UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 40-8905-MLA
QUIVIRA MINING COMPANY	)	
	)	ASLBP No. 97-728-04-MLA
(Materials License No. SUA-1473)	)	

NRC STAFF'S RESPONSE TO ENVIROCARE OF UTAH'S SUBSTITUTE APPEAL OF DECISION OF ATOMIC SAFETY AND LICENSING BOARD PANEL

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December 23, 1997

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INTRODUCTION

On November 4, 1997, the Presiding Officer issued a *Memorandum and Order* (Denying Request for Hearing), LBP-97-20, (LBP-97-20), denying the request of Envirocare of Utah, Inc.(Envirocare), pursuant to 10 C.F.R. § 2.1205, for a hearing concerning the granting of a license amendment to Quivira Mining Company (QMC). On December 2, 1997, Envirocare filed "Envirocare of Utah's Substitute Appeal of Decision of Atomic Safety and Licensing Board Panel" (Appeal).[1]

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[1] Initially, on November 14, 1997, Envirocare filed a petition for review of the Board's decision. On November 21, 1997, the Commission issued an Order construing Envirocare's petition for review as an appeal pursuant to 10 C.F.R. § 2.1205(o), and affording Envirocare an opportunity to supplement its appeal or file a substitute appeal. The Order required that the Commission and the parties receive the supplemental or substitute appeal by December 3, 1997. Envirocare's Appeal was received by the Staff on December 4, 1997.

For the reasons stated below, the staff of the Nuclear Regulatory Commission (Staff) opposes Envirocare's Appeal and recommends that it be denied.

BACKGROUND

On November 20, 1995, Quivira Mining Company (QMC), filed an application for an amendment to its source materials license for its Ambrosia Lake facility in New Mexico, which authorizes it to, *inter alia*, possess uranium byproduct material in the form of waste generated by the operations of the mill on site and to accept limited amounts of byproduct material from in situ leach uranium mining facilities (Materials License No. SUA-1473). 62 Fed. Reg. 23,282 (April 29, 1997). The requested amendment would allow it to annually receive and dispose of up to 10,000 cubic yards per generator of byproduct material as defined in § 11e.(2) of the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011, *et seq.*) (Act or AEA), in tailings impoundment #2, with an annual total limit of 100,000 cubic yards from all generators, at the Ambrosia Lake facility. 62 Fed. Reg. at 23,283. QMC also requested that material from in situ leach facilities be excluded from the limits. The request noted that QMC is licensed to possess byproduct material in the form of uranium process tailings or other wastes generated by QMC's processing operations (in standby status since 1986), and is authorized to accept and dispose of byproduct wastes from its Wyoming in situ leach facility and damaged yellowcake drums from Sequoyah Fuels.[2] The site already contains 33 million tons of tailings in two impoundments. QMC proposed to accept material similar to material

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[2] Byproduct Disposal Request, filed by Quivira Mining Company, (November 20, 1995) (Amendment Request).

already on site and material for which it had prior authorization to accept. The material proposed for disposal would be put into "earthen cells constructed on top of the finished NRC approved radon attenuation cover system on impoundment #2."[3] The cell would have a impermeable clay liner, at least one foot thick. Amendment Request at 4. QMC provided additional details regarding the site and the amendment request, including reclamation considerations and the environmental impact. *See* Amendment Request.

The Staff performed an appraisal of the environmental impacts of the requested amendment in accordance with 10 C.F.R. Part 51 and determined that the request "will not result in significant environmental impacts because the impacts will be a small fraction of those that could result due to currently approved activities. . . .". 62 Fed. Reg. at 23,283. On April 22, 1997, the NRC issued its Final Finding of No Significant Impact (FONSI). 62 Fed. Reg. at 23,282. The license amendment was approved by the Staff on May 16, 1997.

