

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

November 30, 2004 (3:15pm)

BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

In the Matter of:	)	
	)	
Hydro Resources, Inc.	)	Docket No.: 40-8968-ML
P.O. Box 777	)	Date: November 22, 2004
Crownpoint, NM 87313	)	
	)	

**HYDRO RESOURCES, INC.'S RESPONSE TO INTERVENORS' PETITION FOR  
REVIEW OF LBP-04-23 WITH RESPECT TO SECTION 8**

**I. INTRODUCTION**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenor's Petition for Review of LBP-04-23 With Respect to Section 8 regarding HRI's Nuclear Regulatory Commission (NRC) source material license to operate an *in situ leach* (ISL) uranium recovery facility in Church Rock, New Mexico. For the reasons discussed below, HRI respectfully requests that the Commission deny Intervenor's Petition for Review, because the Presiding Officer's decision below with respect to Section 8 does not warrant Commission review.

**II. BACKGROUND AND PROCEDURAL HISTORY**

HRI obtained a source material license (SUA-1580) for its proposed Crownpoint Uranium Project (CUP) from NRC. As part of NRC Staff's review process, a draft and final environmental impact statement (FEIS) were prepared addressing various potential impacts from HRI's proposed CUP. After HRI's NRC license was approved by NRC Staff, several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM) and the Southwest Research Information Center (SRIC) (hereinafter the "Intervenor's"), were allowed to intervene to challenge that license. During the hearing, the Presiding Officer at that time (Judge Peter Bloch) bifurcated the proceeding to address separately HRI's four proposed ISL mining sites under its NRC license: (1) Church Rock Section 8, (2) Church Rock Section 17; (3) Unit One, and (4)

Crownpoint. As a result, most of the issues raised by Intervenor with respect to Section 8 were addressed and decided by Judge Bloch and, subsequently, by the Commission on appeal.

One final issue remained on which Intervenor appealed to the Commission wherein they alleged that HRI had not submitted necessary financial assurance information required for a license. On May 25, 2000, the Commission issued an Order requesting that HRI submit, within 180 days of its receipt, "a decontamination, decommissioning and reclamation plan with cost estimates on which a surety will be based."<sup>1</sup> The Commission further stated that, "[t]he plan in the first instance need only address the Section 8 site where HRI plans to begin operations first."<sup>2</sup>

In accordance with the Commission's May 25, 2000 Order, on November 21, 2000, HRI submitted the requested Section 8 Restoration Action Plan (RAP) and accompanying cost estimates addressing only the Section 8 portion of the CUP. On February 16, 2001, NRC Staff issued a Request for Additional Information (RAI) asking HRI to answer questions regarding specific issues associated with the Section 8 RAP.<sup>3</sup> On March 16, 2001, HRI submitted its response to NRC Staff's RAI.<sup>4</sup> On April 16, 2001, NRC Staff completed its review of HRI's Section 8 RAP and determined that the financial assurance information set forth therein was acceptable.<sup>5</sup> Subsequently, on July 24, 2001, HRI submitted a RAP for its Section 17 site and, later, RAPs for Unit One and Crownpoint. These RAPs and accompanying cost estimates were prepared by HRI personnel who would be responsible for groundwater restoration at Sections 8 and 17, based upon their personal experience implementing groundwater restoration at other ISL

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<sup>1</sup> See *In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-00-08, 51 NRC 227, \*16 (May 25, 2000).

<sup>2</sup> CLI-00-08 at \*23.

<sup>3</sup> See *Hydro Resources, Inc., Request for Additional Information Concerning Restoration Costs for Hydro Resources In-Situ Uranium Mining Project*, ML010520228 (February 16, 2001).

<sup>4</sup> See *Hydro Resources, Inc., Response to Request for Additional Information Concerning Restoration Costs for Hydro Resources In-Situ Uranium Mining Project*, ML010810221 (March 16, 2001).

