UNITED STATES
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Shirley Ann Jackson, Chairman
Nils J. Diaz
Edward McGaffigan, Jr.

In the Matter of	
QUIVIRA MINING COMPANY	Docket No. 40-8905-MLA
(Ambrosia Lake Facility Grants, New Mexico)	

MEMORANDUM AND ORDER

CLI-98-11

I. Introduction

In this decision we review the Atomic Safety and Licensing Board's Memorandum and Order, LBP-97-20, 46 NRC 257 (1997). The Board's order denied Envirocare of Utah, Inc.'s request for a hearing and leave to intervene to challenge a materials license amendment granted to the Quivira Mining Company (Quivira or QMC). The Board found that Envirocare lacked standing to challenge the license amendment and accordingly terminated this proceeding. Pursuant to 10 C.F.R. § 2.1205, Envirocare has appealed to the Commission, requesting us to reverse LBP-97-20. Quivira and the NRC staff support the Board's decision. We affirm the decision.

II. Background

This proceeding stems from the Quivira Mining Company's request for a materials

license amendment. The amendment, approved by the NRC staff on May 16, 1997, permits Quivira to accept and dispose of specified amounts of 11e.(2) byproduct material[1] at its Ambrosia Lake facility, located near Grants, New Mexico. Prior to the amendment, Quivira was already authorized to possess byproduct material generated by its own operations at the Ambrosia Lake uranium mill, and also to receive limited amounts of byproduct material from in situ leach uranium mining facilities. The license amendment at issue in this proceeding authorizes Quivira to receive 11e.(2) material from unspecified outside generators.

Envirocare, which itself operates a commercial disposal facility for 11e.(2) material, filed a request for a hearing on: (1) the Quivira license amendment and (2) the Finding of No Significant Impact (FONSI) issued by the NRC for that license amendment. Envirocare's core complaint is that the license amendment permits Quivira to become a general commercial disposal facility like Envirocare, but that the NRC did not require Quivira to meet the same regulatory standards the agency imposed upon Envirocare when Envirocare sought its license to become a commercial disposal facility for 11e.(2) material.

Envirocare, for example, states that to obtain its disposal facility license, it bore the expense of a full environmental review, which included an environmental impact statement (EIS), while in contrast the NRC did not require and has never required an EIS for the Quivira facility. In Envirocare's view, the NRC improperly relied upon outdated and incomplete information when it determined that there was no need for an EIS. Envirocare further claims that Quivira apparently did not or does not have to comply with various strict regulatory standards, found under 10 C.F.R. Part 40, Appendix A, which Envirocare states it must meet at

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[1] Such material is defined 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." AEA § 11.e(2), 42 U.S.C. § 2014(e)(2).

great financial cost. Instead, argues Envirocare, Quivira's "summary application" for its license amendment simply failed to show that Quivira has met or will meet these Appendix A requirements for groundwater protection, radon barriers, detection monitoring, inspections, siting and design, and other matters. Envirocare's Request for Hearing (May 28, 1997) at 16. Envirocare states that "it is not clear that the NRC has required QMC to meet these standards," and "[t]o 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." Envirocare's Supplement To Its Request for Hearing (July 3, 1997) at 16.

In short, Envirocare's petition for a hearing argued that it is "unfair and inconsistent for the NRC to apply different, less stringent standards for the commercial disposal of 11e.(2) wastes at a former mill site, than the NRC applies for the commercial disposal of 11e.(2) at a disposal facility." Envirocare's Request for Hearing (May 28, 1997) at 12-13. If Quivira does not have to meet the same regulatory standards, Envirocare argues, it will suffer a "severe competitive disadvantage," for Quivira's "lower costs will allow it to attract customers away from Envirocare." Id. at 12. Envirocare, therefore, claims an "economic interest in ensuring that all licensees that propose to accept 11e.(2) byproduct material from other persons for disposal comply with applicable NRC standards." Id. at 11. Envirocare submits that the NRC's approval of Quivira's license amendment violated the Atomic Energy Act (AEA), the National Environmental Policy Act (NEPA), and the Due Process Clause of the United States Constitution.

Quivira and the NRC staff opposed Envirocare's petition for hearing. Both argued that Envirocare, which operates its disposal facility some 500 miles away from Quivira's Ambrosia Lake facility, has no standing to request a hearing on Quivira's license amendment. Both stressed that the AEA focuses upon the protection of public health and safety -- protection from

radiological harm and not the alleged economic "competitive injury" alleged by Envirocare. Neither the AEA nor the NRC's regulations permit "market competitors to use the administrative process to oppose new applications," submits Quivira. Answer of Quivira Mining Co. in Opposition to the Request for Hearing of Envirocare of Utah, Inc., at 10 (June 12, 1997). Nor does Envirocare's alleged economic injury fall within the interests of NEPA , argues Quivira and the NRC staff, stressing that although NEPA encompasses economic interests, it also requires there to be some concrete environmental risk to the petitioner, not simply economic risk untied to any environmental injury. Because Envirocare is located nowhere near the Ambrosia Lake facility and thus faces no risk of radiological harm to health or property, Envirocare cannot simply rely upon its status as a market "competitor" to challenge this license amendment, concludes Quivira and the staff.

