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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECURITY
RULENAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

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)
)

**HRI'S REONSE TO INTERVENORS' MOTION FOR LEAVE
TO REPLY TO HRI AND STAFF PRESENTATIONS ON NEPA ISSUES**

INTRODUCTION

Intervenors, Eastern Navajo Dine Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam, and Marilyn Morris ("Sams") (jointly, hereinafter, "Intervenors") have moved for leave to reply ("ENDAUM & SRIC Motion," "Sams' Motion") to HRI's and NRC Staff's responses to NEPA issues raised by Intervenors. With respect to Intervenors' motions directed to HRI's NEPA filing, HRI opposes Intervenors' motions, as Intervenors have failed to raise any issue of fact or law warranting a reply and because Intervenors' request, like so many of Intervenors' filings, appears intended primarily to cause added expense and delay. Thus, HRI respectfully submits that the Presiding Officer decline to reopen briefing of issues that already are the subject of hundreds, if not thousands, of pages of the administrative record chronicling this matter as well as the massive briefs just filed

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by the parties. HRI likewise opposes Intervenors' motions directed to the Staff's NEPA filing and joins in the Staff's opposition thereto.

STANDARD OF REVIEW

Intervenors' challenge of HRI's source materials license is a "Subpart L" hearing, governed by Nuclear Regulatory Commission regulations set forth at 10 C.F.R. Part 2, Subpart L (§§ 2.1201 – 2.1263). Subpart L hearings are intended to be an informal adjudicatory process, designed to afford parties wishing to challenge a license the opportunity to apprise the NRC of concerns and to create an administrative record upon which to resolve these concerns. See Kerr-McGee Corporation (West Chicago Rare Earths Facility) CLI-82-2, 15 NRC 232, 253 (1982), aff'd sub nom. City of West Chicago v. NRC, 701 F.2d 632 (7th Cir. 1983).

The Subpart L regulations generally provide that after a party has filed its initial written 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 informal Subpart L process, section 2.1233(a) expressly accords the Presiding Officer the discretion to manage the proceeding and to determine the sequence in which the parties present their arguments, data, informational materials, and other written evidence.¹ Curators of University of Missouri, CLI-95, 41 NRC 71, 116-17 (1995). Moreover, unlike in the formal NRC adjudicatory process (see, 5 U.S.C. § 551 et seq.), Section 7(c) and the APA does not apply to informal Subpart L proceedings. Instead,

¹ Intervenors frequently have cited Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1178 (1984) for their argument that 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.'" Intervenors misstate the rule in that case (and the Presiding Officer therefore, was misled to rely on it in his March 24, 1999 decision granting Intervenors' motion to reply to HRI's written presentation regarding groundwater issues). In Long Island Lighting Co., a formal adjudication case, the Appeal Board, citing 5 U.S.C. § 556(d) (APA's rules for formal adjudications), stated "the right to submit rebuttal evidence and conduct cross-examination [] is not unlimited; it is bounded by a need for full disclosure of the facts." Based on this rule and the fact that intervenor made only a "generalized claim" of

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Intervenors are entitled only to notice, an opportunity to comment, and a statement of reasons for the agency action. *Id.* at 119. Perhaps most importantly, Subpart L does not accord Intervenors the right to speak last regarding the issues in a materials license proceeding. *Id.* at 117. The Presiding Officer has broad discretion to determine whether Intervenors have been accorded a sufficient opportunity to present their concerns. Should the Presiding Officer determine that additional information is required to create an adequate record, he may pose questions to the parties pursuant to 10 C.F.R. § 2.1233(a). In creating an informal adjudicatory process under Subpart L, the Commission specifically intended to empower presiding officers to control the parties written submissions so as to decrease the cost and delay often attendant to license challenges. Curators of University of Missouri, 41 NRC 71, 116-17. Allowing Intervenors multiple opportunities to brief every issue they can conjure is directly contrary to this goal.

