THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF INTERNATIONAL URANIUM (USA)CORPORATION	)	DOCKET NO. 40-8681-MLA-6
(Receipt of Material from St. Louis, Mo.)	)	ENVIROCARE OF UTAH, INC.'S APPEAL OF THE PRESIDING OFFICER'S MEMORANDUM AND ORDER DATED 5/21/99

Pursuant to 10 C.F.R. § 2.1205(o), Envirocare of Utah, Inc. ("Envirocare") hereby appeals the May 21, 1999 decision of Presiding Officer Peter B. Bloch dismissing Envirocare's Request for Hearing on the basis that Envirocare lacks standing to challenge International Uranium (USA) Corporation's ("IUSA") application to amend its Source Material License SUA-1358.

By letter dated March 2, 1999, IUSA submitted a request to the Nuclear Regulatory Commission ("NRC") to amend its Source Material License No. SUA-1358 to allow for the receipt, processing and disposal of uranium-bearing material from the Formerly Utilized Sites Remedial Action Program ("FUSRAP") site near St. Louis, Missouri ("the St. Louis Material"). On April 26, 1999, Envirocare filed a Request for Hearing challenging IUSA's application to amend its license on the basis that IUSA failed to satisfy: (1) the requirements of the NRC's "Final Revised Guidance on Disposal of Non-Atomic Energy Act of 1954 Section 11e.(2) Byproduct Material in Tailing Impoundments," (September 1995); (2) the requirements set forth in 10 C.F.R. part 40;

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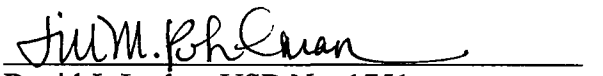
and (3) the standards established by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4232, the NRC's regulations for the implementation of NEPA, 10 C.F.R. part 51, and the NRC's prior application of NEPA to similarly situated licenses. In support of its Request, Envirocare described its economic interest in ensuring that all licensees proposing to accept 11e.(2) byproduct material comply with applicable NRC standards. Envirocare further described its interest, as a member of an environmentally sensitive industry, in ensuring that the environmental laws designed to protect human health and the environment from the hazards of radioactive waste disposal are uniformly applied and enforced by the NRC. Envirocare concluded by arguing that these interests fall within the zone of interests protected by NEPA and the AEA.

On May 21, 1999, Presiding Officer Peter B. Bloch dismissed Envirocare's Request for Hearing, finding that Envirocare lacked standing to challenge the amendment. In his decision, Judge Bloch relied on the NRC's recent opinions in *Quivira Mining Company* (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, (1998) and *International Uranium (USA) Corporation* (Receipt of Material from Tonawanda, New York), CLI-98-23 (Nov. 24, 1998), wherein the NRC affirmed the dismissal of Envirocare's requests for hearing in those matters for lack of standing. In filing this appeal, Envirocare recognizes the NRC's recent decisions in *Quivira* and *IUSA*. However, Envirocare respectfully disagrees with the NRC's decisions and has appealed the *Quivira* and *IUSA* decisions on the basis that the decisions erred in concluding that Envirocare's interests do not fall within the zone of interests of either NEPA or the AEA.

While its appeal to the federal court is pending, Envirocare hereby files this appeal, in good faith, to preserve its right to participate as a party in a hearing on IUSA's latest license amendment application. Thus, on the same grounds as articulated in Envirocare's *IUSA* appellate brief of August 31, 1998, incorporated herein by reference, Envirocare hereby appeals Judge Bloch's decision that Envirocare lacks standing to challenge the IUSA license amendment, and respectfully requests that (1) the NRC find that the Presiding Officer erred in determining that Envirocare lacked standing to challenge IUSA's application to amend its Source Material License SUA-1358, and (2) the NRC remand this matter to the Presiding Officer for a hearing on the merits. (A copy of Envirocare of Utah, Inc.'s Appeal of the Presiding Officer's Memorandum and Order Dated August 19, 1998, incorporated herein, is attached hereto as Exhibit 1).

