

UNITED STATES COURT OF APPEALS FOR THE 10th CIRCUIT

Eastern Navajo Diné Against Uranium Mining,)
Southwest Research and Information Center,)
Marilyn Morris and Grace Sam)
)
Petitioners,)
)
v.)
)
United States Nuclear Regulatory Commission and)
the United States,)
)
Respondents,)
)
Hydro Resources, Inc.,)
)
Intervenors.)
_____)

Petition for Review of Final Order of the United States Nuclear Regulatory
Commission

Petitioners' Reply Brief

Oral Argument Requested

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GLOSSARY

AEA	Atomic Energy Act
APA	Administrative Procedure Act
ACRS	Advisory Committee on Reactor Safeguards
COP.....	Consolidated Operations Plan
DEIS.....	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
ENDAUM.....	Eastern Navajo Diné Against Uranium Mining
EPA	U. S. Environmental Protection Agency
FEIS	Final Environmental Impact Statement
HIR.....	Hydro Resources, Inc.
ISL	<i>in situ</i> leach
mSv	milliSievert
NEPA	National Environmental Policy Act
NRC/ Commission.....	Nuclear Regulatory Commission
SRIC	Southwest Research and Information Center
TEDE	Total Effective Dose Equivalent
TENORM	Technologically Enhanced Naturally Occurring Radioactive Material

INTRODUCTION

The U.S. Nuclear Regulatory Commission (“NRC”) must be held accountable for its failure to protect public health and safety and for its failure to adequately inform the public about the environmental consequences of its actions. The NRC and Hydro Resources, Inc. (“HRI”) attempt to show that HRI’s source and byproduct materials license issued by the NRC is legally defensible. They fail to do so.

The thrust of both the NRC’s and HRI’s attempt to justify the NRC’s interpretation of its regulations governing radioactive air emissions and groundwater restoration surety estimates is that the Court must defer to agency expertise in these technical areas. Moreover, both the NRC and HRI attempt to frame the Petitioners’ concerns as disputes over factual matters.

The NRC’s and HRI’s arguments ignore both the broader history and purpose of the NRC’s governing regulations and must be rejected. The NRC is charged with regulating the domestic nuclear industry to protect public health and safety and is required to disclose and meaningfully discuss the potential environmental impacts of a project. 42 U.S.C. § 2099; Sierra Club v. U.S. Army Corps of Engineers, 701 F.2d 1011, 1029 (2d Cir. 1983).

Unfortunately, the NRC appears to have lost site of these legal obligations and upholds the issuance of a license based on fallacious assumptions about

the quality of the environment at Church Rock and Crownpoint, a profound misreading of its institutional history, and a number of misleading and contradictory decisions. As shown below, these failures are so egregious that agency deference is not warranted.

Furthermore, as a preliminary matter, in violation of FED. R. APP. P. 28(a)(7) and 28(b), HRI makes a significant number of factual assertions regarding the allegedly benign health and environmental effects of *in situ* leach (“ISL”) mining, without providing any supporting citations to the record. Given the fact that the Court’s decision must be based upon the record, the Court should disregard any factual assertions by HRI that are unsupported by record citations. United States Lines, Inc. v. Fed. Maritime Comm’n, 584 F.2d 519, 532 (D.C. Cir. 1978), citing 5 U.S.C. § 706.¹

¹ See generally Brief of Intervenor-Respondent Hydro Resources, Inc. (“HRI Brief”) at 8-14. For example, HRI asserts that ISL mining “leaves the underground ore body in place” (*Id.* at 8); that techniques for ISL uranium mining “have evolved to the point where it is a controlled, safe, and, indeed, an occupationally and environmentally benign method of uranium recovery that does not result in any significant, adverse impacts to workers, the surface (lands) or the subsurface (groundwater), including underground sources of drinking water” (*Id.* at 10); that sampling of water quality within and outside the ore zone enables a licensee to “readily determine if an excursion has occurred” (*Id.* at 11); that the “cone of depression” created during ISL mining “assures” that underground sources of drinking water adjacent to the wellfield “will not be impacted” by groundwater contamination (*Id.* at 11); that after mining ceases, the groundwater in the recovery (*i.e.*, mining) zone “is restored consistent with baseline or other water quality criteria” (*Id.* at 13); that “over-injection” of water into the mine

I. NRC’S INTERPRETATION OF “LICENSED OPERATION” IS INTERNALLY INCONSISTENT, INCONSISTENT WITH NRC REGULATORY HISTORY, AND NOT ENTITLED TO DEFERENCE.

The NRC argues that the plain language of the phrase “licensed operation” as used in 10 C.F.R. § 20.1302(a)(1) logically excludes radiation doses from onsite contamination that “predates” HRI’s licensed activities. Preliminary Response Brief for the Federal Respondents (“NRC Brief”) at 34. But nothing in the plain language of 10 C.F.R. § 20.1301(a)(1) limits the scope of a “licensed operation” to the handling of radioactive material placed on the licensed site during the term of a license, in disregard of other radioactive material that is possessed by the licensee within the bounds of its licensed site. In fact, such a narrow interpretation is contradicted by the NRC’s own decisions in other aspects of this case and by the Part 20 regulations and their history.

