BEFORE THE UNITED STATES NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF INTERNATIONAL URANIUM (USA) CORPORATION (Source Material License Amendment)

Docket No. 40-8681-MLA-4
ASLBP No. 98-748-03-MLA

June 14, 1999

INTERNATIONAL URANIUM (USA) CORPORATION'S REPLY TO THE STATE OF UTAH'S BRIEF ON APPEAL OF LBP-99-5 AND ENVIROCARE OF UTAH, INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THE STATE

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Pursuant to the Commission's Order, CLI-99-13 (April 26, 1999), International Uranium (USA) Corporation ("IUSA") submits this brief in response to the *State of Utah's Brief On Appeal of LBP-99-5* (May 24, 1999) ("*Utah Appeal Brief*") and in response to Envirocare of Utah, Inc.'s ("Envirocare's") *Amicus Curiae Brief . . . In Support of the State of Utah's Appeal of the Presiding Officer's Initial Decision LBP-99-5*, (May 24, 1999) ("*Envirocare Amicus Brief*").[1]

I. INTRODUCTION

IUSA operates the White Mesa uranium mill near Blanding, Utah, (the "Mill") pursuant to a source material license issued by NRC (SUA-1358). This source material license allows IUSA to process at the Mill conventional uranium ores and certain other materials, termed "alternate feeds." Alternate feeds are uranium-bearing materials, other than conventional ores, that are approved by NRC for processing through a licensed mill for the extraction of uranium. *See* 60 Fed. Reg. 49,296 (September 22, 1995). At issue in this appeal is a license amendment that was granted to IUSA on June 23, 1998.[2] This license amendment (hereinafter referred to as the "Ashland 2 Amendment")

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[1] By motion dated May 18, 1999, Envirocare sought leave to file an *amicus curiae* brief in this matter. Contrary to the requirements set forth at 10 C.F.R. § 2.730(a), Envirocare did not serve IUSA with that motion.

[2] *See* letter from J. Holonich, NRC, to M. Rehmann, IUSA, forwarding Amendment 6 to Source Material License SUA-1358, dated June 23, 1998 (hereinafter "*Ashland 2 Amendment Approval Letter*") (Hearing File Document 12). IUSA's

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permitted IUSA to receive and process as an alternate feed at its Mill certain uranium-bearing material from the Ashland 2 site near Tonawanda, New York.[3]

The decision by NRC Staff to grant the Ashland 2 Amendment was made pursuant to the Commission's *Final Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores*, 60 Fed. Reg. 49,296 (September 22, 1995) (the "Guidance").[4] The Guidance establishes four criteria that must be satisfied before materials may be processed at a licensed uranium mill as alternate feed. First, processing the alternate feed (and disposal of the resulting tailings and wastes) must conform with the requirements of 10 C.F.R. Part 40. Second, the alternate feed must not contain any "listed" hazardous wastes (*i.e.*, any wastes listed under the Resource Conservation and Recovery Act ("RCRA") at 40 C.F.R. §§ 261.30-33 or under comparable state law provisions). Third, the alternate feed must qualify as an "ore."[5] And finally, the alternate feed must be "processed primarily for its source material content." 60 Fed. Reg. 49,296-97.

With regard to this last criterion, the Guidance sets out two tests that can be used to determine whether a proposed alternate feed will be "processed primarily for its source material content." The two tests are: (i) the certification and justification test (which, for the sake of

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initial application for the Ashland 2 Amendment was submitted by letter dated May 8, 1998 (Hearing File Document 1). This was supplemented by additional data submissions dated May 27, 1998, May 29, 1998, June 3, 1998, June 11, 1998, and June 12, 1998 (Hearing File Documents 2, 3, 5, 6, 7, and 8).

[3] On August 6, 1998 Utah filed a motion requesting a stay of the effectiveness of the Ashland 2 Amendment. That motion was denied by the Presiding Officer by Order dated August 13, 1998 (LBP-98-19). After the stay request was denied, IUSA proceeded to initiate processing of the material. That processing has recently been completed.

[4] *See Technical Evaluation Report: Request To Receive And Process Ashland 2 FUSRAP Material* ("TER") at 3, attached to *Ashland 2 Amendment Approval Letter*") (Hearing File Document 12).

[5] Consistent with Congress' intent to include a broad range of materials within the scope of the term "ore" (and, thereby, to encompass a wide range of materials within the regulatory program governing the disposal of 11e.(2) byproduct material), *see* discussion at pp. 6-7, *infra*, NRC defines "ore" for purposes of the Guidance to mean: "a natural or native

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simplicity, we will refer to as the "certification test"), and (ii) the co-disposal test. Under the certification test, the licensee must certify that the proposed alternate feed is to be processed *primarily* for its source material content and for no other *primary* purpose, [6] and the licensee must justify this certification with "reasonable" documentation. According to the Guidance, this justification can be based on "financial considerations, the high uranium content of the feed, or other grounds." 60 Fed. Reg. at 49,297. Under the co-disposal test, the Staff evaluates whether a proposed alternate feed could be disposed of directly into the mill's tailings impoundment, consistent with NRC's policy on the disposal of *non*-11.e(2) byproduct material.[7] The *rationale* underlying the co-disposal test is straightforward: if an alternate feed can be disposed of *directly* into a licensed mill tailings impoundment without being processed through the mill first, it can be presumed that a mill operator that processes the feed does so primarily for its source material content. *Id.*

Utah's principal argument on appeal is that the Ashland 2 Amendment does not conform with the requirements of the Guidance. *Utah Appeal Brief* at 7,10. Utah asserts that NRC Staff and the Presiding Officer failed to conduct thorough reviews of the record and relied upon an inadequate record to support their respective decisions. *Id.* at 16-20. According to the State, this error was compounded by the Presiding Officer's misapplication of the Guidance. *Id.* at 8, 10-16. Envirocare

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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 (emphasis added).

[6] The inclusion of the phrase "and no other *primary* purpose" in the Guidance indicates that a licensed uranium mill may legitimately have one or more *secondary* purposes in processing an ore (*e.g.*, to recover other metals such as vanadium or tantalum, or to provide recycling services for a fee), in addition to its *primary* purpose of recovering uranium.

[7] *Final Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments*, 60 Fed. Reg. 49,296 (September 22, 1995) (hereinafter referred to as the "*Non*-11e.(2) Disposal Policy").

in its *amicus* brief amplifies the State's arguments, also asserting that the Presiding Officer failed to correctly apply the Guidance. *Envirocare Amicus Brief* at 5-7.

IUSA's processing of the Ashland 2 material is entirely consistent with the Guidance. Utah and Envirocare rely upon a superficial analysis of the Guidance and a simplistic assessment of the record to conclude otherwise. A more focused analysis of the Guidance and its statutory underpinnings reveals that the decision to approve the Amendment was proper, consistent with the Guidance, and justified by ample evidence in the record.