<sup>5</sup> See *Hydro Resources, Inc. Acceptance of Restoration Action Plan for Hydro Resources In Situ Uranium Mining Project, License SUA-1580*, ML011270156 (April 16, 2001).

uranium mining facilities, including one in Texas operated by HRI's parent company, Uranium Resources, Inc. (URI).

Section 8 RAP issues were under consideration by the Presiding Officer when Intervenor filed a request with NRC Staff to supplement the FEIS for HRI's CUP based on a proposed housing project to be located in Fort Defiance, New Mexico (hereinafter the Springstead Estates Project or "SEP"), which would be located approximately two (2) miles from the southern restricted site boundary of the Section 17 mining site. On November 13, 2003, NRC Staff issued a letter indicating that it would review Intervenor's request. After the Presiding Officer issued LBP-04-03 and during a telephone conference regarding the status of the remaining Section 8 litigation, NRC Staff stated that they had reviewed Intervenor's request to supplement the FEIS and had determined that such a supplement was not necessary. As a result, Intervenor indicated that they wished to file their Motion to Supplement the FEIS with the Licensing Board. The Presiding Officer indicated that such a motion with respect to Section 17 could be filed with the Licensing Board, however, the Presiding Officer stated that such a motion with respect to Section 8 would have to be filed with the Commission, because the Licensing Board no longer had jurisdiction over Section 8 matters.

On May 14, 2004, Intervenor filed a motion requesting that the Presiding Officer direct NRC Staff to supplement the FEIS with respect to Section 17. Intervenor also filed a separate motion with the Commission requesting that NRC Staff be directed to supplement the FEIS with respect to Section 8. On May 26, 2004, the Commission issued an Order referring Intervenor's Motion to supplement the FEIS with respect to Section 8 to the Presiding Officer to be considered in conjunction with Intervenor's Motion to supplement the FEIS with respect to Section 17.

Subsequently, Intervenor filed an additional motion requesting that the Presiding Officer re-open the administrative record with respect to Section 8 to be considered in conjunction with their Motion to Supplement the FEIS with respect to Section 8. In response to those (3) motions, HRI responded asserting that, *inter alia*, the proposed SEP was too speculative

to require a supplement to the FEIS. On October 22, 2004, the Presiding Officer denied Intervenor's Motions and determined that Intervenor had not met the substantive legal requirements for the supplementation of an FEIS.<sup>6</sup> On November 11, 2004, Intervenor filed their Petition for Review with the Commission. In response, HRI submits this Response and respectfully requests that the Commission deny Intervenor's Petition for Review, because the Presiding Officer's decision below with respect to Section 8 was not based on legal error.

### III. STANDARD OF REVIEW

10 CFR § 2.1253 refers aggrieved parties seeking Commission review to 10 CFR § 2.786 which states, "a party may file a petition for review with the Commission" within fifteen (15) days of the service of an initial or partial initial decision by the Presiding Officer. *See* 10 CFR § 2.786 (b)(1). The Commission may, as a matter of discretion, grant review of Licensing Board orders based on whether a "substantial question" exists in light of the following considerations:

- (1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) A substantial and important question of law, policy or discretion has been raised;
- (4) The conduct of the proceeding involved a prejudicial procedural error; or
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 CFR § 2.786(b)(4)(i-v); *see also In the Matter of Duke Energy*, (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 2003 NRC LEXIS 215, \*5 (December 9, 2003). This standard of review has been fully incorporated into NRC's Subpart L regulations. *See* 10 CFR § 2.1253; *see also Babcock and Wilcox* (Pennsylvania Nuclear Service Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).

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<sup>6</sup> *See In the Matter of Hydro Resources, Inc.'s*, Memorandum and Order: Ruling on Intervenor's Motions to Supplement the FEIS, LBP-04-23, (October 22, 2004).

