UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

ANSWER OF APPLICANT QUIVIRA MINING COMPANY IN OPPOSITION TO SUPPLEMENT TO REQUEST FOR HEARING BY ENVIROCARE OF UTAH, INC.

BACKGROUND

In a Memorandum and Order, dated June 20, 1997, the Presiding Officer in this case found that the request by Envirocare of Utah, Inc. ("Envirocare") for a hearing pursuant to 10 C.F.R. Part 2, Subpart L is deficient. In particular, the Presiding Officer observed that Envirocare's "statement of standing and injury in fact are not sufficiently specific for me to determine whether those factors have been satisfied." Memorandum and Order at 3. To afford Envirocare a meaningful opportunity to develop its hearing request, the Presiding Officer allowed Envirocare to supplement its request for hearing, and similarly afforded the NRC Staff and Applicant Quivira Mining Company ("Applicant" or "Quivira") an opportunity for response. The Presiding Officer suggested that a prehearing conference might be held to clarify standing and other issues and establish a schedule, either by telephone or at a location near Grants, New Mexico, a town near Quivira's uranium mill and tailings facility in Ambrosia Lake, New Mexico.

Envirocare's supplemental filing confirms that it lacks standing to request a hearing on Quivira's requested license amendment. For all its prolixity, Envirocare's supplemental brief shows that the differences between Envirocare, on the one hand, and the NRC Staff and Quivira on the other, are quite narrow. All parties agree that the test for standing in an NRC proceeding is derived

from evolving judicial concepts of standing. See Quivira Answer in Opposition the Request for Hearing at 2; NRC Staff's Notice of Participation and Response to Request for Hearing at 6; Request for Hearing of Envirocare at 14 and Supplement at 4. The parties further agree that these contemporaneous concepts of standing include the constitutional minimum requirements as well as the "prudential," or judicially self-imposed, requirements frequently enunciated by the Supreme Court. E.g., Bennett v. Spear, 117 S. Ct. 1154 (1997); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

As discussed below, Envirocare's claims to standing under the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA") and the Atomic Energy Act, 42 U.S.C. § 2011 ("AEA"), fail to meet these constitutional and prudential requirements for standing. As a matter of constitutional requirements, Envirocare admits that it cannot show any particularized environmental "injury in fact" sufficient to demonstrate its stake in the outcome of this proceeding. Instead, Envirocare asserts economic injury. Yet, Envirocare has failed to show that a causal connection exists between its asserted economic injury in fact and the alleged failure of the NRC to prepare what Envirocare regards as an appropriate environmental evaluation. Similarly, Envirocare has not shown a causal connection between its asserted economic injury and any potential health and safety violation sufficient for standing under the AEA. As for prudential standing requirements, Envirocare has also failed to demonstrate that the asserted economic injury falls within the zone of interests protected by NEPA or the AEA, respectively. Accordingly, Envirocare's request for hearing should be denied.[1/]

[1/] Because the legal issue of standing can be decided on the briefs alone, Applicant believes that a prehearing conference at or near the site (or otherwise) would not be beneficial.

ARGUMENT

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

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

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

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

A. Envirocare concedes that it has failed to allege a "concrete and particularized" environmental injury.

Envirocare complains that the NRC is not preparing an Environmental Impact Statement ("EIS") for Quivira's proposed license amendment, is relying upon outdated environmental information, and is not requiring Quivira to submit an Environmental Report. Envirocare's Request for Hearing at 7-10. Yet, nowhere does Envirocare claim that it will suffer any environmental injury

as a result of these supposedly unevaluated environmental impacts. Rather, its alleged injury is purely economic in nature. Envirocare admits that, in cases involving "only allegations of environmental harm" a plaintiff who asserts standing "clearly must show that the environmental harm somehow affects him or her directly." Envirocare Supplement at 10. This is but a familiar restatement of the "injury-in-fact" requirement that the injury be "concrete and particularized" to the plaintiff, Bennett, 117 S. Ct. at 1163, to demonstrate "that the party seeking review be himself among the injured," Defenders of Wildlife, 504 U.S. at 563, and therefore has "a personal stake in the outcome of the controversy." Warth v. Seldin, 422 U.S. 490, 498-99 (1975), citing Baker v. Carr, 369 U.S. 186, 204 (1962). At least implicitly, Envirocare acknowledges that it cannot possibly meet this standard as regards environmental injury because its facility is some 500 miles away.[2/]

