19824

December 18, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	
INTERNATIONAL URANIUM (USA) CORPORATION	)	Docket No. 40-8681-MLA-5
	)	
	)	
(Request for Material License Amendment)	)	
	)	

NRC STAFF OPPOSITION TO
REQUEST FOR HEARING BY ENVIROCARE OF UTAH, INC.

INTRODUCTION

On November 3, 1998, the NRC published in the *Federal Register* a notice of receipt of an application by International Uranium (USA) Corporation (IUSA or Licensee) to amend Source Material License No. SUA-1358 to allow IUSA to process at its White Mesa mill, uranium-bearing material received from the Ashland 1 and Seaway Area D Formerly Utilized Sites Remedial Action Program (FUSRAP) sites, near Tonawanda, New York. 63 Fed. Reg. 59340 (November 3, 1998). The notice indicated (1) that the sites are currently being remediated by the U.S. Army Corps of Engineers and are associated with uranium ore processing activities conducted by the Manhattan Engineering District during the mid-1940s, (2) that IUSA expects that approximately 25,000 to 30,000 cubic yards of material with an average uranium content of approximately 0.06 weight percent uranium would be shipped over a three-to-four month period to White Mesa, and (3) that Staff guidance addresses requests for processing alternate feed materials. *Id.* The notice also provided that any person whose

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interest may be affected by this proceeding may file a request for a hearing, in accordance with 10 C.F.R. § 2.1205(c) [sic: (d)] [1] within thirty days of the notice.

On December 3, 1998, Envirocare of Utah, Inc. (Envirocare), Envirocare, a Utah corporation licensed in the business of operating a waste disposal facility in Clive, Utah, and licensed by the NRC to receive and dispose of uranium and thorium by product material (as defined in section 11e.(2) of the Atomic Energy Act (AEA), as amended, 42 U.S.C. § 2011 *et seq.*), filed a timely request for hearing pursuant to 10 C.F.R. § 2.1205. Request for Hearing of Envirocare of Utah, Inc., dated December 3, 1998 (Petition), at 1-3. For the reasons set forth below, the Staff opposes the Petition as Envirocare lacks standing to intervene in this proceeding.

BACKGROUND

Operation of the White Mesa uranium mill is authorized by an NRC source material license issued under 10 CFR Part 40, which allows IUSA to process natural uranium ore and certain other materials for their uranium content and to possess the waste generated from such milling operations. The NRC prepared an environmental impact statement and issued the license for the White Mesa mill in 1979, and renewed the license in 1985 and again in 1997.[2]

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[1]Paragraph (c) of 10 C.F.R. § 2.1205 pertains to noticing Part 50 license amendments.

[2]*See* Letter from R. Scarano, NRC, to R. Adams, Energy Fuels Nuclear, Inc, dated August 7, 1979 (transmitting Source Materials License SUA-1358); Final Environmental Statement related to operation of White Mesa Uranium Project, dated May 1979 (FES); Letter from R. Smith, NRC, to UMETCO Minerals Corporation, dated September 26, 1985; Letter from J. Holonich, NRC, to H. Roberts, IUSA, dated March 14, 1997.

Wastes generated by operations at the White Mesa mill are disposed onsite in impoundments (with natural and synthetic liners) that are designed and constructed to minimize seepage of tailing fluids into the subsurface soil, surface water, and ground water, and the impoundments have a leak detection system that is monitored daily. *International Uranium (USA) Corp.*, LBP-98-21, 48 NRC ___, slip op. at 11 (September 1, 1998) (*IUSA*), *citing*, Environmental Assessment for Renewal of Source Material License No. SUA-1358, Energy Fuels Nuclear, Inc., White Mesa Uranium Mill, dated February 1997 (Renewal EA), at 15, 18.[3]

By application, dated October 15, 1998, IUSA requested that its license be amended to allow uranium-bearing material (*i.e.*, alternate feed material -- material other than natural uranium ore) from Ashland 1 and Seaway Area D FUSRAP sites.[4] The amendment would allow IUSA to the process alternate feed material under Staff guidance entitled "Final Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores," 60 Fed. Reg. 49296 (September 22, 1995) (Alternate Feed Guidance),[5] which provides that requests

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[3]The Renewal EA is attached to NRC Staff Response to State of Utah Request for Hearing, dated December 14, 1998 (Staff Response to Utah Petition).

