

May 30, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF SUPPLEMENTAL BRIEF ON THE
INTERVENORS' PRESENTATION ON PHASE II NEPA ISSUES

INTRODUCTION

This brief is being filed in response to an "Order (Directing The Parties To Provide Supplemental Briefs)," issued by the Atomic Safety and Licensing Board ("Board") on May 16, 2006, requesting the parties' position on the effect the recent Commission decision in CLI-06-14¹ might have upon the Intervenor's Phase II NEPA-related claims. In CLI-06-14, the Commission upheld the Board's decision in LBP-06-01,² which rejected the Intervenor's Phase II radiological air emissions challenges. The arguments presented in this brief are in addition to, not in place of, the arguments the NRC Staff ("Staff") has previously presented.

BACKGROUND

This proceeding concerns challenges by intervenors Grace Sam, Marilyn Morris, Eastern Navajo Diné Against Uranium Mining, and Southwest Research and Information Center (collectively, "Intervenor's"), to a materials license issued under 10 C.F.R. Part 40 to Hydro Resources, Inc. ("HRI"), to perform *in situ* leach mining at four sites in McKinley County, New Mexico. The litigation has proceeded in two phases. The Phase I proceeding involved

¹ *Hydro Resources, Inc.*, CLI-06-14, 63 NRC ____ (May 16, 2006).

² *Hydro Resources, Inc.*, LBP-06-01, 63 NRC 41 (Jan. 6, 2006).

challenges to operation at one of the four sites, Section 8 near Church Rock. The Phase II proceeding, which encompasses the NEPA-related claims at issue here, involves challenges to operation at the other three sites: Section 17 near Church Rock, Crownpoint, and Unit 1 in Crownpoint. Because prior pleadings have set forth in detail the complicated and lengthy procedural history of this case, only a summary of the particular pleadings and orders relevant to the issue at hand will be given below.

A. Procedural Background With Regard to the NEPA-related Challenges at Issue

The Intervenor's Phase II NEPA-related claims are found in their "Written Presentation in Opposition to Hydro Resources, Inc.'s Application for a Materials License With Respect To: NEPA Issues for Church Rock Section 17, Unit 1 and Crownpoint," ("Phase II NEPA Presentation"), filed June 24, 2005. The Intervenor's Phase II NEPA Presentation challenges the adequacy of the "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico" ("FEIS")³ with regard to certain environmental issues, some of which concern radiological air emissions.

On July 28, 2005, HRI filed its "Response in Opposition to Intervenor's Written Presentation Regarding Environmental Impact Statement Adequacy" ("HRI Response") and on August 12, 2005, the Staff filed its "Response to Intervenor's Presentation on NEPA Issues" ("Staff Response"). On August 19, 2005, the Intervenor's filed their "Reply to Hydro Resources Inc.'s and the Nuclear Regulatory Commission Staff's Responses in Opposition to Intervenor's Written Presentation with Respect to NEPA Issues for Church Rock Section 17, Unit 1 and Crownpoint" ("Intervenor's Reply").

³ NUREG-1508, ACN# 9703200270 (Feb. 28, 1997).

B. Decisions by the Presiding Officer and the Commission on Radiological Air Emissions

The Intervenors challenged whether HRI's operation would violate radiological air emissions standards in their "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" ("Phase II Radiological Air Emissions Presentation"), filed June 13, 2005. In LBP-06-01, issued January 6, 2006, the Presiding Officer found that radiological air emissions from HRI's proposed *in situ* leach mining facility at Section 17 at Church Rock would not exceed the 0.1 rem "total effective dose equivalent" ("TEDE") limit found in 10 C.F.R. § 20.1301(a)(1).⁴ The Commission took review of this decision upon a petition by the Intervenors averring that the Presiding Officer erred in excluding from the TEDE calculation the radioactive air emissions from surface mining spoil, which spoil the Presiding Officer concluded fell under the definition of "background radiation" as found in 10 C.F.R. 20.1003.⁵ In CLI-06-14, the Commission upheld the Presiding Officer's decision in LBP-06-01, specifically holding that the radioactive residue from the site's previous conventional mining activities was background radiation and was not to be included in the TEDE calculation.⁶

