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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	)	Date: February 10, 2006
	)	

RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-06-01 REGARDING CHURCH ROCK SECTION 17 AIR EMISSIONS

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenors' Petition for Review of the Presiding Officer's decision in LBP-06-01. For the reasons discussed below, HRI respectfully requests that the Commission reject Intervenors' Petition for Review.

I. INTRODUCTION AND PROCEDURAL HISTORY

HRI obtained source material license SUA-1508 for a proposed *in situ* leach (ISL) uranium recovery operation in January of 1998. Several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM), the Southwest Research Information Center (SRIC), and Grace Sam and Marilyn Morris (hereinafter the "Intervenors") subsequently were allowed to challenge that license.

On February 3, 2005, the Presiding Officer approved a revised briefing schedule under which Intervenors, HRI, and NRC Staff were required to submit written presentations regarding four (4) areas of concern, one of which was radioactive air emissions at the Church Rock Section 17 site. On June 13, 2005, Intervenors submitted their written presentation regarding radioactive air emissions issues for the Section 17 site. In response, on July 29, 2005 and August 5, 2005, respectively, HRI and NRC Staff submitted their written presentations in opposition to Intervenors' arguments. Later, the Presiding Officer requested

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that all parties submit supplemental briefs answering specific questions regarding the interpretation of NRC 10 CFR Part 20 requirements, including the definition of "background radiation." On December 7, 2005, all parties submitted responses to the Presiding Officer's questions.

On January 6, 2006, the Presiding Officer issued LBP-06-01 and held that HRI's NRC license and the health and safety commitments encompassed therein with respect to radioactive air emissions at the Section 17 site were adequately protective of public health and safety. More specifically, the Presiding Officer determined that the total effective dose equivalent (TEDE) from HRI's licensed operations at the Section 17 site would not exceed 10 CFR Part 20 limits. Further, the Presiding Officer held that radiation from surface *mining* spoilage at the Section 17 site should be excluded from TEDE calculations because, pursuant to Part 20, radiation from such *mining* spoilage is part of "background radiation."

On January 26, 2006, Intervenors' submitted a Petition for Review of LBP-06-01 alleging: (1) that LBP-06-01 improperly used the term technically enhanced naturally occurring radioactive material (TENORM) to define *mining* spoilage at the Section 17 site; (2) that LBP-06-01's interpretation of "background radiation" was inconsistent with traditional canons of statutory and regulatory interpretation; and (3) that, as a policy matter, LBP-06-01 impermissibly broadens the scope of radiation that may be excluded from TEDE calculations. HRI submits this Response in opposition and respectfully requests that the Commission deny Intervenors' Petition for Review.

II. 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).[1]

Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically demands, the record compels a different result. *See e.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). However, a finding by a Licensing Board will not be overturned simply because a different result could have been reached. *See Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975). Thus, the Commission generally does not "second-guess" a Presiding Officer's "reasonable findings." *Id.*

[1] 10 CFR § 2.786 requirements for Commission review of Presiding Officer initial decisions are now codified at 10 CFR § 2.341 and are substantially the same. However, since this proceeding commenced prior to the promulgation of Section 2.341, Section 2.786 requirements should apply.

III. ARGUMENT

A. The Presiding Officer's Decision in LBP-06-01 Properly Determines that the Section 17 Mining Spoilage Should Be Excluded as Background Radiation from TEDE Calculations

First, the Presiding Officer's decision in LBP-06-01 properly held that the Section 17 *mining* spoilage should be excluded as "background radiation" from TEDE calculations and does not constitute a substantial question of law warranting Commission review. Intervenors contend that the Presiding Officer's use of the term "TENORM" was improper and, apparently, an error of law "because the Commission has never adopted TENORM into the Part 20 definition of background radiation." Intervenors' Petition for Review at 5. Intervenors claim that the use of TENORM by the Commission would be inconsistent with the concept of "naturally occurring radioactive material" or "NORM" and that the Commission specifically did not intend to use TENORM, as evidenced by its removal from the final rule regarding the definition of "background radiation." *Id.* at 5-6.