II. STANDARD OF REVIEW

A presiding officer's decision in a licensing proceeding is ordinarily accorded some degree of deference upon review by the Commission. *See, e.g., In the Matter of Louisiana Energy Services*, Docket No. 70-3070-ML (1998), ("We will not overturn the hearing judges' findings simply because we might have reached a different result." (quoting *General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1)* ALAB-881, 26 NRC 465, 473 (1987)). Even though a presiding officer's decision in a licensing proceeding normally receives some deference, the Commission remains the ultimate fact finder. *See* 10 C.F.R. § 2.770; *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121. Thus, even if it could be demonstrated that the Presiding Officer did not conduct an adequate record review or failed to correctly apply the Guidance, the Commission can now look at the record itself and independently determine whether the issuance of the Ashland 2 Amendment and IUSA's processing of the Ashland 2 material conform with NRC's regulations and the requirements of the Guidance. *Id.*

III. ARGUMENT

A. IUSA's Processing Of The Ashland 2 Material Satisfies The Requirement That An Alternate Feed Be "Processed Primarily For Its Source Material Content"

As the State suggests, the controversy that is now before the Commission is centered on one question: was the Ashland 2 material being "processed primarily for its source material content," as required under the Guidance. *Utah Appeal Brief* at 8; *Envirocare Amicus Brief* at 5. IUSA agrees; this is the central issue to be resolved by the Commission. However, Utah suggests that the Commission need not delve too deeply into this question. Specifically, the State asserts that when answering this question there is no need – indeed, it is improper -- to look to the Atomic Energy Act ("AEA"), as amended by the Uranium Mill Tailings Radiation Control Act ("UMTRCA"), in order to understand fully the meaning of the phrase "processed primarily for its source material content." *Utah Appeal Brief* at 11-12. On this last point, IUSA and the State disagree. The meaning of the phrase "processed primarily for its source material content" as used in the Guidance can be fully understood *only* within the context of UMTRCA, its legislative history, and relevant NRC interpretations of both.

One of the central objectives of UMTRCA was to create under the AEA a comprehensive program for the regulation of tailings and other wastes generated from uranium ore processing activities both at active milling operations and, in particular, after termination of such operations. Pub. Law No. 95-604 at 2(b)(2), 92 Stat. 3022. The key to this regulatory program was a new category of AEA-regulated material, known as 11e.(2) byproduct material, which Congress defined to include the tailings and wastes produced by the extraction of uranium from *any* ore "processed primarily for its source material content." 42 U.S.C. § 2014e.(2). By developing such a broad definition of 11e.(2) byproduct material, Congress sought to ensure that *all* wastes from NRC-licensed uranium milling operations would be regulated under UMTRCA's comprehensive

regulatory scheme, and that none of the wastes from these operations would become orphaned and go unregulated by the Commission. Following a review of UMTRCA's legislative history, the D.C. Circuit concluded:

> It is clear from this exchange [in the legislative history] that the definition of "byproduct material" proposed by [then NRC chairman] Dr. Hendrie and adopted by Congress was designed to extend the NRC's regulatory authority over *all* wastes resulting from the extraction or concentration of source materials in the course of the nuclear fuel cycle.

Kerr McGee v. U.S. Nuclear Regulatory Commission, 903 F.2d 1, 7 (D.C. Cir. 1990).

In order to achieve regulatory control over the wide range of wastes intended to be covered by the definition of 11e.(2) byproduct material, Congress had to ensure that an equally broad range of material would qualify as "ore," so that wastes generated from processing such ore would be covered under UMTRCA's regulatory program. Thus, Congress defined 11e.(2) byproduct material as the tailings and wastes produced by the extraction of uranium from *any* ore. As NRC has noted:

> The fact that the term "any ore" rather than "unrefined and unprocessed ore" is used in the definition of 11e.(2) byproduct material implies that a broader range of feed materials could be processed in a mill, with the wastes still being considered as 11e.(2) byproduct material.

57 Fed. Reg. at 20,532. Because 11e.(2) byproduct material must be derived from ore, the concepts of "ore" and 11e.(2) byproduct material are largely coextensive under UMTRCA.

1. The Meaning Of The Phrase "Processed Primarily For Its Source Material Content" As Used In The Alternate Feed Guidance

The Guidance was developed in order to formalize the considerations the Commission had applied over the years, on an *ad hoc* basis, when evaluating licensee requests to process alternate

feeds.[8] As the Staff succinctly explained, the primary focus of the Guidance is to ensure that a given material will not be approved for use as an alternate feed unless the resulting tailings and wastes qualify as "byproduct material" as defined in AEA Section 11e.(2):

> The purpose of the proposed [alternate feed] guidance is to ensure that processing of alternate feed materials would only be permitted if the resulting wastes meet the definition of 11e.(2) byproduct material.

U.S. NRC, SECY-95-211 (August 15, 1995), Attachment 3 at 18.[9] The Guidance achieves this objective by taking the statutory definition of 11e.(2) byproduct material ("the tailings or wastes produced . . . from any *ore processed primarily for its source material content*"), and incorporating that statutory definition into the criteria used to evaluate potential alternate feeds. [10]

Since the requirement in the Guidance that an alternate feed must be "processed primarily for its source material content," is taken directly from AEA Section 11e.(2), the term "processed primarily for its source material content" as used in the Guidance *must* have the same meaning as in Section 11e.(2) of the AEA; otherwise the Commission's objective of ensuring that tailings and wastes from processing alternate feeds qualify as 11e.(2) byproduct material would not be met.

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[8] *See, e.g.*, 57 Fed. Reg. 20,525, 20,531 (discussing various amendments to the licenses for the Rio Algom and Quivira Mills during the period from 1982 to 1987, that allowed the mills to process alternate feeds).

[9] This document is included with IUSA's *Reply To The State Of Utah's Brief In Opposition To IUSA's Source Material License Amendment 6*, (corrected January 22, 1999) (hereinafter "*IUSA's Reply Brief*") as Exhibit 4.

[10] The Commission explained the need to link the Guidance criteria to the definition of 11e.(2) byproduct material as follows:

> If the alternate feed material does not meet the definition of ore, or is not processed primarily for its source material, there are two concerns. The first is that complicated dual regulation of the tailings pile by both NRC and the Environmental Protection Agency (EPA) under RCRA could result. The second concern is that the requested activity might jeopardize the ultimate transfer of the reclaimed tailings pile to the State or Federal Government for perpetual custody and maintenance [because Section 83 of the AEA only requires the government to take custody of *11e.(2) byproduct material* and the land used for its disposal, and there is no requirement for the government to take custody of material that is *not* 11e.(2) byproduct material].

