



Mr. Sam Coleman
Acting Regional Administrator
U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Suite 1200
Dallas, Texas 75202

VIA ELECTRONIC MAIL &
U.S. MAIL, FIRST CLASS

August 6, 2012

RE: Aquifer Exemption Issued to Hydro Resources, Inc. for Church Rock Section 8

Dear Acting Administrator Coleman:

On behalf of Eastern Navajo Diné Against Uranium Mining (“ENDAUM”) and its members, I wish to thank you and your staff for taking the time to discuss the aquifer exemption for *in situ* leach (“ISL”) mining that Region 6 issued to Hydro Resources, Inc. (“HRI”) in 1989 for its proposed mine site at the southeast ¼ section of Section 8, Township 16 North, Range 16 West (“Section 8”). Per our telephone conference call on July 12, 2012, I am submitting for your consideration the following analysis of the Safe Drinking Water Act (“Act”) and its implementing regulations.

As a preliminary matter, I want to provide ENDAUM’s understanding of Region 6’s position, as a matter of law, on the Act and its regulations as it pertains to the aquifer exemption at Section 8, based on William Honker’s June 27, 2012 letter to Stuart Bluestone, Douglas Meiklejohn, and Eric Jantz, and our discussion on July 12. ENDAUM understands that in determining whether an aquifer exemption is appropriate for a particular aquifer or portion of an aquifer, Region 6 will consider two factors. First, Region 6 will consider whether minerals are present in an aquifer or portion of an aquifer. Second, if EPA determines that minerals are present, it will determine if the proposed exempted area or nearby areas are being used as drinking water sources. *See*, June 27 Honker letter at 1. If they are not, the aquifer or portion of an aquifer will be exempted. ENDAUM understands that Region 6 does not consider whether an area that is proposed for exemption has groundwater quality that would qualify it as an underground source of drinking water (“USDW”) or whether adjacent underground sources of drinking water might be impacted by operations in the exempted area. June 27 Honker letter at 1-2. Further, ENDAUM understands that a community’s or tribe’s identification of the proposed exempted area or immediately adjacent areas as important sources of *future* drinking water are irrelevant to Region 6’s analysis. If any portion of this understanding is inaccurate, please do not hesitate to provide ENDAUM with clarification.

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Assuming that ENDAUM's understanding of Region 6's analysis of whether an aquifer exemption will be granted or denied is accurate, ENDAUM has significant concerns that Region 6's decision-making process undermines the purpose of the Act and is misguided as a matter of policy.

I. The Safe Drinking Water Act

The primary purpose of the Safe Drinking Water Act and its implementing regulations is to protect underground sources of drinking water. 42 U.S.C. § 300h(b); H.R. Rep. No. 93-1185, 120 Cong. Rec. 6454, 6480 (1974); *Western Nebraska Resources Council v. EPA*, 793 F.2d 194, 195-196 (8th Cir. 1986). Congress further recognized the need to balance protection of clean water with development of energy and mineral resources. H.R. Rep. No. 93-1185, 120 Cong. Rec. at 6483. Nevertheless, Congress did not intend to make protection of water sources secondary to mineral development.

A. Statutory Language

The Act's requirements for protecting USDWs are found in 42 USC § 300h. Specifically, the Act provides that drinking water programs have requirements that, at a minimum, assure that no underground sources of drinking water will be endangered by any underground injection. *Id.* at 300h(b)(1), 3(C). The Act further provides that underground injection endangers drinking water sources if:

such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise affect the health of persons.

Id. at 300h(d)(2).

Courts have reviewed the Act's plain language and held that Congress intended its scope to be broad. *Western Nebraska Res. Council v. EPA*, 793 F.2d 194, 195 (8th Cir. 1986); *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d 545, 560 (10th Cir. 1986). In order to further the purposes of protecting groundwater, courts have noted that the Act's protections extend not only to current underground sources of drinking water, but also potential future sources. *Phillips Petroleum Co.*, 803 F.2d at 560. Additionally, the Act's protections extend to USDWs that are adjacent to an exempted aquifer. *Western Nebraska Res. Council*, 793 F.2d at 196.

B. Legislative History

The Act's primary purpose, as embodied in its plain language, is confirmed by its legislative history. The Committee Report on the Act indicates, in the context of oil and gas¹ production, that groundwater protection is paramount:

the Committee recognizes the existence of varying geological, hydrological, and historical conditions in different States and in different areas within a State. The committee intends the Administrator's national guidelines would be sufficiently flexible to permit States to take account of these varying conditions in their underground injection control programs. These varying conditions should be considered for the purpose of assuring protection of underground water sources, while preventing unnecessary interference with oil and gas production. This authority for reasonable flexibility should not be construed to undermine or reduce the State's duty to assure protection of underground water sources. It means, for example, that detailed technical and procedural specification of the guidelines may be relaxed or modified if the State shows that under special local conditions such specifications are not necessary to protect underground water resources.

