UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
QUIVIRA MINING COMPANY	)	Docket No. 40-8905
(Ambrosia Lake Site)	)	

ANSWER OF APPLICANT QUIVIRA MINING COMPANY TO APPEAL BY ENVIROCARE OF UTAH OF MEMORANDUM AND ORDER DENYING ITS REQUEST FOR A HEARING AND PETITION FOR LEAVE TO INTERVENE

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BACKGROUND

On November 4, 1997, Administrative Judge Charles Bechhoefer, the Presiding Officer in this proceeding, issued an order denying Envirocare's request for a hearing and its petition for leave to intervene in the proceeding ("Memorandum and Order"). Envirocare of Utah, Inc. ("Envirocare") now appeals the Memorandum and Order.

Envirocare has requested a hearing and intervention on an amendment to the source material license (SUA-1473) issued to Quivira Mining Company ("Quivira" or "Applicant") that permits Quivira to receive defined quantities of Section 11.e(2) byproduct material from outside generators for disposal at its Ambrosia Lake uranium mill tailings site, located near Grants, New Mexico. Envirocare operates a waste disposal facility at Clive, Utah, approximately five hundred miles from Quivira's facility. Envirocare acknowledges that it will suffer no environmental injury whatsoever from the licensing or operation of Quivira's facility. Rather, it alleges potential economic harm from competition with Quivira as a result of its accepting "the same type of byproduct waste material from

outside generators that [Envirocare] now accepts at its Clive, Utah site." Memorandum and Order at 7.

After examining Envirocare's allegations of standing with initial and supplemental briefs, the Presiding Officer correctly determined that Envirocare lacked standing. The decision of the Presiding Officer faithfully adheres to the Commission's requirements for standing to intervene in a contested proceeding, derived from evolving judicial concepts of standing. In particular, the Presiding Officer properly rejected Envirocare's claim of competitive injury as a basis for standing under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.; the Atomic Energy Act ("AEA"), 42 U.S.C. § 2011 et seq.; and the equal protection and due process clauses of the Constitution. Further, the decision of the Presiding Officer on standing is entitled to substantial deference. See Georgia Institute of Technology, CLI-95-12, 42 NRC 111, 116 (1995) citing Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47-49 (1994). Accordingly, the Commission should affirm the decision denying Envirocare's request for a hearing and intervention.

ARGUMENT

As Envirocare's brief demonstrates, it has no quarrel with the Presiding Officer's application of evolving judicial concepts of standing to NRC proceedings, including informal Subpart L proceedings. Memorandum and Order at 4-5. These contemporaneous concepts of standing include minimum constitutional requirements as well as "prudential" (i.e., judicially self-imposed) requirements enunciated by the Supreme Court most recently in Bennett v. Spear, 117 S. Ct. 1154 (1997).

In Bennett, the Supreme Court defined three standing requirements that constitute the "irreducible constitutional minimum" arising out of the "case" or "controversy" provision of Article III of the Constitution. Bennett, 117 S. Ct. at 1163. These are:

> (1) that the plaintiff have suffered an "injury in fact" — an invasion of a judicially cognizable interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;
>
> (2) that there be a causal connection between the injury and the conduct complained of — the injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and
>
> (3) that it be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Id., citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Among the "prudential standing requirements of general application" is the doctrine "that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennett, 117 S. Ct. at 1161. In this instance, Envirocare has not met either the constitutional or prudential standing requirements for claims arising under NEPA or the AEA with respect to the license amendment requested by Applicant.

I. Envirocare lacks standing under NEPA and 10 C.F.R. Part 51.

A. Envirocare nowhere alleges any "concrete and particularized" environmental injury.

In its request for hearing, Envirocare had complained that the NRC did not prepare an Environmental Impact Statement ("EIS") for Quivira's license amendment, that the NRC is relying upon outdated environmental information, and that the NRC is not requiring Quivira to submit an Environmental Report. See Envirocare's Request for Hearing at 7-10. But nowhere has Envirocare alleged that it will suffer any environmental injury as a result of the NRC's allegedly inadequate

environmental evaluation. But to meet the "injury in fact" requirement for standing under the first prong of Bennett, a party alleging injury from an insufficient environmental evaluation must show that the injury is "concrete and particularized" as to the plaintiff himself (Bennett, 117 S. Ct at 1163) so as to demonstrate "that the party seeking review be himself among the injured" (Defenders of Wildlife, 504 U.S. at 563), and therefore has "a personal stake in the outcome of the controversy." Warth v. Seldin, 422 U.S. 490, 498-99 (1975), citing Baker v. Carr, 369 U.S. 186, 204 (1962). Inasmuch as its own facility is some 500 miles distant from Lake Ambrosia, Envirocare cannot possibly meet this requirement of any "concrete and particularized" environmental harm to itself.

