

March 20, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

DOCKETED
USNRC

March 20, 2006 (3:57pm)

In the Matter of:)
)
HYDRO RESOURCES, INC.)
P.O. Box 777)
Crownpoint, NM 87313)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

**INTERVENORS' REPLY BRIEF
REGARDING CHURCH ROCK SECTION 17 AIR EMISSIONS**

I. INTRODUCTION

Intervenors, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), hereby reply to the supplemental briefs of Hydro Resources, Inc. ("HRI") and the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff on review of LBP-06-01, Partial Initial Decision (Phase II Radiological Air Emissions Challenges to In Situ Leach Uranium Mining License) (January 6, 2006) (hereinafter "LBP-06-01").¹ As demonstrated below, HRI's and the Staff's arguments are without merit.

II. ARGUMENT

A. HRI and the Staff Fail to Show That the Commission Intended to Include TENORM Within the Definition of Background Radiation.

The NRC Staff contends that the Presiding Officer was entitled to import the concept of technologically enhanced naturally occurring radioactive material ("TENORM") into the definition of background radiation, as an exercise in interpreting the regulations. NRC Staff Brief

¹ Supplemental Brief Regarding LBP-06-01 on Radiological Air Emissions at Hydro Resources, Inc.'s Church Rock Section 17 Emissions at Hydro Resources, Inc.'s Church Rock Section 17 Uranium Recovery Site (March 13, 2006)(hereinafter "HRI Brief"); NRC Staff's Brief on Appeal of LBP-06-01 Concerning Radiological Air Emissions (March 13, 2006) (hereinafter "NRC Staff Brief").

at 4. The exception to the notice-and-comment requirements of the Administrative Procedure Act for interpretive rules, however, does not apply where the agency's action effectively makes a substantive change in the underlying regulations.² Here, LBP-06-01's addition of TENORM to the scope of "background radiation" would have a substantive effect on public health by increasing the allowable level of radioactivity on the HRI site. Thus, it cannot be considered to constitute a mere interpretation of the regulations.

Additionally, HRI relies on language in NUREG/CR-6204, *Questions and Answers from Eight Sets of Questions and Answers on the Major Revision of 10 CFR Part 20* (May 1994), for its argument that background radiation includes TENORM. HRI Brief at 4-5. But NUREG/CR-6204 was issued in 1994, three years after the promulgation of the definition of "background radiation" in the 1991 amendments to Part 20. Moreover, NUREG/CR-6204 was written by a contractor to the NRC Staff, not the Commissioners, and therefore provides no information on the Commission's intent at the time of the 1991 rulemaking. Accordingly, it may not be relied on now to import additional meaning to the NRC's definition of "background radiation."

Further, NUREG/CR-6204 quotes a 1975 technical paper to the effect that TENORM is restricted to emissions from technologically enhanced natural radiation sources that are "truly natural sources of radiation . . . which would not occur without (or would be increased by) *some technological activity not expressly designed to produce radiation.*" NUREG/CR-6204 at 3, citing Gesell and Pritchard, *Health Physics* 28, 361-66 (April 1975) (emphasis added). Under this definition, TENORM would not include emissions produced by uranium mining, an activity which has no other purpose than to produce radiation as a consequence of providing a source of fuel for

² Sprint Corporation v. FCC, 315 F.3d 369, 373-74 (D.C. Cir. 2003); United States Telecom Association v. FCC, 400 F.3d 29, 34-35 (D.C. Cir. 2005).

nuclear power plants.³

Both HRI and the NRC Staff also persist in their argument that TENORM is included in background radiation simply because its sources are not regulated by the Commission. HRI Brief at 6-8, NRC Staff Brief at 5. They also contend that the phrase “from the licensed operation,” as used in 10 C.F.R. § 20.1301(a), restricts the scope of TEDE estimates or calculations to emissions that come directly from HRI’s operation. HRI Brief at 6-8, NRC Brief at 6. As Intervenors have demonstrated, however, these arguments are inconsistent with the regulatory scheme and history of the Part 20 regulations and with fundamental principles of statutory interpretation.⁴ Moreover, as HRI points out, the regulatory history of the Part 20 regulations indicates that the phrase “from the licensed operation” has the broader meaning of “under the licensee’s control.” HRI Brief at 5, citing 56 Fed. Reg. 23,360, 23,374-75 (May 21, 1991). The mining spoils left by UNC on Section 17 clearly are within HRI’s control, and in fact HRI has acknowledged they exist and committed to removing them at some pointing the future.⁵

B. The Parenthetical In the Definition of Background Radiation Does Not Exclude Section 17 Mining Spoils Emissions From the TEDE.