Intervenors contention is without merit. The term "TENORM" is commonly used in NRC's interpretations of "background radiation" in relation to the proper regulatory classification for a given material. TENORM and the Commission's regulatory authority over such material are discussed in SECY-01-0057 entitled *Partial Response to SRM COMEXM-00-0002—"Expansion of NRC Statutory Authority Over Medical Use of Naturally Occurring and Accelerator-Produced Radioactive Material.* (March 29, 2001). SECY-01-0057 involves a Commission inquiry into whether the Atomic Energy Act of 1954 (AEA), as amended, should be amended further to extend its regulatory authority to NORM and TENORM.[2] The SECY paper defines TENORM as a subset of NORM, as that term is used

[2] Indeed, unquestionably the Commission's inquiry into whether the AEA should be amended to extend its regulatory scope to NORM and TENORM, which is a subset of NORM, demonstrates that the Commission recognized that such material was outside the scope of its jurisdiction.

in 10 CFR § 20.1003, and is described by NRC Staff as "primordial material whose radioactivity has been increased or concentrated as a result of human intervention." NRC Staff August 5, 2005 Written Presentation at 25, *citing* SECY-01-0057 at 3. Such materials, as noted by the United States Environmental Protection Agency (EPA), include materials produced as a result of "*mining* operations."[3] *Id.* at 26-27, Staff Exhibit 8, *citing* United States Environmental Protection Agency, EPA 402-R-00-01, *Evaluation of EPA's Guidelines for [TENORM]* at 2.

As Congress has not yet amended the AEA to extend Commission jurisdiction to NORM and TENORM and the Commission has explicitly recognized the existence of a class of materials known as NORM and its subset TENORM, which are currently regulated under appropriate EPA or State authority. Although TENORM is not AEA-*licensable* material, the Commission still may define the Section 17 *mining* spoilage as TENORM, if for no other reason than to demonstrate that such material is excluded from Commission jurisdiction. Moreover, as subset of NORM, TENORM is explicitly excluded from the definition of "background radiation." As a result, the use of the term "TENORM" in LBP-06-01 is consistent with existing Commission regulations and guidance.[4]

Further, the concept of TENORM, in the context of "background radiation," can be found in NUREG/CR 6204 entitled *Questions and Answers from Eight Sets of Questions and Answers on the Major Revision of 10 CFR Part 20*, which recognizes that:

> "If the source of the radon is from radium that is not licensed or controlled by any agency, then the dose from radon and its daughters is considered background

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[3] This definition is also consistent with "unrefined and unprocessed ore," as defined in 10 CFR § 40.13(b), which is exempt from NRC licensing.

[4] Intervenors' allegation regarding the need for a "notice-and-comment" proceeding to use the term "TENORM" would be correct if Congress were to amend the AEA to expand Commission authority to such material. However, the Presiding Officer merely classified the Section 17 *mining* spoilage as TENORM to demonstrate that such material is outside the scope of Commission authority.

radiation and may be excluded from...public dose estimates, *whether there is any technological enhancement of the concentrations or not.*"

NUREG/CR-6204 at 3; *see also* HRI's December 7, 2005 Written Presentation, Exhibit D. Thus, while not expressly using the term TENORM, NRC's answer recognizes a class of materials (i.e., TENORM) that are part of "background radiation," even though they may have undergone some form of *technological enhancement.* Given that *mining* spoilage qualifies as TENORM as defined by NRC in SECY-01-0057 and by EPA in EPA-402-R-00-01 and that, as discussed above, such material is outside the scope of Commission jurisdiction, the Presiding Officer's classification of the Section 17 *mining* spoilage as TENORM is consistent with NRC regulations and guidance and does not warrant Commission review.

