March 20, 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 REPLY TO SUPPLEMENTAL BRIEFS ON APPEAL OF LBP-06-01 CONCERNING RADIOLOGICAL AIR EMISSIONS

INTRODUCTION

On January 26, 2006, Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), requested in their "Intervenors' Petition For Review of LBP-06-01" (Petition) that the Commission review LBP-06-01.[1] The Commission accepted review and set a briefing schedule.[2] Pursuant to CLI-06-07, the parties filed supplemental briefs on March 13, 2006, and the Staff files this Reply Brief, responding only to those arguments in the Intervenors' Supplemental Brief[3] not substantially dealt with elsewhere.[4]

DISCUSSION

The bulk of the Intervenors' Supplemental Brief argues that the Presiding Officer erred in his conclusions regarding the use of the term "technologically enhanced radioactive material" in the definition of "natural background exposure" in the 1986 proposed rule revising the Part

---

[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] CLI-06-07 (Feb. 27, 2006).

[3] Intervenors' Supplemental Brief Regarding Church Rock Section 17 Air Emissions (March 13, 2006) (hereafter Intervenors' Supplemental Brief).

[4] 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.

20 radiation protection standards.[5] Specifically, the Intervenors contend that the Presiding Officer erred in concluding that this usage showed that the Commission "long has viewed NORM as including radioactive materials that, as a result of human activities, are no longer in their natural state."[6] The Intervenors claim that because the definition in the final rule no longer included the term “technologically enhanced,”[7] and because the Advisory Committee on Reactor Safeguards (ACRS) made a negative comment on inclusion of TENORM, the change in the definition must have come in response to the ACRS comment.[8] This argument does not hold up to close scrutiny for several reasons.

First, as the Intervenors acknowledge,[9] the Staff *explicitly rejected* the ACRS request and decided to keep “technologically enhanced radioactive materials” within the definition of “natural background exposure.”[10] Second, although the ACRS asked the Staff to *“emphasize*” that “natural background” did not include TENORM,[11] the Staff clearly did not do this. The Commission was aware of TENORM, a term which is considered a component of NORM, and included NORM in the final rule. This should be seen as an unambiguous statement that NORM and its component TENORM are included in the definition of “background radiation.”

Third, and most injurious to the Intervenors, is the change made in SECY-88-315 to the

---

[5] *See* Proposed Rule, Standards for Protection Against Radiation; Republication, 51 Fed. Reg. 1092, 1126 (Jan. 9, 1986).

[6] LBP-06-01, slip op. at 30 n.25.

[7] *See* Final Rule, Standards for Protection Against Radiation, 56 Fed. Reg. 23360, 23365 (May 21, 1991). For the final rule, the definition of “natural background radiation” was substantially revised and given the new name “background radiation.”

[8] *See* Intervenors' Supplemental Brief Regarding Church Rock Section 17 Air Emissions at 6 (March 13, 2006) (hereafter “Intervenor’s Supplemental Brief”).

[9] *See id.*

[10] *See* SECY-88-315, Memorandum from Victor Stello, Jr., NRC Executive Director for Operations, to the Commissioners re: Revision of 10 CFR Part 20, "Standards for Protection Against Radiation," Enclosure 10 at 3-4 (Nov. 4, 1988).

[11] *See id.*

definition of “natural background.” The Intervenors correctly point out that SECY-88-315 changed the definition of “natural background” to “naturally occurring cosmic and terrestrial radiation and radioactive material, but not including source, byproduct, or special nuclear material."[12] This definition, therefore, included naturally occurring radioactive materials (NORM), but did not explicitly include TENORM. The Intervenors claim that dropping the explicit reference to TENORM is evidence that TENORM was meant to be excluded from the definition, but looking at the change in context proves just the opposite. SECY-88-315 was sent to the Commission just two months after the Staff communicated to the ACRS the Staff’s decision to include TENORM within the definition of “natural background.”[13] Furthermore, the ACRS comment and the Staff’s response were included in SECY-88-15 in Enclosure 10.[14] This juxtaposition in the same paper of a definition of “natural background” including NORM but not explicitly mentioning TENORM, along with the Staff’s explicit determination to include TENORM within the definition of “natural background,” conclusively demonstrates that TENORM was considered a component of NORM and within the definition of “natural background.”