On May 28, 1997, Envirocare filed a request for hearing on the NRC's issuance of the FONSI and Notice of Opportunity for Hearing concerning QMC's request for an amendment to its materials license. Envirocare, which operates an 11e.(2) disposal facility in the state of Utah, approximately 400 miles from QMC's Ambrosia Lake site, was seeking to require the preparation of a full environmental review and an Environmental Impact Statement (EIS) in connection with the issuance of QMC's requested amendment. Appeal at 1. Envirocare also alleged that QMC was "apparently" not being

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[3] Amendment Request at p. 3. *See also* "Request for Hearing of Envirocare of Utah, Inc.," Appendix B, Environmental Assessment (May 28, 1997).

held to the same requirements as Envirocare. Appeal at 2. The request for hearing was opposed by the Staff and QMC on the ground that Envirocare had not demonstrated standing to intervene in the licensing matter.[4] On November 4, 1997, the Presiding Officer issued LBP-97-20, denying Envirocare's request for hearing on the basis of lack of standing to participate. The Presiding Officer concluded that "injury in fact, as well as a causal connection to [the] proceeding, has been shown for standing purposes." LBP-97-20, slip op. at 11. He also found that the injury did not "arguably" fall within the "zone of interests" of the AEA, stating that the licensing authority applicable to QMC's application is Section 84 of the AEA, which was amended in 1983 to include economic matters, but was not intended to include competitive interests. *Id.* at 12, 14. The intent of the amendment was to afford additional flexibility to balance health and safety requirements with the cost of compliance. *Id.* at 14. The Presiding Officer found that Envirocare's position would have the opposite effect by "depriving the Staff of additional flexibility by making the precise licensing requirements governing [Envirocare's] facility the floor (rather that the ceiling) for any authorization that might be given to QMC." *Id.* at 14-15. To find standing would open such proceedings to all competitors and would run counter to Congress' intent. *Id.* The Presiding Officer held that the environmental impacts of the Ambrosia Lake facility must directly affect Envirocare in order for standing

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[4] "Answer of Quivira Mining Company in Opposition to the Request for Hearing of Envirocare of Utah, Inc.," June 12, 1997; "NRC Staff's Notice of Participation and Response to Request for Hearing Filed by Envirocare of Utah, Inc.," June 19, 1997; "NRC Staff's Response to Envirocare of Utah's Supplement to its Request for Hearing," July 15, 1997; "Answer of Applicant Quivira Mining Company in Opposition to Supplement to Request for Hearing by Envirocare of Utah, Inc.," July 15, 1997.

to be found under NEPA. *Id.* at 15. Envirocare did not demonstrate that any environmental or radiological impacts would have a direct impact on its economic interests. Finally, in response to Envirocare's claim of disparate treatment, the Presiding Officer found no constitutional basis for standing under the Equal Protection and Substantive Due Process clauses of the 5th and 14th Amendments to the United States Constitution. *Id.* at 23-24.

On December 2, 1997, Envirocare filed its Appeal of the Presiding Officer's decision. For the reasons stated below, the Staff opposes Envirocare's Appeal and recommends that it be denied.

ARGUMENT

I. The Presiding Officer Did Not Err in Denying Standing to Participate

Envirocare has alleged that it has standing to participate in a proceeding relating to the amendment of QMC's materials license under the AEA and the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321), because it has suffered an "injury-in-fact" and its interests are within the "zone of interests" protected by those statutes. As the Presiding Officer correctly held, Envirocare's concerns are not within the "zone of interests" of the AEA or NEPA.[5]

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[5] Although the Staff agrees with the Presiding Officer regarding the "zone of interests" aspect of standing, the Staff submits that Envirocare has not demonstrated an "injury-in-fact" for standing purposes under NEPA. The Staff maintains that the potential injuries alleged by Envirocare are speculative and attenuated, at best. They are based on a future chain of events and actions which Envirocare speculates may occur. That is, for example, that QMC will have lower costs than Envirocare and that those lower costs would be passed on to QMC's customers, to Envirocare's detriment. There has not been a sufficient showing that would afford standing to Envirocare. *See United Transportation*

(continued...)

It is fundamental that any person or entity that wishes to request a hearing (or intervene in a Commission proceeding) must demonstrate that it has standing to do so. Section 189a(l) of the AEA, (42 U.S.C. § 2239(a)), provides that:

> In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license . . ., the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

Pursuant to 10 C.F.R. § 2.1205(h), the Presiding Officer must determine "that the requester meets the judicial standards for standing," and shall consider, among other factors, "(1) [t]he nature of the requestor's right under the Act to be made a party to the proceeding; (2) [t]he nature and extent of the requestor's property, financial, or other interest in the proceeding; and (3) [t]he possible effect of any order that may be entered in the proceeding upon the requestor's interest."