Interpreting the parenthetical in the definition of background radiation, the NRC Staff argues that emissions from the Section 17 mining spoils constitute background radiation because they are not “a decay product of source or special nuclear material.” NRC Staff Brief at 8. By

³ HRI argues that while milling and processing are intended to produce radiation, mining is not. HRI Brief at 5. This distinction is specious: all of these activities lead to the production of radiation from nuclear power plant fuel. Indeed, uranium is mined for no other purpose than providing fuel for nuclear power reactors.

⁴ See Intervenors’ Supplemental Brief on Radioactive Air Emissions at 6-13 December 7, 2005); Intervenors’ Petition for Review of LBP-06-01 at 6-8 (January 26, 2006); Intervenors’ Supplemental Brief Regarding Church Rock Section 17 Air Emissions at 5 n.8 (March 13, 2006) (hereinafter “Intervenors’ Supplemental Brief to the Commission”).

⁵ Affidavit of Mark S. Pelizza, ¶ 71 (June 26, 2005), attached as Exhibit A to Hydro Resources, Inc.’s Response in Opposition to Intervenors’ Written Presentation Regarding Air Emissions (July 29, 2005) (hereinafter “Pelizza Affidavit”).

focusing on the parenthetical, the Staff overlooks the preceding language, which defines sources of background as “naturally occurring radioactive material.” In order for gamma radiation and radon gas emissions to be included in background radiation, they must be naturally occurring. Gamma radiation and radon emissions from the Section 17 mining spoils are not naturally occurring because they emanate from uranium and its decay products that have been disturbed from their natural setting and deposited on Section 17 by human activities.⁶ Thus, they may not be included within the scope of background radiation.⁷

C. HRI Has Not Demonstrated That the TEDE From Section 17 Would Be Below the Regulatory Limits.

HRI’s argument at pages 9-10 that even if the Section 17 mining spoils were excluded from the scope of background radiation, “the TEDE to members of the public would not exceed applicable NRC limits for licensed operations,” is unsupported by the record. As demonstrated through HRI’s own records and through radiation measurements and analyses by Intervenors’ experts, existing levels of radon and non-radon radiation at the Section 17 site are each in excess of NRC regulatory standards.⁸

III. CONCLUSION

The Section 17 mining spoils are not “naturally occurring radioactive materials,” but

⁶ See Exhibit K to Intervenors’ Written Presentation in Opposition to Hydro Resources, Inc.’s Application for a Materials License with Respect to Radiological Air Emissions for Church Rock Section 17 (June 13, 2005) (hereinafter, “Intervenors’ 2005 Air Presentation”), Declaration of Melinda Ronca-Battista, ¶¶ 21-30 (June 10, 2005) (hereinafter “Ronca-Battista Declaration”).

⁷ In contrast, gamma radiation and radon emissions from undisturbed uranium ore which contains less than 0.05% uranium by weight would be included within the scope of background radiation.

⁸ See Intervenors’ Supplemental Brief to the Commission at 2. See also Intervenors’ 2005 Air Presentation at 12-16; Ronca-Battista Declaration at ¶ 20; Exhibit L to Intervenors’ 2005 Air Presentation, Declaration of Bernd Franke, ¶ 9 (June 12, 2005) (hereinafter “Franke Declaration”); Exhibit 2 to Franke Declaration, Franke & Associates, *Crownpoint Uranium Solution Mining Project: Review of Outdoor Radon Levels and External Gamma Radiation* at 7 (January 5, 1999).

rather were placed on Section 17 by human beings whose sole purpose was to produce nuclear power plant fuel. As a result of these human activities, UNC left the site severely contaminated, and HRI has cleaned it up to only a minimal degree.⁹ The NRC Staff has known that Section 17 is contaminated since 1988, when HRI filed its license application.¹⁰ Yet, the Staff has required no further cleanup by HRI in preparation for mining operations. Now, in LBP-06-01, the Presiding Officer has determined that HRI should be allowed to use the contaminated Section 17 site without cleaning it up, in total disregard of the health effects of existing contamination on the neighboring members of the public. In effect, LBP-06-01 rewards HRI for failing to take reasonable measures to protect public health from human-caused radioactive emissions emanating from its property and that are within its control.

