

March 5, 1999
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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 MAR -5 P2:32

BEFORE THE PRESIDING OFFICER

In the matter of)
)
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF
Docket No. 40-8968-MIL
Re: Leach Mining and Milling License

NRC STAFF'S RESPONSE TO INTERVENOR MOTION
TO FILE REPLY BRIEF

INTRODUCTION

On February 26, 1999, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC), jointly filed a motion¹ requesting leave to file a reply brief and rebuttal testimony regarding the written presentations submitted by in situ leach (ISL) uranium mining licensee Hydro Resources, Inc. (HRI) and the Staff² on issues concerning air emissions.

¹ See "ENDAUM's and SRIC's Motion For Leave To Submit Reply Brief And Rebuttal Testimony In Response To HRI's And Staff's Initial Presentations Regarding Air Emissions" (SRIC's Air Reply Motion). While this motion is dated March 2, 1999, it was actually sent and received via electronic mail (e-mail) on February 26, 1999. The Presiding Officer's "Memorandum and Order (Questions Concerning the Technical Qualification Issue)," dated March 3, 1999 (unpublished) (March 3 Order), references a companion SRIC motion (which the Presiding Officer has granted in part) as being dated February 26, 1999. See March 3 Order, at 3 n.3. Remarkably, the certificate of service attached to the e-mailed version of SRIC's Air Reply Motion incorrectly states that it was served via e-mail on March 2.

² See "[HRI's] Response To [ENDAUM'S] and [SRIC's] January 11, 1999 Brief Regarding Radioactive Air Emissions At The Crownpoint Project", dated February 11, 1999 (HRI's Air Response); and "NRC Staff's Response To Intervenors' Presentation On Air Emissions Issues," dated February 18, 1999 (Staff's Air Response).

Pursuant to 10 C.F.R. § 2.1233, the Presiding Officer's "Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation)", dated September 22, 1998 (unpublished) (September 22 Order), and the subsequent Joint Notice of Modification of Schedule for Written Presentations dated November 5, 1998 (as later amended), SRIC and ENDAUM have already filed a number of lengthy written presentations on various issues which they contend are raised by the ISL mining HRI proposes to undertake.

As discussed below, the Staff finds that with respect to SRIC's Air Reply Motion, it only seeks an opportunity to argue again points which have already been amply covered in SRIC's January 11, 1999 air emissions brief, HRI's Air Response, and Staff's Air Response. Accordingly, SRIC's Air Reply Motion should be denied.

DISCUSSION

Section II of SRIC's Air Reply Motion, at 6-9, does not identify any factual information which the Intervenors could not have obtained previously. The legal arguments they assert have already been briefed. Cf. SRIC's Air Reply Motion, at 6, to their January 11, 1999 air emissions brief, at 3-4.

ENDAUM and SRIC argue (*see* Air Reply Motion, at 7-8) that they should be permitted to respond to factual assertions made for the first time in HRI's Air Response and Staff's Air Response, but the examples of "factual assertions" cited (*e.g.*, national radon data) are based on publicly available information. Moreover, these sources of information were used to rebut the opinions of Mr. Bernd Franke, which were introduced into the record by the Intervenors in their January 11 air emissions brief. It is therefore hardly surprising that HRI and the Staff made new assertions in their response briefs, since HRI and the Staff were

responding to new arguments. Additionally, acceptance of this Intervenor argument would threaten a cycle of arguments in which each party seeks to respond to the latest round of filings.

The Intervenors complain about "the unfairness" of requiring them to prepare presentations without having access to a complete hearing file, *citing Sequoyah Fuels Corporation*, LBP 94-39, 40 NRC 314 (1994). Air Reply Motion, at 7, and n.5. Yet they identify no documents regarding air emissions which should have been included in the HRI Hearing File, but were not. Copies of Hearing File materials were distributed to the parties by cover letter dated June 11, 1998.

ENDAUM and SRIC further seek to file additional information regarding the technical aspects of Mr. Franke's report. *See* Air Reply Motion, at 9. This request should be denied, as the Intervenors fail to properly cite to the specific portions of the record which they claim are defective or erroneous, in violation of the Commission's recent policy statement update regarding the conduct of adjudicatory proceedings. The Commission stated, in pertinent part, as follows:

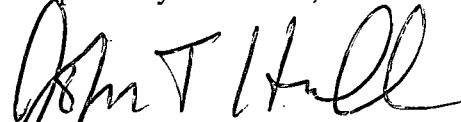
Parties are also obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

63 Fed. Reg. 41872, at 41874 col. 2 (August 5, 1998). The general statements made by the Intervenors (*see* Air Reply Motion, at 9) make a meaningful response thereto difficult, and do not form a proper basis upon which to grant their requested relief.

CONCLUSION

Accordingly, for the reasons set forth above, the Presiding Officer should deny SRIC's Air Reply Motion. As shown by the information in the HRI Hearing File, the intervenors have failed to identify any matters supporting the relief they request. Accordingly, the Staff requests the Presiding Officer to deny the relief sought.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 5th day of March, 1999

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NUCLEAR REGULATORY COMMISSION

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BEFORE THE PRESIDING OFFICER

In the Matter of)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
) (Leach Mining and Milling License)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

OFFICE OF SECRETARY
RULLING, KIRBY, AND
ADJUDICATION STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENOR MOTION TO FILE REPLY BRIEF" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, via e-mail and express mail, this 5th day of March, 1999:

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