B. The Presiding Officer's Interpretation of "Background Radiation" Does Not Pose a Substantial Question of Law With Respect to Statutory and Regulatory Interpretation Warranting Commission Review

Second, the Presiding Officer's interpretation of the definition of "background radiation" in LBP-06-01 does not constitute a substantial question of law warranting Commission review. Intervenors contend that the Presiding Officer admits that, "his reading of 10 C.F.R. § 20.1301(a)(1) renders part of the regulation 'unnecessary,' thus violating basic principles of statutory and regulatory interpretation." Intervenors' Petition for Review at 7. Further, Intervenors' claim that the Presiding Officer's interpretation also "is inconsistent with the regulatory scheme of Part 20, as evidenced in the statement of purpose and the definition of 'public dose.'" *Id.* Finally, Intervenors claim that the Commission should accept review to "provide an interpretation of the relevant Part 20 regulations that is consistent with the entire Part 20 regulatory scheme." *Id.*

Initially, Intervenors' allegation that the Presiding Officer's interpretation of Part 20.1301(a)(1) is inconsistent with traditional canons of statutory and regulatory interpretation

practices is without merit. As noted in NRC Staff's December 7, 2005 Supplemental Brief, the United States Supreme Court has stated that this canon of construction (i.e., lending meaning to all portions of a regulation without redundancy) is not dispositive, "as one rule of construction among many, albeit an important one, the rule against redundancy does not necessarily have the strength to turn a tide of good cause to come out the other way." NRC Staff Written Presentation at 10, *citing Gutierrez v. Ada*, 528 U.S. 250 (2000). Further, the Presiding Officer explicitly notes that he "decline[s] to base this decision exclusively on this rationale...*I therefore proceed with an analysis that inquires whether radiation from the surface spoilage is background radiation that is excluded from the TEDE.*" LBP-06-01 slip op. at 30, fn. 22 (emphasis added). After making this statement, the Presiding Officer provides a detailed discussion and interpretation of the definition of "background radiation" and concludes that, based on Part 20.1301(a)(1), radiation from *unlicensed* Section 17 *mining* spoilage should be excluded from TEDE calculations as "background radiation." Thus, the Presiding Officer's decision that the canon of "redundancy" was not controlling in this instance and, as such, does not warrant Commission review.

Next, Intervenors' allegation that the Presiding Officer's interpretation of "background radiation" is inconsistent with the Part 20 regulatory scheme is also without merit. While Intervenors cite language from Part 20.1001(b) regarding "licensed" and "unlicensed" sources, they neglect to address the remaining language in that regulation which states that TEDE calculations should include all such radiation sources, "*other than background radiation....*" 10 CFR § 20.1001 (2006). Intervenors argument also fails to account for NRC's interpretation of this regulation in NUREG-1736 entitled *Consolidated Guidance: 10 CFR Part 20-Standards for Protection Against Radiation*: "[h]owever, as noted in Section 20.1002, the limits *do not apply to doses from background radiation.*" NUREG-1736 at 3-2 (emphasis added). The plain language of the regulation and NRC's interpretation

thereof demonstrates that *unlicensed* radiation sources deemed to be part of "background radiation," are specifically excluded from TEDE calculations and, thus, outside the scope of Commission regulation. As a result, instead of an inappropriate interpretation, as Intervenors suggest, the Presiding Officer's interpretation of Part 20.1301 is consistent with the language of Part 20.1001(b). Further, as the Supreme Court has repeatedly stated, an agency's reasonable interpretation of its empowering statute and implementing regulations is entitled to deference.[5] Thus, Intervenors' allegation on this issue does not constitute an error or novel issue of law warranting Commission review.

