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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Before Administrative Judges:
Thomas S. Moore, Presiding Officer
Thomas D. Murphy, Special Assistant

In the Matter of)
)
HYDRO RESOURCES, INC.)
P.O. Box 15910)
Albuquerque, NM 87174)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**INTERVENORS' RESPONSE TO PRESIDING OFFICER'S ORDER FOR
SUBMISSION OF PROPOSED SCHEDULE AND OTHER MATTERS**

INTRODUCTION

Pursuant to the Presiding Officer's Order of May 2, 2001 (LBP-01-16),
Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest
Research and Information Center ("SRIC") (collectively "Intervenors") hereby submit
their response to the Presiding Officer on the issue of a phased hearing versus a single
hearing for all three remaining proposed mine sites, and a proposed schedule that is based
on discussions by Intervenors and Hydro Resources, Inc. ("HRI"). Intervenors are joined
in the filing of this motion by Intervenors Marilyn Morris and Grace Sam.

In this filing, Intervenors will (1) illustrate that if and when the Crownpoint

hearing recommences, the remaining sites covered under the license should be considered together; and (2) propose a tentative schedule for the expeditious conclusion of the proceeding.

I. THE REMAINING SITES COVERED UNDER THE CROWNPOINT LICENSE SHOULD BE CONSIDERED TOGETHER.

In LBP-01-16, Judge Moore directed the parties to set forth their views on whether each of the remaining sites covered by HRI's license should be considered together, or separately and consecutively. LBP-01-16, slip op. at 3. In an April 30, 2001, letter to the Commission, HRI proposes a phased approach. Letter from Anthony J. Thompson to NRC Commissioners (hereinafter the "Thompson letter").¹ The Staff has stated that it favors a unified approach. NRC Staff's Response to Presiding Officer's Order at 3 (May 7, 2001).

Intervenors respectfully submit that, in order for consistency with the Commission's decision in CLI-01-04, compliance with NEPA, and maximum efficiency and fairness, contested issues concerning the remainder of the Crownpoint Project should be heard together rather than in a phased approach. A phased approach will merely serve to prolong the hearing and unlawfully segment these proceedings.

A. A Phased Approach Would Not Comply with CLI-01-04.

In CLI-01-04, the Commission stated that "it believes it is time to resume the

¹ As of this morning, Intervenors have learned that HRI may have changed its position with regard to this issue. In this filing, Intervenors have responded to HRI's latest published position on the matter (the Thompson letter).

hearing process and allow the intervenors to litigate the rest of their concerns. Our decision furthers the Administrative Procedure Act's directive that an agency 'within a reasonable time, shall set and complete proceedings required to be conducted ... and shall make its decision.'" 5 U.S.C. § 558(c)." CLI-01-04. 53 NRC 31 at 43. (emphasis added).

In the Thompson letter, HRI asserts that the Commission overturned the former Presiding Officer's bifurcation and abeyance decision, but did not directly address the validity of bifurcating the proceeding into various phases. See Thompson letter, note 2. HRI fails to recognize that the Commission rejected, as unfair and prejudicial "a situation where the license is issued but contested issues lie fallow without resolution for years." CLI-01-04, 53 NRC at 40. HRI's latest suggestion for a bifurcated approach will have a proximate result to the unfair situation the Commission just rejected.

The Commission was clear when it stated that Intervenors should be allowed to litigate the rest of their concerns as expeditiously as possible — a result that is certainly most fair to all of the parties. The phased approach suggested in the Thompson letter with "further information provided in the latter phases of the hearing" (Thompson letter at 3) is seemingly another attempt at bifurcation, but with different nomenclature. Just as with the rejected bifurcated approach, experts for all the parties would be called repeatedly to testify to the issue of appropriate groundwater restoration standards or compliance with the National Historic Preservation Act (testifying at least one time for each of the four sites, possibly more often if the Presiding Officer were to desire more

testimony on a particular issue). Concerns about the project as a whole would be dragged out over months, if not years, thus weakening the impact of each individual concern. HRI's second attempt at having a bifurcated hearing should be rejected on the same grounds the Commission reversed LBP-99-40, as it is time to resume the hearing process and to allow the Intervenors to litigate the rest of their concerns. CLI-01-04, 53 NRC at 43.

