RAS 11386

March 13, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of:	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
P.O. Box 777	)	ASLBP No. 95-706-01-ML
Crownpoint, NM 87313	)	
	)	

INTERVENORS' SUPPLEMENTAL BRIEF
REGARDING CHURCH ROCK SECTION 17 AIR EMISSIONS

I. INTRODUCTION

The case presents the Commission with the first-impression question of whether, in determining whether Hydro Resources, Inc.'s ("HRI's") proposed *in situ* leach mine on Section 17 at Church Rock, New Mexico, meets the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") standards for protection of public health from airborne radioactive emissions, the NRC may characterize as "background radiation" -- and thereby ignore -- the high levels of radioactivity already present at Section 17 due to the previous owner's and HRI's failure to clean up the spoils from a past underground uranium mine. Intervenors, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), respectfully submit that the decision by the Presiding Officer of the Atomic Safety and Licensing Board ("ASLB") in LBP-06-01[1], which characterizes as "background radiation" emissions from mine spoilage leftover from the past underground uranium mining operation, is inconsistent with the plain language of NRC's regulations, the NRC's regulatory scheme, and the history of the regulations. Accordingly, the ASLB's determination that HRI complies with NRC regulatory

[1] LBP-06-01, Partial Initial Decision (Phase II Radiological Air Emissions Challenges to In Situ Leach Uranium Mining License) (January 6, 2006)

Template = SECY-021

SECY-02

limits on radioactive air emissions must be reversed.

As noted by the Commission in CLI-06-07 Intervenors previously briefed the question of whether HRI complies with NRC limits on airborne radioactive emissions, and therefore will not repeat all of their arguments here. CLI-06-07, Order at 3 (February 27, 2006). The purpose of this supplemental brief is to clarify and add to arguments made in Intervenors' previous submissions.[2]

II. FACTS

According to the Final Environmental Impact Statement ("FEIS") for the Crownpoint Project, HRI's operation would add a dose of 0.25 mrem/year to the closest resident to the Church Rock site.[3] This dose would compound the dose from radioactive materials left on Section 17 by United Nuclear Corporation ("UNC") after abandoning an underground mine it had operated there for about 30 years.[4] Mining spoilage left by UNC on the surface of Section 17 continuously emits significant levels of radiation into the air, including gamma radiation and radon. *See* Intervenors' First Supplemental Brief at 17-18 and citations therein.

Intervenors have presented uncontraverted evidence that measured gamma radiation levels

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[2] *See* Intervenors' Written Presentation in Opposition to Application for a Materials License With Respect to Radiological Air Emissions for Church Rock Section 17 (June 13, 2005) (hereinafter "Intervenors' Written Presentation"); Intervenors' Reply to Hydro Resources Inc.'s and the Nuclear Regulatory Commission Staff's Responses in Opposition to Intervenors' Presentation on Radioactive Air Emissions (August 12, 2005) (hereinafter "Intervenors' Reply Presentation); Intervenors' Supplemental Brief on Radioactive Air Emissions (December 7, 2005) (hereinafter "Intervenors' First Supplemental Brief"); Intervenors' Petition for Review of LBP-06-01 (January 26, 2006) (hereinafter "Intervenors' Petition for Review").

[3] NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico at 4-78 (1997). While this estimated dose is very small, Intervenors have demonstrated that it is insufficient and incomplete. Intervenors' Evidentiary Presentation at 24-35.

[4] HRI acquired the Section 17 property, called the Old Churchrock Mine, from UNC in the early 1990s. *See* Intervenors' Written Presentation, Exhibit G, Report by the New Mexico Energy, Minerals and Natural Resources Department, Mining and Minerals Divison, Mining Act Reclamation Bureau, *Prior Reclamation Inspection Report and Recommendation for Release or Permit Requirement, Hydro Resources, Inc., Church Rock Mine* (September 18, 1995) (hereinafter "Exhibit G").

