LAWYERS

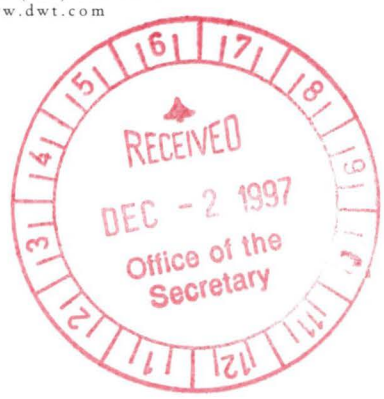
Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE BOISE CHARLOTTE HONOLULU LOS ANGELES PORTLAND RICHLAND SAN FRANCISCO SEATTLE WASHINGTON, D.C. SHANGHAI, CHINA

2600 CENTURY SQUARE
1501 FOURTH AVENUE
SEATTLE, WA 98101-1688

TEL (206) 622-3150
FAX (206) 628-7699
www.dwt.com

LYNDA L. BROTHERS
Direct (206) 628-7628
lyndabrothers@dwt.com



December 2, 1997

Via Facsimile and Express Mail

Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington D.C. 20055
Attn: Rulemaking and Adjudication Staff

Re: In the matter of Quivira Mining Co.
Docket No. 40-8905-MLA
ASLBP No. 97-728-MLA

Dear Rule Making and Adjudication Staff:

Enclosed please find the original and two copies of Envirocare of Utah's Substitute Appeal in the above-captioned matter. Please return a conformed copy in the enclosed self-addressed, stamped envelope.

Pursuant to the Nuclear Regulatory Commission's ("the Commission") November 21, 1997 Order, Envirocare submits this Substitute Appeal in compliance with the Commission's rules of general practice for formatting, and for receipt by the Commission and all parties by December 3, 1997.

18652

Thank you for your attention to this matter.

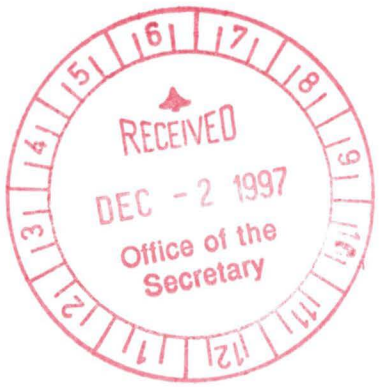
Very truly yours,

Davis Wright Tremaine LLP

Lynda L. Brothers

Enclosures

cc: Charles Bechhoefer, Presiding Officer
Mark Stout, Esq.
James R. Curtis, Esq.
Mark J. Wetterhahn, Esq.
Dr. Peter S. Lam
Susan L. Uttal, Esq.
Executive Director, Operations, NRC
Office of Commission Appellate Adjudication, NRC



THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:	)	Docket No. 40-8905-MLA
QUIVIRA MINING CO. Ambrosia Lake Facility Grants, New Mexico	)	ASLBP No. 97-728-04-MLA
Amendment to Source Materials License No. SUA-1473	)	ENVIROCARE OF UTAH'S SUBSTITUTE APPEAL OF DECISION OF ATOMIC SAFETY AND LICENSING BOARD PANEL

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Envirocare of Utah, Inc., ("Envirocare") submits this Substitute Appeal of the November 4, 1997, decision of the Atomic Safety and Licensing Board Panel ("ASLBP") which denied Envirocare's request for a hearing on an amendment to Quivira Mining Company's ("QMC") Source Materials License No. SUA-1473.

I. FACTUAL BACKGROUND

QMC operated a uranium mill at its Ambrosia Lake site for decades under Source Materials License No. SUA-1473, and apparently ceased milling operations in 1985. Since 1986, QMC has asked the NRC for, and has received, 36 amendments to its milling license. On November 20, 1995, QMC applied for an amendment to its license to allow QMC to accept 10,000 cubic yards per generator per year of 11e.(2) byproduct material for disposal from unrestricted outside sources.[1] In effect, QMC's latest license application requested authority to operate its mill site as a commercial disposal facility for 11e.(2) material. The NRC granted QMC's application by issuance of License Amendment No. 37 (the "License Amendment"). Despite this fundamental change in the nature of the facility, the NRC did not require full environmental review under the National Environmental Policy Act ("NEPA"), including preparation of an Environmental Impact Statement ("EIS"), when it approved the License Amendment. Envirocare seeks to challenge that omission.

