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OFFICE OF SECRETARY
RULEMAKING AND
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

INTERNATIONAL URANIUM (USA))
CORPORATION)

Docket No. 40-8681-MLA-4

(Receipt of Material from)
Tonawanda, New York))

NRC STAFF RESPONSE
TO STATE OF UTAH PETITION FOR REVIEW OF LBP-99-5

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On February 9, 1999, the Presiding Officer in the above-captioned proceeding issued an Initial Decision, LBP-99-5, 49 NRC ___, denying the State of Utah's request to vacate Amendment 6 to License No. SUA-1538 (Amendment), which authorizes International Uranium (USA) Corporation (IUSA) to receive and process certain uranium-bearing material for the Ashland 2 site located in Tonawanda, New York.

Subsequently, the State of Utah (State or Utah) filed a petition pursuant to 10 C.F.R. §§ 2.786(b) and 2.1253 asking that the Commission review the decision because it raises important legal and policy questions concerning the application of the NRC guidance on alternate feed material. *See* State of Utah's Petition for Review of LBP-99-5, dated February 26, 1999 (Petition), at 2.¹ As set forth below, the Staff opposes the Petition.

¹Because the Petition was filed by e-mail after close of business on Friday, February 26, 1999, the Staff files this response as if the pleading was hand delivered on Monday, March 1, 1999.

BACKGROUND

IUSA, the owner and operator of the White Mesa mill in Blanding, Utah, is authorized pursuant to a source material license issued under 10 C.F.R. Part 40 to process natural uranium ore and certain other materials for their uranium content and to possess the waste generated from such millings operations. *See International Uranium (USA) Corporation* (Receipt of Material from Tonawanda, New York), LBP-98-21, 48 NRC 137, 143 (1998). The contested amendment allows IUSA to receive and process approximately 25,000 dry tons of uranium-bearing material (*i.e.*, alternate feed material -- material other than natural uranium ore) from the Ashland 2 FUSRAP site, which is currently being managed by the U.S. Army Corps of Engineers (ACE). *See id.* at 144; LBP-99-5, at 2, 4-5.² The material consists of uranium ore processing residues and contaminated soils associated with activities conducted by the Manhattan Engineering District (MED) during the mid-1940s that were originally disposed at the site now called Ashland 1, but later moved to the Ashland 2 site by the Ashland Oil Company, which acquired the property in 1960. TER at 1.

Applying NRC guidance entitled "Final Position and Guidance on the Use of Uranium Feed Material Other Than Natural Ores," 60 Fed. Reg. 49,296, 49,297 (September 22, 1995)

²*See* Technical Evaluation Report: Request to Receive and Process Ashland 2 FUSRAP Material (TER), at 1, attached to Letter from J. Holonich, NRC to M. Rehmann, IUSA, forwarding Amendment 6 to Source Material License SUA-1358, dated June 23, 1998 (Hearing File Document 12 and IUSA Exhibit 1). The proceeding regarding the State's challenge to a similar request to allow IUSA to receive, process and dispose of uranium-bearing material from the nearby Ashland 1 and Seaway Area D FUSRAP has been ordered held in abeyance pending the outcome of this appeal. *See* Memorandum and Order (Hearing Held in Abeyance), dated February 22, 1999; IUSA, LBP-99-8, 49 NRC ____ (February 19, 1999); Notice of Opportunity for Hearing, 63 Fed. Reg. 59,340 (November 3, 1998).

(Alternate Feed Guidance) (Hearing File Document 10), the Staff issued the contested license amendment on June 23, 1998. *See* LBP-98-21, 48 NRC at 144-45.³ The State's petition for leave to intervene was granted on September 1, 1998. *See* LBP-98-21, 48 NRC at 145-47.

