

# Keys to the Nuclear Regulatory Commission Hearing Process for Uranium Recovery Facilities

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Recovery

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# Introduction

- Uranium Recovery Companies Seeking Licenses or License Amendments in Non-Agreement States for the Following Will Require Nuclear Regulatory Commission (NRC) Approval:
  - Uranium Recovery Licenses for New Conventional Mills or In Situ Recovery Projects;
  - Restart of Existing Facilities on Standby;
  - License Amendments to Construct and/or Operate New Projects on Licensed Sites

# Introduction

- New Project, Project Restart, and Construction of New Project Facilities Potentially May Be Subject to an Administrative Hearing;
- NRC Administrative Hearings for Uranium Recovery are Subject to New Hearing Procedures That Differ Greatly from Those Used in Prior Hearings Such As:
  - Hydro Resources, Inc. (Crownpoint Uranium Project)
  - International Uranium (USA) Corporation (now “Denison Mines”) Alternate Feed License Amendments

# Development of New Procedures

- Prior to 2003, NRC Administrative Hearings for Uranium Recovery Projects Were Considered “Informal Hearings” With Several Distinct Characteristics:
  - 10 CFR Part 2, Subpart L Regulations;
  - Two-Three Judge Panels Consisting of a Presiding Officer and Special Technical Assistants;
  - All Pleadings and Argument, Unless Otherwise Ordered, Submitted in Writing;
  - Discovery Expressly Prohibited

# Development of New Procedures

- After 2003, New NRC Administrative Hearings Are Still Considered “Informal,” But:
  - 10 CFR Part 2, Subpart G & Subpart L Procedures;
  - While Some Filings are Written, Unless Otherwise Agreed Upon by the Parties, the Proceedings are Oral;
  - Limited Discovery Allowed

# Hearing Process

- To Best Understand NRC's New Hearing Procedures, a Critical Path for a Model Hearing Should be Assessed:

- Preliminary Matters;
- Hearing Request;
- Standing & Admissible Contentions;
- Preliminary Motions;
- Mandatory Disclosures;
- Witness Testimony;
- Initial Decision;
- Appeals

# Preliminary Matters: Proper Service

- Proper Service of Documents:
  - Commission Policy Dictates that ALL FILINGS Shall be Submitted Through NRC's E-Filing System;
  - The Presiding Officer and/or the Commission May Issue Orders Permitting Alternative Methods of Service:
    - First Class Mail;
    - Courier/Express Mail;
  - Filing is Considered Complete When:
    - Electronic Submission is Sent (i.e., Last Act Necessary to Transmit Documents Electronically);
    - Deposit of Hard Copy in Mail;
    - All Methods of Filing are Complete in the Case of Multiple Methods of Filing (i.e., Electronic & Hard Copy)

# Preliminary Matters: Proper Service

- Proper Service of Documents:
  - Documents Are Considered Timely Filed When Submitted By:
    - 5:00 pm for Documents Submitted in Person or By Expedited Service;
    - 11:59 pm for Documents Filed Electronically
  - NOTE: THE PRESIDING OFFICER CAN CHANGE ANY OF THESE REQUIREMENTS



# Preliminary Matters: Document Requirements

- NRC Has Imposed Specific Requirements for Documents: All Documents Must Have:
  - Appropriate Docket Number and Caption;
  - Certificate of Service;
  - Margins of Not Less Than One Inch;
  - Appropriate Signature With Statement of Authority:
    - Electronic Documents Must Have Phrase “Signed By”
  - Paper Documents:
    - Stapled or Bound on Upper Left Side;
    - Ink Signature

# Preliminary Matters: Computation of Time

- Standard Time Computation Running From the Day After Filing to the Due Date Applies Except if the Last Day Falls on:
  - Weekend Day;
  - Federal Legal Holiday;
  - Emergency Federal Government Closure Day
- **NOTE: ALWAYS ERR ON THE SIDE OF CAUTION: IF YOU DO NOT KNOW WHETHER A DAY FALLS ON ONE OF THE ABOVE, FILE THE DOCUMENTS THE LAST DAY NOTED ABOVE**

# Hearing Request

- An NRC Administrative Hearing Can Only Be Triggered Upon a Request for a Hearing from an Interested Stakeholder:
  - Member(s) of the Public;
  - Organizations or Groups;
  - Governmental Entities:
    - Cities;
    - Counties;
    - States;
    - Tribes
- Hearing Requests Must Meet Explicit Regulatory Requirements

# Standing

- In Order to Be Granted an NRC Administrative Hearing, a Proposed Intervenor Must Demonstrate Standing Under NRC Regulations (10 CFR §2.309(d)):
  - Traditional Tenets of Standing;
    - Injury-in-Fact;
    - Causal Nexus;
    - Redressibility
  - A request for hearing or petition for leave to intervene must state:
    - (i) The name, address and telephone number of the requestor or petitioner;
    - (ii) The nature of the requestor's/petitioner's right under the Act to be made a party to the proceeding;
    - (iii) The nature and extent of the requestor's/petitioner's property, financial or other interest in the proceeding; and
    - (iv) The possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest.

