

November 11, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
HYDRO RESOURCES, INC.)
(PO Box 777,)
Crownpoint, New Mexico 87313))

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

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

Pursuant to 10 C.F.R. § 2.1253 and § 2.786, Intervenors Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center (collectively "Interveors") hereby petition for review of the Licensing Board's Memorandum And Order (Ruling on Intervenors' Motions to Supplement the FEIS), LBP-04-23, with respect to Section 8.¹ The Commission should take review because LBP-04-23 is based on legal error.

I. FACTS AND SUMMARY OF DECISION

A. Facts And Procedure

This Petition seeks to appeal LBP-04-23, which decided that the Nuclear Regulatory Commission Staff ("Staff") was not required to supplement the Final Environmental Impact Statement, NUREG-1508 ("FEIS"); for the Crownpoint Uranium Project ("CUP") Church Rock

¹ LBP-04-23 was served via first class mail, October 22, 2004.

Sections 8 and 17 under the National Environmental Policy Act ("NEPA") because of an impending residential development nearby.

On January 5, 1998, the Staff issued to Hydro Resources, Inc. ("HRI") a source and byproduct material license authorizing HRI to conduct *in situ leach* ("ISL") uranium mining on four sites in Crownpoint and Church Rock in the Navajo Nation, New Mexico². SUA-1508. In granting the license, the Staff relied on the conclusion of the FEIS that the CUP would be environmentally acceptable and that potential impacts of the ISL operations could be mitigated. Letter from Joseph Holonich to Richard Clement (January 5, 1998).

The FEIS was published in February 1997. FEIS cover page. The FEIS evaluated five alternatives, including the proposed action of issuing HRI a byproduct and material license, and determined that the proposed action's impacts could be mitigated and the license should therefore be issued. FEIS at xxi.

On July 31, 2003, counsel for Intervenor sent a letter to the Staff alerting it to a proposal by the Ft. Defiance Housing Corporation ("FDHC") to construct a 1000 unit housing development, called the Springstead Estates Project ("SEP"), within two miles of Section 8 and Section 17 in Church Rock. Letter from Eric Jantz to Mitzi Young and John Hull at 1 (July 31, 2003). In that letter, counsel for Intervenor requested that the Staff supplement the FEIS due to the significant new circumstance that would affect the CUP's environmental impacts. *Id.* at 2. Attached to the letter was an Environmental Assessment ("EA") prepared for the FDHC by an

²The sites are designated Section 8 and Section 17 in Church Rock and Crownpoint and Unit 1 in Crownpoint.

environmental consultant, which evaluated the SEP's potential environmental impacts. Id., attachment.

On November 13, 2003, the Staff responded to Intervenor's letter requesting supplementation of the FEIS. Letter from Gary Janosko to Eric D. Jantz at 1 (November 13, 2003). In that letter the Staff indicated that it would review the new information regarding Springstead Estates when it reviewed HRI's license renewal application. Id. However, in a Joint Status Report filed March 26, 2004, the Staff indicated that it had reviewed the EA and other documents and would not supplement the FEIS. Joint Status Report at 7 (March 26, 2004). The Staff did not offer any technical reason for its refusal to supplement the FEIS. Id.

On April 14, 2004 the Presiding Officer held a conference call with all the parties participating. During that conference call, the Staff, with the support of HRI, again refused to supplement the FEIS.

On May 14, 2004 Intervenor submitted a motion to the Presiding Officer requesting that he direct the Staff to supplement the FEIS for Section 17 in Church Rock based on the proposed SEP. Intervenor's Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 17 (May 14, 2004).³ Intervenor simultaneously moved the Commission to direct the Staff to supplement the FEIS for Section 8. Intervenor's Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 8 (May 14, 2004). The Commission later referred this motion to the Presiding Officer, who determined the supplementation issue with

³The issues raised before the Commission were previously raised before the Licensing Board in the Intervenor's motions to supplement the FEIS.

respect to both Section 8 and 17. Commission Order at 2 (May 26, 2004) (unpublished). Both the Staff and HRI opposed Intervenor's Motions. Hydro Resources, Inc.'s Response To Intervenor's Motion To Supplement The Final Environmental Impact Statement For Sections 8 And 17 And To Re-Open And Supplement The Record For Section 8 (June 21, 2004) ("HRI Answer"); NRC Staff's Answer To Intervenor's Motions To Supplement The FEIS (June 25, 2004) ("Staff Answer"). On October 22, 2004, the Presiding Officer issued a decision denying both of Intervenor's Motions. Memorandum and Order (Ruling on Intervenor's Motions to Supplement the FEIS), LBP-04-23, slip. op, (October 22, 2004).

B. Summary Of Decision

In LBP-04-23, the Licensing Board denied the Intervenor's motions to supplement the FEIS for Sections 8 and 17. LBP-04-23, slip. op. at 2. The Board denied Intervenor's motions because it found that they had failed to establish that a "hard look" had not already been taken at the potential impacts of HRI's operations on the SEP and whether the SEP presented significantly different environmental picture to an extent not already considered. Id. The Board found that HRI's Church Rock operations would not affect the SEP in a significant manner or extent not already considered by the FEIS. Id.