The Licensing Board in LBP-97-20 denied Envirocare's petition, finding no standing to intervene. Because there "clearly is a real possibility ... that competition from the Ambrosia Lake facility will cause economic harm to Envirocare," the Board found that Envirocare had demonstrated sufficient "injury in fact" for standing. 46 NRC at 265. The Board, however, went on to conclude that the alleged "competitor" injury did not fall within the "zone of interests" of either the AEA or of NEPA, the two statutes upon which Envirocare had based its standing.

III. Analysis

Under section 189a of the Atomic Energy Act, the Commission must grant a hearing upon the request of any person "whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a). In evaluating whether a petitioner's "interest" provides an appropriate basis for intervention, the Commission has long looked for guidance to current judicial concepts of standing. Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); see, e.g., Georgia Inst. of Technology (Georgia Tech Research

Reactor), CLI-95-12, 42 NRC 111, 115 (1995). [2] To demonstrate standing in Commission licensing proceedings under § 189a, a petitioner must allege a particularized injury that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision. Cleveland Elec. Illuminating Co. (Perry Nuclear Power Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993); see generally Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-62 (1992). Injury must be "actual or imminent." City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983). Consistent with an additional, so-called "prudential" requirement of standing, the Commission also has required the petitioner's interest to fall, arguably, within the "zone of interests" protected or regulated by the governing statute(s) -- here, the AEA and NEPA. See Gulf States Utils. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); see also Bennett v. Spear, 117 S. Ct. 1154, 1167 (1998); Reytblatt v. NRC, 105 F.3d 715, 721 (D.C. Cir. 1997). The actual "breadth" of the applicable zone of interests will vary according to the particular statutory provisions at issue. Bennett v. Spear, 117 S. Ct. at 1161. At bottom, the standing analysis seeks to determine "whether Congress intended for a particular class of plaintiffs to be relied upon to challenge an agency's disregard of the law." Clarke v. Securities Ind. Ass'n, 479 U.S. 388, 389 (1987).

Here, we hold that Envirocare meets the actual injury test but fails the zone of interests requirement. Because the question of "competitor standing" is essentially a matter of first impression for the Commission, we lay out our reasoning at some length.

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[2] Although the Commission customarily follows judicial concepts of standing, we are not bound to do so given that we are not an Article III court. Our principal concern is to assure that parties participating in our adjudicatory proceedings have interests that are cognizable under the AEA. See 42 U.S.C. § 2239.

A. Injury in Fact Traceable to Challenged Action

The Licensing Board found that Envirocare adequately had demonstrated injury-in-fact for standing. Noting the "realities of market competition," the Board concluded that there is more than a speculative possibility that Envirocare may suffer economic injury from competition with the Ambrosia Lake facility, and that such injury need not be great to satisfy standing requirements. 46 NRC at 264-65. In their appeal briefs, Quivira and the NRC staff continue to challenge Envirocare's showing of injury. Specifically, the staff maintains that Envirocare's alleged "competitor" injuries are too speculative. Staff Appeal Brief (Dec. 23, 1997) at 5 n.5. Both Quivira and the staff also assert that Envirocare's alleged injury lacks any causal connection to the agency action complained of, and therefore would not be redressable by a favorable decision. Id. at 11-12. As the staff's argument goes, any alleged economic harm to Envirocare would not be caused by Quivira's licensing but by Envirocare's licensing. Id. at 12.

We reject these claims and agree with the Licensing Board that Envirocare has shown sufficient injury in fact for standing. Envirocare and Quivira are competitors providing a similar service. Envirocare's argument is not simply that it faces added competition from the Ambrosia Lake facility, but that through an alleged inappropriately lax licensing of the Quivira facility, Quiivira will have an unfair competitive edge over Envirocare, which faced more stringent -- and more expensive -- licensing.

There is no question that "increased competition represents a cognizable Article III injury." MD Pharmaceutical Inc. v. Drug Enforcement Administration, 133 F.3d 8, 11 (D.C. Cir. 1998) (citing Liquid Carbonic Inds. Corp v. FERC, 29 F.3d 697 (D.C. Cir. 1994)). Here, as the Licensing Board found, the alleged competitive injury "would not occur absent the licensing" at issue. Envirocare does not claim that its licensing violated statutory requirements, but that the licensing of the Ambrosia Lake facility did. 46 NRC at 265. And if, as Envirocare argues,

Quivira obtained improper licensing advantages in violation of the AEA, it is certainly conceivable that these allegedly insufficient license requirements could be remedied through the imposition of additional license conditions or through invalidating the Quivira license pending further safey or environmental reviews. Such actions by the NRC could remedy the "unfair" competition of which Envirocare complains.

