BEFORE THE UNITED STATES NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF	)	
INTERNATIONAL URANIUM (USA)	)	DOCKET NO. 40-8681
CORPORATION'S AMENDMENT TO	)	
NRC SOURCE MATERIAL LICENSE	)	August 4, 1998
SUA-1358	)	
	)	

ENVIROCARE'S AMENDMENT TO ITS REQUEST FOR HEARING

INTRODUCTION

On June 22, 1998, Petitioner Envirocare of Utah, Inc. ("Envirocare") filed a Request for Hearing challenging the Nuclear Regulatory Commission's ("NRC") amendment of International Uranium (USA) Corporation's ("IUSA") Source Material License SUA-1358 to allow for the receipt and "processing" of uranium-bearing material from the Ashland 2 Formerly Utilized Sites Remedial Action Program ("FUSRAP") site near Tonawanda, New York ("the Amendment"). On August 4, 1998, Administrative Judge Peter B. Bloch ordered Envirocare to file an amendment to its petition stating why its petition should not be dismissed for lack of standing pursuant to the NRC's decision in *Quivira Mining Company* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 47 NRC ___, *slip op.* (July 17, 1998).[1] During a telephonic

[1] In *Quivira*, the NRC affirmed the finding of the Atomic Safety and Licensing Board that Envirocare lacked standing to challenge the license amendment granted to Quivira Mining Company allowing it to accept and dispose of specified amounts of 11e.(2) byproduct material at its Ambrosia Lake facility located near Grants, New Mexico. The NRC concluded that Envirocare demonstrated actual injury but did fall within the zone of interest of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4232, *et. seq.*, or the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011-2284.

hearing on August 7, 1998, Judge Bloch further requested that Envirocare provide expedited notice of its intentions with regard to the standing issue. On August 11, 1998, Envirocare notified Judge Bloch by letter of its intention to appeal the *Quivira* decision and accordingly requested that it be allowed to remain in this case and be heard on both the State of Utah's pending motion for stay and on the merits of its Request for Hearing. In its letter, Envirocare notified Judge Bloch that it believed that the United States Supreme Court's recent decision in *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998), dictates a different result in *Quivira.* On August 12, 1998, Judge Bloch gave Envirocare permission to brief the significance of *National Credit Union*, and in response, Envirocare respectfully submits this summary of the argument it will present on appeal.

ANALYSIS

I. The *Quivira* Decision

In *Quivira*, Envirocare filed with the NRC a request for hearing and for leave to intervene to challenge a materials license amendment granted to the Quivira Mining Company. In its petition for a hearing, Quivira argued in part that it was unfair and inconsistent for the NRC to apply less stringent standards for the commercial disposal of 11e.(2) wastes at the former mill site owned and operated by Quivira that it applied to Envirocare for the disposal of such waste at a disposal facility. Envirocare claimed that it would suffer a severe competitive disadvantage if Quivira was not required to satisfy the stringent standards met by Envirocare, and thus that Envirocare had an economic interest

in ensuring that all licensees that propose to accept 11e.(2) byproduct material from other persons for disposal comply with applicable NRC standards. Envirocare argued that the NRC's amendment of Quivira's license violated the AEA, NEPA, and the Due Process Clause of the United States Constitution. (NRC Memorandum & Order, 7/17/98, at p.3.)

Without the benefit of *National Credit Union*, the Atomic Safety and Licensing Board ("the Board") denied Envirocare's petition on the basis that it had no standing to intervene. LBP-97-20, 46 NRC 257 (1997). The Board concluded that there was "clearly" a real possibility that competition from the Quivira facility would cause economic harm to Envirocare and that Envirocare therefore had demonstrated sufficient "injury in fact." 46 NRC at 265. The Board, however, ultimately concluded that the injury alleged by Envirocare did not fall within the "zone of interest" of either the AEA or NEPA, and therefore Envirocare lacked standing to challenge the amendment.

On appeal, the NRC agreed with the Board and concluded that Envirocare had demonstrated sufficient "injury in fact," but did not fall within the zone of interest of the AEA or NEPA. In reaching that conclusion, the NRC cited to *National Credit Union*, a significant Supreme Court decision addressing the issue of competitor standing.[2]

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[2] The *National Credit Union* decision was decided after briefing by the parties on *Quivira* was complete. Therefore, the Commission did not have the benefit of any analysis by the parties on *National Credit Union*.

II. The *National Credit Union* Decision

A. A Procedural History

In *National Credit Union*, five banks and the American Bankers Association ("the Banks") filed a lawsuit against the National Credit Union Administration ("NCUA"), seeking to overturn the NCUA's approval of certain applications filed by a credit union to expand its field of membership to include unrelated employer groups to its membership. 118 S. Ct. at 930–31. The Banks alleged that "the NUCA's approval of the charter amendments was contrary to law because the members of the new group did not share a common bond of occupation with [the credit union's] existing members as required by the Federal Credit Union Act. [3] *Id.* at 931.

