

November 22, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

NRC STAFF'S ANSWER TO INTERVENORS' PETITIONS TO REVIEW LBP-04-23

INTRODUCTION

On November 11, 2004, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), submitted to the Commission (1) "Intervenors Eastern Navajo Diné Against Uranium Mining And Southwest Research And Information Center's Petition For Review Of Memorandum and Order LBP-04-23 With Respect To Section 8" (Section 8 Petition); and (2) "Intervenors' Petition Interlocutory Review [sic] Of LBP-04-23 With Respect To Section 17" (Section 17 Petition). The Staff, pursuant to 10 C.F.R. § 2.786(b)(3),¹ files this consolidated answer to the two petitions. For the reasons discussed below, the Section 8 Petition and the Section 17 Petition should be denied.

BACKGROUND

By motion dated May 14, 2004, the Intervenors requested the Presiding Officer to direct the Staff to supplement its February 1997 Final Environmental Impact Statement² with respect to

¹ The citation to 10 C.F.R. § 2.786(b)(3) is to the regulation in effect prior to the revision of the NRC's Rules of Practice in 10 C.F.R. Part 2, which became effective February 13, 2004. Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply, and the former sections are referenced throughout the Answer.

² See NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico" (FEIS).

Church Rock Section 17,³ one of the sites on which the licensee, Hydro Resources, Inc. (HRI), plans to conduct *in situ* leach (ISL) uranium mining. The Intervenor simultaneously moved the Commission to direct the Staff to supplement the FEIS for Section 8, another one of the sites on which HRI plans to conduct ISL mining.⁴ The Commission referred this motion to the Presiding Officer on May 26, 2004.

The May 2004 requests that the FEIS be supplemented were based on the possible future existence of a nearby housing development – to be constructed in phases over a number of years – that could eventually contain up to 1,000 single-family, apartment, and townhouse units. If constructed, this housing development would be situated on 640 acres of largely undeveloped land (Section 30 of Township 16 North, Range 16 West of the New Mexico Principal Meridian in McKinley County, New Mexico), the edge of which is approximately two miles southwest of HRI's proposed ISL mining operations in Churchrock Sections 8 and 17.⁵ The requests were opposed by HRI and the NRC Staff.⁶

³ See "Intervenors' Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 17."

⁴ See "Intervenors' Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 8." When this motion was filed, HRI and Intervenor petitions to review the Presiding Officer's Section 8 financial assurance decision (LBP-04-03) were pending before the Commission. On May 20, 2004, the Commission granted the HRI and Intervenor review petitions. See *Hydro Resources, Inc.*, CLI-04-14, 59 NRC 250 (2004).

⁵ See "Environmental Assessment," prepared by Howard Bitsui for the Springstead Estates Project, dated June 1, 2003, Attachment 1, at 4-5.

⁶ See "[HRI's] Response to Intervenors' Motions to Supplement the Final Environmental Impact Statement for Sections 8 and 17 and to Re-Open and Supplement the Record for Section 8," dated June 21, 2004; and NRC Staff's "Answer to Intervenors' Motions to Supplement FEIS," dated June 25, 2004.

On October 22, 2004, the Presiding Officer issued a decision denying the Intervenor's supplementation request. See "Memorandum and Order (Ruling on Intervenor's Motions to Supplement the FEIS)", LBP-04-23 (slip. op.).

DISCUSSION

I. Legal Standards Governing Petitions to Review Presiding Officer Decisions

Pursuant to 10 C.F.R. § 2.786(b)(1), a party may file a petition for review with the Commission within fifteen (15) days after service of a full or partial initial decision by a Presiding Officer.⁷ A petition for review under this provision must contain the following:

1. A concise summary of the decision or action of which review is sought;
2. A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;
3. A concise statement why in the petitioner's view the decision or action is erroneous; and
4. A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv). As a matter of its discretion, the Commission may grant review of Presiding Officer decisions based on a determination that a "substantial question" exists regarding the following considerations:

1. A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
2. A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
3. A substantial and important question of law, policy or discretion has been raised;
4. The conduct of the proceeding involved a prejudicial procedural error;

⁷ 10 C.F.R. § 2.1253 incorporates by reference the 10 C.F.R. § 2.786 requirements into Subpart L proceedings. See also *Babcock and Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).

