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) May 24, 1999
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In the Matter of)
) **AMICUS CURIAE BRIEF OF**
INTERNATIONAL URANIUM) **ENVIROCARE OF UTAH, INC. IN**
(USA) CORPORATION) **SUPPORT OF THE STATE OF**
) **UTAH'S APPEAL OF THE**
(Receipt of Material from Tonawanda, New) **PRESIDING OFFICER'S INITIAL**
York) **DECISION LBP-99-5**
)
)
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10 C.F.R. § 2.715(d) 1

Pursuant to 10 C.F.R. § 2.715(d) and the Nuclear Regulatory Commission's ("NRC") Order of May 20, 1999, *amicus curiae* Envirocare of Utah, Inc. ("Envirocare") hereby submits this brief in support of the State of Utah's appeal of the Presiding Officer's Initial Decision in the above-referenced matter.

I.

INTRODUCTION

On May 8, 1998, International Uranium (USA) Corporation ("IUC") requested that the NRC amend its Source Material License SUA-1358 and allow it to receive, process, and dispose of waste material from the Ashland 2 Formerly Utilized Sites Remedial Action Program ("FUSRAP") located near Tonawanda, New York (the "Ashland 2 material"). In seeking its license amendment, IUC certified to the NRC that the material would be processed "primarily for the recovery of uranium and for no other primary purpose" as required by the NRC's "Final Position and Guidance on the Use of Uranium Mill Feed Material Other than Natural Ores," 60 Fed. Reg. 49,296 (the "Guidance"). The NRC Staff blindly accepted IUC's certification and ignored the significant evidence which clearly demonstrated that IUC sought to process the Ashland 2 material primarily for the opportunity to dispose of the waste. Moreover, upon review, the Presiding Officer accepted the Staff's conclusions and failed to recognize that IUC seeks to do that which the Guidance strictly prohibits—process the Ashland 2 material in order to receive a significant fee for the disposal of waste.

Envirocare files this brief in support of the State of Utah's position and requests that the NRC reverse the Presiding Officer's decision and revoke IUC's license amendment. A sincere review of the record and a sensible application of the Guidance clearly establish that IUC improperly seeks to process the Ashland 2 material primarily for the recovery of a disposal fee and not to recover uranium.

II.

ISSUE PRESENTED

Whether the Presiding Officer erred in upholding IUC's Ashland 2 license amendment on the basis that the NRC Staff properly applied the Guidance to find that IUC is processing the Ashland 2 material "primarily for its source material content" rather than to receive over \$4,000,000 in disposal fees.

III.

PROCEDURAL HISTORY¹

A. The White Mesa Mill

IUC operates the White Mesa Mill near Blanding, Utah where it mines and processes conventional uranium ores and other types of ores with an acid leaching system and then disposes of the 11e.(2) byproduct material in its tailings impoundment. The NRC has regulated the White Mesa Mill since its construction in 1980 under Source

¹ In addition to the brief procedural history described above, Envirocare adopts and incorporates herein by reference the facts and testimony presented in support of the State of Utah's Brief in Opposition to International Uranium (USA) Corporation's Source Material License Amendment ("the State's Opposition Brief").

Material License SUA-1358. The license covers IUC's receipt and processing of uranium ores, limiting the total production of U₃O₈ to 4380 tons per year, and regulates the disposal and reclamation of the uranium byproduct material in accordance with 10 C.F.R. part 40.

B. IUC's Ashland 2 Material License Amendment Request

On May 8, 1998, IUC submitted a letter request to the NRC for an amendment to its Source Material License SUA-1358 which would allow it to receive, process, and dispose of up to 25,000 tons² of 11e.(2) byproduct material from the Ashland 2 FUSRAP site near Tonawanda, New York.³ Without adequate notice or a public hearing, the NRC granted IUC's license amendment request.

C. The State of Utah's Request for Hearing

On July 23, 1998, the State of Utah filed a Request for Hearing challenging the NRC's decision. The State challenged the amendment primarily on the basis that the NRC Staff had failed to (1) properly apply the NRC's "Final Position and Guidance on the Use of Uranium Mill Feed Material other than Natural Ores," 60 Fed. Reg. 49296 (the "Guidance"), or (2) consider the environmentally hazardous nature of IUC's license amendment request. The Presiding Officer granted the State's Request for Hearing, and on December 7, 1998, the State of Utah filed its written presentation pursuant to

² Although IUC initially represented that it expected to receive a maximum of 25,000 dry tons of material, the record indicates that IUC now expects to receive as much as 45,000 cubic yards. State's Opposition Brief at 2 & n.2.