ARGUMENT

Intervenors Arguments Regarding Requirement for an EIS

Intervenors argue that they should be permitted to “reply to HRI’s assertion that no environmental impact statement (“EIS”) was required for the Crownpoint Uranium Project (“CUP”). ENDAUM & 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.**” ENDAUM & SRIC Motion at 2 (emphasis added). ENDAUM & SRIC’s argument defies logic. Of course HRI did not previously assert that an EIS was not required for the entire CUP – in what context would HRI possibly have raised this? ENDAUM & SRIC argue that HRI’s assertion is “incorrect” because “[T]he issue under NEPA is whether licensing of the CUP by the Nuclear

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prejudice, the Board denied intervenor’s request that additional cross-examination was required. It is, however, Footnote continued on next page

Regulatory Commission () is a ‘major Federal action significantly affecting the quality of the human environment.’” Id. (citations omitted). Conveniently, ENDAUM & SRIC then decree that the CUP is such an action, citing their own brief on NEPA issues as authority for that conclusion. Id. Finally, they deem the question of whether an EIS was required for the entire CUP irrelevant because an EIS addressing the entire CUP was, in fact, performed. Id.

Intervenors do not suggest that any other ISL project in the last 15 years has required an EIS and offer nothing at all to support their conclusion that the CUP constitutes a major Federal action significantly affecting the environment.² More importantly, Intervenors offer nothing to suggest why additional briefing on this issue is warranted. HRI submits that the Presiding Officer is well-equipped to determine, on the record and the pleadings presently before him, the sufficiency of the EIS prepared for the CUP. The right to reply sought by Intervenors adds nothing to this proceeding and is contrary to the intent of Subpart L proceedings. Consequently, Intervenors’ Motion for Leave to Reply should be denied.

Treatment of Transportation Issues in the FEIS

Intervenors claim that the FEIS does not adequately address the unique transportation concerns of this project. They claim that the project will cause an increase in the level of traffic posing increased risk of accidents along the material transportation route. See Sams’ Brief dated February 19, 1999 at 7-10. Intervenors’ transportation concern is focused on the possibility that

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misleading to characterize this holding as providing any kind of “right” to offer rebuttal in a Subpart L hearing.

² As discussed in HRI’s Response to Intervenors’ Presentations on NEPA Issues, NRC Staff did not determine that the CUP was a major federal action significantly affecting the environment. Rather, because the BIA required an EIS in connection with HRI’s lease of Unit 1, NRC and HRI agreed to expand the EIS process

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the marginal increase in vehicular traffic expected to be associated with the CUP increases the risk of injury to pedestrian traffic along the route, particularly at night. concern See id. HRI, in its March 29, 1999 brief, responded to this concern by noting that there would be no transportation of materials along the route at night. See HRI Brief dated March 29, 1999 at 2. The Sams complain that this is a new fact that entitles them to a response. Sams' Motion at 3. This is ridiculous. This fact was not previously discussed, apparently, because no one had thought it necessary to disprove a non-issue, i.e., as night transportation was not planned, there was no discussion of the fact that pedestrians would not be put at risk by traffic that would not exist. In any event, having raised the issue, it is difficult to see what the Sams might add to prove HRI wrong on this point; in response to HRI's assertion that it will not transport materials at night, do the Sams desire the opportunity to argue that HRI will transport materials at night? Because the Sams belabor this point, HRI wishes to address, on the record, the Sams' concern regarding night transportation associated with the CUP and moves the Presiding Officer for leave to supplement HRI's March 29, 1999 brief by attaching the Affidavit of Mark S. Pelizza enclosed herewith.

Statements by HRI Counsel Are Not Testimony

Intervenors complain about statements of counsel in HRI's brief. See ENDAUM & SRIC Motion at 3-4. Intervenors cite Louisiana Power and Light Co. (Waterford Steam Electric Station Unit 3), ALAB-732, 17 NRC 1076 (1983); Duke Power Co. (William B. McGuire Nuclear Station, Units 1 and 2), ALAB-669, 15 NRC 453 (1982) and Fed. R. Evid. 603 in