A. NRC’s Interpretation of “Licensed Operation” Conflicts With Other NRC Interpretations of the Scope of HRI’s Licensed Operation in This Case.

The NRC fails to justify—or even address—the inconsistency between its interpretation of 10 C.F.R. § 20.1301(a)(1) and its interpretation

“cannot take place;” (*Id.* at 12); that “[i]n over three decades of operations, there have been no significant, adverse impacts” to U.S. drinking water supplies from ISL mining (*Id.* at 14); and that groundwater restoration “has been a success because there has never been a report” of contamination of adjacent drinking water sources without citation to the record. *Id.* at 14.

of the scope of HRI's licensed operations in other aspects of this case. For example, the licensed operation regulated by HRI's license includes not just HRI's activities but the "place(s)" where it will conduct those activities. *See* Petitioners' Opening Brief at 33, citing License at 1, Joint App. at 314.

Similarly, in the final environmental impact statement for HRI's mine, the NRC sought to assure the public that licensing HRI's mine would benefit the environment by resulting in the clean-up of onsite radioactive contamination. *See* Petitioners' Opening Brief at 60, citing Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint New Mexico at 4-88 (1998) ("FEIS"), Joint App. at 288. *See also* FEIS at 4-117, Joint App. at 314 (cleanup of onsite contamination is likely because "some areas of the site have higher concentrations of residual radioactivity (from previous mining activities) than would be allowed in decommissioning the site under the proposed action.") The NRC's assurance of eventual clean-up of the HRI mine is premised on its regulatory authority over clean-up of the contamination: only if the contamination were part of HRI's licensed operation could the NRC order HRI to clean it up at the end of HRI's license term.

The inconsistencies between the NRC's brief and the FEIS regarding the NRC's interpretation of the scope of HRI's licensed operation eliminate any deference that would otherwise be owed to the NRC's interpretation of its regulations. Valley Camp of Utah, Inc., v. Babbitt, 24 F.3d 1263, 1268 (10th Cir. 1994). Where the NRC has publicly represented that onsite contamination of the HRI site would eventually be cleaned up, and even characterized it as a benefit of allowing the mine to operate (FEIS at 4-117, Joint App. at 314), a subsequent anomalous interpretation that effectively retracts that promise and reduces the protection of public health and safety warrants particularly close scrutiny.

B. NRC's Interpretation of "Licensed Operation" Conflicts With the Language and History of the Part 20 Regulations.

Further, contrary to the NRC's argument that the language and history of the Part 20 rules support its narrow interpretation of the meaning of "licensed operation," in fact the regulations contradict the NRC's position. The NRC argues that in 1991, when the agency dropped language from the 1986 proposed rule that would have established public radiation dose limits for "any and all sources" and substituted language setting dose limits for the "licensed operation," it intended to exclude unlicensed sources of radiation within the licensee's possession. NRC Brief at 35. In support of its claim, the NRC quotes language from the Part 20 statement of purpose asserting

that the regulations' purpose is to protect "against ionizing radiation resulting from activities conducted under licenses issued by the [NRC]." NRC Brief at 35 n.15, quoting 10 C.F.R. § 20.1001(a). But this same language has appeared in *all* of the NRC's previous regulations establishing radiation dose limits, including the 1957 regulations that limited radiation doses from all licensed and unlicensed sources within the licensee's possession; as well as the 1979 regulation and the 1986 proposed rule, which limited radiation doses from all sources, regardless of their provenance.² Thus, the regulatory language quoted by the NRC avails it nothing.

The NRC's quotation from the Part 20 statement of purpose is also misleadingly selective, omitting language in section 20.1001(b) which makes clear that the scope of a "licensed operation" is much broader than characterized by the NRC:

It is the purpose of the regulations in this part to control the receipt, possession, use, transfer, and disposal of licensed material by any licensee in such a manner that the total dose to an individual (*including doses resulting from licensed and unlicensed radioactive material* and from radiation sources other than background radiation) does not exceed the standards for protection against radiation prescribed in the regulations in this part.

² See 10 C.F.R. § 20.1(a), 22 Fed. Reg. 548, 549 (January 29, 1957); 10 C.F.R. § 20.1(a), 44 Fed. Reg. 32,349, 32,352 (June 8, 1979); and proposed 10 C.F.R. § 20.1(a), 51 Fed. Reg. 1,032, 1,123 (January 9, 1986).

10 C.F.R. § 20.1001(b) (emphasis added). This language makes clear that radiation doses from a “licensed operation” include both licensed and unlicensed sources of radiation. Thus, the NRC’s interpretation of the term “licensed operation” fails to “sensibly conform[] to the purpose and wording of the regulations.” Martin v. OSHRC, 941 F.2d 1051, 1055 (10th Cir. 1991).