On December 7, 1998, the State filed its written presentation, asking that the amendment be revoked because it allows a "sham disposal" of unprofitable uranium-bearing material that could be low-level waste that should be placed in a Utah regulated disposal facility and is contrary to the Alternate Feed Guidance. *See* State of Utah's Brief in Opposition to International Uranium (USA) Corporation's Source Material License Amendment, dated December 7, 1998 (Utah Brief), at 2-4, 14-16, 22. Utah alleged, *inter alia*, that the Amendment did not satisfy Criterion 3 of the Alternate Feed Guidance in that the material is being processed primarily to obtain a disposal fee and not for extraction of its source material content. *See id.* at 3-14.⁴

³The Staff concluded that the criteria in the guidance were met in that (1) the feed material qualified as "ore," (2) DOE remedial investigations did not identify any hazardous waste on the Ashland 2 property and confirmatory measures would be taken to guard against the presence of listed hazardous waste prior to shipment to, and upon receipt at, the mill, and (3) the Licensee had provided an adequate certification that the uranium-bearing material is being processed primarily for recovery of uranium. TER at 4-6. The Staff also noted that, because DOE had determined that the Ashland 2 material was 11e.(2) byproduct material under the AEA, the material could be disposed of directly in the White Mesa tailings impoundments. TER at 6. The Staff recently explained that, because the material could be directly disposed of in the tailings impoundment, the co-disposal test was inapplicable. *See* NRC Staff Response to Written Presentations By State of Utah and [IUSA], dated January 29, 1999 (Staff Brief), at 10 n.11 and Affidavit of Joseph Holonich, dated January 29, 1999 (Holonich Affidavit) (attached thereto) at 6-8.

⁴The Licensee and Staff disputed these claims. IUSA asserted (1) that the legislative history of the phrase shows that economics are not determinative in a finding of whether material that is being processed primarily for its source material content, (2) that IUSA
(continued...)

In LBP-99-5, the Presiding Officer found that the license amendment was properly granted and that the State had misconstrued Section 11e.(2) of the Atomic Energy Act (AEA), 42 U.S.C. § 2014e(2), which defines byproduct material 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.” *Id.* at 3, 8. Declining to apply a “test of motive or purpose,” the Presiding Officer found that the phrase “processed primarily for its source material content” means that when the extraction of uranium is the principal reason to process the ore, the material is subject to NRC’s jurisdiction over the uranium fuel cycle. *Id.* at 2-3. If, however, material is processed primarily to remove other substances (vanadium, titanium, coal, etc.), it would not be byproduct material within the meaning of the AEA. *Id.* at 3. “That is, the adverb ‘primarily’ applies to what is removed from the material by the process and not to the motivation for undertaking the process.” *Id.*⁵ The Presiding Officer also found that there were

⁴(...continued)

adequately documented its showing under Criterion 3, and (3) that Utah, an Agreement State for the disposal of low level radioactive waste (but not the milling of uranium and the disposal of resulting tailings and wastes), challenges the amendment due to the State’s dissatisfaction with the regulatory regime in 10 C.F.R. Part 40. *See e.g.*, [IUSA’s] Reply to the State of Utah’s Brief in Opposition to IUSA’s Source Material License Amendment 6, dated January 22, 1999, at 2-20, 40-63, 78-82. The Staff argued that a showing of whether material is being primarily processed for its source material content can be based on “other grounds” besides financial considerations or the high uranium content of the feed material. *See* Staff Brief at 10-13.

⁵The Presiding Officer noted that the purpose of the Uranium Mill Tailings Radiation and Control Act of 1978 (UMTRCA), as amended, 42 U.S.C. § 7901 *et seq.*, and the legislative history of the definition of 11e.(2) byproduct material show an intent to regulate the nuclear fuel cycle. *See id.* at 4. While he recognized that IUSA would collect a material handling and disposal fee for the Ashland 2 material, the Presiding Officer found that there were practical reasons for permitting the milling of uranium from the Ashland 2 materials, and, inasmuch as
(continued...)

various practical reasons to conclude that processing would occur, including financial and environmental benefits, as well as IUSA's previous alternate feed activities. *Id.* at 4-8.