Intervenors respectfully submit that this result is not countenanced by the plain language, the regulatory scheme or the history of the Part 20 regulations; nor is it consistent with the Commission's responsibility to ensure that public health is not jeopardized by the activities that it licenses. The Commission should reverse LBP-06-01.

⁹ Pelizza Affidavit, ¶ 75. See also Exhibit G to Intervenors' 2005 Air Presentation, *Prior Reclamation and Inspection Report* (September 18, 1995), Exhibit 4 to Franke Declaration, HRI letter to New Mexico Mining Act Reclamation Bureau (August 31, 1994).

¹⁰ See Hydro Resources, Inc., Church Environmental Report at 227 and Fig. 2.9-1 (April 1988) (ACN 8805200344). In 1993, Intervenor SRIC also informed the NRC that cattle were seen and photographed grazing on Section 17 in areas of high gamma radiation reported in HRI's Church Rock Revised Environmental Report. Letter from Chris Shuey, SRIC, and Lila Bird, Water Information Network, to Joel Grimm, U.S. Nuclear Regulatory Commission (December 14, 1993) (ACN 9509060115).

Respectfully submitted this 20th day of March, 2006.



Eric D. Jantz

Sarah Piltch

Douglas Meiklejohn

New Mexico Environmental Law Center

1405 Luisa Street, Suite 5

Santa Fe, New Mexico 87505

(505) 989-9022

Attorneys for ENDAUM and SRIC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)	
)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)	ASLBP No. 95-706-01-ML
(P.O. Box 777)	
Crownpoint, New Mexico 87313))	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Reply Brief Regarding Church Rock Section 17 Air Emissions" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, 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: rfe1@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@msn.com

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

John T. Hull*
Steven Hamrick
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555
Fax: 301-415-3725
Email: jth@nrc.gov
Email: schl@nrc.gov

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

Anthony J. Thompson, Esq.*
Christopher Pugsley, Esq.*
Anthony J. Thompson, P.C.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
Fax: (202) 496-0783
E-mail: ajthompson@athompsonlaw.com
E-mail: 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

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

William Zukosky *
DNA-People's Legal Services, Inc.
201 East Birch Ave., Ste 5
Flagstaff, AZ 86001-5215
E-mail: wzukosky@dnalegalservices.org

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

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
E-mail: cmrdiaz@nrc.gov

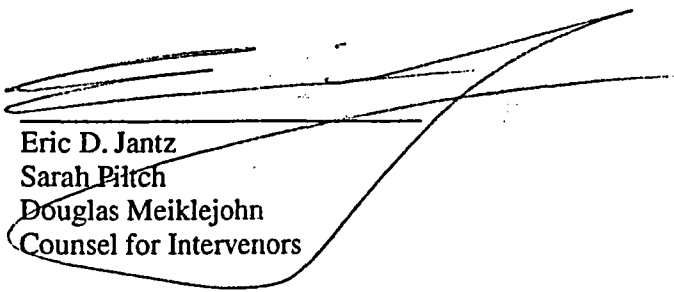
U.S. Nuclear Regulatory Commission
Attn: Jeffery S. Merrifield*
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: cmrmerrifield@nrc.gov

U.S. Nuclear Regulatory Commission
Attn: Gregory Jaczko*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Jacki Raines, jkr@nrc.gov

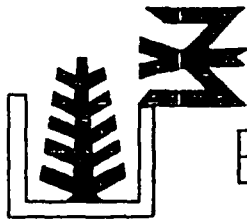
U.S. Nuclear Regulatory Commission
Attn: Peter Lyons*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Vicki Ibarra, vai@nrc.gov

Susan C. Stevenson-Popp *
ASLB Panel
U.S. NRC
Mail Stop T-3 F23
Washington, DC 20555
E-mail: scs2@nrc.gov

Karen Valloch*
E-mail: ksv@nrc.gov



Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
Counsel for Intervenors



NEW MEXICO
ENVIRONMENTAL LAW CENTER

March 20, 2006

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
One White Flint North
11545 Rockville Pike
Rockville, MD 20852

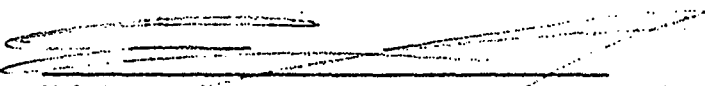
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Reply Brief Regarding Church Rock Section 17 Air Emissions". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped of the enclosed filing in the attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022.
Thank you for your attention to this matter.

Sincerely,


Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
New Mexico Environmental Law Center
Attorneys for Intervenors

Enclosures