In Defenders of Wildlife, the Court distinguished the plaintiffs' generalized grievance against a challenged regulation interpreting the Endangered Species Act from a situation where plaintiffs are seeking to enforce "the a procedural requirement for an environmental impact statement before a federal facility is constructed *next door to them."* 504 U.S. at 572 (emphasis added). The Court pointed out that "one living adjacent to the site for proposed construction of the federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered . . . . " Id. at 572 n.7. The Court hastened to add, however, that such standing "is quite different . . . from standing for persons who have no concrete interests affected — persons who live (and propose to live) *at the other end of the country from the dam.*"

2/ The Commission has recognized the need for particularized injury in developing the general presumption for standing to participate in a reactor licensing case, which requires the intervenor to reside within about 50 miles of the facility. E.g., Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 n.4 (1977).

Id. (emphasis added). In simple terms, Envirocare lives "at the other end of the country" from the Ambrosia Lake site and, as such, cannot show the particularized injury required for standing, any more than every other business, organization or individual located 500 miles from the Ambrosia Lake facility.

Establishing that Envirocare lacks a "concrete and particularized" environmental injury, is not an academic exercise. The existence of such injury in fact is a necessary predicate for fulfilling the second constitutional requirements for standing — proof that a "causal connection" exists between the injury in fact and the agency's challenged conduct. Quivira shows below that a plaintiff asserting standing under NEPA must prove a direct connection between an environmental injury and the asserted failure of the agency to comply with NEPA. Because a plaintiff must allege an *environmental* injury connected causally with the agency's alleged failure to comply with NEPA, as the discussion below demonstrates, Envirocare must first prove that such an *environmental* injury in fact exists. This it has not done, for the reasons just discussed.

B. Envirocare has failed to show a causal connection between its alleged economic or competitive injuries and the NRC's environmental evaluation of the application for a license amendment.

Envirocare admits that its only basis for standing is economic in nature. First, it asserts that it will be at an "economic disadvantage" because the NRC is not preparing an EIS as with the initial licensing of a commercial disposal facility, and that Quivira will therefore be spared the cost of preparing an Environmental Report and reimbursing the NRC for its more extensive environmental review. Envirocare Supplement at 7. Second, Envirocare also asserts that it must comply with more stringent licensing standards, placing a greater financial burden on it and creating a competitive disadvantage with Quivira. Envirocare Request for Hearing at 12. Envirocare admits that economic injuries alone do not give rise to standing under NEPA, but contends that these economic injuries

suffice to create standing because Envirocare also asserts that environmental injuries will arise from licensing the Ambrosia Lake facility and, having alleged environmental harm, it is irrelevant that Envirocare will also suffer economic injury.

This clever but facile reasoning is unavailing. The Supreme Court has made clear numerous times that "there must be a causal connection between the injury and conduct complained of" so that the injury of which the plaintiff complains "must be fairly traceable to the challenged action of the defendant."[3/] Bennett v. Spear, 117 S. Ct. at 1163, citing Defenders of Wildlife, 504 U.S. at 560-61. The flaw in Envirocare's reasoning is that it confuses the licensing of the Ambrosia Lake facility — the act it asserts that ultimately will cause its economic injury — with the agency conduct of which it complains — the licensing of the Ambrosia Lake facility without preparation of an EIS. Thus, Envirocare does not really claim that the NRC's failure to perform a preferred form of environmental analysis will cause it economic injury; it claims instead that Quivira's competition will do that.

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

3/ Envirocare notably omits the second factor of a "causal connection" from its recitation of Bennett. See Envirocare Supplement at 5.