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to address the entire CUP. See, generally, HRI's Response to Intervenors' Presentation on NEPA Issues at Footnote continued on next page

support of their position that these statements should not be regarded as testimony. *Id.* HRI agrees. The cited cases and Fed. R. Evid. 603, taken together, discuss the qualifications of witnesses and the need to administer an oath or affirmation to all witnesses. HRI's counsel are not witnesses and are not entitled to testify in this proceeding. HRI's counsel are, however, advocates for HRI. Arguing the facts and applicable law is the standard role of advocates in adversarial proceedings. HRI's counsel are advocating that the FEIS is "accurate and sufficient" and "properly evaluates" the CUP and "provides an accurate picture of the impacts" likely to result from the CUP. ENDAUM & SRIC Motion at 3-4 (citations to HRI's Response omitted). HRI's counsel are urging that these are the legal conclusions to be drawn from the facts presented. This is legitimate advocacy.

Intervenors' Request to Respond to HRI's Assertions of Law

Intervenors dispute several of the legal arguments asserted by HRI. See, generally, ENDAUM & SRIC Motion at 4-5. HRI responds generally that Intervenors wish to reply to HRI's arguments in order to recharacterize them, that is, Intervenors want to get the last word; this should not entitle them to a reply. See Curators of University of Missouri, *supra*, at 117. Contrary to Intervenors' claims, HRI does not dismiss Intervenors' concerns because they are not "certain to occur" (*id.*), but because they are unfounded speculation. See, e.g., HRI's Response at 24-25. Likewise, HRI did not claim that insignificant impacts cannot contribute to cumulative impacts. ENDAUM & SRIC Motion at 5. In fact, a review of the portion of HRI's Response cited by Intervenors for this proposition ("See, e.g. HRI's Response at 34"; ENDAUM & SRIC

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Motion at 5) reveals that it says nothing of the sort. In any event, the administrative record and pleadings before the Presiding Officer offer an adequate basis upon which to decide the issues Intervenors have raised. Intervenors should not be afforded another opportunity to delay this proceeding so that they may offer their views on what HRI's pleadings really mean.

Intervenors Request to Respond to HRI's Legal Argument Citing Earlier Proceedings

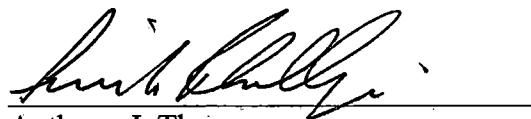
Lastly, Intervenors wish to reply to HRI's citations to an earlier order in this proceeding by this Presiding Officer (LBP-99-1). See ENDAUM & SRIC Motion at 5. Intervenors request that they be allowed to advise the Presiding Officer regarding what the Presiding Officer really meant by the Presiding Officer's prior ruling. Certainly, Intervenors are correct that HRI cited language from the order favorable to HRI's position. It seems ludicrous, however, for Intervenors to be afforded an opportunity to brief the Presiding Officer on the proper interpretation of his own order. Certainly the Presiding Officer can adequately consider and weigh the significance of his own prior rulings without the need for briefing by the parties. HRI's citation to LBP-99-1 was intended to remind the Presiding Officer that he previously had considered issues identical or very similar to those presented by Intervenors' NEPA presentations. If HRI is incorrect in its reliance on the Presiding Officer's earlier ruling, the Presiding Officer surely can make that known without additional briefing.

CONCLUSION

Intervenors were given ample opportunity to brief the myriad NEPA issues they had raised. See Intervenors' Briefs dated February 19, 1999. HRI responded to these briefs in accordance with the process customary to licensing proceedings. See HRI Response dated March 25, 1999. Intervenors have failed to show why they should be given yet another opportunity to address these same issues. It is clear that Intervenors dispute most every position HRI has asserted; this, alone, should not be cause for permitting Intervenors to re-brief issues already briefed multiple times.

For all of the foregoing reasons, HRI respectfully requests that Intervenors' Motions for Leave to Reply to HRI's Response to NEPA Issues be DENIED.

Respectfully submitted this 15th day of April, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, HYDRO RESOURCES, INC.'S ("HRI's") RESPONSE THE ENDAUM/SRIC AND SAM/MORRIS MOTIONS FOR LEAVE TO REPLY TO HRI'S NEPA PRESENTATION in the above-captioned proceeding were sent to the following by electronic mail (where possible) and first class mail on this 15th day of April, 1999.

