THE 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	ENVIRONCARE OF UTAH'S SUPPLEMENT TO ITS REQUEST FOR HEARING

I. INTRODUCTION

Envirocare of Utah, Inc. ("Envirocare") submits this supplemental information in response to the June 20, 1997 Memorandum and Order ("Order") from the Atomic Safety and Licensing Board Panel of the Nuclear Regulatory Commission ("the Board"). The Order provides Envirocare with the opportunity to supplement its request for a hearing to address the points raised by the Nuclear Regulatory Commission ("NRC") Staff on the threshold issue of whether Envirocare has standing to request a hearing on license amendment No. 37 for Quivira Mining Company's

("QMC") Materials License No. SUA-1473 ("the License Amendment").

Envirocare satisfies the Atomic Energy Act's ("AEA") standing requirements to request this hearing in three respects. See 42 U.S.C. § 2239(a). First, Envirocare has standing to raise challenges to the NRC's Finding of No Significant Impact ("FONSI") for the License Amendment under the National Environmental Policy Act ("NEPA"); 42 U.S.C. § 4321. Second, Envirocare has standing to raise issues related to the substantive terms of the License Amendment under the AEA. Third, Envirocare has standing to request a hearing on NRC's approval of the License Amendment under the equal protection and substantive due process clauses of the United States Constitution. U.S. Const., amend. V, XIV.

II. FACTUAL BACKGROUND.

On November 20, 1995, QMC sought the 37th amendment to its Source Materials License SUA-1473. QMC has operated a uranium mill at its Ambrosia Lake site for decades, and obtained the License as an upgrade to its existing license in 1986, pursuant to 10 C.F.R. part 40. The License authorized QMC to conduct activities that are consistent with uranium mill operations: (1) to receive and transfer uranium, (2) to possess byproduct material generated by mill operations, and (3) to accept limited

amounts of byproduct material from *in situ* leach uranium facilities. Since 1986, QMC has amended the License 36 times. The NRC did not conduct full environmental review under NEPA when the License was issued in 1986, nor when the License was amended 36 times.

QMC's request for the 37th amendment to its License ("the License Amendment") requested authorization to accept 10,000 cubic yards per generator per year of 11e.(2) byproduct material for disposal. In effect, QMC's license amendment application requested authority to establish a commercial disposal facility for 11e.(2) material. The NRC's approval of the License Amendment changed the nature of QMC's facility from a uranium mill to a commercial disposal facility. Despite this fundamental change in the nature of the facility, the NRC did not require full environmental review under NEPA when it approved the License Amendment. Therefore, no Environmental Impact Statement ("EIS") has been prepared to identify and disclose the environmental impacts associated with this change

As a byproducts material licensee, Envirocare is also subject to regulation and supervision by the NRC. Envirocare was the first facility in the United States to be licensed as a commercial 11e.(2) disposal facility for receipt of radioactive materials from other persons. In obtaining its license,

Envirocare was required to strictly comply with the requirements at 10 C.F.R. part 40, as well as bear the cost of full environmental review of its facility under NEPA. The full environmental review included the preparation of an Environmental Report and an EIS, as well as full public participation.

With the License Amendment, Envirocare and QMC are both licensed to receive and dispose of off-site byproduct materials generated by third parties. Under the AEA, both facilities must be required to conform to identical standards for protection of public health, safety and the environment. Similarly, both are subject to full environmental review under NEPA. By approving the License Amendment without the benefit of an EIS disclosing adverse environmental impacts, and without requiring QMC to strictly comply with NRC standards made applicable to Envirocare, the NRC has inconsistently and unfairly applied the AEA and NEPA to the two disposal facilities.

III. ARGUMENT IN SUPPORT OF ENVIROCARE'S STANDING

Envirocare has standing to obtain a hearing on the License Amendment, and on the NRC's issuance of a FONSI for the License Amendment. In determining standing, the Commission applies contemporaneous judicial concepts of standing. In the Matter of Envirocare of Utah, Inc., 35 NRC 167, 1992 NRC LEXIS 24, *10

(1992). Under those standards, a petitioner must make two demonstrations. First, it must show that it has suffered "injury in fact" that is fairly traceable to the actions of the defendant and that will likely be redressed by a favorable decision; and second, it must show that its interest "arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." Bennet v. Spear, ___U.S.___, 117 S. Ct. 1154, 1161 (1997).

