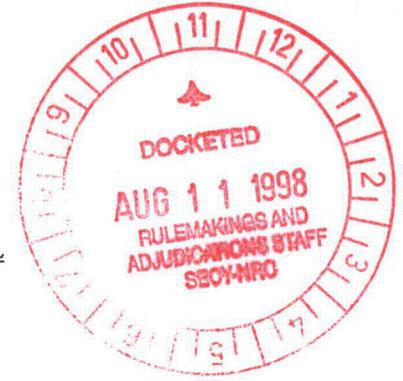


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

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



In the Matter of:)
)
) Docket No. 40-8681-MLA-4
INTERNATIONAL URANIUM)
(USA) CORPORATION)
(source material license amendment)) August 10, 1998

**STATE OF UTAH'S RESPONSE ON THE TIMELINESS OF ITS MOTION
FOR A STAY AND REQUEST FOR A TEMPORARY STAY**

Judge Bloch convened a transcribed telephone conference at 2 p.m. EDT, August 7, 1998, allowing all sides to argue whether the State's Motion for a Temporary Stay, filed August 6, would be appropriate. During the telephone conference, International Uranium (USA) Corporation ("IUC") and the NRC Staff argued that under 10 C.F.R. § 2.1263, the State's Motions was untimely. In accordance with Judge Bloch's instructions at the hearing conference, the State submits the following in response to oral arguments presented by IUC and the Staff.

The IUC license amendment, as approved by NRC, should be considered conditional because the Tonawanda waste material was subject to testing by the Army Corps' contractor **prior** to being shipped off-site. In the Technical Evaluation Report (TER), a Staff-produced document giving the basis for the current IUC amendment request, the Staff made the following determination:

SECY-041

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[T]o guard against the potential for material containing such wastes [*i.e.* hazardous waste] being sent to White Mesa for processing, ICF Kaiser, the USACE contractor charged with excavating the material and preparing it for shipment offsite, will conduct confirmatory testing of excavated materials prior to their shipment to ensure that listed hazardous wastes are not present....

See TER at p. 4 (attached as Exh. 1 to the State's Petition to Intervene). Thus, the IUC license amendment, as approved by NRC, was not effective until ICF Kaiser completed on-site confirmatory testing of excavated material. During the telephone conference on August 7, 1998, IUC was unable to confirm what tests ICF Kaiser had performed at the site on excavated materials. In fact, in response to State's request during the August 7 telephone conference, as of the time of filing this pleading, IUC has been unable to provide the State with any test data from ICF Kaiser.¹

While 10 CFR § 2.1263 provides that a motion for a stay must be filed at the time a request for a hearing or petition to intervene or within 10 days of the Staff's action, whichever is later, the rule should not be interpreted as an absolute bar to filing a motion for a stay because of changed circumstances. First, case law provides that "a request for a stay relative to that amendment application is not appropriate until the Staff has taken action to grant the amendment request **and to make the approved licensing action effective.**" In the Matter of Babcock and Wilcox (Apollo,

¹ The TER also relied on IUC conducting testing of the Tonawanda waste arriving at White Mesa Mill on a regular basis to confirm ICF Kaiser's test determinations. TER at 4. IUC has not supplied the State with a copy of its Sampling and Analysis Plan for confirmatory testing, and to the State's knowledge, no such Sampling and Analysis Plan exists.

Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 335, 359 (1992) (*emphasis added*). As discussed above, the IUC license amendment was not effective until after ICF Kaiser had completed testing of excavated on site material -- a condition that has not been performed.

Second, the Commission has demonstrated a willingness to hear motions to stay when changed circumstances have created the likelihood of immediate and irreparable harm. In the Matter of Hydro Resources, Inc., CLI-98-8 at 6, __ NRC __, (1998). While rejecting a petitioner's arguments that contaminants would likely be released and migrate to water wells prior to the completion of a hearing, the Commission in Hydro Resources denied a motion to stay but stated that the petitioner could later renew the motion to stay "if circumstances change in such a way that the harm becomes irreparable and immediate as well as serious." Id. In reaching its decision, the Commission rejected the petitioner's argument that if the injury will likely occur before completion of the hearing, the harm should be considered "immediate." Id. Additionally, the Commission found that the petitioner did not show why the license conditions were inadequate to prevent contamination of the well water supply. Id. at 11.

In this case, no immediate injury faced the State at the time it filed its Petition to Intervene. In fact, the State believed that the material would undergo significant testing for hazardous constituents prior to shipping to White Mesa. As soon as the

State learned that some of the material had been shipped, the harm became immediate. Accordingly, the State took action and filed a Motion for a Stay to prevent any irreparable injury. Like the petitioner in Hydro Resources, the State could not have successfully argued at the time of filing its Petition to Intervene, that it would have suffered "immediate" harm. There is no doubt that had the State filed its Motion to Stay before shipments had begun, IUC would have argued that unless and until the shipments began, the State would not have been entitled to a stay, an argument the Presiding Officer likely would have upheld. Thus, given the facts of the case, filing a motion for a stay with the petition to intervene would have been a nullity. However, unlike the petitioner in Hydro Resources, the State of Utah now faces immediate, irreparable injury. The shipping campaign has begun, and the material is en route to IUC without the appropriate on-site testing. Thus, the license conditions, as applied, will not protect Utah citizens and resources from the effects of shipping, storing and disposing of hazardous waste.

Finally, the Presiding Officer has discretion to receive and act on the State's Motion for a Stay, provided that there is a rational foundation for such action. See In the Matter of Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-924, 30 NRC 331, 372 at n. 196 (1989); In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-832, 23 NRC 135, 138 (1986). The State acted promptly when it became aware that shipments to the White

Mesa Mill had begun. IUC has not argued that it is prejudiced by the State's timing in filing the Motion for a Stay. Fairness dictates consideration of the Motion in view of the critical issues presented by the State. The NRC Staff must demonstrate that hazardous waste is not contained in the shipments to White Mesa. Shipments are or shortly will be arriving in Utah presenting an immediate threat to the State. Accordingly, there is a rational foundation for granting the State's temporary request for a stay.

DATED this 10th day of August, 1998.

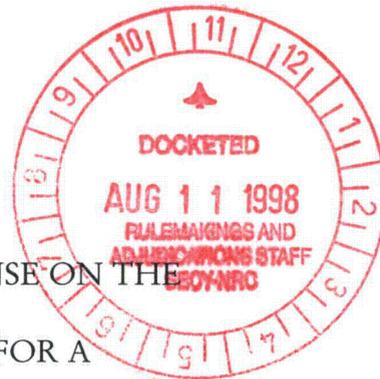
Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Denise Chancellor", written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that copies of STATE OF UTAH'S RESPONSE ON THE
TIMELINESS OF ITS MOTION FOR A STAY AND REQUEST FOR A
TEMPORARY STAY were served on the persons listed below by fax, unless
otherwise noted, on August 10, 1998, and by first class mail, on August 11, 1998:



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