UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

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

I. Introduction

On November 20, 1995, Quivira Mining Company ("Quivira" or "QMC"), the holder of NRC Source Material License SUA-1473, filed an application for a license amendment which would allow it to receive and dispose of certain defined quantities of 11e.(2) byproduct material at its Ambrosia Lake facility. The Ambrosia Lake facility has been in operation since 1958. It was originally an Agreement State licensee until 1986 when licensing authority reverted to the NRC.[1/] On April 29, 1997, the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") published a notice in the Federal Register (62 Fed. Reg. 23282) summarizing its Environmental Assessment for the proposed amendment which concluded that the environmental impacts which may result from the proposed action would not be significant and granting an opportunity for any person whose interest may be affected by the grant of the license to file a request for a hearing.

On May 28, 1997, Envirocare of Utah, Inc. ("Envirocare") filed a request for a hearing on the proposed amendment and the Finding of No Significant Impact ("FONSI"). Based

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1/ Since 1958, the facility has processed over 33 million tons of uranium ore.

upon the assertions in the Request for Hearing of Envirocare of Utah, Inc. ("Request"), Envirocare is a competitor of the Licensee, being "the first private facility in the United States to be licensed by the NRC to accept 11.e(2) material from outside generators for disposal." Request at 3 (footnote omitted).[2/] For the reasons set forth below, the NRC should deny Envirocare's request for a hearing because it lacks standing to participate in this proceeding.

II. Discussion

1. The NRC's Standing Requirement.

A person requesting a hearing before the NRC is required by Commission regulations - specifically, in this case, 10 C.F.R. § 2.1205(a) and (d)(1) and (2) - to set forth in detail in its petition its interest in the proceeding and how that interest may be affected by the results of the proceeding. A petitioner must demonstrate and the presiding officer must determine that the judicial standards for standing have been met. 10 C.F.R. § 2.1205(g).

The Commission has consistently employed judicial concepts to determine whether a petitioner has sufficient interest in the proceeding to be entitled to intervene as a matter of right under § 189(a) of the Atomic Energy Act ("AEA"). 42 U.S.C. § 2011, et seq. Gulf States Utilities Company (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 47 (1994), citing Cleveland Electric Illuminating Co. (Perry Nuclear Plant, Unit 1), CLI-93-21, 38 NRC 87, 92 (1993).

2/ The NRC had previously authorized Quivira to accept source specific 11.e(2) byproduct material for disposal at the Ambrose Lake facility. (See NRC License Amendments 2 and 23 (May 6, 1987, and November 2, 1991, respectively)).

The interest of a petitioner sufficient to confer standing in a particular proceeding is not presumed. Rather, a proposed intervenor must demonstrate a cognizable interest that will be affected by one or another outcome of the proceeding. The interest must be within the "zone of interests" protected by the AEA, the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321, et seq., as amended, or the Commission's regulations. Three Mile Island, CLI-83-25, 18 NRC 327, 332 (1983). See also Allen v. Wright, 468 U.S. 737, 751 (1984) (standing requires "that a plaintiff's complaint fall within the zone of interests protected by the law invoked"); Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.. 454 U.S. 464, 475 (1982). A petitioner must also demonstrate the real possibility that concrete harm to that interest could flow as a result of the proceeding. Nuclear Engineering Co., Inc. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 741-43 (1978). Finally, the petitioner must show that, if he prevails, the alleged injury likely will be redressed by a favorable Commission "action." Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). See also Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-27 (1980) (views of Chairman Ahearne and Commissioner Hendrie) (economic injury to ratepayers from the termination of the project cannot be redressed by the Commission because it cannot order that the plant be built).

2. The Interests Identified by Envirocare's Statement of Its Interest and How They Would Be Affected by the Proceeding.

Envirocare is a Utah corporation in the business of operating a facility in Clive, Utah, for the disposal of radioactive wastes including wastes from processing uranium and thorium ore waste. Request at 10. This facility is some 500 miles away from the Licensee's Quivira facility which is located near Grants, New Mexico. Envirocare's stated interest is "an economic interest in assuring that all licensees that propose to accept 11.e(2) byproduct material comply with applicable NRC standards," and that "as a member of an environmentally sensitive and controversial industry in assuring that the environmental laws designed to protect human health and the environment from the hazards of radioactive waste are uniformly applied and enforced by the NRC." Id. at 11.