A. Envirocare Has Standing Under NEPA.

1. Envirocare Has Suffered "Injury in Fact" Under NEPA.

To demonstrate injury in fact under NEPA, Envirocare must show: (1) an actual, concrete injury (as opposed to a speculative one) that is "fairly traceable" to the NRC's actions; and (2) that the injury will likely be redressed by a favorable decision from this body. See Bennet, 137 L.Ed.2d at 295. Here, the NRC's decision not to require full environmental review of the License Amendment directly causes injury to Envirocare's economic interests and the environmental interests Envirocare asserts, and those injuries will be redressed if this Board withdraws the FONSI for QMC's License Amendment and requires QMC to prepare an Environmental Report and an EIS.

The combination of environmental impact and economic injury constitute "injury in fact" for the purpose of standing. Port of Astoria v. Hodel, 595 F.2d 467, 476 (9th Cir. 1979). As long as Envirocare's economic injury is a direct and immediate result of NRC's approval of QMC's license amendment, and the approval of the license amendment "will have a primary impact on the natural environment," Envirocare's injury is sufficient to confer standing. Id., accord, Lake Erie Alliance v. United States Army Corps., 486 F.Supp. 707, 712 (W.D. Pa. 1980); County of Josephine v. Watt, 539 F.Supp. 696, 703-704 (N.D. Ca. 1982).

In Port of Astoria, a broadcasting company brought a claim under NEPA, alleging that the transmission lines to be built to service a proposed aluminum plant would interfere with the company's broadcasts. Id. Despite the fact that the primary injury alleged was economic, the court found that the broadcasting company had suffered an "injury in fact" because its economic injury would be the direct result of the building of the aluminum plant, and the building of the plant would impact the environment. Id.; accord, Western Radio Services Co. v. Espy, 79 F.3d 896, 902 (9th Cir. 1996); cert. denied, ___U.S.___, 117. S.Ct. 80 (1996).

Here, Envirocare has alleged facts that show that it will suffer a direct and immediate economic injury from the NRC's

approval of QMC's License Amendment without requiring full environmental review. Envirocare has also alleged facts that show that the NRC's approval will impact the environment. Therefore, Envirocare satisfies the "injury in fact" requirement.

First, Envirocare will suffer a direct economic injury because of the NRC's failure to require QMC to pay for the cost of an EIS and an Environmental Report confer a competitive advantage on QMC. As set forth in its Request for Hearing ("Request"), when Envirocare was licensed as an 11e.(2) disposal facility, it was required to prepare an Environmental Report, and to pay for the cost of preparing an EIS. Request at p.4, ¶ 4.1.1. Of the $1.6 million Envirocare paid to NRC for licensing and oversight activities related to Envirocare's facility, a large portion went to reimburse the NRC for the cost of preparing the EIS.

Envirocare's interests are directly injured when the NRC inconsistently applies the same environmental standards to QMC and Envirocare, and both engage in the same activity (the commercial disposal of 11e.(2) material). Requiring only Envirocare to prepare an Environmental Report and EIS for this activity, provides QMC with a significant competitive advantage and places Envirocare at an economic disadvantage. This kind of

competitive injury, when combined with an environmental impact, constitutes an "injury in fact" for purposes of standing. See Port of Astoria, 595 F.2d at 475.

Second, Envirocare has identified environmental harm caused by the NRC's failure to require full environmental review of QMC's License Amendment. See Request at p. 14, ¶ 5.4.5; pp. 18-19, ¶¶ 5.6.8-5.6.9. From a historical review of the Federal Register, it does not appear that the NRC ever required full environmental review of QMC's operations under its current license. Therefore, the public has never had an opportunity to be notified of those operations and any associated dangers to the public health and the environment. Additionally, the NRC's failure to require full environmental review means that the public has not had the opportunity to comment on the environmental impacts associated with QMC's facility.

A review of the publicly available information indicates that QMC's facility currently poses threats to public health and the environment. QMC's facility has documented groundwater contamination in three plumes, which have been the subject of ongoing corrective action for eight years. Additionally, a 1983 hydrogeologic assessment indicates that approximately one-third of the tailings solution in QMC's unlined ponds has seeped into the substrate and contributed to the groundwater contamination.