...a proper interpretation of the act... requiring measures to eliminate practices which may reasonably be anticipated to endanger underground water sources, while not imposing unnecessary requirements which would impede or interfere with oil or gas production

...

In no event, however, should these statements of committee intention be construed as requiring the Administrator to subordinate the concern for protection of underground water sources to that of energy production.

H.R. Rep. 95-338, 123 Cong. Record 3658-3659 (1977) (emphasis added);² *see also, Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d at 560 (concluding that if a requirement on injecting activities is necessary to assure that underground sources of drinking water are not endangered, whether that requirement impedes mineral recovery is irrelevant because the “clear and overriding concern” of Congress in passing the Act was to assure the safety of “present and potential sources of drinking water”).

Further, the Interstate and Foreign Commerce Committee reported the following, “the Committee sought to assure that constraints on energy production activities would be kept as limited as possible while still assuring the safety of present and *potential* sources of drinking

¹ While the Committee's report discusses oil and gas, Congress' rationale also applies to uranium and other minerals.

² It is noteworthy that the Interstate and Foreign Commerce Committee invoked a recent drought in the West as highlighting the particular importance of conserving and safeguarding “our Nation's present and future supplies of drinking water.” 123 Cong. Record at 3659. The ongoing drought in New Mexico and likelihood of future extended droughts due to global climate change make protecting groundwater resources in Churchrock and throughout New Mexico all the more critical.

water.” House Rep. 93-1185 120 Cong. Record at 6484 (emphasis added); *see also*, *Phillips Petroleum Co. v. U.S. Environmental Protection Agency*, 803 F.2d at 548 (reviewing legislative history demonstrating that Congress intended for underground injection control policy to require that injection activities would not “interfere with present or potential subsurface water supplies, contaminate interconnected surface waters or otherwise damage the environment”).

Finally, in enacting the Act, Congress emphasized a national policy of clean water. *Phillips Petroleum Co. v. EPA* at 555. Congress implemented a national policy because contaminated groundwater may cross state boundaries. *Id.*

II. EPA’s Implementing Regulations

A. Regulatory Language

The language and purpose of EPA’s regulations implementing the Act are similar to the language and purpose of the Act. Specifically, the regulations prohibit movement of fluid into any underground source of drinking water from underground injection activities such that the intruding fluid would cause a violation of drinking water standards or otherwise adversely affect public health. 40 C.F.R. § 144.12(a). The regulations define a USDW as:

an aquifer or its portion:

- (1) (i) Which supplies any public water system; or
(ii) Which contains a sufficient quantity of ground water to supply a public water system; and
 - (A) Currently supplies drinking water for human consumption; or
 - (B) Contains fewer than 10,000 mg/l total dissolved solids; and
- (2) Which is not an exempted aquifer.

Id. at 146.3. The regulations further outline the requirements for exempting an aquifer. A aquifer may be exempt if:

- (a) It does not currently serve as a source of drinking water; and
- (b) It cannot now and will not in the future serve as a source of drinking water because:
 - (1) It is mineral, hydrocarbon or geothermal energy producing, or can be demonstrated by a permit applicant as part of a permit application for a Class II or III operation to contain minerals or hydrocarbons that considering their quantity and location are expected to be commercially producible.
 - (2) It is situated at a depth or location which makes recovery of water for drinking water purposes economically or technologically impractical;

(3) It is so contaminated that it would be economically or technologically impractical to render that water fit for human consumption; or

(4) It is located over a Class III well mining area subject to subsidence or catastrophic collapse; or

(c) The total dissolved solids content of the ground water is more than 3,000 and less than 10,000 mg/l and it is not reasonably expected to supply a public water system.

Id. at 146.4.

As ENDAUM indicated in its December 5, 2011 letter to the Regional Administrator, the groundwater quality in the Westwater Canyon aquifer is good, with two of the sample wells that HRI constructed – CR-2 and CR-5 – indicating that groundwater within Section 8 meets EPA’s Maximum Contamination Levels (“MCLs”) and New Mexico groundwater quality standards without treatment. Further, the Navajo Nation has identified groundwater in Churchrock as an important future drinking water source. Navajo Nation Department of Water Resources, *Draft Water Resource Management Strategy for the Navajo Nation* at 8, § 3.1.1. (July, 2011). The groundwater within, Section 8, therefore, can now serve and can serve in the future, as an underground source of drinking water.

