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

OFFICE OF PUBLIC AFFAIRS
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)) HYDRO RESOURCES, INC.) (2929 Coors Road, Suite 101) Albuquerque, NM 87120)) Docket No. 40-8968-ML) ASLBP No. 95-706-01-ML))
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**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)**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move the Presiding Officer for leave to reply to the response filed by the Nuclear Regulatory Commission ("NRC") Staff¹ to ENDAUM's and SRIC's written presentations concerning project purpose and need and other issues under the National Environmental Policy Act ("NEPA").² This motion is made pursuant to 10 C.F.R. §§2.730 and 2.1233(d) on

¹ NRC Staff's April 1, 1999 Response to Intervenor's Presentation on NEPA Issues (Purpose, Cost/Benefit, Alternatives, and Supplementation ("Staff's Response"). This motion is timely because it is filed on the first business day following the tenth day after service.

² Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's February 19, 1999 Brief 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

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the grounds that ENDAUM and SRIC should be permitted to address several issues raised by the Staff in its Response. Some of these issues were raised for the first time in Staff's Response. On several other issues ENDAUM and SRIC should be given an opportunity to reply in order to ensure a complete record and to correct inaccurate statements made by the Staff in its Response.

ARGUMENT

I. STANDARD FOR REBUTTAL PRESENTATIONS.

The NRC's Subpart L regulations provide for the filing of initial presentations and for the filing of additional presentations if leave is given to do so by the Presiding Officer. 10 C.F.R. §2.1233(d). The NRC Appeals Board has held in a formal adjudication that the Presiding Officer's discretion as to such additional filings is subject to the limited right of a party to present rebuttal testimony where it is needed for "full disclosure of the facts." *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 N.R.C. 1097, 1178 (1984). In addition, the Presiding Officer here has recognized that a decision must be based on a complete and accurate record. March 24, 1999 Memorandum and Order (Motions to Reply and Rebut) at 2.

II. ENDAUM AND SRIC SHOULD BE ABLE TO REPLY TO THE STAFF'S MISSTATEMENTS OF FACT AND LAW.

ENDAUM and SRIC should be able to reply to the Staff's erroneous assertion that its characterization of the purpose and need for the action did not influence the

Alternative, Failure to Supplement EIS, and Lack of Mitigation ("ENDAUM's and SRIC's NEPA Brief").

Final Environmental Impact Statement.³ Staff's Response at 5-6. ENDAUM and SRIC would point out in a reply that the FEIS's description of the purpose and need of the action determined the direction taken by the FEIS on several significant issues.

For example, with the exception of the no action alternative, the alternatives considered are all alternative ways of conducting the Crownpoint Uranium Project ("CUP"). ENDAUM's and SRIC's NEPA Brief at 56-60. The FEIS does not go beyond those alternatives because its scope is limited to the "need" of the NRC to issue a license. If the purpose and need for the proposed action had been properly defined, the FEIS could have considered other reasonable means of achieving that goal. These could have included, for example, blending down highly enriched uranium which "is a reasonable alternative for providing fuel for the production of electricity by nuclear power plants." Staff's Response at 8. *See also* ENDAUM's and SRIC's NEPA Brief at 58-59.

ENDAUM and SRIC also should be permitted to reply to the Staff's assertion that a public benefit of the proposed CUP is the "provision of a domestic source of uranium which can offset the deficit in uranium production." Staff's Response at 9. This statement, which is based on 1994 information, is contradicted by the current evidence presented by ENDAUM and SRIC. ENDAUM's and SRIC's NEPA Brief at 25-35 and supporting evidence. The Staff's statement also is not supported by its own

³ NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February, 1997) ("FEIS") (ACN 9703200270).

witness, Robert Carlson;⁴ he never alleges that there is a deficit in uranium production or that the CUP is needed to fill such a deficit. He also testifies that "domestic demand for uranium is shrinking...." Carlson Affidavit at 3. This statement is consistent with the testimony of ENDAUM's and SRIC's witnesses, and confirms that the CUP's addition to the domestic source of uranium is not a benefit because it is not needed.⁵ Moreover, the public does not benefit from the threat to national security that would result from the production of uranium, and it is not clear that the public benefits in any way from such production. *See* ENDAUM's and SRIC's NEPA Brief at 33-36.

Another factual error by the Staff is its assertion that various changes that have been made in the CUP do not require supplementation of the FEIS. For example, the Staff asserts that the change in the proposed mining sequence (from mining Section 8 first to mining Section 17 first) is not significant. Staff's Response at 18-19. As ENDAUM and SRIC pointed out in their NEPA Brief, the plan to mine first at Section 17 was one of the bases for HRI's assertion that it could control excursions. ENDAUM's and SRIC's NEPA Brief at 71-72. Moreover, Dr. William Staub and

⁴ Notably, Mr. Carlson's background is in engineering, and he has no apparent qualifications to make the economic judgments that are necessary to determine the need and market, if any, for uranium. *See* Carlson affidavit filed with the Staff's Response and his resume, Exhibit 3.A. to NRC Staff's February 20, 1998 Response to Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay.