on Section 17 lands that are leased and used by ENDAUM member Larry King for grazing livestock yield a dose of 1,576.8 mrem/yr to a person continuously present on the property, or over 15 times the dose limit in 10 C.F.R. § 20.1301(a). Id. at 17. Even in the unlikely case that Mr. King spent only 11 hours per week tending to his cattle on the contaminated land, he would receive a gamma radiation dose in excess of the 100-mrem/yr NRC limit. Id. Radon measurements on Section 16, a half-mile northeast of Mr. King's property, also indicate that Mr. King would receive a dose of radon in excess of NRC regulatory limits. Id. at 18.[5]

III. ARGUMENT

This case turns on the proper interpretation of the phrase "naturally occurring radioactive material" as it is used in the definition of "background radiation" in 10 C.F.R. § 20.1003. Intervenors agree with the Presiding Officer that because the term "naturally occurring" is not defined in the regulations, it must be given its common or ordinary meaning. LBP-06-01, slip op. at 29 n.24, citing Smith v. United States, 508 U.S. 223, 228 (1993). As discussed in Intervenors' Petition for Review at 4, the ordinary meaning of "naturally occurring" is "undisturbed in nature."

Clearly, the spoils of UNC's underground mining operation, brought to the surface and dumped there, would not qualify under the ordinary meaning of the phrase. Nevertheless, instead of giving the phrase "naturally occurring" its ordinary meaning, the Presiding Officer imported the technical concept of "technologically enhanced naturally occurring radioactive material" or "TENORM" into the definition of background radiation. LBP-01-06, slip op. at 29-30.

Judge Hawkens' technical interpretation of the phrase is not only inconsistent with Smith v. United States, but it fails to meet any of the exceptions to the Smith doctrine that are cited by

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[5] As demonstrated by Intervenors' witness Bernd Franke, doses from the measured ambient radon levels on Section 16 are equivalent to 900 mrem/yr, or nine times the NRC limit. Franke & Associates, *Crownpoint Uranium Solution Mining Project: Review of Outdoor Radon Levels and External Gamma Radiation* at 11 (January 5, 1999), attached as Exhibit 2 to

the NRC Staff in its response to Intervenors' Petition for Review. NRC Staff's Answer to Intervenors' Petition to Review LBP-06-01 at 5 (February 10, 2006). For example, in Utah v. Evans, 536 U.S. 452, 467 (2002), the Supreme Court gave a technical interpretation to the word "sampling" where Congress had used the phrase "known as" to describe the word "sampling," and also enclosed the word in quotation marks. In contrast, NRC regulations contain no indication that the Commission intended to rely on a technical definition of the phrase "naturally occurring." In Bradley v. United States, 410 U.S. 605, 609 (1973) and U.S. v. Cuomo, 525 F.2d 1285, 1291 (5th Cir. 1976), and in all of the federal cases cited in footnote 17 of U.S. v. Cuomo, the courts interpreted legal terms their legal sense rather than their ordinary sense. The phrase "naturally occurring" is not a legal term, and therefore those cases are inapposite here.

U.S. v. Cuomo also contains the very broad assertion that:

> The sense of a word that is commonly used as a term of art in a particular discipline is the relevant sense for purposes of statutory construction, where the statute being constructed deals with that discipline.

525 F.2d at 1291. As discussed above, however, U.S. v. Cuomo and all of the federal cases cited in footnote 17 as support for this proposition, concern the choice between ordinary and legal interpretations of statutory terms, not a choice between ordinary and scientific interpretations.

In any event, even if the Court's assertion in U.S. v. Cuomo were true, LBP-06-01 contains no evidence that in 1991, the scientific or regulatory community had a consistent or commonly used understanding that TENORM was included within the scope of "naturally occurring radioactive material."[6] For instance, Report No. 26 of the International Commission on

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Declaration of Bernd Franke (June 12, 2005), Exhibit L to Intervenors' Written Presentation.

