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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: March 20, 2006

RESPONSE TO INTERVENORS' SUPPLEMENTAL BRIEF REGARDING SECTION 17 RADIOLOGICAL AIR EMISSIONS

INTRODUCTION

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenors' Supplemental Brief Regarding Radiological Air Emissions at HRI's Church Rock Section 17 (Section 17) uranium recovery site. For the foregoing reasons, HRI respectfully requests that the Commission affirm the Presiding Officer's decision in LBP-06-1.

ARGUMENT

I. INTERVENORS' ARGUMENT REGARDING "NATURALLY OCCURRING" MATERIALS

Intervenors allege that the Presiding Officer's interpretation of "background radiation," as defined in 10 CFR § 20.1003 and as used in 10 CFR § 20.1301(a), is inconsistent with the plain language of NRC regulations, NRC's regulatory scheme, and its regulatory history. Intervenors assail the Presiding Officer's interpretation of "background radiation" by alleging that the plain language of the term "naturally occurring radioactive material" (NORM) excludes the Section 17 *mining* spoils. Intervenors claim that the "ordinary" meaning of "naturally occurring" is that the material

in question is 'undisturbed in nature' and, therefore, the Section 17 *mining* spoils do not qualify as "naturally occurring." Intervenors' March 13, 2006 Brief at 3.

Intervenors' argument ignores the difference between the term "*natural background radiation*" and the term "background radiation." As currently defined, the term "background radiation" includes "naturally occurring" radiation sources and radiation sources resulting from *anthropogenic* activities. Thus, Intervenors' attempt to narrow the focus of the relevant definition should be disregarded.

With that said, Intervenors claim that the "common" meaning of "naturally occurring" means "undisturbed in nature," is, on its face, too narrow a reading. In the context of NRC regulations, the term "naturally occurring" applies to materials not created as a result of Atomic Energy Act (AEA)-regulated activities (e.g., uranium milling, fuel fabrication, etc.). For example, source material uranium and thorium are "naturally occurring," and may or may not be subject to NRC jurisdiction. However, "byproduct material" can never be "naturally occurring," because it can only be *created* by anthropogenic activity. Thus, technologically enhanced *naturally occurring* radioactive material or TENORM is widely recognized as a subset of NORM, and neither are AEA materials subject to Commission jurisdiction.[1] Indeed, as evidenced by the various citations to NUREG-1736 and NUREG/CR-6204 in HRI's briefs, NRC has recognized that the concept of TENORM may be used as a term to differentiate between AEA materials under the Commission's jurisdiction and technologically enhanced

[1] *See e.g.*, United States Environmental Protection Agency, TENORM Sources, http://www.epa.gov/radiation/tenorm/sources.htm (2006); *see also* http://www.epa.gov/radiation/tenorm/uranium_waste.htm (2006) ("The Atomic Energy Act does not require controls on uranium mining overburden and neither the Nuclear Regulatory Commission or DOE regulate the disposal of conventional (open pit and underground) mining wastes").

radioactive materials not regulated by the Commission. *See e.g.,* HRI December 7, 2005 Brief at 10, *citing e.g.,* NUREG/CR-6204 at 3 ("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 radiation and may be excluded from...public dose estimates, *whether there is any technological enhancement of the concentrations or not*"). Thus, the "common" meaning of "naturally occurring," in the context of NRC regulation is that TENORM is a type of "naturally occurring," anthropogenically enhanced radioactive material that is not subject to the Commission's jurisdiction.

Intervenors' allegation that the National Council on Radiation Protection and Measurements (NCRP) and the International Commission on Radiation Protection (ICRP) would not include Section 17 *mining* spoils in "background radiation" is irrelevant. The AEA, and not NCRP or ICRP, dictates which materials the Commission is empowered to regulate. The AEA specifically limits Commission jurisdiction to AEA materials, and Section 17 *mining* spoils do not qualify as an AEA material (i.e., such materials are not special nuclear or byproduct material and do not contain sufficient uranium or thorium to constitute *licensable* source material). Both NCRP and ICRP are focused on radiation protection from all radioactive materials, so ICRP's conclusion that Section 17 *mining* spoils are no longer in their natural state is not relevant to the Commission's regulations and policy excluding *mining wastes* from its jurisdiction (NRC's *Generic Environmental Impact Statement on Uranium Milling* (GEIS) states that the Commission "has no direct authority over *uranium mining or mine wastes*"). NUREG-0706, Vol. 1 at 89 (1980).