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Therefore, it is absolutely essential to look to that statutory definition, and the Congressional intent underlying that definition, in order to understand what is meant by the phrase "processed primarily for its source material content' as used in the Guidance.[11]

A review of the legislative history of UMTRCA reveals that Congress used the phrase "processed primarily for its source material content" in the definition of 11e.(2) byproduct material in order to distinguish between ores processed at licensed uranium mills that are part of the nuclear fuel cycle and ores processed in a sidestream process at non-fuel cycle facilities (*e.g.*, at mills processing phosphates, rare earths or other metals). In testimony before Congress prior to the enactment of UMTRCA, then-NRC Chairman Joseph M. Hendrie explained the significance of the phrase "processed *primarily* for its source material content" as used in the definition of "byproduct material" that had been proposed by the Commission and that was ultimately incorporated into AEA Section 11e.(2).

> Dr. Hendrie. [T]he Commission would suggest that the definition of byproduct material in H.R. 13382 be revised to include tailings produced by extraction of uranium or thorium from any *ore processed primarily for its source material content.*
>
> Mr. Dingell. I am curious about why you include in that the word processed primarily for source material content. There are other ores that

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57 Fed. Reg. at 20,531.

[11] In general, an agency may look to the legislative history of the statute it administers to understand the parameters of its regulatory authority. *See, United States v. Riverside Bayview Homes,* 474 U.S. 121, 132 (1985) In addition, where the meaning of the statutory language is unclear, resort to legislative history is also appropriate. *See. Oklahoma v. New Mexico,* 501 U.S. 221, 234 (1991) (citing *Green v. Block Laundry Machine Co.*, 490 U.S. 504, 511 (1989)). The fact that Utah and Envirocare so vigorously disagree with the manner in which the Presiding Officer (and IUSA) interpret the phrase "processed primarily for its source material content" is itself evidence that the meaning of that phrase is not so clear on its face so as to obviate the need to consult the legislative history behind that phrase. Similarly, the State misses the point when it argues that "the Presiding Officer need have looked no further than the third step of the Commission Alternate Feed Guidance which spells out how the 'processed primarily for' test is to be met." *Utah Appeal Brief* at 11-12. The tests in the Guidance are used to confirm that a feed will be processed primarily for its source material content; however, those tests do not define what "processed primarily for" means.

> are being processed that do not contain thorium and uranium in amounts and I assume equal in value to those you are discussing here.
>
> Is there any reason why we ought not give you the same [regulatory] authority with regard to those ores?
>
> Dr. Hendrie. Mr. Chairman, *the intent of the language is to keep NRC's regulatory authority primarily in the field of the nuclear fuel cycle. Not to extend this out into such things as phosphate mining and perhaps even limestone mining which are operations that do disturb the radium-bearing crust of the Earth and produce some exposures but those other activities are not connected with the nuclear fuel cycle.* EPA is looking at those and those appear to me to be things that ought to be left to EPA regulation under the Resource Conservation Recovery Act and general authorities.

Uranium Mill Tailings Radiation Control Act of 1978, Hearings on H.R. 11698, H.R. 12229, H.R. 12938, H.R. 12535, H.R. 13049 and H.R. 13650, Subcomm. On Energy and Power, House Comm. On Interstate and Foreign Commerce, 95th Cong. (hereinafter "*UMTRCA Hearings*") at 343-44 (1978) (emphasis added) (included with *IUSA Reply Brief* as Exhibit 3).

As this excerpt from the legislative history reveals, Congress' inclusion of the phrase "*processed primarily for its source material content*" in the definition of 11e.(2) byproduct material was not intended to distinguish between feed materials based upon, in Congressman Dingell's words, the "amount" or "value" (or the relative profitability) of the source material that might be recovered. Instead, the phrase "*processed primarily for its source material content*" was intended to distinguish between ores processed in facilities that are licensed to be part of the nuclear fuel cycle and ores processed in non-fuel cycle facilities. In other words, Congress wanted to ensure that the comprehensive program it had created in UMTRCA for the management and final disposal of 11e.(2) byproduct material would apply only to tailings and wastes *produced as part of the nuclear fuel cycle*, and that wastes created at non-fuel cycle facilities would not be affected. Thus, feeds processed to recover uranium outside of the nuclear fuel cycle (for example in a *secondary* or

side-stream process at a phosphate recovery operation) are deemed *not* to be processed *primarily* for their source material content, and the tailings and wastes from such processing are not regulated as 11e.(2) byproduct material.[12]

The foregoing discussion reveals that Congress created a *presumption* that ores are "processed primarily for their source material content" so long as they are processed for the extraction of uranium in a licensed uranium mill that is part of the nuclear fuel cycle. Since the phrase "processed primarily for its source material content" must have the same meaning in the Guidance that it has under UMTRCA, the presumption that Congress incorporated into the

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[12] The limited case law in this area also supports the conclusion that an ore is processed *primarily* for its source material content if it is processed for the extraction of uranium at a licensed uranium mill that is part of the nuclear fuel cycle, regardless of the "motivation" of the mill operator. In *Kerr McGee*, the United States Court of Appeals for the District of Columbia was asked to review a decision by NRC regarding the status of wastes produced from the re-processing of tailings that had been generated when an ore was originally milled for its rare earth content. NRC determined that the tailings and wastes from this *re*-processing did not qualify as 11e.(2) byproduct material because source material was not the first (or presumably the most valuable) component for which the ore had been processed, and therefore, the Commission concluded, the ore had not been processed *primarily* for its source material content. The D.C. Circuit rejected this interpretation, finding that Congress had enacted UMTRCA to accomplish two objectives:

> first, to close the gap in NRC regulatory jurisdiction over the nuclear fuel cycle by subjecting uranium and thorium mill tailings to the NRC's licensing authority; and second, to provide a comprehensive regulatory regime for the safe disposal and stabilization of the tailings.

903 F.2d at 7. According to the court, NRC's interpretation would have recreated the regulatory gap Congress sought to close, because under NRC's approach, the determination of whether a waste constitutes 11e.(2) byproduct material would be made "not on the basis of [the material's] physical characteristics or relationship to the nuclear fuel cycle, but solely on the objectives for which the ore is first processed." *Id.*

definition of 11e.(2) byproduct material is also implicit in the Guidance.[13] This understanding was adopted by the Presiding Officer below.[14]

Although the Guidance incorporates the presumption that a material is "processed primarily for its source material content" if it is processed for uranium in a licensed uranium mill, NRC Staff, in developing the Guidance, also recognized that the physical, chemical, and radiological characteristics of alternate feeds may vary considerably in comparison to conventional ores. Thus, to ensure that the presumption under UMTRCA is justified and that a proposed alternate feed will, indeed, be "processed primarily for its source material content" (and the resulting tailings will be 11e.(2) byproduct material) the Guidance sets forth two alternative tests – the certification test and the co-disposal test -- which are used to assess whether it is reasonable to expect that uranium will, in fact, be extracted from the proposed feed (i.e., whether the feed will, indeed, be "processed primarily for its source material content").