As the Presiding Officer correctly observed, "there has not even been an assertion that the alleged environmental impacts of the Ambrosia Lake facility in any way directly affect Envirocare." Memorandum and Order at 18. Accordingly, the Presiding Officer ruled that Envirocare's claim to standing violates the principle that "standing is never allowed solely on the basis of a procedural right unconnected to the plaintiff's own concrete harm." Id. at 18-19, citing Defenders of Wildlife, 504 U.S. at 573 n.8 (internal quotations deleted).

Indeed, the facts in Defenders of Wildlife underscore the lack of any concrete injury here to Envirocare. In that case, the Court distinguished the plaintiffs' generalized grievance against a challenged regulation interpreting the Endangered Species Act from a situation where plaintiffs are seeking to enforce a "procedural requirement for an environment impact statement before a federal facility is constructed *next door to them*." 504 U.S. at 572 (emphasis added). The Court pointed out that "one living adjacent to the site for proposed construction of the federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the

license to be withheld or altered . . . ." Id. at 572 n.7. The Court hastened to add, however, that such standing "is quite different from . . . standing for persons who have no concrete interests affected — persons who live (and propose to live) *at the other end of the country from the dam."* Id. (emphasis added). In simple terms, Envirocare lives "at the other end of the country" from the Ambrosia Lake site and, as such, cannot show the particularized injury required for standing, any more than every other business, organization or individual located 500 miles from the Ambrosia Lake facility. Envirocare has therefore failed to satisfy the first, "injury in fact" prong of Bennett.[1/]

B. Envirocare has not shown a "direct connection" between its alleged competitive injury and the NRC's environmental evaluation of Quivira's application for a license amendment.

Envirocare admits that economic injuries alone do not give rising to standing under NEPA, but contends that its alleged competitive injury suffices to create standing so long as licensing the Ambrosia Lake facility will result in environmental impacts affecting others. According to Envirocare, "the law only requires that a petitioner show that it would suffer a direct economic injury as a result of an agency action, and that the action will also have environmental impacts," even though the economic injury and environmental impacts are entirely unrelated. Envirocare Brief at 7. The Presiding Officer properly rejected this untenable proposition. The Supreme Court has made clear that the second prong of standing requires "a causal connection between the injury and conduct

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[1/] The Presiding Officer reached the same result, but by a different route. He concluded that allegations of competitive injury sufficed to show injury in fact. Memorandum and Order at 11. But the Presiding Officer agreed with Quivira and the NRC Staff, as discussed in the next section, that standing under NEPA requires proof of a causal connection between the licensing of the Lake Ambrosia facility and the asserted injury in fact. Id. at 15-16, 22. Whether cast as the absence of a causal connection between the NRC's licensing action and the putative competitive injury, or a failure to show injury in fact, the standing problem is the same: there has been no showing that any alleged environmental impact of the facility results in cognizable injury to Envirocare.

complained of," and that the injury of which the plaintiff complains "must be fairly traceable to the challenged action of the defendant."[2/] Bennett v. Spear, 117 S. Ct. at 1163, citing Defenders of Wildlife, 504 U.S. at 570-61.

In Defenders of Wildlife, the Supreme Court underscored that a causal connection must exist between a plaintiff's asserted injury in fact (here, economic or competitive injury) and the challenged agency action (failure to prepare an EIS). The Court stated that a plaintiff like Envirocare asserting non-compliance with agency procedures has standing only "so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing." 504 U.S. at 573 n.8. The Court admonished that it has never allowed standing "solely on the basis of a 'procedural right' *unconnected to the plaintiff's own concrete harm*." Id. (emphasis added). Here, Envirocare's allegations that the requested license amendment requires preparation of an EIS are likewise wholly "unconnected" to its asserted economic or competitive injury.[3/]

As the Presiding Officer explained, Envirocare's theory of standing was rejected many years ago in Clinton Community Hosp. Corp. v. Southern Maryland Medical Center, 374 F. Supp. 450 (D. Md. 1974), aff'd, 510 F.2d 1037 (4th Cir.), cert. denied, 422 U.S. 1048 (1975). The plaintiff hospital was located about two miles away from the defendant's proposed hospital site near Andrews Air Force Base. Plaintiff argued that siting a hospital near the airbase violated NEPA. The Court held that the plaintiff hospital lacked standing because it "cannot show any harm accruing to it from

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[2/] In the proceeding below, Envirocare notably omitted the second factor of a "causal connection" from its recitation of Bennett. See Envirocare Brief at 5.