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[1] QMC had previously been allowed under several license amendments to accept limited amounts of 11e.(2) material from specifically-designated sources. Prior to the instant amendment, QMC had never been licensed as a general commercial facility for acceptance of waste from unspecified outside generators.

Envirocare operates a commercial 11e.(2) disposal facility for receipt of radioactive materials from outside generators. In obtaining its license for disposal of 11e.(2) material, Envirocare was required to bear the cost of full environmental review of its facility under NEPA (including preparation of an EIS). In addition, the NRC required Envirocare to comply with certain requirements designed to protect the environment as a condition of licensure, including the requirements in 10 C.F.R. Part 40. NRC apparently has not made QMC meet the same standards in approving QMC's License Amendment.

Envirocare requested a hearing pursuant to 10 C.F.R. § 2.1205 on QMC's License Amendment and on the Finding of No Significant Impact ("FONSI") issued by the NRC for that amendment. Envirocare asserted standing under NEPA, the Atomic Energy Act ("AEA"), and the U.S. Constitution. In support of its request, Envirocare submitted detailed arguments in its Request for Hearing and its Supplement to Request for Hearing. The ASLBP concluded that Envirocare lacked standing and denied Envirocare's request for a hearing.

II. NRC REVIEW OF ASLBP DECISION

In this case, NRC review of the ASLBP's decision is justified – and reversal of the ASLBP's decision is required – because the ASLBP's decision is contrary to established law. 10 C.F.R. § 2.786(b)(4)(ii). Envirocare has demonstrated standing pursuant to established judicial concepts of standing under NEPA, the AEA, and the U.S. Constitution. The ASLBP erred in determining otherwise. Under 10 C.F.R. § 2.1205(o), an appeal may be taken of a presiding officer's denial of a request for a hearing by filing and serving upon all parties a statement that succinctly sets out, with supporting argument, the errors alleged.

III. THE ASLBP ERRED IN DETERMINING THAT ENVIROCARE LACKED STANDING UNDER NEPA

To obtain standing under NEPA, a petitioner must demonstrate that its grievance "arguably fall[s] within the zone of interests to be protected or regulated by [NEPA]," and that the agency action challenged has caused it an "injury in fact." Bennett v. Spear, ___ U.S. ___, 117 S. Ct. 1154, 1161 (1997). Here, the ASLBP found that the environmental impacts that Envirocare alleged will occur at the Ambrosia Lake facility as the result of QMC's License Amendment "surely fall within the zone of interests protected by NEPA[.]" Memorandum and Order, In the Matter of Quivira Mining Co., Docket No. 40-8905-MLA, at 15 (November 4, 1997) ("ASLBP Order"). However, the ASLBP erred when it ruled that "the alleged environmental impacts of the Ambrosia Lake Facility must affect [Envirocare] directly in order to serve as a foundation for injury in fact [under NEPA]." See ASLBP Order at 15.

This ruling conflicts with established case law that holds when a petitioner alleges that (1) it will suffer a direct economic injury from an agency action, and (2) the agency action will also have a "primary effect on the natural environment," the petitioner's injury is a sufficient "injury in fact" to confer standing under NEPA. See Envirocare of Utah's Supplement to its Request for Hearing, Docket No. 40-8905-MLA, at 6-11 (July 3, 1997) ("Envirocare's Supplement"); see also County of Josephine v. Watt, 539 F. Supp. 696, 703-704 (N.D. Cal. 1982); Port of Astoria v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979); Lake Erie Alliance v. United States Army Corps., 486 F. Supp. 707, 712 (W.D. Pa. 1980); Mobil Oil Corp. v. Federal Trade Comm'n, 430 F. Supp. 855, 862 (S.D.N.Y. 1977), reversed on other grounds, 562 F.2d 170 (2nd Cir. 1977). When economic injury is coupled with environmental impacts, the established law

requires no further showing that the alleged environmental impacts will directly affect the petitioner to demonstrate that the petitioner has suffered an "injury in fact" under NEPA. See id.

In coming to its contrary conclusion, the ASLBP misconstrued the governing case law. See ASLBP Order at 16-20. For example, the ASLBP cited Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979), as a basis for its ruling. However, an examination of the facts and holding of that case reveals that they support Envirocare's position, not the ASLBP's ruling. In Port of Astoria, standing was affirmed for a private broadcasting company that alleged it would suffer economic harm due the construction of a power plant, which was subject to NEPA review. Id. at 476. The broadcasting company alleged that the construction of power lines would interfere with its broadcasts, and thereby cause it *economic* injury. Id. However, the broadcasting company also alleged that the construction of the power plant would impact the environment, and therefore warranted the preparation of an EIS under NEPA. Id. The court found that the broadcasting company had standing because its economic injury was "the direct and immediate result of the building of the [power plant], an action that 'will have a primary impact on the natural environment.'" Id.