³ The clean-up of the FUSRAP site is the responsibility of the Army Corps of Engineers.

10 C.F.R. § 2.1233 stating the basis for its opposition to IUC's license amendment. IUC and the NRC Staff filed briefs opposing the relief requested by the State.

D. The Presiding Officer's Initial Decision

On February 9, 1999, the Presiding Officer entered his Initial Decision denying the State of Utah's petition on the basis that IUC's license amendment complied with the terms of the NRC's Guidance. The State of Utah subsequently filed a Petition for Review, challenging the Presiding Officer's interpretation and application of the Guidance. On April 26, 1999, the NRC granted the State's Petition agreeing to review the Presiding Officer's Initial Decision in its entirety, and on May 20, 1999, the NRC granted Envirocare's Motion for Leave to participate in this matter as *amicus curiae*.⁴

IV.

ARGUMENT

The State of Utah challenged IUC's Ashland 2 license amendment on the basis that the NRC Staff failed to properly determine that the NRC's Guidance had been satisfied. Specifically, the State disputed the Staff's finding that IUC intends to process the Ashland 2 material "primarily for its source material content." The Presiding Officer rejected the State's challenge based on an erroneous assumption that if alternate feed material is milled in a uranium mill and any uranium is extracted, the Guidance has been

⁴ By letter dated October 15, 1998, IUC submitted another license amendment request seeking approval to receive, process, and dispose of approximately 30,000 yards of 11e.(2) byproduct material from the Ashland 1 FUSRAP site near Tonawanda, New York. Proceedings relating to that request have been held in abeyance pending the outcome of the State's appeal of the Presiding Officer's Initial Decision. See Presiding Officer's Memorandum & Order (Feb. 19, 1999).

satisfied and sham disposal cannot occur. As demonstrated below, the Presiding Officer's decision fails to properly apply the NRC's Guidance and therefore fails to guard against sham disposals. Moreover, a correct application of the Guidance clearly demonstrates that IUC improperly intends to process the Ashland 2 material for the primary purpose of recovering a disposal fee. Therefore, the Presiding Officer's decision should be reversed and IUC's license amendment should be revoked.

A. The Presiding Officer Committed Reversible Error by Upholding the NRC's Approval of IUC's License Amendment Request Based on an Improper Interpretation of the NRC's Guidance.

1. The Guidance

On September 15, 1995, the NRC published its "Final Position and Guidance on the Use of Uranium Feed Material other than Natural Ores." *See* 60 Fed. Reg. 49,296. To receive NRC approval to process alternate feed materials at a licensed uranium mill, a licensee must demonstrate that the terms of the Guidance have been satisfied.

Specifically, a licensee must show that the alternate feed material

- (1) satisfies the definition of "ore" as articulated in the Guidance,
- (2) does not contain a listed hazardous waste, and
- (3) is being processed primarily for its source-material content.

Id. at 49,296-49,297. While some question has been raised as to whether IUC's license amendment request satisfied the first two requirements, the only issue now before the NRC is whether the Staff had sufficient basis to conclude that IUC would process the Ashland 2 material "primarily for its source-material content."

To demonstrate that material is being processed primarily for its source-material content, either the “co-disposal test” or the “licensee certification and justification test” must be satisfied. Because the NRC Staff has concluded that IUC failed to satisfy the co-disposal test,⁵ IUC must satisfy the requirements of the licensee certification and justification test which requires IUC to

(1) certify under oath “that the feed material is to be processed primarily for the recovery of uranium, and for no other primary purpose.” This is a legal requirement based on the Atomic Energy Act, necessary in order for the government to eventually take title to the tailings, and

(2) justify the certification, with reasonable documentation, based on “financial considerations, the high uranium content of the feed material, or other grounds.”

60 Fed. Reg. 49297 (emphasis added). As described in further detail below, the Presiding Officer failed to determine that IUC presented sufficient certification and documentation to establish that the Ashland 2 material would be “processed primarily for the recovery of uranium, and for no other primary purpose.” Therefore, the Presiding Officer’s decision should be reversed.

