February 10, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
P.O. Box 777	)	
Crownpoint, NM 87313	)	

NRC STAFF'S ANSWER TO INTERVENORS' PETITION TO REVIEW LBP-06-01

INTRODUCTION

On January 26, 2006, Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), requested that the Commission review LBP-06-01,[1] in which the Presiding Officer rejected their radiological air emission areas of concern.[2] *See* "Intervenors' Petition For Review of LBP-06-01" (Petition). The Staff files this answer, pursuant to 10 C.F.R. §§ 2.1253 and 2.786(b)(3), opposing the Petition.

BACKGROUND

In 1988, Hydro Resources Inc. (HRI) submitted a license application, pursuant to 10 C.F.R. Part 40, for authority to conduct *in situ* leach (ISL) uranium mining at its Church Rock site (contiguous portions of Sections 8 and 17) in New Mexico. HRI later amended its application to include additional lease areas known as the Unit 1 and Crownpoint sites (in and around Crownpoint, New Mexico), and to propose that processing of licensed material be conducted at a facility located at its Crownpoint site. In 1997 the NRC Staff published NUREG-1508, the "Final

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[1] *See* LBP-06-01, "Partial Initial Decision (Phase II Radiological Air Emissions Challenges To In Situ Leach Uranium Mining License)," 63 NRC ___(slip op. dated January 6, 2006).

[2] This proceeding commenced prior to February 13, 2004 – the effective date of the substantial revisions to the NRC's Rules of Practice in 10 C.F.R. Part 2. This proceeding is thus governed by the former Part 2, Subpart L hearing procedures, under which "areas of concern" rather than contentions are litigated. Accordingly, throughout this filing, the former Part 2 rules are cited.

Environmental Impact Statement to Construct and Operate [HRI's] Crownpoint Uranium Solution Mining Project" (FEIS), and in early January of 1998 the Staff issued a materials license to HRI.

In relevant part, after admitting the Intervenors' air emission concerns (*see* LBP-98-09, 47 NRC 261, 282 (1998)), the Presiding Officer bifurcated this proceeding and required that issues pertaining to HRI's Church Rock Section 8 site be adjudicated first. *See* unpublished orders dated September 22, 1998 and October 13, 1998. On this basis, the Intervenors filed their Phase I air emission presentation in January 1999, and in May 1999 the Presiding Officer rejected these concerns. *See* LBP-99-19, 49 NRC 421 (1999). The Commission denied the Intervenors' petition to review LBP-99-19. *See* CLI-00-12, 52 NRC 1(2000).

On June 13, 2005, the Intervenors submitted their Phase II air emission concerns (which pertain to radon emissions) for the Church Rock Section 17 ISL mining site;[3] the Presiding Officer rejected these concerns in LBP-06-01.[4] The Presiding Officer held that radon emanating from the surface spoilage from an old uranium mine (the UNC mine) on the Section17 site is background radiation under the regulatory definition at 10 C.F.R § 20.1003. The Presiding Officer went on to hold that, as background radiation, this radon should not be included in the total effective dose equivalent (TEDE) calculation for the site under 10 C.F.R. § 20.1301(a)(1). The Intervenors then filed their Petition, which the Staff now opposes.

DISCUSSION

I. Legal Standards Governing Petitions to Review Presiding Officer Decisions

The Commission has long limited its discretionary review of decisions, such as the Presiding Officer's decision in this proceeding, to matters for which established standards

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[3] *See* "[Intervenors'] Written Presentation in Opposition to [HRI's] Application for a Materials License With Respect to: Radiological Air Emissions for Church Rock Section 17" (June 13 Brief).

[4] The Intervenors previously petitioned for review of LBP-05-26 (cultural resources), which is still pending before the Commission. The Intervenors have also challenged the adequacy of the Environmental Impact Statement. This issue is still pending before the Presiding Officer.

demonstrate that Commission review is justified. To that end, pursuant to 10 C.F.R. §§ 2.1253 and 2.786(b)(1), "a party may file a petition for review with the Commission" within fifteen (15) days after service of a full or partial initial decision by a presiding officer. *See Babcock and Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995). A petition for review must contain:

> (1) A concise summary of the decision or action of which review is sought;
> (2) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;
> (3) A concise statement why in the petitioner's view the decision or action is erroneous; and
> (4) A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv).

As a matter of its discretion, the Commission may grant review of presiding officer decisions if a "substantial question" exists indicating that:

> (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;
> (5) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4)(i-v); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001).

