BEFORE THE UNITED STATES

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF UMETCO MINERALS CORPORATION (SOURCE MATERIALS LICENSE NO. SUA-1358) DOCKET NO. 40-8681-MLA-2	REPLY TO THE NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY ENVIROCARE OF UTAH, INC.

ENVIROCARE OF UTAH, INC. ("Envirocare"), by and through its undersigned attorneys, hereby files this Reply to the NRC Staff Response to Request for Hearing Filed by Envirocare of Utah, Inc.

ENVIROCARE'S STANDING IS BASED ON AN INJURY TO ITS LEGAL INTEREST, NOT TO ITS ECONOMIC INTEREST.

The NRC staff asserts that Envirocare's standing is based "solely on an injury to its economic interest, caused by an alleged competitive advantage afforded to its competitor," and that such an interest is not "within the zone of interests protected by [the Atomic Energy Act ("AEA") or the National Environmental Policy Act ("NEPA")], and does not confer standing upon Envirocare to request a hearing . . .." NRC Staff Response at 7. The NRC staff's assertions are incorrect, because Envirocare's standing is based on an injury caused by the Field

Office's arbitrary, capricious, and inconsistent application of NRC and EPA environmental and engineering regulations and standards to Envirocare's and Umetco's disposal facilities. The economic injury which the NRC staff wrongly asserts is the sole basis for Envirocare's standing is merely a manifestation of the injury to Envirocare's legal interests. Envirocare has already described the different treatment given the two disposal facilities in its Request for Hearing and will not repeat them here. *See* Request at 5-7.

Envirocare is entitled to the same treatment as given to Umetco by the NRC regarding the licensing of their similar disposal facilities to accept § 11(e)(2) byproduct materials. *See International Business Machines Corp. v. United States*, 343 F.2d. 914, 920 (1965), *cert. denied*, 382 U.S. 1028 (1966). The Field Office cannot require Envirocare to comply fully with the applicable NRC and EPA environmental and engineering regulations and standards, while at the same time, and under the same conditions, not require the completion of a meaningful environmental analysis of Umetco's disposal facilities and comparable compliance with the applicable NRC and EPA standards. Such unfairness evidences arbitrary or capricious action, action which is unlawful. *See Offshore Power Systems* (Floating Nuclear Power Plants), ALAB-489, 1978 WL 14085, at *18 (N.R.C. Aug. 21, 1978); *see also Cross v. United States*, 512 F.2d 1212, 1217 n.8 (4th Cir. 1975). The Field Office's unequal treatment of Envirocare causes a concrete injury to Envirocare's legal interests, and by violating those interests, provides the basis for Envirocare's standing.

Injury to Envirocare's legal interests also satisfies the redressability criteria for standing because Envirocare's injury can be redressed by a favorable decision by the Field Office

requiring the completion of a meaningful Environmental Analysis and application of the same environmental and engineering regulations and standards to Umetco's facilities as has been required of Envirocare's facilities. Such a decision would guarantee equal treatment under the law.

The Commission previously has held that "an injury to a purely legal interest will support standing." *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Unit 1) LBP-90-15, 31 NRC 501, 1990 WL 324388, at *3 (N.R.C. June 11, 1990); *see also Cleveland Electric Illuminating Co.*(Perry Nuclear Power Plant, Unit 1) CLI-93-21, 1993 WL 417826, (N.R.C. Sept. 30, 1993) ("*Cleveland II*"). In *Cleveland II*, the petitioner's standing was based on the alleged loss of significant procedural rights, including the right to receive notice and meaningfully participate in hearings regarding threatened injuries caused by the release of hazardous material from the power plant. In *Cleveland II*, the Commission reversed the License Board's order that dismissed the petitioner's request for leave to intervene on the basis of lack of standing, and stated:

> Standing may be based on the alleged loss of a procedural right "so long as the procedures in question are designed to protect some threatened concrete interest" that is the ultimate basis of the individual's standing.

Cleveland II at *5.

Envirocare faces the loss of similar procedural rights, the right to equal treatment by the Field Office, and the right to be free from arbitrary or capricious treatment by the NRC. These procedural rights are not unimportant, they guarantee that the purposes of the AEA and

NEPA are fulfilled, and that Envirocare is not unfairly burdened by the Field Office's arbitrary and capricious actions. Clearly, these rights are within the zone of interests protected by the AEA and NEPA.

The NRC staff's argument is without merit because the NRC staff has misread Envirocare's Request for Hearing and, therefore, does not understand Envirocare's basis for standing. The economic impact on Envirocare's operation created by the Field Office's actions is simply a manifestation of the injury to Envirocare's legal interests–unequal treatment under the law. Notwithstanding the NRC staff's argument, Envirocare has clear standing to challenge the Field Office's actions on the basis that it has acted arbitrarily and capriciously and those actions are unfair to Envirocare. Indeed, if Envirocare did not have sufficient standing to challenge the Field Office's actions on that basis, who would?

