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NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

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OFFICE OF SECRETARY
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 THE NRC STAFF
TO ENDAUM'S AND SRIC'S PRESENTATIONS
ON CUMULATIVE IMPACTS AND SEGMENTATION 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 the Nuclear Regulatory Commission ("NRC") Staff¹ to ENDAUM's and SRIC's written presentations concerning cumulative impacts and segmentation of impacts 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 the grounds that ENDAUM and SRIC should be permitted to reply in

¹ NRC Staff's April 1, 1999 Response to Intervenor's Presentation on Cumulative Impact and Segmentation Issues ("Staff's Response").

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: Cumulative Impacts and Segmentation of Consideration of Impacts ("ENDAUM's and SRIC's Cumulative Impacts Brief").

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order to address issues raised by the Staff's Response, to make a complete record, and to correct inaccurate statements made by the Staff.

FACTUAL BACKGROUND

In accordance with the schedule established by the Presiding Officer, ENDAUM and SRIC filed their Cumulative Impacts Brief on February 19, 1999. The Staff filed its Response on April 1, 1999.

ARGUMENT

I. STANDARD FOR REBUTTAL PRESENTATIONS.

The NRC's Subpart L regulations provide for the filing of initial presentations and for additional presentations if leave is given to do so by the Presiding Officer. 10 C.F.R. §2.1233(d). In a formal adjudication, the Appeals Board has held 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.

A. ENDAUM and SRIC should be given the opportunity to reply to the Staff's incorrect statement that the cumulative impact of radiological contamination is not germane.

ENDAUM and SRIC seek to reply to the Staff's inaccurate assertions of fact.

The first example of these is the Staff's allegation that:

the Presiding Officer [has] ruled that concerns regarding existing radiological contamination in and around HRI's Church Rock site are not germane

Staff's Response at 1. That was not the Presiding Officer's ruling. He stated:

The Sams are concerned that this proposal "does not address how existing contamination of the area on and around the Church Rock site will be cleaned up." That concern is not germane to this proceeding.

LBP-98-9, 47 N.R.C. 261, 283 (1998). Moreover, a cumulative impacts analysis must include effects resulting from prior actions regardless of what agency or person caused those effects. 40 C.F.R. §§1508.7, 1508.8.

B. ENDAUM and SRIC should be able to reply to the Staff's inaccurate assertions concerning impacts of the CUP on ground water.

ENDAUM and SRIC should be given leave to reply to other inaccurate statements of fact in the Staff's Response. For example, ENDAUM and SRIC seek to reply to the Staff's incorrect assertion in its Response that the Final Environmental Impact Statement³ analyzes the impacts of the proposed Crownpoint Uranium Project ("CUP") on ground water in the area. Staff's Response at 5.

If they are permitted to reply, ENDAUM and SRIC would point out that the Staff's assertion is based upon a general paragraph in the FEIS, a paragraph that sets forth only conclusory statements. It lists past actions that "have contributed" to cumulative impacts; asserts that certain actions "may have had" some effects and that others "would have" had other effects; and indicates that water quality "was probably

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).

degraded" by certain activities. FEIS at 4-123.

ENDAUM and SRIC also would assert in a reply that these vague and conclusory statements do not meet the requirements of NEPA for cumulative impacts analyses. See Fritofson v. Alexander, 772 F.2d 1225, 1245 (5th Cir. 1985), *overruled on other grounds* Sabine River Authority v. U.S. Department of the Interior, 951 F.2d 669 (5th Cir. 1992). Nor should these vague and conclusory statements be deemed sufficient. As was pointed out by Dr. William Staub, an expert on *in situ* leach uranium mining, and Mr. Michael Wallace, an expert hydrologist,⁴ the discussion relied upon by the Staff sets forth several possible impacts but does not provide any research or data to determine actual cumulative impacts. ENDAUM's and SRIC's Cumulative Impacts Brief Exhibit 2 at 6-7, Exhibit 3 at 6-7.

Moreover, the Staff's opinion that these statements are adequate was asserted by the Staff's counsel without any support by experts through testimony or in documents. Evidence can only be presented, however, by a witness who is qualified has been sworn. 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. The Staff's counsel has not been sworn as a witness or shown any qualifications to address this or any cumulative impacts or segmentation issue.

ENDAUM's and SRIC's reply also would point out the inaccuracy of the

⁴ Dr. Staub's and Mr. Wallace's qualifications are set forth in their resumes, which are the first exhibits to their statements filed with ENDAUM's and SRIC's January 19, 1999 Amended Ground Water Brief.