We disagree with the staff's claim that the alleged competitor injury is too speculative. For standing purposes, it suffices that an alleged improper licensing of the Ambrosia Lake facility has the "clear and immediate" potential to compete with Envirocare's own services. See Associated Gas Distribs. v. FERC, 899 F.2d 1250, 1259 (D.C. Cir. 1990); see also Fisons Corp. v. Shalala, 860 F. Supp. 859, 862 (D.D.C. 1994) (alleged injury not too speculative because of the potential for "an improper FDA approval of a generic drug to hurt" competitor). Petitioners need not wait until actual increased competition occurs. Louisiana Energy and Power Auth. v. FERC, 141 F.3d 364, 367 (D.C. Cir. 1998); UPS Worldwide Forwarding, Inc. v. United States Postal Serv., 66 F.3d 621, 626 (3d Cir. 1995), cert. denied, 516 U.S. 1171 (1996).

B. Zone of Interests

Under our case law, to establish standing to intervene, a petitioner must not only demonstrate injury in fact, but also that the asserted injury is arguably within the zone of interests protected or regulated by the statute at issue. See, e.g., Gulf States Utils. Co. (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994); Reytblatt v. NRC, 105 F.3d at 721. The zone of interests test derives from Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152-53 (1970), and has been followed by the courts ever since. See, e.g., Liquid Carbonic Indus. v. FERC, 29 F.3d at 704. Envirocare argues that its economic injury as a

competitor falls within the zone of interests of both the National Environmental Policy Act and the Atomic Energy Act. The Licensing Board rejected both these claims and so do we.

1. NEPA

Envirocare first argues that its economic injury is encompassed by NEPA. Envirocare claims, in effect, that a purely economic injury suffices for standing, so long as the challenged agency action -- here the licensing of the Ambrosia Lake facility -- will have environmental effects somewhere, even if those effects will occur hundreds of miles away and could not possibly impact Envirocare. In sum, Envirocare argues it need not suffer any environmental injury to bring an action under NEPA, as long as the facility has a "primary effect on the natural environment," regardless of where that effect may be. See Envirocare's Substitute Appeal Brief (Dec. 2, 1997) at 3.

We find Envirocare's position inconsistent with a long line of judicial cases. NEPA's purpose is to protect the environment, "not the economic interests of those adversely affected by agency decisions." Nevada Land Action Ass'n v. United States Forest Serv., 8 F.3d 713, 716 (9th Cir. 1993)(citing Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir.), cert. denied, 479 U.S. 911 (1989)). A petitioner who suffers only economic injury has no standing to bring a challenge under NEPA. Id. Indeed, parties whose motivation is solely "economic self-interest and welfare are singularly inappropriate parties to be entrusted with the responsibility of asserting the public's environmental interest." Churchill Truck Lines, Inc. v. United States, 533 F.2d 411, 416 (8th Cir. 1976). An interest in "economic well-being vis-a-vis [] competitors is clearly not within the zone of interests" of NEPA, which was "not designed to prevent the loss of profits." Id. See also Mountain States Legal Found. v. Glickman, 92 F.3d 1228, 1236 (D.C. Cir. 1996) (NEPA's "rather sweeping list of interests ... do not include purely monetary interests,

such as the competitive effect that a ... project might have on plaintiff's commercial enterprise").

It has long been established that the risk that environmental harm "will be overlooked -- is itself sufficient `injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect [] to suffer whatever environmental consequences the project may have." Sabine River Auth. v. United States Dept. of Interior, 951 F.2d 669, 674 (5th Cir.)(citation omitted)(emphasis added), cert. denied, 506 U.S. 823 (1992). Parties affected solely by economic harm should not be able to use NEPA "as a device" to "thwart governmental activity under the guise of environmental interest" simply by "invoking the magic word `environment,' when their injury has factually nothing to do with the environment." Hiatt Grain & Feed, Inc. v. Bergland, 446 F. Supp. 457, 487-88 (D. Kan. 1978) (citations omitted), aff'd, 602 F.2d 929 (10th Cir. 1979), cert. denied, 444 U.S. 1073 (1980). See also David J. Hayes and James A Hourihan, "NEPA Requirements for Private Projects," 13 B.C. Envtl. Aff. L. Rev. 61, 75 (1985) ("Courts should vigorously apply standing principles to ensure that the judicial system is not clogged with economic dog-fights hidden behind `environmental' disguises").