Envirocare states that its economic interest will be affected in five ways. First, "[it] will be placed at a severe competitive disadvantage because QMC's lower costs will allow it to attract customers away from Envirocare." Id. at 12. Second, Envirocare relies on "certainty and consistency on the part of the NRC in making its business and investment decisions and that "the NRC's failure to uniformly apply the same regulatory standards upsets Envirocare's settled expectations." Id. Third, Envirocare asserts there is a risk that QMC's operation of the Ambrosia Lake facility "would harm the public image of and public confidence in the entire byproduct material disposal industry, including Envirocare." Id. at 13. Fourth, Envirocare alleges that the failure to prepare an environmental impact statement for this facility threatens to undermine public confidence in the licensing and operation of 11.e(2) radioactive waste disposal facilities." Id. at

14. Fifth, Envirocare complains that the failure on the part of the NRC "to impose comparable requirements on QMC creates an unfair competitive advantage for QMC and a concomitant disadvantage for Envirocare" based upon the fact that Envirocare was required to pay for the preparation of an Environmental Impact Statement ("EIS") for its facility.

Envirocare argues an economic interest is sufficient to grant standing in that the AEA and its regulations provide that the NRC, in its management of byproduct material, should give due consideration to the economic costs associated with possession and transfer of such material, citing 42 U.S.C. § 2114(a)(1) and 10 C.F.R. Part 40, Appendix A. Request at 15. Envirocare asserts as a member of the nuclear industry it is in a unique position to assure that the NRC is meeting the requirements of the AEA and NEPA. Finally, Envirocare argues that an order to comply with the same AEA and NEPA requirements as Envirocare was required to comply with would prevent injury to Envirocare's interests. Id.

3. The Competitive "Injury" Alleged by Envirocare Is Not Within the Zone of Interest Cognizable under the Atomic Energy Act, National Environmental Policy Act, or the Commission's Regulations as a Basis for Intervention.

Envirocare's interest in this proceeding is an economic one derived from the business potential of a competitor. This purely economic injury is clearly beyond the "zone of interests" protected by the AEA. Envirocare cites no Commission precedent for the proposition that its economic interests would satisfy the NRC's standing requirement in a licensing proceeding. To the contrary, the cases are uniform in denying standing where a petitioner's interest is economic. It has never been successfully disputed that "the protected interests under

the Atomic Energy Act relate to radiological health and safety." Detroit Edison Company (Enrico Fermi Atomic Power Plant, Unit 2), LBP-78-11, 7 NRC 381, 385, aff'd, ALAB-470, 7 NRC 473 (1978). See also Three Mile Island, 18 NRC at 332 (assertions of "broad public interest . . . however noteworthy, do not qualify [petitioner] for intervention in [NRC] proceedings); Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 614 (1976) (an alleged "interest" in avoiding the possibility of future rate increases is not within the zone of interest protected by the AEA); Houston Lighting and Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-582, 11 NRC 239, 242 (1980) (future economic interest in real estate does not confer standing to intervene under the AEA or NEPA); Public Service Co. of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 198 (1978) (Licensing Board lacked authority to exclude items from the utility's rate base as this was an economic issue for the state regulatory agency); Shoreham, LBP-91-1, 33 NRC 15, 22-23 ("economic concerns are more properly raised before state economic regulatory agencies"); id. at 30 (a stated interest in obtaining sufficient amounts of electricity at reasonable rates is insufficient to confer standing). Similarly, under NEPA, a petitioner must suffer some concrete injury from the proposed agency action which still must be shown apart from any interest in having the procedures of NEPA observed. Under NEPA, a petitioner has a burden of showing concrete harm to a legitimate health, safety or environmental interest supposedly impacted. Babcock & Wilcox (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-93-4, 37 NRC 72, 93 (1993).

When stripped down to its essentials, Envirocare's interest is that of a competitor to Quivira. It would seek to use the NRC administrative process to make market entry more difficult and expensive for its potential competitors.[3/] An interest in preventing competition is clearly outside the zone of interests protected by the governing statute. In fact, Section 1 of the AEA states that the policy of the United States is that "the development, use, and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise." 42 U.S.C. § 2011 (emphasis supplied). This protection from competition is clearly not within the zone of interests protected.

The Commission cases cited above uniformly hold that economic injury is insufficient to invoke the NRC hearing process. Were it otherwise, a competitor from anywhere in the United States could seek to intervene in any materials license proceeding, opening the floodgates of litigation and rewarding the early entrants in a field with a weapon to keep out others.

Furthermore, Envirocare cannot assert standing based upon the radiological protection under the AEA afforded for human life and property. As noted previously, Envirocare's facility is some 500 miles from the Quivira facility. It alleges no concrete injury to

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3/ This is not Envirocare's first attempt to employ the NRC administrative process as a barrier to market entrance. In UMETCO Minerals Corporation, LBP-94-7, 39 NRC 112 (1994), Envirocare filed a similar request for an informal hearing in an untimely attempt to challenge NRC Staff approval of an amendment to UMETCO's source material license authorizing UMETCO to dispose of a finite amount of 11e.(2) byproduct material at its White Mesa Mill facility.

itself or its property, relying on an undefined and speculative secondary effect on the byproduct industry as a whole as a basis for standing.[4/] Moreover, Envirocare has failed to demonstrate that it is the representative of any segment of the nuclear industry[5/] or is acting on their behalf. A petitioner faces an increased burden of demonstrating injury in fact as it relates to factors of causation and redressability when it is challenging the legality of government regulation of someone else. Apollo, 37 NRC at 81 n.20. Envirocare has not met this burden.

