

DOCKETED
April 5, 1999 USNRC

'99 APR 12 A10:58

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

OFFICE OF SURVEILLANCE
RULEMAKING AND
ADJUDICATIONS 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

**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**

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 Hydro Resources, Inc.¹ to ENDAUM's and SRIC's written presentations concerning cumulative impacts and segmentation of impacts and concerning project purpose and need and other issues under the National Environmental Policy Act ("NEPA").²

¹ Hydro Resources, Inc.'s March 25, 1999 Response to ENDAUM's 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 ("HRI's Response").

² HRI's Response purported to address two filings by ENDAUM and SRIC. The first is ENDAUM's and SRIC's February 19, 1999 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 ("ENDAUM's and SRIC's NEPA Issues Brief"); and the second is Eastern Navajo Diné Against Uranium Mining's and Southwest Research and (continued)

20228

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

Document Statistics

Postmark Date 4/5/99
Copies Received 3
Add'l Copies Reproduced 0
Special Distribution OGC, RIDs

Emailed on 4/5/99

This motion is made pursuant to 10 C.F.R. §§2.730 and 2.1233(d) on the grounds that ENDAUM and SRIC should be permitted to address several issues raised by HRI in its Response.³ Some of these issues were raised for the first time in HRI's Response. On several other issues ENDAUM and SRIC should be given an opportunity to reply in order to make a complete record and to correct inaccurate statements made by HRI in its Response.⁴

FACTUAL BACKGROUND

In accordance with the schedule established by the Presiding Officer, ENDAUM and SRIC filed their NEPA Brief and their Cumulative Impacts Brief on February 19, 1999. HRI filed its Response on March 25, 1999 after the deadline for that filing. HRI asserted that the relief sought by ENDAUM and SRIC should be denied; HRI also raised arguments that had not been raised before and made misstatements of law and fact.

ARGUMENT

ENDAUM and SRIC seek to reply to HRI's assertion that no environmental

Information Center's February 19, 1999 Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Cumulative Impacts and Segmentation of Consideration of Impacts ("ENDAUM's and SRIC's Cumulative Impacts Brief").

³ This motion is an alternative to ENDAUM's and SRIC's March 29, 1999 Motion to Strike HRI's Responses to Intervenors' Presentations on Environmental Justice and NEPA Issues. ENDAUM and SRIC request that the Presiding Officer consider this motion only if ENDAUM and SRIC's Motion to Strike is denied.

⁴ This motion does not address the responses to ENDAUM's and SRIC's NEPA Brief and Cumulative Impacts Brief filed by the Staff on April 1, 1999. Counsel for ENDAUM and SRIC are reviewing those responses to determine whether to seek leave to file replies to them.

impact statement ("EIS") was required for the Crownpoint Uranium Project ("CUP"). ENDAUM and SRIC should be granted an opportunity to respond to this assertion because it has not been raised before and because it is incorrect and irrelevant.⁵

Contrary to HRI's argument, whether an agency is required to prepare an EIS does not depend upon the ability of an intervenor to "show that the proposed facility would significantly degrade the quality of the human environment." HRI Response at 7. It also is not pertinent, as HRI has argued, whether environmental impact statements have or have not generally been required for other *in situ* leach ("ISL") mining operations. HRI's Response at 6-7. The issue under NEPA is whether licensing of the CUP by the Nuclear Regulatory Commission ("NRC") is a "major Federal action significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C); Andrus v. Sierra Club, 442 U.S. 347, 350 (1979).

The CUP is such a major federal action. ENDAUM's and SRIC's NEPA Issues Brief at 18-20; DEIS at 1-1; FEIS at 4-113, 4-116 - 4-118, 4-121. Moreover, HRI's application is for a "license to possess and use source material for uranium milling", and the CUP therefore meets one of the NRC's regulatory requirements for

⁵ Although ENDAUM and SRIC addressed this issue in a preliminary fashion earlier (ENDAUM's and SRIC's NEPA Issues Brief at 18-20), ENDAUM and SRIC did not anticipate HRI's argument because of the preparation for the CUP of the draft and final environmental impact statements. NUREG-1508, Draft Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (October, 1994) ("DEIS") (ACN 9411160064); NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February, 1997) ("FEIS") (ACN 9703200270).

a project requiring an EIS. 10 C.F.R. §51.20(a)(8).