The NRC either disregards or unsuccessfully attempts to discount contemporaneous NRC statements in the 1991 rulemaking which further demonstrate the Commission’s intent to include unlicensed radiation sources within the licensee’s possession as part of the “licensed operation” for purposes of evaluating compliance with 10 C.F.R. § 20.1301(a)(1). *See Martin*, 941 F.2d at 1056 (preamble to a regulation may be consulted as a “secondary source of interpretation.”). For instance, as discussed in Petitioners’ Opening Brief at 36-37 (but ignored in the NRC’s brief), the Commission specifically recognized, in the preamble to the 1986 proposed rule, the impracticality of regulating radiation doses from several sources, “not all of which are controlled by the licensee.” 51 Fed. Reg. at 1,133. *See*, Addendum to Opening Brief (“Add.”) at C 61. To address this problem, the Commission proposed a “reference level” of 0.1 rem/year, which would assure compliance with the 0.5 rem/year limit “even if there are other

licensed and unlicensed radiation sources *in the vicinity.*” Id. (emphasis added). Thus, in proposing the 0.1 rem/year reference level, the Commission distinguished between unlicensed sources in the licensee’s possession (subject to the 0.1 rem/year reference level) and unlicensed sources “in the vicinity” (subject to the 0.5 rem/year dose limit). When, in 1991, the Commission decided to convert the 0.1 rem/year reference level to a regulatory limit, it did not make any “major change” to the proposed rule. 56 Fed. Reg. at 23,374, Add. at C 73.

In the preamble to the final rule, the Commission further clarified that the “new lower dose limit” of 0.1 rem/year “applies only to doses from radiation and radioactive materials *under the licensee’s control.*” See Petitioners’ Opening Brief at 37-38, citing 56 Fed. Reg. at 23,374 (emphasis added). The NRC attempts to discount this crucial statement by arguing that if taken in “context” as a response to a comment, the statement simply clarifies that fallout from nuclear weapons testing and accidents would not be included in the radiation dose calculations. NRC Brief at 36. But the context of the statement actually undermines the NRC’s argument. The subject matter of the comment was framed in the rulemaking notice as “Inclusion of doses from other licensed or unlicensed radiation sources.” 56 Fed. Reg. at 23,374, Add. at C 73-74. Moreover, the comment itself was not

limited to the question of whether only fallout is covered by the radiation dose limits, but also asked generally about “other resources of radiation not under the control of the licensee.” *Id.* Finally, the NRC responded to the comment by distinguishing its own regulations—which apply to “doses from radiation and radioactive materials under the licensee’s control”—from the U.S. Environmental Protection Agency’s (“EPA’s”) radiation dose limits, which regulate emissions from all sources. *Id.*³

³ The full text of the comment and the NRC’s response reads as follows:

Comment. Inclusion of doses from other licensed or unlicensed radiation sources. Many commenters expressed an opinion that the dose should not be all-inclusive and should not include fallout from nuclear weapons tests, transportation of radioactive materials, or other sources of radiation *not under the control of the licensee.*

Response. The EPA’s generally applicable environmental radiation limit for nuclear power operations (40 CFR Part 190) does apply to the total dose from all sources within the uranium fuel cycle [the uranium fuel cycle describes the lifecycle of uranium as a fuel from the time of milling, through enrichment, to use in nuclear power plants. 10 C.F.R. § 20.1003]. However, in its practical implication, the sources would have to be located within a few miles of each other for the combined dose contributions to be significantly different from the dose from either facility alone.

The definition of “natural background” has been replaced by “background radiation,” which means radiation from cosmic sources; naturally occurring radioactive materials, including radon (except as a decay product of source or special nuclear material), and global fallout as it exists in the environment from the testing of nuclear explosive devices. This clarifies sources of radiation and

Thus, contrary to the NRC's assertion, the language and history of the NRC's 10 C.F.R. Part 20 clearly shows that unlicensed radiation sources within a licensee's control fall within the scope of a "licensed operation" as the term is used in 10 C.F.R. § 20.1301(a)(1). Because the NRC's interpretation of the regulations is inconsistent with the Part 20 regulations themselves, it must be reversed. Valley Camp of Utah, 24 F.3d at 1267.

II. THE NRC'S INTERNALLY INCONSISTENT INTERPRETATION OF "BACKGROUND RADIATION" IN THIS CASE MUST BE REVERSED.

The NRC does not even attempt to reconcile the significant discrepancy between its interpretation of "background radiation" in applying 10 C.F.R. § 20.1301(a)(1) and its interpretation of the same term in the FEIS. In the context of applying § 20.1301(a)(1), the NRC gave the term "background radiation" its broadest possible interpretation, concluding that background radiation encompasses radiation emitted from soil and rocks contaminated with mine waste on HRI's Section 17 site.

In contrast, in the FEIS, the NRC at times treated this onsite contamination as background radiation, but at other times called it "residual contamination" that would be cleaned up as part of HRI's eventual

radionuclides that can be excluded from evaluation of the dose from licensed activities.

56 Fed. Reg. at 23,374-75 (emphasis added), Add. at C 70-74.

decontamination of the mine. *See* discussion, *supra*, at 4-5 and Petitioners' Opening Brief at 44-45, 60. The NRC would not and could not have publicly promised clean-up of radioactive material that emitted mere background radiation and therefore was not subject to NRC regulation. As discussed above, the Court should not defer to inconsistent interpretations of the same regulatory terms. Valley Camp of Utah, 24 F.3d at 1268. Where the agency has based public representations about environmental impacts on one interpretation of a regulation, differing interpretations should be particularly suspect.