2. IUSA's Processing Of The Ashland 2 Material Does Not Implicate An "Improper Motive" And Does Not Raise Concerns Regarding "Sham Disposal"

There is no question that in developing the Alternate Feed Guidance, the Commission and Staff were concerned about the potential for abuse of the Guidance by entities seeking to run inappropriate materials through a uranium mill, solely for the purpose of "converting" such

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[13] In the preamble to the proposed Guidance, the Staff discusses the definition of ore, noting that because ore is defined as being extracted in a licensed uranium mill and is thereby tied to the fuel cycle, "*the extraction of uranium in a licensed mill remains the primary purpose of processing the feed material*" 57 Fed. Reg. at 20,532 (emphasis added). As the Commission explains, this contrasts sharply with materials that are processed in a non-fuel cycle mill "Sometimes the uranium is captured in a side-stream recovery operation . . . . Although this side-stream recovery operation is licensed by NRC, the tailings . . . are not 11e.(2) byproduct material. *This is because the ore was not processed primarily for its source material content, but for the rare earth or other metal.*" *Id.* at 20,527 (emphasis added).

[14] *Initial Decision* at p.3, footnote 4 ("Ordinarily material processed at a nuclear fuel cycle facility would be considered to be processed primarily to remove uranium.").

materials into 11e.(2) byproduct material. This concern is highlighted in the following excerpt from the proposed Guidance:

> 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 as 11e.(2) byproduct material. The possibility of converting such wastes to 11e.(2) byproduct material can be very attractive to owners of such material. . . . Utah officials have already expressed concern over "sham disposal" (i.e., converting a mill into a LLW disposal site).
>
> 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.

57 Fed. Reg. 20,525, 20,533. Based on this language and similar statements elsewhere in the proposed Guidance, Utah and Envirocare have asserted that the "processed primarily for" criterion mandates a sweeping inquiry into the licensee's motivation in seeking to process an alternate feed, focusing on whether the licensee is motivated more by the desire to recover uranium or by the desire to dispose of the resulting tailings. *Utah Appeal Brief* at 9-11, 19-20; *Envirocare Amicus Brief* at 8. In particular, Utah and Envirocare urge an approach that focuses on the *economic* motivation of the licensee by comparing the market value of the uranium recovered from an alternate feed against other values associated with processing the alternate feed (in this particular case, Utah and Envirocare focus on the recycling fee received by IUSA, arguing that because the recycling fee exceeds the value of the uranium expected to be extracted, the material is being

processed "primarily" for the fee and not for the uranium). *Utah Appeal Brief* at 11, 19; *Envirocare Amicus Brief* at 2.[15]

On the issue of economic motivation, Utah and Envirocare are incorrect. UMTRCA's legislative history reveals that Congress did not intend to require an economic or profitability showing in order to demonstrate that an ore is "processed primarily for its source material content" (see discussion at pp. 10-11, *supra*). Moreover, the economic motivation approach advanced by Utah and Envirocare would lead to absurd results. For example, if the determination of whether an ore is being "processed *primarily* for its uranium content" is tied to the relative profitability of extracting the uranium, mills would be put in the untenable position of producing wastes which are regulated as 11e.(2) byproduct material on one day and on the following day producing wastes, from the same ore, which are regulated under a different regulatory regime (*e.g.*, RCRA), solely

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[15] In addition, Envirocare suggests that since "ore" is defined in the Guidance to mean material from which uranium is extracted in a licensed mill, the requirement that an ore be "processed primarily for its source material content" must mean something more than the processing of ore for its uranium content in a licensed mill (i.e., it must imply some inquiry into motive). *Envirocare Amicus Brief* at 10-11. In support of this analysis, Envirocare quotes from the proposed Guidance, although it quotes out of context. The passage that Envirocare relies upon addresses the definition of "ore" (i.e., "any matter from which source material is extracted in a licensed uranium mill"). The full context of the language Envirocare relies upon is as follows:

> The definition [of ore] continues to be tied to the nuclear fuel cycle. *Because the extraction of uranium in a licensed mill remains the primary purpose of processing the feed material, it excludes secondary uranium side-stream recovery operations at mills processing ores for other metals.* Thus, tailings from such side-stream operations at facilities that are not licensed as uranium or thorium mills would not meet the definition of 11e.(2) byproduct material.

57 Fed. Reg. at 20,532 (emphasis added). In other words, as discussed previously (*see* p. 7, *supra*), the concepts of 11e.(2) byproduct material and "ore" are largely coextensive. The concept of ore defines a material from which uranium *can* be extracted in a licensed mill. In addition, the Guidance incorporates a "processed primarily for" requirement to ensure that uranium *will*, in fact, be extracted from the ore so that the resulting tailings and wastes qualify as 11e.(2) byproduct material. See discussion at p. 11, *infra*. However, the concept of "ore" together with the concept of "processed primarily for" in the Guidance *must* have the same meaning as the phrase "any ore processed primarily for its source material content" as used in the AEA. The interpretation urged by Envirocare ignores the legislative history underlying the phrase "processed primarily for" by inferring an inquiry into motivation that Congress never intended. Envirocare effectively asserts that the phrase "processed primarily for" means something different in the Guidance than it does in the AEA. Given that the Guidance *must* conform to the statute, Envirocare's interpretation cannot be correct.

because of fluctuations in the market price of uranium (and corresponding shifts in the relative profitability of extracting uranium).[16]

Similarly, it is clear that when Congress used the phrase "processed primarily for its source material content" it did not intend to prescribe a minimum percentage of uranium that must be present in an ore. Indeed, the opposite is true: Congress intended to include within the scope of 11e.(2) byproduct material *all* tailings and wastes from processing ores for their uranium content at a licensed uranium mill, *regardless* of the concentration of uranium contained in the ore.[17]

Both Utah and Envirocare ignore the central fact that the criterion in the Guidance that must be satisfied is that "the [alternate feed] ore *must be processed primarily for its source material content.*" 60 Fed. Reg. 49,296, 49,297. As we have demonstrated, this phrase *must* have the same meaning that Congress intended in Section 11e.(2) of the AEA. Congress created a presumption

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[16] It is equally absurd to suggest that whether or not an ore is deemed to be "processed primarily for its source material content" could depend on how high a fee a licensee is able to negotiate for recycling an alternate feed, and whether that fee exceeds the value of uranium extracted. In addition, a relative profitability inquiry ignores years of precedent, since historically, licensed uranium mills processing conventional ores have recovered other minerals – such as vanadium -- as part of *secondary* or *side-stream* operations, and in the past, the value and relative profitability of those other minerals (e.g., vanadium) has exceeded the value of uranium recovered. However, neither NRC nor, as far as we are aware, the State has *ever* suggested that uranium ore processed under such circumstances is not being processed *primarily* for its source material content. In short, it is difficult to imagine that Congress or NRC would have intended to link the determination of whether a material qualifies as 11e.(2) byproduct material (*i.e.*, whether a feed material is processed *primarily* for its source material content) to something so ephemeral as the relative profitability of the uranium produced from the processed feed material.

