

May 30, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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May 30, 2006 (4:52pm)

Before Administrative Judges:

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

E. Roy Hawkens, Presiding Officer
Dr. Richard F. Cole, Special Assistant
Dr. Robin Brett, Special Assistant

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

**INTERVENORS EASTERN NAVAJO DINÉ AGAINST URANIUM MINING'S
AND SOUTHWEST RESEARCH AND INFORMATION CENTER'S
SUPPLEMENTAL BRIEF REGARDING THE IMPACT OF CLI-06-14 ON
INTERVENORS' NEPA CLAIMS**

I. INTRODUCTION

Pursuant to the Presiding Officer's Order (Directing Parties To Provide Supplemental Briefs) (May 16, 2006) (unpublished) (hereinafter "May 16 Order"), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC")(collectively, "Intervenors") hereby submit their supplemental brief addressing the impact of the Commission's decision in CLI-06-14, on Intervenors' Phase II National Environmental Policy Act (hereinafter "NEPA") claims pending before the Board.

II. ARGUMENT

A. CLI-06-14 Must Be Narrowly Construed

The Commission's decision regarding how HRI is required to calculate TEDE is limited to this very narrow issue for two reasons. First, by the Commission's own language, the scope of the decision at CLI-06-14 is limited. Second, the issue presented to the Commission on appeal was limited to how 10 C.F.R. Part 20 regulations should be interpreted, specifically in terms of how HRI is required to calculate TEDE.

1. The Commission Limited the Scope of its Decision in CLI-06-14.

The Commission's decision in CLI-06-14 is limited to one narrow issue. In CLI-06-14, the Commission necessarily had to consider the factual circumstances surrounding Intervenors' contention that the Presiding Officer had erred by characterizing existing anthropogenic sources of radiation from past uranium mining as "background". See, e.g. CLI-06-14, slip. op. at 4-5. However, the Commission explicitly limited its decision affirming the Presiding Officer's decision regarding calculation of TEDE. The Commission held that the Presiding Officer's decision and the Commission's decision affirming it "merely finds that, *for the purposes of calculating the TEDE* for an NRC-licensed activity, radiation from pre-existing, conventional mining spoil is not included." CLI-06-14, slip. op. at 12 (emphasis in original). Therefore, the Commission expressly limits the scope of its decision in CLI-06-14 to the very narrow issue of whether radiation from existing spoil from past uranium mining is included in TEDE calculations.

CLI-06-14 was based on the Commission's interpretation of the Atomic Energy Act and its regulations. This in no way bears on NEPA or NEPA requirements in this case. It is 'unreasonable to suppose that [environmental] risks are automatically acceptable, and may be imposed upon the public by virtue of the AEA, merely because operation of a facility will conform to the Commission's basic health and safety

standards.” Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719 (3d Cir. 1989) quoting Citizens for Safe Power v. NRC, 524 F.2d 1291, 1299 (D.C. Cir. 1975).

2. The Commission Reviewed Issues Relating Exclusively to Calculating TEDE on Appeal.

In addition to the self-limiting language of CLI-06-14, the issue Intervenor presented to the Commission for review was likewise very narrow. The Commission will not consider any issue not clearly articulated in a petition for review. In the Matter of Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), CLI-01-11, 53 NRC 370, 383 (2001); In the Matter of Yankee Atomic Electric Co. (Yankee Nuclear Power Station), CLI-98-21, 48 NRC 185, 198 n.1 (1998). In their petition for review of LBP-06-01, Intervenor asked the Commission to review a specific aspect of the Presiding Officer’s decision: whether the Presiding Officer erred in interpreting 10 C.F.R. Part 20 regulations as they relate to the calculation of TEDE.¹

Thus, the issue presented to the Commission for review was limited to the narrow issue of how TEDE should be calculated.