The importation of large volumes of additional radioactive waste for disposal in an unlined impoundment cannot make it easier to resolve those problems. A full environmental analysis should be performed so that the full extent of the public health and environmental dangers associated with QMC's facility can be identified, disclosed, and remedied if necessary.

Additionally, the NRC's failure to require an EIS ignores the fact that the License Amendment changes the very nature of QMC's operations. A commercial 11e.(2) disposal facility that accepts large volumes of waste from other generators is fundamentally different from a mill that disposes of its own wastes on site. A commercial disposal facility has different impacts to the environment. For example, the transportation of large volumes of radioactive waste to commercial 11e.(2) disposal facilities threatens public health and the environment on and around highways and railroad tracks. Similarly, the toxicity and instability of imported wastes are not known until they arrive at a disposal site. The NRC's failure to address the unique environmental impacts associated with QMC's operation of a commercial disposal facility constitutes environmental harm that is protected by NEPA. See Overseas Shipholding Group, Inc. v. Skinner, 767 F. Supp. 287, 293 (D.D.C. 1991).

The NRC staff mistakenly argues that Envirocare can only demonstrate injury in fact if it "makes a specific showing outlining how the particular [environmental] impacts . . . can reasonably be assumed to accrue to the petitioner." NRC Staff's Notice of Participation and Response to Request for Hearing Filed by Envirocare of Utah, Inc. ("NRC Response"), at 13 (June 19, 1997). The NRC Staff concedes that Envirocare's standing is to be determined according to "contemporaneous concepts of judicial standing." NRC Response at 6. The "contemporaneous concepts of judicial standing" under NEPA simply do not require such a showing of a direct link between economic injuries and environmental harm. See Port of Astoria, 595 F.2d at 467; Western Radio Services, 79 F.3d at 902.

Current NEPA cases that require a showing of "personal" or "particularized" environmental harm for standing are distinguishable. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Florida Audubon Society v. Bentsen, 94 F. 3d 658 (D.C. Cir. 1986). None of these cases involve the combination of economic and environmental harm. See id. Instead they involve only allegations of environmental harm, for which a plaintiff clearly must show that the environmental harm somehow affects him or her directly.

In contrast, in cases where a direct economic injury to the plaintiff is also alleged, it is sufficient to show that the act that causes the economic harm is also one that will harm the environment. See Port of Astoria, 595 F.2d at 476; County of Josephine, 539 F.Supp. at 703-704. This is the case here, for Envirocare has alleged that the NRC's approval of the License Amendment without full environmental review caused its economic injury, and environmental harm.

Further, forcing Envirocare to put forth "concrete" proof of environmental harm defeats NEPA's "overriding informational and investigative purposes." Overseas Shipholding, 767 F. Supp. At 293; City of Los Angeles v. NHTSA, 912 F.2d 478, 492 (D.C.Cir. 1990) ("The need to fully assess harm before a project is undertaken is a major justification for the broad test courts have laid down for NEPA standing") (emphasis in original) overuled on other grounds, Florida Audubon Society v. Bentsen, 94 F.3d 658 (D.C.Cir. 1996). The tests for NEPA standing only require that the harm alleged is a reasonably foreseeable consequence of the governmental action. Overseas Shipholding at 294.

Here, both Envirocare's direct economic injury and the potential environmental harms it alleges are reasonably foreseeable consequences of the NRC's approval of QMC's License

Amendment, and are sufficient to confer standing on Envirocare. See id. (finding that it was reasonably foreseeable, for the purpose of standing, that the promulgation of a rule regarding repayment of tanker subsidies could increase the risk of oil spills).

Therefore, Envirocare has satisfied the requirement of an injury in fact caused by the NRC is approved of QMC's License Amendment without requiring full environmental review. Envirocare's injury will also be redressed by the relief that can be granted in a hearing pursuant to 10 C.F.R. Part 2, Subpart L. For example, the NRC can modify, suspend, or revoke QMC's License Amendment pursuant to 10 C.F.R. § 2.206, or simply withdraw the FONSI and require full environmental review including an environmental report or EIS of QMC's License Amendment. Any of these forms of relief will redress the economic and environmental harms Envirocare has alleged. Therefore, Envirocare has satisfied the "injury in fact" requirement for standing.