The Port of Astoria court also found that the Port of Astoria did *not* have standing under NEPA. However, it did so because the Port was challenging an act that *had no impact* on the environment: the power company's decision not to build the power plant near the Port. Id. at 475. Although the Port of Astoria also alleged economic injuries (the loss of tax base and revenue and other financial guarantees the power company had allegedly made), the court denied

standing to the Port because the Port's alleged economic injuries were not the direct result of an act that would impact the environment, but instead the result of an act that would have no impact on the environment (the *failure to build* the power plant near the Port). Id. Because the Port's economic injury was caused by something that had no impact on the environment, the court found that its injuries were outside the zone of interests protected by NEPA. Id.; see also County of Josephine, 539 F. Supp. at 703-704 (interpreting Port of Astoria to deny standing to the Port because "the injurious action claimed was the removal of a proposed power plant to a different site, a happening which [sic] would have no direct environmental impact at all.")

The dispositive factor in Port of Astoria was that the alleged economic injury was directly caused by an action that impacted the environment, not that the petitioners were directly affected by the environmental impacts. Port of Astoria, 595 F.2d at 475-76. Indeed, it is not clear from the Port of Astoria decision whether the broadcasting company actually would have been directly affected by the negative *environmental* impacts of the power plant. Id. at 476 (court merely stated that the broadcasting company was situated in the same *county* as the proposed plant, not that it would actually be affected by the plant's alleged environmental impacts).

Neither Port of Astoria nor any of the other cases cited by the ASLBP require that a petitioner show that it will be directly and physically affected by the alleged environmental impacts of a project as a prerequisite to standing under NEPA. Id.; see also County of Josephine, 539 F. Supp. at 704 ("standing is adequately alleged inasmuch as [petitioners] are causally affected by a matter of NEPA concern"); Western Radio Services Company, Inc. v. Espy, 79 F.3d 896, 902 (9th Cir. 1995), cert. denied, ___ U.S. ___, 117 S. Ct. 80 (1996) (denying standing

because "[n]o one alleges that [the challenged] facility 'will have a primary impact on the natural environment,'" not because the environmental impacts alleged would not have a direct physical impact on the petitioner); Overseas Shipholding Group, Inc. v. Skinner, 767 F. Supp 287, 295 (D.D.C. 1991) (finding standing because the claims were not only economic, but "relate[d] to a significant public interest in reducing air and water pollution"). The ASLBP misinterpreted these cases and committed error when it found that a showing of direct physical impact was required for Envirocare to satisfy the "injury in fact" test for standing under NEPA.[2] Id.

Indeed, standing has consistently been found in cases where there was no indication that the asserted environmental impacts would have a direct physical impact on the petitioner. E.g., Port of Astoria, 595 F.2d at 476; Chemical Leaman Tank Lines, Inc. v. United States, 368 F. Supp. 925 (D.Del. 1973) (finding a petitioner had standing because it alleged a general increase in air pollution from an ICC order increasing the number of carriers of waste commodities); Mobil Oil Corp. v. Federal Trade Comm'n, 430 F. Supp. 855 (S.D.N.Y. 1977).

In Mobil Oil, the court held that a group of oil companies had standing under NEPA to challenge a Federal Trade Commission ("FTC") order that required the oil companies to cease noncompetitive practices and divest themselves of certain pipelines and oil exploration and drilling leases. Mobil Oil, 430 F. Supp. at 862. The court's standing determination was based on the economic injuries that the oil companies asserted would flow from the FTC order, and

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[2] The ASLBP also erred in finding that a direct, physical environmental injury was required under the *injury in fact* prong of the standing analysis under NEPA. All of the cases that discuss a direct and immediate physical environmental impact on the petitioner do so in the context of the *zone of interest* prong of the standing test. See, e.g., County of Josephine, 539 F. Supp. at 704; Port of Astoria, 595 F.2d at 475.

their allegation that the FTC order would also cause environmental impacts. The alleged environmental impacts included "pollution of the environment," "a general increase in fuel consumption and pollution," and "the accidental spillage of oil or other toxic materials that involves environmental consequences to the land, water, and living organisms as well as affecting the aesthetic environment." Id. The court found that these allegations of economic injury caused by an action that has a significant impact on the environment, were "sufficient to confer standing" without any allegation that the oil companies would be directly, physically affected by the environmental impacts. Id.