[3/] Moreover, in NEPA cases the existence of a "particularized risk of injury to the plaintiff's interests" (including a causal connection to environmental impacts) requires a more definite showing where the plaintiff lacks a sufficient geographical nexus to the site of the challenged project. Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 667 (D.C. Cir. 1996).

potential damage to the environment" (374 F. Supp. at 456), notwithstanding plaintiff's allegations of competitive injury. Id. at 455. The Presiding Officer aptly noted that "[a]bsence of a direct connection to potential harm to the plaintiff caused by the environmental impact . . . was crucial" to the Court's finding that standing did not exist. Memorandum and Order at 20.

Commission precedents under NEPA are consistent with these judicial rulings requiring a direct causal connection between alleged environmental impacts and competitive or economic injury to give rise to standing. The Presiding Officer accordingly followed the Commission's holding that "NEPA does protect some economic interests," but only when injuries to those interests "*result from* environmental damage." Memorandum and Order at 21-22, citing Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (emphasis added).[4/] This holding in Rancho Seco relies upon and follows an uninterrupted line of cases requiring a causal connection between environmental impacts and economic injury to create standing. Memorandum and Order at 22, citing Jersey Central Power & Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (standing of marina operators to complain of shipworms introduced in vicinity of their business by nuclear power plant operations); Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman's standing to challenge cooling water discharge affecting his catch); Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-94-3, 39

[4/] For example, the Commission hypothesized that potential destruction of a woodland area would give rise to standing by local timber industry workers deprived of their livelihood. In fact, the Commission's hypothetical occurred in Mountain States Legal Foundation v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996).

37-38, aff'd, CLI-94-10, 40 NRC 43, 47-48 (1994) (radiological hazards to property sufficient for standing).

By contrast, the Commission's adjudicatory boards have consistently disallowed standing where economic loss was not "occasioned by the impact that the [agency action] would or might have upon the environment." Rancho Seco, 35 NRC at 57, quoting Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977), quoting Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2) ALAB-292, 2 NRC 631, 640 (1975).

C. Envirocare has misconstrued the cases upon which it relies.

The Presiding Officer correctly concluded that the cases cited by all of the parties established that "the specific environmental or radiological impacts allegedly emanating from the project itself . . . must themselves, in some manner, either economically or physically, have an impact on the Petitioner in order for it to use those impacts to establish its standing." Memorandum and Order at 15-16. On appeal, Envirocare continues to rely upon cases that supposedly allow a plaintiff to claim standing on the basis of alleged competitive or other economic injury, even though unrelated to environmental impacts. Envirocare, however, has wholly ignored the Presiding Officer's analysis of those cases, which he correctly construed to require a causal connection between an environmental impact and alleged economic injury to give rise to standing. Memorandum and Order at 16-20.

For example, Port of Astoria v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979), involved economic and environmental injury to the plaintiff broadcast company occurring in tandem from the construction of transmission lines, where the economic injury was the "immediate and direct result"

of the environmental impact. 595 F.2d at 476. Contrary to Envirocare's argument that the causal connection between economic injury and environmental impacts is irrelevant, the Ninth Circuit cautioned that mere indirect causation is insufficient for standing; economic losses "not coupled with environmental considerations" do not create standing. Id. at 476. Indeed, the Ninth Circuit later clarified Port of Astoria as holding that "the primary impact of the plant was environmental, and that [the broadcasting company] had standing because its purely economic injuries were *causally related* to an act that lies within NEPA's embrace." Western Radio Servs. Co. v. Espy, 79 F.3d 896, 903 (9th Cir.), cert. denied, 117 S. Ct. 80 (1996) (emphasis added; internal quotations omitted).

Envirocare has also misinterpreted Lake Erie Alliance v. United States Army Corps of Engineers, 486 F. Supp. 707 (W.D. Pa. 1980), relying upon the Court's statement that a legal claim under NEPA is not disqualified because the "impetus behind it may be economic." 486 F. Supp. at 712. Envirocare misses the point. No one argues that an economic motive disqualifies otherwise valid standing. But as the Presiding Officer pointed out, that case involved steelworkers who resided in the area of a steel manufacturing facility under construction and "those found to have standing were directly affected not only economically but also by the environmental impacts of the project (alleged quality of air, water, lands and wildlife in the region)." Memorandum and Order at 20. Hence, the Presiding Officer did not deny standing because Envirocare's "real" or "obvious" interest may be viewed as monetary (Envirocare Brief at 8), but rather because its alleged economic interest has no causal connection with any environmental impact.

