UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
GENERAL COUNSEL

July 15, 1997

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Peter S. Lam
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Atomic Safety
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Mail Stop: T-3 F23
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Washington, D. C. 20555

In the Matter of
Quivira Mining Company
Docket No: 40-8905-MLA

Dear Administrative Judges:

Attached please the Staff's Response to Envirocare of Utah's Supplement to its Request for Hearing. Pursuant to the Presiding Officer's invitation to comment on the need for a site visit, the Staff does not believe that a site visit would be helpful to the Presiding Officer in determining the issue of standing.

Sincerely,

Susan L. Uttal
Counsel for NRC Staff

Enclosure: As stated

18402

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8905-MLA
QUIVIRA MINING COMPANY	)	
	)	ASLBP No. 97-728-04-MLA
(Materials License No. SUA-1473)	)	

NRC STAFF'S RESPONSE TO ENVIROCARE OF UTAH'S SUPPLEMENT TO ITS REQUEST FOR HEARING

INTRODUCTION

On June 20, 1997, the Presiding Officer in this matter issued a Memorandum and Order (Request for Hearing), which provided Envirocare of Utah, Inc. (Envirocare) with an opportunity to supplement its request for hearing and afforded the licensee and the NRC staff (Staff) an opportunity to respond by July 15, 1997. The Staff hereby responds to Envirocare's supplement. For the reasons stated below, and in the Staff's Response to Envirocare's request for hearing,[1] the Staff opposes Envirocare's hearing request and recommends that it be denied.

BACKGROUND

On May 28, 1997, a request for a hearing was filed by Envirocare seeking a hearing on the NRC's issuance of its Final Finding of No Significant Impact (FONSI) and Notice of Opportunity for Hearing concerning Quivira Mining Company's (QMC) request for an amendment

[1] NRC Staff's Notice of Participation and Response to Request for Hearing Filed by Envirocare of Utah, Inc. (Staff's Response), June 19, 1997.

to its materials license to permit it to receive increased amounts of 11e.(2) byproduct waste materials for disposal. On June 12, 1997, QMC filed its answer to Envirocare's request for hearing.[2] On June 19, 1997, the NRC staff (Staff) filed its response to Envirocare's request for hearing. On June 20, 1997, the Presiding Officer issued a Memorandum and Order providing Envirocare with an opportunity to supplement its request for hearing and affording the other parties an opportunity to respond thereto. On July 3, 1997, Envirocare filed its supplement to the request for hearing.[3] For the reasons stated below, and in the Staff's Response to Envirocare's request for hearing, the Staff opposes Envirocare's hearing request and recommends that it be denied.

ARGUMENT

Envirocare Does Not Have Standing Under the Atomic Energy Act (AEA).

In order to establish standing pursuant to the AEA, Envirocare must demonstrate "an actual 'injury-in-fact' as a consequence of the [proposed action] and that this interest is within the 'zone of interests'" of the AEA.[4] *Rancho Seco,* CLI-92-2, 35 NRC at 56. Envirocare has not asserted an injury which is fairly traceable to the issuance of a license amendment to QMC. On the contrary, the harm asserted is, at best, an indirect economic harm attributable *not* to QMC's licensing, but to Envirocare's licensing, and as such does not confer standing in the instant

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[2] Answer of Quivira Mining Company in Opposition to the Request for Hearing of Envirocare of Utah, Inc., June 12, 1997.

[3] Environcare[sic] of Utah's Supplement to its Request for Hearing, June 3, 1997. (Supplement).

[4] A more detailed discussion of the standing requirements is found in the Staff's Response at 5-7, 9-10.

proceeding.

The cases cited by Envirocare do not abrogate the basic requirement of standing that the interests of the petitioner be arguably within the zone of interests of the AEA. The cases cited by Envirocare arose under different statutes, with decidedly different zones of interests. Thus, the applicability of those cases to the instant case must be examined in light of the zone of interests protected by the AEA.

The AEA is a statute that affords the NRC authority to regulate the commercial uses of nuclear materials in order to protect the public health and safety. Although the AEA authorizes the Commission to issue licenses and promulgate regulations regarding the issuance of licenses, it is not concerned with economic matters (other than in certain limited instances such as Price-Anderson issues) or competitive effects (other than in antitrust matters).

The NRC has previously held that general economic interests are not within the zone of interests of the AEA. *See, e.g., Kansas Gas & Electric Co.* (Wolf Creek Generating Station, Unit 1) ALAB-424, 6 NRC 122, 128 (1977). The zone of interests of the AEA is limited to protection of the public health and safety and radiological matters. Economic interests are outside that zone, although interests in protecting property from direct radiological hazards do come within the zone of interests of the AEA. Such interests are not implicated in the instant case. *See Gulf States Utility Co.* (River Bend Station, Unit 1), CLI-94-10, 40 NRC 43, 48-49 (1994). Thus, Envirocare's economic interests, even if they constituted an "injury-in-fact" under the AEA, are not within the zone of interests of the AEA, and Envirocare is not an intended beneficiary of that statute.

