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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

BEFORE THE PRESIDING OFFICER

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

NRC STAFF'S RESPONSE TO INTERVENORS'
MOTIONS FOR LEAVE TO REPLY

INTRODUCTION

"Grace Sam and Marilyn Morris's Motion For Leave To Reply To The Responses Filed By HRI and NRC Staff," dated April 8, 1999 (Sam's Motion), seeks leave to reply to the March 29, 1999 written presentation filed by Hydro Resources, Inc. (HRI); and to the Staff's April 1, 1999 written presentation on environmental justice issues (Staff's EJ Brief). Similarly, by filings dated April 12, 1999, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC), moved for leave to reply to the Staff's EJ Brief, and to the Staff's April 1, 1999 written presentation on cumulative impacts and segmentation issues (Staff's Segmentation Brief).¹ See "ENDAUM's and SRIC's Motion For Leave To Submit Reply Brief and Rebuttal Testimony In Response To The NRC Staff's Response Presentation On Environmental Justice" (E/S's EJ Motion); and "ENDAUM's and SRIC's Motion For Leave To

¹ ENDAUM and SRIC filed a third motion on April 12, 1999, seeking leave to reply to the Staff's April 1, 1999 written presentation on various NEPA issues. The Staff is responding to that motion in a separate filing.

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Reply To The Response Filed By The NRC Staff To ENDAUM's and SRIC's Presentations On Cumulative Impacts And Segmentation Issues" (E/S's Segmentation Motion).

This Staff response is made pursuant to the Presiding Officer's April 13, 1999, electronic mail messages to the parties, directing that any responses to the motions for leave to reply be filed by April 19, 1999. For the reasons discussed below, the Presiding Officer should deny Sam's Motion; deny E/S's EJ Motion; and deny E/S's Segmentation Motion.

DISCUSSION

ENDAUM and SRIC refer to a limited "right" to present rebuttal testimony. See E/S's EJ Motion, at 2; and E/S's Segmentation Motion, at 2. As noted in HRI's April 13 response to E/S's EJ Motion, there is no such right in a subpart L proceeding. Whether to allow such testimony is entirely within the Presiding Officer's discretion under 10 C.F.R. § 2.1233. See *Curators of University of Missouri* (Trump-S Project), CLI-95-1, 41 NRC 71, 114-17 (1995). Neither Sam's Motion, E/S's EJ Motion, nor E/S's Segmentation Motion, demonstrate that discretionary replies should be allowed here.

A. Staff's Briefs Do Not Contain The Factual Errors Alleged

In claiming that both the Staff's EJ Brief, and the Staff's Segmentation Brief, contain factual errors, ENDAUM and SRIC do not correctly characterize the record. See E/S's EJ Motion, at 3-5; and E/S's Segmentation Motion, at 2-7. For example, ENDAUM and SRIC state that the Staff "chooses to simply ignore the significant Navajo population living close to HRI's proposed Church Rock Section 8 mining site." E/S's EJ Motion, at 3-4. From the start of the Staff's environmental justice evaluation, the Staff has recognized the fact that "the population near the proposed project

sites is made up almost entirely of Navajo.” NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February 1997) (FEIS), Section 4.12, at 4-112.

Similarly, in claiming that Larry King, his family, and other un-named residents living in the vicinity of HRI's Church Rock site would “face relocation” if ISL mining occurs there, the cited testimony of Mr. King says nothing about such a relocation.² E/S's EJ Motion, at 4, *citing* Mr. King's February 9, 1999, testimony, at 2.

ENDAUM and SRIC characterize as an “allegation” the Staff's citation to LBP-98-9, 47 NRC 261 (1998). *See* E/S's Segmentation Motion, at 2-3. On the contrary, the Staff accurately paraphrased the Presiding Officer's ruling that concerns regarding the clean-up of existing radiological contamination are not germane. *See* Staff's Segmentation Brief, at 2, *citing* LBP-98-9, 47 NRC 261, at 283. Moreover, ENDAUM's and SRIC's quotation of the relevant ruling omits the Presiding Officer's footnote 68, which references page two of the December 14, 1994 hearing request made by Grace Sam and Marilyn Morris. In addition to the sentence quoted therefrom by the Presiding Officer in LBP-98-9, page two of the December, 1994, hearing request references the 1979 tailings spill, and “the radiation effect on people and animals using the area.” Therefore, it seems quite clear that the Presiding Officer's ruling takes concerns regarding existing radiological contamination outside the scope of this proceeding.