[6] Clearly, the NRC memorandum cited by the Presiding Officer, written ten years after the promulgation of the amendments to Part 20, does not show the Commission's intent at the time of the rulemaking. *See* LBP-06-01, slip op. at 29-30, citing SECY-01-0057, Memorandum from William D. Travers, NRC Executive Director for Operations, to NRC Commissioners, re: "Partial Response to SRM COMEXM-00-0002 - Expansion of NRC Statutory Authority Over Medical

Radiation Protection ("ICRP"), on which the NRC relied in promulgating the Part 20 amendments[7], states that:

> In radiation protection the Commission's recommended dose-equivalent limits have not been regarded as applying to, or including, the 'normal' levels of natural radiation, but only as being concerned with those components of natural radiation that result from man-made activities or in special environments.

ICRP Report No. 26, *Radiation Protection,* par. 89 (1977). Under the ICRP's conception of naturally occurring radioactive material, mining spoils would not be included in background radiation.[8]

The Presiding Officer also erred in concluding that by using the term "technologically enhanced radioactive material" in the 1986 proposed rule's definition of "natural background radiation," the Commission showed that it "long has viewed NORM as including radioactive materials that, as a result of human activities, are no longer in their natural state." LBP-06-01, slip

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Use of Naturally Occurring and Accelerator-Produced Radioactive Material (NARM) at 2 (March 29, 2001). It should also be noted that the memorandum was written by the NRC Staff, not the Commission. Finally, the subject of SECY-01-0057, whether the Commission has the authority to regulate TENORM, is an entirely different question than whether the Commission must take unlicensed TENORM emissions into account in assessing the safety of its proposed licensing decisions.

[7] *See* Final Rule, 56 Fed. Reg. 23,360 (May 21, 1991) (stating that the NRC and its predecessor, the Atomic Energy Commission, "have generally followed the basic radiation protection recommendations" of the ICRP, and that the NRC adopts the "basic tenets of the ICRP system of dose limitation").

[8] In LBP-06-01, the Presiding Officer also states that the use of the phrase "from the licensed operation" in 10 C.F.R. 20.1301(a) "appears to serve as a limitation on what is to be included in the TEDE calculation." Id., slip op. at 28. Intervenors respectfully submit that the phrase "from the licensed operation" must be interpreted in light of the Part 20 statement of purpose, which shows that the Commission meant the term "licensed operation" to include *all* aspects of the operation, not just the emissions from the radioactive material licensed by the Commission. If the Commission had intended otherwise, it could have used the language in Appendix I to 10 C.F.R. Part 50, which defines "background" as:

> radioactive materials in the environment and in the effluents from light-water-cooled power reactors not generated in, or attributable to, the reactors of which specific account is required in determining design objectives.

op. at 30 n.25. To the contrary, the history of the Part 20 rulemaking shows that the Commission proposed including the concept of TENORM in the definition of background radiation, and then dropped it after receiving an adverse comment from the Advisory Committee on Reactor Safeguards ("ACRS").

The definitions section of the 1986 proposed rule included the term "natural background radiation," which was defined as:

> exposure to cosmic and terrestrial sources of naturally occurring radioactive material, including technologically enhanced radioactive material, such as plasterboard and fertilizer, but not including byproduct material or radioactive material specifically intended to be a radiation source.

51 Fed. Reg. 1092, 1126 (January 9, 1986). The NRC received over 800 comments on the proposed rule, including a comment from the ACRS, a quasi-independent body tasked by the Atomic Energy Act with providing advice to the Commissioners regarding "the hazards of proposed or existing reactor facilities and the adequacy of proposed reactor safety standards." 42 U.S.C. § 2039. ACRS Chairman W. Kerr criticized the proposed rule on the ground, inter alia, that "[s]everal of the definitions included in the proposed revision [to 10 C.F.R. Part 20] appear to be incomplete or to contain errors." Letter from W. Kerr, Chairman, ACRS, to Lando W. Zech, Chairman, NRC, re: Proposed Revisions of 10 CFR 20, "Standards for Protection Against Radiation" at 2 (June 7, 1988) (ACN # 8806230183). In particular, the ACRS Chairman stated that the definition of "natural background" should "emphasize that the exempted sources do not include those of natural origin that have been technologically enhanced." Id.