The NRC also fails to support its assertion that in 1991, the agency implicitly understood sources of background radiation to include contaminated uranium mining waste under the category of technically enhanced naturally occurring radioactive material ("TENORM"). If that were the case, the NRC would not have found it necessary, in the 1986 proposed rule, to explicitly mention certain limited categories of TENORM as part of natural background radiation; nor would the NRC's advisory body, the Advisory Committee on Reactor Safeguards ("ACRS"), have criticized the proposed rule for including TENORM at all. Petitioners' Opening Brief at 41-42. Nor would the NRC, in the 1997 FEIS—which was issued six years *after* the 1991 final rule—have referred to onsite contamination as

“residual radiation” that was subject to cleanup requirements during decommissioning. *See* discussion, *supra*, at 4-5. If, in 1991, the Commission wanted to fundamentally change the proposed rule to include a much broader category of TENORM pollutants within the scope of “background radiation”, it was required by the Administrative Procedure Act to issue notice and comment of that change. Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 586 (D.C. Cir. 1997).

III. NRC’S LEGAL ARGUMENTS IN DEFENSE OF HRI’S DECOMMISSIONING COST ESTIMATE ARE ERRONEOUS.

In attempting to defend its requirement for a groundwater restoration surety based on flushing HRI’s mine with nine pore volumes of water, the NRC asserts that nine pore volumes is “just” an “initial estimate” that is based on the “best information available at the time.” NRC Brief at 48. According to the NRC, an “estimate” is all that is legally required at this stage of the proceeding, and therefore the surety is sufficient. *Id.*

In making this argument, however, the NRC ignores the legal requirement that even an “estimate” must be sufficiently accurate to ensure that a “reasonable minimum sum” can be determined “and then adequate assurance provided for its availability.” Public Service Company of New Hampshire (Seabrook Station, Units 1 and 2), CLI-88-10, 28 NRC 573, 586 (1988).

Here, the NRC has failed to justify its reliance on a groundwater restoration cost estimate that is facially inadequate to ensure groundwater quality restoration at HRI’s mine: the NRC concedes that for the toxic and radioactive elements uranium and radium-226, the Mobil Section 9 groundwater restoration pilot project—on which the NRC relied in basing HRI’s groundwater restoration surety on the cost of flushing HRI’s mine with nine pore volumes of water—did not succeed in restoring groundwater quality to either the primary restoration goal of pre-mining, or baseline, concentrations, or the secondary goal of compliance with EPA drinking water standards. NRC Brief at 25. Nevertheless, the NRC contends that the Court should defer to its “expert” judgment that a surety based on the cost of flushing HRI’s mine with nine pore volumes of water will be adequate to ensure restoration of the groundwater. *Id.* at 57.

The NRC’s brief demonstrates, however, that its defense of the nine-pore-volume estimate is based on a series of legally indefensible rationales that are entitled to no deference from this Court. *Wedelstedt v. Wiley*, 477 F.3d 1160, 1165 (10th Cir. 2007).

A. The NRC Unlawfully Accepts Long-term Contamination of Groundwater at HRI’s Mine Site.

The NRC disputes Petitioners’ assertion that the Atomic Energy Act (“AEA”) will be violated if groundwater is not restored to “premining

baseline or drinking water standards,” on the basis of Petitioners’ alleged failure to cite “evidence that a restoration failure, even if it occurred, would be a ‘threat to public health and safety’ as opposed to an undesirable but non-safety-related environmental impact.” NRC Brief at 51, citing Petitioners’ Opening Brief at 46. Thus, the NRC implicitly argues that long-term contamination of the HRI mine site is acceptable if Petitioners cannot show that it is a future drinking water source.⁴

The NRC’s position completely contradicts the regulations’ requirement that groundwater must be restored after completion of mining operations. *See* Appendix A to 10 C.F.R. Part 40. Nothing in the regulations or regulatory guidance allows a licensee to contaminate an aquifer if it is not a proven drinking water source. Instead, the regulations and guidance require the licensee to restore the groundwater to previous conditions or to primary or drinking water standards. *See* Petitioners’ Opening Brief at 8 and citations therein.⁵

⁴ Even though the Presiding Officer found that groundwater would be safe to drink away from the mine area because the toxic elements would be diluted and precipitated, he did **not** find that groundwater within the mine area but outside the ore zone would be safe. LBP-99-30, 50 NRC at 104-105, Joint App. at 526.

⁵ In an apparent attempt to downplay the costs of cleaning up Section 8 to EPA regulatory standards, the NRC misrepresents the secondary restoration standards for HRI’s mine as “pre-operation ‘class use’ which includes

Moreover, in making this argument, the NRC unlawfully attempts to shift to Petitioners the burden of showing that regulatory compliance has health and safety significance. The burden of proof in the licensing case is on the license applicant, not Petitioners. 10 C.F.R. § 2.1237. And ultimately, the Commission bears the burden of finding that a licensed operation is not inimical to the public health and safety. 42 U.S.C. § 2099; 10 C.F.R. § 40.32(c)(d); *see also* Union of Concerned Scientists v. NRC, 824 F.2d 108, 114 (D.C. Cir. 1987) (AEA’s “command is simple and sure: the Commission must provide ‘adequate protection’ of the public health and safety”).