Staff's effort to discount the testimony of Mr. Wallace about the abandoned mines in the Church Rock area.⁵ The Staff asserts that Mr. Wallace's testimony should be disregarded because it was followed by a statement about the proposed relocation of the Crownpoint water wells. Staff's Response at 8. That is inappropriate. Mr. Wallace's statement about the Church Rock area abandoned mines is valid with respect to those mines, and the Staff has not provided anything about the context in which the statement was made that would render it qualified or without credibility.⁶

ENDAUM's and SRIC's reply would state as well that the Staff has provided only the unsworn allegations of its counsel for its position that the ground water problems at the old Church Rock mine do not include the Westwater Canyon aquifer and for the Staff's assertions about the extent of the Superfund site at that mine.⁷

C. The Staff's incorrect assertions about the effects of past mining warrant a reply by ENDAUM and SRIC.

As another example, ENDAUM and SRIC seek leave to reply to the incorrect assertion by the Staff that FEIS does not ignore the history of mining in the Church Rock area. Staff's Response at 4. This assertion, which also is made by the Staff's

⁵ ENDAUM and SRIC regret not citing to Mr. Wallace's testimony in their Brief, and apologize for any inconvenience caused by that oversight.

⁶ It also is noteworthy that in its April 1, 1999 Response to Intervenor Presentations on NEPA Issues (Purpose, Need, Cost/Benefit, Alternatives, and Supplementation), the Staff "waived" its objection to arguments relating to Crownpoint and Unit 1 because "the FEIS address all of [the] three locations" a consideration that applies equally to the issues at hand.

⁷ Dr. Robert Bullard's testimony about the Superfund site was incorrectly cited by ENDAUM and SRIC in their Brief as being at page 24 of his testimony. In fact, the testimony was provided at page 26 of his testimony. ENDAUM and SRIC regret the error and apologize for any inconvenience that it has caused.

unqualified and unsworn counsel, relies upon several general and non-quantitative statements in the FEIS about past mining in the area. An illustration of this point is the contrast between the statements in FEIS §§4.12.4, 4.13.2, 4.13.3, and 4.13.6 (cited by the Staff) and the analysis provided by Bernd Franke in his Report filed as Exhibit A.2 to ENDAUM's and SRIC's January 11, 1999 Air Quality Issues Brief.

The FEIS, for example, asserts without support or references in its section on cumulative impacts as to health physics and radiological impacts that the CUP "would result in a negligible increase in cumulative impacts in the area due to uranium mining and milling." FEIS §4.13.6 at 4-125. By contrast, Mr. Franke's Report addresses the impacts of the CUP at the Church Rock site in a scientific manner. The Report provides several pages of data, with citations to the sources of the data, and analyzes the exposures that will result from the CUP. Franke Report at 8-11.

The FEIS also states that the CUP "*may result* in a positive environmental health effect at the Church Rock site" (emphasis added), and that the CUP would cause a "negligible increase in existing impacts to the area due to mining and milling." FEIS §4.12.4 at 4-117. Mr. Franke's report, however, contains two pages of quantitative data, including citations to the sources of the data, and analyzes the existing levels of radon, external gamma radiation at the Church Rock site. Franke Report at 6-7. Mr. Franke has provided sworn testimony; more importantly, he is qualified to analyze the existing data and make these conclusions. *See* Franke resume, Exhibit A.1 to his testimony filed with ENDAUM's and SRIC's Air Quality Issues Brief. The Staff's assertions, on the other hand, were made by its counsel,

who is neither a sworn witness nor qualified to analyze these issues.

Finally, in response to LBP-99-15, the Staff's expert acknowledged that specific information about air emissions that was included in the Draft Environmental Impact Statement should have been included in the FEIS. April 7, 1999 Affidavit of Christopher A. McKenney at 9.

III. ENDAUM AND SRIC SHOULD HAVE AN OPPORTUNITY TO ADDRESS THE STAFF'S MISCHARACTERIZATION OF THEIR POSITIONS.

In its Response, the Staff has inaccurately described ENDAUM's and SRIC's presentations on improper segmentation. First, the Staff erroneously alleges that the only assertions made by ENDAUM and SRIC about the FEIS are vague and without citations to specific pages. Staff's Response at 8-9. The Staff's argument is incorrect because it ignores the information provided in ENDAUM's and SRIC's Cumulative Impacts Brief concerning issues on which there has been improper segmentation.

For example, ENDAUM's and SRIC's Brief sets forth the deficiencies in the FEIS's discussion of the cumulative impacts of the CUP on cultural resources, and is supported by the testimony of William Dodge that is attached as Exhibit 4.

ENDAUM's and SRIC's Cumulative Impacts Brief at 30-33 and Exhibit 4 to that Brief. That discussion also includes a citation to the more detailed discussion of the inadequacies of the FEIS on this issue contained in ENDAUM's and SRIC's December 7, 1998 Brief with Respect to Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act and Related Cultural Resource Issues and the testimony supporting that Brief.

ENDAUM's and SRIC's Cumulative Impacts Brief at 30, n.19.

Similarly ENDAUM's and SRIC's Cumulative Impacts Brief provides a detailed analysis of the inadequacy of the discussion in the FEIS of the cumulative impacts of the CUP's proposed disposal of liquid waste. ENADUM's and SRIC's Cumulative Impacts Brief at 33-34. This analysis also refers to the more detailed discussion in ENDAUM's and SRIC's November 9, 1998 Liquid Waste Disposal Brief. ENDAUM's and SRIC's Cumulative Impacts Brief at 33, n.23.