#### IV. ARGUMENT

Intervenors' Petition focuses on three (3) issues: (1) that the Licensing Board impermissibly shifted the burden of proof for demonstrating that a supplement to the FEIS was warranted to Intervenors, (2) that NRC Staff has failed to take a "hard look" at the potential impacts of the CUP on the proposed SEP, and (3) that the Licensing Board was in error by not directing NRC Staff to produce a supplement to the FEIS for public comment. As will be discussed below, with respect to each of their arguments, Intervenors have failed to make the requisite legal showing to justify, much less mandate, Commission review and, as such, their Petition for Review should be denied.

##### **A. The Licensing Board Was Not in Error When It Required Intervenors to Submit Written Motions Regarding FEIS Supplementation**

In their Petition, Intervenors allege that "[w]hen the Licensing Board required Intervenors to submit detailed affidavits regarding why the FEIS should be supplemented due to the SEP, it impermissibly shifted the burden of supplementing the FEIS to Intervenors." Intervenors' November 11, 2004 Petition for Review at 7. Intervenors also allege that the Licensing Board should have required NRC Staff to "at least justify its position with expert opinions or technical affidavits." *Id.*

Intervenors' allegations mischaracterize the requirements for disputing licensing decisions rendered by NRC Staff. Intervenors correctly state that NRC Staff declined to supplement the FEIS based on the proposed SEP and the environmental assessment prepared by the United States Department of Housing and Urban Development (HUD). However, Intervenors incorrectly state that NRC Staff was required to make an affirmative showing, using expert affidavits and testimony, that a supplement to the FEIS was not required. Intervenors have failed to provide one modicum of statutory or regulatory authority demonstrating that NRC Staff was required to complete and distribute analyses using expert affidavits and testimony.

Further, the Presiding Officer correctly directed Intervenors to submit motions (written challenges) to NRC Staff finding that the FEIS did not require supplementation in accordance with standard NRC licensing processes. As the expert regulatory agency for the management of nuclear materials, NRC Staff is responsible for conducting the initial review of requests for licensing actions, including proposed supplementation of a FEIS. As such, NRC Staff is required to make a decision regarding the merit of a party's request for licensing action. Each of these procedural steps is in accordance with standard NRC administrative practices.

In the instant case, NRC Staff reviewed Intervenors' request for FEIS supplementation and the accompanying EA from HUD. After this review, NRC Staff determined that Intervenors' request should be denied, because the analyses in the original FEIS were sufficient to account for the presence of the proposed SEP, should it ever be constructed and occupied. Based on this and in the interests of administrative finality and because of the extraordinary nature of Intervenors' request for supplementation of the FEIS, the Presiding Officer correctly directed Intervenors to submit written motions setting forth a *prima facie* case for supplementation of the FEIS. If the Presiding Officer did not issue such a requirement for Intervenors, it is possible that there could be no finality in administrative proceedings involving the preparation and evaluation of any FEIS.

Additionally, Intervenors' citation to 10 CFR § 2.732<sup>7</sup> and supporting case law is nothing more than a thinly veiled attempt to mischaracterize the type of licensing decision rendered by NRC Staff. NRC Staff received a request for a licensing action from Intervenors when the request for FEIS supplementation was submitted. Denial of their request provided Intervenors with an avenue to challenge NRC Staff's decision, but, as the Presiding Officer correctly determined, Intervenors were required to file motions demonstrating a *prima facie* case for supplementation.

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<sup>7</sup> Indeed, even if Intervenors' reliance on 10 CFR § 2.732 is not misplaced, the regulation specifically states that the Presiding Officer may order that the burden of proof on an order be shifted. *See* 10 CFR § 2.732.

Obviously, therefore, the Presiding Officer is not required to *sua sponte* order NRC Staff to have provided a technical justification tailored to satisfy Intervenors. The Presiding Officer's decision is firmly in accordance with standard NRC administrative practices regarding the burden of proceeding with a challenge to NRC Staff decisions and should not be considered legal error. Thus, Intervenors allegation that the Presiding Officer impermissibly shifted the burden of proof to Intervenors is without merit and does not warrant review.