As demonstrated by the foregoing authorities, 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. Here, Envirocare has clearly made that showing by alleging: (1) that it will suffer a direct economic injury as a result of an agency action (NRC's approval of QMC's License Amendment without requiring an EIS, while requiring Envirocare to bear the expense of a full EIS for its license), and (2) that NRC's approval of QMC's License Amendment without full environmental review will impact the environment. See Envirocare's Supplement at 6-10. Envirocare has therefore satisfied the current judicial test for standing under NEPA. See, e.g., Port of Astoria 595 F.2d at 476; Overseas Shipholding, 767 F. Supp. at 295; Mobil Oil, 430 F. Supp. at 862.[3]

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[3] The only cases that do require a showing of direct physical environmental impact are distinguishable because in those cases, no economic injury is alleged and the only possible "injury in fact" is either procedural or environmental. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 563-67 (1992) (in which only environmental and procedural injuries were alleged). See also Envirocare's Supplement at 10-11. As set forth in Envirocare's Supplement, a showing that the

Moreover, the ASLBP's conclusion that Envirocare has to demonstrate a direct economic injury as well as a direct physical environmental injury for standing under NEPA contradicts NEPA's broad remedial purposes:

> As long as the environmental concerns are not so insignificant that they ought to be disregarded altogether, courts generally do not disqualify a plaintiff from asserting a legal claim under NEPA because the impetus behind it may be economic. *Otherwise, the broad congressional purposes of the Act to ensure that environmental values are adequately protected would be defeated.*

Lake Erie v. United States Army Corps, 486 F.Supp. at 712 (emphasis added); see also Realty Income Trust v. Eckerd, 564 F.2d 447, 452 (D.C. Cir. 1977) (finding that to effectuate NEPA's broad goal of protecting environmental values, a petitioner should not be denied standing just because his "real" or "obvious" interest may be viewed as monetary).

The environmental concerns that Envirocare has raised here are not insignificant. QMC's Ambrosia Lake facility has documented seepage from the uranium tailings impoundment where QMC plans to dispose of 11e.(2) material. The facility's groundwater problems have been the subject of corrective action for eight years. See Envirocare's Supplement at 8-9; see also Request for Hearing of Envirocare of Utah, Inc., Docket No. 40-8905, at 7, ¶ 4.10 (May 28, 1997) ("Request for Hearing"). The importation of large quantities of commercial radioactive waste to this facility will likely exacerbate, not ameliorate, the existing environmental problems. Id. Additionally, there will be impacts associated with QMC's transportation and importation of large

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petitioner is directly and physically affected by the alleged environmental impacts is necessary when the environmental or procedural impacts themselves are the only asserted "injury in fact." Id. In contrast, where a direct economic injury is also alleged (as here), no such showing is needed for standing under NEPA. Id. at 11.

volumes of 11e.(2) material to the Ambrosia Lake facility. Id. Further, QMC obtained its source materials license and 36 amendments of that license without an EIS ever being performed. See Envirocare's Supplement at 8; Request for Hearing at 5, ¶ 4.4. NEPA simply does not allow projects to be piecemealed in this way in order to bypass full NEPA review. See Western Radio Services v. Glickman, 123 F.3d 1189, 1194 (9th Cir. 1997).

Established judicial standards for standing under NEPA require no greater showing than Envirocare has already made. Envirocare's direct economic injury results from the same NRC actions that authorize activities that will have a significant effect on the environment. These allegations are more than sufficient to confer standing on Envirocare to challenge these actions under NEPA. Accordingly, Envirocare requests that the Commission grant Envirocare's Petition for Review.

IV. THE ASLBP ERRED IN DETERMINING THAT ENVIROCARE LACKED STANDING UNDER THE AEA

To establish standing under the AEA, a petitioner must show that it has suffered "injury in fact" and that its interests "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennett v. Spear, supra. The ASLBP held that Envirocare had established "injury in fact" under the AEA, but that its interests did not fall within the zone of interests protected by the AEA. See ASLBP Order at 9-15. This ruling is erroneous.