[4]A similar request to allow the receipt, processing and disposal of uranium-bearing material from the Ashland 2 site (near Tonawanda, New York) at IUSA's White Mesa mill near Blanding, Utah, was approved by the NRC Staff, on July 23, 1998, and is the subject of a separate proceeding. *See IUSA*, LBP-98-21at 1-2.

[5]With the passage of the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 *et seq.* (UMTRCA), the AEA was amended to provide an additional definition of byproduct material (11.e(2)) to include "tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content."

to process alternate feed material can be approved if the Staff concludes that the material proposed for processing is "ore," that it does not contain a listed hazardous waste, and that it is being processed primarily for its source material content. 60 Fed. Reg. 49296-49297.[6] "Feed material exhibiting only a characteristic of hazardous waste (ignitable, corrosive, reactive, toxic) would not be regulated as hazardous waste and could therefore be approved for recycling and extraction of source material." *Id.* at 49297. The amendment request is still pending before the Staff.

On December 14, 1998, a presiding officer was designated to rule on five petitions (including an Envirocare petition) filed regarding the amendment request[7] under 10 C.F.R. Part 2, Subpart L, and conduct any hearing ordered. Designation of Presiding Officer, dated December 14, 1998. Envirocare acknowledges that it has been denied standing to intervene in two other materials license proceedings, but contends that its request is filed, "in good faith,

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[6] The guidance was intended to present an expanded interpretation of the term "ore" as used in the section 11.e(2) of the AEA, thus permitting feed material other than natural ore to be used by licensed mills to extract source material, avoiding possible dual regulation by the Environmental Protection Agency (EPA) and enabling transfer of other material to the Department of Energy. *See* "Uranium Mill Facilities, Request for Public Comments on Revised Guidance on Disposal of Non-Atomic Energy Act of 1954, Section 11e.(2) Byproduct Material in Tailings Impoundments and Position and Guidance on the Use of Uranium Mill Feed Materials Other Than Natural Ores," 57 Fed. Reg. 20525, 20530-31 (May 13, 1992) (Draft Guidance).

[7] The State of Utah, Ken Sleight and Envirocare of Utah, Inc., the Navajo Utah Commission of the Navajo Council of San Juan County, Utah, and the Concerned Citizens of San Juan County, Utah. Memorandum from John C. Hoyle to B. Paul Cotter, ASLBP, dated December 10, 1998. The Staff responded to the other petitions on December 14 and 17, 1998. *See* NRC Staff Response to State of Utah Request for Hearing, dated December 14, 1998; NRC Staff Notice of Intent to Participate and NRC Staff Response to Requests for Hearing Filed by Ken Sleight, Navajo Utah Commission, Concerned Citizens of San Juan County, dated December 17, 1998.

to preserve its right to participate as a party" to this proceeding while its appeals of the Commission decisions are pending in Federal court. Petition at 1-2. The Staff's opposition to the Petition is provided below.

DISCUSSION

I. Legal Requirements for Standing and Participation in an NRC Proceeding

A. Standing

Pursuant to 10 C.F.R. § 2.1205, interested persons may request a hearing on the grant of an amendment to a source or byproduct materials license under the Commission's informal hearing procedures set forth in 10 C.F.R. Part 2, Subpart L. A hearing request is considered timely if filed within 30 days of the notice of opportunity for hearing. 10 C.F.R. § 2.1205(k).

