

ADAMS

April 9, 2002

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)	
)	
(White Mesa Uranium Mill))	

NRC STAFF RESPONSE TO UTE MOUNTAIN
UTE TRIBE'S INITIAL PRESENTATION

INTRODUCTION

The NRC Staff ("Staff") hereby responds to the initial presentation filed by the participants in this proceeding, the Ute Mountain Ute Tribe ("Tribe") asking that the license amendment at issue be immediately withdrawn based on lack of Staff consultation with the Tribe pursuant to specific Executive Orders.

BACKGROUND

The Presiding Officer's Memorandum of March 18, 2002, granted a request for participational status filed by the Ute Tribe regarding the amendment issued to International Uranium (USA) Corporation ("IUSA") 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-xx, slip op. (March 18, 2002)*. The Tribe filed its written submission in the matter on March 28, 2002.¹ By Memorandum and Order dated March 29, 2002, the Presiding Officer requested the Staff to address questions raised in the Tribe's initial presentation by filing responses "to so much of the Tribe's initial presentation as brings into question whether the

¹ "Ute Mountain Ute Tribe Initial Presentation in Informal Hearing and Request for Withdrawal of License Amendment #20", dated March 28, 2002.

issuance of the license amendment under consideration violated the provisions of certain specified Executive Orders.” See “Memorandum and Order (Directing Responses to Recent Filing),” dated March 29, 2002, slip op. at 1.

DISCUSSION

In its initial presentation, the Tribe alleges that the amendment was issued in violation of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”, and Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” Each will be addressed in turn.

I. Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments”

On November 6, 2000, the President signed Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” 65 Fed. Reg. 67249 (Nov. 9, 2000). The Order directs that agencies shall be guided by three fundamental principles; first, that the United States has developed a unique legal relationship with Indian Tribal governments;” second, that the United States has recognized that “tribes exercise inherent sovereign power over their members and their territory;” and third, that the Federal government “recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.” *Id.* The Order directs Federal agencies to, among other things, establish a system for consultation with Indian tribes when issuing regulations and policies that have tribal implications. *Id.* at 67250.

The Staff initially notes that issuance of the license amendment in this matter could not have violated Executive Order 13175 as the Tribe claims. Section 1(c) of the Order excludes from the definition of “agency” any agency considered to be an independent regulatory agency as defined in 44 U.S.C. §3502(5). *Exec. Order No. 13175, Section 1(c), 65 Fed. Reg. at 67,249.* Thus, by its terms, the Order explicitly excludes application to the NRC.

Nevertheless, the Staff recognizes the importance of maintaining open communication with Indian tribes which may be affected by its actions. Accordingly, the Staff has maintained continuous communication with the Tribe on issues related to the White Mesa mill, including copying the Tribe on virtually all correspondence and interacting with the Tribe during frequent telephone conversations regarding various issues at the mill. In fact, after learning of the Tribe's continued concerns regarding the potential dust and groundwater concerns from other, non-Molycorp, alternate feed material placed on the ore pad, the Staff, in a January 14, 2002 letter, has been in contact with IUSA in an attempt to resolve the Tribe's continued concerns.² Thus, as is evident from the Staff's numerous interactions with the Tribe, the Staff's intent has always been to consult with the Tribe on all White Mesa actions.

Upon completion of the Molycorp Draft Environmental Assessment, the Staff forwarded the Draft Environmental Assessment to the Utah Department of Environmental Quality as an attachment to a letter. The Tribe, due to an unfortunate administrative oversight, was not carbon copied on this letter, and thus, did not receive the Draft Environmental Assessment regarding the Molycorp amendment. However, this oversight in no way diminished the Tribe's ability to consult with the Staff on issues relating to this license amendment request. Notice of the NRC's receipt of a request to process Molycorp material at the White Mesa site was provided when published in the *Federal Register* on January 9, 2001. 66 Fed. Reg. 1702. Additionally, when the Environmental Assessment (EA) and the Finding of No Significant Impact (FONSI) was published in the *Federal Register*, (and the Tribe was copied on a letter in this regard)³ it included a Staff

² See letter to Ron Hochstein, IUC, from Melvyn Leach, NRC, Subject: Materials License SUA-1358 - White Mesa Uranium Mill Questions and Concerns Regarding Alternate Feed Material Storage, dated January 14, 2002. The document is located at Tab #1 of the hearing file, and in ADAMS as ML020170491.