The Commission has long held that contemporaneous judicial concepts of standing will be applied in determining whether a petitioner for leave to intervene has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189a of the Act. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit No. 1), CLI-83-25, 18 NRC 327, 332 (1983); *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units I and 2), CLI-76-27, 4 NRC 610, 613 (1976).

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[5](...continued)
Union v. Interstate Commerce Commission, 891 F. 2d 908, 912 (D.C. Cir. 1989).

The United States Supreme Court has recently reiterated the "irreducible constitutional minimum" requirements for standing: that the plaintiff suffer an "injury-in-fact" which is "concrete and particularized and . . . actual or imminent, not conjectural or hypothetical," that there is a causal connection between the alleged injury and the action complained of, and that the injury will be redressed by a favorable decision. *Bennett v. Spear*, 520 U.S. ___, 117 S. Ct. 1154, 1163 (1997). *See also Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1991). In addition, the petitioner must meet the "prudential" standing requirement that the complaint must arguable fall within the "zone of interests" of the governing law. *Id.* at 1167. *See also Port of Astoria v. Hodel*, 595 F. 2d 467, 474 (9th Cir. 1979); *Georgia Power Co.*(Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993).

Envirocare has failed to demonstrate that it has constitutional and prudential standing to request a hearing in this matter under the AEA, NEPA or the United States Constitution.

A. The Presiding Officer Did Not Err in Denying Standing Under NEPA

The Commission has previously stated that NEPA only protects economic interests that flow or result from environmental damage. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992). *See also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977). As noted by the Presiding Officer, the cases cited by Envirocare do not obviate the required nexus. LBP-97-20, slip op. at 22.

In *Port of Astoria v. Hodel*, a radio broadcasting company (Hermiston), among others, sought to require that an Environmental Impact Statement (EIS) be prepared before an aluminum reduction plant was built. *Port of Astoria*, 595 F. 2d at 471. The issue of standing was raised. *Id.* at 474. Hermiston alleged that it was located in the same county as the planned aluminum plant, and that the power lines to the plant would interfere with its radio broadcasts. *Id.* at 476. The court found standing, stating that the injury claimed, although economic, was the "immediate and *direct* result of the building of the . . . plant, an action that 'will have a primary impact on the natural environment.'" *Id.* (emphasis supplied) (citations omitted). Hermiston alleged two essential factors which afforded it standing in the eyes of the court - factors which are not present in the instant case: (1) it was located in the same county as the planned plant and thus, had proximity; and (2) the environmental effects of building the plant would have a direct effect on it (interference with its radio broadcasts). Contrary to Envirocare's analysis, the dispositive factor in *Port of Astoria* was the direct effect of the environmental harm on the plaintiff. The plaintiff's broadcasts would be directly impacted by the building of the plant. That the plaintiff's proximity to the plant was indeed a factor in the court's decision is demonstrated by the fact that the court made specific reference to it. In the instant case, Envirocare of Utah is not proximate to QMC's facility in New Mexico and therefore, cannot be harmed by any environmental damage which may be caused by the operation of a commercial disposal facility. In addition, even if the economic injury alleged (competitive disadvantage) were not speculative and remote, it does not flow from the potential environmental injury. Thus, Envirocare cannot claim standing based upon the holding in *Port of Astoria*.

Nor is standing afforded under *Lake Erie Alliance v. U.S. Army Corps of Engineers*, 486 F. Supp. 707 (W.D. Pa. 1980), wherein the court found standing for steelworkers to challenge the sufficiency of an EIS permitting the construction of a steel factory based upon the primary environmental effects of the construction. *Id.* at 710-13. In *Lake Erie,* the court found that although the steelworkers were also alleging a secondary economic injury (unemployment potentially caused by shutdowns of other steel mills), "all live in or around the tri-state area which will be affected environmentally by this project, and all have alleged a concern with those adverse environmental effects." *Id.* at 713. The steelworkers had proximity to the plant and alleged a direct environmental effect which was within the zone of interests of NEPA. The fact that they raised a secondary effect of unemployment (a problem the court found to be within the public interest) did not preclude them from establishing standing.

In *Overseas Shipbuilding Group v. Skinner*, 767 F. Supp. 287 (D.D.C. 1991), the court said:

> The "'creation of a risk that serious environmental impacts will be overlooked' is sufficient to establish the injury necessary for standing under NEPA 'provided that this injury is alleged by a plaintiff that . . . maybe expected to suffer what ever environmental [consequences] the decision may have.'"