B. A Phased Approach Would Not Comply with the National Environmental Policy Act.

The weakening of individual concerns raised by the Intervenors by means of phasing review of the project would not only violate CLI-01-04, but would result in unlawful segmentation of review of the project under the National Environmental Policy Act ("NEPA"). See Regulations of the Council on Environmental Quality, 40 C.F.R. § 1502.4(a) (related proposals that are effectively a single course of action shall be evaluated in a single Environmental Impact Statement ("EIS")). The prohibition against segmentation does not end with the preparation of the Final Environmental Impact Statement ("FEIS") by the Staff. Rather, the EIS must "accompany the application . . . through, and be considered in, the commission's decisionmaking process." 10 C.F.R. § 51.94.

The Licensing Board hearing on the application is a significant part of the decisionmaking process wherein NRC must consider the environmental impacts of the project, and must not segment parts of a single project, separately consider connected

actions, or ignore cumulative impacts. See Carolina Power and Light Co., et al. (Shearon Harris Nuclear Power Plant, Units 1 and 2), LBP-82-119A, 16 NRC 2069, 2111 (1982) (even where one unit of a project may be completed much later than another, "the effects of effluents on the environment are more realistically viewed in the aggregate from multiple units, rather than piecemeal") and Cady v. Morton, 527 F.2d 786, 795 (9th Cir. 1975)(where agency approved leases for 30,000 plus acres making possible the future approval of mining plans for individual tracts within the leased area, the agency's limitation of EIS scope to first five year mining plan for 770 acres violated NEPA).

As the Court noted in Cady v. Morton, the consequences of several mining projects spaced over a period of several years will be "significantly different" from the impacts of a single phase of the project. Cady v. Morton, 527 F.2d at 795. The project must be examined in its entirety, not in piecemeal form as, once again, a bifurcated approach would have it. Continuing the piecemeal examination of the Crownpoint Project will likely impair the Presiding Officer's ability to review other parts of the Project and to judge the adequacy of the license as a complete whole. See Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 240-241 (3d Cir. 1980), cert. den. 449 U.S. 1096 (1981)(When construction begins before a complete review of the environmental impacts of a whole containment project, the construction "has the almost inevitable effect of distorting the view of the agency and reviewing court as to the desirability of the action."). If each section is separately addressed and mining were to

begin at one or two sites prior to the completion of the hearing for the entire license, such procedure will unquestionably create a distorted view of the rest of the project that will favor approval of all licensed activities regardless of whether those activities comply with the law.

To ensure compliance with NEPA, the Intervenor's should be allowed to address HRI's license in its entirety in one hearing.

C. A More Efficient Hearing Will Result If the Crownpoint Project Is Examined in its Entirety.

As the Commission noted in CLI-01-04, the NRC has a "long-standing commitment to the expeditious completion of adjudicatory proceedings." 53 NRC at 38. HRI enjoys a single license covering four sites and the suggestion of a phased completion of the hearing on that license would serve only to drag out the process of deciding whether that license complies with the law.

The Thompson letter states that the various mining locations should be handled separately because "to address each of the locations ... would be unwieldy and too complex due to the technical and legal issues involved." (Thompson letter at 2).² As the Commission noted in CLI-01-04, however, all the parties have already spent considerable

² HRI further asserts that since the license "authorizes only a phased development of the properties," (Thompson letter at 1, n. 1), and that the former Presiding Officer developed a phased approach to the hearing on the license, then the rest of the Crownpoint hearing must be conducted in the same manner — a phased approach with a hearing on each proposed mining site in succession; first on Section 17, then Unit 1, then Crownpoint. However, the Commission effectively overruled this rationale in CLI-01-04. 53 NRC 31 (January 31, 2001).

time reviewing an application and license for all four sites. *Id.* at 39. The geographical division of the hearing suggested by HRI in the April 30, 2001 letter would not be practical or cost-effective for the parties because it would result in repetitive litigation of many of the same factual licensing issues, requiring a degree of repetitive testimony from witnesses. While each of the mining sites has some subtle, crucial distinctions that will merit close attention, many of the issues will be similar and can certainly be heard in one complete phase that addresses the entire license. The phased approach would merely serve to (1) aid the repeated calling of expert witnesses on similar issues, site by site; (2) ensure counsel (for all parties) will write three times as many briefs as necessary; and (3) drag out the involvement of the parties for several more years.

III. INTERVENORS' PROPOSED SCHEDULE.

The Presiding Officer instructed the parties to prepare a complete proposed schedule for completing the proceeding. LBP-01-16 slip op. at 3. Intervenors' proposed schedule follows. Intervenors respectfully submit to the Presiding Officer that for the Crownpoint hearing to recommence, HRI must submit restoration plans and surety estimates for the proposed mining sites of Section 17, Unit 1 and Crownpoint and that the NRC Staff must make a determination regarding the adequacy of those plans. As the Commission has noted, "HRI will have to supplement the plan with financial information on the remaining three sites unless HRI chooses to reduce the scope of the license." CLI-00-08, 51 NRC 227 at 242, n. 20 (May 2000). In addition, as the litigation regarding

Section 17 is partially contingent on the resolution of the Section 8 restoration plan and surety estimate, the dates of this schedule may change if the Section 8 issue has not been resolved.