II. Intervenors Fail to Meet 10 C.F.R. § 2.786(b)(4) Review Standards

The Intervenors do not address any of the 10 C.F.R. § 2.786(b)(4) standards set forth above, and thus fail to show that Commission review of LBP-06-01 is warranted. No clearly erroneous findings of material fact are identified in the Petition. No necessary legal conclusions lacking a governing precedent, or otherwise departing from established law, are identified in the Petition. No substantial and important questions of law or policy are identified in the Petition. As

discussed below, the Intervenors' three arguments in support of Commission review (set forth in their Sections A-C and addressed accordingly below) ignore most of the Presiding Officer's analysis, and do not support discretionary review of LBP-06-01. Because Intervenors have not provided a sufficient basis for Commission review, their Petition should be denied.

A. Reliance on TENORM Concept Appropriate

The Intervenors' Argument A contends that in construing the definition of "background radiation" (one of the defined terms in 10 C.F.R. § 20.1003), the Presiding Officer improperly incorporated into that definition the concept of "technically enhanced naturally occurring radioactive material" (TENORM). *See* Petition, at 4-6. This argument lacks merit. The NRC's broad definition of "background radiation," as noted by the Presiding Officer, includes naturally occurring radioactive material (NORM), and states in full as follows:

> *Background radiation* means radiation from cosmic sources; naturally occurring radioactive material [NORM], including radon (except as a decay product of source or special nuclear material); and global fallout as it exists in the environment from the testing of nuclear explosive devices or from past nuclear accidents such as Chernobyl that contribute to background radiation and are not under the control of the licensee. *"Background radiation"* does not include radiation from source, byproduct, or special nuclear materials regulated by the Commission.

10 C.F.R. § 20.1003. After noting that the NRC's regulations do not further define NORM, the Presiding Officer found that TENORM is commonly regarded as being a subset of NORM, as shown by the documented evidence of regulatory and industry practice submitted by the Staff. *See* LBP-06-01, slip op. at 29-31 ("The broad definition of NORM includes radioactive materials that are undisturbed in nature, as well as radioactive materials that, as a result of human activities, are no longer in their natural state").

The Intervenors in their Petition do not reference the Presiding Officer's discussion of this regulatory and industry practice, or show that reliance on such evidence constitutes legal error. The Intervenors, relying on *Smith v. United States*, 508 U.S. 223, 228 (1993) (a decision also cited by the Presiding Officer), suggest that the Presiding Officer should have stopped his inquiry

after determining the ordinary meaning of the term. Importantly, however, the Intervenors fail to acknowledge that the *Smith* court applied its ordinary-meaning rule to "non-technical words and phrases" *id,* or to demonstrate that *Smith* prohibits reliance on regulatory and industry practice in the application of an undefined technical regulatory term as the Presiding Officer here appropriately did. *See* Petition, at 4. In fact, when a word or phrase is commonly used as a term of art in a particular discipline and the statutory or regulatory framework deals with that discipline, that word or phrase should be given the meaning understood in that discipline, because, if the words are "addressed to specialists, they must be read by judges with the minds of the specialists." *U.S. v. Cuomo*, 525 F.2d 1285, 1291 n.17 (5th.Cir. 1976) citing *Bradley v. United States*, 410 U.S. 605, 609 (1973); *see also Utah v. Evans,* 536 U.S. 452, 467 (2002).

B. Principles of Regulatory Interpretation Are Not Violated

The Intervenors' Argument B challenges the Presiding Officer's regulatory interpretation of 10 C.F.R. § 20.1301(a)(1) and the definition of "background radiation" found in 10 C.F.R. § 20.1003. As discussed below, the Presiding Officer's interpretation of each section complied with principles of regulatory interpretation. The Intervenors' arguments to the contrary lack merit and should be rejected.

First, the Intervenors have fundamentally mischaracterized the Presiding Officer's holding with respect to the phrase "from the licensed operation" in 10 C.F.R. § 20.1301(a)(1). The Intervenors claim that "LBP-06-01 interprets the phrase 'from the licensed operation' to exclude from the TEDE any radiation whose source is unlicensed by the Commission." Petition, at 7. This restatement of the Presiding Officer's holding is erroneous. Intervenors are correct that the Presiding Officer, in LBP-06-01, interprets the phrase "from the licensed operation" in 10 C.F.R. § 20.1301(a)(1) to serve as a limitation on what is to be included in the TEDE calculation. However, the Presiding Officer interpreted the phrase "from the licensed operation" to exclude from the TEDE radiation that is "wholly unrelated to HRI's licensed ISL mining

operation," such as that emanating from the old UNC mining operation's surface spoilage. LBP-06-01, slip op. at 28. The importance of the phrase "from the licensed operation" in section 20.1301(a)(1), as interpreted by the Presiding Officer, is that it excludes sources of radiation that do not arise from the operation relevant to the matter for which approval is being sought in this proceeding. Because the surface spoilage on the site precedes HRI's operation, it cannot be "from the licensed operation." *Id.*