2. *The Presiding Officer’s Decision*

In his Initial Decision, the Presiding Officer concluded that IUC successfully demonstrated that it would process the Ashland 2 material primarily for its source-material content. The Presiding Officer reached that conclusion based principally on his

⁵ Although the NRC originally indicated in its Technical Evaluation Report (“TER”) that IUC had satisfied both tests, it withdrew its determination that the Ashland 2 material met the co-disposal test in its Response to the Written Presentations by the State of Utah and International Uranium (USA) Corporation (the “NRC Staff Response”). See NRC Staff Response at 11 & n.11.

finding that IUC had demonstrated that it would process the Ashland 2 material to extract uranium rather than any other substance. *See* LBP-99-5 at 3 (Feb. 9, 1999). In reaching that decision, the Presiding Officer concluded that in applying the licensee certification and justification test the NRC does not consider a licensee's motives. Indeed, the Presiding Officer concluded that if a licensee is likely to actually mill for uranium, the Guidance is satisfied and there is no need for the NRC Staff to make any additional inquiries or evaluations. *Id.* at 3 & 6. Furthermore, the Presiding Officer concluded that "the only 'sham' that stops material from being byproduct material is if it is not actually milled. If [the material] is milled, then it is not a sham." *Id.* at 6 & n.6.

The Presiding Officer's decision cannot withstand scrutiny. The decision misconstrues the plain language of the Guidance, fails to consider the history behind the creating of the Guidance, and ignores the admonitions of the NRC in the case of *UMETCO Minerals Corp.*, 37 N.R.C. 267 (Apr. 12, 1993, as corrected May 4, 1993), wherein the NRC recognized the importance of applying the Guidance to safeguard against sham disposals.

a. The Plain Language of the Guidance Supports the State of Utah's Position.

In determining whether the tailings and waste from the proposed processing of alternate feed material qualifies as 11e.(2) byproduct material, the Guidance requires the NRC Staff to determine whether the processing "is primarily for the source-material content or for the disposal of waste." 60 Fed. Reg. at 49297 (emphasis added). Thus, in

this case, the Guidance required the NRC Staff to evaluate whether IUC intended to process the Ashland 2 material primarily to recover the uranium or to dispose of the waste. In interpreting the Guidance, the Presiding Officer ignored this language.

Although the Guidance clearly requires the NRC Staff to evaluate whether a licensee may be seeking permission to process alternate feed material primarily to dispose of the waste, the Presiding Officer never cites or refers to this important language in his decision.

Furthermore, the rationale behind this requirement is plainly explained in the text of the Guidance itself. Specifically, the Guidance provides:

There is concern that wastes that would have to be disposed of as radioactive or mixed waste would be proposed for processing at a uranium mill primarily to be able to dispose of it in the tailings pile as 11e.(2) byproduct material.

Id. at 49,297. Thus, as evidenced by the Guidance, the NRC recognized that uranium mill licensees may be enticed to process material primarily to be able to dispose of the waste. The Presiding Officer, however, failed to recognize this improper motivation and instead concluded that the term “primarily” “applies to what is removed from the material by the process and not to the motivation for undertaking the process.” LBP-99-5 at 3.

Clearly, the Guidance requires that the NRC consider a licensee’s motive so as to guard against approving sham disposals.

b. The NRC Staff’s Proposed Guidance Supports the State of Utah’s Position.

In addition to failing to give meaning to the Guidance’s plain language, the Presiding Officer’s decision fails to consider the rationale behind the Guidance

requirement that a licensee process material for its source-material content rather than for the opportunity to dispose of the waste in its tailings impoundment. In creating the Guidance, the NRC Staff attempted to balance two potentially conflicting goals. While the Staff wished to give licensees the ability to process waste material in certain limited circumstances, it realized the potential for abuse of a policy that would allow material, that would otherwise have to be disposed of as radioactive waste, to be processed for uranium with the bulk of the material going into the tailings impoundment as 11e.(2) byproduct material. The Staff therefore attempted to prevent “sham disposals” or “sham processing” by requiring a licensee to demonstrate that the alternate feed material would be processed “primarily” to recover source-material content rather than for the opportunity to dispose of the waste. Indeed, in the Staff analysis presented for public comment in association with the development of the Guidance, the Staff addressed the issue of “sham disposals” and the danger of misapplying the Guidance to convert a uranium mill into a low-level radioactive waste disposal site. The Staff explained:

The second significant issue that must be addressed is the potential of converting material that would have to be disposed of as LLW or mixed waste into ore, for processing and disposal of 11e.(2) byproduct material. The possibility of converting such wastes to 11e.(2) byproduct material can be very attractive to owners of such material. This is because of the high cost of disposing of LLW and especially of mixed waste. An owner of such material could pay a mill operator substantially less to process it for its uranium content and dispose of the resulting 11e.(2) byproduct material than to dispose of the material as waste in an appropriate facility.

