

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 1692

DOCKETED 5/1/00

BEFORE THE COMMISSION

In the Matter of

HYDRO RESOURCES, INC.
P.O. Box 15910
Rio Rancho, New Mexico 87174

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Docket No. 40-8968-ML

NRC STAFF'S RESPONSE TO MOTION FOR LEAVE TO REPLY

John T. Hull
Counsel for NRC Staff

May 1, 2000

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INTRODUCTION

On April 17, 2000, Intervenors Eastern Navajo Dine Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed "Intervenors' Motion for Leave to Reply to Hydro Resources, Inc.'s [sic]¹ Response in Opposition to Motion to Reopen and Supplement the Record" (Motion to Reply). Attached to the April 17 Motion to Reply is "Intervenors' Reply to Nuclear Regulatory Commission Staff's Response to Motion to Reopen and Supplement the Record" (Proposed Reply), and an April 16 "Declaration of Dr. John D. Fogarty in Support of Intervenors' Reply to the NRC Staff's Response to ENDAUM's and SRIC's Motion to Reopen and Supplement the Record" (April 16 Affidavit).²

For the reasons discussed below, the Staff requests that the Commission deny the Motion to Reply.

¹ The Intervenors' April 17, 2000 motion is in fact replying to the Staff's April 4 answer opposing the Intervenors' March 15 motion to reopen and supplement the record.

² ENDAUM and SRIC had earlier filed "Intervenors' Motion to Reopen and Supplement the Record," on March 15, 2000 (Motion to Reopen). By filing dated April 4, 2000, the Staff opposed the Motion to Reopen. See "NRC Staff's Response to Motion to Reopen and Supplement the Record" (Staff's April 4 Answer).

DISCUSSION

Procedures generally governing motions practice in NRC adjudications, including those applicable to subpart L proceedings, provide no right of reply to answers to motions. *See* 10 C.F.R. § 2.1237(a), *citing* (in part) 10 C.F.R. § 2.730(c). Leave to file such replies must be sought and granted before rebuttal argument on motions may be considered, and movants are expected to anticipate potential arguments in their initial motions. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 469 (1991). Contrary to the general prohibition on filing replies to answers to motions, the Motion to Reply, the Proposed Reply, and the April 16 Affidavit simply provide supplemental argument on some of the issues previously briefed in either the March 15 Motion to Reopen or in the Staff's April 4 Answer.

For example, ENDAUM and SRIC seek to establish good cause for filing the Proposed Reply and the April 16 Affidavit based on the presence of three allegedly "incorrect statements" in the Staff's April 4 Answer pertaining to whether: (1) the Motion to Reopen raised an "exceptionally grave safety issue;" (2) Dr. John Fogarty has sufficient qualifications to provide expert testimony in support of the Motion to Reopen; and (3) the Intervenors had "impermissibly attacked an NRC regulation" in the proceedings before the Presiding Officer. Motion to Reply, at 1-2. These "incorrect statements" are in fact matters of legal opinion which have already been fully briefed. *See* Motion to Reopen, at 7-17; and Staff's April 4 Answer, at 6-16. Items (1) - (3) are addressed *seriatim* below.

First, the "exceptionally grave safety issue" argument pertains to the 0.44 milligram per liter (mg/L) secondary groundwater restoration goal for uranium contained in HRI's license. This argument revisits the issue already before the Commission regarding

whether the 0.44 mg/L restoration goal represents a sufficiently grave safety matter at HRI's Section 8 site to warrant reopening the Phase I record to consider additional evidence. See Motion to Reopen, at 8-13; and Staff's April 4 Answer, at 7-8, and 10-13. In their most recent filings, ENDAUM and SRIC do not challenge any of the relevant case law discussing the legal standard for reopening a closed record, or otherwise show that the Staff's April 4 Answer misinterpreted the requirements of 10 C.F.R. § 2.734. See, e.g., Proposed Reply, at 1-7. The April 16 Affidavit, at ¶¶ 12-16, proffers an extended discussion of alternate groundwater restoration standards for uranium based on draft guidelines published by various agencies, but nowhere do ENDAUM and SRIC address the Staff's legal objection that these draft guidelines are not sufficiently reliable to be admitted as evidence under the standards of 10 C.F.R. § 2.743. See Staff's April 4 Answer, at 5 n.8.