Here, Envirocare's allegations that the requested license amendment requires preparation of an EIS is likely wholly "unconnected" to its asserted economic or competitive injury.[4/]

Envirocare's theory of standing was rejected many years ago in Clinton Community Hosp. Corp. v. Southern Maryland Medical Center, 374 F. Supp. 450 (D. Md. 1974), aff'd, 510 F.2d 1037 (4th Cir.), cert. denied, 422 U.S. 1048 (1975). The plaintiff hospital was located about two miles away from the defendant's proposed hospital site nears Andrews Air Force Base. Plaintiff argued that siting a hospital near the airbase violated NEPA. The Court held that the plaintiff hospital lacked standing because it "cannot show any harm accruing to it from potential damage to the environment," 374 F. Supp. at 456, notwithstanding plaintiff's allegations of competitive injury. Id. at 455. The same situation exists at the Ambrosia Lake facility. Envirocare alleges competitive injury, but not "accruing to it from" any potential environmental injuries, and therefore lacks standing under NEPA.

The Commission has recognized that standing to assert economic injury under NEPA depends upon a causal connection with alleged environmental harm. Thus, "NEPA does protect some economic interests," but only when injuries to those interests "*result from* environmental damage." Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992) (emphasis added). For example, potential destruction of a woodland area would give rise to standing under NEPA by persons deprived of their livelihood in a local timber industry.[5/] Id. In Rancho Seco, 35 NRC at 56-57, the Commission has cited with approval Jersey Central Power

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

[5/] In fact, the Commission's hypothetical occurred in Mountain States Legal Foundation v. Glickman, 92 F.3d 1228 (D.C. Cir. 1996).

& Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (standing of marina operators to complain of shipworms introduced in vicinity of their business by operation of nuclear power plant) and Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-223, 8 AEC 241 (1974) (commercial fishermen's standing to challenge cooling water discharge affecting their catch). See 35 NRC at 56-57.

On the other hand, no standing exists where economic loss was not "occasioned by the impact that the [agency action] would or might have upon the environment." Rancho Seco, 35 NRC at 57, quoting Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 & 2), ALAB- 413, 5 NRC 1418, 1421 (1977), quoting Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 & 2) ALAB-292, 2 NRC 631, 640 (1975).

The cases cited by Envirocare are not to the contrary. In Port of Astoria v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979), for example, economic and environmental injury to the plaintiff broadcast company occurred in tandem from the construction of transmission lines. As such, the economic injury was the "immediate and direct result" of the environmental impact. Contrary to Envirocare's argument that causation is irrelevant, the Court cautioned that mere indirect causation is insufficient for standing: economic losses "not coupled with environmental considerations" do not suffice.[6/] 595 F.2d at 475. Likewise, in Lake Erie Alliance v. Army Corp of Engineers, 486 F. Supp. 707 (W.D. Pa. 1980), steelworkers residing in the area had standing to contest both environmental and economic impacts of constructing a nearby steel manufacturing facility. And in County of Josephine v. Watt,

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6/ The Ninth Circuit later clarified that Port of Astoria held that "the primary impact of the plant was environmental, and that [the broadcasting company] had standing because its purely economic injuries were '*causally related* to an act that lies within NEPA's embrace.'" Western Radio Servs. Co. v. Espy, 79 F.3d 896, 903 (9th Cir.), cert. denied, 117 S. Ct. 80 (1996) (emphasis added).

539 F. Supp. 696 (N.D. Cal. 1982), the challenged designation of an area under the Wild and Scenic Rivers Act allegedly would have created a diminution of lumber supply with resultant environmental and economic impacts upon affected plaintiffs.

In each of these cases, the plaintiff's allegation of concomitant economic harm did not relieve it of the obligation to prove a causal connection between the environmental impact and the putative economic injury. Here, it is absolutely clear the Envirocare's putative economic injury arises from the ultimate action of NRC licensing, not the environmental impacts that might be avoided (according to Envirocare) if the NRC were to prepare an EIS.[7/]

C. The economic injury asserted by Envirocare is unlikely to be redressed by a favorable decision that the NRC must prepare an EIS for the proposed license amendment.