It is fundamental that any person who wishes to request a hearing or to intervene in a Commission proceeding must demonstrate that he or she has standing to do so. Section 189a(1) of the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), provides that:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . . , the Commission shall grant a hearing upon the request of *any person whose interest may be affected by the proceeding*, and shall admit any such person as a party to such proceeding.

Id. (emphasis added).

In addition, pursuant to 10 C.F.R. § 2.1205(e), where a request for hearing is filed by any person other than the applicant in connection with a materials licensing action under 10 C.F.R. Part 2, Subpart L, the request for hearing must describe in detail:

(1) The interest of the requester in the proceeding;

> (2) How that interest may be affected by the results of the proceeding, including the reasons why the requester should be permitted a hearing, with particular reference to the factors set out in [§ 2.1205(h)];
>
> (3) The requester's area of concern about the licensing activity that is the subject matter of the proceeding; and
>
> (4) The circumstances establishing that the request for a hearing is timely in accordance with [§ 2.1205(d)].

Pursuant to 10 C.F.R. § 2.1205(h), in ruling on any request for hearing filed under 10 C.F.R. § 2.1205(d), the Presiding Officer is to determine "that the specified areas of concern are germane to the subject matter of the proceeding and that the petition is timely." The rule further provides that:

> The presiding officer also shall determine that the requestor meets the judicial standards for standing and shall consider, among other factors -
>
> (1) The nature of the requestor's right under the [AEA] to be made a party to the proceeding;
>
> (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
>
> (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

In order to determine whether a petitioner has met these standards and is entitled to a hearing as a matter of right under Section 189a of the Act, the Commission applies contemporaneous judicial concepts of standing. *See, e.g., Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992), *review denied sub nom. Environmental & Resources Conservation Organization v. NRC*, 996 F.2d 1224 (9th Cir. 1993); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1),

CLI-83-25, 18 NRC 327, 332 (1983); *Envirocare of Utah, Inc.* (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992).

The "irreducible constitutional minimum" requirements for standing are that the litigant suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. 154, 167 (1997), *citing, Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[8] In addition to this constitutional aspect of standing, there are "prudential" (*i.e.*, judicially self-imposed) standing requirements, one of which is that the litigant's asserted interests must arguably fall within the "zone of interests" of the governing law. *See id.*, 520 U.S. at 162. *See also Port of Astoria v. Hodel*, 595 F. 2d 467, 474 (9th Cir. 1979).

The Commission applies constitutional and prudential aspects of the standing doctrine. *See, e.g., IUSA*, CLI-98-23, 48 NRC ___, slip. op. at 3-8 (November 24, 1998) (economic harm unrelated to potential radiological or environmental effects is not sufficient for "injury-in-fact" and "zone-of-interests" tests); *Georgia Power Co.* (Vogtle Electric Generating Plant,

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[8]In otherwords, the petitioner must establish (a) that he personally has suffered or will suffer a "distinct and palpable" harm that constitutes injury in fact; (b) that the injury can fairly be traced to the challenged action; and (c) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); *Vogtle, supra*, 38 NRC at 32; *Babcock and Wilcox, supra*, LBP-93-4, 37 NRC at 81; *Envirocare, supra*, 35 NRC at 173. An alleged injury could be redressed in a licensing proceeding since a presiding officer has the power to approve, deny or condition any licensing action that comes under his or her jurisdiction. *See e.g., Sequoyah Fuels Corp.* LBP-96-12, 43 NRC 290, 206 (1996).

Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993) (to show an interest in the proceeding sufficient to establish standing, a petitioner must show that the proposed action will cause "injury in fact" to its interest and that its interest is arguably within the "zone of interests" protected by the statutes governing the proceeding); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 1), CLI-91-14, 34 NRC 261, 266 (1991) (*citing Three Mile Island, supra*, 18 NRC at 332).