In addition, the need for an environmental impact statement for the CUP is no longer relevant. There is no question that the DEIS and the FEIS were prepared. Having been prepared, those documents must comply with NEPA's requirements. Contrary to HRI's implications (HRI's Response at 4), those requirements include the mandates of the regulations adopted by the Council on Environmental Quality.⁶

The second assertion to which ENDAUM and SRIC seek leave to reply is HRI's allegation in its heading "d" on page 7 that it "voluntarily chose to engage in the EIS process", implying that no EIS would have been prepared if it had not been for HRI's initiative. That is incorrect. NEPA imposes obligations upon federal agencies; it requires that those agencies prepare environmental impact statements for the agencies' licensing of major federal actions significantly affecting the quality of

⁶ The Courts have stated that all federal agencies, including the NRC, are governed by the Council on Environmental Quality ("CEQ") regulations implementing NEPA. The Supreme Court has made this point twice. In Baltimore Gas and Electric Company v. Natural Resources Defense Council, 462 U.S. 87 (1983), the Court cited CEQ regulations 40 C.F.R. §§ 1508.7 and 1508.8 (1982) as well as cases for its statement that: "As does the [Nuclear Regulatory] Commission, we agree with the Court of Appeals that NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action." 462 U.S. 106-107. The Supreme Court also addressed this issue in Andrus v. Sierra Club, 442 U.S. 347 (1979)(holding that appropriation requests are not subject to NEPA because they are neither proposals for legislation nor proposals for major federal actions). There, the Court pointed out that Executive Order 11991 orders all federal agencies to comply with the regulations to be adopted by the CEQ after consultation with affected agencies. 442 U.S. 357. Executive Order 11991, 3 C.F.R. 124 (1978). Executive Order 11991 also states that the only exception to this requirement is that compliance is not mandated where compliance would "be inconsistent with statutory requirements." Executive Order 11991 §2, 3 C.F.R. 124 (1978).

the human environment. 42 U.S.C. §4332(2)(C); Andrus v. Sierra Club, 442 U.S. 350. NEPA does not give to private parties the discretion to determine whether the federal agencies involved shall prepare environmental impact statements. Moreover, HRI's assertion is belied by its own statement that the Bureau of Indian Affairs "required that an EIS be prepared as part of its standard procedure for approval of HRI's application to lease Unit 1."⁷ HRI's Response at 7-8.

In addition, ENDAUM and SRIC should be able to reply to the unsupported and incorrect factual and legal allegations of HRI's counsel in its Response. Those factual allegations should not be considered because HRI's counsel are not witnesses in this proceeding and are neither sworn to provide testimony nor qualified to do so.

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. HRI's attorneys are not witnesses, and there is nothing in the record to indicate that one or more of them has any

⁷ HRI's statement also is contradicted by the Staff's assertion in its April 1 Response to Intervenor Presentations on NEPA Issues that preparation of the FEIS was a matter of "Staff discretion". Staff Response at 3, n.5. ENDAUM and SRIC agree that the decision whether to prepare an EIS was the Staff's and not HRI's; they do not concede that the Staff had discretion not to prepare an EIS.

HRI also has implied at several points that the length of the FEIS and the length of time that the Staff took to prepare it mean that it provides adequate analysis of the impacts that the CUP will have. *See, e.g.* HRI's Response at 9, 10, 23. This argument is not persuasive; mere length of a document does not mean that the document contains the appropriate substance. ENDAUM and SRIC should be able to address this issue more fully in a reply.

qualifications to make these statements.

For example, HRI's attorneys state that:

[The FEIS] presents an accurate and sufficient account of the history of uranium mining in the region....It properly evaluates the health impacts of past uranium mining; and it provides an accurate picture of the impacts that the Project would have on radiation levels in the area.

HRI's Response at 32.

There is nothing in the Response to indicate which of HRI's three attorneys on the pleading is making these allegations, or which of those attorneys purports to have the knowledge, the public health qualifications, or the background in radiation levels to make these allegations. As another example, HRI's counsel state:

NRC has determined that proposed in-situ leach uranium recovery operations are low-risk activities unlikely to cause serious environmental harm.

HRI's Response at 7. This assertion is supported only by the Popielak and Siegel article attached to HRI's Response as Exhibit 1, for which there is no evidentiary foundation in the record. The article also is not verified by any expert or other individual providing sworn testimony in this matter, and was written 12 years ago by two individuals whose backgrounds and qualifications are not in the record.

