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March 6, 2003

The Honorable Richard A. Meserve
Chairman
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Re: Subpart L Hearings

Dear Chairman Meserve:

The National Mining Association ("NMA") understands that the Nuclear Regulatory Commission ("NRC" or the "Commission") is in the process of reviewing its adjudicatory procedures. Nevertheless, NMA requests that the Commission review the current status of the Subpart L hearing process and determine additional ways to ensure that this process reflects the low level of risk inherent in materials licensing (particularly uranium recovery ("UR") licensing) which the Subpart L hearing process allegedly was designed to address.

As indicated by recent Subpart L licensing proceedings, UR licensees have been bogged down in extremely burdensome Subpart L hearings requiring the expenditure of significant sums of money. Given the recent decision by the Commission denying NMA's petition for fee relief for UR licensees, it is now even more important for the Commission to address the deficiencies of the Subpart L process to the extent that it is unnecessarily expensive. As the Commission has already acknowledged, the remnants of the domestic UR industry are operating in adverse economic conditions, and, while a reduction in fees has been implemented, the abuses and potential for additional ongoing abuses of the Subpart L hearing process are outweighing or likely will outweigh any benefit realized by the fee reduction or Commission directives to minimize the regulatory burden of UR licensees.

Initially, the Commission should review its August 5, 1998 Policy Statement entitled *Policy on Conduct of Adjudicatory Proceedings; Policy Statement* in which the Commission expressly recognized that "applicants for a license are also entitled to a *prompt resolution* of disputes concerning their applications."[1] So that a prompt resolution of disputes may be achieved, the Policy Statement recommended that the Commission, its Licensing Boards ("LBs"), and Presiding Officers ("POs") be given the authority to *instill discipline* in the adjudicatory process to insure a *prompt yet fair* resolution of contested issues in adjudicatory

[1] *Emphasis added; See Policy on Conduct of Adjudicatory Proceedings; Policy Statement* at p. 2.

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proceedings.[2] In addition, the Commission referenced its "*inherent supervisory authority* including its powers to assume part or all of the functions of the PO in a given adjudication, as appropriate within the context of a particular proceeding."[3] Based on monitoring of recent UR Subpart L proceedings by NMA staff, it appears that the Subpart L process has proven to be anything but prompt or disciplined.

As the Commission should be well aware, during the Hydro Resources, Inc. (HRI) Subpart L hearing, the PO allowed various intervenors to file and re-file redundant pleadings and routinely engage in interlocutory appeals with the result that intervenors filed over 15,000 pages of pleadings[4] in what was supposed to be an *informal hearing*. Unfortunately, after publicly stating that it would closely monitor the proceedings, instead of intervening to stop this chaos, the Commission not only allowed it to continue, but, after the expenditure of inordinate amounts of licensee resources and dollars, had the insensitivity to suggest that HRI could limit the scope of the litigation by surrendering substantial portions of its license, a license which the NRC Staff had granted. NMA's UR licensee members find the Commission's failure to monitor and, as necessary, directly supervise the HRI hearing so that Subpart L hearing procedures would not be abused by intervenors, to be a positively chilling example of the Commission abidcating its responsibility.

In a recent proposed rule, the Commission admitted that it, "has had a longstanding concern that the hearing process associated with licensing and enforcement actions taken by the NRC is not as effective as it could be."[5] The Commission should take the opportunity to correct the problems that prevent the Subpart L process from being even marginally effective. An effective Subpart L process is necessary to implement the Commission's *risk-informed, performance-based* regulatory oversight policy which is designed to maximize the cost-effective use of NRC and licensee resources in their efforts to protect public health and safety[6]. Subpart L proceedings should be consistent with such policies since they were intended to result in more expedient hearings for materials licenses because the public health risks associated with such licenses do not rise to the same level of concern as those associated with commercial nuclear reactors. So, in a sense, Subpart L, which was enacted in advance of the Commission's adoption of a *risk-informed, performance-based* regulatory policy, was, and is, completely in sync with

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[2] *Emphasis added, id.* at p. 3.

[3] *Id.*

[4] In the recent opinion regarding HRI, the Commission stated, "We must note, additionally, that the intervenors petition for review is marred by frequent generalized claims followed by citations to lengthy, multi-page sections of earlier briefs..." *See* CLI-01-04.

[5] *See* 66 FR 19610 (April 16, 2001)

[6] *See* NUREG-CR-6733, "A Baseline Risk-Informed, Performance-Based Approach For In Situ Leach Uranium Extraction Licensees - Final Report"

those current Commission regulatory principles. However, to assure meaningful compliance with those principles, the philosophy underlying Subpart L must be adhered to by POs, LBs, and the Commission itself.

The Subpart L hearing problems are further exemplified by the recent International Uranium (USA) Corporation ("IUC") Subpart L hearing regarding a license amendment to process so-called alternate feed material from Molycorp, Inc. In this hearing, NRC Staff erroneously (and unexplainedly) issued a *second* notice of opportunity for a hearing on the same issues although the *first* notice had been issued almost a year earlier, an action which even the Commission has found to be puzzling. Then, the same P.O., who eight (8) months earlier found that substantially the same intervenors lacked standing for a hearing, granted standing to intervene based on vague and generalized hearing requests which raised essentially the same issues as the hearing requests previously submitted. On appeal, the Commission found that, while the initial set of hearing requests did not adequately demonstrate standing, the second set did because, "while there may be similarities, the case record is not the same."