Purely economic interests (*i.e.*, interests not related to harm stemming from adverse environmental impacts of a proposed action) are not within the zone of interest protected by the AEA or the NEPA and are not sufficient to confer standing. *International Uranium (USA) Corp.*, CLI-98-23, *supra* at 3-8; *Quivira Mining Co.*, CLI-98-11, 48 NRC 1, 8-10 (1998). *See also Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-789, 20 NRC 1443, 1447 (1984). *Accord Churchill Truck Lines, Inc. v. United States*, 533 F. 2d 411, 416 (8th Cir. 1976) (NEPA not designed to prevent loss of profits); *Sabine River Authority v. U.S. Department of Interior*, 951 F.2d 669, 674 (5th Cir.), *cert. denied*, 506 U.S. 823 (1992) (geographic nexus to the project required).

A generalized grievance concerning enforcement of regulatory requirements is not sufficient for particularizing a harm to support standing. *See Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-81-25, 18 NRC 327,333 (1983), *citing, Transuclear Inc.*, CLI-77-24, 6 NRC 525, 531 (1977) (a "generalized grievance" shared in substantially

equal measure by all or a large class of citizens will not result in distinct and palpable harm to support standing). Such interests would be indistinguishable from those of general concerns about the integrity of NRC actions.

In cases without obvious offsite implications, a petitioner must allege some specific "injury in fact" will result from the action taken. *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2, CLI-89-21, 30 NRC 325, 329-30 (1980). Petitioners need not set forth all of their concerns until they have been given access to a hearing file. *Babcock & Wilcox*, LBP-94-4, 39 NRC 47, 52 (1994).

B. Areas of Concern

Pursuant to 10 C.F.R. § 2.1205(h), areas of concern identified by a petitioner must be "germane to the subject matter of the proceeding." The threshold showing at the intervention stage of a Subpart L proceeding is low, but must be specific enough to allow the presiding officer to ascertain whether or not the matter sought to be litigated is relevant to the subject matter of the proceeding. *Sequoyah Fuels Corp.*, LBP-94-39, 40 NRC 314, 316 (1994); "Informal Hearing Procedures for Materials Licensing Adjudication, 54 Fed Reg. 8269, 8273 (February 28, 1989) (inequitable to require intervenor to file written presentations setting forth all of its concerns without access to the hearing file).[9] Only those concerns which fall within the scope of the proposed action set forth in the *Federal Register* notice of opportunity for

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[9] Pursuant to 10 C.F.R. § 2.1233(c), after a hearing is granted and the hearing file is made available in accordance with § 2.1231, written presentations by intervenors must describe in detail any deficiency or omission in the license application, why any particular portion is deficient or why the omission is material, and what relief is sought.

hearing may be admitted for hearing. *See e.g., Commonwealth Edison Co.*(Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980).[10]

When proffering concerns to be admitted in a proceeding, an intervention petitioner may rely on Staff guidance to allege that an application is deficient, but guidance cannot prescribe requirements. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), LBP-95-41, 34 NRC 332, 338-39, 347, 354 (1991); *Curators of University of Missouri*, CLI-95-1, 41 NRC 71, 98, 100 (1995). In addition, because licensing boards and presiding officers have no authority to direct the Staff in the performance of its safety reviews, *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant, Units 1, 2, 3, and 4), CLI-80-12, 11 NRC 514, 516 (1980); *Recoil International Corp.* (Rocketdyne Division), ALAB-925, 30 NRC 709, 721-11 (1989), *aff'd*, CLI-90-5, 31 NRC 337 (1980), and the applicant/licensee has the burden of proof in this proceeding, the adequacy of the Staff's review is not

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[10] In *Philadelphia Electric Co.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20-21 (1974), it was held that a contention must be rejected where:

(1) it constitutes an attack on applicable statutory requirements;

(2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations;

(3) is nothing more than a generalization regarding the petitioner's view of what applicable policies ought to be;

(4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question; or

(5) it seeks to raise an issue which is not concrete or litigable.