At the district court level, the Banks' complaint was dismissed for lack of prudential standing on the basis that the Banks' interests were not within the "zone of interests" to be protected by the Federal Credit Union Act. *Id.* Specifically, the court concluded that "the legislative history of the [Federal Credit Union Act] demonstrated that it was passed 'to establish a place for credit unions within the country's financial market, and specifically not to protect the competitive interests of banks.'" *Id.* at 932 (quoting *National Credit Union*, 772 F. Supp. 609, 612 (D.D.C. 1991). On appeal, the Court of Appeals for the District of Columbia reversed the district court's decision

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[3] Section 109 of the Federal Credit Union Act, 12 U.S.C. § 1759 provides: "Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."

and concluded that the Banks' interests "were sufficiently congruent with the interests of [the Federal Credit Union Act's] intended beneficiaries that [the Banks] were 'suitable challengers' to the NCUA's chartering decision." *Id.* (quoting 988 F.2d at 1276-78).

After remand and subsequent appeals, the case was appealed to the United States Supreme Court where the Court granted certiorari "[b]ecause of the importance of the issues presented." *Id.* The Court ultimately concluded -- in a 5 to 4 decision -- that the Banks' interest as competitors of credit unions "arguably fell within the zone of interests to be protected" by the Federal Credit Union Act even though Congress did not specifically intend to benefit competitors in the Act. *Id.* at 932, 938. The Court therefore held that the Banks had prudential standing to challenge the NUCA's interpretation. *Id.* at 932.

B. The Decision

In its opinion, the Court began by recognizing that although its prior cases "have not stated a clear rule for determining when a plaintiff's interest is 'arguably within the zone of interests' to be protected by a statute, they nonetheless establish that [the Court] should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." *Id.* at 933 (emphasis added). The Court then held that a plaintiff need only show that the interest it seeks to protect is "arguably within the zone of interests" to be protected or regulated by the statute in question. *Id.* at 935.

In application of the "zone of interest" test to the interest asserted by the Banks under the Federal Credit Union Act, the Court concluded that the Banks' interest as competitors of credit unions arguably fell within the zone of interests of the Act even though Congress did not specifically intend for the Act to benefit Banks. *Id.* at 935-36. The Court explained: "[A]s competitors of federal credit unions, [the Banks] certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation has affected that interest by allowing federal credit unions to increase their customer base." *Id.* at 936.

The NCUA attempted to dissuade the Court from finding prudential standing on the basis that Congress, when it enacted the Federal Credit Union Act, was not at all concerned with the competitive interests of commercial banks, "or indeed at all concerned with competition." *Id.* at 937. The Court, however, was not swayed. *Id.* at 938. Instead, the Court clearly stated that "[u]nder [its] precedents, it is irrelevant that in enacting the [Federal Credit Union Act], Congress did not specifically intend to protect commercial banks." *Id.* Moreover, the Court concluded that it was "beside the point," that the Banks' objectives in brining a lawsuit were "not eleemosynary in nature." *Id.*[4]

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[4] It should be noted that the dissent in *National Credit Union* recognized that the majority had broadened the zone of interest test. Specifically, the dissent argued that the majority's decision "all but eviscerates the zone-of interests requirement." *National Credit Union*, 118 S. Ct. at 940 (O'Connor, J., dissenting).

III. Application of *National Credit Union* to *Quivira*

In *Quivira*, the NRC acknowledged the Supreme Court's decision in *National Credit Union*, but failed to recognize its significance. Instead of simply asking whether Envirocare's interest arguably fell within the zone of interests of the AEA as directed by the *National Credit Union* Court, the NRC instead analyzed a litany of pre-*National Credit Union* cases to conclude that because the "AEA contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose," Envirocare does not fall within its zone of interest. (Memorandum and Order, 7/17/98, at 13-14.) In reliance on pre-*National Credit Union* cases, the NRC failed to recognize the significance of the similarities between the Banks' interest under the Federal Credit Union Act, and Envirocare's interest under the AEA. Specifically, just as the Banks have an interest in limiting the markets the credit unions serve, so does Envirocare have an interest in limiting the markets that Quivira can serve. Moreover, just as the NCUA's interpretation of the Federal Credit Union Act has affected that interest by allowing credit unions to expand their markets, so to has the Board's interpretation of the AEA affected Envirocare's interests by allowing Quivira to expand its markets to accept additional waste. Thus, even if Congress, in enacting

the AEA, was not concerned with protecting competitors, Envirocare's interests nevertheless fall within the zone of interest protected by the AEA.[5]

CONCLUSION

Envirocare respectfully requests that the NRC allow it to remain in this case and be heard on the merits of its Request for Hearing pending its appeal of the *Quivira* decision.

DATED this 13th day of August, 1998.

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[5] It should be noted that courts interpreting *National Credit Union* have recognized that a plaintiff can be within the zone of interest of a statute even in the absence of a congressional intent to benefit that plaintiff. *See, e.g., Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.D.C. 1998) ("The analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interest that the statute protects."); *Graham v. FEMA*, ___ F.3d ___, 1998 WL 391864, at *6 (9th Cir. July 15, 1998) ("The [Supreme] Court . . . recently clarified [the zone of interest test], holding that APA plaintiffs need only show that their interest fall within the 'general policy' of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them.")

CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing **ENVIROCARE'S AMENDMENT TO ITS REQUEST FOR HEARING** to be mailed, postage prepaid, this 13th day of August, 1998 to the following:

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