Faced with an imminent hearing on its license amendment which presented little threat to public health and safety or the environment, IUC asked NRC Staff to intervene and provide assistance to its licensee. NRC Staff declined due to a lack of resources. Thus, although it was a Staff error which caused the second request for a hearing, NRC Staff left it to the licensee to bear the severe economic burden of going forward with the case, a decision which can hardly be characterized as attempting to reduce regulatory burden. Subsequently, the P.O. ordered the Staff to participate since its expertise and licensing decision were being challenged by intervenors.

This specific incident demands immediate attention. The Commission should take immediate action and admonish NRC Staff to properly monitor the issuance of notices for hearings in licensing proceedings and, if necessary, to retract such notices when they are not warranted. In the broader sense, the Commission needs to make its rules reflect practical reality by limiting the opportunity for a hearing until NRC Staff has completed its review of the licensing action, including all necessary environmental or technical review. Otherwise, if hearings go forward on incomplete reviews, licensees will be forced to litigate and perhaps re-litigate licensing issues which have already been addressed and, in so doing, expend valuable financial resources at a time when they are scarce.

In order to create Subpart L proceedings that are properly managed wherein endless vague and generalized claims are filed, NMA recommends that POs require that any intervenor must submit, in writing, the claims on which they wish to litigate prior to the submission of written presentations, perhaps after a preliminary organizational hearing. The sole issue to be decided by the presiding officer would be whether the claims submitted by the intervenor(s) are relevant and germane to the proceeding. This will allow the presiding officer to remove any baseless or irrelevant claims from the proceeding so that licensees will not be forced to address such issues in their written presentations. Licensees such as IUC have spent thousands of dollars providing expert affidavits and legal argument in response to claims that have no bearing on whether a

license amendment poses a significant, incremental threat to public health and safety. It makes good sense to encourage presiding officers to eliminate baseless or irrelevant claims because the proceeding will be focused and will allow potentially valid claims to be addressed properly.

NMA also suggests that the Commission review its current legal standards for the determination of *standing* to intervene in a licensing proceeding and the manner in which its LBs, Pos, and appellate staff address such decisions. In the aforementioned IUC Subpart L hearing, the P.O. noted that it is not his responsibility to reach any portion of the merits of a proceeding when determining standing to intervene. However, the Commission has made clear that an element of NRC standing requirements is that all contentions raised by a potential intervenor must be "germane" to the proceeding. That is, the contentions must demonstrate a significant, incremental threat to public health and safety or the environment above and beyond that of previously licensed activities. Determining whether a claim is germane to a proceeding logically entails *some* evaluation of the merits of a particular case because no potential incremental threat or hazard can be determined without considering factors such as the hazardous nature of different constituents in a given alternate feed, *plausible* pathways to a receptor and some potential dose which may pose a hazard.

In a recent Commission opinion in IUC's Maywood License Amendment proceeding, the Commission affirmed the denial of standing to an intervenor but also included a gratuitous commentary on the "confused state" of standing determinations in NRC proceedings. This opinion completely clouded the state of standing determinations by making the following statement:

> "[T]he re-emergence of a similar or yet altogether new...alleged harm, associated with a new licensing action, could prove sufficient for standing, if set forth in detailed fashion and with adequate basis. Already suffered harm, in short, does not necessarily preclude standing based on fresh harm of the same type."

This confusing statement can only be based on circumstances where actual harm was caused in the past, for if prior licensed activities have not resulted in the alleged harm, how can new allegations of the same nature justify standing?[7]

Based on the recent experience of UR licensees with the Subpart L hearing process, NMA has some grave concerns about the way NRC adjudicatory processes are working as opposed to the way they are supposed to work. In fact, if recent experience is any indication, the abject failure of NRC authorities, including specifically the Commission itself, to maintain the *informal, expeditious* nature of Subpart L hearings raises serious questions regarding the value of Commission directives to reduce the regulatory burden on UR licensees during these difficult economic times. NMA requests that the Commission seriously investigate the deficiencies of

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[7] NMA also notes that the cases cited in FN 32 of the Commission's *Maywood* opinion to support the conclusion in this quote appear to have little or nothing to do with the subject matter. The opinion which purports to be an opinion of the Commission is written as if it were the opinion of another entity.

Subpart L process and take immediate steps to restore the integrity of the process by; (1) requiring definition to the potential hearing issues at a pre-hearing organizational conference; (2) placing limits on endless requests to reply where the rules do not specifically allow for replies; (3) define the risk-informed criteria for determining standing in materials licensing cases (i.e., given the lower risk and virtual lack of any realistic, acute threat, allegations must be more specific and must be germane in that the alleged harm presents a *significant, incremental* threat.

If you have any questions regarding this letter, please contact me at 202/463-2627.

Sincerely,

Katie Sweeney

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Associate General Counsel

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