IUC INTERNATIONAL URANIUM (USA) CORPORATION

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February 14, 2001

VIA FACSIMILE AND OVERNIGHT EXPRESS

Mr. Loren Setlow
U.S. Environmental Protection Agency
Office of Radiation and Indoor Air (6608 J)
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Dear Mr. Setlow:

Re: Amendment 19 to Materials License SUA-1358
Amendment Request to Receive and Process Alternate Feed Material from the Molycorp Site at the White Mesa Uranium Mill

This letter follows our telephone discussions with you and representatives of U.S. Environmental Protection Agency Region VIII during the week of February 5, regarding the subject amendment request by International Uranium (USA) Corporation ("IUSA") to the U.S. Nuclear Regulatory Commission. The enclosed memorandum from M. Lindsay Ford of Parsons Behle & Latimer summarizes the RCRA regulatory status of Molycorp material to be sent for processing at IUSA's White Mesa Mill.

Please call me at 303.389.4130 if you have any further questions on this issue.

Sincerely,

David C. Frydenlund
Vice President and General Counsel

Enclosure

NMSS01Public

cc: Michelle R. Rehmann
Ron F. Hochstein
Philip Ting, U.S. Nuclear Regulatory Commission
R. William von Till, U.S. Nuclear Regulatory Commission
Milt Lammering, U.S. Environmental Protection Agency, Region VIII
Terry Brown, U.S. Environmental Protection Agency, Region VIII
William L. Sharrer, Molycorp
John Espinoza, Molycorp
Anthony Thompson, Esq., Shaw Pittman Potts & Trowbridge
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Robert Wyatt, Esq., Allen Matkins Leck Gamble & Mallory

Parsons Behle & Latimer

A Professional Law Corporation

MEMORANDUM

TO: David C. Frydenlund, International Uranium (USA) Corporation

FROM: M. Lindsay Ford, Parsons Behle & Latimer

DATE: February 13, 2001

SUBJECT: *RCRA Regulatory Status of Molycorp Materials Sent for Processing at White Mesa Mill*

This memorandum responds to your request for advice concerning the regulatory status under the Resource Conservation and Recovery Act ("RCRA") of Molycorp materials destined for processing at IUSA's White Mesa mill. I understand the materials at issue are residues that had been produced by Molycorp at its Mountain Pass facility located in California, that the residues are currently stored in three surface impoundments and have been since as early as the mid-1960's to the early 1980's, that the materials are not RCRA listed hazardous waste but that they may exhibit a hazardous characteristic for lead, and that the materials are now being proposed to be sent to the White Mesa mill for processing as "ore"[1] to recover their uranium content. The residual materials after processing at the White Mesa mill will meet the definition of "11e.(2) byproduct material"[2] and will be disposed as such in the mill's tailings impoundment. Under NRC guidance applicable to the processing of alternate feed materials (material other than

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[1] NRC has developed the following definition of ore: "Ore is a natural or native matter that may be mined and treated for the extraction of any of its constituents or *any other matter* from which source material is extracted in a licensed uranium or thorium mill." 57 Fed. Reg. 20525, 20532 (May 13, 1992) (emphasis added).

[2] Under section 11e.(2) of the Atomic Energy Act, 11e.(2) byproduct material is defined as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content." 11e.(2) byproducts are exempt from the definition of RCRA solid (and hazardous) waste. *See* 40 CFR § 261.4(a)(4).

natural ore) in uranium mills,[3] if the materials being processed are hazardous wastes under RCRA, the NRC "licensee can process it only if it obtains EPA (or State) approval and provides the necessary documentation to that effect." As explained below, the Molycorp materials are not subject to regulation as RCRA solid or hazardous wastes when they are sent to the White Mesa mill for processing and hence, EPA or State approval is not required.

The residues, and surface impoundments in which they are stored, are not currently subject to RCRA. Under a long-standing EPA policy, waste generated prior to the effective date of an EPA regulation which would otherwise subject it to regulation as a hazardous waste is not subject to regulation as a hazardous waste unless it is "actively managed."[4] The residues at issue have been stored in three surface impoundments without disturbance since before March 1, 1990, the effective date of the final Beneficiation Rule, and they have not been "actively managed" after that date.[5]

Nor will the residues be subject to RCRA once they are removed from the surface impoundments at Mountain Pass for processing at White Mesa. The NRC Alternate Feed Guidance recognizes that "[f]eed material exhibiting only a characteristic of hazardous waste (ignitable, corrosive, reactive, toxic) would not be regulated as hazardous waste and could therefore be approved for recycling and extraction of source material." This statement reflects

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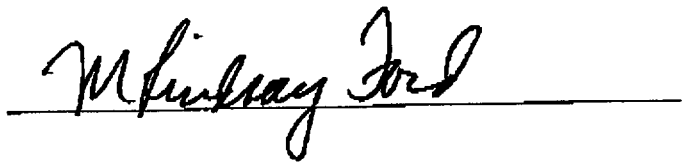
[3] *See* "Interim Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores." http://www.nrc.gov/NRC/GENACT/GC/RI/2000/ri00023.html#_1_6 (the "Alternate Feed Guidance")

[4] *See* 45 Fed. Reg. 33066 (1980); 55 Fed. Reg. 39410 (Sept. 27, 1990).