The Intervenors state that "[b]y itself, this deviation from the norms of statutory and regulatory interpretation warrants review." Petition, at 7. Several sources of radiation are excluded from the TEDE calculation after the phrase "from the licensed operation":

> The [TEDE] to individual members of the public from the licensed operation does not exceed 0.1 rem . . . in a year, exclusive of the dose contributions from background radiation, from any medical administration the individual has received, from exposure to individuals administered radioactive material and released under § 35.75, from voluntary participation in medical research programs, and from the licensee's disposal of radioactive material into sanitary sewerage in accordance with § 20.2003 . . . .

10 C.F.R. § 20.1301(a)(1).

The alleged deviation from the norms of statutory interpretation is a reference to the Presiding Officer's invocation of the rule against surplusage, i.e., "the canon of construction that favors construing regulations to give import and significance to every term and phrase." *See* Order (Directing Parties to Provide Supplemental Briefing in Phase II Radiological Air Emissions Challenges to In Situ Leach Uranium Mining License) November 15, 2005. Under this theory, the exclusions for medical administrations and sanitary sewage would be unnecessary surplusage if the TEDE were limited to radiation "from the licensed operation."

The Staff has argued that the TEDE exclusions in 10 C.F.R. § 20.1301(a)(1) are consistent with its interpretation limiting the TEDE to radiation "from the licensed operation," and are not rendered mere surplusage by this interpretation. *See* NRC Staff's Supplemental Brief (Dec. 7, 2005) at 6-10. The Presiding Officer agreed with the Staff regarding the meaning of the

phrase “from the licensed operation,” yet was unwilling to rest his decision entirely on this interpretation because, contrary to the Staff’s position, he was unable to square this interpretation with the rule against surplusage. LBP-06-01 at 28, n. 22. He was, however, able to base his decision on a separate, entirely independent basis, that is, he was able to base his decision on his determination that the radon emanating from the surface spoilage is background radiation, which is excluded from the TEDE regardless of the interpretation of the phrase “from the licensed operation.”[5] Thus, even if the Intervenors’ argument was valid (a point we do not concede), the Presiding Officer’s interpretation of this phrase does not warrant review by itself because it was not necessary for his decision.[6]

Second, the Intervenors also challenge the Presiding Officer’s holding that the radon emanating from surface spoilage on the site is properly classified as background radiation. Petition, at 8. As background radiation, this radon is excluded from the TEDE. The Presiding Officer’s thorough analysis of the term “background radiation,” discussed below, and its use in 10 C.F.R. § 20.1301(a)(1), did not violate any principles of regulatory interpretation.

In analyzing the second of the two sentences comprising the “background radiation” definition set forth above, the Presiding Officer concluded that (1) the existing mine spoilage on Section 17 is neither by-product material nor source material regulated by the Commission; and (2) radiation from the mine spoilage is thus not excluded from the definition of background

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[5] As detailed in its supplemental brief, the Staff agrees with both possible bases of the decision, i.e., that the radon can be excluded (1) because it does not arise from the licensed operation, and (2) because it is background radiation. While the Staff agrees with the Presiding Officer’s discussion of the definition of background radiation, it does not believe that discussion was necessary because the radon emanating from the site’s surface spoilage can be excluded from the TEDE by virtue of its not arising “from the licensed operation.”

[6] The relative emphasis the Presiding Officer placed on the two theories can be seen from the one paragraph devoted to the interpretation of “from the licensed operation” followed by the Presiding Officer’s four page discussion of whether the radon produced by the surface spoilage is background radiation. LBP-06-01, slip op. at 28-33.

radiation. *See* LBP-06-01, slip op. at 14-27. Intervenors fail to address this part of the Presiding Officer's analysis or indicate in any way how the analysis constitutes reversible error.

Next, the Presiding Officer discussed (*id*., at 28-31) the NRC's TEDE requirement – which sets radiological dose limits for the general public that NRC licensees in conducting licensed operations must meet. As discussed above, the TEDE is calculated "exclusive of the dose contributions from background radiation." 10 C.F.R. § 20.1301(a)(1).