B. Regulatory History

The history of EPA’s implementing regulations mirrors that of the Act itself. In the Federal Register entry noticing the adoption of the UIC program regulations, the EPA noted that the regulations emphasize the fact that USDWs are to be protected, “regardless of whether they have been accurately mapped or otherwise identified.” 45 Fed. Reg. 33,290, 33,328 (May 19, 1980). Consistent with this policy, the EPA intended that aquifers or portions of aquifers only be exempted when they have “no real potential to be used as drinking water sources.” *Id.*; *see also*, *Id.* at 33, 330 (an exempted aquifer is an aquifer or portion of an aquifer that would otherwise qualify as a USDW, but has *no actual potential* for providing drinking water) (emphasis added). As demonstrated above, groundwater within Section 8 has good potential for providing drinking water.

The implementing regulations were subsequently modified in 1981-1982 pursuant to an agreement settling litigation between EPA, the mining industry, and the state of Texas. While these revisions relaxed certain protections in the regulations, they did not eliminate the regulations’ fundamental purpose, i.e., “to provide a framework for State programs which assures that underground injections will not ‘endanger’ drinking water sources.” 45 Fed. Reg. 48, 243, 48,245-48,246 (Oct. 1, 1981).

III. Region 6's Interpretation of the Act and its Implementing Regulations is Contrary to Congress' Intent to Protect USDWs and to the Intent of EPA's Own Regulations

A. EPA Must Consider a Project's Impact on Potential and Adjacent USDWs when Issuing an Aquifer Exemption

Region 6's position that groundwater within the exempted area that meets EPA's MCLs for all constituents and therefore meets the definition of an underground source of drinking water is irrelevant to its decision to issue an aquifer exemption is contrary to Congress' intent to protect current and future underground sources of drinking water. Indeed, Region 6's interpretation of the regulations turns Congress' intent on its head. If Region 6's interpretation is accepted, the presence of minerals in an aquifer would trump the presence of USDWs, unless the USDW is currently being used.

Moreover, nothing in the legislative or regulatory history supports EPA's interpretation. Even in light of the 1981-82 revisions, the regulatory history is clear that environmental and human health protections were not changed in any significant way. 46 Fed. Reg. 48,244. Indeed, the preamble to the draft regulations demonstrate that EPA intended to continue the most stringent protections for groundwater with less than 3,000 mg/l TDS, while allowing for more flexibility in regulating mineral extraction in groundwater containing between 3,000 and 10,000 mg/l TDS. *Id.* at 45,245. Further, the salient factor that EPA must consider in determining whether groundwater is a protectable USDW (either current or potential) is whether the aquifer or portion of an aquifer can yield a sufficient volume of water to supply a public water system. *Id.* EPA considers this to be a small amount of water – usually less than the amount provided by a single low yield domestic well. 47 Fed. Reg. 4,992, 4,993 (Feb. 3, 1982).

In this case, the Westwater Canyon aquifer at Section 8 is capable of yielding millions of gallons of high quality water and therefore meets the definition of a protectable USDW. Indeed, the Westwater at Section 8 falls within the category of water that merits EPA's highest protection, i.e., groundwater with less than 3,000 mg/l TDS. As HRI's initial groundwater monitoring data demonstrates, there is drinking water quality groundwater currently within Section 8, and several other sample wells indicated that even more groundwater may be of drinking water quality within Section 8.³ *See*, December 5, 2011 ENDAUM letter to Regional Administrator Armendariz at 1-2; HRI DP-558 Application, Appendix 4. In fact, the highest TDS concentration within Section 8, occurring at well CR-1, is 875 mg/l, which does not even approach 3,000 mg/l. HRI DP-558 Application, Appendix 4. Even based exclusively on HRI's own incomplete and statistically biased groundwater samples, the groundwater from the Westwater Canyon aquifer within Section 8 meets the criteria for a USDW and is a potential drinking water source. Region 6 should consider the impacts of HRI's proposed operations on that USDW.

³ The boundaries of HRI's aquifer exemption are unclear. ENDAUM's counsel has reviewed many historic documents in the EPA's file concerning HRI's aquifer exemption, and has found no document where the precise boundaries of the exemption have been delineated. Therefore, it is unclear to ENDAUM whether the aquifer exemption encompasses only the portion of the aquifer wherein the uranium ore deposits are located or whether it encompasses the entire portion of the Westwater Canyon aquifer that lies beneath the property boundaries of Section 8. ENDAUM would greatly appreciate clarification of this issue.

