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BEFORE THE UNITED STATES NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF)	DOCKET NO.40-8681-MLA-4
INTERNATIONAL URANIUM (USA))	ASLBP No. 98-748-03-MLA
CORPORATION'S AMENDMENT TO)	OPPOSITION OF INTERNATIONAL
NRC SOURCE MATERIAL LICENSE)	URANIUM (USA) CORPORATION
SUA-1358)	TO STATE OF UTAH'S
_____)	REQUEST FOR A STAY

I. INTRODUCTION

International Uranium (USA) Corporation ("IUSA") operates, in accordance with Source Material License No. SUA-1358 issued by the United States Nuclear Regulatory Commission ("NRC"), a uranium recovery facility called the White Mesa Mill (the "Mill") in Blanding, Utah. The Mill processes uranium-bearing material to extract the uranium therefrom. Residuals, or "tailings," from this process, defined as "11e.(2) byproduct material," are disposed of in an NRC-licensed "cell" or impoundment at the Mill site. IUSA's Mill is regulated by NRC, pursuant to the Atomic Energy Act of 1954, as amended, and the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), as amended, as effectuated by NRC regulations set forth at 10 CFR Part 40 including Appendix A and applicable NRC guidance documents.

On May 8, 1998, IUSA requested that NRC amend IUSA's Source Material License to allow the Mill to process uranium-bearing materials from the Ashland 2 Formerly Utilized Sites

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Remedial Action Program ("FUSRAP") site near Tonawanda, New York ("Ashland 2 material"). NRC granted IUSA's license amendment to process the Ashland 2 material on June 23, 1998. The State of Utah (the "State" or "Utah") filed a Request for Hearing and Petition for Leave to Intervene on or about July 23, 1998.^{1/} IUSA filed its response to the State's Request for Hearing on August 3, 1998. Subsequently, on August 7, 1998, the State filed a Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay.

II. ARGUMENT

As set forth below, the State's Motion for Stay and Request for Temporary Stay must be denied because they are not timely. Additionally, because the State's Request does not satisfy the four part standard governing the issuance of stay as set forth at 10 C.F.R. §§ 1263 and 2.788.

IUSA responds to the State of Utah's Motion for Stay and Request for Temporary Stay as follows:

A. Utah's Motion for Stay and Request for Temporary Stay is Untimely

Under 10 C.F.R. § 2.1263, motions for stay or temporary stay of any licensing decision issued by the Commission "must be filed at the time a request for a hearing or petition to intervene is filed or within 10 days of the staff's action, whichever is later." NRC granted the subject license amendment on June 23, 1998. Thus, the State was required to file its Motion for Stay and Temporary Stay no later than July 23, 1998 when it filed its Request for a Hearing since the staff action complained of -- amendment of IUSA's license -- occurred prior to the filing.

^{1/} On or about the same date, Envirocare of Utah, Inc., also filed a Request for Hearing on IUSA's License Amendment to process the Ashland 2 material.

Failure to adhere to this deadline is an absolute bar to the State's Motion for Stay and Request for Temporary Stay. In general, time limits are strictly enforced^{2/} and the NRC disfavors stay requests not made as soon as possible.^{3/} After all, in its recent Statement of Policy on Conduct of Adjudicatory Proceedings, the Commission noted:

The parties to a proceeding, therefore, are expected to adhere to the time frames specified in the Rules of Practice in 10 C.F.R. Part 2 for filing and the scheduling orders in the proceeding. . . . [T]he licensing boards are expected to take appropriate actions to enforce compliance with these schedules. . . . [T]he boards may grant extensions of time under some circumstances, but this should be done only when warranted by unavoidable and extreme circumstances.^{4/}

The State has failed to allege any "unavoidable and extreme circumstances" that would excuse its failure to comply with the established deadlines for filing its Motion for Stay and Request for Temporary Stay. While the State alleges that it received a news release issued by the U.S. Army Corps of Engineers (USACE) regarding the shipment of the Ashland 2 material on July 28, 1998 -- five days after it filed its Request for Hearing -- that fact is irrelevant. The staff action complained of -- amendment of IUSA's license -- occurred on June 23, 1998. Since that time, IUSA was fully authorized to undertake whatever steps necessary to receive and process the Ashland 2 waste, including transportation of such materials from Tonowanda, New York to its facility in Blanding, Utah. Thus, by inexcusably failing to file its Motion for Stay and Request for Temporary Stay in a timely manner, the State has waived whatever right it may have had to such relief.