[5] There are two bases to conclude that the Molycorp residues are not presently subject to RCRA. First, Molycorp continues to assert that EPA had classified its entire operations as beneficiation when the Agency promulgated the final beneficiation rule on September 1, 1989, and this classification remains an open issue. See Molycorp, Inc. v. U.S. EPA, (DC Cir., 1999). Second, even if Mountain Pass operations are not entirely Bevill exempt, the residues were placed in the impoundments from 1965-84 and have not been actively managed since. Assuming arguendo that the residues are mineral processing wastes, the effective date of EPA's Final Beneficiation Rule on mineral processing wastes is March 1, 1990, 54 Fed. Reg. 36592 (September 1, 1989), and because the materials were stored before March 1, 1990 and have not been actively managed since then, they are not subject to regulation as hazardous waste.

an exemption under RCRA which excludes from the definition of solid (and thus hazardous) waste a byproduct[6] that is reclaimed.[7] *See* 40 CFR § 261.2(c)(3). The Molycorp residues meet the definition of byproducts and will be reclaimed at the White Mesa mill to recover uranium; they are therefore not subject to RCRA.[8]

Please call me (801-536-6605) if you have any further questions on this issue.



[6] RCRA defines a "byproduct" (not to be confused with "11e.(2) byproduct"), as "a material that is not one of the primary products of a production process and is not solely or separately produced by the production process. Examples are process residues such as slags or distillation column bottoms. The term does not include a co-product that is produced for the general public's use and is ordinarily used in the form it is produced by the process." 40 CFR § 261.1(c)(3).

[7] "A material is 'reclaimed' if it is processed to recover a usable product or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents." 40 CFR § 261.1(c)(4).

[8] As part of LDR Phase IV, EPA attempted to restrict the reclamation exemption for secondary mining materials. The effect of these restrictions would have been to exclude from this exemption materials that had been stored on land. The Court of Appeals for the DC Circuit has invalidated this restriction. Association of Battery Recyclers, Inc. v. U.S. EPA, 208 F.3d 1047 (D.C. Cir. 2000). Consequently, secondary mineral products that are reclaimed remain exempt from regulation as hazardous waste. Even if the residues currently were subject to RCRA, they would cease to be once removed from storage for processing at the White Mesa mill under a position taken by EPA in the preambles to the proposed and final LDR Phase IV rule. In the preamble to the proposed LDR Phase IV Rule, EPA encouraged the "re-mining" of previously generated mineral processing wastes. *See* 61 Fed. Reg. 2337, 2353 (Jan. 25, 1996). EPA explained that "[t]he reason re-mining could be encouraged is that the previously disposed mineral processing materials would not be solid wastes once they are excavated for purposes of legitimate recovery by mineral processing or beneficiation processes ..." Id. (citing as support the definition of speculative accumulation at 40 CFR 261.1(c)(8) which provides that "[m]aterials are no longer [considered speculatively accumulated, and thus are not solid (or hazardous) wastes,] once they are removed from accumulation for recycling"). EPA later reiterated this position in the preamble to the final LDR Phase IV rule: "EPA is not asserting authority over mineral processing secondary materials once they are removed from approved storage for reclamation. Thus, should a mineral processing plant reclaim mineral processing secondary materials after those materials are stored in land-based units (i.e., the materials defined as hazardous wastes in today's rule), they would no longer be solid and hazardous wastes. EPA believes it would be counterproductive to retain the hazardous waste status for mineral processing secondary materials entering reclamation. ..." 63 Fed. Reg. 28556, 28582 (May 26, 1998). Portions of the LDR Phase IV rule were recently overturned by the court in Association of Battery Recyclers, Inc. v. U.S. EPA, 208 F.3d 1047 (D.C. Cir. 2000). In particular, the court rejected EPA's assertion of authority over secondary materials whenever they are stored for any length of time, including storage in land-based units. In other words, under EPA's theory, any material stored in land-based units is a solid waste subject to its jurisdiction even though the material is destined for reuse as part of a continuous industrial process. The court rejected that theory, holding that "at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." Id. 208 F.3d at 1056. The court never addressed, and did not overturn, EPA's position on "re-mining."