³ See Letter to Michelle Rehmann, Environmental Manager, International Uranium (USA) Corporation, from Melvyn Leach, NMSS, Subject: Amendment Request to Material License SUA-
(continued...)

contact person who was available to discuss any concerns the Tribe might have had regarding the conclusion of the EA - namely that the action would result in no significant environmental impact. 66 Fed. Reg. 64,064. Therefore, the Tribe had notice of the action and the lines of communication between the Tribe and the NRC were open for any additional concerns the Tribe wished to express.

The Tribe also appears to argue that the alleged failure to consult with the Tribe constitutes a National Environmental Policy Act (NEPA) violation.⁴ However, the Staff did not violate any provision of NEPA by inadvertently failing to carbon copy the Tribe on the letter forwarding the Draft Environmental Assessment. While the NRC regulations implementing NEPA require the NRC to include affected Indian tribes in the scoping process for an Environmental Impact Statement, and require a Draft Environmental Impact Statement to be forwarded to any affected Indian tribe for comment, there are no such requirements for scoping in the EA process, nor is there a requirement for distribution of Draft Environmental Assessments to affected Indian tribes. See 10 CFR §§ 51.26; 51.28(a)(5); and 51.74(a)(6).

The Staff sincerely regrets the omission of the carbon copy listing from the correspondence to the State of Utah regarding the Draft Environmental Assessment. However, this oversight did not result in a Staff violation of Executive Order 13175 or NEPA. As noted above, the Staff could not violate Executive Order 13175 because it does not apply to the NRC. The only existing law applicable in this instance is NEPA, and as mentioned *supra*, there is no requirement in NEPA, or

³(...continued)

1358 - To Receive and Process Alternate Feed Material from the Molycorp Site; Environmental Assessment, dated November 30, 2001. The document is located at Tab #6 of the hearing file, and in ADAMS as ML013380593.

⁴ "Ute Mountain Ute Tribe Initial Presentation in Informal Hearing and Request for Withdrawal of License Amendment #20, dated March 28, 2002, pg. 2, stating, "This ignores how the National Environmental Policy Act (NEPA) directs the NRC to operate regarding consultation with tribes and therefore is grounds for withdrawal of License Amendment #20."

in NRC's NEPA implementing regulations at 10 CFR Part 51, for tribal consultation during the EA process. See 10 CFR §§ 51.26; 51.28(a)(5); and 51.74(a)(6).

II Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations"

The Tribe additionally alleges that NRC's failure to consult with the Tribe regarding the Draft Environmental Assessment on the amendment issued to IUSA to accept Molycorp alternate feed material violated Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations." 59 Fed. Reg. 7629 (Feb. 16, 1994). The Executive Order states that:

To the greatest extent practicable and permitted by law...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories...

Id. (Sec. 1-101). The Executive Order additionally notes that it is intended to improve the internal management of the executive branch and that it does not create any substantive or procedural rights in any person or create any right to judicial review. *Id.* at 7632 (Sec. 6-609). The Executive Order, by its own terms, established no new rights or remedies. See Exec. Order 12898, 59 Fed. Reg. 7629, 7632-7633; see also, *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998). As the Commission has noted, the purpose of the Executive Order "was merely to 'underscore certain provision[s] of existing law that can help ensure that all communities and persons across this Nation live in a safe and healthful environment.'" (emphasis added by Commission) *Id.* at 102, citing Memorandum for the Heads of All Departments and Agencies, 30 Weekly Comp. Pres. Doc. 279 (Feb. 14, 1994).