^{2/} See Public Serv. Co. of New Hampshire, 27 N.R.C. 632, 635 (1988) (referring specifically to appeal deadlines).

^{3/} See Georgia Power Co., 39 N.R.C. 190 91994) (chastising NRC staff for requesting a stay on the last allowable day when they could have filed sooner).

^{4/} U.S. Nuclear Regulatory Commission, Statement of Policy on Conduct of Adjudicatory Proceedings 6 (July 28, 1998).

B. Utah's Motion for Stay and Request for Temporary Stay Does Not Satisfy the Standard Set Forth At 10 C.F.R. § 2.788.

Under 10 C.F.R. § 2.788(e), the Commission or presiding officer will consider the following four factors in determining whether to grant or deny an application for a stay:

- (1) Whether the moving party has made a strong showing that it is likely to prevail on the merits;
- (2) Whether the party will be irreparably injured unless a stay is granted;
- (3) Whether the granting of a stay would harm other parties; and
- (4) Where the public interest lies.

These factors are stringent, and make it difficult for any movant to obtain a stay. See Sequoyah Fuels Corp., 40 N.R.C. 1, 6 (1994). The movant also has the burden of proof, see Curators of the Univ. of Missouri, 31 N.R.C. 559, 575 (1990) (construing 10 C.F.R. § 2.1237(b)), and must come forth with more than general or conclusory assertions in order to demonstrate its entitlement to a stay. See Babcock and Wilcox, 36 N.R.C. 255, 263 (1992), aff'd on rehearing, 36 N.R.C. 355 (1992).

Even assuming that the State's Motion for Stay and Request for Temporary Stay is timely, the Presiding Officer should deny these motions on grounds that the State fails to satisfy the above criteria for issuance of a stay.

1. The State is Unlikely To Prevail On the Merits

a. Standing

As discussed extensively in IUSA's Opposition to Utah's Request for Hearing, the State has failed to allege injury in fact and thus lacks standing to challenge the Commission's issuance of license amendment to IUSA. Unable to satisfy even the criteria for standing, the State cannot carry its burden of proving that it is likely to prevail on the merits.

b. Processing Primarily For Source Material

The state claims that IUSA failed to demonstrate that the Ashland 2 material is being processed primarily for its source material content, alleging that IUSA failed to satisfy either the co-disposal test or the licensee certification. As discussed at length in IUSA's Opposition to Utah's Request for a Hearing, this is not true. In fact, NRC determined that IUSA satisfied both of these tests. Moreover, contrary to Utah's claims, NRC devoted several pages of its Technical Evaluation Report to assessing IUSA's satisfaction of these criteria.

c. The Ashland 2 Material Does Not Contain Hazardous Waste

As with the preceding alleged "merits of Utah's claim, IUSA has addressed its contention in its Opposition to Hearing. The Ashland 2 material was generated approximately 50 years ago. It has been tested multiple times. IUSA provided NRC with all existing data and NRC determined, based upon that data, that the Ashland 2 material does not contain hazardous waste. Moreover, IUSA proposed to re-test the material upon excavation. If any hazardous waste were to be discovered at that time, it will be left at the Ashland site. Finally confirmatory testing will

be done at the White mesa facility. NRC's evaluation of this issue is specifically addressed in the Technical Evaluation Report.

2. The State Will Not Suffer Irreparable Harm As a Result of IUSA's License Amendment.

The State will *not* suffer immediate irreparable injury as a result of IUSA's license amendment and subsequent shipment of the Ashland 2 material.

First, contrary to allegations set forth in the State's Motion for Stay, IUSA has satisfied *both* the co-disposal test and the licensee certification test for processing of the Ashland 2 material.

Under NRC's "Final Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores"^{5/} (hereinafter, "Alternate Feed Guidance") guidance governing processing of alternate feed materials at uranium mills subjects such processing to a three part test:

1. the material must be "*ore*" (Utah's Petition concedes that the Ashland 2 materials may properly be deemed "*ore*"^{6/});
2. the material *cannot contain hazardous wastes* listed under the Resource Conservation and Recovery Act ("RCRA," 42 U.S.C. § 6901 et seq.) (this issue addressed below); and
3. the alternate feed *must be processed "primarily for its source-material content..."*^{7/}

The State has already conceded that the Ashland 2 materials are ore, so no further discussion on that point is required. We will later address the issue of the procedures being employed

^{5/} NRC Policy Issue, August 15, 1995.