A merits determination is not required at the pleading stage. *Id.* at 20.

determinative of whether an action should be approved. *Curators of the University of Missouri,* CLI-95-1, 41 NRC at 121.

II. Envirocare Does Not Have Standing to Intervene

Envirocare, a competitor of IUSA, asserts: (1) that its disposal facility complies with the strict standards, was licensed after an opportunity for public comment, and was required to obtain a groundwater discharge permit from the State of Utah; (2) that Envirocare has an economic interest in ensuring all recipients of 11e.(2) byproduct material comply with applicable NRC standards and in ensuring that environmental laws concerning waste disposal "are uniformly applied and enforced by the NRC;" (3) that Envirocare, although qualified, could not bid on contracts (would suffer lost profits) concerning the material from the Ashland 1 and Seaway Are.. sites" if the NRC decides the material can be "reprocessed" by IUSA, (4) that Envirocare's compliance with "strict" standards, including the preparation of an EIS, places it at a competitive disadvantage and "might result in harm to public health and safety;" and (5) that its economic and financial interests are within the zone of interests protected by both the AEA and NEPA. *See* Petition at 9-13. Appended to the Petition copies of *Federal Register* Notices related to Envirocare, Amendment 13 to it license (License No. SMC 1539), dated May 19, 1998, and a Letter from Kenneth Alkema, Envirocare, to Joseph Holonich, NRC, dated December 1, 1998.

Although Envirocare arguably identifies at least one concern that is germane to the proposed amendment,[11] Envirocare does not have standing to intervene in this proceeding as

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[11]Envirocare contends that (a) the proposed amendment is subject to various provisions (continued...)

it has not demonstrated that it will likely suffer a particularized injury that is within the zone of interests of the AEA or NEPA. *See IUSA*, CLI-98-23, *supra* at 3-8. *International Uranium (USA) Corp.*, CLI-98-6, 47 NRC 116 (1998), *citing Steel Co. v. Citizens for a Better Environment*, 118 S. Ct. 1003, 1016 (1998); *Quivira*, CLI-98-11, *supra* at 8-10; *Warth v. Seldin*, 422, 490, 501, 508, 509 (1975); *Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 72 (1994). Once again, Envirocare has alleged economic competitor injuries that are not associated with any environmental harm associated with the proposed licensing action and that are not cognizable under the NEPA or AEA. *See IUSA*, CLI-98-23, *supra*; *Quivira, supra.* Envirocare's general grievance about the enforcement of certain regulatory requirements fails to particularize an injury sufficient to demonstrate its standing to intervene. *See Metropolitan Edison Co.*, 18 NRC at 333; Moreover, Envirocare cannot obtain standing by asserting the health and safety interests of the general public and the interests of other licensees. *See e.g., Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989) (individual could not represent plant workers without their express authorization); *Combustion Engineering, Inc.* (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 145 (1989) (legislator lacks standing to intervene on behalf of his constituents). Therefore, the Petition should be denied.

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[11](...continued)
of 10 C.F.R. Part 40, which are not addressed in the application, (b) the application does not satisfy the Alternate Feed Guidance, and (c) the application fails to consider the environmental impacts of the proposed action. *See* Petition at 13-15. These concerns are arguably germane to the proposed amendment. The assertion that granting IUSA's request will undermine public confidence in safe operation of low-level radioactive waste facilities, *see* Petition at 15-16, however, is not concrete or litigable. *See Peach Bottom, supra.*

CONCLUSION

For the reasons set forth above, Envirocare lacks standing to intervene in this proceeding and its petition should be denied.

Respectfully submitted,

Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 18th day of December 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
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INTERNATIONAL URANIUM (USA) CORPORATION	)	Docket No. 40-8681-MLA-5
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO REQUEST FOR HEARING BY ENVIROCARE OF UTAH, INC" in the above-captioned proceeding have been served on the following by first class United States Mail; and through deposit in the Nuclear Regulatory Commission's internal mail system as indicated by an asterisk, this 18th day of December 1998:

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