IV. ENDAUM AND SRIC SHOULD BE ABLE TO REPLY TO THE STAFF'S LEGAL ERRORS.

A. A reply is appropriate so that ENDAUM and SRIC may address the Staff's incorrect arguments concerning segmentation.

The Staff's discussion of the segmentation issue is not on point. The issue is not, as the Staff has alleged, whether the CUP can proceed in stages once the FEIS has been completed. Staff's Response at 9. The point is that the FEIS did not consider all of the impacts that the CUP would have; instead, the FEIS postponed consideration of the effects that the CUP would have on various resources.

For example, the FEIS postponed consideration of the effects of the CUP's liquid waste disposal and the CUP's impacts on cultural resources. ENDAUM's and SRIC's Cumulative Impacts Brief at 30-34, 45. This violates NEPA, particularly since the Staff has issued a license to HRI. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989); 40 C.F.R. §§1502.4(a), 1508.25(a)(1), 1508.25(c), and 1508.7.

The Staff's Response also misses the point that the NEPA inquiry does not end

with the preparation of the FEIS. Staff's Response at 9. The FEIS must "accompany the application ... through, and be considered in, the commission's decisionmaking process." 10 C.F.R. §51.94. The Licensing Board proceeding is part of the decision making process in which the NRC must consider the CUP's environmental impacts, and in which the NRC must not segment parts of the CUP, separately consider actions that are connected, or ignore cumulative impacts.

B. The Staff's cumulative impacts discussion is not consistent with applicable law.

As pointed out above, the Staff's Response relies principally on a discussion on page 4-123 of the FEIS for its assertion that the FEIS adequately considered cumulative impacts that the CUP would have on ground water. Staff's Response at 5. That reliance is misplaced because that discussion does not meet the requirements of NEPA for a cumulative impacts analysis. That discussion consists of vague and conclusory statements; a cumulative impacts discussion must provide data and analysis in order to comply with NEPA. *See Fritofson v. Alexander*, 772 F.2d 1245.

V. ENDAUM AND SRIC SHOULD BE ABLE TO REPLY SO THAT THEY CAN ADDRESS THE STAFF'S FAILURE TO RESPOND TO ALL BUT ONE OF THEIR PRESENTATIONS.

Finally, ENDAUM and SRIC should be able to reply in order to address the fact that the Staff responded to only one of the six presentations made by ENDAUM and SRIC in their Cumulative Impacts Brief. ENDAUM's and SRIC's Brief demonstrated that there are six different areas in which the FEIS does not adequately address the cumulative impacts of the CUP. These are: cumulative radiological and health effects (Cumulative Impacts Brief at 15-25 and 36-38), cumulative impacts on

ground water (*id.* at 25-30), cumulative effects on cultural resources (*id.* at 30-33), cumulative effects of liquid waste disposal (*id.* at 33-34), cumulative socioeconomic and infrastructure impacts (*id.* at 35-36), and cumulative environmental justice impacts (*id.* at 39-43).

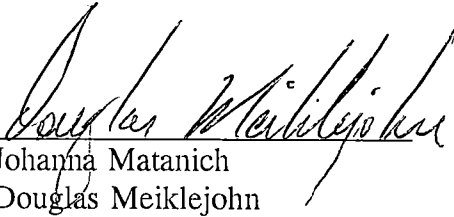
In its Response, however, the Staff addressed only one of these areas, cumulative effects of the CUP on ground water. Staff's Response at 4-7. The Staff mentioned the FEIS's treatment of the history of uranium mining in the Church Rock area, but did not respond to the presentations made by ENDAUM and SRIC concerning either radiological and health impacts or the environmental justice impacts of the CUP. The Staff's Response does not even mention the other four issues addressed by ENDAUM and SRIC: cumulative effects on cultural resources, cumulative effects of liquid waste disposal, cumulative socioeconomic and infrastructure impacts, and cumulative environmental justice impacts.

Moreover, 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.

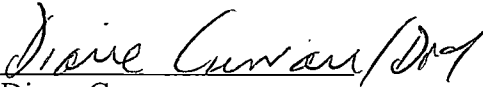
CONCLUSION

ENDAUM and SRIC therefore should be permitted to reply to HRI's Response to address these and other issues.

Dated: April 12, 1999.


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CERTIFICATE OF SERVICE

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

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RESPONSE FILED BY THE NRC STAFF TO ENDAUM'S AND SRIC'S
PRESENTATIONS ON CUMULATIVE IMPACTS AND SEGMENTATION**

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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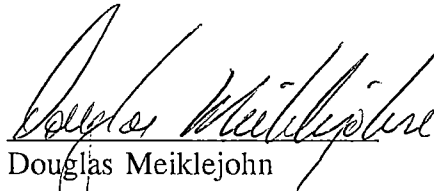
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