2. Envirocare's Interests Are Within the Zone of Interests Protected by NEPA.

The second test Envirocare must satisfy to establish standing, is that the interests it asserts are "arguably within the zone of interests to be protected by [NEPA]." Association of Data Processing Serv. Org., Inc. v. Camp, 397 U.S. 150, 153

(1970). The purpose of the "zone of interests" test is to "exclude those plaintiffs whose suits are more likely to frustrate than further the statutory objectives." Nevada Land Action Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993). NEPA's objective is to "promote efforts which [sic] will prevent or eliminate damage to the environment . . . and stimulate the health and welfare of man." Douglas County v. Babbitt, 48 F.3d 1495, 1499 (9th Cir. 1995), cert. denied, ___U.S.___, 116 S.Ct. 698 (1996). Although purely economic interests are not protected by NEPA, those that are combined with environmental interests that further the objectives of NEPA are within NEPA's zone of interests. Port of Astoria, 595 F.2d at 467; see Nevada Land, 8 F.3d at 716.[1]

As set forth above, Envirocare has asserted injuries and interests that, although economic, are caused by the same NRC action that Envirocare alleges will impact the environment. The environmental interests Envirocare alleges also further the objectives of NEPA, because Envirocare seeks to prevent or mitigate damage to the environment that could likely result from QMC's License Amendment. This is sufficient to establish that Envirocare's interests are within those protected by NEPA. See

[1] The NEPA cases often combine their analysis of "injury in fact" and "zone of interest." Therefore, the analysis tends to be similar. See, e.g., Port of Astoria, 595 F.2d at 465-67;

Port of Astoria, 595 F.2d at 467 (finding that the primary impact of an aluminum plant was environmental, and that the plaintiff was within NEPA's zone of interests because its purely economic injuries were "causally related to an act [the building of the plant] that lies within NEPA's embrace"); Western Radio, 79 F.3d at 902-903. Similarly, here, Envirocare's purely economic injuries are related to an act (NRC's approval of QMC's License Amendment without full environmental review) that "lies within NEPA's embrace." Therefore, Envirocare's interests are within the zone of interests to be protected by NEPA.

Additionally, courts have rejected the argument that the NRC Staff implicitly makes in its Response: that Envirocare is not within NEPA's "zone of interests" simply because it has a competitive interest in the modification, suspension, or revocation of QMC's License Amendment. See, e.g., Overseas Shipholding, 767 F.Supp. At 294-95 ("[The plaintiff's] competitive interest in invalidating the 1987 Rule does not deny it the ability to sue under NEPA"); Realty Income Trust v. Eckerd, 564 F.2d 447 (D.C.Cir. 1977) ("a party is not *precluded* from asserting a cognizable injury to environmental values because his 'real' or 'obvious' interest may be viewed as monetary") (emphasis in original). Denying entities like

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Western Radio, 79 F.3d at 901-903.

Envirocare standing would "rob NEPA of its intended value" because

> It surely does not square with the broad Congressional purpose in NEPA of assuring that environmental values would be adequately and pervasively considered in federal decision-making for private parties who are not "pure of heart" to be excluded from vindicating the Act.

Overseas Shipholding, 767 F. Supp. at 295.

Here, Envirocare's claims have alleged potential environmental injuries that are worthy of the NRC's scrutiny. Envirocare alleged environmental injuries that flow from the transportation of large volumes of 11e.(2) material to QMC's facility, as well as injuries that flow from the disposal of additional large volumes of 11e.(2) material from unknown sources at a site with past environmental problems. These are the kind of injuries that full environmental review under NEPA is meant to identify and remedy. Simply because Envirocare also has an economic interest in whether QMC is required to perform full environmental review under NEPA for the License Amendment does not deprive Envirocare of standing. See id.

B. Envirocare Has Standing Under the Atomic Energy Act.

Envirocare has standing to obtain a hearing on the NRC's issuance of QMC's License Amendment under the Atomic Energy Act, ("AEA") since Envirocare has demonstrated injury in fact and

that its interest falls within the zone of interests protected by the AEA.[2]

1. Envirocare Has Demonstrated Injury in Fact Under the Atomic Energy's Act.

In this case, Envirocare's "injury in fact" is straightforward. The standards applicable to an application to receive and dispose of 11.e(2) byproduct material should be the standards that the NRC applied to Envirocare's application. See, e.g., Request for Hearing, ¶ 4.1.1. There is no rational reason why significantly different standards should be applied to other 11e.(2) material disposal facilities. In this case, it is not clear that the NRC has required QMC to meet these standards. Certainly, an observer comparing Envirocare's license against QMC's License Amendent could well conclude that QMC is being held to lower standards. To the extent that the NRC has not required QMC to meet the strict standards applied to Envirocare, NRC approval of QMC's License Amendment discriminates against Envirocare.