Envirocare cites a line of cases that it asserts permits standing in cases where the interest

sought to be vindicated is a competitive economic interest, if the interests of the competitor coincide with the interests of the intended beneficiaries of the statute in question. *Supplement* at 20-27. The Staff submits that these cases are inapplicable to and distinguishable from the instant case. As indicated above, the cases arose under statutes which relate to different concerns than the AEA.

In *Clarke v. Securities Industry Association*, 479 U.S. 388 (1986), the Court addressed whether a securities association had standing to challenge the Comptroller of the Currency's approval of an application by two banks to provide discount brokerage services at branches and at other offices inside and outside their home states in violation of the bank branching laws. *Clarke* at 390-91. The issue was whether the offices where the discount brokerage services would be offered were "branches" under the McFadden Act. *Id.* at 391. In deciding whether the interests of the securities association fell within the zone of interests of the relevant banking laws, the Court focused on the intent of Congress and found that the intent was to prevent "national banks from gaining a monopoly control over credit and money through unlimited branching" and that discount brokerage services would give the banks access to more money. *Id.* at 403. The Court held that Congress had arguably legislated against competition between the banks and the members of the securities association "by limiting the extent to which banks can engage in the discount brokerage business and hence limiting the competitive impact on nonbank discount brokerage houses." *Id.* Several factors distinguish *Clarke* from the instant case. First, the Court found a congressional intent to prevent the competition by preventing excessive branching. No such intent, to prevent competition, can be found in the AEA. Second, the statutes in question were concerned with regulation of competition and of financial matters, and contained restrictive

measures regulating competition in licensing matters. The AEA is not concerned with financial and economic issues such as the effects of licensing on competition. The AEA has no restrictive measures pertaining to the regulation of competition.

In *First National Bank and Trust v. National Credit Union*, 988 F.2d 1272 (D.C.Cir. 1993), the statute in question was the Federal Credit Union Act (FCUA), the purpose of which is to "encourage the proliferation of credit unions, which were expected to provide service to those would-be customers that banks disdained." *First National Bank,* 988 F.2d at 1275. Although the court noted that the original purpose was not to protect banks from competition from credit unions, it found standing. *Id.* In that case, the plaintiff banks were seeking to enforce a statutory restriction that limited membership in credit unions to groups with a common bond, in order to prevent the growth of a competitor credit union. The court stated that there was "reason to think that a competitor's interest in patrolling a statutory picket line will bear some relation to the congressional purpose, because the entry-like restriction itself reflects a congressional judgment that the constraint on competition is the means to secure the statutory end . . ." and the "potentially limitless incentives of competitors [would be] channeled by the terms of the statute into suits of a limited nature brought to enforce statutory demarcation. . . ." *Id.* at 1278. In the instant case, we do not have the same or even a similar situation. There is no "congressionally drawn boundary" or line of demarcation which would limit or constrain competitors who seek intervention in NRC proceedings for the purpose of vindicating a competitive issue. The AEA is not an entry limiting or expansion limiting statute akin to the FCUA or the National Bank Act addressed in *Clarke, supra*. Those statutes directly affect economic competition in heavily regulated financial industries. They are concerned with economic matters, not health and safety

matters.[5] While the statutory limitations in *Clarke* and *First National Bank* were quite clear, and indeed did limit the scope of the competitors' suits, the same cannot be said of the AEA and underlying issues involved in the instant case, where there are many factual and technical assessments to be made in determining whether to issue a license amendment. Public health and safety concerns are not so precise that the Presiding Officer can be assured that the interests of Envirocare are congruent with the interests of the intended beneficiaries of the AEA. Thus, there is no line of demarcation, no "statutory picket line" for Envirocare to patrol. The AEA is not the sort of statute that the courts had in mind when they permitted competitors to have standing in *Clarke* and *First National Bank*. The difference in the purposes and intent of the AEA makes it impossible to equate it with the statutes under consideration in cases cited by Envirocare.