DISCUSSION

As detailed below, the Commission's decision in CLI-06-14 in no way detracts from, and in some respects strengthens the Staff's position previously presented to the Presiding Officer with respect to NEPA issues. For several of the Intervenors' claims, the Commission's decision robs them of much of their possible force. The paragraphs below will first briefly discuss the Commission's decision and then will discuss the Intervenors' radiological air emissions

⁴ The Intervenors' radiological air emissions challenges were focused solely on the Section 17 site. See LBP-06-01, 63 NRC at 46.

⁵ *Hydro Resources, Inc.*, CLI-06-07, 63 NRC 165 (Feb. 27, 2006).

⁶ CLI-06-07, slip op. at 1-2.

arguments one by one.

The Commission's holding in CLI-06-14 reached a definitive legal conclusion as to whether radioactive emissions from the surface mining spoils left from previous conventional mining activities should be included in the calculation of TEDE. The Commission agreed with the Presiding Officer that such spoils should be excluded from the calculation,⁷ which left undisturbed the Presiding Officer's conclusion that the radiological air emissions at Section 17 would not exceed the TEDE limit in 10 C.F.R. § 20.1003.⁸ In so holding, the Commission noted that the NRC does not regulate conventional mining and declined to "enter[] an area of regulation that [the NRC] has historically considered beyond the scope of the Atomic Energy Act."⁹ After characterizing HRI's proposed activity as "benign," the Commission revealed its bottom line when it stated, "we decline to revoke HRI's license because of the existence of residue from prior mining activity that the NRC did not, and does not, regulate."¹⁰

With regard to radiological air emissions, the Intervenor's make three arguments in their Phase II NEPA Presentation. The Intervenor's first argue that the FEIS misrepresents or inadequately represents the existing radiation levels at Crownpoint 17 in various ways. These alleged misrepresentations concern radiation levels due to past conventional uranium mining activities at the site,¹¹ which mining the NRC does not regulate. One of the subarguments specifically alleges that the FEIS erred by "not adequately address[ing] the distinction between

⁷ CLI-06-07, slip op. at 1-2.

⁸ See LBP-06-01, 63 NRC at 52.

⁹ CLI-06-07, slip op. at 7. The Commission also noted that the EPA regulates "technologically enhanced naturally occurring radioactive material" ("TENORM"), which encompasses the surface spoils at Section 17, and that the state of New Mexico regulates conventional uranium mining within the state, which includes issuing and enforce cleanup orders. *Id.* at 3.

¹⁰ *Id.* at 12.

¹¹ Intervenor's Phase II NEPA Presentation at 22-25.

background radiation levels and the radiation caused by uranium mining and milling.”¹² The Commission’s decision in CLI-06-14 makes clear that this subargument is fatally flawed because the Commission conclusively determined that spoils from past uranium mining are included as part of background radiation under the NRC’s regulations.

As for the misrepresentation arguments generally, the Staff pointed out in its Response that the Commission in CLI-01-04 has already dismissed these arguments in an earlier challenge to this FEIS.¹³ The Staff argued for applying the law of the case doctrine to reject the Intervenor’s misrepresentation argument, and that Staff position now carries decisive weight in view of the Commission’s decision in CLI-06-14.¹⁴ In LBP-05-17, the Presiding Officer pointed out that a tribunal can exercise discretion in not applying the doctrine if “changed circumstances or public interest factors dictate.”¹⁵ Such changed circumstances might include “intervening controlling authority.”¹⁶ After the Commission’s recent decision, the only changed circumstance is a conclusive determination that the Commission does not regulate conventional uranium mining and that the surface spoils from such mining do not count against the NRC’s dose limits. In so concluding, the Commission also explicitly rejected the Intervenor’s policy

¹² *Id.* at 24.

¹³ See Staff Response at 11 (citing *Hydro Resources, Inc.*, CLI-01-04, 53 NRC at 61-62).