On September 2, 1988, the NRC Staff responded to the ACRS comments by rejecting ACRS' suggestion that the reference to TENORM be removed from the rule:

> The NRC staff does not propose to make any changes to the definition of 'Natural Background.' The ACRS proposal would remove 'technologically enhanced natural

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10 C.F.R. Part 50, Appendix I, Section II.A. 40 Fed. Reg. 19,439 (May 5, 1975).

radiation' from the exempted materials. Although this might be desirable, most 'technologically enhanced radioactive materials' are not within NRC's statutory authority to regulate and should remain excluded.

Response to ACRS Comments on 10 CFR 20, "Standard for Protection Against Radiation" (ACN # 9204270217).[9]

In November 1988, the NRC Staff presented the Commissioners with a draft final rule for approval. SECY-88-315, Memorandum from Victor Stello, Jr., NRC Executive Director for Operations, to the Commissioners re: Revision of 10 CFR Part 20, "Standards for Protection Against Radiation" (November 4, 1988). The draft final rule contained a new definition of natural background radiation, which omitted any reference to TENORM. Instead, the new definition simply stated that "'[n]atural background' means naturally occurring cosmic and terrestrial radiation and radioactive material, but not including source, byproduct, or special nuclear material." Id., Enclosure 4 at 13. While the preamble to the draft final rule made no reference to the ACRS comments and provided no other explanation for the change to the definition of "background radiation," it is reasonable to infer that the reference to TENORM was removed in response to the ACRS' concern.[10]

The NRC waited two-and-a-half more years to publish a final version of the revisions to 10 C.F.R. Part 20 in May of 1991. Meanwhile, the Commission made editorial clarifications to the definition of background radiation. At no point during that period, however, did the

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[9] Notably, the Staff continues to adhere to this incorrect view in the instant proceeding, even though it is patently inconsistent with Part 20 statement of purpose. *See* note 8, supra.

[10] Other language in SECY-88-315 confirms that the removal of the reference to TENORM was not just an editorial change, but a substantive one. The definition of "natural background" is listed in an enclosure to SECY-88-315 as one of the definitions in the proposed rule that was "revised or modified" in the draft final rule. *Id.*, Enclosure 3 at 16. *See also* Enclosure 6 at 1, which states as a general matter that the definitions were "extensively rewritten and reorganized." SECY-88-315, Enclosure 6 at 1.

Commission re-introduce the concept of TENORM.[11] Thus, the history of the Part 20 regulations shows that the Commission considered, but declined, to include TENORM in its definition of "background radiation."

Moreover, the Commission's decision to exclude TENORM from the scope of background radiation is consistent with ICRP Report No. 26 and National Council on Radiation Protection and Measurements ("NCRP") Report No. 91, *Recommendations on Limits for Exposure to Ionizing Radiation* (1991), both of which are relied on in the 1991 amendments to Part 20.[12] As discussed above at page 5, ICRP Report No. 26 states that only "'normal' levels of natural radiation" are excluded from ICRP's recommended dose-equivalent limits. Id., par. 89. NCRP Report No. 91 further suggests that "normal" non-radon background radiation doses average about 0.1 rem/year, with a range of between .065 rem/year and .125 rem/year.[13] The non-radon radiation

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[11] *See* Memorandum from Samuel J. Chilk, NRC Secretary, to James M. Taylor, NRC Executive Director for Operations, re: SECY-89-267/SECY-88-315/SECY-90-237 – Revisions of 10 CFR Part 20 – Standards for Protection Against Radiation (July 30, 1990) (ACN No. 9101030421); Memorandum from Samuel J. Chilk, NRC Secretary, to James M. Taylor, NRC Executive Director for Operations, re: Staff Requirements–Affirmation/Discussion and Vote, etc., Enclosure 3 at 51, 116 (December 19, 2000) (ACN No. 9012280118).

[12] *See* Note 7, supra, and 56 Fed. Reg. at 23,362 (citing NCRP Report No. 91 as generally consistent with the ICRP recommendations in ICRP Report No. 26.)