ENDAUM and SRIC should be given the opportunity to respond to all of these and other unsubstantiated allegations by HRI's counsel, as well as to the Popielak and Siegel article.⁸ In the alternative, if ENDAUM and SRIC are not permitted to

⁸ For example, HRI sets forth without support assertions concerning the process followed by agencies involved in various aspects of the CUP, determinations made about ISL mining by the NRC, the scope of the CUP, and other matters. HRI's Response at 8-9, 11-12.

respond to these allegations and the article, they should be stricken from the record.

ENDAUM and SRIC also should be able to reply to inaccurate assertions of law made by HRI's counsel, such as their assertions without citation concerning the Navajo Nation Preference in Employment Act.⁹ According to HRI, the Act does not apply to HRI's private venture (HRI's Response at 21), but the Act clearly states otherwise. Section 603.C defines "employers" subject to the Act as including "all persons, firms, associations, corporations".¹⁰

Another inaccurate legal argument presented by HRI's counsel is that ENDAUM's and SRIC's concerns are unfounded because ENDAUM and SRIC have indicated only that certain adverse impacts may result from the CUP, not that such impacts are certain to occur. *See, e.g.* HRI's Response at 24-25. This position is not the law. *See Foundation for North American Wild Sheep v. U.S. Department of Agriculture*, 681 F.2d 1172, 1177 (9th Cir. 1982). ENDAUM and SRIC should be permitted to address this issue more fully in a reply.

HRI also has suggested inaccurately that if the CUP will not have significant impacts on a particular resource, it therefore also will not contribute to cumulative impacts on that resource. *See, e.g.* HRI's Response at 34. The NEPA regulations adopted by the Council on Environmental Quality make clear, however, that impacts

⁹ The pertinent sections of the Act are attached as Exhibit D to ENDAUM's and SRIC's NEPA Issues Brief.

¹⁰ It would appear that none of HRI's counsel are either licensed to practice before the Courts of the Navajo Nation or associated with counsel who are licensed to practice before those Courts.

need not be significant in order to contribute to cumulative impacts:

Cumulative impacts can result from *individually minor* but collectively significant actions taking place over time.

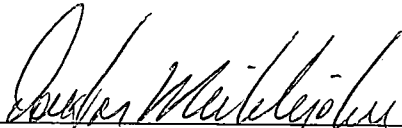
40 C.F.R. §1508.7, emphasis added (quoted by HRI in its Response [p. 30]).

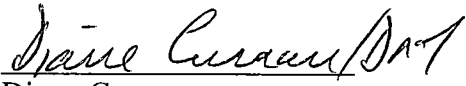
Finally, ENDAUM and SRIC should be permitted to reply to HRI's misplaced effort to parlay the Presiding Officer's *dicta* in LBP-99-1 into a holding that the FEIS is adequate as to all issues for all purposes. HRI's Response at 9-10. The Presiding Officer's statement was made in the context of one written presentation and the responses to that presentation, and it hardly constitutes a ruling on the merits of the FEIS for all purposes.¹¹

CONCLUSION

For these reasons, ENDAUM and SRIC should be permitted to reply to HRI's Response.

Dated: April 5, 1999.


Johanna Matanich
Douglas Meiklejohn
Lila Bird
NM ENVIRONMENTAL LAW CENTER
1405 Luisa Street, Suite 5
Santa Fe, NM 87505
(505) 989-9022


Diane Curran
HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP
1726 "M" Street, Suite 600
Washington, DC 20036
(202) 328-3500

¹¹ A determination by the Presiding Officer that the FEIS is adequate for all purposes without the benefit of the filings by the parties on all issues would constitute prejudgment of the case.

April 5, 1999

DOCKETED
USNRC

'99 APR 12 A10:59

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

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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 5, 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:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
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

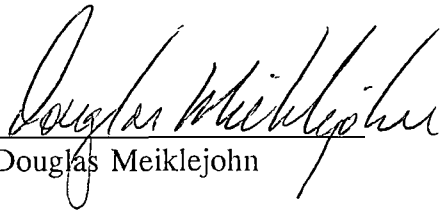
Mitchell Capitan
ENDAUM
P.O. Box 471
Crownpoint, N.M. 77313

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 5, 1999.


Douglas Meiklejohn