In this case, Envirocare asserted an economic interest under the AEA, as a licensed 11e.(2) material disposal facility, in insuring that all licensees who propose to accept 11e.(2) material for disposal comply with applicable NRC standards. See Request for Hearing, ¶¶ 5.3.1, 5.3.2. The

standards that the NRC applied to Envirocare are the standards established by NRC for acceptance and disposal of 11e.(2) material. 56 Fed.Reg. 2959 (Jan. 25,1991). To the extent that QMC is not required to meet the same standards as was Envirocare, Envirocare is placed at a distinct competitive disadvantage. Yet, the ASLBP ruled that, while certain types of alleged economic injury are within the zone of interests protected under amended Section 84 of the AEA, the competitive injury invoked by Envirocare was not considered by Congress in amending Section 84, and thus could not be a basis for standing. See ASLBP Order at 14.

The ASLBP's reasoning ignores the heart of Envirocare's standing argument under the AEA. The Supreme Court has clearly recognized that a petitioner does not need to show that Congress intended to benefit him or her in order for the petitioner's interests to fall within the zone of interests protected by the statute in question. Clarke v. Securities Industry Ass'n, 479 U.S. 388, 399-400 (1987). Rather, parties come within the protected zone of interests *either* if they are intended beneficiaries of the statute *or* if their interests, while not among those Congress intended to protect, coincide with the protected interests, making the parties "suitable challengers." Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922-23 (D.C. Cir. 1989).

Courts have frequently applied the "suitable challenger" doctrine where a statute establishes restrictions on entry into a market, as do licensing laws. In this situation, parties who have an economic interest in limiting competition to licensees have standing to enforce the licensing scheme, even though their interests may not be ones that Congress specifically intended to protect. See Schering Corp. v. Food and Drug Admin., 51 F.3d 390 (3d Cir. 1995), cert.

denied, ___U.S.___, 116 S. Ct. 274 (1995); Community First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050 (6th Cir. 1994); First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin., 988 F.2d 1272 (D.C. Cir. 1993), cert. denied, 510 U.S. 907 (1993); Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105 (D.C. Cir. 1987).

The rationale for this approach is that the very existence of the entry restriction reflects a Congressional judgment that the restriction furthers the statutory purpose; thus, the competitor's interest in enforcing the entry restriction by definition bears some relation to the Congressional purpose. First Nat'l Bank, 988 F.2d at 1278 see also Panhandle, 822 F.2d at 1109 ("a license system by its very nature restricts entry . . . . Firms already operating within the restricted area . . . benefit from vigorous enforcement of the restriction"). Indeed, one financially injured by the issuance of a license may be the *only* party with a sufficient interest to challenge any errors made in the granting of that license. FCC v. Sanders Bros. Radio Stn., 309 U.S. 470, 477 (1940).

For example, in Schering Corporation v. Food and Drug Administration, an amendment to the Food, Drug and Cosmetic Act required that generic drugs be the bioequivalent of their pioneer drug equivalents in order to receive accelerated approval. A pioneer drug maker challenged the Food and Drug Administration's interpretation of the bioequivalence requirement in the context of a competitor's application to manufacture a generic copy of the pioneer drug maker's drug. The court held that the bioequivalence requirement acted as a market entry restriction, and that the pioneer drug maker's competitive interest in enforcing the entry restriction gave it standing as a "suitable challenger." Schering Corp., 51 F.3d at 396.

Similarly, in First National Bank, banks challenged the National Credit Union Administration's approval of the expansion of a credit union, on the ground that it violated the requirement of the Federal Credit Union Act that credit unions be limited to groups having a "common bond." The court held that the "common bond" requirement was akin to an entry restriction, and that the banks' competitive interest in enforcing the entry restriction gave them standing. First Nat'l Bank, 988 F.2d at 1278-79. See also Community First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050 (6th Cir. 1994) (following First Nat'l Bank on similar question).

Here, Envirocare's position is indistinguishable from the plaintiffs' in the preceding entry-restriction cases for the purpose of standing. 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 – in this case the market for commercial disposal of 11e.(2) byproduct material. Thus, even assuming that Congress's primary purpose in enacting the statute was to protect public health and safety, Envirocare's competitive economic interest in insuring that all licensees who propose to accept byproduct material for disposal comply with applicable NRC standards furthers the statutory purpose. See, Schering Corp., 51 F.3d at 396; First Nat'l Bank, 988 F.2d at 1278-79. After all, the NRC's promulgation of standards for disposal of byproduct material represents a judgment that compliance with those standards will protect the public health and safety. Thus, by definition, Envirocare's interest in ensuring equal enforcement of those standards furthers the statutory purpose. See id.. Envirocare therefore has standing under the AEA to challenge QMC's License Amendment as a "suitable

challenger," even though Envirocare may not have been a specifically "intended beneficiary" of the statute.