The Intervenors also wrongly argue that the Presiding Officer erred by importing a technical meaning to the term “naturally occurring radioactive material,” as it is found in the definition of “background radiation” in 10 C.F.R. § 20.1003. The Intervenors again claim that *Smith v. United States*, prohibits resorting to technical definitions, but the Intervenors again fail to acknowledge that the *Smith* Court applied its ordinary-meaning rule to “non-technical words

---

[12] *Id.*, Enclosure 4 at 13. “Natural background exposure” was shortened to “natural background.”

[13] *See* Response to ACRS Comments on 10 CFR 20, "Standard for Protection Against Radiation" (Sept. 2, 1988) (ACN # 9204270217); *and* SECY-88-315 (Nov. 4, 1988).

[14] *See* SECY-88-315, Enclosure 10 at 3-4.

and phrases."[15] As *United States v. Cuomo*[16] and *Utah v. Evans*[17] point out, words or phrases commonly used as terms of art in a particular discipline associated with a legal framework should be given the meaning understood in that discipline, because, if words are "addressed to specialists, they must be read by judges with the minds of the specialists."[18]

The Intervenors unsuccessfully counter *Evans* and *Cuomo*. *Evans* clearly stands for the proposition that context can show a statutory phrase to be "a term of art with a technical meaning."[19] The Intervenors also wrongly claim that *Cuomo,* and the cases it cites in footnote 17, only interpret "legal terms [in] their legal sense."[20] *Cuomo* explicitly treated "detention" as a "term of art"[21] and cited to the understanding of experts and the National Council of Crime and Delinquency.[22] Furthermore, a case cited in footnote 17 gave to the word "plug" its meaning as used in the seismographic trade.[23]

The Intervenors next misstate the meaning of a report of the International Commission on Radiological Protection (ICRP), from which they quote the following:

> In radiation protection the [ICRP]'s recommended dose-equivalent limits have not been regarded as applying to, or including, the 'normal' levels of natural radiation, but only as being concerned with those components of natural

---

[15] 508 U.S. 223, 228 (1993) (internal citation omitted).

[16] 525 F.2d 1285, 1291 n.17 (5th Cir. 1976).

[17] 536 U.S. 452, 467 (2002).

[18] *Cuomo*, 525 F.2d at 1291 n.17.

[19] *See Evans*, 536 U.S. at 467. Although the Intervenors correctly point out that *Evans* uses different contextual evidence to support its conclusion, this is not a meaningful difference because legislative and regulatory history can illuminate in a variety of ways. Different terms, even within the same regulation, might call upon different sources as aids in interpretation.

[20] *See* Intervenors' Supplemental Brief at 4.

[21] *Cuomo*, 525 F.2d at 1291.

[22] *Id.* at 1291 n.12.

[23] *Haynie v. Northern Pacific Ry.*, 490 P.2d 715 (1971) (cited by *Cuomo*, 525 F.2d at 1291 n.17) (concluding that for a "word having both a popular and a trade or technical meaning, the trade or technical meaning should be used in construing a statute having reference to that trade").

radiation that result from man-made activities or in special environments.[24]

The Intervenors claim that "[u]nder the ICRP's conception of naturally occurring radioactive material, mining spoils would not be included in background radiation,"[25] but the quoted portion is speaking of radiation *levels*, not naturally occurring radioactive *materials*. Furthermore, the "man-made activities" that are seen as increasing received radiation levels include "flight at high altitudes" and living in a house with restricted ventilation, as well as uranium mining.[26] To the extent the language is applicable, however, it cuts against the Intervenors. The very portion quoted by the Intervenors explicitly states that natural radiation includes as a component "natural radiation that result from man-made activities."[27] This is consistent by analogy with the view that NORM includes TENORM as a component.[28]

CONCLUSION

For the above reasons, Intervenor's Supplement Brief does not demonstrate any error in the Presiding Officer's analysis and the Commission should uphold LBP-06-01.