B. The NRC’s Estimate of Nine Pore Volumes Is Based on The Unlawful Averaging of Groundwater Contaminant Levels.

The NRC argues that it will not be necessary to restore groundwater at Section 8 to anything like drinking water conditions because the mining zone is already “contaminated.” NRC Brief at 56. In making this argument, the NRC disregards substantial evidence presented by Petitioners, the FEIS, and HRI itself that in fact, the Church Rock mine site contains groundwater of very good quality. *See* Petitioners’ Opening Brief at 50-52.

agricultural or livestock use.” NRC Brief at 7. In reality, the secondary restoration standards in HRI’s license are EPA drinking water standards for human beings. Joint App. at 314.

The NRC's position is legally erroneous because its conclusion that Section 8 groundwater is contaminated is based on unlawful averaging of widely divergent groundwater quality measurements at Church Rock. As the Presiding Officer ruled in LBP-05-17⁶, in setting restoration goals based on baseline conditions, it is impermissible to average the concentrations of contaminants in the ore zone and the concentrations in the part of the mine that lies outside the ore zone. *See* Petitioners' Opening Brief at 51-52. Because of the unlawful averaging of baseline groundwater quality values, the estimated amount of water needed to restore baseline quality is lower than it would be if the restoration effort must achieve more pristine conditions.⁷

⁶ LBP-05-17, 62 NRC 77, 96 (2005) (Joint App. at 972), *rev. denied*, CLI-06-1, 63 NRC 1 (2006), Joint App. at 1322-1326.

⁷ The NRC mistakenly characterizes Petitioner's argument about groundwater quality averaging as complaining that the Commission improperly allowed HRI to establish baseline water quality based only on water measurements within the mining zone. NRC Brief at 56, citing Petitioner's Opening Brief at 51-52. Petitioners have been consistent in their argument that the only thing improper about the Commission's decision in CLI-00-12, the Presiding Officer's decision in LBP-99-30 and HRI's and the NRC Staff's position on measuring baseline is that HRI had been permitted to characterize pre-mining water quality at Section 8 as poor based on averages of high quality water outside the ore zone with poor quality water inside the ore zone. *See, e.g.*, Written Testimony of Dr. Richard J. Abitz at 20-24 (January 8, 1999), Joint App. at 1436-1440; Intervenors' Written Presentation on Groundwater Protection, Restoration, and Surety Estimates at 43 (March 7, 2005), Joint App. at 692.

The NRC argues that the “normal practice of determining baseline conditions is to average a number of samples from wells within the ore zone,” NRC Brief at 57, but this claim is not supported by LBP-05-17, which emphasizes the importance of *not* averaging groundwater quality inside and outside the ore zone in setting restoration goals. 62 NRC at 95-96, Joint App. at 971-972. The NRC also argues that there is “no connection” between LBP-05-12 and the Commission’s decision approving the amount of HRI’s groundwater surety. NRC Brief at 57. But the connection—or rather the stark contradiction is plain—the NRC has based a groundwater surety estimate on a practice of determining baseline water quality that is not only illegal, but that will mask the true cost of restoring groundwater at Church Rock.

C. EPA’s Aquifer Exemption Proceeding Does Not Excuse The NRC of Its Responsibility to Protect Public Health.

Finally, both the NRC and HRI rely on the fact that HRI will be required to obtain an aquifer exemption from the EPA prior to beginning mining to respond to Petitioners’ argument that Church Rock Section 8 contains drinking water quality groundwater. HRI Brief at 56-57; NRC Brief at 52, n.24.⁸ They argue that because aquifer exemptions are only

⁸ The NRC states that Petitioners seek to force HRI to restore the Section 8 groundwater to conditions cleaner than pre-mining conditions. NRC Brief at

granted for aquifers or portions of aquifers that are not currently used as drinking water aquifers and will never be used as drinking water aquifers, the Petitioners' position that groundwater must be restored to drinking water standards should be rejected.

The fact that HRI must obtain an aquifer exemption from the EPA does not absolve the NRC of its statutory duty to assure that HRI's licensed operations are not inimical to the public health and safety. *See* Petitioners' Opening Brief at 51, n. 33, and citations therein; *see also* LBP-05-17, 62 NRC 77, 91 (2005), Joint App. at 969; CLI-06-1, 63 NRC 1, 7, n. 31 (2006), Joint App. at 1325. Thus, this rationale for the proposition that Section 8 groundwater is already contaminated is irrelevant and cannot stand as a basis for allowing HRI to short-change its initial surety requirements.⁹

52 and n. 24, citing May 11, 1999 Ford Affidavit at ¶ 22. Petitioners do not now, nor have they ever made such an argument. Petitioners only seek to require HRI to restore groundwater to pre-mining conditions when those conditions are better than drinking water quality, or, if pre-mining conditions are better than drinking water quality and HRI cannot restore to pre-mining conditions, HRI would have to restore to drinking water quality. HRI's groundwater surety should be sufficient to ensure such restoration. In the case of Section 8, where there is drinking water quality groundwater, HRI should be required to restore the groundwater to drinking water quality.