5. Any other consideration the Commission deems to be in the public interest.

10 C.F.R. § 2.786(b)(4)(i-v); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001). The Commission will not grant a petition for review “to the extent that it relies on matters that could have been but were not raised before the presiding officer.” 10 C.F.R. § 2.786(b)(5).

As discussed in Section II below, Commission review of interlocutory matters is governed by the requirements of 10 C.F.R. § 2.786(g). *See Hydro Resources, Inc.*, CLI-98-8, 47 NRC 314, 320 (1998). With respect to the instant petitions, the Section 17 Petition was filed pursuant to 10 C.F.R. § 2.786(g), under which the Intervenors ask that the Commission review LBP-04-23 as a matter of its discretion.⁸ The Section 8 Petition, on the other hand, was filed pursuant to 10 C.F.R. § 2.786(b),⁹ with the Intervenors treating LBP-04-23 as a partial initial decision in regard to Section 8-related matters.

II. The Intervenors Do Not Meet the Interlocutory Review Standards

Pursuant to 10 C.F.R. § 2.786(g)(1-2), the Commission may undertake interlocutory review of a ruling in the “rare situations” where such rulings either threaten the affected party with “serious, immediate, and irreparable harm” or impact the structure of the proceeding “in a pervasive or unusual manner.”¹⁰ Interlocutory review of rulings is not favored.¹¹

The Intervenors request interlocutory review of LBP-04-23 pursuant to 10 C.F.R. § 2.786(g)(2), contending that the presiding officer’s ruling affects the structure of this proceeding “in a pervasive and unusual manner.” Section 17 Petition, at 4. As discussed below, the

⁸ See Section 17 Petition, at 4.

⁹ See Section 8 Petition, at 5.

¹⁰ *Hydro Resources, Inc.*, *supra*, CLI-98-8, 47 NRC at 320 (footnote omitted).

¹¹ *Id.*, at 320 n. 4.

Intervenors have failed to demonstrate that the Presiding Officer's ruling in LBP-04-23 affects the structure of this proceeding in a manner justifying interlocutory review.

Petitions for review submitted pursuant to 10 C.F.R. § 2.786(g)(2) have previously been granted only in limited situations where the ruling either has effectively converted a Subpart L proceeding into a Subpart G proceeding,¹² or has improperly inserted additional litigation steps into a proceeding.¹³ The Intervenors make no showing that either of these situations is created by LBP-04-23. Instead, their request for interlocutory review is based on two claims: (1) that analyzing Sections 8 and 17 separately will lead to an impermissible segmentation of HRI's ISL mining project under National Environmental Policy Act (NEPA) case law (see Section 17 Petition, at 5-6); and (2) that reviewing Sections 8 and 17 separately will lead to delay and confusion. *Id.*, at 6-7.

The Presiding Officer, in LBP-04-23, decided only that the Intervenors' request that he direct supplementation of the FEIS for this project – which, as Intervenors themselves recognize,¹⁴ analyzes both Section 8 and Section 17 as a single unit – was not warranted. This decision does not, as Intervenors would have it, undertake any substantive review of the environmental impacts of either Section that might even remotely give rise to an argument that consideration of this project has been improperly segmented.

The Intervenors' claim regarding the potential for "delay and confusion" is equally untenable. The Intervenors make no showing that, given the at best remote and speculative status of the proposed housing project, there is any need for the Commission to rule now on whether the

¹² See *Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1992).