[13] *See* NCRP Report No. 91, Recommendations on Limits for Exposure to Ionizing Radiation at 37 (June 1, 1987):

> [E]veryone is exposed to natural background radiation . . . that annually, is commonly about 1 mSv (100 mrem) (excluding radon) or a risk of mortality of about 10^{-5} annually, or approximately 10^{-3} lifetime. The annual effective dose equivalent from background varies in the United States from about 0.654 mSv (65 mrem) on the Atlantic Seaboard to .125 mSv (125 mrem) in Denver. The average annual effective dose equivalent due to radon is about 2 mSv (200 mrem) and variations in it are much greater (NCRP, 1984a) than the average value of natural background from other sources.

Report No. 91 that NCRP's recommendation of a public TEDE limit of 0.1 rem/year is based on the concept that exposures to man-made sources should be equal to exposures from average natural background (excluding radon). Id. at 38.

Intervenors note that the numerical values for background radiation cited by the Presiding Officer at page 21 n.16 are higher than the values cited by the NCRP, presumably because they

dose from the mine spoilage on Section 17, which is up to 15 times the average level of 0.1 rem/year, can hardly be considered "normal" under the NCRP's standard.[14] In ICRP Report No. 26, the ICRP also warns that:

> there is no sharp dividing line between levels of natural radiation that can be regarded as 'normal' and those that are more elevated owing to human activities or choice of environment. There will therefore be instances in which judgment will have to be exercised as to whether the component of increased natural radiation should or should not be subject to the Commission's recommended system of dose limitation.

Id., par. 89. The rulemaking history of the 1991 amendments to 10 C.F.R. Part 20 indicates that the Commission heeded the ICRP's warning, by taking the conservative step of excluding TENORM from the definition of background altogether. Rather than risking public health through an overly broad general definition background radiation or having to judge each unusual situation separately, the Commission simply excluded TENORM from the scope of its own definition of background radiation.[15]

IV. LBP-06-01 SHOULD BE REVERSED BECAUSE IT REWARDS HRI FOR FAILING TO REMEDIATE ITS SITE BEFORE IT STARTS MINING.

The record is clear that the radioactive materials present on Section 17 at the site of the Old Church Rock Mine were deposited by human activities and did not occur at the site

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include radon.

[14] *See also* Intervenors' Written Presentation, Exhibit K, Declaration of Melinda Ronca-Battista, ¶¶ 12, 24-27 (June 10, 2005).

[15] Even if the Presiding Officer were correct that the Commission intended to include TENORM in the scope of naturally occurring radioactive material, the proposed rule gives to indication that the Commission considered uranium mining waste to fall within the scope of included materials. As discussed in Intervenors' Petition for Review at 6 n.6, the wording of the proposed rule shows that the Commission intended to limit the concept of TENORM to a narrow set of materials in which radioactive material was present in relatively small quantities and incidental to some unrelated use, such as plasterboard and fertilizer. The proposed rule gives no indication that the Commission intended to exempt from inclusion in estimates or calculations of total effective dose equivalent ("TEDE") radiation from large quantities of radioactive waste produced in the uranium fuel cycle.

"naturally."[16] HRI knew of the existence of these materials and did little to remove them.[17] The Presiding Officer's finding that those materials are now part of "background radiation" and therefore may be compounded by additional releases from HRI's proposed mine is not only inconsistent with the plain language, regulatory scheme and regulatory history of 10 C.F.R. Part 20, but rewards HRI for failing to properly remediate the site to maintain radiation doses to the public as low as reasonably achievable as required by 10 C.F.C.F.R. § 20.1301(d)(3). Therefore, the Presiding Officer's ruling should be reversed.

V. CONCLUSION

For the foregoing reasons, the Commission should reverse LBP-06-01.

Respectfully submitted this 13th day of March, 2006.

Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
New Mexico Enviromental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
(505) 989-9022

Attorneys for ENDAUM and SRIC

[16] *See* Intervenors' Supplemental Brief at 15, citing the acknowledgment by HRI President Mark Pelizza that the radiation levels on Section 17 at the result of "residual uranium ore and waste rock" containing uranium.

