November 22, 2000

Ms. Katie Sweeney
Associate General Counsel
Legal & Regulatory Affairs
National Mining Association
1130 17TH Street, N.W.
Washington, D.C. 20036-4677

Dear Ms. Sweeney:

I am responding to your May 2, 2000 letter to Thomas H. Essig regarding the National Mining Association's (NMA) comments on two Agreement State guidance documents relating to Termination of Uranium Mill licenses.[1] In the enclosure to your letter, you provided five NMA comments on the guidance documents. Following are our responses to these comments:

A. In the "Conclusion" section of SECY-99-025, the document states that: "[The] Staff will request review and comments on Attachment 3 from Agreement States with authority to regulate uranium recovery operations." (emphasis added) Given the Commission's focus on improving communication with stake-holding groups (e.g. November 9, 1999 Commission Meeting with Stakeholders on Nuclear Materials and Waste Activities, No. 99-239), NMA finds it strange that, at a minimum, the Staff would not also seek comment from affected licensees in such Agreement States, not to mention other interested or potentially affected parties. NMA is, therefore, taking the liberty of submitting these comments based on the assumption that the failure to solicit comments from stakeholders other than Agreement States was an oversight rather than exercise in "selective" stakeholder input and that the Commission will want to improve its Guidance, even at this date.

Response: We welcome and appreciate your comments and will continue to welcome review and comment by all stakeholders in helping to improve our guidance. The document was sent to Agreement States for their comment because it relates to activities conducted by Agreement States and reviewed by the Nuclear Regulatory Commission (NRC) staff. The letter requesting comments was placed on the website of the Office of State and Tribal Programs (STP) at http://www.hsrd.ornl.gov/nrc/agstates/program/sp99009.pdf, which is available to the public. In addition, all STP Procedures are updated on a periodic basis. The SA-900 Procedure, based on SECY-99-025, is on an annual review schedule; however, we will revise the SA-900 Procedure following completion of our review of the Western Nuclear Incorporated (WNI) Sherwood license termination submitted by the State of Washington. Where indicated, modifications resulting from your comments will be included in the revision. In the future, the revised SA-900 Procedure will be placed on both STP and NRC websites to request comments from all stakeholders.

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[1] SECY-99-025 (January 25, 1999), "Guidance to Terminate Agreement State Uranium Recovery License under Requirement of 10 CFR 150.15a(a) and Section 274c." OSP Procedure SA-900 (April 20, 1999), "Termination of Uranium Mill Licenses in Agreement States."

B. The SA-900 Procedure is entitled: "Termination of Uranium Mill Licenses in Agreement States." This title is incorrect or at least ill conceived since SA-900 addresses in-situ leach (ISL) UR operations which, although having some elements in common with portions of conventional milling, do not share the bulk of the potential health and safety issues associated with uranium mills and uranium mill tailings. This mischaracterization is compounded by the reference in Section III.A of the SA-900 document to the Commission's oversight determination being applicable to "material as defined in 10 CFR 150.3(c)(2) (*i.e. uranium mill tailings*)" (emphasis added). The regulations at 10 C.F.R. § 150.3(c)(2) pertain to 11e.(2) byproduct material, and the Guidance document itself proceeds to address "11e.(2) byproduct material." Byproduct material as defined in AEA Section 11e.(2) includes uranium mill tailings, of course, but it also includes other wastes that are not tailings and that do not pose similar potential threats to public health and safety. This raises the question: is the Guidance attempting to draw a distinction between uranium mill tailings versus other kinds of 11e.(2) byproduct material, or is this merely careless use of terminology on the part of NRC?

NMA suggests that to avoid confusion or misunderstanding within the regulated community and among the interested or affected elements of the public at large, SA-900 and any accompanying SECY documents should distinguish between uranium mill tailings and other forms of 11e.(2) byproduct material which, as the discussion hereafter will demonstrate, are not necessarily subject to the same disposal requirements.[2] To further facilitate this distinction, the guidance documents should refer to both conventional and ISL facilities as uranium recovery (UR) facilities. For example, SECY-99-025 in the "Background" section refers to a "*non-conventional uranium mill.*" Presumably this phrase is intended to refer to an ISL facility; however, it could also be read as referring to a secondary, non-fuel cycle UR operation at a phosphate or other type of mineral recovery facility, which does not generate 11e.(2) byproduct material and does not implicate requirements pertaining either to the transfer of land or the transfer to and disposal of byproduct material in licensed uranium tailings impoundment.