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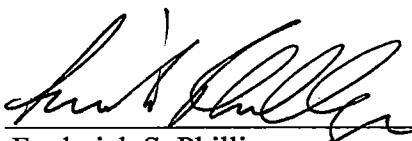
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April 14, 1999

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NUCLEAR REGULATORY COMMISSION

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)

**AFFIDAVIT OF MARK M. PELIZZA
PERTAINING TO HRI'S REONSE TO INTERVENORS' MOTION FOR LEAVE
TO REPLY TO HRI AND STAFF PRESENTATIONS ON NEPA ISSUES**

Before me, the undersigned notary on this day appeared Mark S. Pelizza, a person known or identified to me, and who after being duly sworn deposes and says the following:

A. PERSONAL

My name is Mark S. Pelizza; I am over the age of 18 years, have never been convicted of a felony and am otherwise fully competent to make this affidavit. The factual matters set out herein are within my personal knowledge or my corporate knowledge within my official capacity as set out herein. The opinions set out herein are based upon data and analytic techniques reasonably and customarily used by qualified environmental professionals to form opinions and draw scientific inferences for the purposes of important health, safety, environmental and regulatory decisions.

B. PROFESSIONAL QUALIFICATIONS

I am Vice President of Health, Safety and Environmental Affairs with Uranium Resources, Inc., parent company to HRI, Inc. and URI, Inc. I have served in this position for three years. Prior to being named Vice President, I served Uranium Resources, Inc. as Environmental Manager with similar corporate environmental responsibilities. I have been employed with Uranium Resources, Inc. for nearly 19 years. I have been employed as a health, safety and environmental professional with the in situ uranium industry for 21 years. I have taken an active leadership role with various professional trade organizations in developing the current in situ uranium industry rules, regulations and policies, cooperating with federal and state regulatory agencies in doing so.

During my employment with Uranium Resources, Inc., I have personally supervised all radiological and non-radiological occupational health, safety and environmental programs for operations conducted by HRI/URI in New Mexico, Texas, and Wyoming. This includes radiological and non-radiological occupational and environmental baseline data collection, operational programs, restoration/reclamation programs and regulatory liaison. I have been Uranium Resources, Inc., primary managerial support representative for all environmental litigation.

I have personally supervised all radiological and non-radiological health, safety and environmental permitting activities associated with HRI since the company and the Crownpoint Uranium Project was conceived. In this capacity all environmental studies, reports, papers, permit and license applications and regulatory requirements have either been completed by me or under my supervision. I have been HRI's representative at numerous public presentations regarding the project over the past decade. I have been HRI's regulatory liaison throughout the

project. Given this background I have a first hand knowledge of the Crownpoint Uranium Project developmental history, and the general environmental framework under which HRI will be required to operate.

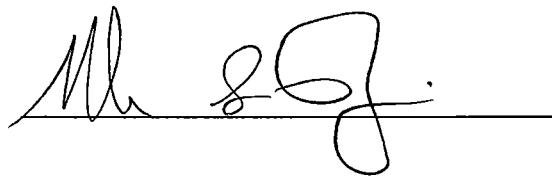
With reference to the Sams' concerns regarding the potential for the CUP to result in increased nighttime truck traffic:

1. Timing on the transport of source or byproduct material from the CUP is discretionary.
2. HRI does not plan to transport source or byproduct material from the CUP at night.

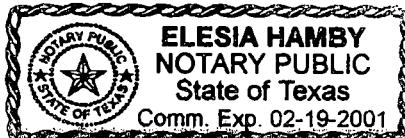
FURTHER AFFIANT SAYETH NOT.

I swear under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Dated this 14th day of April 1999.



Voluntarily signed and sworn to before me this 14th day of April 1999, by the signer, whose identity is personally known to me or was proven to me on satisfactory evidence.



Elesia Hamby
NOTARY PUBLIC
COUNTY OF DALLAS
STATE OF TEXAS

My Commission Expires: 2-19-2001