A. For the Crownpoint Hearing to Recommence, HRI must Submit Restoration Plans and Surety Estimates for the Section 17, Unit 1, and Crownpoint Mining Sites and the NRC Staff must Make a Determination Regarding the Adequacy of Those Plans.

On May 25, 2000, the Commission issued CLI-00-08, which reversed the Presiding Officer's decision in LBP-99-13, 49 NRC 233 (1999), and found that HRI's financial assurance plan for decommissioning the Crownpoint Project must be submitted before the hearing on HRI's license application. CLI-00-08, 51 NRC 239.³

In response to the Commission's Order in CLI-00-08, HRI submitted its Restoration Action Plan for Section 8 of the Crownpoint Project on November 21, 2000. At present, the adequacy of Section 8's restoration plan and surety estimate is in the final stages of being briefed. Subsequently, in the Thompson letter, HRI notified the Commission that it intends to pursue the three additional mining sites: Section 17, Unit 1 and Crownpoint. HRI has not, as of this date, submitted restoration plans or surety

³ On March 10, 1999, the former Presiding Officer issued LBP-99-13, a partial initial decision which resolved decommissioning and financial assurance questions with regard to Section 8 of the CUP in favor of HRI. LBP-99-13, 49 NRC 233 (1999). In that decision, the Presiding Officer acknowledged that HRI had failed to submit a decommissioning financial assurance plan prior to licensing, but held that the plan need not be submitted or reviewed until just prior to commencement of operation. 49 NRC at 235. Intervenors challenged that ruling to the Commission, resulting in the Commission's May 25, 2000 order reversing the former Presiding Officer and ordering HRI to prepare and submit a financial assurance plan with cost estimates for Section 8.

estimates for the mining sites of Section 17, Unit 1 or Crownpoint despite holding a license that encompasses all three sites.

In CLI-01-04, the Commission directed this proceeding to resume in approximately six months if HRI chooses to defend the entirety of its license. CLI-01-04, 53 NRC at 71. Intervenors respectfully submit that pursuant to CLI-00-08, the hearing cannot lawfully commence until after all of HRI's decommissioning plans have been submitted.

B. HRI's license is incomplete and the company must submit the restoration plans and surety estimates for the licensing process to proceed.

In CLI-00-08, the Commission held that HRI was required to submit its decommissioning funding plan prior to licensing. CLI-00-08, 51 NRC at 240 (emphasis added). Further, the Commission stated that HRI's financial assurance plan for decommissioning the Crownpoint Project can not be left for post-hearing resolution or a second round of hearings closer to the time of operation. Id. The Commission ruled that the Intervenors were entitled to a hearing on the adequacy of HRI's decommissioning plan, cost estimates, and financial assurance plan, in course of the licensing proceeding. Id. at 240-241.

It follows that HRI's license is, at present, incomplete. If Intervenors are to have an opportunity to address HRI's license in its entirety, then they should have the opportunity to look at the entirety of the plans for the Crownpoint Project, including

those related to site remediation, groundwater restoration and surety estimates. As the Commission noted, the restoration and surety estimates planned for each of the Crownpoint Project sites are part of what Intervenors should have full opportunity to review as if those plans had been submitted prior to the Staff's licensing of the project. CLI-00-08, 51 NRC at 240.

HRI's compliance with this mandate from the Commission to complete its license application in a timely manner is not discretionary. Contrary to the suggestion made in the HRI's April 30, 2001 letter to the Commission that the restoration plans for the respective sites are "further information that may be provided in the latter phases of the hearing" (Thompson letter at 3), the manner in which the Commission rectified the inadequacy of HRI's license with regard to Section 8 was to suspend the hearing and HRI's use of its license until HRI submitted such a plan and received staff approval for that plan. To reiterate, the Commission was clear that the financial assurance plan should have been submitted as part of the license application, not in the latter stages of the hearing. Today, we are essentially in the same situation with the three remaining proposed mining sites, and therefore, before HRI may proceed, it must support its license with the submission of restoration plans and surety estimates for Section 17, Unit 1 and Crownpoint.

C. The timing and method by which HRI submits the restoration plans and surety estimates should be guided by convenience to the Presiding Officer and all the parties.