As elucidated more clearly in *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F 3d 1356 (D.C. Cir 1996), the "potentially limitless incentives of competitors" being "channeled by the terms of the statute" discussed in *First National Bank, supra,* refers to cases where "there is no possible gradation in the statute's requirement." *Scheduled Airlines*, 87 F. 3d at 1360-61. In that case, the statute in question was the Miscellaneous Receipts statute, 31 U.S.C. § 3302(b) (1994). The court found that because of the inherent limitations of the statute there was no room for the plaintiff (a government contract bidder) to frustrate the congressional

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[5] The same is true of the Natural Gas Act discussed in *Panhandle Producers v. Economic Regulatory Administration*, 822 F. 2d 1105 (D.C. Cir. 1987). It is a statute which, *inter alia*, prohibits the exportation and importation of natural gas unless it is found to be in the public interest. *Panhandle* at 1106. The factors considered in applying that portion of the statute include competitiveness of the product and need for natural gas (protection of regional and national interests). *Id.* at 1107. Therefore, the interests of a competitor are directly implicated by the statute, since it is concerned with aspects of competition, unlike the AEA which is concerned only with public health and safety.

purpose of the statute (to require government officials to deposit certain funds in the Treasury). *Id.* at 1361. "Either the funds are covered by the statute or they are not." *Id.* The court noted that the statutes discussed in *First National Bank, supra,* and Clarke, supra, contained inherent limitations, much like the Miscellaneous Receipts statute. *Id.* The AEA does not contain inherent limitations which would prevent a competitor from frustrating the intent of the statute. As noted above, there are numerous factual and technical issues, touching upon the effects on public health and safety, which go into a decision whether to issue a license. At each step, there are many safety and health issues to be addressed.

The cases cited by Envirocare involve the economic regulation of industries and/or licensing for restrictive purposes. The AEA concerns itself solely with the protection of public health and safety, and thus, effects on competitive position are not within the zone of interest of the statute. Nor did Congress intend that those with competitive or economic concerns be protected by the statute. Licensing decisions under the AEA are based upon health and safety concerns and Envirocare's economic competitive concerns demonstrates that its interests are not in congruence with the intended beneficiaries of the AEA. In addition, Envirocare has not asserted an injury which is fairly traceable to the issuance of the license amendment to QMC. Therefore, Envirocare failed to establish standing under the AEA.

Envirocare Does Not Have Standing to Participate Under NEPA

Envirocare alleges that it has standing to participate in a proceeding relating to the amendment of QMC's materials license under the National Environmental Policy Act (NEPA) (42 U.S.C § 4321), because it has suffered an injury-in-fact and its interests are within the zone

of interests protected by NEPA.[6] The injury-in-fact alleged is an economic injury to Envirocare's competitive interests based on the NRC's failure to require a full environmental review of QMC's license amendment. *Supplement* at 5. It also alleges injury to environmental interests and that the injuries will be redressed by a favorable decision by the Presiding Officer ordering withdrawal of the FONSI and requiring preparation of an Environmental Report and Environmental Impact Statement (EIS). *Id.* In support of those contentions, Envirocare relies upon several federal court decisions. As the Staff will demonstrate below, this reliance is misplaced.

The Commission has previously stated that NEPA only protects economic interests that flow or result from environmental damage. *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-92-2, 35 NRC 47, 56-57 (1992). *See also Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977). None of the cases cited by Envirocare alter this requirement. *See, e.g., Port of Astoria v. Hodel*, 595 F. 2d 467 (9th Cir. 1979).

In *Port of Astoria v. Hodel*, *supra*, a radio broadcasting company (Hermiston), among others, sought to require that an EIS be prepared before an aluminum reduction plant was built. *Port of Astoria*, 595 F 2d at 471. The issue of standing was raised. *Id.* at 474. Hermiston alleged that it was located in the same county as the planned aluminum plant, and that the power lines to the plant would interfere with its radio broadcasts. *Id.* at 476. The court found standing, stating that the injury claimed, although economic, was the "immediate and direct result of the building of the . . . plant, an action that 'will have a primary impact on the natural

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[6] The elements of standing are more fully discussed in the Staff's Response at 5-7, 9-10.

environment'". *Id. (citations omitted).* Hermiston alleged two essential factors which afforded it standing in the eyes of the court - factors which are not present in the instant case: (1) it was located in the same county as the planned plant and thus, had proximity; and (2) the environmental effects of building the plant would have a direct effect on it (interference with its radio broadcasts). In the instant case, Envirocare of Utah is not proximate to QMC's facility in New Mexico and thus, cannot be harmed by any environmental damage which may be caused by the operation of a commercial disposal facility. In addition, even if the economic injury alleged (competitive disadvantage) were not speculative and remote, it does not flow from the alleged environmental injury. Therefore, Envirocare cannot claim standing based upon the holding in *Port of Astoria.*