C. The Presiding Officer's Decision in LBP-06-01 Does Not Pose a Novel Issue of Commission or Public Policy Warranting Commission Review

Third, the Presiding Officer's decision in LBP-06-01 does not constitute a substantial question of public policy warranting Commission review. On this issue, Intervenors' allege the following points: (1) that the Commission would be "turning a blind eye to the public health impacts of anthropogenic radiation sources other than the licensed operation" if LBP-06-01 is not reversed; (2) that the Presiding Officer's concept of "typical" background levels in the United States is "distorted;" and (3) that the Crownpoint Uranium Project FEIS should be revised to reflect "typical" ambient radiation levels at Crownpoint. Intervenors' Petition for Review at 9-10.

Intervenors' allegations are without merit for several reasons. First, as noted above, the Presiding Officer's interpretation of "background radiation" is consistent with Commission policies and practices. As noted in HRI's written presentation, the exclusion from NRC regulation of materials produced from *mining* operations that have not reached a uranium milling facility has been recognized by the Commission since the early 1980s. *See*

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[5] *See Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

United States Nuclear Regulatory Commission, *Generic Environmental Impact Statement on Uranium Milling*, Vol. 1, A-89 & A-94 (September, 1980) (stating that NRC "has no direct authority over *uranium mining or mine wastes*."). This same policy has been recognized by the Atomic Safety and Licensing Appeal Board in *In the Matter of Rochester Gas and Electric,*

> "The Atomic Energy Commission's jurisdiction in this area was transferred to the NRC on January 19, 1975, by the Energy Reorganization Act of 1974, 42 U.S.C. § 5841(f). As the quoted observation indicates, the Commission's authority over uranium ore and other 'source material' attaches only '*after* removal from its place of deposit in nature,' and *not when the ore is mined.*"

8 NRC 551, *6 (November 17, 1978), *citing* 42 U.S.C. § 2092 (2005) (emphasis added). As a result, the Commission is not turning a "blind eye" to radiation safety hazards associated with *mining* spoils, as it expressly recognizes that it does not have the authority to regulate radiation from such spoils. Thus, Intervenors' allegation cannot represent a substantial question of policy, because it is a part of existing Commission policy.

Further, as stated above, the concept of TENORM has been recognized by NRC throughout Part 20's regulatory history and, thus, cannot constitute a substantial question of policy. TENORM, as defined by EPA, is a term recognized by the Commission and by NRC Staff in responses to the Commission's questions regarding the scope of AEA regulation and the interpretation of what constitutes "background radiation" under Part 20. Thus, Intervenors' allegation on this issue cannot constitute a substantial question of law or policy, because, as stated above, TENORM is a commonly used term in NRC Part 20 policy and interpretations.

Moreover, when opining on background radiation levels in the Church Rock and Crownpoint area, Intervenors' claim that the Commission should correct the Presiding Officer characterization of Section 17 levels as "typical." This argument fails to make any

colorable claim that this characterization affects the outcome of this proceeding in any substantive manner. The Presiding Officer's discussion of "typical" background radiation levels in the United States was merely offered as a "factual backdrop," and was based on NRC guidance (i.e., NUREG-1501 entitled *Background as a Residual Radioactivity Criterion for Decommissioning* (August 1994, Draft Report)), and was further qualified by the Presiding Officer: "this broad range itself is subject to variation, because the cosmic component of background radiation can vary by 10 percent over the 11-year solar cycle, and sporadic geophysical phenomena...can contribute significant additional background doses to the environment." LBP-06-01 slip op. at 22, fn 22. Intervenors' failure to offer any colorable claim as to how the Presiding Officer's discussion of "typical" background radiation levels would affect the ultimate outcome of this proceeding demonstrates that their allegation is without merit.

IV. CONCLUSION

For the reasons discussed above, HRI respectfully requests that the Commission deny Intervenors' Petition for Review.

Respectfully Submitted,

Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Simmons, PLLC
1225 19th Street, NW, Suite 300
Washington, DC 20036
(202) 496-0780
(telefax) (202) 496-0783
ajthompson@athompsonlaw.com
cpugsley@athompsonlaw.com

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: Hydro Resources, Inc. P.O. Box 777 Crownpoint, NM 87313	)	Docket No.: 40-8968-ML Date: February 10, 2006

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Hydro Resources, Inc.'s Response to Intervenors' Petition for Review of LBP-06-01 Regarding Church Rock Section 17 Air Emissions in the above-captioned matter has been served upon the following via electronic mail, expedited service, and U.S. First Class Mail on this 10th day of February, 2006.