Id. at 291 (citations omitted). It is clear that Envirocare will not "suffer whatever environmental [consequences] the decision may have." It will not be subject to any direct environmental effects by QMC. Therefore, its interests are not within the zone of interests protected by NEPA.

In order to find standing under NEPA, the environmental harm alleged must affect Envirocare in a direct way. Only when that factor is found to have been established, can the next step be taken to address the secondary factor of economic harm. *See, e.g., Port of Astoria,* 595 F. 2d 467. The allegation of economic harm without a cognizable environmental harm that directly affects the petitioner is insufficient to confer standing. *See, e.g., Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp 457, 487 (D. Kan. 1978), *aff'd* 602 F. 2d 929, *cert den.* 444 U.S. 1073.

Judicial authority and Commission precedent require a direct environmental effect for standing to lie for an economic injury. The authorities cited by Envirocare do not obviate this requirement. The cases generally demonstrate that standing may be found where an environmental harm directly affects the proponent of standing, and causes the alleged economic harm.[6]

It is important to note that neither the decision not to prepare an EIS nor the NRC's action in approving the license amendment is the gravamen of the impact to the environment. It is the operation of the disposal facility and the effect of the receipt and disposal of additional 11e.(2) material from off-site generators at the Ambrosia Lake site which will impact the environment. The economic injuries claimed must be causally

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[6] *See Western Radio Service Co. Inc. v. Espy*, 79 F. 3d 896 (9th Cir. 1996) (standing denied to plaintiff claiming only economic injury); *Nevada Land Action Association v. U.S. Forest Service*, 8 F. 3d 713, 716 (9th Cir. 1993) (standing denied to plaintiff claiming economic harm and "lifestyle" loss inapposite to the purposes of NEPA); *County of Josephine v. Watt*, 539 F. Supp. 696 (N.D. Cal 1982) (standing granted to plaintiffs claiming economic loss directly related to environmental harm directly affecting them).

related to that "act that lies within NEPA's embrace." *Port of Astoria,* 595 F.2d at 476. *See also Western Radio Services,* 79 F.3d at 901. Therefore, Envirocare must allege that it is affected by *that* environmental impact -- clearly it is not. As the Presiding Officer held, there must be a direct connection between the environmental harm and the complainant, that is, the complainant must be directly affected by the environmental harm alleged. To find otherwise - that the environmental harms do not have to injure the proponent of standing - would create the anomalous result of anyone with an economic claim, no matter how attenuated their relationship to the site or the alleged environmental damage, being able to demonstrate standing and participate in NRC proceedings. This is clearly not the intent of NEPA, which is to protect the environment, not the economic interests of those adversely affected by agency decisions. *Nevada Land Action*, 8 F. 3d at 716.

The Staff submits that the Presiding Officer correctly construed the case law regarding the "zone of interests" of NEPA, and Envirocare does not have standing to request a hearing under NEPA.

B. The Presiding Officer Did Not Err in Denying Standing Under the Atomic Energy Act (AEA)

In order to establish standing pursuant to the AEA, Envirocare must demonstrate "an actual 'injury-in-fact' as a consequence of the [proposed action] and that this interest is within the 'zone of interests'" of the AEA. *Rancho Seco*, CLI-92-2, 35 NRC at 56. Envirocare has not asserted an injury which is fairly traceable to the issuance of a license amendment to QMC. On the contrary, the harm asserted is, at best,

an indirect economic harm attributable *not* to QMC's licensing, but to Envirocare's licensing, and as such does not confer standing in the instant proceeding.

The cases cited by Envirocare do not abrogate the basic requirement of standing that the interests of the petitioner be arguably within the zone of interests of the AEA. The cases cited by Envirocare arose under different statutes, with decidedly different zones of interests. The applicability of those cases to the instant case must be examined in light of the zone of interests protected by the AEA. Moreover, as discussed below, each case presents a decidedly different set of circumstances. Different statutes and different parties would necessarily bring different results.