⁵ Because there is no need for the uranium that would be produced by the CUP, the only justification for it is the secondary benefits (such as economic benefits to HRI and socioeconomic benefits to the local community) that allegedly would result. These are not an adequate basis for a determination of need for the CUP. *See* ENDAUM's and SRIC's NEPA Brief at 36-45 and supporting evidence.

Mr. Michael Wallace, experts with significant qualifications to evaluate that issue, have pointed out the importance of the mining sequence. *See* ENDAUM's and SRIC's NEPA Brief at 71-72 and supporting Staub and Wallace testimony.

The Staff's statement, on the other hand, was made by counsel for the Staff and is not based upon any testimony or other evidence. The Staff's statement should be disregarded because evidence can only be presented by a witness who is both qualified to provide the testimony and sworn to tell the truth. *See* Louisiana Power and Light Co. (Waterford Steam Electric Station Unit 3), ALAB-732, 17 NRC 1076, 1091 (1983); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453, 477 (1982); Fed. R. Evid. 603.

ENDAUM and SRIC also seek to reply to the Staff's inaccurate statement that ultimate NEPA judgments should be made on the basis of the entire record even though the FEIS may be deficient in some respects, and that findings and conclusions of an licensing board are deemed to amend the FEIS. Staff's Response at 4-5. In a reply, ENDAUM and SRIC would point out that the Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-262, 1 N.R.C. 163 (1975) case cited by the Staff is not applicable. In Subpart G proceedings such as that matter, the Presiding Officer's ruling becomes the record of decision for NEPA purposes. 10 C.F.R. §51.102. This is a Subpart L proceeding in which the Staff both issued the license and is responsible for issuing a record of decision. ENDAUM's and SRIC's NEPA Brief at 10.

ENDAUM and SRIC also would state in a reply that the FEIS must stand on

its own, and that an NRC decision under NEPA must be made on the basis of the information in the FEIS, not in other parts of the record. National Wildlife Federation v. Marsh, 568 F.Supp. 985, 996-997 (D.D.C. 1983). The FEIS must set forth an adequate analysis pursuant to NEPA; this analysis must be contained in the FEIS even if it is also in other documents, in order to provide in the FEIS the information that is required by the NRC and by members of the public.⁶

Contrary to the Staff's position, ENDAUM and SRIC also would explain that there is no exception to these requirements for NRC proceedings. NEPA indicates explicitly that it applies to the consideration of all major actions by all federal agencies, and the courts have confirmed that NEPA applies to major federal action proposed by all federal agencies, including the NRC.⁷ Moreover, the CUP is such a major federal action. ENDAUM's and SRIC's NEPA Brief at 18-20.

ENDAUM and SRIC would state as well in a reply that the need for review of

⁶ "To fulfill its role, the EIS must set forth sufficient information for the general public to make an informed evaluation ... and for the decisionmaker to "consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action." Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1029 (2d Cir. 1983) (citations omitted). "At the very least, NEPA is an environmental full disclosure law." Environmental Defense Fund v. Corps of Engineers of the U.S. Army, 325 F.supp. 749, 759 (E.D. Ark., 1971). *See also* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989), Committee for Nuclear Responsibility, Inc. v. Seaborg, 463 F.2d 783, 787 (5th Cir. 1971).

⁷ *See, e.g.* Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 89 (1983), Andrus v. Sierra Club, 442 U.S. 347, 357 (1979), Citizens Awareness Network v. U.S. Nuclear Regulatory Commission, 59 F.3d 284, 292, n.7 (1st Cir. 1995), Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1112 (D.C. Cir. 1971) Executive Order 11991, 3 C.F.R. §124 (1978).

the environmental consequences of the CUP is especially relevant here because NEPA requires federal agencies to examine the consequences of their actions *before* taking those actions, so "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."

Robertson v. Methow Valley Citizens Council, 490 U.S. 349.⁸ The need for the FEIS to stand on its own is a particularly important consideration in this matter because the Staff has already acted on the basis of the FEIS; the Staff issued a license to HRI on January 5, 1998. Any effort to rectify deficiencies in the FEIS or to justify the issuance of the license on the basis of information not in the FEIS therefore would violate NEPA and would be a *post hoc* rationalization of an agency decision in violation of the Administrative Procedures Act.