⁹ HRI's assertion that underground sources of drinking water adjacent to the Section 8 wellfield will be protected because of a buffer zone required under EPA's underground injection control permit regulations is irrelevant for the same reasons that the argument that HRI is required to receive an aquifer exemption is irrelevant. HRI Response Brief at 14, n. 6.

D. The Surety Must be Demonstrably Adequate at the Time of Licensing.

Finally, the NRC argues that an inadequate “initial estimate” is nevertheless acceptable at the time of licensing because it can be increased at various points after HRI’s Section 8 mine is licensed. NRC Brief at 48. After mining at Section 8 is finished, for example, NRC will require HRI to conduct a “demonstration project” to see how much water it actually will take to clean up the mine site. Id. According to the NRC, HRI will not be allowed to proceed with mining operations “beyond Section 8 until the demonstration is completed and approved by the Staff,” and the NRC will increase the required surety if the demonstration shows that additional pore volumes are needed. Id. at 49.

In asserting that a facially inadequate surety is acceptable because it can be amended after licensing, the NRC commits legal error. While Appendix A of 10 C.F.R. Part 40 requires annual surety updates, these updates are intended to adjust for “inflation, changes in engineering plans, activities performed, and any other conditions affecting costs.” They are not meant to remedy a fundamentally defective surety. Public Service Co. of New Hampshire, 28 NRC 573, 586 (1988). Thus, a surety that is

demonstrably insufficient to restore groundwater may not be approved on the basis that it can be increased later.¹⁰

In asserting that significant insufficiencies in the groundwater restoration surety can be made up after licensing, the NRC also repeats the historical—and costly—mistake that its decommissioning regulations were intended to correct: allowing mining to proceed before collecting a reasonable surety that will allow clean-up of the site upon termination of the license. The NRC fails to anticipate the very real possibility that when HRI has finished mining of Section 8, it will have run out of any funds, beyond the protected surety, with which to clean up the Section 8 mine site. *See* Petitioners’ Opening Brief at 48. In that event, the fact that HRI is unable to go forward with mining “beyond Section 8” will do nothing to ensure that Section 8 groundwater is cleaned up to the yet to be determined levels

¹⁰ The NRC also has interpreted Criterion 9’s annual surety adjustment provision to cover increases due to inflation, but only *decreases* due to changes in operation, leading to the conclusion that an adequate surety should be secured before operations begin. *Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-Term Surveillance and Control of Uranium Recovery Facilities* at 8 (“[i]f, during the operating life of the uranium recovery facility, the cost estimate for decommissioning and reclamation decreases due to a change in operating plans or other factors, the licensee may apply to NRC for approval of the decreased coverage.”) Thus, even though HRI’s operations may be “phased” the NRC cannot rely on the annual surety adjustments permitted by Criterion 9 to allow HRI to avoid posting an adequate surety prior to mining. *See* NRC Brief at 49.

required by HRI's license. In fact, if HRI is not allowed to proceed with mining on the other HRI mine sites, the proceeds from HRI's "phased" mining operation will not be available for Section 8. *See* NRC Brief at 53.

As discussed in Petitioners' Opening Brief at page 47, the reasonableness of a decommissioning funding plan must be established at the time of licensing. Moreover, under the health-based standards of the AEA and NRC regulations, a decommissioning funding plan must be based on information that is needed to make a reasonable estimate of decommissioning costs—not on a determination of what expenditures for information collection are within the license applicant's budget prior to mining. As a matter of law, therefore, the decommissioning surety estimate for HRI's mine is inadequate.

IV. PETITIONERS' POST-LICENSING HEARING RIGHTS ARE NOT ASSURED.

While the NRC and HRI assert that any change in the license conditions after review of the demonstration project will result in an amendment to HRI's license, Petitioners' right to a hearing on any such license amendment is far from assured. NRC Brief at 58; HRI Brief at 61. Unless HRI's surety is adjusted downward, Petitioners are unlikely to receive any hearing.

In Bellotti v. NRC, 725 F.2d 1380, 1383 (D.C. Cir. 1983), the Court of Appeals held that when the NRC is seeking to make a facility's operation safer, it may deny automatic participation in a hearing under 42 U.S.C. § 2239(a). Under Bellotti, if HRI's surety were to be increased, the NRC is under no obligation to hold a hearing, because it would be seeking to increase the facility's safety. Thus, even if the increase in surety were wholly inadequate to cover restoration of contaminated groundwater, Petitioners would not be entitled to a hearing.

V. THE NRC VIOLATED NEPA IN ASSESSING THE ENVIRONMENTAL IMPACTS OF HRI'S MINE.

A. The NRC'S Failure To Properly Evaluate Cumulative Impacts of Existing Airborne Radioactive Contamination Violates NEPA.

1. The NRC failed to evaluate the relationship between existing contamination at section 17 and the incremental impacts of the proposed project.