B. Intervenor’s NEPA Arguments are Largely Unaffected by CLI-06-14

1. Only Intervenor’s Argument Relating to Calculation of TEDE is Affected by the Commission’s Decision.

Because CLI-06-14’s scope is narrow, all of Intervenor’s NEPA arguments, except one sub-argument, remain intact.² In their Phase II NEPA brief, Intervenor argue

¹ In the Petition for Review, Intervenor argued that the Presiding Officer improperly relied on the concept of TENORM, in determining what constitutes background radiation. Petition for Review at 4-6. Intervenor argued that the Presiding Officer erred by violating accepted standards of statutory and regulatory construction when interpreting 10 C.F.R. §20.1301(a)(1) and §20.1003. *Id.* at 6-8. Intervenor argued that by allowing HRI to exclude existing radioactive contamination from its TEDE calculations, the Commission would be violating its obligation to protect public health. *Id.* at 9-10.

² Intervenor’s arguments on the FEIS’ inadequate analysis of the effects of the proposed CUP on groundwater, radiological levels, health effects and land use are clearly unaffected by the Commission’s decision in CLI-06-14. Also, arguments regarding the adequacy of the FEIS statement of purpose and need

a range of issues, including the Final Environmental Impact Statement's ("FEIS") insufficient analysis of the Crownpoint Uranium Project's ("CUP's") radioactive air impacts.³ NEPA Brief at 21-26. Of intervenors' arguments relating to the analysis of the CUP's radioactive air impacts, only one sub-argument could conceivably be affected by the Commission's decision in CLI-06-14 – the sub-argument that the FEIS does not adequately address the distinction between background radiation levels and the radiation caused by previous mining in the context of HRI's TEDE calculations. NEPA Brief at 24. The Commission's decision in CLI-06-14 clearly decides this issue. However, this is the only NEPA related argument that intervenors raised that is affected by CLI-06-14.

2. Intervenors' Cumulative Air Impacts Argument is Unaffected by the Commission's Decision.

Conversely, none of the intervenors' other arguments regarding the CUP's radioactive air impacts are affected. Particularly, the Commission's decision does not bear on the intervenors' primary argument that the FEIS' analysis of the cumulative impacts of existing radioactive contamination from past uranium mining is inadequate and incorrect. NEPA Brief at 26. The Commission's determination that existing mine spoil is "background radiation" for the purposes of calculating TEDE is irrelevant to the adequacy of the FEIS analysis concerning cumulative air impacts of the radiation from that same existing contamination.

a. FEIS cumulative air impacts analysis requirements are much broader than the issue of TEDE calculation.

(NEPA Brief at 33), alternatives analysis (NEPA Brief at 36), mitigation measures (NEPA Brief at 40) and failure to supplement (NEPA Brief at 42) are clearly unaffected by CLI-06-14.

³ Intervenors' NEPA arguments cover Section 17, Unit 1 and Crownpoint. Intervenors' Section 17 Air Brief addressed only Section 17. Intervenors do not concede any of their NEPA arguments for all three sections, other than that one sub-argument decided by CLI-06-14, the argument that the FEIS does not adequately address the distinction between background radiation levels and the radiation caused by previous mining in the context of HRI's TEDE calculations.

NEPA analysis required here is much broader and more comprehensive than merely the issue of the method of TEDE calculation. Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1983 U.S. App. LEXIS 30142 (2d Cir. 1983). NEPA analysis is necessarily broader in order for federal agencies and the general public to fully consider a project's risks and benefits. Id. at 1029.

The NEPA EIS requirement serves two purposes. First, "[i]t ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." Robertson v. Methow Valley Citizens Council, 490 U.S. at 349, 104 L.Ed 2d 351, 109 S. Ct. 1835. Second, it "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." Id.

The United States Supreme Court described the informational role of the EIS: "... to give the public the assurance that the agency has indeed considered environmental concerns in its decisionmaking process and, perhaps more significantly, provide a springboard for public comment in the agency decisionmaking process itself. The purpose here is to ensure that the "larger audience" can provide input as necessary to the agency making the relevant decisions." Department of Transportation v. Public Citizen, 541 U.S. 752, 768 (U.S. 2004).

One of the purposes of the EIS process is to provide information to the public, information which will serve as a springboard for public comment. This purpose is much broader than the discrete decision made in CLI-06-14 regarding TEDE calculation.