The proposed definition of ore would include any material from which source material is extracted in a licensed mill and would thus seem to allow such sham disposals. However, the definition of 11e.(2)

byproduct material requires that the ore be processed “. . . primarily for its source material content” and thus would not permit such sham disposals. Material that was processed primarily to convert what would have been LLW or mixed waste into 11e.(2) byproduct material would not meet the definition of 11e.(2) byproduct material.

Uranium Mill Facilities, Request for Public Comments on . . . Guidance on the Use of Uranium Mill Feed Materials Other than Natural Ores, 57 Fed. Reg. 20,525, 20,533 (1992) (the “Proposed Guidance”) (emphasis added).

It is important to note that in his decision, the Presiding Officer complained that the State of Utah inappropriately quoted portions of the above analysis “out of context” in its opposition brief. LBP-99-5 at 7. In fact, the Presiding Officer claimed that the State’s citation to the above analysis was “misleading” because the same Staff analysis “makes it clear that if source material is extracted from a material at a licensed uranium mill, then the material is considered to be ‘ore,’ providing that . . . it is processed so that a useable product, uranium, is extracted from it.” *Id.* at 7-8 (citing 57 Fed. Reg. at 20,532-33). It is the Presiding Officer, however, who fails to recognize the context of the statement from which he draws support. In determining whether the Guidance has been satisfied, the NRC Staff must first ask whether the alternate feed material qualifies as “ore.” The Guidance provides that in making such a determination the following definition of ore may be used:

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.

60 Fed. Reg. at 49,296. The NRC Staff drafted a broad definition so to “exclude[] secondary uranium side-stream recovery operations at mills processing ore for other metals.” Proposed Guidance, 57 Fed. Reg. at 20,532. Thus, alternate feed material will not qualify as “ore” under the Guidance if it is to be processed for substances other than the source material. However, if it is determined that the alternate feed material at issue qualifies as “ore,” then the NRC Staff must determine whether the material is to be processed primarily for its source-material content or for the disposal of waste. To the extent the Presiding Officer interpreted the Guidance to require only a determination of whether material will be processed to recover its source-material content as opposed to another substance, the Presiding Officer failed to recognize the difference between and the significance of the two requirements articulated above.

c. The *UMETCO Minerals* Decision Supports the State of Utah’s Position.

In a previous decision, the NRC addressed concerns related to the application of the Guidance on the use of uranium mill feed materials other than natural ores. *See In the Matter of UMETCO Minerals Corp.* (Source Materials License No. SUA-1358) decided by the Nuclear Regulatory Commission Atomic Safety and Licensing Board, 37 N.R.C. 267 (April 12, 1993, as corrected May 4, 1993). In the *UMETCO* case, the NRC considered claims under the Proposed Guidance relating to *UMETCO’s* “certification” that it was accepting uranium mill tailings to be processed primarily for the recovery of uranium and for no other primary purpose. Specifically, the State of Utah argued that an

obligation rests on the NRC to do something more than merely accept a licensee's certification as to the primary purpose of its processing of feed material, as the Staff has done in the instant case with IUC's request. The NRC recognized the State had raised valid issues and concerns as to whether UMETCO was accepting the material primarily for the purpose of disposal and receipt of a disposal fee and not for the extraction of uranium. 37 N.R.C. at 281. The NRC stated:

The basis for the Staff's contention that economic and processing considerations involved in the UMETCO materials acquisition are outside its purview is not relevant here. In the cases cited in the Staff's Brief, economic issues were rejected as matters for litigation since they are generally considered outside the health and safety domains which constitute the normal regulatory arena for the NRC. Here, however, the matter is one of casting light on the raison d'être of the transaction itself. Without more substantive reasoning, the State's claim for having the transaction walls pierced cannot be easily dismissed. Reviewing some of the particulars of economic matters involved in license transactions is simply one means by which a licensee's intention for obtaining material can be determined. Arguably, this can become a valid area for questioning where a licensee is being paid to receive TWCA's processed waste tailings.

37 N.R.C. at 282 (emphasis added). The NRC went on to say that, "[c]onsequently, the question arises whether a certification, without more, would adequately protect against ulterior motives to dispose of waste." 37 N.R.C. at 283 (emphasis added).

In *UMETCO*, the NRC squarely focused on the application of the Guidance in the very same manner that the State of Utah has requested the NRC in this instance to analyze the Guidance -- that is, by looking at a licensee's motive and asking if the primary purpose of the processing of the alternate feed material is to extract uranium or,

for some other primary purpose, such as waste disposal. The Presiding Officer erred by not heeding the previous instruction of the NRC and should be reversed.

B. The Presiding Officer Failed to Determine that IUC Had Presented Reasonable Documentation to Support its Certification that it Would Process the Ashland 2 Material Primarily for its Source-Material Content.