Finally, the Presiding Officer turned to the first of the two sentences comprising the "background radiation" definition, and explained why radiation from the mine spoilage on Section 17 is included in that definition. *See* LBP-06-01, slip op. at 31-33. Specifically, the Presiding Officer acknowledged the Commission's intent to include ambient radon in the regulatory definition of "background radiation" and agreed with the Staff's argument that the parenthetical in the definition's first sentence – "(except as a decay product of source or special nuclear material)" – must not apply to radon emanating from all source or special nuclear material. Otherwise, no ambient radon would fit the definition of background radiation, contrary to the Commission's stated intent. *Id.* at 32 *citing Exxon Nuclear Co.* (Nuclear Fuel Recovery and Recycling Center), ALAB-447, 6 NRC 873, 878 (1977). Thus, the Presiding Officer agreed with the Staff's interpretation of the parenthetical, limiting its application to radon emanating from source or special nuclear materials regulated by the Commission. The Intervenors dispute this interpretation, yet fail to propose any alternative interpretation of the parenthetical in keeping with the Commission's intent to include ambient radon as background radiation and fail to show any error that would justify Commission review.

The Intervenors argue that this interpretation of the parenthetical renders the definition's second sentence superfluous. Petition, at 8. This argument is without merit. The second sentence deals with all sources of radiation from materials regulated by the Commission, while the parenthetical in the first sentence deals with radon only. In light of the second sentence, it

would have been superfluous for the radon parenthetical to include the phrase "regulated by the Commission."

Based on his analysis harmonizing the entire definition of background radiation (*i.e.*, both its first and second sentences) with the use of this term in the 10 C.F.R. § 20.1301(a)(1) TEDE requirement set forth above, the Presiding Officer concluded that any radiation that is being emitted from the Section 17 surface spoilage is excluded from HRI's required TEDE calculations. *See* LBP-06-01, slip op. at 33. The Intervenors state that interpreting an NRC regulation requires reading it as a whole, taking into account its language and structure. *See* Petition, at 6, *citing Wrangler Laboratories, et. al.*, ALAB-951, 33 NRC 505, 513-514 (1991). As set forth above, this is precisely what the Presiding Officer did in analyzing the NRC regulations at issue here. *See* LBP-06-01, slip op. at 14-33.

The Intervenors conclude their Argument B by charging that the FEIS "misleadingly dismisses" the existence of airborne radioactivity at the Church Rock Section 17 site, and that the Commission should accordingly order that the FEIS be revised. Petition, at 8. In addition to being outside the scope of the request for Commission review of LBP-06-01, the charge is unacceptably vague in its cite to "*Id*. at 19-20," for no such pages exist in the FEIS. *See* 10 C.F.R. § 2.786(b)(2)(ii) (a petition for review must contain adequate record citation, and identify where the matter raised in the petition was previously raised before the presiding officer). The Intervenors failed to show that the Presiding Officer's interpretation was without governing precedent or was a departure from established law. Therefore review should not be granted.

C. Policy Argument Lacks Merit

The Intervenors' sole reference to LBP-06-01 in their Argument C is to a footnote in which the Presiding Officer provides a factual backdrop to his finding that any HRI Section 17 mining operations would produce only an insignificant addition to preexisting radiological impacts there. *See* Petition, at 9, *citing* LBP-06-01, slip op. at 21 n.16. The Presiding Officer's factual

discussion here is not a ruling on which legal error can be charged because it is not pertinent to the Presiding Officer's ruling. Neither his interpretation of the phrase "from the licensed operation," in 10 C.F.R. § 20.1301(a)(1) nor that of the definition of "background radiation" in 10 C.F.R. § 20.1003 rely on the amount of radiation involved. The level of radiation associated with this radon is irrelevant to the fact that it is, indeed, background radiation. The Intervenors further fail to establish that the Presiding Officer's discussion constitutes an erroneous finding of material fact pursuant to 10 C.F.R. § 2.786(b)(4)(i). The Intervenors make reference to a "dose of over one rem/year at Church Rock Section 17." Petition, at 9. But they do not identify who would allegedly receive such a dose, nor do they make clear the extent to which they are claiming that this dose would relate to HRI's proposed ISL operations. *See id*., at 9-10. The Intervenors' unacceptably vague policy argument thus does not support their request for Commission review.

CONCLUSION

For the reasons set forth above, Intervenors have failed to establish the existence of the type of issue for which the Commission considers discretionary review of a decision. *See* 10 C.F.R. §§ 2.1253 and 2.786(b). Accordingly, the Commission should deny the Petition.

Respectfully Submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 10th day of February, 2006

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' PETITION TO REVIEW LBP-06-01" in the above-captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**), on this 10th day of February, 2006.

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