluding them from EPA’s proposed rule. As NRC has indicated, uranium recovery operations are the lowest risk operations in the nuclear fuel cycle. Importantly, NRC considers ISR operations more “environmentally benign” than other types of uranium recovery. In 2009, using knowledge gained during the past 30 years of licensing and regulating ISR facilities, NRC published a Generic Environmental Impact Statement (GEIS) to assess the potential environmental

impacts associated with all aspects of ISR recovery, including groundwater restoration. The GEIS confirms the low risk nature of ISR activities:

- indicates the majority of potential impacts are “small;”
- explains that all groundwater in an ISR uranium recovery zone is exempted from consideration as a source of drinking water by the EPA because it is unsuitable for human consumption as a drinking water source both before and after uranium recovery operations occur;
- describes the groundwater restoration that is required to protect adjacent non-exempt waters; and
- explains that in ISR mining, non-toxic leaching agents, such as oxygen with sodium carbonate, are injected through wells into the ore body to dissolve the uranium.

Furthermore, NRC’s proven and effective regulatory program reduces the risks of releases from UR facilities. As a part of the larger overall UR program, NRC staff has demonstrated ISR facilities currently are regulated in a manner consistent with the AEA’s statutory mandate of adequate protection of public health and safety and the environment. Pursuant to a Commission directive NRC staff conducted a study of its licensed ISR projects, past and present, to determine if there has ever been migration of ISR ore body fluids to adjacent, non-exempt aquifers. In 2009, NRC staff completed its inquiry and reported that no such migrations had ever taken place. Therefore, EPA’s imposition of otherwise duplicative and, in many cases, onerous requirements on ISR facilities through CERCLA-based financial assurance is unwarranted.

The EPA fails to consider the risk profile of uranium recovery operations. The EPA states that solution mining can release hazardous contaminants to the environment and threaten adjacent groundwater. Yet, in the more than four decades of operational history, there has never been a single documented case of groundwater contamination from an ISR uranium project. Clearly the existing regulations at the state and federal level remain robust and protective. The EPA has provided no evidence that the existing federal and state requirements are insufficient, particularly given the low-risk of ISR uranium recovery.

In conclusion, UPA urges the EPA to conclude that no additional financial assurance is required for the uranium industry.

Respectfully submitted,

A handwritten signature in blue ink that reads "Jon J. Indall". The signature is fluid and cursive, with the first name "Jon" being the most prominent part.

Jon J. Indall
Counsel for Uranium Producers of America