DATED this 26 day of May, 1999.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I hereby certify that I caused true and complete copies of the foregoing ENVIROCARE OF UTAH, INC.'S APPEAL OF THE PRESIDING OFFICER'S MEMORANDUM AND ORDER DATED 5/21/99 in the above-captioned matter to be served, in the manner indicated below, on this 26th day of May, 1999 to:

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EXHIBIT 1

THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF INTERNATIONAL URANIUM (USA)CORPORATION'S AMENDMENT TO NRC SOURCE MATERIAL LICENSE SUA-1358	)	DOCKET NO. 40-8681 August 31, 1998 ENVIROCARE OF UTAH, INC.'S APPEAL OF THE PRESIDING OFFICER'S MEMORANDUM AND ORDER DATED 8/19/98

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Cases

Statutes

Pursuant to 10 C.F.R. § 2.1205(o), Envirocare of Utah, Inc. ("Envirocare") hereby appeals the August 19, 1998 decision of Presiding Officer Peter B. Bloch dismissing Envirocare's Request for Hearing on the basis that Envirocare lacks standing to challenge 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 site (Formerly Utilized Sites Remedial Action Program, "FUSRAP"), near Tonawanda, New York.

INTRODUCTION

The NRC recently amended IUSA's Source Material License SUA-1358 to allow it to accept for disposal up to 25,000 tons of 11e.(2) material from the FUSRAP site. On July 22, 1998, Envirocare filed a Request for Hearing challenging the IUSA amendment on the basis that (1) the NRC did not follow its own internal guidance in reaching its decision; (2) the amendment did not demonstrate that the standards set forth in 10 C.F.R. part 40 had or will be met; and (3) the action was inconsistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4232, *et seq.*, and corresponding NRC regulations.

On August 19, 1998, Presiding Officer Peter B. Bloch dismissed Envirocare's Request for Hearing, finding that Envirocare lacked standing to challenge the amendment. In his decision, Judge Bloch relied on the NRC's recent opinion in

Quivira Mining Company (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 47 NRC ___, *slip op.* (July 17, 1998), wherein the NRC affirmed the Atomic Safety and Licensing Board's decision to dismiss Envirocare's request for hearing and leave to intervene to challenge a materials license amendment allowing Quivira Mining Company to accept and dispose of specified amounts of 11e.(2) byproduct material at its Ambrosia Lake facility located near Grants, New Mexico. In *Quivira*, the NRC concluded that while Envirocare had demonstrated actual injury, its interests did not fall within the "zone of interests" of NEPA or the Atomic Energy Act ("AEA"), 42 U.S.C. §§ 2011-2284.

With all due respect to the NRC, Envirocare intends to appeal the *Quivira* decision on the basis that the decision failed to recognize the significance of the United States Supreme Court's decision in *National Credit Union Administration v. First National Bank & Trust Co.*, 118 S. Ct. 927 (1998), and thus erred in concluding that Envirocare's interests do not fall within the zone of interests of either NEPA or the AEA.[1] On the same grounds, Envirocare hereby appeals Judge Bloch's decision -- reached in reliance on *Quivira* -- that Envirocare lacks standing to challenge the IUSA license amendment. Indeed, a review of *National Credit Union* and its progeny

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[1] The Atomic Safety and Licensing Board reached its decision in *Quivira* before the Supreme Court decided *National Credit Union*. Moreover, *National Credit Union* was decided after briefing by the *Quivira* parties on appeal to the NRC was complete. Thus, in reaching its decision, the NRC did not have the benefit of the parties' analysis on *National Credit Union*.

demonstrates that Envirocare's interests in challenging IUSA's license amendment fall within the zone of interests protected and regulated by NEPA and the AEA.

BACKGROUND

I. The IUSA White Mesa Site and Source License Amendment SUA-1358

IUSA has operated a uranium mill at its White Mesa site processing materials from its own mine and from outside generators. IUSA disposes of the radioactive wastes produced as byproducts of its milling operations on site. Pursuant to its Source Material License SUA-1358, IUSA is authorized to receive and transfer uranium, possess byproduct material generated by mill operations, and accept limited amounts of byproduct material from in situ leach uranium mining facilities.

