UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:

Charles Bechhoefer, Presiding Officer
Dr. Peter S. Lam, Special Assistant

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 Material License No. SUA-1473)	November 4, 1997

MEMORANDUM AND ORDER
(Denying Request for Hearing)

This proceeding involves an amendment to the source material license (SUA-1473) of Quivira Mining Co. (QMC or Applicant) to permit it to receive defined quantities of Section 11.e(2) byproduct material from outside generators for disposal at its Ambrosia Lake uranium mill and tailings site, located near Grants, New Mexico.[1] It is being conducted pursuant to the Commission's informal hearing procedures, set forth in 10 C.F.R. Part 2, Subpart L.

One timely request for a hearing (Request), submitted by Envirocare of Utah, Inc. (Envirocare or Petitioner), has

[1]That material is defined by § 11.e(2) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2014(e)(2), as "the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content."

been received. For reasons set forth herein, I am denying that request and terminating the proceeding.

A. Background.

As set forth in my Memorandum and Order (Request for Hearing), dated June 20, 1997 (unpublished), Envirocare filed its Request on May 28, 1997. QMC and the NRC Staff (Staff) filed responses in opposition to Envirocare's Request, dated June 12 and 19, 1997, respectively.[2] Both of those responses were founded, in large part, on Envirocare's lack of demonstrated standing to participate.

In my June 20 Memorandum and Order, I noted that in Subpart L proceedings such as this one, a petitioner is required to set forth (1) its interest in the proceeding--i.e., its standing; (2) how that interest may be affected by the results of the proceeding; (3) its areas of concern about the licensing activity that is the subject matter of the proceeding; and (4) the timeliness of the petition. 10 C.F.R. § 2.1205(e). I also stated that to admit Envirocare, I must find that its specified areas of concern are germane to the subject matter of the proceeding, that its petition was timely, and that the petitioner has standing. 10 C.F.R. § 2.1205(h).

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[2]In its response (at 2), the Staff stated that, in accordance with 10 C.F.R. § 2.1213, it wishes to participate as a party. The Staff also stated (at 3 n.7) that, consistent with 10 C.F.R. § 2.1205(m), the license amendment was approved by the Staff on May 16, 1997; and that, as issued, the license amendment differs in certain respects from that applied for by QMC.

In that Memorandum and Order, I went on to find that Envirocare's petition was timely submitted and that, as asserted by the Staff, certain (although not all) of its areas of concern are germane to the subject matter of the proceeding.[3] But I determined that the Petitioner's statement of standing--particularly injury in fact--was not sufficiently specific for me to determine whether the relevant factors had been satisfied.

Accordingly, taking into account (1) in Subpart G proceedings there is a right for a petitioner to supplement its request for a hearing; (2) in Subpart L proceedings there is no bar to that practice; (3) the lack of local availability of information concerning the proceeding; and (4) the complexity of questions concerning standing and injury in fact, I permitted Envirocare to file a supplement to its petition (Supplement) and the Applicant and Staff to respond. Envirocare filed a timely Supplement on July 3, 1997, and the Applicant and Staff filed timely responses in opposition to Envirocare's Request on July 15, 1997 (Applicant's Supplemental Response, Staff's Supplemental Response).

In my June 20, 1997 Memorandum and Order, I also indicated that I might convene a prehearing conference to

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[3]In particular, taking into account Envirocare's supplementary statement, the adequacy of the environmental review carried out for this license amendment (Request at 18, ¶ 5.6.9) is clearly germane.

resolve questions of standing either near the site (if a site visit would prove useful) or by telephone conference call. I invited suggestions from the parties and Petitioner. Envirocare did not comment. The Staff opined that a site visit would not be helpful in determining the issue of standing. The Applicant suggested that, because the legal issue of standing can be decided on briefs alone, such a conference would not be beneficial. In light of the issues before me at this time, I agree with these positions and accordingly am issuing this Order based on the various briefs (i.e., petitions and responses) to which I have referred.