As previously discussed, Envirocare's standing is based on injuries arising from unequal treatment of Envirocare's and Umetco's disposal facilities by the Field Office. It is not based on economic concerns. Contrary to the NRC staff's assertion that "Envirocare essentially contends that if Umetco's license application was denied, Envirocare might be chosen to receive the in situ waste materials which otherwise would have been shipped to Umetco,"[1] Envirocare's concern arises as a result of the disparate environmental analyses and the costs associated therewith required at the two facilities, not because Envirocare might receive in situ waste which would otherwise be shipped to Umetco's facility. The mischaracterization of Envirocare's

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[1]For the record, Envirocare never made such a contention.

position is nothing more than a to clouding of the real issue: Envirocare is entitled to equal treatment.[2]

ENVIROCARE'S REQUEST FOR INFORMAL HEARING WAS TIMELY FILED

The NRC staff has asserted and suggested that Envirocare failed to timely file its Request for Hearing and failed to meet the requirements of § 2.1205(c)(2). This is simply a continuation of the NRC staff's attempts to use procedural niceties to deny Envirocare's equal treatment under the AEA and NEPA and, seemingly, to prevent a reasoned examination of the Field Office's failure to require Umetco to submit adequate environmental justification for its amended license. Under any reading of the NRC's admittedly confusing notice regulations,

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[2] The NRC staff's contentions regarding whether economic concerns are within the zone of interests protected by the AEA and NEPA are based on decisions that are easily distinguishable. In all but two of the cited decisions, the reference to economic injuries concerns "garden variety pocketbook" injuries alleged by electric power utility ratepayers who sought to intervene in NRC matters on the basis that the NRC decision would have an economic impact on them, as ratepayers.

In the two cited cases that do not involve ratepayers, *Virginia Electric and Power Company* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976) and *Consumers Power Co.* (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247 (1981), the petitioners based their standing on economic injuries that are not similar to those suffered by Envirocare. In *Virginia Electric*, the petitioner was a contractor whose standing was based on a threat to its reputation and its desire to avoid damage suits related to the possible structural failure of a power plant. In *Consumers Power*, the petitioners were members of a labor union which raised "pocketbook" issues concerning employment rights. Again, *Virginia Electric* and *Consumers Power* provide no guidance in this matter because Envirocare does not allege damage to its reputation or the necessity of avoiding lawsuits, or matters involving employment rights as the basis of its standing. Envirocare's standing is based on the unequal treatment by the Field Office.

Finally, *Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631 (1975), a decision which predates the 1983 amendment to the AEA discussed in *Envirocare*, is also of questionable assistance. The NRC staff relies on *Jamesport* for authority that economic competitive interests do not come within the zone of interests protected by the AEA or NEPA. NRC Staff Response at 10. However, the issue is not whether the AEA specifically provides for the "protection of the competitive position of commercial entities," but whether the Field Office can arbitrarily and capriciously apply the AEA and NEPA so as to create an unfair commercial advantage between licensees. It goes without saying that Congress intended the AEA and NEPA to be applied equally to similar licensees. Otherwise, the laws would be totally void of meaning and would be worthless. Without question, the unarbitrary and uncapricious application of the AEA and NEPA to licensing decisions comes within the zone of interests to be protected by those statutes. The NRC staff raises issues and relies on authorities which simply do not apply to Envirocare's basis for standing.

Envirocare timely sought specific information about the amendment to Umetco's license in a letter sent to the Field Office in December.[3] At the time of the letter, Envirocare had no specific information as to the purpose or breadth of the Umetco amendment. Without specific information at its disposal, Envirocare was unable to determine whether the amended license was properly issued and whether the applicable regulations have been complied with when the amended license was being reviewed and issued. Without this specific information, Envirocare could do little more than it did, request the information. Only when this information was obtained was Envirocare in a position to determine whether it needed to act or not and request a hearing.[4]

The response received from the Field Office to Envirocare's request for information was little more than an invitation to Envirocare to investigate the records in Denver. This response was hardly helpful. It did, however, serve to suggest that something was amiss in the process associated with the amended license issued to Umetco. Once Envirocare was able to confirm its now raised suspicions, it filed its Request for Hearing.

Envirocare, using as a basis for the request for hearing the specific and actual information and notice it obtained in Denver, has now raised serious health and human environment issues related to the Umetco license. There are issues that require, as stated before,

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[3] Amazingly, a recent decision involving still other amendments to Umetco's license (*Umetco Minerals Corp.* (Source Materials License), LBP-92-20, 36 NRC 112 (1992)) provided the genesis of proposed changes to language in similar NRC notice and timing requirements. A cynic would suggest that notice problems abound when Umetco is attempting to amend their license without public review or input.

[4] Surely the NRC staff does not mean to suggest that citizens interested in NRC licensing decisions should file peremptory requests for hearing without sufficient information just to guarantee compliance with timing and notice requirements that are even now being revised because of their inherent ambiguity.

reasoned review. These are issues that cannot and should not be dismissed or given "short shrift" by reliance on hyper-technical definitions of "categorical exclusions" and notice requirements.

The reasoned review an informal hearing request will provide in no way damages or endangers the rights of Umetco or the NRC and will provide an important examination to determine whether protection of the health and human environment has been guaranteed by the license amendments and whether Envirocare has received disparate and unequal treatment under the AEA and NEPA.

DATED this 28th day of February, 1994.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1994, the original and two correct copies of the foregoing REPLY TO THE NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY ENVIROCARE OF UTAH, INC. were mailed via United States Express Mail, postage prepaid, addressed to the following:

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I also hereby certify that on this 28th day of February, 1994, a true and correct copy of the foregoing REPLY TO THE NRC STAFF RESPONSE TO REQUEST FOR HEARING FILED BY ENVIROCARE OF UTAH, INC. was deposited in the United States mail, postage prepaid, addressed to the following:

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