Although, as an independent regulatory agency, the NRC is not mandatorily subject to Executive Order 12898,⁵ the NRC voluntarily agreed to implement the President's environmental justice directive in a letter to the President on March 31, 1994, from the then Chairman of the Commission. Relying upon this letter, the Board, in *Louisiana Energy Services*, held that, "[t]he NRC is obligated, therefore, to carry out the Executive Order in good faith in implementing its programs, policies, and activities that substantially affect human health or the environment." *Louisiana Energy Services, L.P. (Claiborne Enrichment Center)*, LBP-97-8, 45 NRC 367, 376 (1997), *rev'd on other grounds*, CLI-98-3, 47 NRC 77 (1998).

Indeed, the NRC has carried out the directive in Executive Order 12898 to develop agency-specific environmental justice strategies. 59 Fed. Reg. 7629, 7630 (Sec. 1-103). The NRC's "Environmental Justice Strategy," formulated in March, 1995, promptly after the Executive Order, noted that, "NRC is committed to integrating environmental justice into NRC's NEPA activities. Greater emphasis will be placed in discussing impacts on minority and low-income populations when preparing agency NEPA documents such as Environmental Impact Statements (EIS), supplemental EISs, and Environmental Assessments, where appropriate." (Attachment A)⁶ As time has progressed, so, too, has NRC's Environmental Justice guidance, which now is described in various NRC environmental guidance documents.⁷

⁵ Section 6-604 of Executive Order 12898 provides that independent agencies are requested to comply with the provisions of the Order. 59 Fed. Reg. 7629, 7632.

⁶ 60 Fed. Reg. 30871 (June 12, 1995), announcing Federal agencies' final Environmental Justice Strategies available for distribution, including the "U.S. Nuclear Regulatory Commission Environmental Justice Strategy" March, 1995, as publication no. 200-R-95-907. Because this document is not available electronically, it will be included only in the hard copy of this filing, and not in the electronic filing.

⁷ See, e.g., NRR Office Instruction, LIC-203, "Procedural Guidance for Preparing Environmental Assessments and Considering Environmental Issues, June 21, 2001, pg. 5; Environmental Standard Review Plan, Supplement 1, NUREG-1555, Supp. 1, Sec. 4.4.6; NMSS Policy and Procedures Letter 1-50 Revision 2, "Environmental Justice in NEPA Documents" 1999; (continued...)

Because the amendment at hand concerns a materials licensee, the guidance applicable in this instance is NMSS Policy and Procedures Letter 1-50 "Environmental Justice in NEPA Documents" which contains NRC's guidance regarding environmental justice in NMSS NEPA documents.⁸ According to that guidance:

It is the policy of NMSS to address environmental justice in every Environmental Impact Statement (EIS) and every supplement to an EIS that is issued by NMSS. Under most circumstances, no environmental justice review should be conducted where an Environmental Assessment (EA) is prepared. If it is determined that a particular action will have no significant environmental impact, then there is no need to consider whether the action will have disproportionately high and adverse impacts on certain populations. However, in special cases or circumstances, the reviewer may recommend to management that staff conduct an environmental justice analysis in preparing an EA. Such determinations will be made on a case-by-case basis and only where there is an obvious potential that the consideration of specific demographic information at the site may identify significant impacts that would not otherwise be considered. Management (Division Director/Branch Chief level) will decide on a case-by-case basis when special cases or circumstances exist that require the staff to perform an environmental justice review for an EA.

NMSS Policy and Procedures Letter 1-50, Revision 2, "Environmental Justice in NEPA Documents," 1999, Section II "Policy".

⁷(...continued)

and NUREG 1748, "Environmental Review Guidance for Licensing Actions Associated with NMSS Programs, Draft Report for Interim Use and Comment, Appendix B, "Environmental Justice Procedures," 2001.