# Standing

- Standing May Be Demonstrated as Follows:
  - Standing as a Matter of Injury-in-Fact (Traditional);
  - Standing Based on “Proximity-Plus:”
    - Presumption in Reactor Cases, Not Materials Cases;
    - Materials Case Standard: “Significant Source of Radioactivity Producing an Obvious Potential for Offsite Consequences”
  - Representational or Group Standing

# Admissibility of Contentions

- A Proposed Intervenor Also Must Offer at Least One Admissible Contention to be Granted a Hearing (10 CFR § 2.309(f)):
  - A request for hearing or petition for leave to intervene must set forth with particularity the contentions sought to be raised. For each contention, the request or petition must:
    - (i) Provide a specific statement of the issue of law or fact to be raised or controverted, *provided further*, that the issue of law or fact to be raised in a request for hearing under 10 CFR 52.103(b) must be directed at demonstrating that one or more of the acceptance criteria in the combined license have not been, or will not be met, and that the specific operational consequences of nonconformance would be contrary to providing reasonable assurance of adequate protection of the public health and safety;
    - (ii) Provide a brief explanation of the basis for the contention;

# Admissibility of Contentions

## Admissible Contentions (Continued):

- (iii) Demonstrate that the issue raised in the contention is within the scope of the proceeding;
- (iv) Demonstrate that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
- (v) Provide a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing;
  - Provide references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue;

# Interlocutory Review of Standing/Contentions Determinations

- Appeals of Determinations Regarding  
Standing & Contentions Are Permitted:
  - Appeals Must be Filed Within 10 Days of Service of an Order Regarding Standing/Contentions;
  - Response to Appeals Must Be Filed Within 10 Days of Service of the Appeal:
    - All Appeals Must Have a Notice of Appeal and Accompanying Legal Brief



# Preliminary Motions

- As a Matter of Regulation, Parties are Entitled to File Preliminary Motions:
  - All Motions Must Be Filed No More Than 10 Days After the Act Which is Being Addressed;
  - All Responses to Motions Must Be Filed Within 10 Days of Service of a Motion
  - NOTE: 10 CFR § 2.323 REQUIRES THAT THE MOVING PARTY OR COUNSEL CERTIFY THAT A SINCERE EFFORT HAS BEEN MADE TO RESOLVE THE SUBJECT OF THE MOTION

# Preliminary Motions

- Other Motions May Be Filed in These Proceedings:
  - Motion for Stay:
    - Stay the Effectiveness of an NRC Staff Action;
    - Without an Actual Action, Motion for Stay is Premature;
    - Criteria for Stays Are Similar to Those Applied in Civil Cases;
    - Criteria for Stays Are Difficult to Satisfy
  - Motion for Summary Disposition:
    - Similar to Summary Judgment Motions in Civil Cases;
  - Motion for Cross-Examination:
    - Description of Issue
    - Objective to Be Achieved;
    - Proposed Line of Questioning

# Additional Notes

- **Standing and Admissible Contentions Are Not Intended to Reach the Merits of a Particular Argument;**
- **Threshold for Standing is Extremely Low;**
- **Only One Admissible Contention Will Trigger a Hearing Assuming Standing is Shown**

# Administrative Hearings

- In the Event a Hearing is Granted, NRC has Delineated Specific Procedures for the Conduct of Such Hearings;
- NRC's New "Informal" Hearing Regulations Encourage Advance Preparation by License Applicants & Licensees;
- A Thorough Understanding of the Hearing Procedures and Required Submissions Will Help Reduce Litigation Costs

# Preliminary Determinations

- Initially, an Applicant Must Determine Whether the Requested Licensing Action Falls Under Subpart L:
  - New Projects or License Amendments Use Subpart L;
  - Direct or Indirect Change/Transfer of Control Applications Use Subpart M
- If a Subpart L Hearing is Indicated, Then All Parties Must Agree on Hearing Procedures:
  - Parties May Agree on the Use of Written Proceedings as in Pre-2003 Hearings
- NOTE: THE DEFAULT PRESUMPTION IS ORAL HEARINGS
- The Atomic Safety and Licensing Board (ASLB) Will Then Appoint a Panel Consisting of a Presiding Officer (Administrative Law Judge) and at Least One Technical Assistant