Intervenors believe it is reasonable to schedule the commencement of the hearing with Intervenors' first evidentiary presentation in March 2002, following the provision of a reasonable amount of time for submission of all the surety plans and NRC Staff review. Intervenors believe HRI has the discretion to submit either three separate restoration plans and surety estimates over the next several months on a timely schedule, or one Omnibus restoration plan and surety estimate with three separate parts. The schedule for such submissions should, of course, expeditiously move the hearing along and to take into consideration the convenience of the Presiding Officer and all the parties.

D. Intervenors should have an opportunity to review the restoration plans and surety estimates after the NRC Staff has made its determination regarding the adequacy of the plans.

Once in receipt of HRI's submissions, the NRC Staff should be accorded an appropriate time to make a determination regarding the adequacy of HRI's restoration and surety submission(s). If the Staff finds all or part of the restoration plan or surety estimate for the remaining sites lacking, the need for a hearing on that site(s) may not even be necessary, saving all the parties and the Presiding Officer an enormous amount of time and expense. If the Staff determines the restoration plans and surety estimates adequate to support the licensing of the project, then the proceeding may go forward and the Intervenors should be accorded an opportunity to address any concerns they may have

with the plans and the Staff's approval of them. Either way, such an action on the part of the Staff should have been integral to the initial licensing of the Crownpoint project. As the Commission noted in CLI-00-08:

Intervenors are logically entitled to *pre-hearing* receipt of all information critical to the license, including the full terms of the license itself and its associated financial assurance plan . . .

The NRC Staff, although stating that HRI submitted sufficient information to issue a license, has continued to request and receive extensive information related to cost estimates. As a result, Intervenors cannot be said to have had an opportunity to address the adequacy of the final cost estimates and financial assurance plan.

51 NRC at 240-241 (italics in original).⁴ This situation can be avoided by requiring (1) HRI to submit the appropriate restoration and surety plans; and (2) Staff to make its determination prior to the resuming the hearing.

Following the Staff's actions and presuming the hearing proceeds, Intervenors should be given a full opportunity to respond to HRI's submissions and the NRC Staff's determinations regarding the adequacy of those plans as appropriate and in conjunction with the rest of the resumed licensing proceeding. Finally, consistent with the Commission's position in CLI-00-08, the Intervenors request the Presiding Officer make clear that HRI is prohibited from utilizing its license to mine any site for which there is not an approved restoration plan and surety estimate. See 51 NRC at 234.

⁴ The Commission further noted that "it makes a good deal of policy sense, in the context of in-situ mining, for the NRC to consider a license applicant's cost estimates for cleaning up the mining site, and its pay for cleanup, prior to issuing a license." Id. at 239.

E. Intervenors' Proposed Schedule.

ENDAUM and SRIC set forth below a schedule for the presentation of briefs and testimony on the areas of concern they have raised that have not previously been litigated or decided. The schedule establishes deadlines for the filing of ENDAUM's and SRIC's initial briefs and testimony, a 30-day response period, and a 15-day reply period.

ENDAUM and SRIC anticipate that most of the testimony will be by technical experts, although some non-expert factual testimony may also be introduced. Intervenors note that they expect this schedule to be changed to accommodate the Presiding Officer and all the parties should the Presiding Officer set dates for the filing and review of HRI's surety plans different from those proposed in Intervenors' and HRI's joint submission.

For each group of issues, the schedule also includes an opportunity for Intervenors, as the parties filing first, to submit rebuttal. Philadelphia Electric Co., et al. (Sterling Power Project, Unit 1) ALAB-566, 10 NRC 527, 529 (1979). It also includes time to take oral presentations, if the Presiding Officer determines it necessary under 10 C.F.R. § 2.1235. Intervenors plan to evaluate whether to request an opportunity for oral presentations at the time they prepare their briefs and testimony, and will file any such requests at the time that briefs and testimony are submitted.

Intervenors also recognize that there are certain adverse (to the Intervenors) legal and factual determinations made in the last round of hearings by the former Presiding Officer and the Commission that apply to all four proposed sites. Intervenors will not

litigate issues that have previously been decided. However, Intervenor should be accorded the opportunity to preserve those arguments with respect to Section 17, Unit 1 and Crownpoint.