To the same effect is Overseas Shipholding Group, Inc. v. Skinner, 767 F. Supp. 287 (D.D.C. 1991), which "involved economic claims resulting *directly* from the environmental impacts allegedly produced by the rule in question," a direct connection missing here. Memorandum and Order at 18.

For the same reason, Envirocare has misplaced reliance upon Mobil Oil Corp. v. FTC, 430 F. Supp. 855 (S.D.N.Y.), rev'd on other grounds, 562 F.2d 170 (2d Cir. 1977). The plaintiff oil companies there were found to have standing under NEPA, notwithstanding financial interests and motives in bringing suit "because they have alleged an injury in fact, namely, damage to the environment *in which they work and upon which they depend for their livelihood* and continued maintenance of the quality of their lives." 430 F. Supp. at 864, quoting Duke City Lumber Co. v. Butz, 382 F. Supp. 362, 374 n.35 (D.D.C. 1974) (emphasis added; internal quotations omitted).[5/]

The fallacy in Envirocare's analysis was exposed years ago in Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 and 5), LBP-75-2, 1 NRC 21 (1975), where the Licensing Board rejected a geothermal energy industrialist's claim that the plant would operate in competition with his planned geothermal project. The Board agreed that various kinds of economic and competitive interests may give rise to standing, but pointed out that, in such instances, "there is an alleged failure to comply with NEPA, an alleged specific effect of the proposed action on some specific aspect of the environment, which specific environmental effect *directly causes* economic injury." 1 NRC at 35 (emphasis added). In contrast, "[s]uch specificity is wholly lacking" with regard to the claims of the industrialist who, like Envirocare, had "no standing by virtue of any use and enjoyment of the environs of the proposed plant to complain of any failure to follow the

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[5/] Nor does Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925 (D. Del. 1973), help Envirocare. That court's invocation of a broad "public interest" as sufficient for standing has been overruled by more recent authority that purely economic interests unrelated to environmental impacts are inadequate for standing. See Western Radio Servs. Co. v. Espy, 79 F.3d 896, 902-03 (9th Cir.), cert. denied, 117 S. Ct. 80 (1996); Nevada Land Action Ass'n v. U.S. Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993); Trawler Diane Marie, Inc. v. Brown, 918 F. Supp. 921, 931 (E.D.N.C. 1995) (collecting cases), aff'd, 91 F. 3d 134 (4th Cir. 1996).

mandates of NEPA."[6/] Id. In sum, standing is disallowed to any intervenor who alleges "no environmental effect of the proposed action which, if taken, will cause him direct or indirect economic injury." Id. at 36.

II. Envirocare lacks standing under the Atomic Energy Act.

A. The NRC and federal courts have found no standing under the AEA for economic injury unrelated to radiological hazards.

The Presiding Officer correctly held that Envirocare lacks standing under the AEA on the basis of alleged competitive injury. Memorandum and Order at 14-15. Overwhelming authority rejects economic interests as a basis for standing under the AEA. The mere reference to compliance cost balancing under Section 84 of the AEA, moreover, does not convert the AEA from a radiological hazards orientation to a statute protective of competitive interests. Thus, in an unbroken line of precedents, the NRC has allowed economic injury as a basis for standing under the AEA only if the alleged injury results from a radiological hazard to the health and safety of the general public or nuclear employees. Economic interests unrelated to radiological hazards lie outside the "zone of interest" protected by the AEA.[7/]

[6/] Like the Commission in Rancho Seco years later, the Board pointed out that "the protection of [an] economic interest [is] directly dependent upon specific aspects of the environment, such as the interest of a commercial fisherman in continued stocks of fish." Id. at 35-36.

[7/] See generally Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976); Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); Detroit Edison Co. (Greenwood Energy Center, Units 2 and 3), ALAB-376, 5 NRC 426, 428 (1977); Kansas Gas & Electric Co. (Wolf Creek Generating Station, Unit 1), ALAB-424, 6 NRC 122, 128 n.7 (1977); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1420-21 (1977); Public Service Co. of Indiana, Inc., (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 198 (1978); Houston Lighting & Power Co., (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980); Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), (continued...)