The fact that economic interest or motivation is involved will not preclude standing, but the petitioner must also be threatened by environmental harm. See, e.g., City of Los Angeles v. United States Dep't of Agric., 950 F. Supp. 1005, 1011-12 (C.D. Cal. 1996). Otherwise, to permit a competitor "under the banner of environmental champion" to raise "legal challenges to a project approved by federal and state agencies would be so marginally related to and inconsistent with the purposes implicit in NEPA that it cannot be assumed that Congress intended to permit" the lawsuit. Id. at 1013 (citations omitted). See also Florida Audubon Soc'y v. Bentsen, 94 F.3d 658, 665-66 (D.C. Cir. 1996) (environmental harm must threaten petitioner's interest).

Envirocare's argument for NEPA standing relies heavily upon Port of Astoria v. Hodel, 595 F.2d 467 (9th Cir. 1979). Envirocare cites this case in support of its claim that economic injury is sufficient for standing under NEPA, as long as the project at issue also has environmental effects, no matter where these might occur. But like the Licensing Board, we do not read Port of Astoria to stand for so broad a proposition.

In Port of Astoria, a broadcasting company had standing to challenge a power plant whose power lines would interfere with the station's broadcasts. Although the injury was economic, it was nevertheless "the immediate and direct result" of the power plant, located in the broadcasting company's area. Id. at 476. In other words, the injury directly resulted from the project's environmental impacts. The same decision rejected standing for a party threatened only by monetary losses "not coupled with environmental considerations." Id. at 474-75. Indeed, the court's reasoning in Port of Astoria is similar to that of several of our own agency decisions which hold that economic injury may be protected under NEPA, but only when the economic harm is directly caused by environmental effects.

As the Commission summarized in Sacramento Municipal Util. Dist. (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56 (1992):

> It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage. For example, if the licensing action in question destroyed a woodland area, those persons who would be deprived of their livelihood in a local timber industry could assert a protected interest under NEPA. See, e.g., Jersey Central Power and Light Co. (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business, resulting from the operation of a nuclear power plant); Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water that may affect his catch).

Here, unlike Port of Astoria and the cases cited in Rancho Seco, no direct environmental effects

would lead Envirocare to lose any profits. Envirocare's competitor injury is therefore not protected under NEPA.

2. AEA

We turn now to a more difficult question, and one of first impression: whether Envirocare's alleged "competitor" injuries fall within the zone of interests of the Atomic Energy Act. As the Licensing Board and the staff have noted, this agency historically has rejected bare economic injury -- unlinked to any radiological harm -- as a basis for standing. See, e.g., Virginia Elec. & Power Co. (North Anna Power Station, Units 1 and 2), ALAB-342, 4 NRC 98, 105-06 (1976). Envirocare did raise a "competitor" injury claim a few years ago when it sought to intervene in a different proceeding. See Umetco Minerals Corp., LBP-94-7, 39 NRC 112 (1994). But by rejecting Envirocare's petition as untimely, the Licensing Board in that earlier proceeding did not need to resolve the question of Envirocare's standing. We now hold that a petitioner's mere claim of "competitor" injury, unlinked to a claim of radiological injury, is not among those interests arguably protected or regulated under the Atomic Energy Act.

We begin our analysis by looking at what the Supreme Court has stated about "zone of interests." The Court has said that the zone of interests test is "not meant to be especially demanding." Clarke, 479 U.S. at 399-400. There need not be, for instance, any showing of a specific Congressional intent to protect or otherwise benefit the particular petitioner or his class. Id. Nevertheless, the Court consistently has looked for "some indication" that the petitioner's interest is arguably among those interests protected by the relevant statute. National Credit Union Admin. v. First Nat'l Bank & Trust Co., 118 S. Ct. 927, 936 n.7 (1998).

Merely because one may be injured by a particular agency action, then, "does not necessarily mean one is within the zone of interests to be protected by a given statute." Air

Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 524 (1991) (emphasis added). The zone of interests test would prove "meaningless" if it encompassed any party affected by an agency's decision. Liquid Carbonic Indus. v. FERC, 29 F.3d at 704. Indeed, the test is "meant to narrow the field of potential challengers." Id.

In short, the petitioner "must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the `zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." Air Courier, 498 U.S. at 523-24 (rejecting standing for postal workers because employment issues were not among the interests postal statutes sought to advance). The two-pronged test set forth in the latest Supreme Court decision on competitor standing thus asks: (1) what are the interests "arguably ... to be protected" by the relevant statutory provisions; and (2) are the petitioner's interests that are affected by the challenged agency action among them? National Credit Union, 118 S. Ct. at 935. Here, we find no indication in the AEA of an intent to protect the competitor interest Envirocare asserts -- a purely economic interest entirely unrelated to any radiological harm to Envirocare. Envirocare therefore lacks standing. A review of "zone of interests" decisions, particularly at the Supreme Court level, supports our view.