¹⁴ The law of the case doctrine, “a common law rule applicable to NRC adjudicative proceedings, establishes that the decision of an appellate tribunal should ordinarily be followed in all subsequent phases of that case, provided that the particular question in issue was ‘actually decided or decided by necessary implication.’” *Hydro Resources, Inc.*, LBP-05-17, 62 NRC 77, 87 (July 20, 2005) (quoting *Safety Light Corp. (Bloomsburg Site Decontamination)*, CLI-92-09, 35 NRC 156, 159-60 & n.5 (1992)).

¹⁵ LBP-05-17, 62 NRC at 87 (quoting *Private Fuel Storage, L.L.C. (Independent Spent Fuel Storage Installation)*, CLI-04-27, 61 NRC 145, 154 (2004) (internal quotation marks omitted)).

¹⁶ *Id.* at 88.

arguments.¹⁷

The Intervenor's second argument claims that the "FEIS incorrectly concludes that radiation from the CUP [Crownpoint Uranium Project] will be under regulatory limits" because of alleged faulty reliance upon MILDOS modeling and alleged faulty reliance upon HRI's proposed air effluent control system.¹⁸ The MILDOS modeling arguments are said to apply to all three Phase II sites.¹⁹ Although the Commission in CLI-06-14 did not specifically address MILDOS modeling or the air effluent control system, it left standing the Presiding Officer's finding in LBP-06-01 that operation at the Section 17 site will be below the regulatory limits. The Intervenor made the same MILDOS modeling arguments and air effluent control system arguments in their Phase II Radiological Air Emissions Presentation as they now do in their Phase II NEPA Presentation.²⁰ The Intervenor's arguments were rejected by the Board in LBP-06-01 and should be rejected here. Accordingly, the Intervenor's claims have already been explicitly rejected to the extent they imply that radiological air emissions at Section 17 exceed the NRC's dose limits, and the Intervenor's MILDOS modelling arguments and air effluent control system arguments should be rejected with regard to the remaining sites as well.²¹

Finally, the Intervenor argues that the cumulative impacts section of the FEIS gives a "false impression" regarding health impacts from prior human activities at the Church Rock site.²² In its Response, the Staff pointed to specific sections of the FEIS that discussed health

¹⁷ CLI-06-07, slip op. at 12.

¹⁸ Intervenor's Phase II NEPA Presentation at 25.

¹⁹ *Id.*

²⁰ Compare Phase II Radiological Air Emissions Presentation at 31-39 with Phase II NEPA Presentation at 25-26.

²¹ CLI-06-14 also does nothing to disturb the "law of the case" arguments made in the Staff's Response.

²² Intervenor's Phase II NEPA Presentation at 26.

impacts from prior activities such as uranium mining. The Staff does not believe that these counter-arguments are directly affected by the Commission's decision in CLI-06-14, but the Staff's arguments certainly are not harmed by the decision because it is now known that the Commission does not desire to regulate the operation or after-effects of conventional uranium mining.

CONCLUSION

For the above reasons, the Commission's decision in CLI-06-14 demonstrably strengthens the Staff's position with respect to those NEPA issues involving radiological air emissions, and does not help the Intervenor's' positions on any environmental issue they have raised. Thus, the Staff continues to maintain that the Board should reject the Intervenor's' NEPA areas of concern.

Respectfully Submitted,

/RA/

Michael A. Spencer
Counsel for NRC Staff

Dated at Rockville, Maryland
this 30th day of May, 2006

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Docket No. 40-8968-ML

NOTICE OF WITHDRAWAL

Notice is hereby given that, effective May 30, 2006, the undersigned counsel withdraws his appearance in the captioned proceeding. All mail and service lists in this proceeding should be amended appropriately.

Respectfully submitted,

/RA/

Steven C. Hamrick
Counsel for NRC Staff

Dated at Rockville, Maryland
this 25th day of May, 2006

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF SUPPLEMENTAL BRIEF ON THE INTERVENORS' PRESENTATION ON PHASE 11 NEPA ISSUES" and "NOTICE OF WITHDRAWAL" for Steve Hamrick 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 30th day of May, 2006.

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