Moreover, The Commission recently noted that environmental justice considerations are integrated in the NRC's NEPA review process. The Commission further stated that it expects Environmental Impact Statements to inquire whether a proposed project has disparate impacts on minority and low-income populations and whether and how those impacts may be mitigated. *Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 64 (2001).

⁸ Although the Staff, in the Molycorp Draft Environmental Assessment, pg. 6, (*see infra*. Fn 9) cited to NMSS Policy and Procedures Letter 1-50, Revision 1, the revision in effect at the time of drafting of the Molycorp Environmental Assessment was Revision 2. While the language regarding how and when environmental justice is to be considered during the NEPA process varies from revision to revision, the differences are merely editorial. Substantively, all revisions to the NMSS Policy and Procedures Letter 1-50 remain the same.

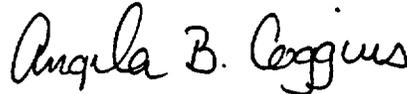
With this guidance in mind, it is clear that the Staff complied with NRC's Environmental Justice guidance implementing Executive Order 12898. Section 6.0 of the Environmental Assessment prepared for the Molycorp amendment explained that, "[b]ecause the staff has determined that there will be no significant impacts associated with this action, there can be no disproportionately high and adverse effects and impacts on minority and low-income populations. Consequently, further evaluation of Environmental Justice concerns, as outlined in Executive Order 12898 and NRC's Office of Nuclear Material Safety and Safeguards Policy and Procedures Letter 1-50, Revision 1, is not warranted."⁹

Therefore, the Tribe's allegation that, "[b]ased on Executive Order 12898's requirement for tribal consultation with the Ute Mountain Ute Tribe which the NRC ignored the NRC is therefore prohibited from approving IUC's license request for the Molycorp waste," has no merit. The Staff's actions in this instance were in agreement with NRC's environmental justice guidance, guidance that the NRC developed to ensure compliance with Executive Order 12898.

CONCLUSION

For the reasons stated above, the Staff's issuance of the license amendment at issue did not violate Executive Order 13175 or Executive Order 12898. Therefore, the Tribe's request that the amendment be withdrawn should be denied.

Respectfully submitted,



Angela B. Coggins,
Counsel for NRC Staff

⁹ See, the "Environmental Assessment for International Uranium (USA) Corporation's Uranium Mill Site, White Mesa, San Juan County, Utah; In Consideration of an Amendment to Source Material License SUA-1358 For the Receipt and Processing of the Molycorp Alternate Feed", attached to letter dated November 30, 2001, from Melvyn Leach, NMSS, to Michelle Rehmann, Environmental Manager, International Uranium (USA) Corporation. The document is located at Tab #6 of the hearing file, and in ADAMs as ML013380593.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "NRC STAFF RESPONSE TO UTE MOUNTAIN UTE TRIBE'S INITIAL PRESENTATION" have been served upon the following persons by United States mail, first class; through the Nuclear Regulatory Commission's internal mail distribution as indicated by an asterisk (*), and by electronic mail as indicated by a double asterisk (**) on this 9th day of April, 2002.

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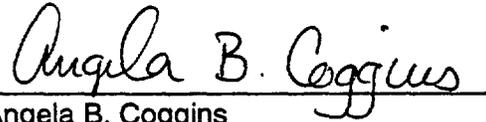
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Attachment A

D-1
3-10-95

U.S. NUCLEAR REGULATORY COMMISSION
ENVIRONMENTAL JUSTICE STRATEGY
MARCH 1995

Introduction:

The Nuclear Regulatory Commission (NRC) was created by the Energy Reorganization Act of 1974 as an independent regulatory agency. The mission of the NRC is to assure that civilian uses of nuclear materials in the United States---in nuclear power plants, fuel cycle plants, and in medical, industrial and research applications---are carried out with proper regard for the protection of the public health and safety, of the environment and of national security. The NRC is not a "land management" agency, i.e., it neither sites, owns, nor manages facilities or properties. Therefore, the President's February 11, 1994, Executive Order "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population" and the accompanying Presidential memorandum have been determined to primarily apply to our efforts to fulfill the requirements of the National Environmental Policy Act (NEPA) as an integral part of NRC's licensing process.