In support of standing, Envirocare cites the various Supreme Court cases which have found standing for "competitors" adversely affected by administrative rulings. But while it is true that these cases involved statutes not specifically designed to protect the competitor plaintiffs bringing suit, it was simply not sufficient for standing that these competitors might suffer competitive injury. In every Supreme Court decision to date involving "zone of interests" and competitor standing, the Court has found some form of statutory interest in or provision for restricting competition -- typically a restriction on market activities or a limitation on the available customer base. Because these cases in some form or other have all involved a statutory intent

to limit competition, the interests of competitors seeking to challenge allegedly illegal competition properly fell within these statutes' zone of interests.

For example, in the most recent of these cases, the Court found that banks fall within the zone of interests of the Federal Credit Union Act, a statute enacted without any intent to protect banks, but instead to promote the financial soundness of credit unions and to help make credit more readily available to those who otherwise might not be able to obtain loans. National Credit Union, 118 S. Ct. at 935-36 n.6. To promote these dual goals, the statute contains a provision restricting credit union membership to those who share a "common bond." As competitors of the credit unions, the banks had an interest in upholding this restriction on the credit unions' customer base. Id. at 936.

Because the National Credit Union Administration had interpreted the "common bond" restriction in an expansive fashion that would permit credit unions to greatly enlarge their membership, banks, who might suffer competitively by losing current or future members to credit unions, had standing to challenge the agency's interpretation. The banks had more than "merely ... an interest in enforcing the statute in question." Id. at 937 n.7. Their particular interest as competitors was directly related to the statute's "interest in limiting the markets that federal credit unions can serve." Id. at 935-36 n.6; see also id. at 936 n.7. As the Court wrote, this statutory interest "is precisely the interest of respondents.... As competitors of federal credit unions, respondents certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA interpretation has affected that interest by allowing federal credit unions to increase their customer base." Id. at 936 (emphasis added). There was, then, an "unmistakable link" between the competitor interest of the banks and an express statutory provision that effectively limited the credit unions' market. Id. at 936 n.7.

In similar fashion, all other Supreme Court "competitor" zone of interests cases have

been rooted in some applicable statutory provision whose clear intent or effect is to restrict competition, thereby drawing "competitors" within the statutes' zone of interests. See, e.g., Clarke, 479 U.S. 388 (1987); Investment Co. Inst. v. Camp, 401 U.S. 617 (1971); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). Following this reasoning, the Court has permitted securities dealers, data processors, and investment companies to challenge rulings made by the Comptroller of Currency under various banking-related statutes. But again, by these statutes, "Congress had arguably legislated against the competition that the petitioners sought to challenge, and from which flowed their injury." Investment Company Inst., 401 U.S. at 620 (empasis added); see also Clarke, 479 U.S. at 403. Congress thus had "provided the sufficient statutory aid to standing even though the competition may not be the precise kind Congress legislated against." Association of Data Processing, 397 U.S. at 155; see also Clarke, 479 U.S. at 403. Standing in these cases was predicated, therefore, upon the fact that "Congress, for its own reasons, primarily its concern for the soundness of the banking system, had forbidden banks to compete with plaintiffs" by "limit[ing] the activities [available to} national banks." Clarke, 479 U.S. at 398 (emphasis added).

Cognizant of the potential for litigants to frivolously delay or otherwise frustrate administrative action, the Supreme Court indeed has stressed that "where the plaintiff is not itself the subject of the contested regulatory action, the [zone of interests] test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit." Clarke, 479 U.S. at 399.

Applying these various Supreme Court principles, the District of Columbia Circuit rejected standing for an association representing competitor waste disposal firms seeking to challenge an EPA rule. Under existing regulations, these firms incurred high disposal costs for

ash generated from their incineration facilities. They objected to an EPA interpretation which would, among other effects, permit some other kinds of utilities and smelters to generate ash "without incurring comparable costs," and thus to potentially "undersell them." Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 281 (D.C. Cir. 1988), cert. denied, 490 U.S. 1106 (1989). Although the association vigorously asserted that their members' interests -- albeit financial -- would promote the environmental aims of the relevant statute, the Resource Conservation and Recovery Act (RCRA), the court refused to find the firms' financial interests any more than "marginally related" to RCRA's environmental goals. Hazardous Waste, 861 F.2d at 283. That the firms "may suffer competitive loss because EPA ha[d] not forced on their competitors as demanding (and expensive) techniques as they themselves employ" did not by itself prove a sufficient ground for standing. Id. at 280.