[17] This intent is evident from the testimony that Chairman Hendrie offered to Congress prior to the enactment of UMTRCA, where he suggested that Congress modify the definition of 11e.(2) byproduct material specifically to accommodate tailings and wastes generated from the processing of ores containing less than 0.05% uranium.

> The Commission is informed that there are a few mills currently using feedstock of less than 0.05-percent uranium. As high-grade ores become scarcer, there may be a greater incentive in the future to turn to such low grade materials.
>
> *Since such operations should be covered by any regulatory regime over mill tailings,* the Commission would suggest that the definition of byproduct material in H.R. 13382 be revised to include tailings produced by extraction of uranium or thorium from *any* ore processed primarily for its source material content.

UMTRCA Hearings at 343 (emphasis added). Clearly, Congress did not consider uranium concentrations of 0.05% to be "de minimis" for purposes of the "processed primarily" determination, as Utah asserts. *See Utah Appeal Brief* at 22.

that ores that are processed in a licensed uranium mill for the extraction of uranium are processed primarily for their source material content. Therefore, when evaluating whether a licensed mill will be processing an alternate feed "primarily for its source material content" the *only* question to be answered is whether it is reasonable to expect that the ore will, *in fact*, be processed for the extraction of uranium. That is the function of the certification and co-disposal tests -- to ensure that a proposed alternate feed material will, in fact, be processed for the recovery of uranium. So long as these tests indicate that it is reasonable to expect that uranium will be extracted from a proposed feed, then the "processed primarily for" criterion is satisfied.[18] This is consistent with the reasoning the Presiding Officer applied when he concluded that IUSA's processing of the Ashland 2 material does not implicate "sham disposal" because "it is reasonable to predict that the milling will actually occur." *Initial Decision* at 6.

As discussed earlier (*see* p. 11, footnote 14, *supra*), NRC Staff has acknowledged that the *primary purpose* for processing a feed material in a licensed uranium mill is to extract uranium. Thus, there can be no "improper" motive or "sham disposal" associated with processing an ore through a licensed mill, provided that it is reasonable to expect that uranium will, in fact, be extracted. However, if it is not reasonable to expect that uranium will be extracted from an alternate feed (and, therefore, the resulting tailings may not qualify as 11e.(2) byproduct material), then the presumption that the feed will be processed *primarily* for its uranium content would not be satisfied and processing of the feed should not be permitted. This is what the Commission contemplated as "sham disposal" within the context of the Guidance:

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[18] This discussion assumes that the tests are applied prospectively – i.e., prior to processing an alternate feed. By contrast, if an alternate feed transaction is examined after processing has occurred and the evidence shows that uranium was, in fact, extracted from the feed then the inquiry into whether the feed was "processed primarily for its source

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> For the tailings and wastes from the proposed processing to qualify as 11e.(2) byproduct material, the ore must be processed primarily for its source-material content. 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. In determining whether the proposed processing is primarily for the source-material content or for the disposal of waste, either of the following tests can be used [the policy then describes the co-disposal test and the certification test]

60 Fed. Reg. at 49,297 (emphasis added). If it is not reasonable to expect that uranium will be extracted from an alternate feed and in fact uranium is not extracted, the tailings will not qualify as 11e.(2) byproduct material and hence *would have to be disposed* of as radioactive or mixed waste. However, if it is reasonable to expect that uranium will be extracted from a feed, in which case the resulting tailings will meet the statutory definition of 11e.(2) byproduct material, the feed can be processed at the mill and *need not be disposed of* as a radioactive or mixed waste.

Thus, "sham disposal" occurs when a mill processes a feed material even though it is not reasonable to expect that uranium can be extracted from such material, and, in fact, no uranium is extracted. This is because the tailings would not be 11e.(2) byproduct material and therefore could not be disposed of in an 11e.(2) disposal facility. Under such circumstances processing the material through a uranium mill would be considered a "sham" and the tailings would have to be disposed of elsewhere. It would also be "sham disposal" if it was reasonable to expect that uranium would be extracted from a proposed feed but a good faith effort was not made and no uranium was in fact recovered. These are the *only* situations that could constitute "sham disposal" under the Guidance

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Footnote continued from previous page

material content" can stop. There is no need to look further to determine whether, *prior* to processing, it would have been reasonable to expect that uranium would be extracted.

because they are the only circumstances where the resulting tailings would not constitute 11e.(2) byproduct material. [19]

Accordingly, to the extent that an inquiry into a mill operator's "motivation" is relevant in assessing whether a feed material is "processed primarily for its source material content," it is relevant only insofar as it reveals whether it is reasonable to expect that uranium will be extracted.[20] If the certification or co-disposal tests indicate that a mill operator is "motivated" by the desire to process through the mill material from which it is not reasonable to expect that uranium will be extracted, then a basis exists for concluding that the "processed primarily for" criterion is *not* satisfied. Under such circumstances it would be appropriate to reject a request to process an alternate feed.

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[19] Some examples of proposed alternate feed materials from which it may not be reasonable to expect that uranium will be extracted include: (a) Alternate feeds that may be high in other radionuclides, such as radium or thorium, but that do not contain uranium; (b) Alternate feeds that do not contain any uranium that processing can separate from various contaminants or other metals in the feed materials; and (c) Alternate feed materials where there are not adequate considerations (*e.g.*, financial, uranium content, contractual obligations, or any other considerations) that would make it reasonable to expect that the mill operator will make a good faith effort to extract uranium by processing the material through the mill.

[20] Envirocare relies on the presiding officer's decision in *In the Matter of Umetco Minerals Corp.*, 37 N.R.C. 267 (May 4, 1997) to support its position that the "processed primarily" criterion requires a broad inquiry into the motives of the mill operator to determine whether the processing of a feed material is motivated more by the desire to extract uranium or by the desire to dispose of the resulting tailings. *Envirocare Amicus Brief* at 12-13. Envirocare's reliance on the opinion in *Umetco* is misplaced. First, although the presiding officer does *suggest* that an inquiry into the "raison d'etre" of an alternate feed transaction might be warranted, there is no indication that the presiding officer contemplated the kind of sweeping inquiry advocated by Envirocare as opposed to the more limited inquiry outlined above. Moreover, it must be borne in mind that the presiding officer's discussion of "motivation" in the *Umetco* case was *dicta* and therefore without binding precedential value. Finally, Envirocare's interpretation should be contrasted with the opinion of the D.C. Circuit Court of Appeals in the *Kerr McGee* case, where the court rejected NRC's determination of whether a material was "processed primarily for its source material content" because that determination was made "not on the basis of [the material's] physical characteristics or relationship to the nuclear fuel cycle, but solely on the objectives for which the ore is first processed." 903 F.2d at 7.

