

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-8681-MLA-11
INTERNATIONAL URANIUM (USA))	
CORPORATION)	
)	ASLBP No. 010789-01-MLA
(Source Material License Amendment))	

NRC STAFF RESPONSE TO REQUESTS FOR
ADDITIONS TO THE HEARING FILE

INTRODUCTION

The NRC Staff ("Staff") hereby responds to the requests filed by the Intervenors in this proceeding, the Glen Canyon Group of the Utah chapter of the Sierra Club ("Sierra Club") and William E. Love, to include additional documents in the hearing file. As explained below, the Staff proposes submitting a supplement to the hearing file including additional documents consisting NRC reports and correspondence between IUSA and the NRC which are directly relevant to the proceeding. However, the Staff objects to providing the remaining documents, which include documents which are not required by regulation, are not directly relevant to the issues to be considered in this hearing, such as the regulation of alternate feed materials in general, or constitute impermissible discovery requests.

BACKGROUND

The Memorandum and Order of January 30, 2002, granted hearing requests filed by the Sierra Club and William E. Love regarding the amendment requested by International Uranium (USA) Corporation to receive and process alternate feed materials from Molycorp, Inc.'s site in Mountain Pass, California. *International Uranium Corp.* (White Mesa Uranium Mill) LBP-02-06, slip op. (January 30, 2002). Accordingly, the Staff was directed to prepare and file a hearing file no later than March 1, 2002. *Id.* at 10. Thereafter, on February 28, 2002, the Sierra Club filed a

request that certain documents be placed in the hearing file. After the hearing file was submitted by the Staff on March 1, 2002, William Love filed separate requests that additional records be added to the hearing file on March 2 and March 3, 2002. Upon receipt of the subsequent hearing requests, the Staff determined that one of documents identified should have been included in the original hearing file.¹ Accordingly, that document was submitted on March 6, 2002, along with a revised index to the hearing file.

Based on these requests, a Memorandum (Requesting NRC Staff Response to Certain Filings) was issued on March 6, 2002, directing the Staff to respond to the requests, indicating whether, the staff is willing to include it in a supplement to the hearing file.² On the same day, another request for addition to the hearing file was submitted by William E. Love. Thereafter, another request that additional materials be added to the hearing file was submitted by Mr. Love on March 13, 2002. The Staff has considered those additional requests in this response.

DISCUSSION

The regulatory requirements concerning the contents of a hearing file in a Subpart L proceeding are set forth in 10 C.F.R. § 2.1231(b). According to that regulation, a hearing file "will consist of the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application." As applied in the case *Curators of*

¹ January 5, 2001, letter from Michelle R. Rehmann, Environmental Manager, International uranium (USA) Corporation (IUSA), to Philip Ting, Branch Chief, Fuel Cycle and Safety and Safeguards Branch, Nuclear Regulatory Commission (NRC), re: Amendment Request to Process an Alternate Feed Material from Molycorp at White Mesa Uranium Mill).

² The Presiding Officer also requested that the Staff provide information as to what documents are in our possession. While the Staff has been diligently searching for these documents, due to the large volume, and our efforts to produce the supplemental filing in a timely fashion, the Staff has not completed this determination. In light of the Memorandum and Order issued on the day of this filing, the Staff will limit the scope of its search to the earlier requests. We expect to file a list of documents we have located on Monday, March 18th, 2002 along with the supplemental hearing file.

the University of Missouri, LBP-90-33, 32 NRC 245, 250 (1990), the regulation places no obligation on the Staff to provide correspondence, even if related to the amendment, except that between the Staff and the Applicant. Further, the Staff need not provide documents in a hearing file to which Intervenors already have access. *Id.* at 251.

The requirement that the Staff provide a hearing file must be distinguished from any expectation that the Staff respond to discovery-type requests. Discovery in Subpart L proceedings is explicitly prohibited under 10 C.F.R. § 2.1231(d). As explained in *Rockwell International Corporation* (Rocketdyne Division) ALAB-925, 30 NRC 709, 718 (1989), the presiding officer's responsibility for controlling the record begins *after* the parties have been admitted to the proceeding and have made their own initial evidentiary presentations. The authority vested in the presiding officer to settle disputes over the contents of the hearing file in 10 C.F.R. § 2.1231(b) is to ensure access to the particular types of agency records which the regulation specifies must be provided, and cannot be used as a means to engage in prohibited discovery against the Staff or other parties. *Id.* at 718, fn. 9.