Moreover, the Court went on to emphasize the following:

> Petitioner wants to increase the regulatory burden on others. Its interest lies in the competitive advantage that its membership might secure if the government imposed higher costs on other firms. As noted above, that interest carries a considerable potential for judicial intervention that would distort the regulatory process.... [W]e see no special reason to suppose that Congress might have thought them suitable advocates of the environmental interests underlying the statute.

Id. at 285.

"A firm has no common law interest, much less a constitutional one, in having ... government force competitors' services to be of the same quality (and cost!) as its own." Id. Thus, the firms' status as competitors of facilities "allegedly advantaged by [the EPA's] failure to adequately perform a statutory duty" did not bring their purely economic concerns within the zone of interests of RCRA. National Fed'n of Federal Employees v. Cheney, 883 F.2d 1038, 1047 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990). The "interest in stricter regulation of

their competitors" simply "fell outside the zone of interests Congress intended to protect in enacting RCRA." Petro-Chem Processing, Inc. v. EPA, 866 F.2d 433, 435 (D.C. Cir.), cert. denied, 490 U.S. 1106 (1989). RCRA's intent was to promote the safe disposal and recycling of hazardous wastes -- health and safety interests that provided no reason to view competitor firms as "suitable challengers" of EPA violations. See id. at 435-36. See also Calumet Indus. v. Brock, 807 F.d 225, 229 n.3 (D.C. Cir. 1986)(competitor would not have standing to "contest [agency's] failure to similarly burden others").

As Envirocare points out, there have been a number of court of appeals and district court decisions basing standing upon competitive injury. The bulk of these cases, however, can be analogized to the Supreme Court cases, for they similarly involve statutory provisions whose intent or effect is to bar or limit competition in some fashion. By setting forth restrictions on specific market activities or customer base, these statutes effectively cordoned off a segment of the relevant market from competition. "When the core purpose of a statute is to barricade an area from competitive entry, the interests of firms that operate in the reserved area are presumptively congruent with the statutory goal. It is thus appropriate to treat them as `arguably within the protected zone.'" National Coal Ass'n v. Hodel, 825 F.2d 523, 533 (D.C. Cir. 1987)(concurrence)(emphasis added).

Acknowledging that these zone of interest "competitor" cases can be "devilishly complex," the D.C. Circuit has nevertheless attempted to parse these cases and explain what makes one competitor meet the standing requirements while another does not, even where their "economic motivations could be thought analogous." First National Bank and Trust Co. v. National Credit Union Admin., 988 F.2d 1272, 1278-79 (D.C. Cir. 1993).[3] Competitors are more

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[3] The standing portion of this decision was affirmed by the Supreme Court in National Credit Union Admin. v. First National Bank & Trust Co., 118 S. Ct. 927 (1998).

likely to further congressional purposes, the court reasoned, when the applicable statutory restriction "itself reflects a congressional judgment that ... constraint on competition is the means to secure the statutory end." Id. (emphasis added). Even where the intent of restrictions have nothing to do with any party's "competitive" or economic interests, competitors satisfy standing requirements where the statute involves a "restraint on competition" and this restraint is "the means to assure the statutory end." Id. at 1279 (concurrence); see also Liquid Carbonic Indus., 29 F.3d at 705. This reasoning follows that of the Supreme Court competitor cases.

Here, although Envirocare has a general interest in limiting the competition for its services, the AEA contains no provision intended to limit competition, either as an end in itself or as a means to another statutory purpose. See Cities of Statesville v. AEC, 441 F.2d 962, 975 (D.C. Cir. 1969). Unlike the statutes under which the courts have found competitors within a statutory "zone of interests," the AEA includes no express provision effectively cordoning off a portion of the market from competition. The AEA concentrates on the licensing and regulation of nuclear materials for the purpose of protecting public health and safety and the common defense and security. These provisions by themselves do not necessarily turn all competitor licensees into suitable challengers of agency action. The only express statutory direction regarding competition concerns antitrust reviews for commercial nuclear power reactors and production facilities, which are not involved here. See AEA §§ 103, 105, 42 U.S.C. §§2133, 2135.

Permitting routine adjudicatory challenges to agency decisions solely because one company "sues to complain of [a] competitive advantage" would be "more likely to frustrate than to further statutory objectives." See National Coal Ass'n v. Hodel, 825 F.2d 523, 530 n.9 (D.C. Cir. 1987); see also Hazardous Waste Treatment Council v. Thomas, 885 F.2d 918, 927 (D.C.