[17] *See* Intervenors' Written Presentation at 9 and Exhibit G.

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HYDRO RESOURCES, INC.	)	ASLBP No. 95-706-01-ML
(P.O. Box 777	)	
Crownpoint, New Mexico 87313)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Supplemental Brief Regarding Church Rock Section 17 Air Emissions" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 13th day of March 2006:

Administrative Judge, E. Roy Hawkens*
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: **erh@nrc.gov**

Administrative Judge*
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: **rfc1@nrc.gov**

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755

Mark S. Pelizza, President*
Uranium Resources Inc.
650 S. Edmonds Lane
Lewisville, TX 75067
Email: **mspelizza@msn.com**

Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 150
Crownpoint, New Mexico 87313

John T. Hull*
Steven Hamrick
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555
Fax: 301-415-3725
Email: **jth@nrc.gov**
Email: sch1@nrc.gov

W. Paul Robinson
Chris Shuey
Southwest Research and Information Center
P. O. Box 4524
Albuquerque, NM 87106

Anthony J. Thompson, Esq.*
Christopher Pugsley, Esq.*
Anthony J. Thompson, P.C.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
Fax: (202) 496-0783
E-mail: **ajthompson@athompsonlaw.com**
E-mail: **cpugsley@athompsonlaw.com**

Office of the Secretary*
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: OWFN-16 C1
Washington, D. C. 20555
E-mail: **hearingdocket@nrc.gov**
Administrative Judge, Robin Brett *
2314 44th Street, N.W.
Washington, D.C. 20007
Fax: (703) 648-4227
E-mail: **rbrett@usgs.gov**

Louis Denetsosie, Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

William Zukosky *
DNA-People's Legal Services, Inc.
201 East Birch Ave., Ste 5
Flagstaff, AZ 86001-5215
E-mail: **wzukosky@dnalegalservices.org**

Laura Berglan *
DNA-People's Legal Services, Inc.
P.O. Box 765
Tuba City, AZ 86045
E-mail: **lberglan@dnalegalservices.org**

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G15
Washington, D.C. 20555

Adjudicatory File
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop: T-3F23
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D. C. 20555

David C. Lashway, Esq. *
Hunton & Williams, LLP
1900 K Street, NW
Washington, D.C. 20006-1109
E-mail: **dlashway@hunton.com**

Geoffrey H. Fettus *
Natural Resources Defense Counsel
1200 New York Ave, N.W.
Suite 400
Washington, D.C. 20005
E-mail: **gfettus@nrcdc.org**

U.S. Nuclear Regulatory Commission
Attn: Chairman Nils J. Diaz*
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: **cmrdiaz@nrc.gov**

U.S. Nuclear Regulatory Commission
Attn: Jeffery S. Merrifield*
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: **cmrmerrifield@nrc.gov**

U.S. Nuclear Regulatory Commission
Attn: Gregory Jaczko*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Jacki Raines, **jkr@nrc.gov**

U.S. Nuclear Regulatory Commission
Attn: Peter Lyons*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Vicki Ibarra, **vai@nrc.gov**

Susan C. Stevenson-Popp *
ASLB Panel
U.S. NRC
Mail Stop T-3 F23
Washington, DC 20555
E-mail: **scs2@nrc.gov**

Karen Valloch*
E-mail: **ksv@nrc.gov**

Eric D. Jantz
Sarah Pilitch
Douglas Meiklejohn
Counsel for Intervenors

NEW MEXICO
ENVIRONMENTAL LAW CENTER

March 13, 2006

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
One White Flint North
11545 Rockville Pike
Rockville, MD 20852

Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Supplemental Brief Regarding Church Rock Section 17 Air Emissions". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped of the enclosed filing in the attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022. Thank you for your attention to this matter.

Sincerely,

Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
New Mexico Environmental Law Center
Attorneys for Intervenors

Enclosures

1405 Luisa Street, Suite 5, Santa Fe, New Mexico 87505
Phone (505) 989-9022 Fax (505) 989-3769 nmelc@nmelc.org