B. Envirocare's Standing.

The standing requirement in NRC's Rules of Practice--including that applicable in 10 C.F.R. Part 2, Subpart L proceedings such as this one[4]--arises from the hearing authorization in § 189.a(1) of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2239(a)(1), providing a hearing "upon the request of any person whose interest may be affected" by a proceeding (emphasis supplied). Through a long series of cases, the Commission has held that, in determining standing, it will look to "contemporaneous judicial concepts of standing." Portland General Electric

[4]The same standing requirements govern Subpart L proceedings as govern formal, Subpart G proceedings. Chemetron Corp. (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 18 (1994).

Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see also Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983); id., CLI-85-2, 21 NRC 282, 316 (1985); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992); Envirocare of Utah, Inc. (Byproduct Material Waste Disposal License), LBP-92-8, 35 NRC 167, 172 (1992).

As set forth by the Applicant (Supplemental Response at 3), a contemporary delineation of judicial concepts of standing appeared in a recent Supreme Court decision, Bennett v. Spear, 520 U.S. __, 117 S. Ct. 1154, 1163 (1997) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). In Bennett, the Court observed that constitutional minimum standards of standing are that (1) the plaintiff suffer injury in fact, both actual or imminent, not conjectural or hypothetical, (2) there is a causal connection between the injury and the conduct in question, and (3) the injury likely will be redressed by a favorable decision. In addition, a "prudential" standing requirement is that the plaintiff's grievance must arguably fall within the "zone of interests" protected or regulated by the statutory or constitutional provisions invoked in the suit (here, the Atomic Energy Act, the National Environmental Policy Act (NEPA) and Amendments V and XIV of the Constitution itself). 117 S. Ct. at 1160-61.

Commission decisions are consistent with these requirements. To satisfy "judicial" standing, the Commission has held that a petitioner must demonstrate, inter alia, that it could suffer an actual "injury in fact" to its interest, that the injury occur as a consequence of the proceeding and that the petitioner's interest is "arguably" within the "zone of interests" to be protected by the statute(s) under which the petitioner seeks to intervene. Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), CLI-93-16, 38 NRC 25, 32 (1993); Rancho Seco, CLI-92-2, supra, 35 NRC at 56. To conform to the "injury in fact" requirement, the injury must also be "concrete and particularized, fairly traceable to the challenged action, and likely to be redressed by a favorable decision." Vogtle, CLI-93-16, supra, 38 NRC at 32; Envirocare, LBP-92-8, supra, 35 NRC at 173; Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988). Each of these elements is in dispute here.

1. Envirocare's Position. Envirocare, which operates a waste disposal facility at Clive, Utah, some 500 miles from QMC's Ambrosia Lake facility, claims that it will suffer injury through the NRC's licensing of a facility that will be its competitor. It claims (Request at 3) to be "the first private facility in the United States to be licensed . . . to accept § 11.e(2) material from outside generators for disposal." It alleges potential economic harm from the

licensing of the Ambrosia Lake facility to accept the same type of byproduct waste material from outside generators that it now accepts at its Clive, Utah site.

In its Request (at 11), Envirocare claims an economic interest in ensuring that all licensees that propose to accept Section 11.e(2) byproduct material from other persons for disposal comply with applicable NRC standards. It adds (Request at 11-12) that if QMC need not comply with the same requirements as were imposed on Envirocare, then Envirocare will be placed at a "severe competitive disadvantage, because QMC's lower costs will allow it to attract customers away from Envirocare."

In its Supplement, Envirocare acknowledges that QMC is currently authorized to store certain specified § 11.e(2) materials at the Ambrosia Lake facility. Envirocare, however, differentiates the limited, strictly defined authorization for disposal activities under QMC's license prior to this amendment (derived for the most part from in situ leach uranium facilities) with the amendment which allegedly "changed the nature of QMC's facility from a uranium mill to a commercial disposal facility" (Supplement at 3). Envirocare claims that this "fundamental" change was permitted by the NRC without requiring a full environmental review under NEPA, comparable to the full review previously carried out for the Petitioner's own facility (id. at 3-4). It adds that no full environmental review was ever carried

out for the QMC facility (Request at 5; Supplement at 3). Among impacts allegedly created or exacerbated by the amendment and never reviewed, Envirocare lists groundwater contamination, seepage into the substrate, additional radioactive releases and transportation of large volumes of Section 11.e(2) material to the site (Supplement at 8-9).