**B. NRC Staff Did Not Fail to Take a "Hard Look" at Environmental Justice Issues**

Intervenors allege that NRC Staff failed to take a "hard look" at environmental justice issues pursuant to National Environmental Policy Act (NEPA) requirements. Intervenors' November 11, 2004, Petition for Review at 7-8. Even though Intervenors' allegation is directed at NRC Staff, Intervenors also allege that the Licensing Board ignored Intervenors' expert affidavits and other evidence demonstrating that the proposed SEP will affect the populations surrounding the CUP and that both NRC Staff and HRI only rely on analyses from the FEIS, which was drafted prior to the proposed SEP. *Id.* at 8-9.

Intervenors' allegations here are incorrect as they fail to account for the Presiding Officer's analysis in LBP-04-23 and the substance of HRI's and NRC Staff's response to Intervenors' motions below. The Presiding Officer's decision in LBP-04-23 with respect to environmental justice focuses on the analyses in the FEIS regarding the potential effects of the CUP on an area within *an 80 kilometer radius* of the HRI facility, including the area where the proposed SEP is to be located. *See* LBP-04-23 at 24. The FEIS analyses are supplemented by the current analyses provided by HRI's and NRC Staff's responses regarding the speculative status of the proposed SEP and the fact that groundwater flow and wind direction are away from the proposed SEP with no likelihood that either can or will be reversed by ISL mining operations at the CUP. *See generally id.* at 13; *see also In the Matter of Hydro Resources, Inc.*, Hydro Resources, Inc.'s Response to Intervenors' Motions to Supplement the Final Environmental

Impact Statement for Sections 8 and 17 and to Re-Open and Supplement the Record, at 7-8, Affidavit of Craig Bartels (June 21, 2004).<sup>8</sup> Based on this, the Presiding Officer determined that “the SEP presents no additional environmental justice concerns *not already addressed by the FEIS* and the Intervenor’s *have presented no evidence to the contrary.*” *Id.* at 24. Therefore, Intervenor’s allegation regarding a failure to take a “hard look” at environmental justice concerns does not warrant Commission review.

**C. The Licensing Board’s Decision Below Did Not Violate NEPA’s Public Participation Requirements**

Intervenor’s allege that “by deciding that the FEIS should not be supplemented, the Licensing Board also foreclosed the possibility of input from the very entities that could put to rest the questions of whether and how the SEP would be developed.” Intervenor’s November 11, 2004, Petition for Review at 9. Intervenor’s further allege that, “because...the [NRC] Staff did not circulate any draft supplementation documents publicly, nor did it attempt to contact those entities, those entities were unable to comment on the project and thus potentially clarify issues.” *Id.* at 10.

Similar to their first allegation discussed above, Intervenor’s allegation here mischaracterizes the proper procedures for addressing licensing actions. As stated above, since NRC is the expert regulatory agency for the management of nuclear materials, NRC Staff is responsible for reviewing requests for licensing actions such as the supplementation of an FEIS. Only after NRC Staff has reviewed a request for an initial EIS or for the supplementation of an

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<sup>8</sup> HRI recently submitted a letter from the Ft. Defiance Housing Corporation stating that they have relinquished control over the project and will not be performing work to construct such a housing development unless the Navajo Housing Authority requests their assistance. *See In the Matter of Hydro Resources, Hydro Resources, Inc.’s Submission of Information Potentially Relevant to This Proceeding, (September 27, 2004).* Further, HRI’s responses to Intervenor’s motions below specifically state that the proposed SEP has not engaged any regulatory or oversight authorities to conduct the required studies and assessments for the project prior to commencement of construction. *See In the Matter of Hydro Resources, Inc., Hydro Resources, Inc.’s Response to Intervenor’s Motions to Supplement the Final Environmental Impact Statement for Sections 8 and 17 and to Re-Open and Supplement the Record, at 7-8 (June 21, 2004).*