The ASLBP completely failed to address this key issue. The section of the ASLBP's Order that addresses whether Envirocare's economic interest is within the zone of interests protected by the AEA lacks any discussion whatsoever of the "suitable challenger" cases cited by Envirocare. See ASLBP Order at 11-15. Instead, the ASLBP only addresses these cases in a footnote in another section of the Order that discusses injury in fact under NEPA. Moreover, in that footnote, the ASLBP characterizes these cases as "involv[ing] specific statutory provisions – not present here – allowing participation of competitors to further the intent of the particular statute to regulate a defined area of competition, without a direct connection to the physical or environmental impacts (if any) of the action under review." See ALSBP Order at 21 n.10.

The ASLBP's discussion of these important cases is completely inapposite for at least two reasons. First, it is misplaced in the section of the Order dealing with injury in fact under NEPA, because the cases the ASLBP cites in that footnote are only relevant to the AEA standing issue. Second, if the ASLBP is attempting to distinguish these cases in the context of standing under the AEA, it has failed to do so. Contrary to the ASLBP's footnote, the statutes in the cases cited by Envirocare did not contain special procedures that allowed competitors to enforce the statutes' entry restrictions. If that had been the case, there would have been no reason for the lengthy analysis in those cases concerning whether a party has standing as a "suitable challenger." These cases stand for the broader proposition that courts grant standing to competitors to enforce entry restrictions because their economic interests make them suitable challengers.

In the proceeding before the ASLBP, Quivira and the NRC Staff unsuccessfully attempted to distinguish the "suitable challenger" cases. First, Quivira and the NRC Staff argued that the "suitable challenger" principle is inapplicable unless the purpose of the statute that imposes the entry restriction is the limitation of competition by the entity whose license or other governmental approval is being challenged. See Quivira's Answer to Envirocare's Supplement, p. 14; NRC Staff's Response to Envirocare's Supplement, p. 4. Quivira and the NRC Staff based this argument on Clarke v. Securities Industry Association, supra. In Clarke, an association of brokers challenged the approval by the Comptroller of the Currency of applications by two banks to establish discount brokerages, on the ground that the applications violated the National Bank Act's branching restrictions. The purpose of the Act's branching restrictions was in part to prevent national banks from obtaining monopoly control over credit. Clarke, 479 U.S. at 402. The Court held that the association had standing, reasoning that by enacting the branching restrictions, Congress had legislated against the competition the association sought to prevent, and thus the association's competitive interest bore a plausible relationship to the policies underlying the Act. Id. at 403.

Cases decided after Clarke make clear that the "suitable challenger" principle is not limited to situations where the purpose of the statute imposing the entry restriction is specifically to restrict competition by the one whose license or approval is being challenged. In Schering, the purpose of the amendment in question (to the extent that it even concerned competition) was to increase the ability of generic drug makers to enter the market, *not* to prevent competition by generic drug makers. Schering Corp., 51 F.3d at 396. The entry restriction in question – the

bioequivalence requirement – was imposed to ensure that this purpose was not achieved at the expense of public safety. Id. Nonetheless, as noted above, the court held that the pioneer drug makers' interest in avoiding competition by the generic drug makers made the pioneer drug makers "suitable challengers."

Similarly, in First National Bank, the purpose of the National Credit Union Act was to help assure the provision of credit to persons of moderate means by establishing a system of credit unions. The purpose was not to prevent competition by any other provider of credit. First Nat'l Bank, 988 F.2d at 1274. The entry restriction in question was imposed to help ensure that credit unions remained solvent. Id. at 1276. Still, as noted above, the court held that the banks' interest in avoiding competition from the credit union gave them standing.

In other words, in neither case was the purpose of the statute imposing the entry restriction to limit competition by the one whose approval was being challenged. Rather, the point of these cases is that, where an entry restriction exists, a party who has a competitive interest in enforcing the entry restriction may challenge the government's failure to enforce the restriction even though the purpose of the statute and the entry restriction is not to limit the competition that the challenger seeks to prevent.