² Moreover, any such relocations would be very unlikely to happen, if the proffered environmental justice testimony of Dr. Robert Bullard is accepted. According to Dr. Bullard, all of the residents he spoke with in the Church Rock area repeatedly told him that “their intention [was] to remain on the land, which they said had been in their families for several generations.” Bullard Testimony, at 18. Significantly, Dr. Bullard makes no mention of any of these residents telling him that they would move if ISL mining takes place on HRI's Church Rock site.

The charge that statements of counsel citing to the FEIS are improper, is equally without merit. *See* E/S's Segmentation Motion, at 5-6 (regarding the FEIS' treatment of past impacts of uranium mining). The FEIS was authored by properly credentialed experts, whose knowledge and training covers several different technical fields. *See* FEIS, Section 8. The FEIS is part of the record, and it certainly requires no technical expertise to cite appropriate sections of the FEIS. To argue that Staff only be allowed to cite to the FEIS through use of affidavits is absurd, and ENDAUM and SRIC cite no authority to support their argument.

B. Staff's Briefs Do Not Contain The Legal Errors Alleged

Both the Staff's EJ Brief, and the Staff's Segmentation Brief, are also said to contain legal errors. *See* E/S's EJ Motion, at 5-8; and E/S's Segmentation Motion, at 7-9. In this regard, ENDAUM and SRIC state that an environmental justice analysis of proposed federal actions is required by law. *See* E/S's EJ Motion, at 5. Assuming *arguendo* that they are correct (the point is open to question), this point is a moot one here. An environmental justice analysis was done, as the Staff has already emphasized. *See* Staff's EJ Brief, at 10, *citing* FEIS sections 3.10 and 4.12.

Regarding the segmentation issue, the Staff had noted that the relevant argument presented by ENDAUM and SRIC failed to cite any specific portions of the FEIS. *See* Staff's Segmentation Brief, at 8-9, *citing* the ENDAUM and SRIC "Cumulative Impacts and Segmentation of Consideration of Impacts" brief, dated February 19, 1999 (E/S Segmentation Brief), at 43-46. ENDAUM and SRIC now assert, without explanation, that the Staff should have cited the E/S Segmentation Brief, at 30-34. *See* E/S's Segmentation Motion, at 7-8. While several specific cites to the FEIS are contained therein, ENDAUM and SRIC provide no explanation as to how these cited

portions of the FEIS support (or even relate to) their segmentation argument. In further arguing that the Staff's segmentation argument contains legal errors (stating that "the point is that the FEIS did not consider all of the impacts"), ENDAUM and SRIC confuse the segmentation issue with the cumulative impacts issue. ENDAUM and SRIC also incorrectly characterize the Staff's argument, in stating that Staff missed the point "that the NEPA inquiry does not end" with the FEIS' publication. E/S's Segmentation Motion, at 8-9, *citing* Staff's Segmentation Brief, at 9. The Staff said nothing there about ending "the NEPA inquiry." ENDAUM and SRIC's segmentation argument reflects a misunderstanding of the case law pertaining to segmentation.³

C. Proffered Testimony Should Be Rejected

ENDAUM and SRIC also seek leave to reply on the question of whether the proffered testimonies of Dr. Bullard, Dr. Christine Benally, and Dr. Douglas Brugge, should be accepted. *See* E/S's EJ Motion, at 8-10. The Staff submits that the record is sufficient as it stands for the Presiding Officer to decide this question, but the suggestion that "the NRC" found Dr. Bullard "credible and convincing" (*id.*, at 9) is both misleading and irrelevant. The presiding officer in another case, rather than the Commission, made this determination. Additionally, this determination was made in the context of whether property values had been properly taken into account, an issue which is not relevant here in this phase of the proceeding. *See* Staff's EJ Response, at 11-12.