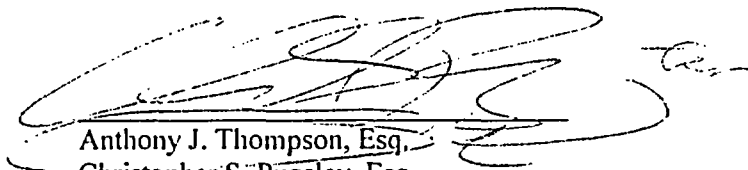
existing FEIS and determined that such an action is warranted will NEPA public participation requirements be triggered and will publication for comment of the appropriate EIS or supplementation documents be necessary. Thus, Intervenor's allegation improperly mischaracterizes the role of NRC Staff in the evaluation of FEIS supplementation requests.

Further, Intervenor's claim that several groups, if included in the public participation process, could have clarified the status of the SEP and the timeline along which the project would have been constructed and occupied and that, because they were not parties to the proceedings, they could not participate. This statement ignores the fact that Intervenor's could have solicited affidavits from these organizations in support of their motions below but, without such support, have no authority to represent them. The organizations' themselves have the right to participate in the publicly-noticed NRC hearing process had they so desired. As such, Intervenor's allegation regarding potential violation of NEPA public participation requirements is without merit and does not warrant review.

## V. CONCLUSION

Based on the discussion above, HRI respectfully requests that the Commission deny Intervenor's Petition for Review of LBP-04-23 with respect to Section 8.

Respectfully Submitted,



Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Law Offices of Anthony J. Thompson, P.C.  
1225 19<sup>th</sup> Street, NW  
Suite 300  
Washington, DC 20036  
(202) 496-0780  
(fax) (202) 496-0783



Administrative Judge, Robin Brett  
2314 44<sup>th</sup> Street, NW  
Washington, DC 20007  
Email: [rbrett@usgs.gov](mailto:rbrett@usgs.gov)

Louis Denetsosie, Attorney General  
Steven J. Bloxhalm, Esq.  
Navajo Nation Department of Justice  
P.O. Box 2010  
Window Rock, AZ 86515

William Zukosky  
DNA-Peoples' Legal Services, Inc.  
222 East Birch  
Flagstaff, AZ 86001  
Email:  
[wzukosky@dnalegalservices.org](mailto:wzukosky@dnalegalservices.org)

Adjudicatory File  
Atomic Safety and Licensing Board  
U.S. Nuclear Regulatory Commission  
Mail Stop: T- 3F23  
Washington, DC 20555

David C. Lashway, Esq.  
Hunton & Williams, LLC  
1900 K Street, NW  
Washington, DC 20006-1109  
Email: [dlashway@hunton.com](mailto:dlashway@hunton.com)

Geoffrey H. Fettus  
Natural Resources Defense Counsel  
1200 New York Avenue, NW  
Suite 400  
Washington, DC 20005  
Email: [gfettus@nrcdc.org](mailto:gfettus@nrcdc.org)

John T. Hull, Esq.  
U.S. Nuclear Regulatory Commission  
Office of the General Counsel  
Mail Stop: O-15D21  
Washington, DC 20555  
Email: [jth@nrc.gov](mailto:jth@nrc.gov)  
Email: [mtl1@nrc.gov](mailto:mtl1@nrc.gov)

W. Paul Robinson  
Chris Shuey  
Southwest Research and  
Information Center  
P. O. Box 4524  
Albuquerque, NM 87106

Eric Jantz, Esq.  
Douglas Meiklejohn, Esq.  
Heather L. Green  
New Mexico Environmental Law  
Center  
1405 Luisa Street, Suite 5  
Santa Fe, NM 87505  
Email: [ejantz@nmelec.org](mailto:ejantz@nmelec.org)  
Email: [meikljhn@nmelec.org](mailto:meikljhn@nmelec.org)  
Email: [Hgreen@nmelec.org](mailto:Hgreen@nmelec.org)