# Preliminary Filings

- New Subpart C Regulations Require an Initial Mandatory Disclosures or Discovery (10 CFR §2.336: *General Discovery*):
  - Within 30 Days of the Issuance of an Order Granting a Hearing, the Following Must Be Disclosed or Provided:
    - (1) The name and, if known, the address and telephone number of any person, including any expert, upon whose opinion the party bases its claims and contentions and may rely upon as a witness, and a copy of the analysis or other authority upon which that person bases his or her opinion;
    - (2)(i) A copy, or a description by category and location, of all documents and data compilations in the possession, custody, or control of the party that are relevant to the contentions, provided that if only a description is provided of a document or data compilation, a party shall have the right to request copies of that document and/or data compilation, and
    - (3) A list of documents otherwise required to be disclosed for which a claim of privilege or protected status is being made, together with sufficient information for assessing the claim of privilege or protected status of the documents.
  - NOTE: IF DOCUMENTS ARE AVAILABLE IN OTHER PUBLIC SOURCES, MUST SUBMIT LOCATION, TITLE, AND PAGE REFERENCE

# Preliminary Filings

- Important Notes Regarding Initial Disclosures/Discovery:
  - 10 CFR § 2.336(d): Duty to Disclose is Ongoing (i.e., Subsequently Developed or Obtained Documents or Information Must Be Disclosed Within 14 Days);
  - 10 CFR § 2.336(b): NRC Staff Has Mandatory Disclosures;
  - 10 CFR § 2.336(f): Initial Disclosures Constitute Only Permissible Discovery in Subpart L Hearings;
  - 10 CFR § 2.1203: NRC Staff Must Develop & Submit a Hearing File

# **Hearing Submissions: Written Testimony**

- **All Parties are Required to File Initial Written Statements of Position and Written Testimony with Supporting Affidavits on Dates Set by the Presiding Officer;**
- **Within 20 Days of the Filing of Initial Testimony, Written Responses and Rebuttal Testimony Due 20 Days from Service of Initial Testimony**



# Hearing Submissions: Proposed Questions

- Questions Proposed by All Parties to Be Asked by the Administrative Panel Must Be Submitted No Later Than 20 After Submission of Initial Testimony;
- Questions Proposed in Response to Rebuttal Testimony Must Be Submitted No Later Than Seven Days After Service of the Rebuttal Testimony:
  - If Either of These Dates are Less Than 5 Days From the Date of the Oral Hearing, Then Questions Must Be Submitted No Later Than 5 Days Prior to the Hearing Date

# Hearing Submissions: Proposed Questions

- Important Notes Regarding Proposed Questions:
  - 10 CFR § 2.1207(a)(3)(iii) & (b)(6): Proposed Questions are Asked Only by the Panel and NOT BY THE PARTIES (i.e., No Cross-Examination):
  - Parties Can Move for Cross-Examination:
    - Since Cross-Examination is an Exception to the Hearing Procedures, Concern Lies With the Inability to Ask Spontaneous Questions & Level of Knowledge of the Technical Aspects of Uranium Recovery by Hearing Panel:
      - *Licensees, License Applicants, NRC Staff Are Forced to Anticipate Every Possible Scenario in Advance Rather Than Ask Questions if Issues Are Raised at Oral Hearings*
  - 10 CFR § 2.1207(b)(5): A Witness Unable to Appear Can Submit Written Testimony But Will be Subject to Questions to be Answered in Writing

# Important Notes: Summary

- All Parties May Agree to Have a Hearing Based on Written Submissions:
  - 10 CFR § 2.1206: If One Party is Not in Favor of a Written Hearing, Then Default Assumption is Oral Hearing
- Parties are Entitled to File Preliminary Motions:
  - 10 CFR § 2.1213: Motion for Stay;
  - 10 CFR § 2.1204(b): Motion for Cross-Examination
- Interlocutory Appeals Continue to be Disfavored

# Conclusions

- **NRC's Administrative Hearing Processes for Uranium Recovery Facilities Are Just Now Being Tested;**
- **As Applications Are Docketed & Hearings Are Requested, Additional Experience Will Assist in the Efficient Management of the Hearing Process;**
- **License Applicants Should Prepare for Potential Hearings Well In Advance & Take Advantage of the Prescriptive Requirements Provided in 10 CFR Part 2**