

DOCKETED
USNRC

April 12, 1999

'99 APR 15 P2:31

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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Before Administrative Judge Peter B. Bloch, Presiding Officer

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

**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**

INTRODUCTION

Pursuant to 10 C.F.R. § 2.1233(d), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move for leave to reply to the initial presentation filed by the NRC Staff on environmental justice issues. Intervenors seek leave to reply in order to correct significant material misstatements of fact and law.

FACTUAL BACKGROUND

On February 19, 1999, Intervenors served their initial presentation on environmental justice issues via e-mail and overnight delivery. Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Brief in

20247

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date ? Emailed

Copies Received 3

Add'l Copies Reproduced 0

Special Distribution

RIDS, OGC

Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Environmental Justice Issues ("Intervenors' Presentation"). The presentation included expert testimony from Dr. Robert Bullard, Dr. Christine Benally, and Dr. Douglas Brugge. Intervenors' Presentation and Exhibits 2 and 3. On April 1, 1999, the NRC Staff filed NRC Staff's Response to Intervenors' Presentations on Environmental Justice Issues ("Staff Response").¹

ARGUMENT

I. STANDARD FOR REBUTTAL PRESENTATIONS.

The NRC's Subpart L regulations generally provide that after a party has filed its initial presentation, leave must be obtained to file any further presentations, subject to the discretion of the Presiding Officer. 10 C.F.R. § 2.1233(d). In the context of formal adjudications, the Appeal Board has held that the Presiding Officer's discretion is subject to the limited "right" to present rebuttal testimony where it is needed for "full and true disclosure of the facts." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) (upholding Licensing Board's decision to require parties to conduct cross-examination, redirect examination, and re-cross examination in depositions, with deposition transcripts to be filed in lieu of testimony). As the Presiding Officer has recognized, the requirement to base a decision on a complete and accurate record is no less vital for this proceeding. Memorandum and Order

¹ The Staff Response is a "combined response" to separate filings by Intervenors ENDAUM and SRIC and by Intervenors Grace Sam and Marilyn Morris.

(Motions to Reply and Rebut) (March 24, 1999) at 2. The opportunity to file reply presentations is also required in order to ensure that the burden of proof is properly allocated to HRI on health and safety issues and to HRI and the Staff on environmental issues.² An opportunity for reply briefs and rebuttal testimony should therefore be provided.

II. ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO FILE A REPLY PRESENTATION TO ADDRESS FACTUAL AND LEGAL ERRORS IN THE STAFF'S INITIAL PRESENTATION.

The NRC Staff's presentation is based on several factual errors. For example, the NRC Staff wrongly asserts that "Church Rock is the only town in the vicinity of HRI's Section 8 site, and it is located more than six miles south of Section 8" thereby making the LES decision factually distinguishable from this case. Staff Response at 10, *citing Louisiana Energy Services* (Claiborne Enrichment Center), 45 NRC 367, 370 (1997) ("LES"). The Staff asserts, in effect, that there is no population in the project vicinity at all. However, the LES decision is applicable to this case because there are 87 residences (representing at least 350 individuals) that are living within a 2.5 mile radius of the Church Rock Section 8 site. Intervenors' Presentation, Exhibit 1, Testimony of Dr. Robert Bullard at 25. The NRC Staff chooses to simply ignore the significant Navajo

² See Louisiana Energy Services (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 338 (1996) The Board finds that the NRC has the burden of complying with NEPA. The applicant has the burden of proof on other contentions which assert deficiencies in the application. However, if the applicant is a proponent of a challenged position in the EIS, the applicant also has the burden on that matter.

population living close to HRI's proposed Church Rock Section 8 mining site. As in the LES case, the populations surrounding HRI's mining and processing sites are predominantly minority (Native American), deeply impoverished, and face disproportionate and adverse impacts from a proposed federal action. Intervenors' Presentation at 11; LES, 45 NRC 367, 370. Intervenors should be granted leave to reply to this material factual error.³

The Staff erroneously claims that relocation of Navajo residents would only be necessary at HRI's Unit 1 site. Staff Response at fn. 5. However, Larry King, other King family members, and other Navajo families living close to HRI's Church Rock mine site would also face relocation. Intervenors' Presentation, Exhibit 4, King Testimony at 2.

The Staff chides Dr. Bullard for describing the daily outdoor activities of Navajo farmers and livestock owners without explaining why their health has apparently not been affected by past uranium mining activities. Staff Response at 5-6. Staff counsel appears to infer that if one carries on the necessary activities of daily life on the Navajo reservation, one must be healthy. Applying this "logic" anywhere, then anyone riding the subway to work or shopping at a grocery store must be healthy. The Staff presents no evidence to support the statement that residents of Church Rock and Crownpoint have not

³ The Staff first made this argument in the Staff's response presentation on groundwater protection. NRC Staff's Response to Intervenors' Amended Presentation on Groundwater Issues at 6-8. See ENDAUM's and SRIC's Reply in Response to HRI's and the NRC Staff's Response Presentations on Groundwater Protection Issues, at 6 (April 8, 1999).

been affected by past uranium mining activity or that they are in good health.