On May 6, 1998, IUSA applied for an amendment to its license to allow it to accept for disposal up to 25,000 tons of 11e.(2) byproduct material from the FUSRAP site near Tonawanda, New York. The NRC granted IUSA's requested amendment, and on July 24, 1998, the first of many shipments of uranium-bearing materials were loaded on railcars at the FUSRAP site for shipment to White Mesa. Despite the significance of the amendment, the NRC did not ensure that the IUSA's amendment satisfied applicable congressional and NRC standards. Specifically, the NRC did not (1) make adequate findings that IUSA had satisfied the co-disposal or economic justification tests pursuant to the NRC's internal guidance; (2) require the preparation of an Environmental Report or an Environmental Impact Statement pursuant to the

NRC's NEPA regulations; or (3) ensure compliance with the standards set forth in 10 C.F.R. part 40 applicable to an 11e.(2) disposal facility.

II. Licensing of Envirocare

Envirocare was the first private facility in the United States to be licensed by the NRC to accept 11e.(2) material from outside generators for disposal. In licensing Envirocare, the NRC set forth the requirements that an 11e.(2) disposal facility must meet for licensure. In part, the NRC requires (1) compliance with stringent site regulations set forth in 10 C.F.R. part 40, and (2) preparation by the NRC Staff of an Environmental Impact Statement based upon an Environmental Report prepared by the applicant. At great expense to Envirocare, Envirocare satisfied the standards promulgated by the NRC and received its license to receive and dispose of 11e.(2) byproduct material.

III. Envirocare's Interest in the IUSA Amendment

As stated above, Envirocare filed a Request for Hearing with the NRC challenging the amendment of IUSA's license. In support of its Request, Envirocare described its economic interest in ensuring that all licensees proposing to accept 11e.(2) byproduct material comply with applicable NRC standards. Envirocare further described its interest, as a member of an environmentally sensitive industry, in ensuring that the environmental laws designed to protect human health and the environment from the hazards of radioactive waste disposal are uniformly applied and enforced by the

NRC. Envirocare concluded by arguing that these economic interests fall within the zone of interests protected by NEPA and the AEA.

ARGUMENT

I. The Presiding Officer Erred in Relying on the *Quivira* Analysis to Find that Envirocare Lacked Standing to Challenge IUSA's License Amendment.

To establish standing under NEPA or the AEA, a petitioner must demonstrate that it has (1) suffered a sufficient "injury in fact" and (2) that its interests arguably fall within the "zone of interests" to be protected or regulated by the statute. *National Credit Union*, 118 S. Ct. at 933. Without addressing the first requirement for standing, Judge Bloch -- in reliance on *Quivira* -- concluded that Envirocare did not have standing to challenge the amendment to IUSA's Source Material License because Envirocare's economic interests fall outside the "zone of interests" of either NEPA or the AEA. Judge Bloch's decision was reached in error. Indeed, a careful analysis of *National Credit Union* and its progeny demonstrates that Envirocare has standing to challenge the IUSA amendment as its economic injuries arguably fall within the zone of interests to be protected or regulated by NEPA and/or the AEA.

A. The *Quivira* Decision Fails to Recognize the Significance of the Supreme Court's Decision in *National Credit Union*.

In his brief decision denying Envirocare's Request for Hearing, Judge Bloch expressly relied on the NRC's decision in *Quivira* to find that Envirocare lacked standing to challenge the NRC's amendment of IUSA's license. *Quivira*, however,

failed to recognize the significance of *National Credit Union* and its effect on the zone of interest test. Accordingly, Judge Bloch's decision should be reversed.

1. The *National Credit Union* Decision

(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"), challenging the NCUA's approval of certain applications filed by a credit union seeking to expand its field of membership to include unrelated employer groups. 118 S. Ct. at 930–31. The Banks alleged that "the NCUA'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.[2] *Id.* at 931.

At the district court level, the Banks' complaint was dismissed for lack of standing on the basis that the Banks' interests did not fall within the "zone of interests" to be protected by the Federal Credit Union Act. *Id.* The district 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 *First*

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[2] The Federal Credit Union Act 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." 12 U.S.C. § 1759.