3. There Is Ample Evidence In The Record To Support The Conclusion That The Ashland 2 Material Was To Be Processed "Primarily For Its Source Material Content"

A licensee must justify its certification with "reasonable" documentation, which can be based on "financial considerations, the high uranium content of the feed material, or other grounds." 60 Fed. Reg. at 49,297. As discussed above, this test is intended to demonstrate that, prior to processing an alternate feed, it is reasonable to expect that uranium will, in fact, be extracted from the proposed feed. After an alternate feed has already been processed, the inquiry can focus on whether uranium was in fact extracted from the feed, since, if uranium was indeed extracted, the definition of "processed primarily for its source material content" is satisfied.

a. The Record Contains Sufficient Evidence To Justify IUSA's Certification On Financial Grounds

In its amendment application, IUSA provided considerable evidence to support the conclusion that IUSA would receive a *substantial* economic benefit from processing the Ashland 2 material, based upon increased efficiencies in running the Mill and similar considerations.[21]. In addition, even the State has acknowledged that, based upon what was known at the time of the amendment application it was expected that the value of the uranium to be recovered from the Ashland 2 material, on its own, could total as much as $600,000 or more. *See State of Utah's Brief In Opposition to [IUSA's] Source Material License Amendment* (December 7, 1988) (hereinafter "Utah Opposition Brief") at 8, citing *Herbert Testimony* at 8. Moreover, IUSA committed contractually to process the Ashland 2 material to recover uranium, in consideration of receiving a recycling fee, and IUSA had agreed to rebate a portion of the recycling fee to USACE depending on uranium content of the Ashland 2 material. *See IUSA Reply Brief* at 50-51. These considerations

[21] *See Letter from M. Rehmann, IUSA, to J. Holonich, NRC, forwarding Application for Amendment to Source Material License SUA-1358, dated May 8, 1998* (Hearing File Document 1)

establish a reasonable expectation that uranium would, in fact, be recovered from the Ashland 2 material; therefore it was appropriate for the Staff to conclude that the "processed primarily for" criterion in the Guidance had been satisfied.

b. The Record Contains Sufficient Evidence To Justify IUSA's Certification On The Basis Of High Uranium Content

Since IUSA's certification was adequately justified on the basis of financial considerations, no further justification is required in order to satisfy the Guidance's certification test. However, the uranium content of the Ashland 2 material provides a *second, independent* basis for justifying IUSA's certification.

Although the Guidance does not define the phrase "high uranium content," at least two meanings are possible. The term may refer to the total *quantity* of uranium present in an alternate feed, or it may refer to the *concentration* of uranium found in an ore. The record contains sufficient evidence to support the conclusion that the Ashland 2 material being processed by IUSA would yield a substantial quantity of uranium -- between roughly 8,000 to 70,000 pounds of uranium -- even though the average concentration of uranium in the Ashland 2 material might not be characterized as "high." *See IUSA Reply Brief* at 52-54; Herbert Testimony at 7-8.[22] It is well within NRC's discretion to conclude that the ability to recover such a substantial quantity of uranium from the Ashland 2 material indicates that the material has a "high" uranium content.

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[22] The State complains that the Presiding Officer's decision would allow an alternate feed to be processed for the recovery of "minute" quantities of source material. *Utah Appeal Brief* at 10; *see also Envirocare Amicus Brief* at 4. That argument is a red herring. The facts of this case demonstrate that it was reasonable to expect that between 8,000 to 70,000 pounds of uranium would be extracted from the Ashland 2 material. This quantity of uranium could hardly be characterized as "minute." Moreover, in the hypothetical situation posited by the State, where only a truly "minute" total quantity of uranium could be extracted from an alternate feed, arguably there would be no "reasonable expectation" of recovering uranium, in which case the material should not be processed as an alternate feed.

c. *The Record Contains Sufficient Evidence To Justify IUSA's Certification On The Basis Of "Other Grounds"*

Under the Guidance, a licensee's certification can be justified "based on . . . *[any] other grounds*." 60 Fed. Reg. at 49,297 (emphasis added). There are several "other grounds" that support the conclusion that the Ashland 2 material satisfies the "processed primarily for" criterion. First, processing the Ashland 2 material recycles substantial quantities of a valuable material. Recovering and recycling a substantial quantity of uranium is an important benefit.[23] Second, by recovering uranium from the Ashland 2 material, IUSA's processing makes the material less radioactive, thereby reducing the radiological hazards associated with its ultimate disposition. Third, recycling the Ashland 2 material benefits the public, by allowing the FUSRAP program to reduce its inventories of unwanted materials and accomplish clean-up in a manner that is environmentally sound and cost efficient. Fourth, through its processing of the Ashland 2 material IUSA has, in fact, extracted a substantial amount of uranium – approximately 8,000 pounds. *See Affidavit of Harold R. Roberts*, attached. As explained above, this fact, alone, is sufficient to demonstrate that the Ashland 2 material was "processed primarily for its source material content," given the meaning that Congress intended for that phrase.

Finally, the Ashland 2 material qualified as 11e.(2) byproduct material without being processed through the Mill. Indeed, NRC has stated with respect to the Ashland 2 material that:

> Based on DOE's characterization [of the Ashland 2 material as being 11e.(2) byproduct material], USACE could have opted to remediate the [Ashland 2] site by disposing of the material in question *directly into a*

[23] As EPA has noted, recycling can be legitimate and beneficial even if it is not profitable. *See generally*, 63 Fed. Reg. at 28,556. Indeed in the RCRA context EPA specifically declined to adopt an economic test or a minimum concentration requirement for determining whether wastes are being processed to recover their mineral content or for sham recycling purposes. *See* 63 Fed. Reg. at 28,587; *IUSA Reply Brief* at 28.

> *mill tailings impoundment* authorized to take material other than that generated as part of milling operations. . .[24]

Thus, IUSA's processing of the Ashland 2 material satisfies the *rationale* underlying the co-disposal test – under which an alternate feed is presumed to be "processed primarily for its source material content" if the feed would be approved for direct disposal in a licensed mill tailings impoundment consistent with NRC's *Non*-11e.(2) Disposal Policy. 60 Fed. Reg. at 49,297. The *rationale* behind the test is that a licensee who processes a feed material that could simply be disposed of, for a fee, *directly* into a licensed mill tailings impoundment can be presumed to be processing the feed material primarily for its source material content.

NRC Staff has noted that the co-disposal test is technically inapplicable to the Ashland 2 material because the test only applies to *non-11e.(2) byproduct material.* Nevertheless, as 11e.(2) byproduct material, the Ashland 2 material could have been disposed of directly in the Mill's tailings impoundment with an appropriate NRC license amendment. This satisfies the *rationale* underlying the co-disposal test. Therefore, as the Staff concluded, the fact that the Ashland 2 material was 11e.(2) byproduct material constitutes one "other ground" that adequately justifies IUSA's certification.[25]

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[24] Letter from Richard L. Bangart, Office of State Programs, to Paul J. Merges, Director, Bureau of Pesticides and Radiation [New York Department of Environmental Conservation] (Sept. 15, 1998) at 2 (Included with *IUSA Reply Brief* as Exhibit 8.).