The Staff has reviewed the requests for additions to the hearing file in light of the applicable regulations and case law. Our specific determinations as to which documents should be included or excluded from the hearing file are set forth below. However, we believe that some general observations regarding these requests are warranted. Many of the documents requested do not bear directly on the amendment at issue in this proceeding. Both Intervenors have asked that numerous guidance, policy and rulemaking documents be provided on all manner of issues regarding uranium mill facilities, ranging from financial assurance for uranium recovery facilities to the use of uranium mill tailings impoundments for the disposal of waste other than 11e.(2) byproduct material. While these documents may be of interest to the Intervenors, they have made no showing that they are relevant to the issues to be considered in this proceeding, which are the concerns raised by the Sierra Club and Mr. Love in their hearing requests as they relate to this

specific amendment. Clearly, this hearing cannot be used to raise issues concerning the NRC's policies concerning the regulation of uranium mills.

In addition, throughout these filings, Intervenor ask the Staff to search for and provide correspondence, guidance documents, policy statements and analyses to obtain evidentiary support for their positions. In the Sierra Club's February 28, 2002, filing, the Staff is asked to provide documentation of contact between the NRC and the EPA and the State of California, any guidance or policy statements used by the NRC staff in reviewing the application, and any generic or site-specific guidance used in determining the surety for the White Mesa Mill. Mr. Love, in his filing of March 2, 2002, has asked that the NRC search for any Resource Conservation and Recovery Act (RCRA) analysis performed for Molycorp by California, Utah or Nevada. His filing of March 3, 2002, contains numerous requests for the Staff to provide analysis, supporting documentation and methodology for his stated purpose of determining whether the Staff exercised "due diligence" in performing its review. He also requests that the NRC produce letters it requested from States, and an NRC legal opinion on an EPA concern expressed in a letter. Mr. Love's March 6, 2002, filing requests additional information related to tests of the permeability shale protecting the lower sandstone aquifers.

In these respects, these filings are in reality discovery requests which are expressly prohibited by regulation. The Intervenor should not be permitted to circumvent the prohibition on discovery by requesting the Staff to provide analyses and justification in the hearing file. Moreover, it is evident that the purpose behind obtaining these documents is to challenge the Staff's review and approval of the amendment at issue. However, as in formal proceedings, the Presiding Officer in a Subpart L proceeding does not have the authority to direct the Staff in performing its regulatory functions. *Rockwell International Corporation, supra*, 30 NRC at 721-722.

Finally, we note that Intervenor are seeking to have the Staff include in the hearing file NRC regulations, to include Part 40 and Part 71, as well as other documents which are publically

available. Aside from the objections expressed above, many of these documents are readily available to the public and, indeed, are likely to already be in the possession of the Intervenor. In particular, with regard to NRC regulations, the Staff perceives no need to include such documents in the hearing record. Our specific responses to the documents requested is set forth below.

I. Documents The Staff Proposes to Add to the Hearing File
in Response to Sierra Club's February 28, 2002, request

- January 5, 2001, letter from Michelle R. Rehmann, Environmental Manager, International Uranium (USA) Corporation (IUSA), to Philip Ting, Branch Chief, Fuel Cycle and Safety and Safeguards Branch, NRC, re: Amendment Request to Process an Alternate Feed Material from Molycorp at White Mesa Uranium Mill (request numbered 1)
- License Renewal Application for the White Mesa Mill, Sections 2.0 and 4.0 (Umetco, 1991) (request numbered 11)
- May 28, 1999, IUSA, "Groundwater Information Report, White Mesa Mill, Blanding, Utah" (request numbered 13)
- IUSA's response to NRC staff's November 27, 2001, letter to Ron Hochstein, IUSA, from Melvyn Leach, NRC, re: Amendment Request for Performance-Based License Condition for Acceptance of Alternate Feed Materials (request numbered 15)
- January 14, 2002, letter to Ron Hochstein, IUSA, from Melvyn [Leach], re: "White Mesa Uranium Mill, Questions and Concerns Regarding Alternate Feed Material Storage" (request numbered 16)
- IUSA's response to the January 14, 2002, letter to Ron Hochstein, IUSA, from Melvyn Leach, NRC (request numbered 17)