This basic principle has been sustained by the federal courts. For example, standing to assert economic interests under the AEA was rejected in Drake v. Detroit Edison Co., 453 F. Supp. 1123 (W.D. Mich. 1978), where plaintiffs claimed that, as members of electric power purchasing cooperatives, their utility rates would increase owing to payment by the cooperatives on loans covering their purchase of an ownership interest in Fermi Unit 2. Observing that the AEA was enacted for protection of the public health and safety, the Court added:

> It cannot be said, however, that the Act was designed to protect against the type of economic loss allegedly suffered by plaintiffs. Plaintiffs' detriment, if any, is unrelated to the interests of health and safety with which Congress was concerned in the atomic energy area. In effect, plaintiffs' injury is too far removed from the claimed unlawful actions of defendants to warrant the invocation of judicial relief under the Atomic Energy Act. Thus, while plaintiffs *possess* interests intended to be protected by the Act, they do not *assert* those interests in this case. The interests they do claim to have been injured simply do not arguably fall within the zone of interests to be protected or regulated by the Act.

453 F. Supp. at 1130 (emphasis in original).[8/]

The Appeal Board made the same distinction in Virginia Electric & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98 (1976). Petitioner Sun Ship fabricated steam

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[7/](...continued)
ALAB-789, 20 NRC 1443, 1447 (1984); Consumers Power Co. (Palisades Nuclear Power Facility), LBP-81-26, 14 NRC 247, 251 (1981); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 22-23 (1991). Accordingly, while Applicant does not dispute the abstract proposition that competitive injury will support standing in some cases (Memorandum and Order at 10), that general proposition is irrelevant to standing under the AEA in NRC licensing proceedings.

[8/] Plaintiff in Drake brought her case in parallel to a licensing proceeding in which the NRC likewise held that "[t]he protected interests under the Atomic Energy Act relate to radiological health and safety," disallowing these same allegations as a basis for Mrs. Drake's standing. Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 385, aff'd, ALAB-470, 7 NRC 473 (1978).

generator coolant pump supports for the North Anna plant and alleged, following suit by the applicant against Sun Ship for breach of contract, that the supports were defective. Despite the obvious safety issue raised, the Appeal Board had no difficulty deciding that Sun Ship's economic self-interest in raising the issue was not within the "zone of interests" protected by the AEA. It held:

> [B]eyond doubt, the zone of interests created by [the AEA] embraces an interest in the avoidance of a threat to health and safety as a result of radiological releases from the nuclear facility . . . .[T]hat zone is broad enough to encompass as well an interest in avoiding an economic loss which might be *directly* tied to the radiological releases. (e.g., a loss occasioned by the necessity to cease doing business in the area affected by the releases).
>
> But no such interests are involved here. Sun Ship does not assert that its employees or its property might be directly affected in the slightest degree by a release of radioactive materials which might be attributed to a failure of the allegedly defective supports. Nor is there any claim that such releases would, of themselves, have any other type of immediate impact upon Sun Ship's conduct of its business affairs at a considerable distance from the North Anna site.

4 NRC at 105 (emphasis in original). Hence, cases construing the "zone of interests" under the AEA are conclusive that the economic interests asserted by Envirocare, utterly unrelated to any potential for radiological releases from the Lake Ambrosia site affecting it, are outside the zone of interests giving rise to standing.

And in Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 638-43 (1975), the Appeal Board explicitly rejected competitive interest as a basis for standing. The Appeal Board concluded that "the Act and its history are barren of the slightest manifestation of a possible legislative concern (in other than an antitrust context) for the protection of the competitive position of commercial entities . . ." Id. at 638. Accordingly, an "asserted economic competition interest does not come within the 'zone of interests' protected or regulated by

either the Atomic Energy Act or NEPA." Id. at 643. Just as alleged economic harm would come within the "zone of interests" encompassed by NEPA if it were *environmentally related*" (id. at 640; emphasis in original) such an economic interest would be encompassed by the AEA "zone of interests" only if related to a radiological threat to health or safety.

B. No "suitable challenger" standing exists under the AEA.

Envirocare contends that "Congress' primary purpose in enacting [the AEA] was to protect public health and safety," and implies that another, related purpose is to control entry into markets involving the possession and disposition of nuclear materials. Envirocare Brief at 12. Thus, Envirocare insists that it has standing to protect a purely economic or competitive interest because licensing criteria constitute "a regulatory scheme for limiting entry into a market." Id. Envirocare is wrong. The paramount and exclusive concern of the NRC in regulating nuclear materials is protection of public health and safety. E.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), CL1-82-6, 15 NRC 407, 415 (1982). The NRC does not regulate "entry into the market" for disposal of uranium tails, nor does it regulate the disposal "marketplace."[9/] There are no limits to the number of licenses it may issue. It merely regulates licensed materials and activities, whether marketed or not. Although an NRC license is certainly necessary to possess, store and dispose of licensed material, NRC licensing focuses solely upon protection against radiological hazards, not the licensee's competitive position.