The AEA is a statute that affords the NRC authority to regulate the commercial uses of nuclear materials in order to protect the public health and safety. Although the AEA authorizes the Commission to issue licenses and promulgate regulations regarding the issuance of licenses, it is not concerned with economic matters (other than in certain very narrow instances) or competitive effects (other than, for example, in antitrust matters affecting commercial nuclear reactors (Section 105)).

The NRC has consistently held that general economic interests are not within the zone of interests of the AEA. *See, e.g., Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1) ALAB-424, 6 NRC 122, 128 (1977); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). The "zone of interests" of the AEA is generally limited to protection of the public health and safety and radiological matters. *North Anna*, ALAB-342, 4 NRC

at 105.[7] Economic interests are outside that zone, although interests in protecting property from direct radiological hazards do come within the zone of interests of the AEA. Such interests are not implicated in the instant case. *See Gulf States Utility Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48-49 (1994). The economic harm, to afford standing, must be "an economic loss which might be directly tied to" harm to public health and safety. *North Anna*, ALAB-342, 4 NRC at 105. Thus, Envirocare's economic interests, even if they constituted an "injury-in-fact" under the AEA,[8] are not within the "zone of interests" of the AEA, and Envirocare is not an intended beneficiary under that statute. Envirocare is not the intended beneficiary of section 84(a)(1) of the AEA (42 U.S.C. § 2114(a)(1)), which addresses the section 11.e(2) byproduct material at issue herein. As the Presiding Officer observed, the competitive harm raised by Envirocare is not within the "zone of interests" of that section, as amended, which was designed to afford flexibility to the Commission in the licensing 11e.(2) disposal facilities. LBP-97-20, slip op. at 13-15. Economic factors were to be taken into account in order to permit the

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[7] To the extent that the recent case of *Reytblatt v. U.S. Nuclear Regulatory Commission*, 105 F. 3d 715 (D.C. Cir. 1997) addresses the "zone of interests" of the AEA, it does so in the context of a federal court proceeding, pursuant to the Hobbs Act, initiated by plaintiffs seeking information related to health and safety issues.

[8] As stated in footnote 3, the Staff submits that the injury claimed by Envirocare does not constitute an "injury-in-fact" under the AEA or NEPA. "A petitioner who wants to establish 'injury-in-fact' for standing purposes must make some specific showing outlining how the particular radiological (or other cognizable) impacts from the materials involved in the licensing action at issue can reasonably be assumed to accrue to the petitioner." *Atlas Corp.* (Moab, Utah Facility), LBP-97-9, 45 NRC 414, 426 (1997), *citing Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 247-48 (1996). Envirocare has made no such showing.

Commission to consider the economic impact of regulatory compliance on the applicant, not on its competitors. *See* "NRC Staff's Notice of Intent to Participate and Response to Request for Hearing Filed by Envirocare of Utah, Inc.," at 10-12 (June 19, 1997) (discussion of the legislative history of section 84a(1)).

Envirocare cites a line of cases that it asserts permit standing in cases where the interest sought to be protected is a competitive economic interest, if the interests of the competitor coincide with the interests of the intended beneficiaries of the statute in question. Appeal at 10-18. The Staff submits that these cases are inapplicable to and distinguishable from the instant case. The cases arose under statutes which relate to different concerns than the AEA. Moreover, as noted by the Presiding Officer, Envirocare's competitive injury and the relief sought is inapposite to the purpose of the controlling statute. LBP-97-20, slip op. at 14-15. Thus, Envirocare is in a different position than those plaintiffs in the cases cited who were determined to be "suitable challengers" because their interests coincided with those of the intended beneficiaries of the statutes in question.

In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1986), the Court addressed whether a securities association had standing to challenge the Comptroller of the Currency's approval of an application by two banks to provide discount brokerage services at branches and at other offices inside and outside their home states in violation of the bank branching laws. *Clarke* at 390-91. The issue was whether the offices where the discount brokerage services would be offered were "branches" under the McFadden Act. *Id.* at 391. In deciding whether the interests of the securities association fell within the zone of

interests of the relevant banking laws, the Court focused on the intent of Congress and found that the intent was to prevent "national banks from gaining a monopoly control over credit and money through unlimited branching" and that discount brokerage services would give the banks access to more money. *Id.* at 403. The Court held that Congress had arguably legislated against competition between the banks and the members of the securities association "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.* Several factors distinguish *Clarke* from the instant case. First, the Court found a congressional intent to prevent the competition by preventing excessive branching. No such intent, to prevent competition, can be found in the controlling sections of the AEA.[9] Second, the statutes in question were concerned with regulation of competition and of financial matters, and contained restrictive measures regulating competition in licensing matters. The relevant sections of AEA are not concerned with financial and economic issues such as the effects of licensing on competition.