Second, Quivira and the NRC Staff argued that the "suitable challenger" principle does not apply in this case because Envirocare's economic competitive interests are not sufficiently consistent with the AEA's purpose of protecting the public health and safety. See Quivira's Answer to Envirocare's Supplement, pp. 15-16; NRC Staff's Response to Envirocare's Supplement, pp. 5-7. This argument ignores the fact that, as in Schering Corp., Envirocare seeks

equal enforcement of a statutorily-created entry restriction that is implemented by detailed regulations designed to protect the public health and safety. Envirocare's economic interest in ensuring QMC's compliance with those health and safety regulations by definition relates to that statutory purpose. See First Nat'l Bank, 988 F.2d at 1278.

Quivira's argument that Envirocare has an incentive to insist on more stringent licensing criteria for Quivira's facility than are required to protect the public health and safety ignores the NRC's role as a licensing authority in this case. Regardless of what Envirocare has an incentive to demand, the NRC's authority to impose licensing requirements on Quivira is circumscribed by the regulations that govern licensure of 11e.(2) byproduct material disposal facilities. Specifically, for example, 10 C.F.R. Part 40, Appendix A, sets forth in great detail the site and design criteria, groundwater protection standards, radon barrier requirements, detection monitoring requirements, and inspection requirements with which Quivira's license amendment must comply. Envirocare cannot force (and does not ask) the NRC to do anything more than ensure that Quivira's license amendment complies with the preexisting standards (i.e., those imposed on Envirocare) for such an approval. Moreover, contrary to the argument of the NRC Staff, the fact that there are numerous factual and technical issues involved in determining whether Quivira's License Amendment complies with applicable standards does not change the fact that the existence of such standards channels the "potentially limitless incentives of competitors" into "suits of a limited nature." First Nat'l Bank, 988 F.2d at 1278. It is inherent in the nature of an administrative body that it must make factual and technical determinations; indeed, the need to make such determinations is a primary reason for the establishment of specialized

administrative bodies. However, the technical nature of the determination in this case does not change the fact that the NRC's authority in approving Quivira's license amendment is constrained by the standards imposed on Envirocare. See, 56 Fed. Reg. 2959 (Jan. 25, 1991).

The fact that Envirocare seeks to enforce the application of a statutorily-created entry restriction distinguishes this case from Hazardous Waste Treatment Council v. Thomas, supra. In Hazardous Waste Treatment Council, where an association of hazardous waste treatment firms sought review of a land-disposal rule promulgated by the Environmental Protection Agency, on the ground that it did not sufficiently reduce the maximum permissible concentration of certain substances in hazardous wastes subject to land disposal, as required under the Resource Conservation and Recovery Act ("RCRA"), and that it violated RCRA in other ways. The association argued that it was a "suitable challenger" because its interest in lower concentrations of hazardous waste (which would increase the demand for its members' services) coincided with the statute's purpose of protecting health and the environment. Hazardous Waste Treatment Council, 885 F.2d at 924. The court rejected this argument, reasoning that there was no reason the treatment firms' interest in increasing demand for their services would serve RCRA's purpose of protecting human health and the environment: the treatment firms' interest would cause them to demand more treatment even if additional treatment would not protect human health and the environment. Hazardous Waste Treatment Council, 885 F.2d at 925.

Hazardous Waste Treatment Council is fundamentally different than the instant case, since it involved a determination as to what *rule* would best carry out the statute's purpose, rather than the enforcement of a statutorily-created entry restriction such as a licensing requirement. The

determination as to what rule is proper is an open-ended inquiry that contains no standards to channel a competitor's economic interests. By contrast, in this case, Envirocare seeks to ensure that Quivira is required to comply with preexisting, detailed regulatory requirements for issuance of a byproduct materials license. The framework of the entry restriction channels Envirocare's economic interests. Envirocare seeks only to ensure that Quivira comply with applicable standards for licensure, and those standards as defined by NRC are protective of the public health and safety. Thus Envirocare's economic interests bear a sufficient relation to the statutory purpose so as to make Envirocare a "suitable challenger."

In sum, the ASLBP's determination that Envirocare's economic interest is not within the zone of interests protected by the AEA, and that Envirocare therefore lacks standing under the AEA, was contrary to established law. The NRC should reverse this determination and remand this case to the ASLBP for a hearing on QMC's license amendment.

V. THE ASLBP ERRED IN DETERMINING THAT ENVIROCARE LACKED STANDING UNDER THE U.S. CONSTITUTION

The ASLBP also erred in finding that Envirocare lacked standing under the Substantive Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. See ASLBP Order at 23. Specifically, the ASLBP erred when it found that Envirocare had to make an affirmative showing that it was similarly situated with QMC, and therefore within the zone of interests protected by those two constitutional provisions. Id.