- September 2001 “Environmental Review Guidance for Licensing Actions Associated with NMSS Programs: Draft Report for Interim Use and Comment,” NUREG-1748 (request numbered 22)
- II. Documents the Staff Proposes to Add to the Hearing File in Response to William E. Love’s March 2, 2002, March 3, 2002, March 6, 2002, and March 13, 2002 requests
- December 3, 2001, letter from William VonTill to NRC Docket 040-8681, subject: “Technical Evaluation Report, Request to Receive and Process Molycorp Site Material” and copy of IUC report showing that the mill has sufficient licensed tailing capacity.
- III. Documents the Staff Objects to Adding to the Hearing File in Response to the Sierra Club’s February 28, 2002, request
- A. The Staff objects to the inclusion of the following correspondence on the basis that they are not required to be included, as they are not NRC reports or correspondence between the applicant and the NRC that is relevant to this proceeding.
- February 14, 2001, letter to Loren Setlow, Office of Radiation and Indoor Air, Environmental Protection Agency (EPA) from David C. Frydenlund, Vice President and General Counsel, IUSA, re: Amendment Request to Process an Alternate Feed Material from Molycorp at White Mesa Uranium Mill (request numbered 2)
 - April 12, 2001, letter to William J. Sinclair, Director, Division of Radiation Control, Department of Environmental Quality, State of Utah, from NRC staff (request numbered 4)
 - May 16, 2001, letter from William J. Sinclair, DRC, to Dan Gillen, Acting Chief, Fuel Cycle Licensing Branch, NRC, re: “State Response to April 12, 2001 NRC Consultation Request: Environmental Assessment for the IUC White Mesa Mill Proposed Processing of Molycorp Lead Bearing Waste Material” (request numbered 6)

- Meeting Summary of April 11, 2001, Meeting between the EPA and NRC, re: April 5, 2001, EPA letter regarding the processing of the Molycorp waste (request numbered 3)
- September 11, 1997, Utah Division of Air Quality Approval Order for White Mesa Mill (Air Quality Permit Conditions) (request numbered 12)
- Documents listed under title of "NRC Regulations and Laws" (requests numbered 24-26)

B. The Staff objects to inclusion of any documents in response to the following requests by the Sierra Club on the grounds that they are impermissible requests for discovery.

- Request for "[a]ny other response to any NRC request for consultation on the draft EA for the" (sic) (request numbered 9)
- Request for "[a]ny other correspondence between the NRC, IUSA, State of Utah, the EPA (both headquarters and Region 8), and the State of California regarding the processing of the Molycorp waste" (request numbered 10)
- Any NRC environmental review guidance or policy statements used by NRC Staff in reviewing IUSA's December 19, 2000 application (request numbered 23)

C. The Staff objects to inclusion of the following documents on the grounds that they are not directly relevant to this proceeding

- Documentation of consultation between the NRC and EPA and the State of California (requests numbered 7 and 8)
- November 16, 2000, letter from IUSA to NRC regarding "Tailings Capacity Evaluation" (request numbered 14)
- Documents listed under title of "White Mesa Mill" (requests numbered 18-19)

- Documents listed under the title of “Other Documents Related to the Molycorp Application” (requests numbered 27-29)
- Documents listed under title of “NRC Guidances” (requests numbered 20-21)
- Documents listed under title of “Policy Regarding ‘Use of Uranium Mill Feed Materials Other Than Natural Ores,’” (requests numbered 30-41, two requests numbered 43, and request numbered 44)

IV. Documents the Staff Objects to Adding to the Hearing File in Response to William E. Love’s March 2, 2002, March 3, 2002, March 6, 2002 and March 13, 2002 requests.

A. The Staff objects to the inclusion of the following in the hearing file on the grounds that the correspondence is not between the Staff and the applicant, IUSA.

- May 16, 2001, letter from State of Utah, Department of Environmental Quality, to Dan Gillen, subject: State Response to April 12, 2001, NRC Consultation Requests and NRC’s reply to Utah’s requests (March 3, 2002, request at p. 2)
- All letters from California, Nevada and Utah that the NRC requested after the meeting of 4/11/2001 (March 3, 2002 request at p. 4-5).

B. The Staff objects to the inclusion of the following documents on the grounds that they are not NRC reports or correspondence and as such are not required to be included in the hearing file. In addition, this information is not directly relevant to the issues in this proceeding, as the purported purpose is to determine whether the Staff properly carried out its administrative review functions. (March 13, 2002 request at p. 2-3)

- Concurring memorandum or transcript of a telephone call documenting concurrence of Regional EPA in determination that Molycorp material should be classified as “source material” (March 13, 2002 request I at p. 1-2)³

³Because of the fact that this request for information has just been received, the Staff has not determined whether any of the documentation showing concurrence of the EPA or the State
(continued...)