Thus, Envirocare cannot so glibly assume the mantle of one having an interest in protecting against radiological hazards simply by redefining licensing criteria as "market entry restrictions."

9/ By contrast, where Congress has wished the Commission to have some say over competitive conditions for entry into the marketplace, it has said so explicitly. See § 105c of the Atomic Energy Act, as amended, 42 U.S.C. § 2135(c).

As held by the principal case upon which Envirocare relies, "[w]hen a plaintiff's protection of its competitive interests, . . . fails to coincide with the legislative purpose of the statute it seeks to enforce, prudential standing will not lie." Schering Corp. v. FDA, 51 F.3d 390, 396 (3d Cir.), cert. denied, 116 S. Ct. 274 (1995). Schering is a good example of how Envirocare would misapply "suitable challenger" standing extracted from cases involving a competitive scheme concerned with competition in the marketplace. Standing issues arose in that case in the context of the Drug Price Competition and Patent Term Restoration Act, whose very name indicates the purpose of the statute is to encourage generic drug manufacturers to compete against the patented drug pioneer. As Schering stated, this statute enables a competitor to enter the market with generic reproductions of pioneer drugs whose patent has expired, such that the law will "aid generic drug competition," but "not diminish the safety of commercial drugs." Schering, 51 F. 3d at 396. Accordingly, standing by a competitor to contest whether the generic drug is bioequivalent with the pioneer drug clearly coincides with the congressional purpose of abetting competition in the sale of safe commercial drugs.

The other cases cited by Envirocare are similarly distinguishable as involving a statutory concern for healthy competition. For example, the Supreme Court allowed standing in Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987), to a trade association representing securities brokers, underwriters and investment bankers, which opposed a ruling by the Comptroller of the Currency under the National Bank Act that allowed two national banks to open offices offering discount brokerage services. Because the Act reflects a congressional concern "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," the trade association, whose members "compete with banks in providing discount brokerage services," had

standing. 479 U.S. at 403. The Court reasoned that competitors who allege "an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings." Id. By "limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses" (id.), the National Bank Act legislates against the very kind of competition the trade association challenged. The AEA has no counterpart to these competitive restrictions.

Envirocare relies upon other cases evolving from statutes that regulate competition. For example, in First Nat'l Bank & Trust Co. v. National Credit Union Admin., 988 F.2d 1272, 1273 (D.C. Cir.), cert. denied, 510 U.S. 907 (1993), the banks were permitted to challenge a decision under the Federal Credit Union Act allowing a member credit union to extend its membership (and potential borrowing customers) in violation of the "common bond of occupation or association" rule to the competitive disadvantage of the banks. As the Court pointed out in that case, standing was found only "because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is *the means to secure the statutory end*." 988 F.2d at 1278 (emphasis added). Under the AEA, however, competition is scarcely a means to "secure the statutory end" of protecting public health and safety.

Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1109 (D.C. Cir. 1987), is also inapposite. The very purpose of FERC's authority under the Natural Gas Act is to regulate prices and market entry through a finding of "the public interest." The Presiding Officer correctly determined that these "suitable challenger" cases are inapposite because of the absence of any regulatory interest in or control over "market entry" by competitors under the

AEA. Moreover, it is the correctness of the Presiding Officer's reasoning, not the placement of the discussion in his Memorandum and Order, that matters.

Applicant agrees that the Presiding Officer properly considered whether Section 84 of the AEA includes "competitive interests" within its zone of interests. Nonetheless, Section 84 should be analyzed in the context of the overall purpose of the AEA; it should not be construed in isolation from all other sections of the AEA but read in pari materia. Thus, having determined the general inapplicability of economic/competitive interest to standing under the AEA, one has the proper context to examine more closely the particular interests implicated by Section 84 of the AEA.