The License Amendment allows QMC to accept for disposal 11e.(2) material that it otherwise could not accept and enables QMC to compete with Envirocare, which operates a 11e.(2)

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[2] The statutory provision governing the NRC's regulation of 11.e(2) byproduct material is 42 U.S.C. § 2114, which was added to the Atomic Energy Act by the Uranium Mill Tailings Radiation Control Act of 1978.

material disposal facility in Clive, Utah. Request for Hearing, ¶¶ 2.1, 2.2. Under basic economic principles, such an increase in the supply of disposal services is likely to depress the prices that Envirocare can charge. Courts have recognized such a likely effect on prices as an injury in fact. Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Admin., 822 F.2d 1105, 1108 (D.C. Cir. 1987). Similarly, Envirocare stands to lose customers lured to QMC. Again, courts have recognized such imminent loss of business as an 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).[3]

Moreover, Envirocare's injury in fact is fairly traceable to the NRC's approval of QMC's license amendment -- in the absence of such approval, Envirocare would face no competition from QMC -- and will likely be addressed by a favorable decision. Thus, Envirocare has clearly demonstrated injury in fact arising from the NRC's decision to amend QMC's license without holding QMC to the same AEA standards that were applied to Envirocare.

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[3] Alternatively, one could characterize Envirocare's injury in fact in terms of the competitive disadvantage suffered by Envirocare as a result of QMC's lower costs if QMC is not required to meet the same standards as Envirocare. Request for Hearing, ¶ 5.4.2.

2. Envirocare's Interest Is Within the Zone of Interests Protected by the Atomic Energy Act.

The "zone of interests" test established by the Supreme Court requires that "the interest sought to be protected by the complainant [be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Clarke v. Securities Industry Ass'n, 479 U.S. 388, 396 (1987) (quoting Association of Data Processing Service Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

In this case, Envirocare has an economic interest, as a licensed 11e.(2) material disposal facility, in insuring that all licensees who propose to accept 11e.(2) material for disposal comply with applicable NRC standards. Request for Hearing, ¶¶ 5.3.1, 5.3.2. As noted above, the standards that apply to acceptance and disposal of 11e.(2) material should be the standards that the NRC applied to Envirocare.

QMC and NRC staff contend that economic interests of competitors do not fall within the zone of interests protected by the AEA. Answer of QMC, p. 5; NRC Staff's Response, p. 8. Rather, QMC reasons that "the protected interests under the Atomic Energy Act relate to radiological health and safety." Answer, pp. 5-6.

This analysis is correct as far as it goes, but is too simplistic. While QMC and NRC staff cite a number of NRC

decisions for the proposition that the AEA does not protect economic interests, none of these cases involved the economic interest of a competitor in insuring that licensees comply with applicable NRC standards.[4] Indeed, in a case the postdates all of the cases cited by QMC and NRC staff, the NRC Atomic Licensing and Safety Board recognized that

> economic competitive disadvantages as a foundation for standing, grounded on NRC's noncompliance with regulatory standards, has not to this Presiding Officer's knowledge been tested in NRC litigation.

In the Matter of UMETCO Minerals Corporation, 39 NRC 112, 1994 NRC LEXIS 34, *7 (1994).

As noted above, in determining standing issues, the NRC applies contemporaneous judicial concepts of standing. In the Matter of Envirocare of Utah, Inc., 35 NRC 167, 1992 NRC LEXIS 24 at *10. Significantly, the Supreme Court and other federal courts have interpreted the "zone of interests" test ways to strongly supportive of Envirocare's standing claim. Even assuming arguendo that economic interests are not among the interests Congress intended to protect under the AEA,

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[4] The NRC Staff states incorrectly that "The question of injury to a competitor's competitive interest was explicitly addressed by the Appeal Board" in In the Matter of Long Island Lighting Co., 2 NRC 631, 1975 NRC LEXIS 29 (1975). In fact, the Appeal Board in that case affirmed the denial of a petition to intervene on grounds of untimeliness; the members of the Board did not agree on an opinion with respect to the question of standing.

