



May 22, 2008

Elisabeth Shumaker, Clerk
United States Court of Appeals
for the Tenth Circuit
Byron White Courthouse
1823 Stout Street
Denver, Colorado 80257

VIA U.S. POSTAL SERVICE, OVERNIGHT
DELIVERY

RE: *Eastern Navajo Diné Against Uranium Mining, et. al. v. U.S. Nuclear Regulatory Commission*, Case No. 07-9505

Dear Ms. Shumaker:

Charles Mullins, attorney for the Respondent United States Regulatory Commission ("NRC"), has filed a letter seeking to correct a mistake he made during oral argument on May 12, regarding the record of the NRC's administrative proceeding with respect to airborne radiation doses at Church Rock Section 17. Mr. Mullins correctly states that neither the Final Environmental Impact Statement nor the Draft Environmental Impact Statement specifically addresses the dose to the public at the fence line on Section 17.

Mr. Mullins' letter also asserts that in LBP-06-01, 64 NRC 41 (2006), the Presiding Officer "did address the dose to the public from all sources at the fence line on the eastern side of Section 17." His description of the LBP-06-01 is incomplete and misleading. The Presiding Officer made no finding regarding doses at the eastern fenceline, but he did acknowledge Petitioners' evidence that the levels of gamma radiation alone at that location (not including radon and other sources of radiation) equate to an annual radiation dose of 1.1 rem. 63 NRC at 61 n.16. That dose is more than ten times above the regulatory limit in 10 C.F.R. § 20.1301(a)(1).

Importantly, in the same footnote, the Presiding Officer characterized the radiation levels at Section 17 as "background radiation" and found that therefore they should not be counted in calculating radiation doses from Hydro Resources, Inc.'s ("HRI's") Section 17 operations. *Id.* Thus, the Presiding Officer found it unnecessary to make a factual determination regarding the radiation doses from Section 17. Nor did the Commission subsequently make any such determination. CLI-06-14, 63 NRC 510, 515 (2006).

Finally, Mr. Mullins cites record evidence that even if radiation from mine waste at Section 17 is included in radiation exposure calculations, exposure levels do not exceed regulatory limits. Since this evidence played no part in the Presiding Officer's or Commission's determination that radioactive air exposures from HRI's operation meet regulatory limits, it is beyond the scope of the Court's review. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 50 (1983) (citations omitted) (agency

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U.S. Court of Appeals for the Tenth Circuit
May 22, 2008
Page 2

action must be reversed or upheld on the basis articulated by the agency itself). In any event, Mr. Mullins neglects to cite contrary record evidence, submitted by Petitioners, showing that when radiation from mine waste is included in dose calculations for radiation exposures at Section 17, regulatory limits are exceeded. Declaration of Linda Ronca-Battista, Joint Appendix at 823-833.

Thank you for your attention to this matter and please distribute three enclosed copies of this letter to the panel considering this case and return one date stamped copy in the enclosed postage paid envelope.

Sincerely,

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