The Presiding Officer observed that the legislative history suggests that Section 84 "was designed to afford flexibility to the Staff to permit it to balance health and safety requirements with cost of compliance, so that cost of compliance would bear a reasonable relationship to expected benefits." Memorandum and Order at 14. The provision thereby contemplates that "the Staff will have somewhat more latitude than under the Atomic Energy Act licensing provisions to take into account the economic impact of regulatory compliance." Id. As the Presiding Officer concluded, however, the competitive interest asserted by Envirocare is not only different from, but precisely contrary to, the stated economic concerns under Section 84 in reducing the costs of regulatory compliance.[10/]

[10/] The legislative history of Section 84 confirms congressional policy *maximizing* the sites available for the safe, efficient disposal of uranium mill tailings. In the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 et seq., Congress mandated "that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner" of uranium mill tailings located at active and inactive mill operations. As Envirocare acknowledged to Congress: "There is great need for more facilities like ours. The Nation's radioactive waste problem is huge. Comparatively, Envirocare's capacity is very small." *Legislation to Increase State Governments' Control Over Disposal of Certain Low-Level Nuclear*
(continued...)

Thus, Envirocare does not seek intervention to help Quivira or the Staff balance health and safety requirements with the costs of compliance such that compliance costs will be reasonably proportionate to anticipated benefits. Envirocare instead seeks to keep a potential competitor out of the market altogether by making licensing costs as prohibitively expensive as possible. Hence, rather than abetting the statutory purpose of maximizing disposal site availability at a reasonable cost, Envirocare would frustrate that purpose. Accordingly, the Presiding Officer properly ruled that allowing intervention by Envirocare "would run contrary to the congressional purpose behind amended Section 84 and would counter the zone-of-interests requirement's purpose to 'exclude those [petitioners] whose suits are more likely to frustrate than to further' the statutory objectives." Memorandum and Order at 15, quoting Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993).

Although Envirocare relies upon the doctrine of the "suitable challenger," as approved in Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989), it unsuccessfully tries to distinguish the Court's explanation for denying standing, which applies equally here. The Court there reasoned that the HWTC's interest in increasing the need for its members' waste treatment services would cause them to insist upon "even more demanding treatment" even if it would frustrate rather than further "protecting human health and the environment." HWTC, 885 F.2d at 925. That is precisely the same situation here. Envirocare will insist upon more stringent licensing criteria for the Ambrosia Lake facility even if unnecessary to protect public health and

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[10/](...continued)
Materials: Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 102d Cong. 93 (1992) (statement of Khosrow Semnani, president, Envirocare of Utah).

safety, at the expense of expanding uranium mill tailings disposal services, to further its competitive self-interest.

Contrary to Envirocare's suggestion, HWTC may not be distinguished on the ground that it involved a rulemaking rather than an adjudicatory proceeding. The focal point is whether the putative plaintiff is aligned with the congressional purpose behind the statute, not the nature of the proceeding. In market entry cases, such as those upon which Envirocare primarily relies, healthy, regulated competition was the principal statutory objective, and so the courts found competitors aligned with the statutory purpose of preserving healthy competition. In public health and safety cases, however, like HWTC as well as the instant case, competition is not only foreign to the statutory objective, but even antagonistic. A competitor arguing standing is only price conscious, and will therefore propose whatever health and safety arguments may serve its anti-competitive ends, regardless of the ultimate impact upon chemical, toxic or, as here, radiological hazards. Certainly, this is bound to be the case where, as with Envirocare, the putative plaintiff enjoys a monopoly or near monopoly in the market.

Because Envirocare's perspective on safety would be biased by its economic self-interest, the Court's admonition in HWTC applies equally here:

> [The treatment firms'] immediate interest is in more stringent treatment standards, on the theory that such standards will result in their selling more treatment services, which will, in turn, generate more earnings. *But there is not the slightest reason to think that treatment firms' interest in getting more revenue by increasing the demand for their particular treatment services will serve RCRA's purpose of protecting health and the environment.* Every merchant wants to maximize its earnings, and any merchant will, to the extent practicable, steer its customers to those of its goods or services that generate the greatest profit margins. Thus, we would expect the treatment firms, like any other merchant, to pursue regulation that

> encourages the alternatives with the greatest profit potential at the expense of others . . . that might be less profitable.