^{6/} State of Utah Petition for Hearing, at 17.

^{7/} 57 Fed. Reg. 20530-31.

) to ensure that the Ashland 2 materials do not contain listed hazardous waste. In determining whether the proposed processing was primarily for the source-material content or for the disposal of waste, *either* of the following tests can be used:^{8/} the co-disposal test or the licensee certification test. NRC has determined that *both* of these tests were satisfied in connection with IUSA's request for a license amendment.

a. **co-disposal test:**

Under the co-disposal test, if NRC would approve direct disposal (i.e., in the absence of any reprocessing) of *non-11e.(2)* material (i.e., source material) in an 11e. (2) tailings cell for a fee, then NRC reasons that if the licensee reprocesses the material, it must be doing so "primarily" for its source material content. NRC found that the Ashland 2 material satisfies the co-disposal test because the Department of Energy ("DOE") (the regulatory agency with responsibility for the Tonawanda Site under the AEA until that responsibility recently was delegated to the USACE determined that the material was 11e. (2) byproduct material.^{9/} Thus, the reasoning of the co-disposal test applies to the Ashland 2 material with even more vigor than it would with respect to *non-11e.(2)* byproduct material. It is unquestioned that 11e.(2) byproduct material can

^{8/} Id.

^{9/} See DOE document EM-0233 (April 1995) discussing DOE FUSRAP sites. This document explains that "the waste at many FUSRAP sites...is a waste "byproduct" material known as 11e.(2), as defined under the Uranium Mill Tailings Radiation Control Act of 1978." (p.5). This document goes on to define "By-Product Material" as including "wastes from the processing of ores primarily to recover their source material content." (p. A-11). The document profiles the Ashland 2 material as "By-Product Material." (p. A3).

be directly disposed in uranium mill tailings cells for a fee; therefore, if the licensee processes such materials, it must be doing so primarily for its source material content.^{10/}

The State's suggestion that the Ashland 2 material cannot be approved for disposal in an 11e. (2) disposal cell because NRC Uranium Recovery Branch stated that the material is not subject to NRC regulation until it arrives at White Mesa is irrelevant. Even if the Ashland 2 material were conventional ore, NRC would not regulate it until it arrived at IUSA's mill. Thus, both conventional ore and non-NRC regulated 11e.(2) materials *become subject to NRC regulation* upon arrival at IUSA's mill.^{11/}

b. licensee certification test:

Under the Alternate Feed Guidance,^{12/} licensee certification that materials are being processed "primarily for source material content" can be justified by (i) financial considerations, (ii) the material's high uranium content, or (iii) on *other grounds*. NRC has accepted IUSA's certification that IUSA's reprocessing of the Ashland 2 materials is justified by financial considerations (increased efficiency of operating closer to mill capacity, avoiding the costs of shutdowns and startups, maintaining a trained work force, the similarity of the material to the conventional ore currently being stockpiled for the upcoming mill run, value of uranium

^{10/} 11e.(2) byproduct material from in situ leach (ISL) uranium recovery operations must be disposed in uranium mill tailings facilities pursuant to Appendix A, Criterion 2. Disposal of such material directly into mill tailings impoundments for a disposal fee is currently and has been a routine practice under NRC's uranium recovery regulatory program.

^{11/} See U.S. Nuclear Regulatory Commission, Final Generic Environmental Impact Statement on Uranium Milling, Appendix A, A-89 (Sept. 1980) (activities associated with and prior to processing ore at a mill site are within NRC's regulatory authority).

^{12/}See Alternate Feed Guidance at 3-4.

extracted)^{13/} and on *other grounds* (the added advantage of recycling materials to recover a valuable resource and to reduce the radioactive content of the materials ultimately disposed). IUSA has made this certification based on knowledge of its business and has provided reasonable justification for this certification. NRC has accepted that justification. The State is not in a position to determine how IUSA should run its business or what makes sense to IUSA from a financial point of view.

Second, NRC technical staff has determined that the Ashland 2 materials do not contain any hazardous wastes listed pursuant to RCRA. The staff has reviewed the extensive materials testing data provided to date by USACE and IUSA and provisions for testing to be performed in the future prior to processing at the Mill and found these a satisfactory basis for determining that the Ashland 2 material does not contain listed hazardous wastes. It should also be noted that remedial investigations carried out by the DOE did not find any listed hazardous wastes on the Ashland 2 property.