No matter how small the incremental impacts of a project are expected to be, 40 C.F.R. §1508.7 requires the NRC to “add [] [the incremental impacts] to other past, present, and reasonably foreseeable future actions.” Once this is done, the NRC must “to the fullest extent practicable, [] quantify the various factors considered.” 10 C.F.R. §51.71; *Cf. Hall v. Norton*, 266 F.3d 969, 978 (9th Cir. 2001) (EA that failed to quantify the cumulative emissions from potential development was

inadequate, even when project would only contribute a small portion of overall emissions). For Section 17, this required the NRC to combine the site's existing contamination with the projected releases from HRI's operations to determine the site's cumulative radiological impacts. The NRC violated NEPA by failing to do this.

Contrary to the NRC's assertions, nothing in the FEIS, DEIS or any adjudicatory decision, demonstrates that the cumulative radiological impacts at Section 17 were adequately considered. Instead, the FEIS improperly averaged good quality air from Crownpoint with poor quality air from Church Rock leading the Board and the Commission to conclude that ambient radiation levels in the general area fall below national averages and therefore the additional incremental impacts from the project do not pose a significant risk. *See* NRC Brief at 45-46; HRI Brief at 49-50.

2. The NRCs Inconsistent Characterization of Section 17's Mine Waste Violates NEPA.

The NRC claims that the Commission's characterization of Section 17's mine waste as background radiation was proper because the definition of "background is a technical one" under 10 C.F.R. § 20.1003. NRC Brief at 47. This argument, however, does nothing to correct the misleading effects of the NRC's inconsistent treatment of concept of background radiation throughout the NEPA process or rectify the FEIS' failure to adequately

inform the public and decision makers about the environmental consequences of the proposed mining operation at Section 17.

The NRC's "technical" definition of the concept of background radiation cannot be reconciled with the actual text of the FEIS. For example, the NRC never made any assertion in the FEIS that Section 17's mine waste qualifies as TENORM and is therefore properly considered background radiation. In fact, the FEIS refutes this idea, because it characterizes Section 17's mine waste as a separate and distinct source of radiological emissions in the FEIS. *See e.g.* FEIS at 4-73, Joint App. at 277 (describing Section 17's mine waste as "remnant radiation"); FEIS at 4-88, Joint App. at 278 (describing Section 17's mine waste as "existing residual contamination") FEIS 4-117, Joint App. at 284 (describing Section 17's mine waste as "residual radioactivity"). As a result, the NRC's imprecise and inconsistent treatment of the concept of background radiation during the NEPA process has left the public uninformed about the distinction between the human-caused environmental impacts, i.e. mine waste, and the natural environment.

Furthermore, the NRC makes no attempt in its brief to reconcile the disparity between its "technical" definition of the term "background" with the assertion in the FEIS that there will be positive health impact and benefit from the project because Section 17's mine waste will be cleaned up as part

of decommissioning the site. If mine waste were so clearly part of background radiation, the NRC could not have touted clean up of Section 17 as benefit of the project, because the NRC does not regulate background radiation and HRI cannot be mandated to clean up background radiation by the NRC.

In sum, what becomes clear from reviewing the FEIS and the adjudicatory decisions is that the NRC's understanding of background radiation has changed during the course of the litigation and cannot be reconciled with the NEPA documents used to evaluate the expected environmental impacts. These inconsistencies clearly undermine NEPA's goals of informed decision making and public participation, because the public and the decision makers are left unclear and uninformed about (a) the difference between background radiation and emissions from mine waste, (b) the environmental impacts of the radioactive emissions from the mine waste, and (c) whether or not the mine spoil will be remediated as part of HRI's licensed operation. Johnston v. Davis, 698 F.2d 1088, 1094 (10th Cir. 1983) (misleading or unqualified statements that do not represent a realistic assessment of project justify remand); Hughes Watershed Conservancy v. Glickman, 81 F.3d 437, 446 (4th Cir. 1999) (rejecting EIS that contained misleading projections of a project's economic benefits); South Louisiana

Env'tl. Council v. Sand, 629 F.2d 1005, 1011-12 (5th Cir. 1980) (misleading assumptions can defeat the purpose of an EIS by impairing the agency's consideration of the adverse environmental effects of a proposed project).

B. The NRC Violated NEPA By Failing to Address the Environmental Impacts of Incomplete Groundwater Restoration in the FEIS.

1. Respondent's Exhaustion Defense Lacks Merit.

The NRC claims that Petitioners failed to raise their argument that the FEIS failed to address the environmental impacts of insufficient groundwater restoration in the administrative proceeding. NRC Brief at 59. In essence, the NRC argues that Petitioners failed to exhaust their administrative remedies.