In *First National Bank and Trust v. National Credit Union*, 988 F.2d 1272 (D.C. Cir. 1993), the statute in question was the Federal Credit Union Act (FCUA), the purpose of which is to "encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *First National Bank,* 988 F.2d at 1275. Although the court noted that the original purpose was not to

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[9] Whether Envirocare's interest is within the "zone of interests" for purposes of standing should be determined by reference to the specific provision of the AEA upon which reliance is being placed. *Bennett v. Spear*, 117 S. Ct. at 1167. Section 84, and the history thereof, contains no indication that there was an intent to regulate competition.

protect banks from competition from credit unions, it found that the plaintiffs were "suitable challengers because the statute arguably prohibits the competition of which they complain." *Id.* at 1273. In that case, the plaintiff banks were seeking to enforce a statutory restriction that limited membership in credit unions to groups with a common bond, in order to prevent the growth of a competitor credit union. The court stated that there was "reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end . . ." and the "potentially limitless incentives of competitors [would be] channeled by the terms of the statute into suits of a limited nature brought to enforce statutory demarcation. . . ." *Id.* at 1278. In the instant case, we do not have the same or even a similar situation. There is no "congressionally drawn boundary" or line of demarcation which would limit or constrain competitors who seek intervention in NRC proceedings for the purpose of vindicating a competitive issue. Most importantly, the AEA is not an entry-limiting or expansion-limiting statute akin to the FCUA or the McFadden Act addressed in the cases discussed above, which directly affect economic competition in heavily regulated financial industries. Those statutes are concerned with economic matters, not health and safety matters.[10] Section 84 of the AEA is not an entry-restricting scheme

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[10] The same is true of the Natural Gas Act discussed in *Panhandle Producers v. Economic Regulatory Administration*, 822 F. 2d 1105 (D.C. Cir. 1987), a statute which, *inter alia*, prohibits the exportation and importation of natural gas unless it is found to be in the public interest. *Panhandle* at 1106. The factors considered in applying that portion of the statute include competitiveness of the product and need for natural gas (protection of regional and national interests). *Id.* at 1107. Therefore, the interests of a competitor (continued...)

enacted for the purpose of limiting entry into a market. Such entry-restricting statutes would address restrictions on entry, such as geographic or product line restrictions or growth limitations. *First National Bank*, 988 F. 2d at 1277.[11] The purpose of the AEA in, is to ensure that health and safety is protected. An additional purpose of section 84 is to afford the Commission the flexibility to take numerous factors into consideration in licensing 11e.(2) facilities. The number of companies given licenses, the area in which they operate, and other competitive factors are immaterial to the licensing decision, except insofar as they may directly bear on health and safety matters or relate to direct impacts on the environment. In fact, whether a market exists at all is immaterial to the licensing decision. Therefore, the AEA is not the sort of statute that the courts had in mind when they permitted competitors to have standing in *Clarke* and *First National Bank*. The difference in the purposes and intent of the AEA makes it impossible to equate it with the statutes under consideration in cases cited by Envirocare.

As construed more clearly in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996), the "potentially limitless incentives of competitors" being "channeled by the terms of the statute" discussed in *First National Bank, supra,* refers to cases where "there is no possible gradation in the statute's

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[10](...continued)
are directly implicated by the statute, since it is concerned with aspects of competition, unlike the relevant section of the AEA, which is concerned, with only minor exceptions, with public health and safety.