Nor can it claim standing based on *Lake Erie Alliance v. U.S. Army Corps of Engineers*, 486 F. Supp 707 (W.D. Pa. 1980), wherein the court found standing for steelworkers to challenge the sufficiency of an EIS permitting the construction of a steel factory based upon the primary environmental effects of the construction. *Lake Erie*, 486 F. Supp at 710-13. The court found that although the steelworkers were also alleging a secondary economic injury (unemployment potentially caused by shutdowns of other steel mills), "all live in or around the tri-state area which will be affected environmentally by this project, and all have alleged a concern with those adverse environmental effects." *Id.* at 713. The steelworkers had proximity to the plant and alleged a direct environmental effect which was within the zone of interests of NEPA. The fact that they raised a secondary effect of unemployment (a problem the court found to be within the public interest) did not preclude them from standing. In the instant case, Envirocare is not located within the area which would be affected environmentally by QMC. Envirocare would not be subject to

any direct environmental effects by QMC, and its interests are not within the zone of interests protected by NEPA. In addition, the economic injury alleged by Envirocare cannot be said to be within the ambit of public interest. It is clear that in order to find standing under NEPA, the environmental harm alleged must affect Envirocare in a direct way. Only when that factor is found to have been established can the next step be taken to address the secondary factor of economic harm. *See, e.g., Port of Astoria,* 595 F. 2d 467. The allegation of economic harm without a cognizable environmental harm that directly affects the petitioner is insufficient to confer standing. *See, e.g., Hiatt Grain & Feed, Inc. v. Bergland,* 446 F. Supp 457, 487 (D. Kan. 1978), *aff'd* 602 F. 2d 929, *cert den.* 444 U.S. 1073.

It is important to note that the environmental impact is not, as alleged by Envirocare, the NRC's action in approving the license amendment. The environmental impact is the effect of the receipt and disposal of additional 11e.(2) material from off-site generators at the Ambrosia Lake site. Therefore, Envirocare must allege that it is affected by *that* environmental impact, which it clearly is not. In addition, the economic effect must be causally related to the environmental impact, which, again, it clearly is not.[7] The failure to prepare an EIS is not the gravamen of the impact to the environment. It is the operation of the disposal facility which will impact the environment and the economic injuries must be causally related to that "act that lies within NEPA's embrace." *Port of Astoria,* 595 F.2d at 476. *See also Western Radio Services, Co., Inc. v. Espy,* 79 F.3d 896, 901 (9th Cir. 1996). The potential environmental injuries alleged

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[7] Envirocare alleges that the failure to prepare an EIS deprives the public of an opportunity to comment on the environmental impacts associated with QMC's facility. *Supplement* at 8. Envirocare fails to allege any factors which would afford it standing to address public informational issues under NEPA.

by Envirocare (transportation of large volumes of 11e.(2) material to QMC's facility and disposal of large volumes of 11e.(2) material at the site) would have no effect on Envirocare, and although those injuries might be addressed by a petitioner with standing, that is someone who would be affected by the environmental impacts, they cannot be addressed by Envirocare.

Because Envirocare's alleged economic injury is not causally related to any environmental impact of the QMC operation of a disposal facility, it has not suffered an injury-in-fact and therefore does not have standing to challenge the issuance of the license amendment under NEPA. None of the cases cited by Envirocare obviate the requirement that the environmental harm affect Envirocare. The cases generally demonstrate that standing may be found where an alleged environmental harm directly affects the proponent of standing, and causes the alleged economic harm. To find otherwise, that the environmental harms does not have to injure the proponent of standing, would create the anomalous result of anyone with an economic claim, no matter how attenuated their relationship to the site or the alleged environmental damage, being able to demonstrate standing and participate in NRC proceedings. This is clearly not the intent of NEPA. The purpose of NEPA is to prevent insult to the environment, not to protect the economic health of competitors.[8]

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[8] The Staff sees no need to address Envirocare's contention that it has standing under the equal protection and substantive due process clauses of the United States Constitution. The case cited by Envirocare, *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985), concerning discrimination by a state against out-of -state insurance companies in taxation does not address standing and, is otherwise inapplicable to this matter. Envirocare has cited no relevant authority for its position.

CONCLUSION

Based upon the foregoing and the Staff's arguments in its Notice of Participation and Response to Request for Hearing Filed by Envirocare of Utah, Inc., Envirocare's hearing request should be denied in that it has failed to demonstrate that it has standing under Atomic Energy Act or NEPA to oppose the granting of the amendment to QMC's license.

Respectfully submitted,

Susan L. Uttal
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of July 1997

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8905-MLA
QUIVIRA MINING COMPANY	)	
	)	ASLBP No. 97-728-04-MLA
(Materials License No. SUA-1358)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENVIROCARE OF UTAH'S SUPPLEMENT TO ITS REQUEST FOR HEARING" in the above-captioned proceeding have been served on the following by deposit into the United States mail, or through deposit in the Nuclear Regulatory Commission's internal mail system; as indicated with an asterisk by fax and United States mail, or as indicated with a double asterisk by hand delivery, this 15th day of July 1997:

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