On appeal, the State asserts that LBP-99-5 raises important legal and policy questions regarding the application of the Alternate Feed Guidance, undermines safeguards against sham disposal, and results from the Presiding Officer failing to apply the guidance. *See* Petition at 3-4. As demonstrated below, the Amendment satisfied Criterion 3 of the guidance and, thus, Commission review is not warranted because the Petition fails to identify "a substantial and important question of law, policy or discretion" as required by 10 C.F.R. § 2.876(b)(4).

DISCUSSION

I. The Petition Fails To Raise A Substantial Question Regarding The Application of the Alternate Feed Guidance

The Alternate Feed Guidance was one of two guidance documents the NRC issued to address numerous requests for permission to process and dispose of feed material in uranium mills. *See* 60 Fed. Reg. 49296 (September 22, 1995).⁶ The guidance provides that requests to process alternate feed material can be approved if the Staff concludes, *inter alia*, that the application shows (1) that the material proposed for processing is "ore," (2) that it does not contain a listed hazardous waste, and (3) that it is being processed primarily for its source

⁵(...continued)
milling of uranium would actually occur, there would be no sham disposal. *Id.* at 5-6.

⁶The other document, which is not at issue here, is the "Final Guidance on Disposal of Non-11e.(2) Byproduct Material in Tailings Impoundments" (Disposal Guidance), 60 Fed. Reg. 49,296, provides criteria for approving wastes that have "characteristics comparable to those of Atomic Energy Act (AEA) of 1954, Section 11e.(2) byproduct material," but the wastes were not generated from ore processed primarily for the extractions of its source material content. 60 Fed. Reg. 49,296.

material content. 60 Fed. Reg. 49,296-49,297. A showing regarding this third criterion may be based upon satisfying either (a) a co-disposal test (*i.e.*, the material is physically and chemically similar to 11e.(2) byproduct material, is not subject to RCRA or other EPA regulations, and can be placed in a tailings impoundment) or (b) a licensee certification or justification test (*i.e.*, certification under oath or affirmation justified by reasonable documentation) that the feed material is to be processed primarily for the recovery of uranium. 60 Fed. Reg. 49,297.⁷ “The determination that the proposed processing is primarily for the source material content must be made on a case-by-case basis.” *Id.*

⁷“The justification can be based on financial considerations, the high uranium content of the feed material or on other grounds.” 60 Fed. Reg. 49,297. The State’s failure to comprehend the relationship between UMTRCA and the guidance results in a misreading of the standard in Criterion 3. *See* Petition at 5-7. While the State is correct that this criterion addresses concerns about sham disposal (raised in part by Utah officials), the State ignores that the Staff also indicated in promulgating the guidance that its primary concern was that material not be “processed primarily to convert what would have been [low-level waste] or mixed waste into 11e.(2) byproduct material.” *See* “Uranium Mill Facilities, Request for Public Comments on Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11.e(2) Byproduct Material in Tailings Impoundments and Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores,” 57 Fed. Reg. 20,525, 20,533 (May 13, 1992) (Draft Guidance). The guidance clearly indicated that FUSRAP sites containing wastes resulting from the processing of material primarily for thorium source material used in the Manhattan Engineering District and early Atomic Energy programs “would qualify as 11e.(2) material.” 57 Fed. Reg. 20,527. Further, the statement in the co-disposal test that “[i]f the material would be approved for disposal, it can be concluded that if the mill operator proposes to process it, the processing is primarily for the source-material content” is similar to (a) the Presiding Officer’s rationale that processing primarily to extract uranium (and not other substances) is determinative and (b) the Staff’s conclusion that since DOE’s classified the feed as 11e.(2) material (permissible under 42 U.S.C. §§ 7911(1), (6), (7)), it could be directly disposed of in the White Mesa tailings impoundment and, thus, is being processed primarily for its source material content. *Compare* 60 Fed. Reg. 49,297 with LBP-99-5, at 2-3, and Staff Brief at 12-14.