Nor can Envirocare meet the third constitutional requirement for standing because it cannot show that an order requiring the NRC's Staff to prepare an EIS for the proposed license amendment will, in any event, affect potential competition between Envirocare and Quivira over customers to dispose of uranium mill tailings. Accordingly, the economic injury it asserts is not "fairly traceable" to the challenged action of the NRC in not preparing an EIS for Quivira's proposed license amendment, or relying upon supposedly outdated environmental information, or not requiring Quivira

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7/ Accordingly, Envirocare misses the point when it alleges that its "direct economic injury" and "potential environmental harms" are the "reasonably foreseeable consequences of the NRC's approval of QMC's License Amendment" sufficient to confer standing. Envirocare Supplement at 11-12. Even taking its allegations at face value, any environmental harm would most assuredly *not* result from licensing the facility, but rather, according to Envirocare, from the NRC's failure to prepare an EIS and otherwise comply with its environmental regulations. Because Envirocare confuses preparation of an EIS with licensing the site, it misapplies the requirement of a "causal connection" between the injury alleged (economic or competitive harm) and the challenged conduct (failure to prepare an EIS).

to submit an Environmental Report, or preparing an allegedly insufficient Environmental Assessment. Envirocare's Request for Hearing at 7-10.[8/]

Envirocare assumes that if Quivira is forced to pay certain NRC fees for environmental evaluation, prices and competition between the two will be aligned. This is purely speculative. First, no one knows what prices Quivira may charge its customers, or to what extent the cost of environmental analyses will be absorbed by Quivira or reflected in charges. Second, any number of factors other than price may affect customer choice. Thus, even assuming the NRC prepares an EIS for the proposed amendment, it is "merely speculative," Bennett, 117 S. Ct. at 1163, to predict that Envirocare's competitive losses will be redressed.

D. Envirocare has failed to establish that its economic interests lie within the "zone of interests" protected or regulated by NEPA and 10 C.F.R. Part 51.

In addition to these constitutional standing requirements, Envirocare has not met the prudential requirement that its grievance arguably fall within the "zone of interests" protected under NEPA or regulated by the NRC by its environmental regulations. Bennett v. Spear, 117 S. Ct. at 1161. Both the NRC Staff and Applicant have demonstrated in their opening briefs that this requirement has not been met because NEPA does not purport to protect or regulate purely economic interests.

Envirocare recognizes the hurdle of federal and NRC precedents that economic interests do not lie within the zone of those interests protected by NEPA, so it once again argues that environmental and economic interests arise concurrently. But as demonstrated above, Envirocare does not and cannot assert any particularized environmental interest in the licensing of the Lake

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[8/] The NRC is not required to prepare an EIS or an Environmental Assessment under 10 C.F.R. Part 51 for this action and, in fact, has previously issued similar license amendments to other uranium mill licensees under the "Categorical Exclusion" provision of 10 C.F.R. Part 51.

Ambrosia facility because it is 500 miles distant from the site. Therefore, it is not in the position of the hypothetical person "living adjacent to the site" who "has standing to challenge the licensing agency's failure to prepare an environmental impact statement" because of alleged environmental harm, Defenders of Wildlife, 504 U.S. at 572 n.7, even though economic harm arises concurrently. As discussed, such was the situation in each of the cases upon which Envirocare relies.

The fallacy in Envirocare's analysis was exposed years ago in Washington Public Power Supply System (WPPSS Nuclear Project Nos. 3 & 5), LBP-75-2, 1 NRC 21 (1975), where the Licensing Board rejected a geothermal energy industrialist's claim that the plant would operate in competition with his planned geothermal project. The Board agreed that various kinds of economic and competitive interests may give rise to standing, but pointed out that, in such instances, "there is an alleged failure to comply with NEPA, an alleged specific effect of the proposed action on some specific aspect of the environment, which specific environmental effect *directly causes* economic injury." 1 NRC at 35 (emphasis added). In contrast, "[s]uch specificity is wholly lacking" with regard to the claims of the industrialist who, like Envirocare, had "no standing by virtue of any use and enjoyment of the environs of the proposed plant to complain of any failure to follow the mandates of NEPA."[9/] Id. In sum, standing is disallowed to any intervenor who alleges "no environmental effect of the proposed action which, if taken, will cause him direct or indirect economic injury." Id. at 36.

