

RAS 11268

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

DOCKETED 02/27/06

SERVED 02/27/06

In the Matter of)
)
)
HYDRO RESOURCES, INC.)
(P.O. Box 777)
Crownpoint, NM 87313)
_____)

Docket No. 40-8968-ML

CLI-06-07

ORDER

By this order, the Commission accepts review and sets a briefing schedule for the issue presented by Intervenor Eastern Navajo Diné Against Uranium Mining (“ENDAUM”) and Southwest Research and Information Center (“SRIC”) (together, “Intervenor”) with respect to the Presiding Officer’s January 6, 2006, Partial Initial Decision concerning radiological air emissions from *in situ* leach mining at Section 17 of Hydro Resources, Inc.’s (“HRI”) Crownpoint, New Mexico site.¹

In LBP-06-1, the Presiding Officer held, in making his overall determination, that radiation from surface mining spoil at the Section 17 site should be excluded from calculation of the “total effective dose equivalent” (“TEDE”) resulting from HRI’s licensed operations, because the definition of “background radiation” in 10 C.F.R. § 20.1003 does not require that radiation from the spoil be excluded from background radiation.

¹ LBP-06-1, 63 NRC ___ (2006).

In their Petition for Review (“Petition”), Intervenors claim that the Presiding Officer erred in refusing to include radioactive air emissions from the onsite surface mining spoil (generated by a past owner’s underground conventional mining operation) in the TEDE attributed to licensed operations. Among other things, the Intervenors urge that the Commission clarify the meaning of 10 C.F.R. §§ 20.1003 and 20.1301(a)(1), in view of an earlier decision in this matter issued by a different Presiding Officer. In LBP-99-15,² the Presiding Officer suggested that radioactive emissions from surface “tailings” left by a prior owner should not be treated as “background radiation.”³

We find that Commission review is warranted here. First, the delineation between what is and is not included in a licensed operation’s TEDE calculation presents a legal issue that is essential to a broad spectrum of Commission licensing decisions, as is the proper interpretation of the term “background radiation.” Intervenors’ Petition, therefore, presents a substantial and important question of law.⁴ Further, the Presiding Officer’s ruling is without governing precedent.⁵ The Commission has not had the opportunity to rule on the precise issue presented by the Intervenors’ Petition. Finally, as noted above, the Presiding Officer’s interpretation appears to conflict with a previous Presiding Officer’s interpretation of the same regulation in an earlier phase of this litigation, suggesting a need for Commission resolution.

² 49 NRC 261 (1999).

³ *Id.* at 265-67.

⁴ See 10 C.F.R. §§ 2.786(b)(4)(iii) (2004). With respect to our rules of practice, this order refers to the rule designations in our former Part 2, which now have been substantially revised and renumbered. See Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004). The revised rules do not apply to this case, which began before their promulgation.

⁵ See 10 C.F.R. §§ 2.786(b)(4)(ii) (2004); *Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22 (2001).

The parties have already briefed this issue at length before the Presiding Officer. Should any party wish to supplement its briefs, it may do so with a brief, not to exceed ten pages, filed within fourteen days following the issuance of this order. The parties may submit reply briefs, not to exceed five pages, seven days thereafter.

IT IS SO ORDERED.

For the Commission⁶

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of February, 2006

⁶ Chairman Diaz was not present when this item was affirmed. Accordingly the formal vote of the Commission was 4-0 in favor of the decision. Chairman Diaz, however, had previously voted to approve this Order and had he been present he would have affirmed his prior vote.