[25] See NRC Staff Response to Written Presentations by State of Utah and [IUSA] (January 29, 1999) (hereinafter "NRC Staff Brief") at 10-11, footnote 11 and attached Affidavit of Joseph J. Holonich (January 29, 1999)(Holonich Affidavit) at 7-8. In his affidavit, Holonich notes that the two federal agencies responsible for administering the Ashland 2 site and its remediation, USACE and DOE, had determined that the Ashland 2 material constituted 11e.(2) byproduct material. Holonich then goes on to state that ("because of its classification [as 11e.(2) byproduct material] the Ashland 2 material could be placed directly in the [Mill] tailings impoundment . . . This direct disposal test clearly satisfies the 'other grounds' test given in criterion 3(b) of the [Guidance]. In addition, the direct disposal test . . . is consistent with the *rationale* underlying the co-disposal test in the Alternate Feed Guidance.") (emphasis added). Given the fact that the Ashland 2 material is 11e.(2) byproduct material, the State's assertion that IUSA is motivated by a desire to "change the classification of the material to allow disposal into the mill's tailings impoundment" (Utah Appeal Brief at 2) is

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B. IUSA's License Amendment is Based Upon an Adequate Record Review.

Utah asserts that the Staff's review of the amendment application and the record was inadequate, although the State fails to develop this argument beyond asserting that the Staff's hazardous waste determination was flawed and that the time spent by the Staff in reviewing the amendment application was "scanty." *Utah Brief* at 16. The State is incorrect.

It is surprising that the State holds up the Staff's listed hazardous waste determination as an example of inadequate record review, since Utah agreed to withdraw that issue from consideration by the Presiding Officer after data supplied by IUSA at Utah's request demonstrated the validity of the Staff's earlier conclusion.[26] In any event, the Staff's review of the record with respect to the listed waste issue was adequate.[27] In addition, the adequacy of the Staff's review is not measured quantitatively, by how much time the staff took, rather a qualitative review is what is required. *See e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 534 (1977). Moreover, the review period for the amendment request was not unusual.[28] Finally, even assuming *arguendo* that

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erroneous, since as just discussed, the material could have been disposed of directly in the Mill's tailings impoundment without any processing to recover uranium.

[26] Letter from Fred Nelson and Frederick S. Phillips to Peter B. Bloch, Esq. (Oct. 26, 1998) (Attached to *IUSA Reply Brief* as Exhibit 9.

[27] For example, the Remedial Investigation report ("RI") reflects the efforts of Bechtel, a DOE contractor, to identify and report sources of potential RCRA listed hazardous contaminants at the Ashland 2 site. *See* RI at 1-26. In addition, NRC Staff reviewed the Radioactive Waste Profile Record (EC-0230) Soil/Building ("Radioactive Waste Profile") which states:

> Bechtel has no reason to believe, after historical research, personal interviews, and physical inspection, that any of this waste stream contains any amount of *listed* waste. Furthermore there have been no spills of *listed* waste into this stream, none of this waste has been generated as a result of the treatment, storage or disposal of a *listed* hazardous waste, and no waste has been mixed with, or is contained in, or commingled with this waste stream.

Radioactive Waste Profile at Attachment 1.

[28] See *Holonich Affidavit* at 11 indicating that the review period for the Ashland 2 amendment was not unusual and depended upon the adequacy of the information submitted by IUSA.

the Staff's determination to grant the amendment was based on an inadequate review, the Commission can conduct its own review of the record and determine that the license amendment was properly issued. 10 C.F.R. § 2.770; *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121.

C. The Presiding Officer Correctly Applied The Alternate Feed Guidance

Utah and Envirocare argue that the Presiding Officer failed to properly apply the Guidance. *Utah Appeal Brief* at 9-15, *Envirocare Amicus Brief* at 6, 8, 11, 13. The Presiding Officer applied the Guidance in a manner that is consistent with the interpretation IUSA has outlined in this brief. *See, e.g.*, p. 11, footnote 15; p. 15, *supra.* However, to the extent the Commission concludes that the Presiding Officer did *not* correctly apply the Guidance, the Commission can rectify that error by applying the Guidance to the record now before the Commission. *Curators of the University of Missouri*, CLI-95-1, 41 NRC at 121.

D. The Adverse Consequences Posited By The State Will Not Occur

Utah makes a number of broad and unsubstantiated allegations regarding the adverse consequences that would flow from the Presiding Officer's interpretation of the Alternate Feed Guidance. *Utah Appeal Brief* at 20-21. One such assertion is that the Presiding Officer's decision would provide mills with "unbridled discretion" to take various types of materials regulated under other statutes and to place those materials into a mill tailings impoundment where they will be under inadequate control. *Id.* This argument is spurious. Under the Guidance, a licensee can obtain approval to process an alternate feed only upon demonstrating: (i) that the alternate feed does not contain a listed hazardous waste; (ii) that processing the alternate feed will not compromise the mill's ability to satisfy the requirements of 10 C.F.R. Part 40; and (iii) that it is reasonable to expect that uranium will be recovered. Similarly, Utah's assertion that the Presiding Officer's decision

allows uranium mills to be turned into waste disposal sites ignores the fundamental fact that, as NRC has itself noted, "each mill tailings pile constitutes a low-level waste burial site containing long-lived radioactive materials" 44 Fed. Reg. 50,015, 50,018 (1979).[29] Further, the State's suggestion that tailings and wastes generated from alternate feeds will not be subject to adequate controls is without merit. These tailings are subject to the health-based standards set out in NRC's regulations at 10 C.F.R. Part 40, Appendix A and EPA's regulations at 40 C.F.R. Part 192, just like any other 11e.(2) byproduct material produced from the extraction of uranium in a licensed uranium mill.[30]

IV. CONCLUSION

Contrary to the State's assertions, the Presiding Officer below did not discard the Guidance in upholding the Ashland 2 Amendment. *Utah Appeal Brief* at 14. IUSA believes that approval of the Ashland 2 Amendment is entirely consistent with the Guidance. However, repeated challenges