Further, Region 6's position that it need not consider the impact of HRI's proposed operation on adjacent underground sources of drinking water is likewise contrary to the Act's purposes and Congress' intent that protecting underground drinking water sources should not be subordinated to energy production. The 1981-82 revisions do nothing to change this fundamental policy. In the Federal Register notice of the draft rule revisions, the EPA re-iterated that operators were required to take all steps necessary to insure that mine contamination does not move into adjacent USDWs such that it would pose a risk to human health.⁴ 46 Fed. Reg. at 48,246. Such steps include exempted aquifer restoration and monitoring requirements.⁵ *Id.*

The Navajo Nation has identified the groundwater resource in Churchrock as an important future drinking water source, the Gallup-Navajo Water Project notwithstanding. December 5, 2011 ENDAUM letter to Regional Administrator Armendariz at 1-2, and Exhibit 2. Further, as ENDAUM pointed out in its December 2011 letter to the Regional Administrator, HRI has presented no supportable evidence that natural attenuation will protect adjacent USDWs and in fact, one of its parent company's operations in Texas has likely resulted in a post-mining contamination of a USDW. *Id.* at 3-4. The EPA must therefore consider how Hydro Resources' project will impact potential USDWs adjacent to the exempted portion of the Westwater aquifer at Section 8, i.e., USDWs at Section 9.

B. Region 6's Criteria for Evaluating Aquifer Exemption Applications Should be Consistent with Other Regions

As the Act's legislative history and the *Phillips Petroleum* case demonstrate, the Act is intended to advance the national policy of protecting groundwater that is or may be used as drinking water. Because the national policy is one of protecting groundwater resources, each EPA region should enforce the Act similarly.

Based on ENDAUM's experience with other regions and documented practice, ENDAUM does not believe that the process Region 6 followed in issuing Hydro Resource's Section 8 aquifer exemption is consistent with processes followed by other regions. In *Western Nebraska Resources*, the Eighth Circuit upheld Region 7's revision of Nebraska's state program in issuing an aquifer exemption because the Region considered a variety of factors in considering the exemption. *Id.*, 793 F.2d at 200. Among the factors the Region considered were the impact of the proposed uranium mining project on surrounding USDWs, the impact of the proposed project on the environment, the extent to which the exempted aquifer could be restored,⁶ and the impact of the proposed project on public health. *Id.*

⁴ Attachment 3 to EPA's Guidance 34, *Guidelines for Reviewing Aquifer Exemption Requests* (July 5, 1984), likewise requires an applicant to demonstrate that contaminated water will remain within the exempted portion of the aquifer.

⁵ This regulatory history suggests that Mr. Honker's statement that EPA does not consider an operator's ability to restore groundwater in issuing an aquifer exemption is inaccurate. See, June 27 letter at 1-2.

⁶ According to Mr. Honker's June 27 letter, EPA does not consider whether or not an exempted aquifer can be restored when determining whether it should be exempted. *Id.* at 1-2. However, Region 7 clearly takes this factor into consideration, consistent with the Act's and its implementing regulations' purpose.

In contrast, based on the conversation with Region 6 on July 12, it appears that the only factors Region 6 considers are 1) whether the proposed exempted area has recoverable minerals and 2) whether the proposed exempted area currently serves as a USDW. Region 6's process is inconsistent and less protective of groundwater resources and public health than the processes followed in other regions. This inconsistency results in unequal protection of resources and public health and can lead to some communities' water resources being sacrificed in favor of industry profits simply by virtue of that community being located in a particular EPA region. This outcome is untenable from both the perspective of fairness and having a consistently enforced national policy.

ENDAUM appreciates that the current Region 6 staff did not issue the 1989 aquifer exemption. However, the EPA's obligation to protect USDWs is ongoing and EPA has clear discretion to initiate revisions to state programs and terminate permits. *See*, 40 C.F.R. § 144.40. EPA meets its obligations by insuring that state programs, including issuances of aquifer exemptions, meet the Act's and regulations' minimum requirements for protecting USDWs. HRI's aquifer exemption does not meet the minimum requirements for protecting USDWs. ENDAUM again urges Region 6 to terminate HRI's aquifer exemption for Section 8.

The importance of this issue is demonstrated by the inability of Hydro Resources' parent corporation, Uranium Resources, Inc. to prevent contamination of underground water at at least one of its Texas sites and to clean up existing contamination. Because Hydro Resources' parent company⁷ has been unable to prevent contamination of adjacent USDWs at at least one of its Texas sites, Hydro Resources' proposal for operations at Section 8 deserves additional scrutiny. ENDAUM respectfully suggests that based on its parent company's operating history, HRI's aquifer exemption should be terminated. Alternatively, EPA should clarify that HRI's aquifer exemption extends only to the immediate ore zone within Section 8 and does not extend to the site's boundaries or to the proposed monitor well ring.

Thank you for your consideration of this matter, and please do not hesitate to contact me if you have any questions or need additional information.

Sincerely,



Eric Jantz
Staff Attorney

⁷ HRI's parent company, Uranium Resources, Inc., shares the same management team with HRI. *See*, <http://www.uraniumresources.com/industry/officers-directorsH>.

Cc:

Senator Jeff Bingaman

Senator Tom Udall

Congressman Ben Ray Lujan

Congressman Henry Waxman

U.S. EPA Administrator Lisa Jackson

Jill Grant, Navajo Nation counsel