In their Response, the Staff states that water used by residents (most of whom haul their water) in the Church Rock area is of "good water quality," despite previous and extensive uranium mining in the area. Staff Response at fn. 9. Staff again presents no evidence to support their claim that past mining has occurred in areas where Church Rock area residents haul their water from (Crownpoint and Gallup). Staff also fails to produce any water quality data from previously mined areas which demonstrates there is no effect from past mining.

ENDAUM and SRIC also seek leave to reply to assertions by NRC Staff which are based on legal error. For example, the Staff argues that because Executive Order 12898 establishes no legal rights or remedies, Intervenors are entitled to no relief under existing law. Staff Response at 9-10, *citing Louisiana Energy Services (Claiborne Enrichment Center)*, 47 NRC 77, 102 and n. 19 ("*LES*") (1998). The NRC Staff further claims that Intervenors fail to establish violations of applicable environmental justice requirements. Staff Response at 11. As explained by Intervenors in their initial presentation, an environmental justice analysis of proposed federal actions is required by existing law.⁴ Intervenors' Presentation at 3-4. The NRC has found that the National

⁴ The NRC finds that:

'Disparate impact' analysis is our principal tool for advancing environmental justice under NEPA. The NRC's goal is to identify and adequately weigh, or mitigate, effects on low-income and minority communities that become apparent only by considering factors peculiar to those

Environmental Policy Act ("NEPA") requires agencies to "consider not only strictly environmental impacts, but also social and economic impacts ancillary to them." *LES*, 47 NRC 77, 101. The NRC has also determined that although NEPA may not require an agency to address racial discrimination in siting processes, NEPA requires an agency to examine a proposed project's impacts on minority and disadvantaged communities. *LES*, 47 NRC 77, 102.

Intervenors seek to reply to the Staff's complaint that Intervenors' expert witnesses rely on and attempt to supplement previously submitted testimony contained in the record. Staff Response at 5 and fn. 8. It is completely legitimate for Intervenors to refer to earlier submitted testimony contained in the record. For example, the NRC Staff complains that testimony by Intervenors' expert witnesses Dr. Robert Bullard and Dr. Christine Benally rely on testimony by Bernd Franke contained in Intervenors' Air Emissions Presentation. NRC Staff Response at 5, fn. 8 (*citing* Bullard Testimony at 22, 27-29, 35, and 39 and Benally Testimony at 7, Table 4 at 35, and 43-44). Dr. Bullard and Dr. Benally carefully cite Franke's submitted testimony in their discussions of past uranium mining activities and potential future impacts of new uranium mining at Church Rock and Crownpoint. This is entirely appropriate.

The NRC Staff wrongly asserts that "concerns regarding existing radiological

communities.

Id. at 100.

contamination in and around HRI's Church Rock site are not germane to this proceeding." Staff Response at 3. The Staff overstates this decision; only the issue of whether past contamination must be cleaned up was excluded. Intervenors' concerns regarding radioactive air emissions and environmental justice were admitted as germane by the Presiding Officer. LBP-98-9 at 282.

In addition, the NRC Staff erroneously claims that testimony by Dr. Douglas Brugge supplements previous groundwater issue arguments. Staff Response at 5, 8 (*citing* Brugge Testimony at 4-5 and 12-14). Dr. Brugge cites previously submitted testimony on groundwater issues that he reviewed to prepare for his testimony, the purpose of which is to explain that the uranium restoration standard is not protective of public health. Dr. Brugge's testimony furthers the public health concerns first listed in ENDAUM and SRIC's Second Amended Request for Hearing, Petition to Intervene, and Statement of Concerns, at 174-175 (August 15, 1997).

The Staff pitches several reasons why the FEIS does not fully address the Navajo Nation's Moratorium on uranium mining. Staff Response at 11, note 15. The situation is much clearer than the Staff would lead the Presiding Officer to believe. First, the Moratorium was reaffirmed in 1992, by which time ISL mining had clearly replaced underground mining as the predominate technique. Second, the Moratorium applies to the Crownpoint project. Indian country is defined as (1) all land within the limits of any Indian reservation, (2) all dependent Indian communities, and (3) all Indian allotments.

18 U.S.C. § 1151. Thus, the Navajo Nation exercises sovereign authority over allotted lands, tribal lands, and dependent Indian communities. The Mining Act of 1872, referenced by the Staff in footnote 15, does not apply to Section 8, which is private land. The Indian Mineral Leasing Act of 1938 governs mineral leasing on allotted and tribal lands. 25 U.S.C. § 396 et seq. The Indian Mineral Leasing Act does not diminish a tribes right to self-government. Kerr-McGee Corporation v. Navajo Tribe of Indians, 731 F.2d 597, 600-601 (9th Cir. 1984) (holding that Navajo Tribe retained right to legislate taxes on Kerr-McGee's mineral leases).