[11] *See e.g., Clarke,* 479 U.S. 388 (seeking enforcement of National Banking Act branching provisions); *Community First Bank v. National Credit Union Administration*, 41 F. 3d 1050 (6th Cir. 1995)(challenge to geographical expansion of credit union, under the "common bond" requirement of the FCUA); *Panhandle Producers,* 822 F. 2d 1105.

requirement." *Scheduled Airlines*, 87 F. 3d at 1360-61. In that case, the statute in question was the Miscellaneous Receipts statute, 31 U.S.C. § 3302(b) (1994). The court found that because of the inherent limitations of the statute there was no room for the plaintiff (a government contract bidder) to frustrate the congressional purpose of the statute (to require government officials to deposit certain funds in the Treasury). *Scheduled Airlines* at 1361. "Either the funds are covered by the statute or they are not." *Id.* The court noted that the statutes discussed in *First National Bank, supra,* and *Clarke, supra*, contained inherent limitations, much like the Miscellaneous Receipts statute. *Id.* The AEA does not contain inherent limitations which would prevent a competitor from frustrating the intent of the statute. As noted above, Envirocare's stated interest is, in fact, in conflict with the intent of the statute.

The cases cited by Envirocare involve the economic regulation of industries and/or licensing for restrictive purposes.[12] As stated above, with minor exceptions, the

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[12] *Schering Corporation v. Food and Drug Administration,* 51 F. 3d 390 (D.N.J. 1995), *cert denied* 116 S. Ct. 274 (1995), is also distinguishable. The case was decided based on the resolution of competing interests by Congress in enacting the Drug Price Competition and Patent Term Restoration Act. Those interests were the interest of generic drug manufacturers in avoiding unnecessary testing versus the interest of the pioneer drug manufacturers in preserving their research investment, while also considering the need of the public for safe drugs. *Id* at 396. Such tension between competitors was not a consideration in relation to the AEA. Moreover, the holding of *Schering* is specific to the situation presented and should be limited to those facts. The Court found that pioneer drug manufacturers are "well-positioned" to monitor the FDA's activities in approving generic competitor drugs, when it is "their pioneer drug that the generic manufacturer seeks to copy." *Id.* Although Envirocare is operating as a commercial disposal site, it has no special expertise which would put it in the same position as a pioneer drug manufacturer making sure that the generic manufacturer copying its drug is properly controlled by the FDA.

AEA concerns itself solely with the protection of public health and safety, and thus, effects on competitive position are not within the "zone of interest" of the statute. Nor did Congress intend that those with competitive or economic concerns be protected by the statute. Licensing decisions under the AEA are based upon health and safety concerns and Envirocare's economic competitive concerns demonstrate that its interests are not in congruence with the intended beneficiaries of the AEA. Envirocare's position in this matter is closer to that of the plaintiffs in *Hazardous Waste Treatment Council v. Environmental Protection Agency*, 885 F. 2d 918 (D.C. Cir. 1989). In that case, a trade association of hazardous waste treatment firms sought to challenge a rule promulgated by the EPA under the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. § 6901, *et seq.*). The plaintiff asserted that it had standing as a regulated party and as an intended beneficiary of the law. *Hazardous Waste,* 885 F. 2d at 922. In denying standing, the court held that a regulated party for purposes of the "zone of interests" test is one who is being regulated by the "particular regulatory action being challenged." *Id.* The court further held that the plaintiff was not an intended beneficiary of the statute, the purpose of which was to "protect human health and the environment from . . . an unacceptable danger" not to "improve the business opportunities" of hazardous waste treatment firms. *Id.* at 923.

> '[W]henever Congress pursues some goal, it is inevitable that firms capable of advancing that goal may benefit . . . . [A] rule that gave such plaintiff standing merely because it happened to be disadvantaged by a particular agency decision would destroy the requirement of prudential standing.'

Id. (citation omitted). Finally, the court held that the plaintiff was not a suitable challenger in that its interests did not "systematically" coincide with those of the intended beneficiaries. *Id.* at 924. The claims made by the plaintiffs were similar to those being made by Envirocare herein, *e.g.* regulatory laxity will hurt their competitive position. *Id.* The court found that plaintiff's demand for more stringent regulation did not coincide with the interests of the intended beneficiaries in that their interest was in making more money and stricter regulation could result in the sale of more of their services. Thus, they would pursue regulation which would maximize their profits at the expense of others. *Id.* Such goal would be pursued regardless of whether it advanced the purpose of the statute or the interests of the intended beneficiaries. *Id.* at 924-925. Envirocare's position in this case is almost identical to that of the plaintiff in *Hazardous Waste*. Its goal, to maximize or equalize the cost to its competitors by more stringent regulation, would be pursued regardless of whether in advanced the goals of the AEA or the interests of the intended beneficiaries.