Response: The NRC staff does not have separate regulatory requirements for "other wastes" since Appendix A to 10 CFR Part 40 is for 11e.(2) byproduct material. All 11e.(2) byproduct material must be disposed of in accordance with Appendix A unless specific approval of alternative standards is made. The term "uranium milling" is defined in 10 CFR Part 40 as, "any

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[2] For example, NRC states several times in the Generic Environmental Impact Statement (GEIS) for Uranium Milling that land transfer requirements in §83 only apply to *uranium mill tailings* piles or impoundments (rather than other types of 11e.(2) waste), presumably because long term custodial oversight is not necessarily required for more limited contamination such as that normally found at ISL sites or, more accurately, on portions of ISL sites. *Final Generic Environmental Impact Statement on Uranium Milling*, Vol. II (NUREG-0706) at A-118; A-123 (September 1980). See also, id at A-103 ("Also the permanency and size of areas devoted to tailings disposal make the problem of radon exhalation quite different than that from relatively thin layers of contamination, which are expected to dissipate through natural processes in any case.")

activity that results in the production of byproduct material as defined in this part." The "conventional" versus "non-conventional" adjective is describing two kinds of uranium milling activities. Only facilities that conduct uranium milling are subject to the Uranium Mill Tailings Radiation Control Act of 1978 (UMTRCA). A secondary, non-fuel cycle UR operation at a phosphate or other type of mineral recovery facility, which does not generate 11e.(2) byproduct material, is not a uranium milling activity according to the definition in Part 40. Therefore, in response to your comment and given the definition in Part 40, we plan to change "Uranium Mill" to "Uranium Milling" in the title. The term uranium recovery (UR) is commonly used to describe a broader spectrum of activities than those covered under UMTRCA. In addition, to avoid confusion, the wording and parentheses "(i.e., uranium mill tailings)" in Section III. A of the SA-900 Procedure will be deleted in the revision.

C. In the same vein, SECY-99–025 and SA-900 both state that "*non-conventional*" uranium mill licensee decommissioning documents must demonstrate that "all contaminated materials have been removed from the site." This statement is incorrect for either type of UR licensee (i.e., either "conventional" or "non-conventional" licensees). Criterion 6(b) of 10 C.F.R. Part 40, Appendix A, provides that site soils which do not contain in excess of 5 picocuries per gram (pCi/g) of uranium-226 in the first 15 centimeters (cm) or 15 pCi/g in the second 15 cm and succeeding 15 cm soil horizons (the so-called 5/15 rule), may be released for unrestricted use. If soil levels satisfy this standard without remediation then no such contaminated material (i.e., 11e.(2) byproduct material) need be removed from the site. The recent modification to Criterion 6(6) contained in Radiological Criteria for License Termination of Uranium Recovery Facilities (64 Fed. Reg. 17506 (April 12, 1999)) also make it clear that uranium or thorium wastes from production activities may or may not have to be removed from the site.

Response: We agree with the comment and the statement in V.D.1.b.(iv) of the SA-900 Procedure will be revised to state that: [D]ecommissioning information which documents that all contaminated materials have been properly disposed of or transferred to another licensed site, or meet applicable standards and requirements for release.