III. INTERVENORS SEEK LEAVE TO REPLY TO NRC STAFF'S ERRONEOUS CLAIM THAT INTERVENORS' EXPERT WITNESSES ARE NOT QUALIFIED.

The NRC Staff fails to cite any expert opinion to support its assertion that Dr. Robert Bullard's testimony should not be accepted.⁵ Staff Response at 5-6 (citing Bullard Testimony at 33 and 39-40). The qualifications of an expert witness are established through a showing of academic training or relevant experience, or a combination of the two. *Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2)*, 22 NRC 681, 720 and fn. 52 (1985); Fed. R. Evid. 702. Dr. Bullard is qualified by both experience and education to provide his opinion about the disparate impacts of HRI's mining activities on an already burdened population. Dr. Bullard is the leading expert on

⁵ Dr. Bullard's discussion of the effects of radiological toxins comprises only one paragraph of 45 pages of testimony. Nevertheless, the Staff seeks to strike all of Bullard's testimony based on this testimony.

environmental justice and has been found by the NRC to be “both credible and convincing.” *LES*, 47 NRC 77, 108. To the extent he discusses radiological impacts, his testimony is based on information contained in the record.

Again, without citing any expert opinion to support its argument, the NRC Staff challenges Intervenor’s expert witness Dr. Christine Benally’s qualifications to assert opinions on various matters. Staff Response at 6-8 (citing Benally Testimony at 1-5, 26-27). Dr. Benally’s education and experience qualify her as an expert in environmental health. She drew the Biological Impact Pathway Model (“BIPM”) from published literature and applied it to establish a *prima facie* basis that there is a public health problem in the project area, for which additional studies are needed. The Staff demonstrates its admitted unfamiliarity with the BIPM by comparing it to the MILDOS Code.

The reasons posited by the NRC Staff to reject Dr. Brugge’s testimony are nonsensical. The Staff complains that he relies on the King Tutt Draft Assessment and that he inserts into the record part of that report. Staff Response at 8. While Dr. Brugge reviewed relevant portions of the HRI record, he discussed the King Tutt assessment because it is “one of the few comprehensive environmental assessments of an abandoned uranium mining area anywhere in Navajo country.” Brugge Testimony at 6. The primary purpose of his testimony was to examine health impacts from abandoned mines in the Church Rock area. In the interest of a full and complete record, the King Tutt data was


submitted.

The NRC Staff counsel contradicts the sworn testimony of Dr. Bullard, Dr. Benally, and Dr. Brugge without support from experts, other witnesses, or the record. Counsel's statements are neither evidence nor based on evidence. NRC Staff counsel is not a witness and there is nothing in the record to indicate that he has any qualifications to make these statements. If the Intervenors are not permitted to address these unsubstantiated allegations in a reply, they should be stricken from the record.


CONCLUSION

For the foregoing reasons, ENDAUM and SRIC should be allowed to reply to the NRC Staff's Response. Otherwise, the result will be an incomplete record that is insufficient to allow a meaningful decision on the adequacy of HRI's application. Such a result is unfair, and would effectively place the burden of proof on the Intervenors. For the foregoing reasons, ENDAUM's and SRIC's Motion for Leave to Reply should be granted.

Respectfully Submitted,



Johanna Matanich
Douglas Meiklejohn
Lila Bird
New Mexico Environmental Law Center
1405 Luisa Street Suite 5
Santa Fe, N.M. 87505
(505) 989-9022



Diane Curran
Harmon, Curran, Spielberg,
& Eisenberg, LLP
1726 M Street, N.W., Suite 600
Washington, DC 20036
(202)328-3500

DOCKETED
USNRC

April 12, 1999
'99 APR 15 P 2:31

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD
OFFICE OF SECRETARY
OF REGULATIONS AND
ADJUDICATIONS STAFF

Before Administrative Judge Peter B. Bloch, Presiding Officer

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

CERTIFICATE OF SERVICE

I hereby certify that:

On April 12, 1999, I caused to be served copies of the following:

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 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 e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
Staff

U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Administrative Judge
Peter B. Bloch*
Atomic Safety and Licensing Board
Mail Stop - T-3 F23

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

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Jep Hill, Esq.
Attorney for Hydro Resources, Inc.
Jep Hill & Associates
P.O. Box 2254
Austin, TX 78768

Mitzi Young*
John T. Hull*
Office of the General Counsel
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

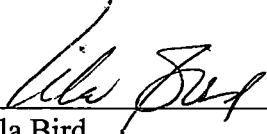
Brit Clapham, Acting Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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, NM 87106

Mitchell Capitan
ENDAUM
P.O. Box 471
Crownpoint, NM 87313

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



Lila Bird