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

II. Envirocare has failed to demonstrate standing under the Atomic Energy Act.

As both the NRC Staff and the Applicant have demonstrated in their opening briefs, the AEA protects the health and safety of the general public and nuclear employees from radiological hazards. Envirocare has failed to plead any "injury in fact" relating to radiological health and safety, much less show that its interest is "concrete and particularized" as well as causally connected to an alleged failure by the NRC to comply with its health and safety regulations. Bennett, 117 S. Ct. at 1163. Because Envirocare cannot satisfy the irreducible constitutional minimum of showing an "injury in fact" arising under the AEA, it cannot claim standing under the AEA, whether or not it meets prudential requirements of standing.

Nonetheless, Envirocare has not met the prudential requirement that its economic interests lie within the zone of interests protected by the AEA. Standing to assert economic interests under the AEA was rejected in Drake v. Detroit Edison Co., 453 F. Supp. 1123 (W.D. Mich. 1978), where plaintiffs claimed that, as members of electric power purchasing cooperatives, their utility rates would increase owing to payment by the cooperatives on loans covering their purchase of an ownership interest in Fermi Unit 2. Observing that the AEA was enacted for protection of the public health and safety, the Court added:

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

453 F. Supp. at 1130 (emphasis in original).

The Appeal Board made the same distinction in Virginia Electric & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98 (1976). Petitioner Sun Ship fabricated steam generator coolant pump supports for the North Anna plant and alleged, following suit by the applicant against Sun Ship for breach of contract, that the supports were defective. Despite the obvious safety issue raised, the Appeal Board had no difficulty deciding that Sun Ship's economic self-interest in raising the issue was not within the "zone of interests" protected by the AEA. It held:

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

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

Envirocare tries to avoid this reasoning by asserting that licensing is a prerequisite to Quivira's acceptance of uranium mill tailings for burial. From this, Envirocare falsely concludes that the AEA "regulates" market entry and competition for this commerce. Envirocare is simply wrong. The NRC does not regulate entry into the market for disposal of uranium tails or the disposal marketplace itself. It merely regulates licensed activities, whether marketed or not. Although an NRC license is

necessary to possess, store and dispose of licensed material, licensing focuses solely upon protection against radiological hazards, not the licensee's competitive position.

The cases upon which Envirocare relies are easily distinguished. For example, the Supreme Court allowed standing in Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987), to a trade association representing securities brokers, underwriters and investment bankers, which opposed a ruling by the Comptroller of the Currency under the National Bank Act, allowing two national banks to open offices offering discount brokerage services. Because the Act reflects a congressional concern "to keep national banks from gaining a monopoly control over credit and money through unlimited branching," the trade association, whose members "compete with banks in providing discount brokerage services," had standing. 479 U.S. at 403. The Court reasoned that competitors who allege "an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the Comptroller's rulings." Id.

The difference between the National Bank Act and the AEA, quite obviously, is that the National Bank Act arguably legislates against the very competition the trade association challenged "by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses." Id. The other cases cited by Envirocare also involve statutes that regulate competition, and for this reason are also readily distinguishable.[10/]

[10/] For example, in First Nat'l Bank & Trust Co. v. National Credit Admin., 988 F.2d 1272, 1277 (D.C. Cir.), cert. denied, 510 U.S. 907 (1993), the banks were permitted to challenge a decision under the Federal Credit Union Act allowing a member credit union to extend its membership (and potential borrowing customers) in violation of the "common bond of occupation or association" rule to the competitive disadvantage of the banks.

Likewise, in Schering Corp. v. FDA, 51 F.3d 390, 396 (3d Cir.), cert. denied, 116 S. Ct. 274 (continued...)