Further, Intervenors reliance on the Advisory Committee on Reactor Safeguards (ACRS) Chairman's statements regarding exclusion of TENORM radiation sources from "background radiation" is misguided. Intervenors' brief specifically notes that NRC Staff refused to adopt the ACRS' recommendation and issued a definition of "background radiation" that includes "naturally occurring radioactive material." *See* Intervenors' March 13, 2006 Brief at 8. Given that it is commonly understood that TENORM is a subset of NORM, it follows logically that the Commission intended to include such material in the definition of "background radiation."

Moreover, as noted by NRC Staff, "background radiation" specifically includes radiation from anthropogenic activities licensed and regulated by the Commission, while NORM/TENORM only includes radiation sources that are *unlicensed* and *not regulated* by the Commission. Thus, the term "background radiation," as defined in Part 20, includes "naturally occurring" radiation sources, most of which are not anthropogenically enhanced, as well as sources resulting from anthropogenic activities regulated by the Commission (e.g., nuclear fallout or reactor accidents). Indeed, the Proposed Rule's statement that such material was included so that "fallout from past nuclear accidents like Chernobyl which contribute to background radiation and are not under the control of the licensee are included in the definition." NRC Staff December 7, 2005 Brief at 6, *citing* 59 Fed. Reg. 43,217 (August 22, 1994).

II. INTERVENORS' STATEMENT REGARDING HRI'S ALLEGED FAILURE TO REMEDIATE THE SECTION 17 SITE

Intervenors also claim that the Presiding Officer's decision unfairly "rewards" HRI for not removing the Section 17 mining spoils prior to commencing licensed ISL uranium recovery operations. Intervenors' allegation is a thinly veiled attempt to amend

the Commission's regulations to expand its jurisdiction to *mining and mining wastes*. As previously argued by HRI and NRC Staff, 10 CFR Part 40 specifically excludes "unrefined and unprocessed ore" from Commission jurisdiction. *See* 10 CFR § 40.13(b) (2006). As a result, the GEIS states that the Commission's jurisdiction is limited to activities that are "associated with processing" and specifically excludes *mining* from the scope of such activities. As acknowledged by the Presiding Officer below, "[u]ndisputed record evidence establishes that Section 17 contained no processing or milling facility." *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), LBP-06-1, slip op. at 26 (January 6, 2006). Thus, a decision to extend the scope of TEDE to *mining* spoils would be a decision to extend Commission jurisdiction to materials produced from activities that are not licensed and regulated by the Commission. Intervenors' argument that HRI is unfairly rewarded for not removing Section 17 *mining* spoils is irrelevant.

CONCLUSION

For the reasons described above, HRI respectfully requests that the Commission affirm the Presiding Officer's decision in LBP-06-1.

Respectfully Submitted,

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BEFORE THE COMMISSION

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Response to Intervenors' Supplemental Brief Regarding Section 17 Radiological 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 20th day of March, 2006.

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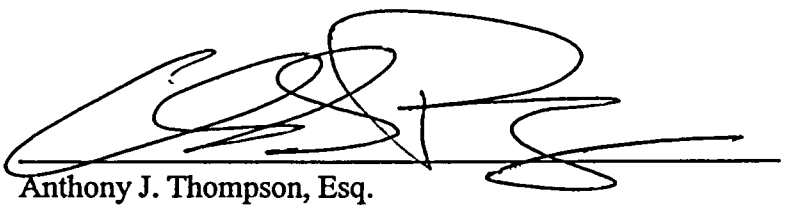

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March 20, 2006

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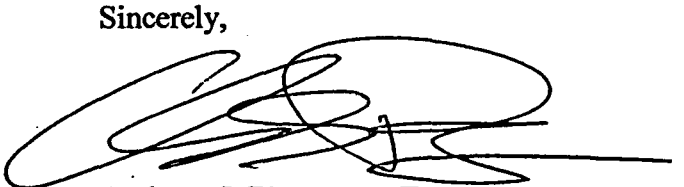
Re: In the Matter of: Hydro Resources, Inc.
Docket No: 40-8968-ML

Dear Sir or Madam:

Please find attached for filing the Response to Intervenors' Supplemental Brief Regarding Section 17 Radiological Air Emissions 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,



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Enclosures

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