In this case, the public health and environmental effects of radioactive contamination from past mining must be evaluated in order for the NRC to take the required "hard look" at the CUP's impacts. Additionally, the FEIS should include detailed information on the cumulative impacts of radioactive air impacts from past uranium mining combined with the impacts from the CUP in order to allow the public to meaningfully comment on the FEIS. The Commission's decision in CLI-06-14 does not affect this fundamental NEPA requirement.

b. Cumulative impacts analysis as defined in Council on Environmental Quality regulations implementing NEPA is much broader than the TEDE calculation

Council on Environmental Quality ("CEQ") regulations implementing NEPA require that environmental impact statements include consideration of direct impacts, indirect impacts and cumulative environmental impacts of proposed federal actions such as the licensing of the CUP. *See* 40 CFR §§1508.7, 1508.8, 1508.25. The CEQ regulations define cumulative impact as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 CFR §1508.7 (emphasis added). FEIS analysis of cumulative air impacts, consistent with the CEQ regulations, clearly includes the cumulative impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. NEPA requirements and therefore the FEIS analysis are not constrained by specific definitions of background radiation on which the Commission based its decision in CLI-06-14. Rather, a broad consideration of

cumulative air impacts from the past, present and reasonably foreseeable future is required in the FEIS.

In this case, in order to meaningfully consider the full range of environmental and public health risks associated with the CUP, the cumulative effects of HRI's radioactive air emissions and existing radioactive contamination must be adequately analyzed in the FEIS.⁴ The Commission's narrow decision in CLI-06-14 cannot be read to overturn this basic function of NEPA and basis requirement of NEPA analysis.

C. All other NEPA arguments argued by Intervenors stand.

The legal examination of the adequacy of the FEIS analysis for Church Rock Section 17, Unit 1 and Crownpoint requires consideration of legal standards unrelated to the method of TEDE calculation. Thus, the Commission's decision in CLI-06-14 is irrelevant to Intervenors' arguments which they renew here.

1. Intervenors' Argument that the FEIS Mischaracterizes Gamma and Radon Levels is Unaffected by the Commission's Decision.

Likewise, Intervenors' arguments that the FEIS inaccurately represents existing elevated levels of gamma radiation and radon, that the FEIS misrepresents the sources of existing radiation levels, and that the FEIS improperly lumps together existing radioactive contamination in Crownpoint and Church Rock are unaffected by the Commission's decision. NEPA Brief at 22-25. As with Intervenors' arguments relating to cumulative impacts, whether or not radiation from existing contamination is considered in TEDE calculations is irrelevant to Intervenor's NEPA arguments on this matter. NEPA requires a sufficiently detailed environmental impact statement that has an analysis that is carried out in good faith. Calvert Cliffs Coordinating Committee v. AEC,

⁴ As argued in Intervenors' NEPA Brief, the cumulative effects of the CUP on the groundwater, radiological levels, health effects and land use must also be adequately analyzed in the FEIS.

449 F.2d 1109, 1114-1115 (D.C. Cir. 1971). Intervenors' arguments about the mischaracterization of radiation from existing contamination in the FEIS speak directly to this aspect of NEPA and stand despite the Commission's decision in CLI-06-14.

2. Intervenors' Argument that the FEIS Inadequately Considers Health Impacts from Air Emissions is Unaffected by the Commission's Decision.

Intervenors' argument that the FEIS is deficient in its analysis of health impacts of the proposed CUP on the affected communities is not affected by the Commission's decision. NEPA Brief at 30-32.

Environmental justice issues, including health impacts, before the NRC are considered in the course of its NEPA review process. In the Matter of Louisiana Energy Services, L.P (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 102 (1998). The environmental justice inquiry must include a disparate impact analysis by considering factors unique to the community. Id. at 100.

In this case, Intervenors argued that the FEIS inadequately addressed the unique aspects of Crownpoint and Church Rock as they relate to the CUP's impact on public health. NEPA Brief at 30-32. Intervenors argued that the FEIS ignores the cumulative health effects of releases of radioactive materials from past uranium mining combined with the proposed CUP's emissions. Id. at 31-32. Moreover, the FEIS fails to adequately analyze the unique vulnerability of the affected population and the affected communities' socioeconomic conditions. Id. at 30. See also Dr. Christine Benally's Testimony attached as Exhibit 2 to ENDAUM's and SRIC's Brief in Opposition to HRI's Application for a Materials License with Respect to: Environmental Justice Issues, February 19, 1999 (ACN 9902240054) (hereinafter "Environmental Justice Brief"). Dr. Benally concludes that the FEIS is fundamentally deficient in its treatment of cumulative impacts of the

CUP in the Church Rock area and that these impacts are “from a public health perspective, disproportionately high and adverse on the local low-income, Native American population.” Environmental Justice Brief Exhibit 2 at 9.