To the contrary, in the administrative case the Petitioners provided the NRC with sufficient notice of its "position and contentions" to allow the NRC to give "meaningful consideration" to their claims. Silverton Snowmobile Club v. U.S. Forest Service, 433 F.3d 772, 783 (2006), quoting Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 764, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004) quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978). In their petition for review of LBP-99-30, Petitioners appealed the Presiding Officer's dismissal of their concern that the FEIS fails to consider the

environmental impacts of groundwater from the Crownpoint Project. Petition for Review at 2-3. *See* Petitioners’ Petition for Review of LBP-99-30 at 41, Joint App. at 1448(“LBP-99-30 dismisses Intervenors’ concern that the FEIS fails to consider the environmental impacts of groundwater from the Crownpoint Project.[] The decision incorporates the findings made with respect to Intervenors’ other groundwater protection concerns.”) (internal citations omitted) citing LBP 99-30 at 51, Joint App. at 591. Thus, Respondents’ exhaustion defense lacks merit and should be denied.¹¹

¹¹ Even if the Petitioners had not properly raised the argument at the Commission level, any further administrative review of the issue would have been futile since the Commission affirmed the PO’s decision to declare all of Petitioners’ groundwater arguments under NEPA “invalid” simply because he had already rejected Petitioners’ AEA claims. *See, generally, McQueen ex rel. McQueen v. Colorado Springs School Dist. No. 11*, 488 F.3d 868, 874 (10th Cir 2007) (“[e]xhaustion is not required ... where it would be futile or fail to provide adequate relief.”) Furthermore, compliance with NEPA is the primary duty of every federal agency and an exhaustion defense should not be lightly entertained. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000 (Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.) Finally, none of the reasons for requiring exhaustion are present in this case: 1) the administrative process has not been prematurely interrupted and there has been a final agency action; 2) the agency has had a meaningful opportunity to develop the record and apply its expertise; 3) the agency has had an opportunity to review and address the issue. *See McKart v. U.S.*, 395 U.S. 185, 193-194 (1969) (discussing reasons for exhaustion requirement.)

2. In Violation of NEPA, the FEIS Never Addressed the Possibility of Incomplete Groundwater Restoration at Church Rock.

The NRC does not claim that the FEIS or Commission actually considered the environmental impacts that would be caused if groundwater at Church Rock Section 8 is not restored. Instead, the NRC argues that by acknowledging groundwater restoration failure is a significant potential adverse impact of ISL mining and that HRI has yet to achieve groundwater restoration, the NRC has met NEPA's hard look requirement.¹² NRC Brief at 59-61. This argument should be rejected.

In violation of NEPA, the NRC unreasonably failed to consider the impacts to the community that would be caused by leaving Church Rock Section 8's groundwater contaminated after the large scale demonstration project. NEPA requires that agencies disclose and meaningfully discuss reasonably foreseeable possible impacts and not merely list them, and the extent to which a particular impact must be discussed is governed by the rule

¹² The NRC also argues that the Commission pointed to various mitigation measures that will decrease the likelihood of this significant impact from occurring. NRC Brief at 61. However, this mitigation scheme does not address the possibility that Church Rock will be left contaminated after the restoration demonstration. Furthermore, all other mitigation measures in the FEIS are premised off the assumption that HRI can achieve what it failed to do in nearly every test it conducted: restore groundwater to primary or secondary standards.

of reason. Utahns for Better Transp. v. U.S. Dept. of Transp., 305 F.3d 1152, 1163 (10th Cir. 2002).

Given that 1) HRI's license allows it to mine at Church Rock Section 8 *before* demonstrating that it can achieve groundwater restoration and 2) HRI has never shown that it can achieve groundwater restoration, the NRC acted unreasonably in failing to address this potential impact. Should HRI fail to restore groundwater to primary or secondary standards after the Church Rock Section 8 demonstration—which, based on nearly every test relied upon by the agency, and by the NRC's own admission in the FEIS, is a reasonably foreseeable impact—an underground source of drinking water will be degraded and suitable for only lower quality uses.

3. The NRC Committed Legal Error By Refusing To Consider Petitioners' NEPA Claim.

The NRC's final argument is that because the Presiding Officer determined that Petitioners' NEPA claims were a "recapitulation of themes" presented under their AEA claims, that the PO was under no obligation to conduct a separate review under NEPA. NRC Brief at 61. This argument is inapt. Once a decision is made regarding the health and safety requirements under the AEA, the NRC is not permitted to merely assume that associated environmental risks are automatically acceptable. Limerick Ecology Action, Inc. v. NRC, 869 F.2d 719 (3d Cir. 1989), quoting Citizens for Safe Power

v. NRC, 524 F.2d 1291, 1299 (D.C. Cir. 1975) (“It is 'unreasonable to suppose that [environmental] risks are automatically acceptable, and may be imposed upon the public by virtue of the AEA, merely because operation of a facility will conform to the Commission's basic health and safety standards”). The Board’s determination under the AEA therefore did not excuse the agency’s obligation to fully disclose and evaluate the associated environmental risks of that decision pursuant to NEPA’s hard look requirement.

CONCLUSION

As shown above, the NRC and HRI have failed to refute Petitioners’ arguments under the AEA and NEPA. The NRC decisions granting HRI’s License should therefore be reversed.

Respectfully submitted this 5th day of November, 2007.

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v.)	
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Respondents,)	
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Hydro Resources, Inc.,)	
)	
Intervenors.)	
)	
)	

CERTIFICATE REGARDING WORD COUNT

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), undersigned counsel for Petitioners hereby certifies that the number of words in Petitioners' Reply Brief of November 5, 2007, excluding the Table of Contents, Table of Authorities and signature block as counted by the Microsoft Word program, is 6,988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Petitioners’ Reply Brief filed in Case No. 07-9505 in the above-captioned proceeding has been served on the following parties by U.S. Mail, first class this 5th day of November, 2007:

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