Nat'l Bank & Trust Co. v. National Credit Union, 772 F. Supp. 609, 612 (D.D.C. 1991), *rev'd*, 988 F.2d 1272 (D.C. Cir.), *cert. denied*, 510 U.S. 907, 114 S. Ct. 288 (1993)). On appeal, the Court of Appeals for the District of Columbia reversed the decision and concluded that the Banks' interests "were sufficiently congruent with the interests of the [Federal Credit Union Act's] intended beneficiaries and that [the Banks] were 'suitable challengers' to the NCUA's chartering decision." *Id.* (quoting *National Credit Union*, 998 F.2d at 1276–78). On writ of certiorari to the United States Supreme Court, the Court affirmed the decision of the Court of Appeals, concluding -- in a 5 to 4 decision -- that the Banks' interests as competitors of credit unions "arguably fell within the zone of interests to be protected" by the Federal Credit Union Act. *Id.* at 933. The Court reached this conclusion even though it found that Congress, in enacting the Federal Credit Union Act, did not specifically intend to benefit the competitors of credit unions. *Id.*

(b) The Decision

The Court began its analysis in *National Credit Union* by defining the zone of interest test. The Court stated that for a party to have prudential standing to challenge an agency decision, "'the interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute . . . in question.'" *Id.* (quoting *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830 (1970)) (alteration in original). The Court then

stated that while its previous cases "have not stated a clear rule" for determining when a plaintiff's interests "arguably fall within the zone of interests" sought to be protected by statute, "they nonetheless establish that we should not inquire whether there has been a congressional intent to benefit the would-be plaintiff." *Id.* (emphasis added). Instead, the Court instructed that a court should first "discern the interests 'arguably . . . to be protected' by the statutory provision at issue," and then "inquire whether the plaintiff's interests affected by the agency action in question are among them." *Id.* at 935.

Applying this analysis to the interests asserted by the Banks under the Federal Credit Union Act, the Court found that the Banks' interest as competitors of credit unions arguably fell within the zone of interests of the Act. *Id.* at 935–36. The NCUA attempted to dissuade the Court from that conclusion by arguing that Congress, in enacting 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 936–37. The Court was not swayed. Instead, the Court stated that the fact that Congress did not specifically intend for the Act to benefit the Banks was irrelevant. *Id.* at 938. The Court therefore concluded that because the Federal Credit Union Act had the effect of protecting the Banks' competitive interests, and because the NCUA's interpretation of the Act affected the Banks' competitive interest by allowing credit

unions to increase their customer base, the Banks had standing to seek judicial review of the NCUA's decision. *Id.* at 936.[3]

2. 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 following the direction of the *National Credit Union* Court and asking simply whether Envirocare's interests arguably fell within the zone of interests of NEPA or the AEA, the NRC instead searched for some "indication" in the relevant statutes of an "intent" to protect Envirocare's competitive interests. Indeed, the NRC explicitly stated that it refused to find that Envirocare had standing to challenge its decision because it could "find no indication in the AEA of an intent to protect the competitor interest Envirocare asserts." (*Id.* at 12 (emphasis added).) Similarly, the NRC concluded that it could not find Envirocare had standing because the cases where courts have found standing have involved statutes with "a statutory intent to limit competition." (*Id.* at 12-13 (emphasis added)); *see also id.* at 17 ("Unlike the statutes under which the courts have found competitors within a statutory 'zone of interests,' the AEA includes no express provision effectively cordoning off a portion of the market from competition." (emphasis added)); *id.* at 18-19 ("Although a few judicial decisions seemingly have

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[3] 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 eviscerate[d] the zone-of-interest's requirement." *National Credit Union*, 118 S.Ct. at 940 (O'Connor, J., dissenting).

accorded standing to a competitor without expressly tying the competitor's interest to an interest of the applicable statute, such a generalized approach seems at odds with the principles the Supreme Court has until now consistently followed." (emphasis added)).

The NRC's approach under *National Credit Union* is inappropriate. The Supreme Court explicitly stated that "there does not have to be an 'indication of congressional purpose to benefit the would-be plaintiff.'" *National Credit Union*, 118 S. Ct. at 935. Therefore, it was improper for the NRC to search for some indication in the AEA of an intent to protect competitors like Envirocare. Instead, the NRC should have simply asked whether Envirocare's interests "arguably fall within the zone of interests" protected or regulated by the AEA.