NEPA required disparate impact and environmental justice analysis is much broader than the mere characterization of existing mine spoil as “background radiation” for the purpose of calculating TEDE. The FEIS’ inadequate treatment of the cumulative health effects of past uranium mining and the CUP is wholly unrelated to the radiation sources included in the calculation of TEDE. Therefore, Intervenor’s argument relating to the CUP’s cumulative health effects and disparate health impacts remains unaffected by the Commission’s decision in CLI-06-14.

3. Intervenor’s Argument that the FEIS Inadequately Identified and Analyzed Alternatives is Unaffected by CLI-06-14.

The alternatives analysis is at the heart of the EIS process. 40 C.F.R. §1502.14; DuBois v. United States Department of Agriculture, 102 F.3d 1273, 1286 (1st Cir. 1996), cert. den. 117 S. Ct. 2510 (1997); Simmons v. United States Army Corps of Eng’rs, 120 F.3d 664, 666 (7th Cir., 1997). Intervenor’s arguments that the FEIS is fundamentally flawed — specifically, that the statement of purpose and need is incorrect and inadequate, that the FEIS inadequately identified and analyzed alternatives and that the FEIS improperly omits any discussion of the impact and consequences of its proposed mitigation measures — all stand, as CLI-06-14 did not address nor did it decide these matters. See NEPA Brief at 33-42. Moreover, the Commission’s decision does not indirectly affect the alternatives analysis because how HRI calculates the TEDE from its operations has no bearing on the existence of radiation caused by previous uranium mining.

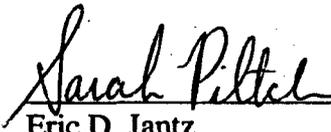
4. Intervenors' Argument that the FEIS Should be Supplemented is Unaffected by CLI-06-14.

CLI-06-14 does not affect Intervenors' argument that the FEIS should be supplemented and recirculated for public comment. NEPA Brief at 42-51. The FEIS should be supplemented and recirculated for public comment because the license is a performance based license; the fact that the action alternatives changed between the DEIS and the FEIS; and because the sequence of mining the sites has been changed. NEPA Brief at 42-47. Additionally, the proposed Springstead Estates Housing Project and the passage of the Diné Natural Resources Protection Act constitute significant factual and legal changes that merit supplementation of the FEIS. NEPA Brief at 47-51.

IV. CONCLUSION

For the foregoing reasons, the Commission's decision in CLI-06-14 is irrelevant to all but one sub-argument of Intervenors' NEPA related arguments as argued in the NEPA Brief. For the reasons explained above, HRI's license should be invalidated or in the alternative, the FEIS should be supplemented and recirculated for public comment.

Dated May 30, 2006.



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Before Administrative Judges:
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In the Matter of)	
)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)	ASLBP No. 95-706-01-ML
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Eastern Navajo Diné Against Uranium Mining's and Southwest Research And Information Center's Supplemental Brief Regarding the Impact of CLI-06-14 on Intervenors' NEPA Claims" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, and via email to those persons indicated by an asterisk, this 30th day of May, 2006:

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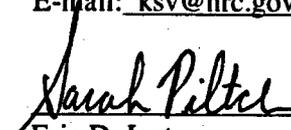
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May 30, 2006

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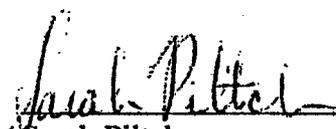
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors Eastern Navajo Diné Against Uranium Mining's and Southwest Research And Information Center's Supplemental Brief Regarding the Impact of CLI-06-14 on Intervenors' NEPA Claims". Copies of the enclosed brief have been served on the parties indicated on the attached certificate of service. Additionally, please return a file-stamped copy of the cover 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,



Sarah Piltch
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New Mexico Environmental Law Center
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Enclosures

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