The following is a proposed schedule for presentations on the areas of concern raised by ENDAUM and SRIC, subsequent to HRI's submission of restoration plans and surety estimates for the Section 17, Unit 1 and Crownpoint proposed mining sites:

Proposed Schedule for remainder of hearing on Crownpoint Project				
Subject Matter	Initial by Intervenors	Response by HRI and Staff	Reply by Intervenors	Oral Pres.
HRI submission of groundwater restoration plans; surety estimates for Section 17, Unit 1, and Crownpoint sites.	If allowed by P. Officer -- 180 day time period for submission of plans; 12/03/01 submission of plans by HRI; 60-90 day adequacy determination by Staff; tentative date -- 3/01/02 (initial pres. by Intervenors if needed)	04/01/02	04/15/02	tbd*
Groundwater Protection	05/01/02 (by Intervenors)	06/01/02	06/17/02	tbd
Liquid waste disposal; surface water protection for Section 17, Unit 1 and Crownpoint.	06/01/02	07/01/02	07/15/02	tbd
Compliance with NHPA; NGPRA; related cultural resource issues; adequacy of consideration in FEIS for Section 17, Unit 1 and Crownpoint.	07/01/02	08/01/02	08/15/02	tbd
NEPA consideration of action alternatives; cumulative impacts of project; consideration of mitigation; failure to supplement FEIS; related concerns with Section 17, Unit 1 and Crownpoint	08/01/02	09/02/02	09/16/02	tbd
Air Emissions Controls; adequacy of consideration in FEIS; related concerns	09/02/02	10/01/02	10/15/02	tbd
Performance Based Licensing/Technical Qualifications Update	10/01/02	11/01/02	11/15/02	tbd
Environmental Justice; consideration of health impacts for Section 17, Unit 1 and Crownpoint.	11/01/02	12/02/02	12/16/02	tbd

*tbd — "to be decided" by the Presiding Officer.

III. INTERVENORS SHOULD NOT BE REQUIRED TO RE-STATE THEIR AREAS OF CONCERN.

In the Thompson Letter, HRI asserts that Intervenors should be required to submit a list of the areas of concern that they wish to litigate, with an opportunity for comment by HRI. Thompson Letter at 3. HRI compares this process to the filing of contentions in Subpart L proceedings, under the Commission's new proposed rule. Id.

Intervenors strenuously oppose any such requirement. Unless and until the proposed rule becomes final, there is no lawful basis for applying it to Intervenors. The areas of concern submitted by Intervenors at the outset of this proceeding were based on HRI's license application for the entire Crownpoint Project. HRI has provided no information to suggest that the original license application no longer forms a valid basis for those concerns, or that circumstances have otherwise changed. HRI has suggested no reason, nor is there any, to require Intervenors to re-submit their areas of concern. The argument appears to constitute an attempt to whittle away at Intervenors' areas of concerns by exposing them to another round of litigation on their admissibility.

The NRC Staff argues that within ten days of the Presiding Officer's decision resolving pending Section 8 financial assurance issues, the Intervenors should be required to submit a list of concerns they wish to litigate; and that HRI and the Staff should be given 20 or 30 days in which to file a response. NRC Staff's Response to Presiding Officer's Order at 3. Intervenors respond that there are very few issues that are purely legal in nature, and to which *res judicata* would apply. The issue of Performance-Based

Licensing is perhaps the only issue that is purely generic to the license. For most issues, the facts relating to the individual remaining mine sites are different than the facts related to the decision on Section 8. Thus, Intervenor question whether this exercise would have any utility.

CONCLUSION

As previously noted, if Staff were to determine that HRI's restoration plans and surety estimates were not adequate, either the timing or the need for the hearing could change accordingly. Intervenor also recognize that all parties, including the Presiding Officer, may have difficulty predicting the time necessary to complete the work required for each of the remaining topics. Thus, Intervenor anticipate that one or all of those involved may, at some point, need to seek adjustments in the schedule, just as occurred during the previous portion of the hearing. As such, Intervenor believe the schedule they have suggested is reasonable and can accommodate the needs of all involved.

Respectfully submitted,


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May 8, 2001

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:
Thomas S. Moore, Presiding Officer
Thomas D. Murphy, Special Assistant

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HYDRO RESOURCES, INC.)	Docket No. 40-8968-ML
P.O. Box 15910)	ASLBP No. 95-706-01-ML
Rio Rancho, NM 87174)	
_____)	

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2001, I caused to be served copies of the foregoing:

**INTERVENORS' RESPONSE TO PRESIDING OFFICER'S ORDER FOR
SUBMISSION OF PROPOSED SCHEDULE AND OTHER MATTERS**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

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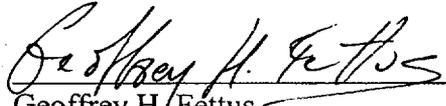
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Dated at Santa Fe, New Mexico,
May 8, 2001


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