³ The string cites provided (*see* E/S's Segmentation Motion, at 8) are to the same decisions previously relied on (*cf.* E/S's Segmentation Brief, at 45-46), and again provide no explanation showing why those decisions are relevant here.

D. Alleged Failure To Address All Cumulative Impact Issues

Finally, ENDAUM and SRIC argue they should be allowed to file a reply detailing the Staff's alleged failure to address all of their cumulative impact issues. *See* E/S's Segmentation Motion, at 9-10. Even if this characterization was correct (and as discussed below, it is not correct), no showing is made that additional filings are needed to achieve an adequate record. Where the Presiding Officer has determined that more information is needed in this proceeding, he has requested additional filings. *See, e.g.*, LBP-99-15.

In its filings so far in this proceeding, the Staff has chosen not to adopt the scatter-shot approach used by ENDAUM and SRIC. For example, ENDAUM and SRIC often choose to discuss the same or similar issues in different briefs. *Cf.* ENDAUM's and SRIC's "Environmental Justice Issues" brief, dated February 19, 1999, at 34, to E/S's Segmentation Brief, at 35, regarding the socioeconomic issue of local hiring. Both presentations criticize the FEIS analysis of this issue, citing FEIS page 4-96. The Staff chose to respond to this criticism in the Staff's EJ Brief, rather than in the Staff's Segmentation Brief. *See* Staff's EJ Brief, at 11.

Nor has the Staff chosen to provide technical rebuttals to issues outside the scope of this phase of the proceeding, or to subjects on which the Presiding Officer has already issued partial initial decisions. Consistent with this approach, the Staff's Segmentation Brief focused on the relevant issues only, as explained at 2-3, and nn. 5-6 therein. Contrary to the charge that the Staff did "not even mention" issues regarding cultural resources and liquid waste disposal, those issues were referenced. *See* Staff's Segmentation Brief, at 3 n. 5. Cumulative radiological impacts (apart from those concerning ground water, which ENDAUM and SRIC admit the Staff did address) are

addressed in the Staff's Segmentation Brief, at 7, contrary to the charge that the Staff did not respond on that issue.

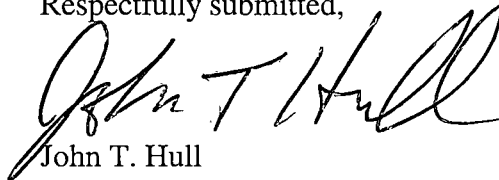
E. Sam's Motion Should Be Denied

Sam's Motion, insofar as it relates to the Staff's EJ Brief, should also be denied. Responding to the Staff's EJ Brief argument, at 11, that the proposed relocation of drinking wells in Crownpoint is outside the scope of this phase of the proceeding, the Presiding Officer's unpublished November 10, 1998 Order, at 2, is cited as allowing for presentations on cumulative impact issues. *See* Sam's Motion, at 5. No showing is made as to how the proposed relocation of drinking wells in Crownpoint relates to cumulative impacts. Moreover, the November 10, 1998 Order, at 2, also states that the "determination of strictly local issues that do not affect [HRI's Church Rock] Section 8" site are not part of this phase of the proceeding. The proposed relocation of drinking wells in Crownpoint is just such a "strictly local issue," which would not need to be litigated until such time as HRI seeks to operate ISL mines in Crownpoint.

CONCLUSION

As discussed above, the arguments made in support of allowing reply presentations lack merit. The Presiding Officer should accordingly deny the pending motions to file replies to the Staff's written presentations.

Respectfully submitted,

A handwritten signature in cursive script that reads "John T. Hull". The signature is written in black ink and is positioned above the printed name and title.

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of April, 1999

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OFFICE OF SECRETARY
RULES, PRACTICE AND
ADJUDICATION STAFF

In the Matter of)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
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2929 Coors Road, Suite 101) (Leach Mining and Milling License)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' MOTIONS FOR LEAVE TO REPLY" 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 19th day of April 1999:

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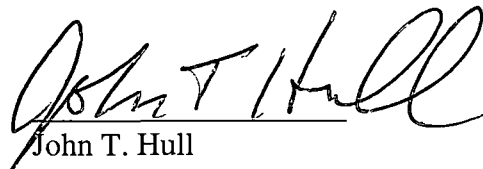
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