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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION APR 20 11:48

BEFORE THE PRESIDING OFFICER OF THE SPECIAL
INVESTIGATIVE AND
ADJUDICATIVE STAFF

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

NRC STAFF'S RESPONSE TO INTERVENOR MOTIONS FOR
LEAVE TO REPLY TO HRI AND STAFF PRESENTATIONS ON NEPA
(PURPOSE, NEED, COST/BENEFIT, ALTERNATIVES, AND SUPPLEMENTATION)

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC), submitted a joint written presentation alleging that NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint New Mexico, dated February 1997 (FEIS), and the Environmental Report (ER) prepared by Hydro Resources, Inc., do not comply with the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (NEPA), or its implementing regulations.¹ Intervenors Grace Sam and Marilyn Sam Morris (Sams) similarly allege that the discussion of alternatives and secondary effects in the FEIS is deficient. Final Written Presentation of Grace Sam and Marilyn Morris, dated February 19, 1999 (Sam NEPA

¹ ENDAUM's And SRIC's Written Presentation In Opposition To Hydro Resources, Inc.'s Application For A Materials License With Respect To: NEPA Issues Concerning Project Purpose and Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Failure to Supplement EIS, And Lack of Mitigation, dated February 19, 1999 (E/S NEPA Brief), at 2.

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Brief), at 2. HRI responded to these intervenor filings on March 25 and March 29, 1999.² The Staff filed its response on April 1, 1999. NRC Staff's Response To Intervenor Presentations On NEPA Issues (Purpose, Need, Cost/Benefit, Alternatives, and Supplementation), dated April 1, 1999 (Staff NEPA Response).

ENDAUM and SRIC, and the Sams, now seek leave to reply to the HRI and Staff filings on these matters. ENDAUM's And SRIC's Motion For Leave To Reply To The Response Filed By HRI To ENDAUM's And SRIC's Presentations On NEPA Issues, dated April 5, 1999; ENDAUM's And SRIC's Motion For Leave To Reply To The Response Filed By The NRC Staff To ENDAUM's And SRIC's Presentations On NEPA Issues (Purpose, Need, Cost/Benefit, Alternatives, and Supplementation), dated April 12, 1999 (E/S Motion); Grace Sam And Marilyn Morris's Motion For Leave To Reply To The Responses Filed By HRI And NRC Staff, dated April 8, 1999 (Sams Motion). As discussed below, the motions should be denied because Intervenor merely seek an additional opportunity to proffer arguments previously raised and to prolong the Presiding Officer's consideration of the issues.³

²Hydro Resources, Inc.'s Response To ENDAUM and SRIC's Brief With Respect To NEPA Issues Concerning Project Purpose And Need, Cost/Benefit Analysis, Action Alternatives, No Action Alternative, Necessity To Supplement EIS, Mitigation, And Cumulative Impacts, dated March 25, 1999 (Hydro NEPA Response A); Hydro Resources, Inc.'s Response To The Final Written Presentation Of Grace Sam and Marilyn Morris, dated March 29, 1999 (Hydro NEPA Response B).

³Inasmuch as HRI has addressed Intervenor arguments concerning their filings, the Staff addresses these motions as they relate to Staff documents.

DISCUSSION

A. ENDAUM and SRIC Motion

ENDAUM and SRIC argue that they should be provided an opportunity to address: (1) the Staff's assertion that there is a public benefit in provision of a domestic source of uranium "which can offset the deficit in uranium production," *see* E/S Reply at 3-4, (2) a "factual error" that various changes in the mining project do not require supplementation of the FEIS, *see id.* at 4; (3) that NEPA judgment should be made based on the entire record of the proceeding, *see id.* at 4-5; (4) the assertion that Council on Environmental Quality (CEQ) regulations are not binding, *see id.* at 6; and (5) the "failure" of the Staff to respond to arguments that the consideration of mitigation measures in the FEIS was inadequate, *see id.* at 7. Because ENDAUM and SRIC merely repeat arguments and testimony previously presented (or state arguments that should have been presented earlier) in this proceeding, iterating their view of what legal conclusions the Presiding Officer should draw from the adjudicatory record, their motion should be rejected. *See* 10 C.F.R. §2.1233(e).

ENDAUM's and SRIC's claim that there is no public benefit from domestic uranium production (as noted on page 5-1 of the FEIS) merely repeats arguments that the current lack of a deficit in uranium production is dispositive. *See* E/S Reply at 3-4. Intervenors again fail to show the FEIS benefit statement was unreasonable when made. They also choose to ignore that, given the unpredictability of the uranium market, HRI could conclude that project is unprofitable and mining would not occur. *See* HRI NEPA Response at 14-15. Thus, the FEIS reasonably discussed the benefits of proceeding with the project.

With respect to supplementation, Intervenors repeat information regarding the significance of the modified mining sequence. *See* E/S Motion at 4, *citing* E/S NEPA Brief at 71-72. Contrary to Intervenors' assertions, *see* E/S Motion at 4, supplementation is one of many NEPA issues that is not purely factual, but involves questions of mixed law and fact, requiring the decision maker to examine documents and apply NRC regulations and relevant case law.⁴ Inasmuch as Intervenors have previously briefed this issue, there is no need for Intervenors to be provided an opportunity to reply to the Staff's position.