- Memorandum or transcript or telephone call documenting that the State of California considers the material to be classified as source material (March 13, 2002 request II at p. 2)
- Letter of agreement by Utah to AFC Criterion 3 (March 13, 2002 request III.2. at p. 2)
- Letter of concurrence by the DOE that it will take title of White Mesa Facility after closure (March 13, 2002 request III.3. at p. 2)

C. The Staff objects to the inclusion of the following documents on the grounds that they are not directly relevant to this proceeding

- November 29, 1999, letter from Utah Department of Environmental Quality to John Surmeier, Division of Waste Management, NRC, subject: Environmental Assessment for the White Mesa Uranium Mill Reclamation Plan: State Comments. (March 3, 2002 request at p. 2)⁴
- December 7, 1999, letter from Harold Roberts, IUC, to Thomas H. Esseg, Division of Waste Management, NRC, subject: Licensee Observations Regarding Comments from Utah Department of Environmental Quality (letter of Nov. 29, 1999, to John J. Surmeier, NRC). (March 3, 2002 request at p. 2)
- November 16, 2000 letter from IUSA to NRC, subject: IUSA "Tailing Capacity Evaluation" (March 3, 2002 request at p. 2)

³(...continued)

(see the next document request) exists. However, the Staff sees no purpose in searching for documentation that concurrence was obtained except to establish that the Staff did in fact obtain concurrence, a question which is not at issue here.

⁴This document should also be excluded for the reason that it is not correspondence between the Staff and IUSA.

- “Interim Guidance on Disposal of Non Atomic Energy Act of 1954 Section 11e(2) Byproduct Material in Tailings Impoundments,” November 30, 2000 (and section 1004(27) (March 3, 2002 hearing request at p. 4)
- “Interim Position and Guidance on the Use of Uranium Mill Feed Material Other Than Natural Ores” from NRC Regulatory Issue Summary 2000-23 (March 3, 2002 hearing request at p. 4)
- Alternate Feed Guidance entitled “NRC Regulatory Issue Summary 200-23 Recent Changes to Uranium Recovery Policy” with attachments (March 13, 2002 request III.1. at p. 2)
- The annual surety bond reports prepared by IUC (March 13, 2002 request IV at p. 2-3)

D. The following documents which have been requested are already in the hearing file.

- Letter dated November 16, 2001, from International Uranium Corporation to Melvin Leach, subject: Drummed Uranium Material (March 3, 2002 request at p. 2-3)
- Letter dated October 17, 2001 from International Uranium Corporation to Melvyn Leach, subject: Information on Drummed Uranium Material (March 3, 2002 request at p. 3-4)

E. The Staff objects to the following requests for additional material to be included in the hearing file on the grounds that they constitute impermissible discovery requests.

- A search of all NRC records to locate any RCRA analysis done for Molycorp by California, Utah or Nevada, along with the corresponding Methodology of Analysis, and have that information placed in the Hearing File” (March 2, 2002 request).

- Any additional information related to tests confirming the thickness of the low permeability shale that protects the lower sandstone aquifers from pollution from the mill site (March 6, 2002 request).
- NRC legal opinion on EPA's concern in a February 12, 2001, letter (March 3, 2002 request at p. 5)
- Mr. Love makes a number of requests requesting that the Staff verify and substantiate representations made by IUSA in a letter from IUSA dated October 17, 2001, to Melvyn Leach. The Staff is asked to provide methodology of tests, analysis of bastnanite ore, and other information to show that the Staff exercised "due diligence" in its review. (March 3, 2002, request at p. 3-4) All of these requests constitute impermissible discovery requests and are also not relevant in that Mr. Love's purpose in requesting the information is to obtain oversight of the Staff's review (March 2, 2002 request at p. 3-4).

CONCLUSION

For the reasons stated above, the Staff proposes the filing of a supplement to the hearing file containing the documents which the Staff has specified. The Staff is currently compiling a supplemental file containing these documents, and will send it by express mail to the parties on March 18, 2002, absent direction otherwise by the Presiding Officer.

Respectfully submitted

/RA/

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/RA/

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Dated at Rockville, Maryland
this 14th day of March 2002

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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INTERNATIONAL URANIUM (USA))	Docket No. 40-8681-MLA-11
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WHITE MESA URANIUM MILL)	
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(Source Material License Amendment))	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO REQUESTS FOR ADDITIONS TO THE HEARING FILE" have been served upon the following persons by United States mail, first class, or through the NRC internal mail distribution as indicated by an asterisk on the 14th day of March, 2002

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