The deciding factor in the "suitable challenger" cases cited by Envirocare is whether the interest of a challenger, although not the interests Congress intended to protect, nevertheless coincide with the interest of the intended beneficiaries. *Hazardous Waste*, 885 F. 2d at 922-23. That cannot be said of the instant matter. The overriding concern of the AEA is public health and safety. Competitive or economic concerns have always been irrelevant to that consideration, other than in specific, clearly delineated areas. The addition of the economic factor in Section 84 was, as noted by the Presiding Officer, to afford the staff additional flexibility in making licensing decisions, not to protect the

competitive interests of competitors. Envirocare's participation in this license amendment matter would contravene the purpose of the statute by limiting the Staff's flexibility to address each application on its merits as dictated by the facts of that application, and requiring the Staff to, *inter alia,* prepare an EIS in all cases, whether or not it was justified or the public health and safety required it. Moreover, it would not advance the purpose of protecting the public health and safety.

In addition, Envirocare has asserted an injury which is not fairly traceable to the issuance of the license amendment to QMC. Therefore, Envirocare failed to establish standing under the AEA.

C. The Presiding Officer Did Not Err in Denying Standing Under the Equal Protection or Substantive Due Process Clauses of the 5th and 14th Amendments of the United States Constitution

Envirocare contends that it has standing under the Equal Protection and Substantive Due Process clauses of the 5th and 14th Amendments of the United States Constitution in that it has allegedly been treated differently from another licensee which is similarly situated. The Staff disagrees. Standing has not been established under the Constitution. In order for Envirocare to be found to have standing under the those clauses of the Constitution, it must have standing under the governing statutes. Its claim must fall within the "zone of interests" of the AEA or NEPA. In the instant case, Envirocare has not demonstrated that it has standing under the AEA or NEPA, nor has it established that the Constitution grants an independent right not afforded under the AEA and NEPA. In the absence of such independent claim, its assertion of standing under the Constitution must fail.

Finally, it is clear from the Presiding Officer's decision that he did not find that Envirocare had alleged sufficient facts in its pleading to demonstrate that it was similarly situated to QMC. In determining standing, the petition must be construed in favor of the petitioner.[13] In construing Envirocare's request for hearing in its most favorable light, the Presiding Officer found that the assertions therein did "not provide an appropriate basis" upon which standing could be found. LBP-97-20, slip op. at 24. Clearly, Envirocare's standing "[did] not adequately appear from all the materials of record". *Warth v. Seldin*, 422 U.S. 490, 501-02 (1974). The Presiding Officer, therefore, did not err in denying the request for hearing.

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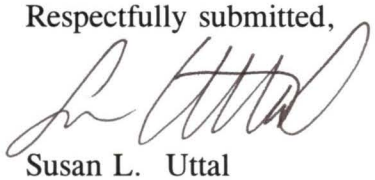
[13] *See Kelley v. Selin*, 42 F. 2d 1501, 1507-08 (6th Cir. 1995); *Georgia Institute of Technology* (Georgia Tech Research Reactor, Atlanta, Georgia), CLI-95-12, 42 NRC 111, 115 (1995).

CONCLUSION

Based upon the foregoing, the Staff's submits that the Presiding Officer was correct in denying standing to Envirocare and Envirocare's appeal should be denied in that it has failed to demonstrate that it has standing under the AEA, NEPA or the United States Constitution to request a hearing in regard to the granting of an amendment to QMC's materials license.

Respectfully submitted,



Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 23rd day of December 1997.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 40-8905-MLA
QUIVIRA MINING COMPANY	)	
	)	ASLBP No. 97-728-04-MLA
(Materials License No. SUA-1473)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENVIROCARE OF UTAH'S SUBSTITUTE APPEAL OF DECISION OF ATOMIC SAFETY AND LICENSING BOARD PANEL" in the above-captioned proceeding have been served on the following by deposit into the United States mail, or through deposit in the Nuclear Regulatory Commission's internal mail system; as indicated with an asterisk by fax and United States mail, or with a double asterisk by hand delivery on this 23rd day of December 1997:

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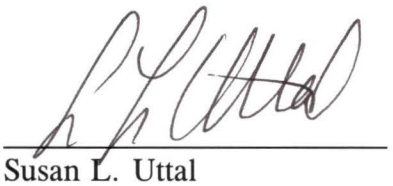

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