In sum, therefore, Envirocare relies for standing on alleged economic injury to its interests coupled with purported environmental impacts of the project that it does not appear to be claiming directly affect it. With respect to a causal connection with this proceeding, it asserts that a favorable decision by me--overturning the Staff's Finding of No Significant Impact (FONSI) and, as a result, requiring QMC to prepare an Environmental Report that would initiate further environmental reviews--will redress the injury both to itself and to the environment (Supplement at 12).

2. QMC and Staff Responses. QMC and the Staff directly controvert Envirocare's claims of injury in fact as well as its formulation of a causal connection. First, they assert that the additional storage authority is essentially a de minimis addition to amounts already authorized to be stored (although, admittedly, stemming from different sources).[5] QMC faults Envirocare for failing to show a

[5]QMC asserts in its Response (at 2 n.2) that it had previously been authorized to accept source-specific § 11.e(2) byproduct material for disposal at the Ambrosia Lake facility. In its license amendment application dated

(continued...)

causal connection between the asserted economic injury and the allegedly deficient environmental review of the project, or any potential health and safety violation under the Atomic Energy Act (Applicant's Supplemental Response at 2, 5-7). The Staff asserts that the alleged environmental harm is "speculative, at best," that the economic harm is not a direct harm to Envirocare flowing from the physical or environmental effects of the project and that Envirocare has not demonstrated that the alleged injuries can be fairly traced to the issuance of the license amendment under review (Staff Response at 10, 13, 15).

3. Economic Impacts. I turn first to whether Envirocare may suffer economic injury from the license amendment and conclude, for purposes of standing, that it has indeed demonstrated injury in fact. For standing purposes alone, such injury need not be substantial. Houston Lighting and Power Co. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48, aff'd., ALAB-549, 9 NRC 644 (1979). Although it must be "actual," "direct," and "genuine," id. at 448, it need not have already occurred. Potential or imminent injury is sufficient. There need only

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[5](...continued)
November 20, 1995 (forwarded to me on June 27, 1997, with copies to Envirocare and the Staff), QMC states that "[t]he addition of a generator's 10,000 [cubic] yard per year quantity is minimal in comparison to the 16 million tons of capacity available for storage . . . and in comparison to the 33 million tons of tailings material already at the site."

be a real possibility of concrete harm to a petitioner's interest as a result of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1984).

Here, it is clear that the facility authorized by the instant license amendment might be a competitor to Envirocare's existing facility. There clearly is a real possibility, although not a certainty, that competition from the Ambrosia Lake facility will cause economic harm to Envirocare. Competitive injury such as this has been recognized as a legitimate basis on which to assert injury-in-fact. UPS Worldwide Forwarding, Inc. v. U.S. Postal Service, 66 F.3d 621, 626 (3d Cir. 1995), cert. denied, 116 S. Ct. 1261 (1996); Panhandle Producers and Royalty Owners Association v. Economic Regulatory Administration, 822 F.2d 1105, 1108 (D.C. Cir. 1987).

Given the realities of market competition, the possibility of economic harm appears to be stronger than "speculative." Moreover, although any such injury would stem from operation of the facility and not technically from its licensing (as claimed by the Applicant and Staff[6]), such a rationalization invokes a distinction without a difference by ignoring the obvious fact that the claimed potential competitive injury could not and would not occur

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[6]Applicant's Supplemental Response at 6; Staff's Supplemental Response at 2.

absent the licensing. Cf. Bennett v. Spear, supra, 117 S. Ct. at 1163-64.