Moreover, as to the technical adequacy of the 0.44 mg/L restoration goal for uranium contained in HRI's license, neither the Proposed Reply nor the April 16 Affidavit identify any factual inaccuracies in the Staff's April 4 Answer. ENDAUM and SRIC continue to ignore the previously discussed chemical inability of mobilized uranium -- regardless of its post-mining concentration level in an aquifer -- to migrate any significant distance away from the mined ore zone areas. See Staff's April 4 Answer, at 3-5, n.5, and 13.³ Neither do ENDAUM and SRIC address the fact that at Section 8, pre-existing uranium levels in the groundwater already exceed the 0.44 mg/L restoration goal. See *id.*, at 5.

Thus, rather than seeking to "correct Staff's inaccurate assertion that the health effects of uranium have been appropriately dealt with" (Motion to Reply, at 2), ENDAUM

³ This inability of uranium to migrate inhibits groundwater contamination, regardless of whether the radiological or chemical effects of uranium are the greater concern for possible future drinking water supplies at Section 8. See Proposed Reply, at 9-13.

and SRIC instead seek to add to this issue another layer of repetitive argument. Accordingly, on this point, these Intervenors establish no basis which supports their Motion to Reply.

Second, the issue of whether Dr. Fogarty has sufficient qualifications to provide expert testimony in support of the March 15 Motion to Reopen is a matter of opinion which has already been fully briefed. *See* Motion to Reopen, at 15-17; and Staff's April 4 Answer, at 13-14. ENDAUM and SRIC state that they "seek to correct the NRC's objections" to Dr. Fogarty's qualifications (Motion to Reply, at 2), but they do not identify any factual errors regarding Dr. Fogarty's qualifications. *See* Proposed Reply, at 8-9. Nor do ENDAUM and SRIC explain why they could not have anticipated objections to Dr. Fogarty's qualifications at the time they filed their Motion to Reopen on March 15. *See Shoreham, supra*, 33 NRC at 469. The Intervenors thus establish no basis on this point which supports their Motion to Reply.

Third, the issue of whether the Intervenors had improperly attacked an NRC regulation is a matter of legal argument which has already been briefed. *See* Motion to Reopen, at 13-15 and nn. 11-12; and Staff's April 4 Answer, at 2-3, and 15-16. ENDAUM and SRIC state that they "seek leave to correct the assertion" that they had improperly attacked an NRC regulation. Motion to Reply, at 2.⁴ However, the Intervenors make only the vague claim that the 0.44 mg/L restoration goal "does not govern the situation as a matter of law" and is therefore open to challenge. Motion to Reply, at 2. Their Proposed Reply identifies no law or regulation supporting the claim that the Staff -- in the absence of

⁴ ENDAUM and SRIC could hardly have been surprised by the Staff's April 4 Answer in this regard, given the Presiding Officer's ruling last August directly on this point. *See* LBP-99-30, 50 NRC 77, 115 (1999).

an Environmental Protection Agency drinking water concentration limit for uranium -- lacked legal authority to incorporate into HRI's license a secondary groundwater restoration goal for uranium derived from 10 C.F.R. Part 20 of NRC's regulations.

The Intervenors thus establish no basis on this point which supports their Motion to Reply.

CONCLUSION

For the reasons discussed above, the Commission should deny the Motion to Reply.

Respectfully submitted,

John T. Hull */RA/*
Counsel for NRC Staff

Dated at Rockville, Maryland
this 1st day of May 2000

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of May 2000, an electronic copy of "NRC STAFF'S RESPONSE TO MOTION FOR LEAVE TO REPLY" in the above-captioned proceeding has been transmitted to the Office of the Secretary for entry into the NRC's ADAMS system, and that electronic copies were transmitted to the other NRC offices listed below. On this date signed paper copies of the above-named response have been served, by U.S. Mail, first class, on the external recipients listed below and marked by single asterisks (electronic copies were also transmitted on this date to those external recipients marked by single asterisks and plus signs).

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