Third, IUSA's facility is highly protective of the environment. IUSA is currently in compliance with an air emissions permit, issued pursuant to 40 C.F.R. Part 61, Subpart W, which regulates radon emissions from its tailings cell.

In addition, contrary to the State's allegations, IUSA's facility has adequate groundwater protection. IUSA does not have a groundwater discharge permit because IUSA's facility is not subject to State jurisdiction in this regard. In any case, even if IUSA was subject to State

^{13/}Despite NRC's having determined that IUSA is processing the Ashland 2 materials "primarily for the recovery of uranium," the State saw fit to attempt to calculate the average uranium content in the Ashland 2 materials. In so doing, the State mistakenly applied "0" values where, in fact, no values had been obtained. Consequently, Utah's calculation undercounts the average uranium content of the Ashland 2 materials.

jurisdiction in this regard, IUSA's tailings cell does not discharge to groundwater and hence a groundwater discharge permit is not necessary and would not provide any additional protection. Nevertheless, IUSA's 11e.(2) tailings cell is highly protective of human health and the environment because it has a double liner (synthetic and clay), a leachate collection system, and leak detection monitoring. Since the facility started its operations in 1980, there have been no discharges.

In summary, processing of the Ashland 2 materials clearly satisfies all three requirements of the Commission's guidance on processing of alternate feed materials and can thus be undertaken without posing any significant threat to health and safety of the citizens of Utah. In addition, IUSA's facility currently provides an adequate protection of groundwater and other environmental pathways and does not pose any significant risk to public health or safety. Thus, the State has failed to demonstrate any irreparable harm if a stay is not granted, and the Presiding Officer should accordingly deny the State's Motion for Stay.

3. IUSA Will Suffer Substantial Harm If a Stay is Granted.

Granting of a stay will cause substantial and undue harm to IUSA's interests. IUSA will undoubtedly suffer economic harm as a result of a stay. IUSA has already expended considerable time and expense in negotiating with USACE and ICF-Kaiser for the delivery and processing of the Ashland 2 materials and obtaining NRC approval for the license amendment. Moreover, regardless of annual production limits on IUSA's facility, a maximum of 250 tons of uranium that could be recovered from the Ashland 2 materials represents a significant amount that would yield substantial profits for IUSA. We also note that any costs entailed by the

stoppage of Ashland 2 materials in transit, including costs for temporary storage and management, will likely be substantial as well. Thus, the Presiding Officer should deny the State's Motion for Stay.

4. Public Interest Supports the Denial of a Stay.

The public's interest would also be served by the denial of a stay. After a careful and lengthy review, the NRC staff has determined that IUSA's application for processing of the Ashland 2 materials meets all applicable standards including both tests for determining whether an ore is being processed "primarily" for its license material content pursuant to the Commission's guidance for processing of alternate feed and has accordingly amended IUSA's application to permit such an activity. The USACE has also concurred with that assessment and thus has agreed to transfer the Ashland 2 materials to IUSA. Any additional review, as requested by the State, is likely to result only in needless waste of public resources on issues that have already been carefully addressed.

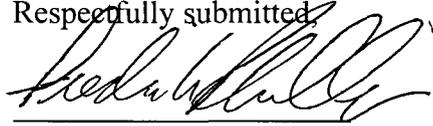
In addition, we note that processing of the Ashland 2 materials will actually promote public health and safety -- a fact that the State appears to have overlooked. Processing of alternate feed materials will result in not only extraction of additional uranium from such materials but also reduction of their source material content, making them that much safer for disposal. Such an activity is far more preferable to direct disposal in 11e.(2) byproduct material cells.

For these reasons, the Presiding Officer should deny the State's Motion for Stay.

III. CONCLUSION

For all of the reasons set forth above, IUSA respectfully submits that State of Utah's Motion for Stay and Request for Temporary Stay should be **DENIED**.

Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges: Peter B. Bloch, Presiding Officer
Richard F. Cole, Special Assistant



IN THE MATTER OF:

INTERNATIONAL URANIUM
CORPORATION
(Source Material License Amendment)

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* Docket No. 40-8681-MLA-4
* ASLBP No. 98-748-03-MLA
*
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CERTIFICATE OF SERVICE

I hereby certify that I caused true and complete copies of the foregoing Opposition of International Uranium (USA) Corporation to State of Utah's Request for a Stay in the above-captioned matter to be served, via facsimile and by First Class United States Mail, on this 7th day of August, 1998 to:

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