The Presiding Officer not only erred in his interpretation of the Guidance, but he improperly upheld IUC's license amendment by failing to find that IUC had submitted reasonable documentation to justify its certification that the Ashland 2 material was to be processed primarily for its source-material content and not for the opportunity to dispose of waste. The licensee certification and justification test requires not only a certification by the licensee that it will process the alternate feed material primarily for its source-material content, but the licensee "must justify, with reasonable documentation, the certification," based on "financial considerations, the high uranium content of the feed material, or other grounds." 60 Fed. Reg. 49,297. Because the Presiding Officer failed to determine that the IUC justified its certification with "reasonable documentation," the Presiding Officer's decision must be reversed. Moreover, a review of the record demonstrates that IUC failed to submit such documentation and that the circumstances surrounding IUC's license amendment request support a finding that IUC seeks to process the Ashland 2 material primarily for the recovery of a significant waste disposal fee. Thus, IUC's license amendment must be revoked.

Although IUC has certified under oath that the Ashland 2 material is to be processed primarily for the recovery of uranium, other facts strongly suggest that disposal and not the recovery of uranium is the primary purpose behind IUC's license amendment request. In fact, IUC has represented that it will receive a substantial payment from the Army Corps of Engineers' prime contractor to accept the Ashland 2 materials. These payments greatly exceed the value of the uranium contained within the material.⁶ In fact, the record establishes IUC will receive a fee of \$90 per cubic yard for the 45,000 cubic yards of the Ashland 2 material. Thus, the total fee IUC expects to receive for accepting this material is in excess of \$4.0 million. *See* State of Utah's Opposition Brief at p. 6. Meanwhile, the record indicates that the Ashland 2 material contains between .008% to .058% uranium, and that the gross value from uranium extraction -- which does not take into account the costs for extracting the material -- ranges from \$68,000 to a little more than \$600,000 depending on the actual density of the material and its total uranium content. *See id.* at pp. 6-7.

Moreover, because IUC cannot recover 100% of the uranium nor mill the material at no cost, it is likely that IUC will make little or no profit on extracting uranium from this material. Thus, based on these economic considerations alone, it is abundantly clear that, contrary to both IUC's representations and the NRC Staff's findings, the Ashland 2

⁶ IUC attempts to support its claim that it is processing the Ashland 2 material for the "primary purpose" of "the recovery of uranium" by explaining that the payment it will receive is a "recycling fee" for extracting the uranium. In reality, this payment is a "disposal fee" that is to be paid to IUC for the disposal of the Ashland 2 material, and it constitutes prima facie evidence that IUC wants to perform sham recycling.

material will not be processed by IUC primarily for the recovery of uranium. Instead, the real benefit to IUC for receiving this material is the “fee” that will be paid on behalf of the Corps.

In the instant case, the NRC Staff and the Presiding Officer simply relied on IUC’s “certifications” without any attempt to “protect against ulterior motives to dispose of waste” contrary to the terms of the Guidance and NRC’s admonition in the *UMETCO* case. The NRC Staff’s failure to require detailed characterization data, cost and fee data, and supporting documentation and to perform a meticulous review of such information violates the Guidance and sends a clear message that the Guidance is itself a sham.

V.

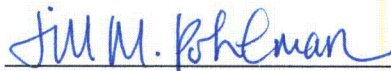
CONCLUSION

The State of Utah challenged IUC’s Ashland 2 license amendment on the basis that the NRC Staff failed to properly determine that IUC intends to process the Ashland 2 material “primarily for its source material content.” The Presiding Officer rejected the State’s challenge based on an erroneous conclusion that if a uranium mill extracts any uranium from alternate feed material, the NRC’s Guidance is satisfied and sham disposal cannot occur. The Presiding Officer’s decision not only ignores the plain language of the Guidance, but it undermines the purpose of the Guidance and the rationale behind its approach. Thus, for all the reasons articulated herein, *amicus curiae* Envirocare

respectfully requests that the NRC reverse the Presiding Officer's Initial Decision and
revoke IUC's Ashland 2 license amendment.

DATED this 24 day of May, 1999.

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I hereby certify that I caused true and complete copies of the foregoing **AMICUS CURIAE BRIEF OF ENVIROCARE OF UTAH, INC. IN SUPPORT OF THE STATE OF UTAH'S APPEAL OF THE PRESIDING OFFICER'S INITIAL DECISION LBP-99-5** in the above-captioned matter to be served, in the manner indicated below, on this 24th day of May, 1999 to:

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