Envirocare's competitive economic interest in ensuring that 11e.(2) licensees comply with applicable NRC standards nonetheless falls within the "zone of interests" protected by the AEA.

In Clarke v. Securities Industry Ass'n, supra, the U.S. Supreme Court explained that:

> The essential inquiry is whether Congress "intended for [a particular] class [of plaintiffs] to be relied upon to challenge agency disregard of the law." [citations omitted.]
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> The "zone of interest' test is a guide for deciding whether, in view of Congress' evident intent to make agency action presumptively reviewable, a particular plaintiff should be heard to complain of a particular agency decision …. The test is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

479 U.S. at 399.400. There are two ways in which parties may fall within the protected zone: (1) if they are intended beneficiaries of the statute, or (2) if their interests, while not among those Congress intended to protect, coincide with the protected interests, making the parties "suitable challengers." Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 922-23 (D.C. Cir. 1989).

In Clarke, an association of brokers challenged the approval by the Comptroller of the Currency of applications by

two banks to establish discount brokerages, on the ground that the applications violated the National Bank Act's branching restrictions. The brokers were clearly not among the intended beneficiaries of the Act which was designed to protect state banks. Nevertheless, the Court held that the association had standing, reasoning that, by enacting the branching restrictions, Congress had legislated against the competition the association sought to prevent, and thus the association's competitive interest bore a plausible relationship to the policies underlying the Act. Clarke, 479 U.S. at 403.

Subsequent cases have derived the following principle from Clarke: where a statute establishes restrictions on entry into a market, a party's economic interest in confining competition within those limits enables him to sue to enforce the restrictions (even if his interest is not one that Congress intended to protect). First Nat'l Bank & Trust Co. v. Nat'l Credit Union Admin., 988 F.2d 1272, 1277 (1993), cert. denied, 510 U.S. 907 (1993). The rationale for this approach is that the very existence of the entry restriction reflects a Congressional judgment that the restriction secures the statutory purpose; thus, the competitor's interest in enforcing the restriction by definition bears some relation to the Congressional purpose. First Nat'l Bank, 988 F.2d at 1278.

In First Nat'l Bank, banks challenged the National Credit Union Administration's approval of the expansion of a credit union, on the ground that it violated the requirement of the Federal Credit Union Act ("FCUA") that credit unions be limited to groups having a "common bond." The court held that the banks were not intended beneficiaries of the FCUA; the purpose of the FCUA, which the "common bond" requirement was meant to further, was encouraging the proliferation of credit unions, not shielding banks from competition from credit unions. First Nat'l Bank, 988 F.2d at 1275-76. Nonetheless, the court held that banks' competitive interest in enforcing the entry restriction made them "suitable challengers" to enforce the FCUA; thus, they had standing. First Nat'l Bank, 988 F.2d at 1278-79. See also Community First Bank v. Nat'l Credit Union Admin., 41 F.3d 1050 (6th Cir. 1994) (following First Nat'l Bank on similar question).

By the same token, in Schering Corp. v. Food and Drug Admin., 51 F.3d 390 (3d Cir. 1995), cert. denied, ___U.S.___, 116 S. Ct. 274 (1995), an amendment to the Food, Drug and Cosmetic Act required that generic drugs be the bioequivalent of their pioneer drug equivalents in order to receive accelerated approval. A pioneer drug maker challenged the Food and Drug Administration's interpretation of the bioequivalence

requirement in the context of a competitor's application to manufacture a generic copy of the pioneer drug maker's drug. The court held that the bioequivalence requirement acted as a market entry restriction, imposed for the purpose of ensuring the safety and effectiveness of generic drugs. Still, the pioneer drug maker's competitive interest in enforcing the entry restriction made it a "suitable challenger" and gave it standing. Schering Corp., 51 F.3d at 396.

Similarly, in Panhandle Producers & Royalty Owners Ass'n v. Economic Regulatory Admin., supra, an association of natural gas sellers challenged an order of the Economic Regulatory Administration that authorized a competitor to import natural gas from Canada (which would compete with plaintiff's gas and depress the prices it could charge). The court held that the association had standing, observing:

> Competitors have a seemingly unbroken record of success in securing standing to challenge decisions involving agency licensing. This success may seem perplexing in light of many judicial assertions of a broad national policy in favor of competition in virtually every area of regulation. But a license system by its very nature restricts entry into a particular field or transaction. Firms already operating within the restricted area, or in competition with such firms, benefit from vigorous enforcement of the restriction. . . [O]ne need not be a cynic to understand competitors' success in seeking to enforce licensing barriers:

> their interests are generally congruent with a statutory purpose to restrict entry.