Intervenors' assertion that NEPA judgments may not be based on the entire record, including Staff testimony, *see* E/S Motion at 5, is disingenuous. In the instant motion and previous reply motions, Intervenors have stated that the Presiding Officer needs to base his judgments on a complete record. *See* E/S Motion at 2. A complete record includes consideration of Staff testimony and arguments responding to alleged deficiencies in the FEIS. While Intervenors correctly note that 10 C.F.R. § 51.102(c) applies to 10 C.F.R. Subpart G proceedings, they ignore other regulations that indicate the NRC is to reach decision based on consideration of the FEIS as well as the record of decision. For example, 10 C.F.R. § 51.94 provides that the FEIS "will be *part* of the record of the appropriate adjudicatory proceeding" and that 10 C.F.R. § 51.103(b) and (c) state that a "record of decision may be integrated into another record prepared by the Commission" and "may incorporate by reference material

⁴The Staff agrees that statements of counsel are not evidence, *see* E/S Motion at 4, but counsel can present arguments concerning legal conclusions regarding whether supplementation of the FEIS is required. The Staff presented information and arguments to support its position that, in this case, there is an absence of (1) substantial changes in the proposed action that are relevant to environmental concerns and (2) significant new circumstances or information relevant to environmental concerns. *See* Staff NEPA Reply at 17-19.

contained in a final environmental statement.” (Emphasis added.) Therefore, arguments about the format of the FEIS should not be determinative if the substance of the document, as illuminated by Staff testimony, contains the information showing that the agency took a hard look at the environmental consequences of the proposed action and provided sufficient information for the public to understand the basis for the agency’s conclusions. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998) and cases cited therein.

Intervenors’ argument that the Staff incorrectly stated the general proposition that the NRC is not required to follow certain CEQ regulations, *see* E/S Motion at 7-8, should be rejected in that Intervenors should have addressed this issue in their initial filing given their frequent use of CEQ regulations and Intervenors have misconstrued the Staff’s position. The Staff did not state that the holding in *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 99 n.12 (1983), was that certain CEQ regulations are not binding on the NRC. Rather, the Staff cited Appeal Board cases which noted that holding in *BG&E v. NRDC* was not at odds with the NRC’s view that, as an independent regulatory agency, the NRC is not bound by substantive CEQ regulations. *See* Staff NEPA Response at 5 n.6, *citing Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Plant), ALAB-800, 26 NRC 449, 461 & n.15; *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-919, 30 NRC 29, 44 (1989). The Appeal Board noted that the Supreme Court specifically left open the issue of

independent agencies were bound by CEQ regulations. *E.g., Vermont Yankee*, 26 NRC at 461 n.15.⁵

Intervenors' claim that the Staff did not address Intervenor arguments about mitigation measures should be rejected. As stated, *see* Staff NEPA Response at 17 n.11, the Staff argued that impacts of such mitigation measures were encompassed by Alternative 1 (the project without mitigation measures). In addition, consistent with 10 C.F.R. § 51.103, the FEIS addressed measures to avoid or minimize harm of the preferred alternative and the HRI license contained conditions for monitoring programs adopted in connection with groundwater mitigation measures. *See e.g.*, FEIS at 4.3.3, 5.2 and Appendix B; HRI License Conditions 10.14, 10.17 to 10.22; Staff NEPA Response at Carlson Affidavit at ¶ 4, *citing* FEIS Sections 4 and 5, and FEIS at xx-xxi..

B. Sams Motion

The Sams argue that they should be able to respond to the factual assertions in the testimony of the NRC project manager, Robert D. Carlson, regarding the consideration of alternatives in the FEIS and to address the significance of the affidavit. *See* Sams Motion at 3-4. However, the Motion makes no proffer as to why the record would be incomplete without their submission or why additional information is necessary for the Presiding Officer to evaluate whether the consideration of alternatives in the FEIS is inadequate. This is

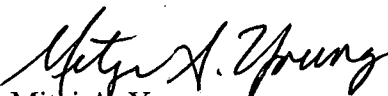
⁵ Moreover, the Commission noted in revising its NEPA regulations that, as a matter of law, the NRC can be bound by CEQ's NEPA regulations only insofar as the regulations are procedural or ministerial in nature since the "NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the NRC performs its regulatory functions." Statement of Consideration, Final Rule: Environmental Protection Regulations for Domestic Licensing and Related Regulatory Functions and Related Conforming Amendments, 49 Fed. Reg. 9352 (March 12, 1984).

particularly true since the Staff, consistent with 10 C.F.R. 51.103(b), discussed the alternatives in the FEIS and included reference to economic considerations, the NRC's statutory mission, and national policy. *See* Staff NEPA Response at 7-17. Thus, the request for leave to reply filed by the Sams should also be denied.

CONCLUSION

As discussed above, Intervenor's motions seek to iterate argument previously made by Intervenor and to prolong needlessly the Presiding Officer's consideration of the issues raised in the proceeding. Additional bites at the apple are not contemplated by 10 C.F.R. Subpart L. In light of the filings already on record and the information sought to be presented, Intervenor's attempt to submit repetitious and cumulative information should be rejected. Thus, the Presiding Officer should deny the motions for leave to reply.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

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

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE PRESIDING OFFICER

In the Matter of)
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101) (Leach Mining and Milling License)
Albuquerque, New Mexico 87120)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE INTERVENOR MOTIONS FOR LEAVE TO REPLY TO HRI AND STAFF PRESENTATIONS ON NEPA ISSUES (PURPOSE, NEED, COST-BENEFIT, ALTERNATIVES, AND SUPPLEMENTATION)" 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 U.S. Mail, first class and e-mail, this 19th day of April, 1999:

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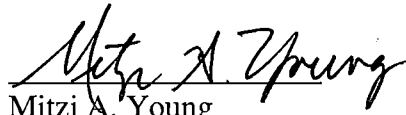
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