¹³ See *Private Fuel Storage* (Independent Spent Fuel Storage Facility), CLI-98-7, 47 NRC 307, 310 (1998) (question of the admissibility of a set of contentions, ripe for decision before one Board, was improperly transferred by the Chief Judge to a newly-constituted Board).

¹⁴ Section 17 Petition, at 6, *citing* FEIS at 2-26.

Presiding Officer correctly decided that the FEIS need not be supplemented.¹⁵ Should circumstances significantly change during the Presiding Officer's adjudication of the Intervenor's Section 17 areas of concern, the Intervenor would of course be able to advance new FEIS supplementation arguments at that point. The Intervenor has thus failed to show that the 10 C.F.R. § 2.786(g)(2) interlocutory review standards have been met.¹⁶

III. The Intervenor Does Not Meet the 10 C.F.R. § 2.786(b) Review Standards

With respect to their requests for Commission review of LBP-04-23 pursuant to 10 C.F.R. § 2.786(b), the Intervenor's two petitions for review are the same.¹⁷ The Intervenor fails to show - or even argue - that LBP-04-23 raises any sufficiently substantial questions warranting Commission review under the standards of 10 C.F.R. § 2.786(b)(4). Further, contrary to 10 C.F.R. §§ 2.786(b)(2)(ii) and 2.786(b)(5), the Intervenor relies here in part on arguments that were not made to the Presiding Officer.

For example, the Intervenor argues that in requiring them to submit affidavits in support of their May 2004 requests that the FEIS be supplemented, the Presiding Officer wrongly shifted the burden of proof for supplementing the FEIS onto them. See Section 8 Petition, at 6-7. This

¹⁵ The Presiding Officer found that a supplemental FEIS is not required just because "new information comes to light. ... [O]nly those changes that cause effects which are significantly different from those already studied" compel a supplemental FEIS. LBP-04-23, slip op. at 7 (footnotes omitted). The Intervenor has not presented anything authoritative to indicate significant error in either the Presiding Officer's determination of the standard for requiring a supplement to an FEIS, nor in his application of that standard to the facts of this case.

¹⁶ Cf. *US Department of Energy* (High Level Waste Repository: Pre-Application Matters), CLI-04-32, slip op. at 5 (2004) (the Commission will not review a Board order where the Board order has only "theoretical and future significance" and no immediate impact).

¹⁷ Cf. Section 8 Petition, at 5-10, to Section 17 Petition, at 7-10. The Staff's cites in Section III are to the Section 8 Petition.

argument should first have been made to the Presiding Officer, but was not.¹⁸ Even if the Commission chooses to consider this argument, it lacks merit. In requiring the Intervenor to submit affidavits in support of their May 2004 motion, the Presiding Officer was properly implementing the procedural hearing provision that “the proponent of an order has the burden of proof.” 10 C.F.R. § 2.1237(b). This argument fails to raise a sufficiently substantial question warranting Commission review under the standards of 10 C.F.R. § 2.786(b)(4).

Similarly lacking in merit is the Intervenor’s environmental justice argument.¹⁹ The Intervenor claims that the Presiding Officer erred in ignoring “the increased density and proximity of the low-income Native American population” that would live in the proposed housing project. Section 8 Petition, at 8. But the Intervenor makes no showing that the housing project will actually happen, or if it does how quickly the local population would increase. As noted by the Presiding Officer, the environmental justice discussion in the FEIS looked at the population within an 80-kilometer radius of the proposed HRI mining sites;²⁰ in this regard, he ruled that the Intervenor had failed to establish that the information presented in their petitions seeking supplementation justified the action sought. The Intervenor does not establish here that this holding raises a sufficiently substantial question warranting Commission review under the standards of 10 C.F.R. § 2.786(b)(4). Moreover, to the extent that the Intervenor’s environmental justice argument now relies on a 1999 decision (see Section 8 Petition, at 9, *citing* LBP-99-30, 50 NRC 77), and quotes

¹⁸ See, e.g., “Intervenor’s Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 17,” dated May 14, 2004, at 5-14.