Administrative Judge*
E. Roy Hawkens
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Mail Stop T3F23
Rockville, MD 20852
Email: erh@nrc.gov

Administrative Judge *
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
11545 Rockville Pike
Mail Stop T3F23
Rockville, MD 20852
Email: rfc1@nrc.gov

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755
Email: jep@jephill.com

Office of the Secretary
Attn: Rulemakings and
Adjudications Staff
U.S. Nuclear Regulatory
Commission
Mail Stop: OWFN-16 C1
Washington, DC 20555
Email: hearingdocket@nrc.gov

Mark S. Pelizza, President
Uranium Resources, Inc.
650 S. Edmonds Lane
Lewisville, TX 75067
Email: mspelizza@msn.com

Office Manager
Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 150
Crownpoint, New Mexico 87313

Administrative Judge, Robin Brett*
2314 44th Street, NW
Washington, DC 20007
Email: 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.
201 East Birch Avenue, Suite 5
Flagstaff, AZ 86001-5215
Email:
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 20037
Email: dlashway@hunton.com

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

John T. Hull, Esq.*
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop: O-15D21
Rockville, MD 20852
Email: jth@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
Sarah Piltch
New Mexico Environmental Law
Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
Email: ejantz@nmelc.org
Email: meikljhn@nmelc.org
Email: Hgreen@nmelc.org

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

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory
Commission
Mail Stop: O-16G15
Washington, DC 20555-0001

Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory
Commission
Mail Stop: T3F23
Washington, DC 20555

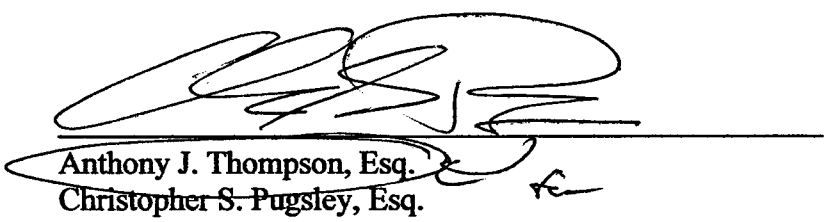
U.S. Nuclear Regulatory Commission
Attn: Chairman Nils J. Diaz,
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
Email: Chairman@nrc.gov

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

U.S. Nuclear Regulatory Commission
Attn: Gregory Jaczko
OCM
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
Email: jkr@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

U.S. Nuclear Regulatory Commission
Attn: Peter Lyons
OCM
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
Email: pbl@nrc.gov



Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Thompson & Simmons, PLLC.
1225 19th Street, N.W., Suite 300
Washington, DC 20036
Telephone: (202) 496-0780
Facsimile: (202) 496-0783
Email: ajthompson@athompsonlaw.com
Email: cpugsley@athompsonlaw.com

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THOMPSON & SIMMONS, PLLC.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
202.496.0780/202.496.9111
Fax: 202.496.0783

440 Meadow Street
Waterbury, Connecticut 06702

ANTHONY J. THOMPSON
ajthompson@athompsonlaw.com
Admitted in D.C. and Virginia

CHARLES T. SIMMONS
csimmons@athompsonlaw.com
Admitted in CT and D.C.

CHRISTOPHER S. PUGSLEY
cpugsley@athompsonlaw.com
Admitted in MD

February 10, 2006

BY ELECTRONIC MAIL, U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: OWFN-16C1
Washington, DC 20555

Re: In the Matter of: Hydro Resources, Inc.
Docket No: 40-8968-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Petition for Review 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.
Thompson & Simmons, PLLC.
Counsel of Record to HRI

Enclosures

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