Laura Berglan  
DNA-People's Legal Services, Inc.  
P.O. Box 765  
Tuba City, AZ 86045  
Email:  
[lberglan@dnalegalservices.org](mailto:lberglan@dnalegalservices.org)

Office of Commission Appellate  
Adjudication  
U.S. Nuclear Regulatory  
Commission  
Mail Stop: O-16G15  
Washington, DC 20555

Atomic Safety and Licensing Board  
Panel  
U.S. Nuclear Regulatory  
Commission  
Mail Stop: T-3 F23  
Washington, DC 20555

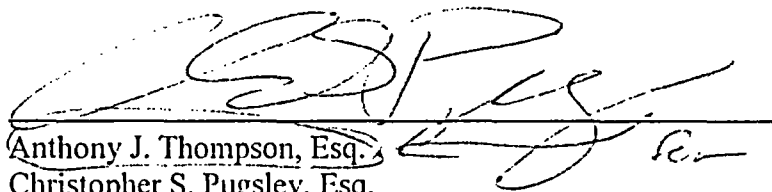
Attn: Chairman Nils J. Diaz,  
Mail Stop O-16C1  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
Email: [Chairman@nrc.gov](mailto:Chairman@nrc.gov)

U.S. Nuclear Regulatory Commission  
Attn: Jeffrey S. Merrifield, OCM  
Mail Stop O-16C1  
11555 Rockville Pike  
Rockville, MD 20852-2738  
Email: [cmrmerrifield@nrc.gov](mailto:cmrmerrifield@nrc.gov)

Thomas Fredrichs  
Nuclear Regulatory Commission  
Mail Stop T7F27  
Washington, DC 20555  
Email: [tlf@nrc.gov](mailto:tlf@nrc.gov)

Mr. Jon Peckinpaugh  
Nuclear Regulatory Commission  
Mail Stop T7J8  
Washington, DC 20555  
Email: [jmp@nrc.gov](mailto:jmp@nrc.gov)

U.S. Nuclear Regulatory  
Commission  
Attn: Edward McGaffigan, Jr.,  
OCM  
Mail Stop O-16C1  
One White Flint North  
11555 Rockville Pike  
Rockville, MD 20852-2738  
Email: [cmrmcgaffigan@nrc.gov](mailto:cmrmcgaffigan@nrc.gov)



Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Law Offices of Anthony J. Thompson, P.C.  
1225 19<sup>th</sup> Street, N.W., Suite 300  
Washington, DC 20036  
Telephone: (202) 496-0780  
Facsimile: (202) 496-0783  
Email: [ajthompson@athompsonlaw.com](mailto:ajthompson@athompsonlaw.com)  
Email: [cpugsley@athompsonlaw.com](mailto:cpugsley@athompsonlaw.com)

*Law Offices of Anthony J. Thompson, P.C.*

1225 19<sup>th</sup> Street, NW., Suite 300  
Washington, DC 20036  
202-496-0780  
Fax: 202-496-0783  
(e-mail): ajthompson@athompsonlaw.com

November 22, 2004

**BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL**

U.S. Nuclear Regulatory Commission  
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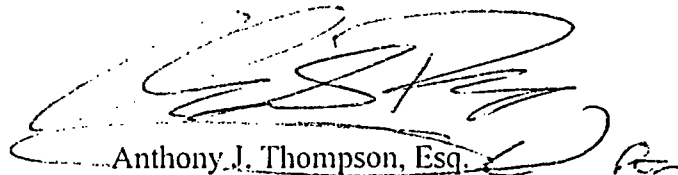
Re: In the Matter of: Hydro Resources, Inc.  
Docket No: 40-8968-ML  
ASLBP No: 95-706-01-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Petition for Review of LBP-04-23 with Respect to Section 8 in the above-captioned matter. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.  
Thank you for your time and consideration in this matter.

Sincerely,



Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Law Offices of Anthony J. Thompson, P.C.  
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER.doc)