However, established judicial requirements dictate that "the determination of standing must be tested by the pleadings, which are to be taken as true, and not by the merits of the allegations[.]" Lake Erie Alliance v. United States Army Corps, 486 F. Supp. at 710. Further,

a presiding officer must "construe the petition in favor of the petitioner." In the Matter of Atlas Corporation, (Moab, Utah Facility), 1997 WL 295119 at *5 (NRC May 6, 1997). Therefore, the ASLBP was required to construe Envirocare's petition in Envirocare's favor, and accept Envirocare's allegations that it is similarly situated with QMC as true, for the purposes of determining standing. Id.

Here, Envirocare alleged that it accepts 11e.(2) material for disposal from outside generators. See Envirocare's Supplement at 3-4; Request for Hearing at 3, ¶ 4.1. Envirocare also alleged that QMC will, under the License Amendment, accept 11e.(2) material for disposal from outside generators.[4] See Envirocare's Supplement at 3-4; Request for Hearing, at 5-6, ¶¶ 4.5-4.6. Envirocare further alleged that, despite the fact that both facilities will be performing the same activity (i.e., the acceptance for disposal of 11e.(2) material from outside generators), they will not be subject to the same regulatory requirements. Id. The ASLBP was required to accept these allegations as true, and they are sufficient to confer standing on Envirocare for its constitutional claims. See Lake Erie Alliance, 486 F. Supp. at 710. Nashar Transport & Storage, Inc. v. United States, 890 F.2d 1348, 1350 n.3 (6th Cir. 1989) (finding standing where the plaintiff alleged a distinct injury that was fairly traceable to DOE, assuming the allegations in the complaint to be true).

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[4] This is clear from the face of the License Amendment, which grants authority for QMC to receive and dispose of 11e.(2) material from unrestricted outside sources.

VI. CONCLUSION

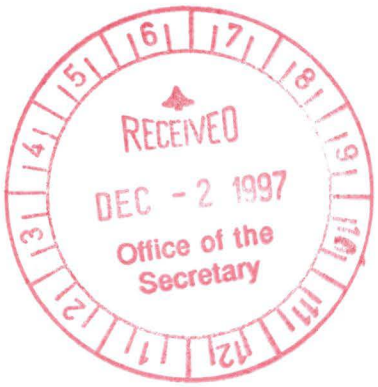
For the foregoing reasons, Envirocare respectfully requests (1) that the NRC grant review of the ASLBP's decision denying Envirocare's request for a hearing on QMC's License Amendment and the NRC's issuance of a FONSI for that amendment, (2) that the NRC, after full briefing and argument, determine that the ASLBP erred in determining that Envirocare lacked standing, and (3) that the NRC remand this case to the ASLBP for a hearing on the merits.

DATED this 2nd day of December, 1997.

Davis Wright Tremaine LLP
Attorneys for Envirocare of Utah, Inc.

By _____

Lynda L. Brothers, WSBA No. 16072
Alexandra K. Smith, WSBA No. 20058
Richard W. Elliott, WSBA No. 5606
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98101-1688
Telephone: (206) 622-3150



THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:	Docket No. 40-8905-MLA
QUIVIRA MINING CO. Ambrosia Lake Facility Grants, New Mexico	ASLBP No. 97-728-04-MLA
Amendment to Source Materials License No. SUA-1473	

CERTIFICATE OF SERVICE

I, Edith M. Alexander, hereby certify that on December 2, 1997, copies of the foregoing document, ENVIROCARE OF UTAH'S SUBSTITUTE APPEAL OF DECISION OF ATOMIC SAFETY AND LICENSING BOARD PANEL, have been served upon the following persons by facsimile and express mail, postage prepaid, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Administrative Judge Charles Bechhoefer
Presiding Officer
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
(original and 2 copies)

Mark Stout, Esq.
Quivira Mining Company
6305 Waterford Boulevard, Suite 325
Oklahoma City, OK 73118

Executive Director of Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

James R. Curtiss, Esq.
Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L. Street NW
Washington, D.C. 20005-3502

Dr. Peter S. Lam
Administrative Law Judge
Special Assistant
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Susan L. Uttal, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

Office of Commission Appellate Adjudication
Mail Stop: O-16 G15
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

DATED this 2nd day of December, 1997.

Edith M. Alexander, secretary
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
Telephone: (206) 622-3150