Cir. 1989) (waste disposal firms have business interests that may prove "fundamentally inconsistent" with the environmental interests of RCRA and thus a disposal firm might be a "peculiarly unsuitable proxy for those whom Congress intended to protect"). The AEA's focus upon health and safety interests are more akin to the environmental and safety interests of RCRA, under which competitors were not permitted to challenge EPA action, than to the drug, banking and other cases that rest explicitly upon statutory provisions intended to prohibit or limit competition, either for the protection of a particular class, or to further some other statutory goal.[4]

Although a few judicial decisions seemingly have accorded standing to a competitor without expressly tying the competitor's interest to an interest of the applicable statute,[5] such a

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[4] See, e.g., Schering Corp. v. FDA, 51 F.3d 390, 395-96 (3d Cir.)(where Drug Competition and Patent Restoration Act's market entry provisions were designed as a "statutory compromise of the competing concerns" of "pioneer" and generic drug manufacturers), cert. denied, 516 U.S. 907 (1995); UPS Worldwide Forwarding, Inc. v. United States Postal Serv., 66 F.3d 621, 630-31 (3d Cir. 1995)(UPS within zone of interests of postal rate statutes, which relate to postal monopoly and reflect Congressional concern with balancing interests of the government, various categories of mailers, and competitors), cert. denied, 516 U.S. 1171 (1996); Louisiana Energy and Power Auth. v. FERC, 141 F.3d 364, 367-68 n.5 (D.C. Cir. 1998)(petitioner's "both concerns, predation and competition, come within the zone of interests of the Federal Power Act"); MD Pharmaceutical, Inc. v. Drug Enforcement Admin., 133 F.3d 8, 12 (D.C. Cir. 1998)(where statute established quotas for registered drugs; and therefore already registered manufacturers, "[e]ven more so than traditional licensees," would have an interest in keeping out each new market entrant who would produce a percentage of the total allowable quota); Panhandle Producers and Royalty Owners Ass'n v. Economic Regulatory Administration, 822 F.2d 1105, 1107-09 (D.C. Cir. 1987)(where a primary factor to be considered under National Gas Act was "competitiveness" of import); Associated Gas Distribs. v. FERC, 899 F.2d 1250 (D.C. Cir. 1990)(action brought under Natural Gas Act which has express concerns about monopoly power and various effects on competition); MOVA Pharmaceutical Corp. v. Shalala, 140 F.3d 1060, 1076 (D.C. Cir. 1998)(pioneer drug company's interest in limiting additional competition was "`by its very nature' linked with the statute's goal of limiting competition")(citing and following National Credit Union, 118 S. Ct. at 935 n.6).

[5] See, e.g., Old Town Trolley Tours, Inc. v. Washington Metrop. Area Transit Comm'n., 129 F.3d 201, 203 (D.C. Cir. 1997). See also Michigan Gas Co. v. FERC, 115 F.3d 1266, 1272 (6th Cir. 1997).

generalized approach seems at odds with the principles the Supreme Court has until now consistently followed. There would be no reason at all to examine and discern the Congressional intent and "interests protected" under a given statute if all competitors could be readily deemed to have standing. Indeed, courts have cautioned against permitting competitors to obtain standing "through a facile assertion that they are enforcing entry-restricting legislation." First National Bank & Trust Co., 988 F.2d at 1277 n.4. Moreover, there is a growing concern about competitors improperly seeking litigation before regulatory agencies simply to "trigger ... litigation costs and other administrative burdens" and thereby impose expenses upon their competitors. See Lars Noah, "Sham Petitioning As A Threat to the Integrity of the Regulatory Process," 74 N.C. L. Rev. 1, 7 (1995).

Envirocare claims that it does not propose here an "open-ended" inquiry because it merely seeks to assure that Quivira has complied with the detailed regulatory standards for mill tailings disposal. Envirocare Substitute Appeal Brief at 18. These standards, however, contained in Appendix A to Part 40, address an extensive list of different matters, and Envirocare appears poised to raise any number of them, in addition to raising challenges under a number of other sections, spanning record-keeping, waste manifest, worker safety, and other regulations. See, e.g., Envirocare's Request for Hearing at 4. The risk of Envirocare -- which has no radiological interest of its own -- inordinately burdening the administrative process is not insignificant.

Envirocare further suggests that its economic injury falls specifically within the interests protected by Section 84 of the AEA, 42 U.S.C. § 2014. As amended in 1983, this section directs the Commission, in managing 11e.(2) byproduct material, to take into account not only public health, safety and environmental risks, but also "economic costs." Yet as the Licensing Board found, Congress added this section merely to assure that licensees did not have to bear

unnecessary costs.[6] Section 84 has nothing to do with competitors' interests.