Accordingly, I conclude that injury in fact, as well as a causal connection to this proceeding, has been shown for standing purposes. The real standing question, to which I now turn, is whether that injury arguably falls within the "zone of interests" protected by the Atomic Energy Act or NEPA so as to be redressable here. Rancho Seco, CLI-92-2, supra, 35 NRC at 56. The Applicant and NRC Staff both claim that competitive injury is not within the zones of interests protected by any of these statutes, whereas Envirocare claims that it is.[7]

With respect to the Atomic Energy Act, Envirocare claims that one should inquire about the zones of interests to be protected by particular sections of a statute pertinent to the litigation, and not necessarily to the statute as a whole. It refers specifically to Section 84 of the Atomic Energy Act, which was amended in 1983 to include language that permits consideration of economic matters and encompasses the Section 11.e(2) byproduct material at issue here. As further authority, Envirocare cites several cases under various environmentally-oriented statutes (including NEPA) that permit economic injury to serve as a basis for standing, in particular, a recent U.S. Supreme Court

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[7]Envirocare also makes certain economic standing claims based on purported constitutional violations. I deal with these assertions below.

decision, Bennett v. Spear, supra (Endangered Species Act); and Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979)(NEPA).

The Applicant and Staff each rely on a long series of Commission decisions to assert that economic matters are not comprehended by the Atomic Energy Act or NEPA (unless the economic injury stems directly from the alleged radiation hazards or other environmental impacts of the project). See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984) ("[t]he zone of interests affected does not include general economic considerations"); Gulf States Utilities Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48-49 (1994); Rancho Seco, CLI-92-2, supra, 35 NRC at 56-57. These decisions each involve the licensing of nuclear power reactors.

The licensing authority applicable to this proceeding stems from Section 84 of the Atomic Energy Act which, as noted above, was specifically amended in 1983 to include economic considerations. See, Envirocare of Utah, Inc., supra, LBP-92-8, 35 NRC at 180-81. At least insofar as the Atomic Energy Act is concerned, the "zone of interests" affected by byproduct material regulated under Section 84 of the Act (including the disposal of Section 11.e(2) wastes) is thus different from that protected under the sections of the Act regulating nuclear reactors or other production or utilization facilities.

Moreover, as the Petitioner claims, under current judicial authority standing may be derived from a specific section of the statute (i.e., § 84) rather than from the statute as a whole. Bennett v. Spear, supra, 117 S. Ct. at 1166-67. Decisions excluding all economic matters from the zone of interests protected by the Atomic Energy Act and based on regulation other than under the amended Section 84 (most of the cases relied on by the Applicant and Staff) are therefore not relevant or applicable in this respect to a case such as this one arising under the amended Section 84.

The one case involving standing under the amended Section 84 opined (by way of dictum) that standing could arise from economic injury but rejected standing because the petitioner had failed to demonstrate injury in fact caused by the licensing action under review. Envirocare, LBP-92-8, supra. The Staff distinguishes LBP-92-8 from this proceeding on the ground that the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) liability invoked there by the petitioner (although held by the Licensing Board to have not been sufficiently demonstrated to satisfy injury-in-fact standards) would allegedly have resulted directly from the project's asserted environmental and safety deficiencies (concerning the adequacy of material storage and isolation) and is different in substance from the competitive injury alleged here, which is not directly attributable to any of the project's

environmental or safety aspects (Staff Response at 11 n.11).

In my view, certain types of alleged economic injury are within the zone of interests protected under amended Section 84 of the Atomic Energy Act. As outlined by the Applicant (Response at 9-10) and Staff (Response at 11), the legislative history of the 1983 amendment to Section 84 suggests that it 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. As amended, Section 84 contemplates that, in dealing with Section 11.e(2) byproduct material, the Staff will have somewhat more latitude than under other Atomic Energy Act licensing provisions to take into account the economic impact of regulatory compliance.

This, however, is very different from the competitive injury invoked by Envirocare, which apparently was not considered by Congress in amending Section 84 and accordingly does not appear to be the type of economic injury that may form a basis for standing under amended Section 84. Indeed, at its heart, Envirocare's economic argument is aimed at depriving the Staff of additional flexibility by making the precise licensing requirements governing its own facility the floor (rather than the ceiling) for any authorization that might be given to QMC. Ultimately, to rule that Envirocare has standing to obtain

such a result would mean not only that any competitor of QMC anywhere in the country would also be entitled to such standing, but also 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. Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993).[8]

4. Environmental Impacts Under NEPA. I turn next to whether the alleged environmental impacts of the Ambrosia Lake facility, which surely fall within the zone of interests protected by NEPA, must affect the petitioner directly in order to serve as a foundation for injury in fact. I conclude they must.

