April 2, 2003

Ms. Katie Sweeney
Associate General Counsel
National Mining Association
101 Constitution Avenue, NW
Suite 500 East
Washington, DC 20001

Re: Subpart L Hearings

Dear Ms. Sweeney:

Your letter of March 6, 2003 to Chairman Meserve has been referred to me for response. In your letter, you indicate that the National Mining Association (NMA) "has some grave concerns about the way NRC adjudicatory processes are working," and you describe in some detail specific concerns about the hearing process and its implementation under the current 10 CFR Part 2, Subpart L. You also discuss and criticize certain Commission and Presiding Officer rulings in the Hydro Resources, Inc. (HRI) and International Uranium (USA) Corporation (IUC) proceedings.

At the outset, I must note that the HRI matter is currently in litigation in the agency and it is inappropriate to discuss the merits of issues in that proceeding. You should take care to avoid communications with the Commissioners on matters that are pending in agency litigation.

As to the current Subpart L, I generally agree that an overhaul of those informal hearing procedures is needed. In fact, the Commission has stated, in proposing major changes to the rules of practice in 10 CFR Part 2, that

> [a]lthough the informal hearing procedures of existing Subpart L have been in place for a number of years, their implementation has shown that some aspects are cumbersome and inefficient in the development of a record. Under the existing subpart L, the parties sometimes devote substantial time and effort to litigation over the specific procedures to be used rather than the substantive issues. In addition, the absence of a specific contention requirement has sometimes resulted in the development of a paper record that is not effectively focused on the issues in dispute but rather, is burdened with extraneous material that makes the formulation of a decision difficult and time consuming. To address these problems, the Commission proposes to replace the existing subpart L in its entirety.

Proposed rule - Changes to Adjudicatory Process, 73 *Fed. Reg.* 19610, 19627-28 (April 16, 2001). In the changes that are proposed, the Commission would introduce a number of

streamlining requirements intended to address the infirmities of the existing Subpart L. The proposed changes include --

- a requirement to file specific and well-supported contentions at the time of filing petitions to intervene
- the use of oral hearings rather than uncontrolled paper exchanges
- the imposition of a fairly well-defined and regimented process and schedule for submissions and presentations in the hearing
- general case scheduling and management requirements, the objective of which is "expediting the disposition of the proceeding . . ," and "establishing early and continuing control so that the proceeding will not be protracted because of lack of management . . . ."

These proposals should go a long way to address many of the issues that you raise.

You note that in the IUC case, the NRC staff erroneously published a second notice of opportunity for hearing but then initially declined to participate as a party in the ensuing hearing. To address the notice problem, the staff has modified its internal procedures for issuing notices in materials licensing matters in an attempt to avoid multiple notices of opportunity for hearing. In addition, the Office of the General Counsel now reviews all materials licensing-related notices prior to issuance as a "quality assurance" check.

You also argue that, in the IUC case, the "NRC staff left it to the licensee to bear the severe economic burden of going forward with a case," implying that the NRC staff somehow has an obligation to support an applicant at hearing. You appear to ignore the fact that the licensee or applicant always bears the burden of proof on its application overlook. See, for example, 10 CFR 2.1237 (Subpart L) (unless otherwise ordered by the Presiding Officer, the applicant or proponent of an order has the burden of proof); 10 CFR 2.732 (Subpart G) (unless otherwise ordered by the Presiding Officer, the applicant or proponent of an order has the burden of proof); 10 CFR 2.1326 (Subpart M) (applicant or proponent of an order has the burden of proof). The NRC staff is part of the regulatory body and it would be inappropriate for the staff "to bear the . . . burden of going forward with the [applicant's] case."

Finally, you use the IUC case to support your argument that the notice of opportunity for hearing should not be published until the staff has completed its technical and environmental reviews. I would only note that the early publication of a notice of opportunity for hearing is intended to save time by allowing the early stages of the hearing process (rulings on petitions to intervene, identification of issues for litigation, summary disposition where permitted) and the hearing itself to proceed based on the applicant's submissions and not be delayed while the staff completes its technical reviews.

You conclude by requesting that the Commission "seriously investigate the deficiencies of [the] Subpart L process and take immediate steps to restore the integrity of the process . . . ." I would suggest that the NRC has, in fact, identified the infirmities in the existing Subpart L and has proposed to fix those problems by the major changes to Subpart L reflected in the Commission's April 16, 2001 proposed rule. The Commission is currently considering the comments on the proposed rule.

I appreciate your interest in, and suggestions on, these matters. If you have questions, please do not hesitate to contact me.

Sincerely,

/RA/

Joseph R. Gray
Associate General Counsel for
Licensing & Regulation

I appreciate your interest in, and suggestions on, these matters. If you have questions, please do not hesitate to contact me.

Sincerely,

Joseph R. Gray
Associate General Counsel for
Licensing & Regulation

DISTRIBUTION
KCyr
SBurns
LChandler
JGray
STreby
TRothschild
JMoore
DDambly
DHassell
OCM/NJD
OCM/GJD
OCM/EXM
OCM/JSM
SECY
EDO
NMSS
OCA
OPA

DOCUMENT NAME:g:\GC\sweeney response.wpd

To receive a copy of this document, indicate in the box: "C" = Copy without enclosures **"E"** = Copy with enclosures **"N"** = No copy

OFFICE	OGC									
NAME	JGray									
DATE	04/ /03		04/ /03		04/ /03		04/ /03		04/ /03	

OFFICIAL RECORD COPY