A proper application of the *National Credit Union* zone of interest test demonstrates that Envirocare had standing to challenge Quivira's license amendment. Indeed, the NRC's licensing requirements for disposal of 11e.(2) byproduct material, implemented pursuant to 42 U.S.C. § 2114, constitute a classic example of a regulatory scheme for limiting entry into a market. Thus, even assuming that Congress' primary purpose in enacting NEPA and/or the AEA was to protect public health and safety, Envirocare's competitive interests in assuring that all market entrants bear the same regulatory burden for commercial disposal of 11e.(2) byproduct material "arguably" falls within the zone of interests the AEA was enacted to protect or regulate.

3. Application of *National Credit Union*.

Subsequent to the Court's decision in *National Credit Union*, federal district and circuit courts have applied the Court's zone of interest test in a manner consistent with a finding that Envirocare has standing to challenge the Quivira amendment. For example, in *American Bankers Insurance Group v. Board of Governors of the Federal Reserve System*, the court concluded that "'a plaintiff who has a competitive interest in confining a regulated industry within certain congressional imposed limitations may sue to prevent the alleged loosening of those restrictions, even if the plaintiff's interest is not precisely the one that Congress sought to protect.'" ___ F. Supp.2d. ___, No. CIV.A.96-2383(EGS), 1998 WL 199961, at *4-5 (D.D.C. April 21, 1998) (quoting *First Nat'l Bank & Trust Co. v. National Credit Union Admin.*, 988 F.2d 1272, 1276 (D.C.Cir. 1993), *aff'd*, 118 S. Ct. 927, 933 (1998). Similarly, in *Graham v. FEMA*, the Ninth Circuit characterized the *National Credit Union* decision as a clarification of the zone of interest test and concluded that a plaintiff need only show "that their interests fall within the 'general policy' of the underlying statute, such that interpretations of the statute's provisions or scope could directly affect them." ___ F.3d ___, No. 97-15590, 1998 WL 391864, at *6 (9th Cir. July 15, 1998).[4] Clearly,

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[4] *See also Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 458 (D.C. Cir. 1998) (recognizing that the Court's zone of interest test "is not meant to be especially demanding"); *Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.D.C. 1998) ("The [zone of interest] analysis focuses, not on those who Congress intended to benefit, but on those who in practice can be expected to police the interests that the statute protects.").

Envirocare's interests fall within the general policy of the AEA and/or NEPA such that the NRC's interpretation and application of those acts directly affects them. Thus, Envirocare should be recognized as having standing to challenge a competitor's license amendment so as to prevent the loosening of the restrictions imposed on 11e.(2) disposal facilities.

B. The Presiding Officer's Decision to Dismiss Envirocare's Request for Hearing Should Be Reversed on the Basis that Envirocare Has Satisfied the Zone of Interest Requirements of *National Credit Union*.

In considering whether Envirocare fell within the zones of interest of either NEPA or the AEA, Judge Bloch relied on the NRC's *Quivira* decision wherein the NRC determined that Envirocare did not have standing to challenge the license amendment allowing Quivira to accept and dispose of specified amounts of 11e.(2) byproduct material at its Ambrosia Lake facility. In fact, Judge Bloch stated that he was certain Envirocare's challenge to the IUSA amendment was "on all fours" with *Quivira* and therefore must be dismissed. As demonstrated above, the NRC failed to give proper consideration to the *National Credit Union* decision in deciding *Quivira* and therefore erred in dismissing Envirocare's request for hearing to challenge the Quivira amendment. For the same reasons, Judge Bloch erred in relying on the *Quivira* decision to deny Envirocare the right to challenge the IUSA amendment. Therefore, Envirocare respectfully requests that the NRC find that Envirocare's interests fall

within the zone of interests of either the AEA or NEPA and reverse Judge Bloch's decision to dismiss Envirocare's Request for Hearing in this matter.

CONCLUSION

For the foregoing reasons, Envirocare respectfully requests (1) that the NRC find that the Presiding Officer erred in determining that Envirocare lacked standing to challenge the amendment to IUSA's Source Material License SUA-1358, and (2) that the NRC remand this matter to the Presiding Officer for a hearing on the merits.

DATED this 31st day of August, 1998.

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