4. 42 U.S.C. § 2114(a)(1) and 10 C.F.R. Part 40 Do Not Provide a Basis for Standing for Envirocare.

Envirocare's citation to 42 U.S.C. § 2114(a)(1) and 10 C.F.R. Part 40, Appendix A, for the proposition that its economic interests are within the zone protected by the AEA is inapposite. Section 84 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2114.a.(1), provides that the Commission shall insure that the management of any byproduct material, as defined in section 11 e.(2), is carried out in such manner as

> (1) the Commission deems appropriate to protect the public health and safety and the environment from radiological and nonradiological hazards associated with the processing and with the possession and transfer of such material, taking into account the risk to the public health, safety, and the environment, with due consideration of the economic costs and such other factors as the Commission determines to be appropriate . . .

4/ Were this rationale to be adopted, every member of the byproduct industry would immediately have standing in every licensing proceeding merely by virtue of its existence.

5/ To the contrary, given Envirocare's publicized difficulties with the State of Utah and the ongoing scrutiny of Envirocare's prior activities, it is unlikely that any industry member would choose to have Envirocare represent it.

(emphasis supplied).

The legislative history of this provision and federal case law interpreting that provision do not indicate that it was intended to provide standing for potential intervenors on the basis of their status as market competitors of the parties involved in the licensing action. Rather, the reference to "consideration of economic costs" refers to the substantive requirement for a balancing of the costs and benefits associated with the NRC's implementing regulations.[6/]

With regard to this language, the Conference Report concerning Pub. L. 97-415 states as follows:

> . . . in adopting the language, the conferees intend neither to divert EPA and NRC from their principal focus on protecting the public health and safety nor to require that the agencies engage in cost-benefit analysis or optimization.
>
> The conferees are of the view that the economic and environmental costs associated with standards and requirements established by the agencies should bear a reasonable relationship to the benefits expected to be derived. This recognition is consistent with the accepted approach to establishing radiation protection standards, and reflects the view of the conferees that, in promulgating such general environmental standards and regulations, EPA and NRC should exercise their best independent technical judgment in making such a determination. At all times, the conferees fully intend that EPA and NRC recognize as their paramount responsibility protection of the public health and safety and the environment.

6/ This is clearly analogous to the Commission's as low as reasonably achievable standard which also speaks to economics versus benefits. 10 C.F.R. § 50.34a(a). Because a substantive legislative standard has been established, it does not lead to a change in standing requirements. To challenge the application of the substantive rule, e.g., as low as reasonably achievable, a petitioner is required to independently establish standing.

See also Quivira Mining Company v. U.S.N.R.C., 866 F.2d 1246 (10th Cir. 1989), where the court of appeals upheld NRC regulations in 10 C.F.R. Part 40, Appendix A, that implemented the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA") against an industry challenge.[7/] The regulations in question establish substantive standards for the NRC to follow in licensing and relicensing uranium mills and uranium mill tailings sites.

Thus, the purpose of the cited statute and regulation was to add additional flexibility for the benefit of prospective licensees in the application of the NRC's health and safety requirements. There is no indication that the statute or regulation was to expand the NRC's standing requirements to permit for market competitors to use the administrative process to oppose new applications.

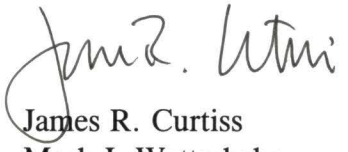
7/ Pub L. No. 95-604, 92 Stat. 3021 (codified as amended in various sections of 42 U.S.C.).

III. Conclusion

For the foregoing reasons, the request for a hearing of Envirocare of Utah, Inc. should be denied.

Respectfully submitted,

WINSTON & STRAWN



James R. Curtiss
Mark J. Wetterhahn
Counsel for the Licensee

June 12, 1997

UNITED STATES OF AMERICA
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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James R. Curtiss
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Dated at Washington, D.C.
this 12th day of June, 1997

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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the captioned matter. In accordance with 10 C.F.R. § 2.713(b), the following information is provided:

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Pursuant to 10 C.F.R. § 2.712(b), service of correspondence and pleadings on Quivira Mining Company should be addressed specifically to the undersigned.

Mark J. Wetterhahn
Winston & Strawn
Counsel for Quivira Mining Company

Dated at Washington, D.C.
this 12th day of June, 1997

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CERTIFICATE OF SERVICE

I hereby certify that copies of "Notice of Appearance" for James R. Curtiss and Mark J. Wetterhahn and "Answer of Quivira Mining Company in Opposition to the Request for Hearing of Envirocare of Utah, Inc." were served upon the following by deposit in the United States mail, first class, this 12th day of June, 1997:

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June 12, 1997