In this connection, I am not dealing with the magnitude of the alleged impacts, or whether they are truly de minimis, as claimed by the Applicant and Staff, or to the adequacy of the Staff's environmental review. Those are matters for the merits, if the proceeding progresses that far. But my interpretation of the various cases cited by all parties or the Petitioner convinces me that the specific environmental or radiological impacts allegedly emanating

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[8]The Atomic Energy Act deals with certain antitrust aspects of the licensing of nuclear power reactors, but those provisions are specialized in their applicability and are of no relevance here.

from the project itself (listed, supra, at p. 8) 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.

The case relied on most strongly by Envirocare in support of its position (see Supplement at 6, 8, 10, 11, 13 and 14) is Port of Astoria, Oregon v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979). There, various plaintiffs, including a port district and the corporate owner of commercial radio facilities, brought suit under NEPA, claiming that an environmental impact statement (EIS) was required in connection with the execution of a power supply contract which obligated the Bonneville Power Administration to supply electrical power to a proposed aluminum reduction plant. The Court ruled the corporate sponsor of commercial radio facilities did have standing to bring suit, but the port district did not.

The port district was far removed from the facility site and claimed injury from the new facility only through losses of potential tax base and potential revenue. The Court commented that these alleged injuries "represent only pecuniary losses and frustrated financial expectations that are not coupled with environmental considerations" and thus are outside NEPA's zone on interests (595 F.2d at 475); it denied standing on that basis.

On the other hand, it granted standing to the corporate owner of broadcast facilities which alleged that the transmission lines to be built to service the new plant would interfere with its broadcast. The Court acknowledged that the injury was economic in nature--static caused by the transmission lines would cause economic injury to the radio station--and was the "immediate and direct result of the building of the [facility]." It added that this injury, unlike that of the port district, "[is] causally related to an act that lies within NEPA's embrace." Id. at 476. Thus, the corporate owner of the broadcast facilities was found to have standing whereas the port district was not.

Envirocare interprets this case to permit standing on the basis of economic injury in a proceeding subject to NEPA. It equates itself with the corporate owner of broadcast facilities. But it has not shown the direct injury alleged by the broadcast facilities arising from one of the environmental attributes of the project in question that was crucial to the finding of standing. In my view, Envirocare in this proceeding is more equivalent to the port district that was found not to have standing than to the broadcasters who had standing.

This view is supported by Western Radio Services Co. v. Espy, 79 F.3d 896, 902-03 (9th Cir. 1996), cert. denied, 117 S. Ct. 80 (1996), also cited by Envirocare (Supplement at 6, 14). There, the Court denied standing to a radio

communication company also asserting economic injury from a transmission tower. Before the trial court, the plaintiff had asserted only economic harm, and the appellate court refused to allow the plaintiff on appeal to characterize its injuries as environmental. It interpreted Hodel as permitting standing on the basis of economic injury that was "causally related" to the environmental impacts of the facility. It characterized the alleged economic injury as "not one that NEPA aims to redress." 79 F. 3d at 903.

Envirocare also cites Overseas Shipholding Group, Inc. v. Skinner, 767 F. Supp. 287 (D.D.C. 1991)(Supplement at 9, 14-15), for the proposition that asserting a competitive interest does not preclude a firm from falling within the zone of interests protected by NEPA. The case granted standing to a corporate shipholding group attempting to challenge a Department of Transportation/Maritime Administration rule for failing to follow NEPA requirements. Although the case does hold economic interests within the zone of interests protected by NEPA, as claimed by Envirocare, it involved economic claims resulting directly from the environmental impacts allegedly produced by the rule in question. This direct connection is what is lacking here, where there has not even been an assertion that the alleged environmental impacts of the Ambrosia Lake facility in any way directly affect Envirocare. As the Supreme Court has observed, standing is never allowed "solely on the basis

of a 'procedural right' unconnected to the plaintiff's own concrete harm." Lujan v. Defenders of Wildlife, supra, 504 U.S. 555, at 573 n.8.