In this regard, the NRC is committed to giving careful consideration to the Council on Environmental Quality (CEQ) guidelines on how to take environmental justice¹ into account under NEPA. However, pending receipt of these guidelines, the NRC has developed its initial environmental justice implementation strategy based on the five principles discussed below.

Background:

The President's Executive Order directs all Federal agencies to develop, according to prescribed timetables, strategies for assuring environmental justice in their programs, policies, and activities. The Presidential memorandum to all agencies is a reminder of relevant provisions of existing law, including the requirement to consider, when environmental impact statements and other environmental documents are prepared, the effects of federal actions on minority and low-income communities. Although independent agencies, such as the NRC, were only requested to comply with the Executive Order, the Chairman, in his March 31, 1994 letter to the President, indicated that the NRC would endeavor to carry out the measures set forth in the Executive Order, and the accompanying memorandum.

¹ The NRC is using the working definition of environmental justice as suggested by the Environmental Protection Agency's Environmental Justice Office. Thus, for purposes of this document, environmental justice means the fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture, income or educational level with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

Principles of Environmental Justice Implementation:

The goal of the NRC's Environmental Justice Implementation Strategy is to integrate environmental justice into the conduct of all pertinent activities at the agency primarily in the NRC's fulfillment of its NEPA responsibilities. The Strategy contains five principles of implementation. The first three principles are institutional in nature and serve as the foundation for the last two principles which are operational in nature, i.e., they address specific activities. The principles emulate the "Principles of Good Regulation" which have been part of NRC policy for several years.

Integration of Environmental Justice into NRC's NEPA Activities

NRC is committed to integrating environmental justice into NRC's NEPA activities. Greater emphasis will be placed in discussing impacts on minority and low-income populations when preparing agency NEPA documents such as Environmental Impact Statements (EIS), supplemental EISs, and Environmental Assessments, where appropriate.

Continue senior management involvement

The NRC Environmental Justice Group, whose members are senior agency officials, will continue to provide guidance in this area. An Environmental Justice Coordinator has been appointed to ensure appropriate policy information flow among the different entities within the NRC, as well as with outside interested members of the public.

Openness and Clarity

Nuclear regulation is the public's business, and must be transacted publicly and candidly. Agency positions should be readily understood and easily applied.² This is of particular import when dealing with environmental justice issues.

Seeking and Welcoming Public Participation

The NRC maintains regular communication with a broad spectrum of entities, such as the States, Indian Tribes, members of the public and other Federal agencies. Outreach programs such as the Enhanced Participatory Rulemaking, open meeting policy, and scheduled meetings with Agreement States are being implemented. The NRC management is committed to improving our outreach efforts with stakeholders, including minority and low-income communities, and welcoming their input.

² From the agency's "Principles of Good Regulations" issued in January 17, 1991, announcement #5.

Continue Review and Monitoring of Title VI Activities

The NRC's financial assistance programs under Title VI of the Civil Rights Act of 1964 are limited to funding training and travel under Section 274 of the Atomic Energy Act of 1954 as amended, in connection with States assuming certain regulatory authority over specified nuclear materials, and the award of grants for the support of basic and applied scientific research and for the exchange of scientific information. 10 CFR Part 4 calls for nondiscrimination with respect to race, color, national origin and sex in any program or activity receiving Federal financial assistance from the NRC. NRC is committed to monitoring this activity.

Implementation:

The NRC's statutory offices---the Office of Nuclear Reactor Regulation which regulates nuclear power plants and research reactors; the Office of Nuclear Material Safety and Safeguards which regulates materials uses, fuel cycle facilities and waste disposal facilities; and the Office of Nuclear Regulatory Research responsible for rulemakings and confirmatory research---will assess their existing environmental activities and integrate environmental justice into these activities, as appropriate.