HWTC, 885 F.2d at 924-25 (emphasis added).[11/]

Making the Ambrosia Lake facility more expensive for users by increasing the cost of its licensing and operation is *exactly what Envirocare admits it is trying to do* — in its own words, trying to equalize the "economic disadvantage" it would face if the site were licensed. Envirocare Brief at 7. And for Envirocare to predicate standing under the AEA on competitive injury is particularly egregious because Envirocare presently exercises a monopoly or near-monopoly over the commercial Section 11e.(2) disposal market. Yet, it is decidedly the policy of Congress under the AEA to "strengthen free competition in private enterprise." 42 U.S.C. § 2011; Nuclear Transport & Storage, Inc. v. United States, 703 F. Supp. 660, 669 (E.D. Tenn. 1988). Therefore, to allow Envirocare standing under the AEA would frustrate the intent of Congress rather than vindicate an interest protected by the statute. The Presiding Officer was therefore eminently correct in denying standing under the AEA.

III. No standing exists to support Envirocare's Equal Protection and Due Process claims.

In a final effort to establish standing, Envirocare invokes the Equal Protection and Due Process Clauses. The Presiding Officer correctly determined that these claims lacked merit. Quite simply, Envirocare has failed to lay the factual predicate for an Equal Protection or Due Process claim. As the Presiding Officer correctly observed, that two facilities may eventually be in

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11/ As the Court of Appeals for the District of Columbia held in an earlier decision challenging EPA's decisionmaking in waste treatment regulations, "allegations that lax regulation of competitors would cause economic harm to HWTC members" is insufficient for standing. Petro-Chem Processing, Inc. v. EPA, 866 F. 2d 433, 435 (D.C. Cir.), cert. denied, 490 U.S. 1106 (1989). The allegedly lax regulation of the industry, however, is exactly what Envirocare proposes for standing.

competition does not establish that they are governed by the same licensing requirements. Opinion and Order at 23.

This is not an instance, as Envirocare erroneously claims, of rejecting its factual allegations, or failing to construe them in the light most favorable to petitioner. Although both Envirocare and Applicant will accept for disposal Section 11e.(2) material from outside generators, the two parties are decidedly not in the same position. When Envirocare sought its license, the proposed disposal site had not previously been utilized for disposal of Section 11e.(2) material. Applicant, however, obtained a license *amendment* to permit it to receive and dispose limited quantities of materials (100,000 cubic yards/year) which are quite similar to the materials already processed and disposed, as governed by its existing license for disposal in its impoundment. The additional authorization under Envirocare's requested amendment, therefore, has far different consequences environmentally and radiologically than the license originally obtained by Envirocare.

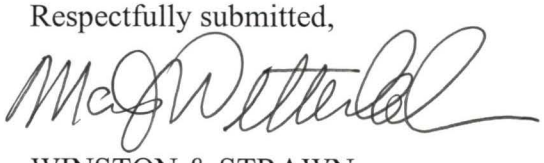
The differences between Envirocare and Quivira justify the Presiding Officer's conclusion that the two entities are not similarly situated. Even accepting the factual allegations in the pleadings as true, the Presiding Officer was not also bound to accept Envirocare's legal conclusions. Rather, the Presiding Officer correctly concluded that the two entities are not similarly situated. Moreover, the Presiding Officer was not limited to the facts in Envirocare's pleadings alone when he assessed Envirocare's standing. "[W]hen [addressing] the standing issue, [if] the court has facts beyond the four corners of the complaint before it . . . the court may consider such facts." See Cone Corp. v. Florida Dep't of Transp., 921 F.2d 1190, 1206 (11th Cir.), cert. denied, 500 U.S. 942 (1991), citing Gladstone, Realtors v. Bellwood, 441 U.S. 91, 109 n.22 (1979).

Finally, an inquiry into the standing of a party to raise a constitutional claim necessarily entails "a limited inquiry into the merits of the plaintiff's claim," 921 F.2d at 1204 n.45. The Presiding Officer properly considered the entire record before him to determine for standing purposes that Envirocare is not similarly situated with Applicant. Hence, the Presiding Officer correctly found that "the law does not require consistency in treatment in two parties in different circumstances." Memorandum and Order at 24, citing Offshore Power Systems (Floating Nuclear Power Plants), ALAB-489, 8 NRC 194, 222 (1978). Accordingly, the factual predicate for a Due Process or Equal Protection case simply does not exist here.

CONCLUSION

For the reasons discussed above, Envirocare's request for a hearing and intervention should be denied.

Respectfully submitted,



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Dated: December 22, 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
QUIVIRA MINING COMPANY	)	Docket No. 40-8905
	)	
(Ambrosia Lake Site)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of Applicant Quivira Mining Company to Appeal by Envirocare of Utah of Memorandum and Order Denying its Request for a Hearing and Petition for Leave to Intervene" were served upon the following via overnight delivery this 22nd day of December, 1997:

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