County of Josephine v. Watt, 539 F. Supp. 696, 703-04 (N.D. Ca, 1982), another case cited by Envirocare (Supplement at 6, 11), supported standing on the basis of "direct use in a recreational or occupational sense of the areas and places" involved. Certain lumber plaintiffs were "causally affected by a matter of NEPA concern." This was not merely a case where, as asserted by Envirocare (Supplement at 11), the act that causes the economic harm (the licensing action) is also one that will harm the environment. A direct causal connection was also involved.

Similarly, Lake Erie Alliance v. United States Army Corps. of Engineers, 486 F. Supp. 707, 712 (W.D. Pa. 1980)(Supplement at 6), found standing under NEPA to challenge the adequacy of an environmental impact statement for a complex steel production facility by individual steelworkers (among others) who might lose or be required to change their jobs because of the new facility. The court observed that NEPA does not encompass monetary interests alone but that a party is not precluded from asserting cognizable injuries to environmental values because his "real" or "obvious" interest may be viewed as monetary. It added:

> While the "real" interest of the steelworkers before us is undoubtedly in job security, all live in or around

> the . . . area which will be affected environmentally by this project, and all have alleged a concern with those adverse environmental effects.

486 F.Supp. at 713. In other words, 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). This is the direct connection to environmental impacts that Envirocare has not claimed here. To the same effect, see Realty Income Trust v. Eckerd, 564 F.2d 447, 452 (D.C.Cir. 1977)(Supplement at 14).

The Applicant points to another NEPA case where a direct causal connection to alleged environmental impacts was required for standing. Applicant's Supplemental Response at 7. Absence of a direct connection to potential harm to the plaintiff caused by the environmental impact in a case involving allegations of economic injury was crucial to the court's holding of lack of standing. Clinton Community Hospital Corp. v. Southern Maryland Medical Center, 374 F. Supp. 450, 455-56 (D. Md. 1974), aff'd, 510 F.2d 1037 (4th Cir.), cert. denied, 422 U.S. 1048 (1975).[9]

Envirocare cites several other cases which it characterizes as not requiring a direct link between economic injuries and environmental harm to the petitioner.

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[9]It perforce does not follow, as claimed by Envirocare (Supplement at 11, 15), that requiring a direct connection to environmental impacts to support standing undercuts the informational and educational purposes served by NEPA.

Port of Astoria, supra; Western Radio Services, supra. (Supplement at 10.) As discussed earlier, however, Envirocare is misinterpreting these cases. A direct link was indeed required. Envirocare also tries to distinguish the results in cases requiring direct environmental injury (e.g., Defenders of Wildlife, supra, and Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C. Cir., 1996)) on the basis that those cases did not involve a combination of economic and environmental harm (Supplement at 10). Again, however, Envirocare has misconstrued the cases that did involve such a combination.[10]

Commission holdings under NEPA are consistent with the foregoing zone-of-interests and causal effect rulings. For example, in Rancho Seco, CLI-92-2, supra, the Commission indicated to be cognizable for standing purposes, economic harm under NEPA must be occasioned by the environmental impacts alleged: "NEPA does protect some economic

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[10]Still other cases cited by Envirocare involve 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. Clarke v. Securities Industry Ass'n, 479 U.S. 388, 396 (1987)(National Bank Act); First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin., 988 F.2d 1272, 1277 (D.C. Cir.), cert. denied, 510 U.S. 907 (1993)(Federal Credit Union Act); Schering Corp. v. Food and Drug Admin., 51 F.3d 390 (3d Cir.), cert. denied, 116 S. Ct. 274 (1995)(Drug Price Competition and Patent Term Restoration Act). Cf. Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922-23 (D.C. Cir. 1989)(Resource Conservation and Recovery Act, standing denied to trade association facing competition as a result of new EPA rule).

interests; however, it only protects against those injuries that result from environmental damage." 35 NRC at 56. Economic standing based on loss of employment at a nuclear plant that was closing did not suffice.