Respectfully Submitted,
/RA/

Michael A. Spencer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of March, 2006

---

[24] ICRP Publication No. 26, *Radiation Protection* ¶ 89 (1977).

[25] Intervenors' Supplemental Brief Regarding Church Rock Section 17 Air Emissions at 5.

[26] *Radiation Protection* at ¶ 88. Also, the ICRP position cannot be seen as conclusively illuminating the NRC's position because the Staff reason for including TENORM within "natural background," as expressed to the ACRS, was that most TENORM materials were outside the scope of the Commission's regulatory authority. *See* SECY-88-315, Enclosure 10 at 3-4.

[27] *Radiation Protection* at ¶ 89.

[28] In a footnote, the Intervenors also argue that the Presiding Officer erred by concluding "that the use of the phrase 'from the licensed operation' in 10 C.F.R. 20.1301(a) 'appears to serve as a limitation on what is to be included in the TEDE calculation.'" Intervenors' Supplemental Brief at 5, n.8 (quoting LBP-06-01, slip op. at 28). The Intervenors claim that "licensed operation" should include all activities from the operation, not just emissions from licensed radioactive materials. Even granting this, the activity of the proposed operation is *in situ* leach mining, not the mining activities from years ago, and radiation from surface spoilage will be emitted whether HRI's proposed operation is allowed or not.

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	)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Michael A. Spencer
Address:	U.S. Nuclear Regulatory Commission Office of the General Counsel Mail Stop: O-15 D21 Washington, D.C. 20555-0001
Telephone Number:	(301) 415-4073
Facsimile:	(301) 415-3725
E-mail Address:	mas8@nrc.gov
Admissions:	District of Columbia
Name of Party:	NRC Staff

Respectfully submitted,

/RA/

Michael A. Spencer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of March, 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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO SUPPLEMENTAL BRIEFS ON APPEAL OF LBP-06-01 CONCERNING RADIOLOGICAL AIR EMISSIONS" and "NOTICE OF APPEARANCE" for Michael A. Spencer 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 20th day of March, 2006.

Administrative Judge, E. Roy Hawkens * **
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: erh@nrc.gov

Administrative Judge * **
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: rfc1@nrc.gov

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755

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

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

Eric Jantz **
Douglas Meiklejohn
Sarah Piltch
Heather L. Green
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
Fax: 505-989-3769
Email: ejantz@nmelc.org
meikljhn@nmelc.org
hgreen@nmelc.org

W. Paul Robinson **
Chris Shuey
Southwest Research and Information Center
P. O. Box 4524
Albuquerque, NM 87106
E-mail: sric.chris@earthlink.net.

Susan C. Stevenson-Popp * **
Law Clerk
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, DC 20555
E-mail: scs2@nrc.gov

Anthony J. Thompson, Esq. **
Chris Pugsley, Esq.
Anthony J. Thompson, P.C.
1225 19th Street, N.W., Suite 200
Washington, D. C. 20036
Fax: (202) 496-0783
E-mail: ajthompson@athompsonlaw.com
cpugsley@athompsonlaw.com

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

Administrative Judge, Robin Brett **
2314 44th Street, N.W.
Washington, D.C. 20007
Fax: (703) 648-4227
E-mail: rbrett@usgs.gov

Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

William Zukosky **
DNA-People's Legal Services, Inc.
222 East Birch
Flagstaff, AZ 86001
E-mail: wzukosky@dnalegalservices.org

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

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

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

David C. Lashway, Esq. **
Hunton & Williams LLP
1900 K Street, NW
Washington, D.C. 20006-1109
E-mail: dlashway@hunton.com

Geoffrey H. Fettus **
Natural Resources Defense Counsel
1200 New York Ave, N.W.
Suite 400
Washington, D.C. 20005
E-mail: gfettus@nrdc.org

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

/RA/

Michael A. Spencer
Counsel for NRC Staff