The Alternate Feed Guidance was issued to present a broad interpretation of the term “ore” as used in Section 11e.(2) of the Atomic Energy Act, thus permitting feed material other than natural ore to be used by licensed mills to extract source material, avoiding possible dual regulation by the Environmental Protection Agency (EPA) and enabling transfer of other material to the Department of Energy. *See* Draft Guidance, 57 Fed. Reg. 20,525, 20,530-31.⁸ In the promulgation of both the draft and final guidance, it was stated that waste or tailings that resulted from the extraction or concentration of ore primarily for its source material content would be considered 11e.(2) material. *See* 57 Fed. Reg. 20,525; 60 Fed. Reg. 49,297.⁹ Thus,

⁸The Draft Guidance notes that both the Congressional intent in passing UMTRCA, as well as the views of a Federal court, warranted a broad interpretation of the term “ore” in the definition of 11e.(2) byproduct material so that a wide range of feed materials could be processed in a mill with the resulting wastes being deemed 11e.(2) byproduct material. *See* 57 Fed. Reg. 20,525, 20,532, *citing*, *Kerr-McGee Corp. v. NRC*, 903 F.2d 1 (D.C. Cir. 1990). UMTRCA addressed concerns about the potential hazards of uranium mill tailings by closing a regulatory gap that existed as a result of NRC only being able indirectly to regulate mill tailings. *See* H. R. Rep. No. 95-1480, Part 2, 95th Cong., 2d Sess. 28 (1978). *See* UMTRCA Section 2.(a), 42 U.S.C. § 7901(a). UMTRCA’s purpose includes providing for “the reprocessing of tailings to extract residual uranium and other mineral values where practicable, in order to stabilize and control such tailings in a safe and environmental sound manner and to minimize or eliminate radiation health hazards to the public.” UMTRCA Section 2.(b), 42 U.S.C. § 7901(b). The amendment of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (AEA), added an additional definition of byproduct material, (designated as Section 11e.(2), 42 U.S.C. § 2014.e(2)) to include “tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content,” encompassing all wastes from the milling process, not just the radioactive components. *See* Draft Guidance, 60 Fed. Reg. 20525, 20526; *Kerr-McGee v. NRC*, 903 F.2d 1, 7 (D.C. Cir. 1990).

⁹The definition of AEA Section 11.e(2) byproduct material applies to the nuclear fuel cycle and excludes tailings containing uranium produced as a side stream of an operation primarily intended to extract a mineral other than uranium or thorium. *See Uranium Mill Tailings Radiation Control Act of 1978 Hearing on H.R. 11698, H.R. 11229, H.R. 12938, H.R. 12535, H.R. 13049 and 13650, Subcommittee on Energy and Power, House Comm. on*
(continued...)

the Presiding Officer properly focused on whether the processing authorized was primarily to extract uranium, in light of the various benefits of processing or recycling such material, and properly applied the guidance. *See* LBP-99-5 at 4-8.

II. The Petition Should Be Rejected As Seeking Reconsideration Of Guidance Which Gives Licensees The Flexibility To Justify Certification On Various Grounds

The State's assertions that IUSA failed to satisfy the license certification and justification test, and that the documentation was insufficient, *see* Petition at 5-9, in effect, ask that the Commission reconsider issuance of the guidance and restrict a licensee's showing to the profitability of the uranium, thereby preventing case-specific determinations which are not solely based on economic considerations. Criterion 3 (whether processing of the feed is primarily for its source material, however) should remain as broad as the definition of 11e.(2) byproduct material, and encompass nuclear fuel cycle activities that include legitimate processing of low grade feed stock. *See* note 9, *supra*. Therefore, the State's attempt to require an economic motive test and to require a detailed financial review should be rejected.¹⁰

⁹(...continued)

Interstate and Foreign Commerce, 95th Cong. 2d Sess. 343-344 (1978) (Licensee Exhibit 3) (*Subcommittee Hearings*); Draft Disposal Guidance, 57 Fed. Reg. 20525-20527. It also encompasses all nuclear fuel cycle waste, irrespective of the concentration of uranium contained in the ore, to capture wastes from mills that used feedstock with less than 0.05% uranium since "[a]s high-grade ores become scarcer, there may be greater incentives in the future to turn to such low grade ores." *See id.* at 343 (Chairman Hendrie).