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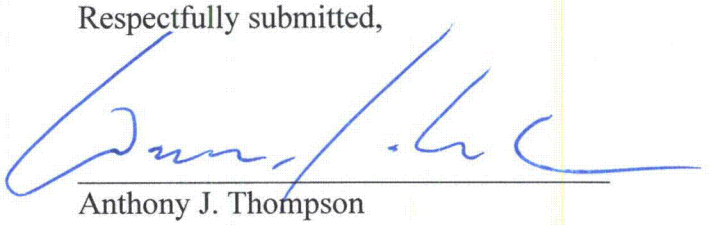
[29] The State's suggestion that 10 C.F.R. Part 61 is more protective than 10 C.F.R. Part 40 makes no sense. *Utah Appeal Brief* at 13. In the first place, the two sets of regulations are intended to address different types of materials. Part 40 is specifically intended to address the disposal and management of wastes produced from milling operations; Part 61 is intended to address wastes that include different radionuclides in various waste forms. Although 10,000 year exposure horizons are evaluated in the Part 61 rulemaking, similar regulatory horizons were evaluated with respect to the management and permanent disposal of 11e.(2) byproduct material under Part 40, but were rejected. *See, e.g., USNRC, Final Generic Environmental Impact Statement on Uranium Milling (NUREG G706) Vol. I at 39, Vol. II at A-57 to 58.* On the other hand, Part 40 requires 11e.(2) byproduct material to be disposed of in a manner that provides reasonable assurance of protection for 1,000 years, to the extent reasonably achievable, and in any event no less than 200 years. 10 C.F.R. Part 40, Appendix A, Criterion 6. By contrast, Part 61 requires that site suitability should be maintained over a minimum period of only 500 years, and that waste forms must be designed for stability over a period of only 300 years. 10 C.F.R. §§ 61.7(a)(2); 61.7(b)(2). It is significant also that Utah has *waived* the requirement for a long term government custodian for Part 61 facilities, while the requirement for a long term government custodian is mandatory under UMTRCA. *See* 42 U.S.C. § 2113.

[30] Utah asserts that the regulations in 10 C.F.R. Part 40 do not incorporate RCRA standards for hazardous wastes and are not as protective as those established under RCRA. *Utah Appeal Brief* at 13. Utah's argument misses the mark. In the first place, Section 275 of the AEA requires EPA to promulgate standards of general applicability governing 11e.(2) byproduct material which are to offer protection equivalent to that provided under RCRA. EPA has issued these standards. *See* 42 U.S.C. § 2022; 60 Fed. Reg. 2,854 (1995) and 48 Fed. Reg. 45,926 (1983). EPA's regulations at 40 C.F.R. Part 192 expressly incorporate the design and groundwater protection standards established under RCRA. *See, e.g.,* 40 C.F.R. § 192.32. NRC has conformed its uranium mill tailings regulations to those established by EPA. *See* 42 U.S.C. § 2114; *Holonich Affidavit* at 10. Indeed, Criterion 5 in Appendix A of 10 C.F.R. Part 40 expressly incorporates the standards contained in 40 C.F.R. Part 192 – including the RCRA standards that are incorporated into that Part.

to IUSA's license amendments authorizing the processing of alternate feeds, and repeated litigation over the Staff's application of the Guidance, suggest that clarification of the Guidance may be warranted. By its decision in this matter, the Commission could eliminate much of the current uncertainty regarding proper application of the Policy, and end the waste of resources involved in repeated litigation of these issues.

Based on all of the arguments presented above, IUSA urges the Commission to *affirm* the Presiding Officer's decision finding that the Ashland 2 Amendment was appropriately granted, in conformance with NRC's regulations and guidance. In addition, IUSA asks the Commission to confirm that for purposes of the Guidance: (i) the relative value of uranium recovered from an alternate feed material and motivation of the applicant are irrelevant in determining whether the feed is "processed primarily for its source material content;" (ii) an alternate feed is presumed to be "processed primarily for its source material content" for purposes of the Guidance if it is processed in a licensed uranium mill and it is reasonable to expect, based on financial considerations, uranium content or any other considerations (such as contractual commitments or fees for processing) that uranium will be extracted from the material; (iii) processing an alternate feed through a licensed mill will constitute "sham" disposal only if it is not reasonable to expect that uranium will be extracted from a proposed alternate feed and no uranium is extracted (or if it is reasonable to expect that uranium will be extracted but a good faith effort to extract uranium is not made and no uranium is extracted); and (iv) alternate feeds that are 11e.(2) byproduct material will, by definition, satisfy the "other grounds" justification in the Guidance's certification test.

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 (USA)	*	Docket No. 40-8681-MLA-4
CORPORATION	*	ASLBP No. 98-748-03-MLA
(Source Material License Amendment)	*	JUNE 14, 1999
	*	

AFFIDAVIT OF HAROLD R. ROBERTS

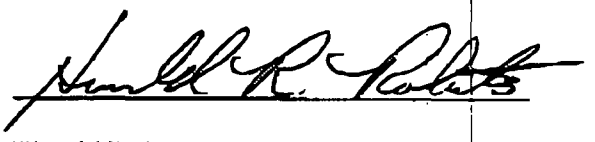
I, Harold R. Roberts, do solemnly state as follows:

1. I am the Executive Vice President of International Uranium (USA) Corporation ("IUSA"). I have held this position or a similar position in management or engineering for over 18 years in this company or its predecessor and have been employed by IUSA for 2 years. I am in charge of the daily operation of IUSA's White Mesa Mill in Blanding, Utah (the "Mill").

2. Approximately 8,000 pounds of uranium has been extracted from the Ashland 2 materials, as a result of processing of those materials at the Mill, some of which uranium has been dried and packaged as of this date and the remainder of which remains in the Mill circuit in solution and will continue to be recovered during the continued processing of other alternate feed materials and conventional ores at the Mill.

Further Affiant Sayeth Not.

I declare, under penalty of perjury, that the foregoing is true and correct.



Harold R. Roberts

dated this 14th day of June, 1999, at Blanding, Utah.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF INTERNATIONAL URANIUM (USA) CORPORATION (Source Material License Amendment)

Docket No. 40-8681-MLA-4
ASLBP No. 98-748-03-MLA
June 14, 1998

CERTIFICATE OF SERVICE

I hereby certify that I caused true and complete copies of the foregoing INTERNATIONAL URANIUM (USA) CORPORATION'S ("IUSA'S") REPLY TO THE STATE OF UTAH'S BRIEF ON APPEAL OF LBP-99-5 AND ENVIROCARE OF UTAH, INC.'S *AMICUS CURIAE* BRIEF IN SUPPORT OF THE STATE in the above-captioned matter to be served, via facsimile, first class mail, and e-mail on this 14th day of June, 1999 to:

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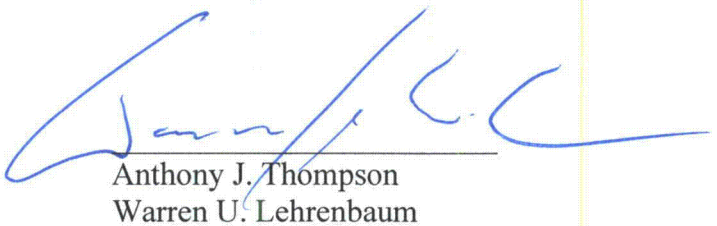

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