In fact, the cases cited by Envirocare work against it because they show how the Supreme Court has excluded from standing, under the "zone of interests" inquiry, "those plaintiffs whose suits are more likely to frustrate than to further statutory objectives." Clarke, 479 U.S. at 397 n.12. Congressional policy favors *maximizing* the sites available for the safe, efficient disposal of uranium mill tailings. In the Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 7901 et seq., Congress mandated "that every reasonable effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner" of uranium mill tailings located at active and inactive mill operations. As Envirocare acknowledged to Congress: "There is great need for more facilities like ours. The Nation's radioactive waste problem is huge. Comparatively, Envirocare's capacity is very small." Legislation to Increase State Governments' Control Over Disposal of Certain Low-Level Nuclear Materials: Hearing Before the Subcomm. on Energy and the Environment of the House Comm. on Interior and Insular Affairs, 102d Cong., 2d Sess. 93 (1992). Rather than abetting the statutory purpose of maximizing disposal site availability, Envirocare would frustrate it.

Thus, contrary to Envirocare's extensive protest (Supplement at 25-26), this case is very much parallel to Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918 (D.C. Cir. 1989), in which the HWTC argued, like Envirocare, that it was a "suitable challenger" to the agency's action.

[10/](...continued)

(1995), standing issues arose in the context of the Drug Price Competition and Patent Term Restoration Act, whose very purpose is to encourage generic drug manufacturers to compete against the patented drug pioneer. Accordingly, whether the generic drug is bioequivalent with the pioneer drug (precisely the issue for which the plaintiff there asserted standing) directly impinges upon the competitive interests at stake under the statute.

Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1109 (D.C. Cir. 1987), is also inapposite. The very purpose of FERC's authority under the Natural Gas Act is to regulate prices and market entry through a finding of "the public interest."

As Envirocare admits, the Court reasoned that the HWTC's interest in increasing demand for member services "would cause them to demand more treatment *even if additional treatment would not protect human health and the environment.*" HWTC, 885 F.2d at 925 (emphasis added), cited in Envirocare's Supplement at 26. That is precisely the same situation here: Envirocare will insist upon more stringent licensing criteria for the Lake Ambrosia facility even if unnecessary to protect public health and safety, at the expense of the public interest in expanding the universe of potential uranium mill tailings disposal sites.

As in HWTC, Envirocare's perspective on safety would be biased by its economic interests, which are not necessarily consistent with the public health and safety. The Court's admonition in HWTC applies equally here:

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

HWTC, 885 F.2d at 924-25 (emphasis added).

Making the Ambrosia Lake facility more expensive for users by increasing the cost of its licensing and operation is *exactly* what Envirocare admits it is trying to do — in its own words, trying to equalize the "economic disadvantage" it would face if the site were licensed. Envirocare's Supplement at 7. For Envirocare to predicate standing under the AEA on competitive injury is particularly egregious because, as the Presiding Officer is undoubtedly aware, Envirocare presently

exercises a monopoly or near-monopoly over the commercial Section 11e.(2) disposal market. It is decidedly the policy of Congress under the AEA to "strengthen free competition in private enterprise." 42 U.S.C. § 2011; Nuclear Transport & Storage, Inc. v. Department of Energy, 703 F. Supp. 660, 669 (E.D. Tenn. 1988). To allow Envirocare's standing in this licensing proceeding on the grounds that its asserted interests are congruent to those protected by the AEA would be an ironic and unjustified conclusion.[11/]

CONCLUSION

For the reasons discussed above and in the other briefs filed by the NRC Staff and the Applicant, Envirocare's request for hearing should be denied.

Respectfully submitted,

WINSTON & STRAWN

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July 15, 1997

Counsel for the Applicant

11/ Almost as an afterthought, Envirocare tosses in at the end of its brief allegations of standing under the Equal Protection and Due Process Clauses. The single case upon which it relies does not even discuss standing. For the host of reasons discussed above, these additional claims do not give rise to standing. Further, the constitutional claims are infirm on their face inasmuch as "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).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Answer of Applicant Quivira Mining Company in Opposition to Supplement to Request for Hearing by Envirocare of Utah, Inc." were served upon the following by deposit in the United States mail, first class, this 15th day of July, 1997:

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