¹⁰In its TER, the Staff noted that IUSA would process the Ashland 2 material either alone or commingled with conventionally-mined uranium ores and (1) reduce the costs of stockpiling ore, (2) enable IUSA to respond quickly to market price fluctuations by reducing the time from the mining, producing and selling the product, (3) run the mill for longer periods of time, (4) retain trained mill workers, and (5) reduce the overall costs of running the mill. *See* TER at 5-6. The concentration of uranium in the material was not important in reaching
(continued...)

While receipt of a fee may raise a question as to whether material is to be processed primarily for its uranium content, the guidance, as approved by the Commission, clearly provides that processing may be justified on financial considerations (not limited to the profitability of the uranium) as well as "other grounds."¹¹ The Presiding Officer's (and the Staff's) conclusion that the material was being processed for legitimate reasons reflects a case-specific determination permissible under the Alternate Feed Guidance. Limiting the justification under the test to a particular uranium concentration (or economic value of the uranium to be recovered), would be contrary to the Staff's intent, endorsed by the Commission, to allow processing of alternate feed materials with varying uranium content, and contrary to the NRC's expanded interpretation of "ore."

The State's desire to limit the guidance to terms that would prohibit recycling of feed material, regardless of the resulting benefits, is not sufficient to show that the Presiding Officer erred or that an important legal, policy or discretion issue has been raised. The State's views do not raise competing questions regarding the prerogative of states to control the siting and regulation of land disposal of radioactive waste versus legitimate extraction of uranium from alternate feed material. *See* Petition at 9-10. Such questions were addressed when the Staff

¹⁰(...continued)

this finding and the expected percentage was similar to that in ores processed elsewhere. *See* Holonich Affidavit at 4-7.

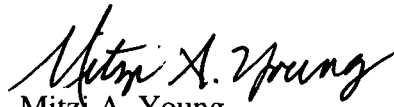
¹¹A detailed financial review of an alternate feed processing request is neither mandated by the health and safety mission of the AEA nor required by the Commission's regulations. *Cf. Umetco Minerals Corp.*, LBP-93-7, 37 NRC 267, 282 (1993).

issued its guidance¹² and when Utah decided not to be an Agreement State with respect to oversight of the milling of uranium and the disposal of the resulting tailings and wastes. Accordingly, the claim that important legal, policy or discretion questions are at issue here should be rejected because the State merely seeks to have the NRC reconsider the flexibility inherent in Criterion 3 -- the various grounds that justify a finding that alternate feed is being processed primarily for its source material content.

CONCLUSION

For the reasons set forth above, the Commission should deny the Petition as it fails to show an erroneous application of the guidance or to raise a substantial and important question of law, policy or discretion.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of March, 1999

¹²In proposing the final guidance the Staff was satisfied that the guidance contained sufficient safeguards against sham disposals, but remained convinced that economic information alone may not be sufficient to allow the Staff to differentiate between legitimate uranium processing and sham disposal. See SECY-95-211, "Final 'Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments,' and Final 'Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores,'" dated August 15, 1995, Attachment 3 (Staff Response to Public Comments) at 16-17.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITION FOR REVIEW OF LBP-99-5" in the above-captioned proceeding have been served on the following by first class United States Mail, through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by a single asterisk, or by e-mail and first class U.S. Mail as indicated by a double asterisk, this 11th day of March, 1999:

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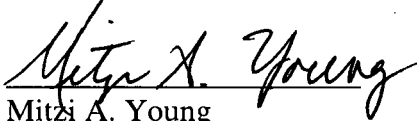
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