D. Additionally, the Guidance here, and elsewhere, fails to reflect the licensee's statutory (§ 84(c)) and regulatory (Introduction to Appendix A) right to propose *alternatives* that provide equivalent or greater protection than NRC, Agreement State or even EPA requirements. For example, homogenizing soils where there is limited surface contamination and appropriate soil and topographic conditions may provide an acceptable *alternative* to removal and disposal based on an appropriate site-specific ALARA analysis. *See, e.g.*, Dr. Elaine Brummett, U.S. NRC Division of Waste Management "Regulatory Approach to Soil Cleanup Verification at Decommissioning Uranium Mill Sites," Waste Management '97 (March 2-6, 1997), ("Staff has also given tentative approval to a proposal to till soil contaminated by windblown tailings in order to meet the Ra-226 cleanup standard. The constraints set by the staff include: fairly flat terrain, uniform low-level surface contamination, and a test plot with extensive surface and subsurface samples to demonstrate that compliance can be achieved.") An ALARA

analysis also could be based on justifications such as those contained in the *supplemental standards* for soil cleanup set forth in 40 C.F.R. 192.21 for Title I sites. See, e.g., memorandum to Robert D. Martin from Hugh L. Thompson, Jr. dated June 27, 1989 regarding Use of Title I Supplemental Standards for Title II Sites; ("We concur that use of criteria like Title I Supplemental Standards established by EPA (40 C.F.R. 192.21) provides an acceptable basis to make the finding [that public health and safety and the environment will be protected.]")

Response: The alternative standards provision in Appendix A to 10 CFR Part 40 can be found in equivalent State regulations and is available to Agreement State licensees. The licensee can propose alternatives to the State based on equivalent State regulations. As long as the alternative standards (including supplemental standards) are adopted by the State, they are considered applicable standards. As stated in the last paragraph of Section 274o, the Agreement State may adopt alternative standards if, after notice and opportunity for public hearing, the NRC determines that such alternative standards provide an equivalent or greater level of protection for public health, safety, and the environment.

In response to your comment and to reflect the possible use of alternative standards, the first sentence in Section V.C. of the SA-900 Procedure will be revised to state that: [T]he "standards and requirements" to be used by NRC in making a determination under Section 150.15a(a) would be the applicable regulations, State adopted alternative standards, and license requirements in the Agreement States.

E. A comment similar to that set forth in paragraph C., above, is applicable to the statement in the Guidance that a "non-conventional" licensee must indicate that the subject site "meets unrestricted release requirements." This may not be correct, depending on site specific circumstances. For example, NRC's new "Radiological Criteria for Decommissioning" rule (D&D rule), 62 Fed. Reg. 39058, July 21, 1997, explicitly provides for restricted use limitations as a control component on potential public exposures (10 C.F.R. § 20.1403).[3]

Response: As stated in 10 CFR 20.1401(a), the criteria in 20.1401-1404 are not applicable to uranium milling facilities; rather, these facilities are subject to the decommissioning criteria in Appendix A to 10 CFR Part 40. The application of the logic set out in 10 CFR 20.1403 regarding license termination under restricted conditions could be applied through the alternative standard provision in the introduction to Appendix A of 10 CFR Part 40. However, it

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[3] UR licensees could propose land use or water use restrictions as a licensee proposed alternative in lieu of removal and disposal or in conjunction therewith (e.g., removal and disposal of hot spots and restricted use of large areas of land with lower, more uniform contaminant concentrations). Further, by allowing an Agreement State to waive a fundamental safety component of its low level waste regulations in 10 C.F.R. Part 61.14 for *a commercial low level waste disposal facility*, (i.e., in the case of the Envirocare facility in Utah, the requirement for a long term, government custodian), NRC has gutted the old presumption that the term "decommissioning" means cleaning up for "unrestricted use" -particularly for low risk fuel cycle components like ISL UR operations.

should be noted that, to date, the NRC has not approved restricted release of a uranium milling facility. Again, in Agreement States, such alternative standard would be subject to the Section 274o provision discussed above. To avoid any confusion, the statement in V.D.1.b.(v) will be revised to state that: Discussion of results of radiation survey and confirmatory soil samples which indicates that the subject sites meet applicable standards and requirements for release.

We understand that some language in the SA-900 Procedure may also need to be revised to be consistent with the changes stated above. After the staff completes revising the Procedure, a draft revised SA-900 Procedure will be publicly available for comment. We appreciate your comments on the guidance documents and will continue to improve our guidance based on the input from our stakeholders.

If you have any questions concerning our responses, please contact me at (301) 415-3340 or Kevin Hsueh at (301) 415-2598.

Sincerely,

/RA/

Paul H. Lohaus, Director
Office of State and Tribal Programs

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