In contrast, marina operators were admitted to a proceeding (and accordingly found to have standing) to complain of shipworms in the vicinity of their business, resulting from operation of a nuclear power plant. Jersey Central Power & Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973). And a commercial fisherman was found to have standing under NEPA to complain of the discharge of cooling water that might affect his catch. Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974). See also Gulf States Utilities Co. (River Bend Station, Unit 1), LBP-94-3, 39 NRC 31, 37-38, aff'd., CLI-94-10, 40 NRC 43, 47-48 (1994)(interest in protecting property from radiological hazards sufficient for standing).

In summary, the cases seem uniformly to hold that, to establish standing, there must be a direct connection between the environmental or physical injury alleged to emanate from the project and the plaintiff. Economic injury may be permissible, as long as the environmental or physical damage assertedly resulting from the activity directly affects the plaintiff (or, here, the petitioner.) Because Envirocare cannot satisfy this aspect of standing, I am

compelled to find that it does not have standing under the Atomic Energy Act or NEPA.

5. Constitutional Basis for Standing.

Envirocare also claims that the competitive interests it asserts are cognizable under the Equal Protection and Substantive Due Process clauses of the fifth and fourteenth amendments of the Constitution, inasmuch as it has suffered injury in fact from the differing treatment accorded by NRC to QMC and itself. Envirocare also asserts that its interest in ensuring that the NRC consistently applies its regulations and standards to similarly situated licensees is within the zone of interests protected by those two clauses. Supplement at 27-28. The single case it cites, however, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985), concerns the differing applicability of certain state taxes to in-state and out-of-state companies and appears to have nothing to do with standing.

Moreover, Envirocare has failed to develop adequately its thesis that it in fact is similarly situated with QMC. That the two facilities may eventually be in competition for the same business and that they are governed by the same statutes is not sufficient; indeed, the very circumstance that Envirocare was involved in the first such facility may well constitute a difference, as might the circumstance that QMC will be using an existing facility for purposes similar to that for which the facility already is licensed.

Further, regulatory requirements, particularly with respect to impact statements, may well not be similar, because of the different years in which applications were submitted. As QMC observes, "the law does not require consistency in treatment of two parties in different circumstances." Offshore Power Systems (Floating Nuclear Plants), ALAB-489, 8 NRC 194, 222 (1978)(Applicant's Supplemental Response at 17 n.11.) Envirocare's assertions concerning these clauses, therefore, do not provide an appropriate basis upon which I could found its standing.[11]

6. Conclusion. Envirocare has not demonstrated standing to be granted the hearing it requests, and its request for a hearing must therefore be dismissed and the proceeding terminated.

C. ORDER.

For the reasons stated, it is, this 4th day of November, 1997, ORDERED:

1. The request for a hearing and petition for leave to intervene of Envirocare, Inc., is hereby denied.

2. This proceeding is hereby terminated.

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[11]Although Envirocare lacks standing to participate in this proceeding, it may not lack a remedy to correct what it may perceive as unequal treatment by the Staff. At least in terms of regulatory requirements currently being applied to operation of the two facilities, Envirocare is always free to seek to have its license amended to incorporate provisions similar to those it may perceive give QMC a competitive advantage. If denied by the Staff, Envirocare could request a hearing on the validity of the denial.

3. This order is effective immediately and, absent appeal, will become the final order of the Commission thirty (30) days after the date of issuance. See 10 C.F.R. § 2.1251(a).

4. This Order is appealable to the Commission in accordance with the provisions of 10 C.F.R. § 2.1205(o). Any appeal must be filed within ten (10) days of service of this Order and may be taken by filing and serving upon all parties a statement that succinctly sets out, with supporting argument, the errors alleged. Any other party may support or oppose the appeal by filing a counter-statement within fifteen (15) days of the service of the appeal brief.

Charles Bechhoefer

Charles Bechhoefer
Presiding Officer
ADMINISTRATIVE JUDGE

Rockville, Maryland
November 4, 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
QUIVERA MINING COMPANY	Docket No.(s) 40-8905-MLA
(License Amendment)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing M&O DENYING HEARING REQUEST have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Docket No.(s)40-8905-MLA
M&O DENYING HEARING REQUEST

Dated at Rockville, Md. this
4 day of November 1997

Emile L. Julian
Office of the Secretary of the Commission