Panhandle Producers, 822 F.2d at 1109 (citations omitted) (emphasis added).

The instant case is governed by the preceding entry-restriction cases. The NRC's licensing requirements for those seeking to dispose of byproduct material, implemented pursuant to 42 U.S.C. § 2114, constitute a classic example of a regulatory scheme for limiting entrance into a market - in this case the byproduct material disposal market. Thus, even assuming that the AEA's purpose in imposing these restrictions was to protect public health and safety (and not to benefit existing operators in the market), Envirocare's competitive economic interest in insuring that all licensees who propose to accept byproduct material for disposal comply with applicable NRC standards furthers the statutory purpose. After all, the NRC's promulgation of standards for disposal of byproduct material represents a judgment that compliance with those standards will protect the public health and safety. Thus, by definition, Envirocare's interest in enforcing those standards furthers the statutory purpose. In sum, one cannot say that Envirocare's interest is "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit

the suit." Clarke, 479 U.S. at 399. To the contrary, Envirocare's economic interest is congruent with promoting the AEA's fundamental goals of protecting public health and safety. Envirocare is therefore a "suitable challenger" under the rule enunciated by the cases discussed above.

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

firms' interest in increasing demand for their services would serve RCRA's purpose of protecting human health and the environment: the treatment firms' interest would cause them to demand more treatment even if additional treatment would not protect human health and the environment. Hazardous Waste Treatment Council, 885 F.2d at 925. The necessary congruence between the challenger's interest and that of the protected class was lacking.

Hazardous Waste Treatment Council is fundamentally different than the instant case, since it did not involve enforcement of a statutorily-created entry restriction such as a licensing requirement, but rather involved a determination as to what rule would best carry out the statute. In the case of an entry restriction, the very existence of the restriction reflects Congress' judgment that compliance with the restriction will serve the purposes of the statute (for example, protecting health and safety). Thus, in seeking to enforce the restriction, a competitor by definition serves the statutory purpose. As the court in First Nat'l Bank observed in distinguishing Hazardous Waste Treatment Council, in entry-restriction cases "the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature." First Nat'l Bank, 988 F.2d at 1278.

In the instant case, Envirocare's economic competitive interest is clearly channeled by the AEA and the NRC regulations governing licensing of 11e.(2) byproduct material disposal facilities. There is a clear congruence or relationship between Envirocare's interest and the interest of the public, the intended beneficiaries of the health and safety provisions of the AEA. Allowing Envirocare to participate in these proceedings will further those statutory purposes by ensuring that the licensee, QMC in this case, complies with applicable NRC standards -- the same ones that were applied to Envirocare's facility. In sum, Envirocare's economic competitive interest clearly falls within the "zone of interests" protected by the AEA.

C. Envirocare Has Standing Under the Equal Protection and Substantive Due Process Clauses of the United States Constitution.

The interests Envirocare asserts, as a similarly situated license, are also congnizable under the Equal Protection and Substantive Due Process clauses of the fifth and fourteenth amendents to the United States Constitution. As set forth above, Envirocare has suffered "injury in fact" from the NRC's differing treatment of Envirocare and QMC. Additionally, Envirocare's interests in ensuring that the NRC consistently

applies AEA regulations and standards to similary situated licenses are within the zone of interests protected by those two clauses Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985).

IV. CONCLUSION

For the foregoing reasons, Envirocare respectfully requests that the NRC grant a hearing on QMC's proposed amendment pursuant to 10 C.F.R. part 2 subpart L, and take the other actions requested in Part III of this Petition.

DATED this 3rd day of July, 1997.

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THE 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	

CERTIFICATE OF SERVICE

I, Edith M. Alexander, hereby certify that on July 3, 1997, copies of the foregoing document, ENVIROCARE OF UTAH INC'S SUPPLEMENT TO ITS REQUEST FOR HEARING, have been served upon the following persons by U.S. mail, first class, postage prepaid, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

Administrative Judge Charles Bechhoefer
Presiding Officer
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DATED this 3rd day of July, 1997.

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