Envirocare does not seek to challenge its own regulatory burdens, but essentially to urge that identical burdens be imposed upon another licensee. Envirocare seeks, as the Licensing Board stated, to make its own "precise licensing requirements the floor (rather than the ceiling)." 46 NRC at 267 Moreover, "any competitor of QMC anywhere in the country" would also be able to have a hearing on QMC's licensing requirements. This outcome would, as the Board noted, go against the flexibility Congress intended the staff to have in considering the particular site-specific factors of each facility, particularly those of pre-existing mill sites.[7]

When Envirocare applied for and received its own NRC license, it had ample opportunity to contest and where appropriate to request an exemption from any of the regulatory burdens imposed by the NRC staff. Envirocare now remains free to request a relaxation of any current

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[6] See, e.g., 128 Cong. Rec. S2976 (daily ed. Mar. 30, 1982)(statement of Sen. Wallop)(amendment intended to protect health and safety without imposing unnecessary costs on already economically depressed industry); 128 Cong. Rec. S2977 (daily ed. Mar. 30, 1982)(statement of Sen. Schmitt)(vital that nuclear industry "not be saddled with unreasonably stringent restrictions in a misguided effort to eliminate remote and hypothetical risks without regard to the enormous costs involved"); 128 Cong. Rec. S13056 (daily ed. Oct. 1, 1982)(statement of Sen. Simpson)(regulatory approach should be "reasonably related to the risks in terms of costs"); 128 Cong. Rec. S15313 (daily ed. Dec. 16, 1982)(statement of Sen. Schmitt)("it is contrary to the public interest ... to impose requirements which are totally unnecessary or which are out of line with the risks involved"); 128 Cong. Rec. H8816 (daily ed. Dec. 2, 1982)(statement of Rep. Lujan)("costly regulatory burdens should not be imposed upon the uranium industry to address insubstantial risks").

[7] See, e.g., H.R. Conf. Rep.No. 884, 97th Cong., 2d Sess. (1982) at 44 (NRC should consider the site-specific conditions of existing mills); 128 Cong. Rec. S2973 (daily ed. Mar. 30, 1982)(statement of Sen. Simpson)(section 84 amendment intended to allow NRC "flexibility in applying ... requirements at existing sites where large quantities of mill tailings already exist"); 128 Cong. Rec. S2975 (daily ed. Mar. 30, 1982)(statement of Sen. Simpson)(amendment "provides, as under existing law, that NRC has greater flexibility in developing and applying requirements to uranium mills in existence prior to November 1, 1981, taking into account" particular additional factors that would not be applicable to new NRC licensees); 128 Cong. Rec. S2968 (daily ed. Mar. 30, 1982)(statement of Sen. Domenici)(amendment "specifically authorizes NRC to take into account various site-specific factors in applying requirements to existing facilities").

license requirement it deems unwarranted or no longer necessary. But Envirocare's purely competitive interests, unrelated to any radiological harm to itself, do not bring it within the zone of interests of the AEA for the purpose of policing the license requirements of a competitor. Indeed, it would be disruptive of our statutory scheme if all competitors could easily obtain hearings to second-guess the staff's actions toward other licensees. [8]

To say that Envirocare lacks standing to bring this action is not to say that Envirocare has no meritorious arguments about Quivira's environmental conditions and current license requirements. Standing requirements determine only who may bring an action, not whether the claims made are valid. Those claims are not before us now. It is for the purpose of considering safety and environmental claims outside of adjudication that the NRC has the section 10 C.F.R. § 2.206 petition process, by which Envirocare may bring its concerns to the attention of the Director.

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[8] Envirocare also claims standing on the ground that the NRC's inconsistent application of its licensing requirements violates constitutional guarantees of due process and equal protection. Agencies like the NRC, however, have wide discretion to perform regulatory functions on a case-by-case basis. Nothing in Envirocare's generalized and unsupported argument provides a basis for a claim of constitutional injury. Moreover, as the Licensing Board suggests, there are inherent, obvious differences between Envirocare and Quivira. See 46 NRC at 271-72. "Different treatment of dissimilarly situated persons does not violate the Equal Protection Clause." Strickland v. Alderman, 74 F.3d 260, 265 (11th Cir. 1996)(citation omitted).

IV. Conclusion and Order

For the reasons stated in this decision, the Commission hereby affirms the Atomic Safety and Licensing Board order LBP-97-20.

It is so ORDERED.

For the Commission

John C. Hoyle
Secretary of the Commission

Dated at Rockville, Maryland,
this 17th day of July, 1998.

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 COMM MEMO & ORDER (CLI-98-11) 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.

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

Administrative Judge
Peter S. Lam
Special Assistant
Atomic Safety and Licensing Board Panel
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Susan L. Uttal, Esq.
Office of the General Counsel
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Lynda L. Brothers, Esq.
Davis Wright Tremaine LLP
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101

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

James R. Curtiss, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Mark J. Wetterhahn, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, DC 20005

Docket No.(s)40-8905-MLA
COMM MEMO & ORDER (CLI-98-11)

Dated at Rockville, Md. this
17 day of July 1998

Office of the Secretary of the Commission