Another error of law to which ENDAUM and SRIC should be able to reply is the Staff's position that the NRC is not required to follow the regulations implementing NEPA adopted by the Council on Environmental Quality ("CEQ"). Staff's Response at 5, n.6. If they are permitted to reply, ENDAUM and SRIC would point out that the Staff's position is not supported by the one Supreme Court case cited by the Staff, Baltimore Gas & Electric Company v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983). In that case, the Court stated that the NRC is not bound by CEQ *guidelines*, not that the CEQ *regulations* are not binding.

⁸ See also 40 C.F.R. §1502.16; Thomas v. Peterson, 753 F.2d 754, 760 (9th Cir. 1985) (NEPA requires the Forest Service to prepare an environmental impact statement that analyzes the combined impact of a road and the timber sales it was meant to facilitate).

462 U.S. 100, n.12. Unlike the regulations codified in Part 40 of the Code of Federal Regulations, the guidelines addressed in the Baltimore Gas & Electric Company opinion were specifically designated as guidelines when they were published. 38 FR 20549 (August 1, 1973).

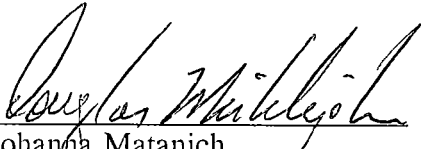
III. ENDAUM AND SRIC SHOULD BE ABLE TO REPLY TO ADDRESS THE STAFF'S FAILURE TO RESPOND TO ENDAUM'S AND SRIC'S PRESENTATION CONCERNING INADEQUATE MITIGATION.

Finally, ENDAUM and SRIC should be able to reply in order to address the Staff's failure to respond to ENDAUM's and SRIC's presentation concerning the inadequacy of the FEIS's mitigation measures. ENDAUM's and SRIC's NEPA Brief demonstrated the inadequacy of the discussion in the FEIS of the measures proposed to mitigate the impacts of the CUP. ENDAUM's and SRIC's NEPA Brief at 73-75. In its Response, however, the Staff never addressed this issue. The Staff's failure to respond is significant because the Staff generally has the burden of proof in complying with NEPA. Duke Power Company, (Catawba Nuclear Station, Units 1 and 2), CLI 83-19, 17 N.R.C. 1041, 1049 (1983); Louisiana Energy Services (Claiborne Enrichment Center), LBP-96-25, 44 N.R.C. 331, 338 (1996). Because the Staff has failed to carry its burden, ENDAUM and SRIC are entitled to the relief that they requested on those issues.

CONCLUSION

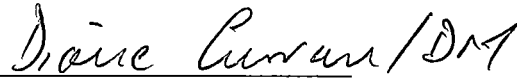
For these reasons, ENDAUM and SRIC should be permitted to reply to these factual and legal errors in the Staff's Response. ENDAUM and SRIC also should be able to reply to other misstatements in the Staff's Response.

Dated: April 12, 1999.



Johanna Matanich
Douglas Meiklejohn
Lila Bird

NM ENVIRONMENTAL LAW CENTER 1726 "M" Street, Suite 600
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
(505) 989-9022



Diane Curran
HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP
Washington, DC 20036
(202) 328-3500

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Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 1999 I caused to be served copies of:

**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**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. §2.712. Service was also made via facsimile to the parties marked below with a + and by electronic mail to the parties marked below by an asterisk. The envelopes for first class mail service were addressed as follows:

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Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Peter B. Bloch*
Administrative Judge
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas D. Murphy*
Administrative Judge
Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Mitzi Young*
John T. Hull*
Office of General Counsel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Brit Clapham, Acting Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Box 1020
Window Rock, AZ 86515

Diane Curran*
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP
Suite 600
1726 "M" Street, N.W.
Washington, DC 20036

Jep Hill, Esq. +
Jep Hill & Associates
P.O. Box 2254
Austin, TX 78768

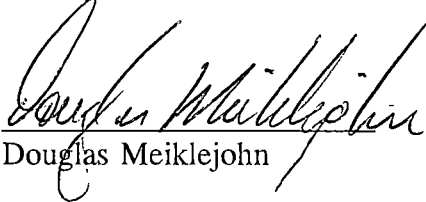
Mitchell Capitan
ENDAUM
P.O. Box 471
Crownpoint, N.M. 77313

Roderick Ventura
Samuel D. Gollis
DNA - People's Legal Services, Inc.*
P.O. Box 306
Window Rock, AZ 86515

Anthony J. Thompson
Frederick Phillips
David Lashway
SHAW, PITTMAN, POTTS &
TROWBRIDGE*
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

William Paul Robinson
Chris Shuey
Southwest Research and Information
Center*
P.O. Box 4524
Albuquerque, N.M. 87106

Dated at Santa Fe, New Mexico
April 12, 1999.


Douglas Meiklejohn