¹⁹ See Section 8 Petition, at 8-9.

²⁰ See LBP-04-23, slip op. at 24, *citing* FEIS at 3-78 to 3-79.

from the 1997 FEIS (*see* Section 8 Petition, at 9, *quoting* FEIS at 3-31), these are matters that could have been presented to the Presiding Officer in May 2004, but were not.²¹

Finally, the Intervenor's contend that the Presiding Officer's refusal to order that the FEIS be supplemented undermines NEPA's goal of providing the public a chance to participate in the decision making process. *See* Section 8 Petition, at 9-10, *citing* LBP-04-23, slip op. at 13.²² This argument is without merit. The Intervenor's as parties to this ongoing proceeding still have the opportunity to adjudicate environmental issues pertaining to the Section 17, Unit 1, and Crownpoint sites. In this adjudicatory hearing, the FEIS is subject to modification should the Presiding Officer -- or the Commission on appellate review -- differ with any of the FEIS findings, so that the adjudicatory record here would effectively become part of the FEIS.²³ Thus, if the Intervenor's establish that the FEIS is flawed in one or more respects on issues pertaining to the Section 17, Unit 1, and/or Crownpoint sites, the environmental record would be supplemented as needed.

Moreover, in making this argument, the Intervenor's seek to represent the interests of *inter alia* the Navajo Housing Authority, the Federal Housing and Urban Development Department, and the Ft. Defiance Housing Corporation insofar as those organizations might wish to comment on the proposed housing project as part of the process which would be required for preparing a supplement to the FEIS. *See* Section 8 Petition, at 10. Simply stated, the Intervenor's do not have standing to represent the interests of other organizations or groups in this proceeding.²⁴

²¹ *See, e.g.*, "Intervenor's Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 17," dated May 14, 2004, at 5-14.

²² The Presiding Officer found that the housing project was "at best, in a conceptual stage," and that the source of the proposed project's water supply was "totally speculative." LBP-04-23, slip op. at 13.

²³ *See Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, at 53 (2001).

²⁴ *See Chemetron Corp.* (Bert Avenue, Harvard Avenue, and McGean-Rohco Sites, (continued...))

Accordingly, the Intervenor has failed to establish that their public process argument raises a sufficiently substantial question warranting Commission review under the standards of 10 C.F.R. § 2.786(b)(4).

CONCLUSION

For the reasons stated above, the Intervenor has failed to satisfy the requirements of 10 C.F.R. § 2.786 so as to warrant Commission review of LBP-04-23. Specifically, the Section 17 Petition meets neither the requirements justifying review of a full or partial initial decision pursuant to 10 C.F.R. § 2.786(b), nor interlocutory review pursuant to 10 C.F.R. § 2.786(g). Similarly, the Section 8 Petition fails to meet the review requirements of 10 C.F.R. § 2.786(b). Accordingly, the Staff urges that both the Section 8 Petition and the Section 17 Petition be denied.

Respectfully submitted,

/RA/

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of November, 2004

²⁴(...continued)

Newburgh Heights and Cuyahoga Heights, Ohio), LBP-94-20, 40 NRC 17, 19 (1994) (“[N]othing in the Commission’s regulations authorizes requestors to undertake to represent the general public as if they were private attorneys general”); *see also Babcock & Wilcox Co.* (Pennsylvania Nuclear Services Operations, Parks Township, Pennsylvania), LBP-94-4, 39 NRC 47, 50 (1994); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-77-11, 5 NRC 481, 484 (1977).

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' PETITIONS TO REVIEW LBP-04-23" in the above-captioned proceeding have been served on the following persons this 22nd day of November, 2004, by deposit into the U.S. Mail, first class (or as indicated by an asterisk, through the Nuclear Regulatory Commission's internal mail system), and by electronic mail (except as indicated by a double asterisk).

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