In particular, the Board determined that development of the SEP and its potential drinking water source was speculative. Id. at 13. The Licensing Board also rejected the Intervenor's evidence that combined groundwater pumping from the SEP and HRI's Church Rock operations would substantially affect the local groundwater flow and risk contamination of potential drinking water sources with lixiviant. Id. at 14-19. Finally, the Board rejected

Intervenors' evidence that the FEIS does not adequately address issues related to radiological air emissions, traffic, and environmental justice with respect to HRI's impacts on the SEP. *Id.* at 19-25. With respect to Section 8, LBP-04-23 represents a final decision of the Board because there are no remaining issues regarding Section 8 over which the Board has jurisdiction. LPB-04-3, 59 NRC 84, 109 (2004).

II. THE COMMISSION SHOULD TAKE REVIEW OF LBP-04-23

Pursuant to 10 C.F.R. § 2.786(b)(4), the Commission may exercise its discretion to take review of decisions which raise: (i) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a substantial and important question of law, policy or discretion, (iv) prejudicial procedural error, or (v) any other consideration which the Commission may deem to be in the public interest.⁴ In this case, the Commission should take review of LBP-04-23 with respect to Section 8, and should reverse the Licensing Board's decision for three reasons. First, the Licensing Board improperly applied the burden of proof for determining whether the FEIS should be supplemented. Second, notwithstanding the evidence presented at the Presiding Officer's direction, the Staff has still failed to take a "hard look" at the impacts of the CUP on the SEP. Third, the Licensing Board erred by failing to require a supplemental environmental impact statement that would be subject to public comment.

⁴ The standards for Commission review in 10 C.F.R. § 2.786(b)(4) have been incorporated into Subpart L proceedings in 10 C.F.R. § 2.1253. See *Babcock and Wilcox* (Pennsylvania Nuclear Service Operations, Parks Township, Pa.) CLI -95-4, 41 NRC 248, 249 (1995).

A. The Licensing Board Impermissibly Shifted The Burden Of Supplementing The FEIS To Intervenors.

Under NEPA, the EIS insures that environmental values are included in the agency decision making process, requiring the agency to take a “hard look” at the environmental consequences of a proposed action. Louisiana Energy Services (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 87 (1998) (“LES”); Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349-50 (1989). However, an agency’s obligation to consider the environmental consequences of its action does not end with the publication of a final EIS. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 373 (1989). Federal agencies must still take a “hard look” at the environmental effects of their planned action, even after the proposal has received initial approval. Id., emphasis added. A “hard look” by the agency requires that it carefully consider the opinions from its own experts and outside experts, gives careful scientific scrutiny and responds to all legitimate concerns that are raised. Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 289 (4th Cir. 1999), citing Marsh, 490 U.S. at 378-85.

In this case, prior to responding to the Intervenors’ technical affidavits, there is not evidence that the Staff had taken a hard look at the CUP’s impact on the SEP. When first alerted to the SEP, the Staff indicated that it would review the new information during HRI’s license renewal review. Letter from Gary Janosko to Eric D. Jantz at 1 (November 13, 2003). Then, the Staff indicated that it had reviewed the SEP Environmental Assessment prepared for the FDHC, and had decided not to supplement the FEIS. Joint Status Report at 7 (March 26, 2004). No technical reason for this decision was given. Id. The Staff again stated, on an April 14, 2004

conference call that supplementation was not warranted and there was no indication that it had conducted the steps necessary to satisfy NEPA's "hard look" requirement.

When the Licensing Board required Intervenors to submit detailed affidavits regarding why the FEIS should be supplemented due to the SEP, it impermissibly shifted the burden of supplementing the FEIS to the Intervenors. NEPA requires that Federal agencies supplement an FEIS when there are significant new circumstances that paint a seriously different picture of the project's impacts than previously considered. Sierra Club v. Froehlke, 816 F.2d 205, 210 (5th Cir. 1987), emphasis added; LES, 47 NRC at 89 ("the NRC Staff bears the ultimate burden of demonstrating that environmental issues have been adequately considered."). Once the Intervenors brought the SEP to the Staff's attention and presented it with the SEP EA, the Staff should have responded with its own analysis showing why no supplementation to the FEIS was necessary. Instead, the Staff simply refused to supplement the FEIS. Rather than directing the Staff to at least justify its position with expert opinions or technical affidavits, on the April 14, 2004 conference call the Presiding Officer directed the Intervenors to submit motions with detailed expert affidavits showing that supplementation was required, thus shifting the burden that supplementation was required to the Intervenors. 10 C.F.R. § 2.732; Consolidated Edison Co. of N.Y., (Indian Point Station, Units 1, 2 and 3), CLI-77-2, 5 NRC 13, 14 (1977). Thus, in order to prevail on their motions, the Intervenors would have had to undertake such a detailed and technical analysis of the CUP's impact on the SEP that it would have amounted to a supplementation of the FEIS. Under NEPA, this task is clearly the Staff's responsibility, not the Intervenors'. LBP-04-23 should therefore be reversed.

B. The Staff Failed To Take A Hard Look At Environmental Justice Issues.

Notwithstanding the technical affidavits and evidence provided to the Licensing Board pursuant to the Presiding Officer's direction, the Staff still failed to take a "hard look" at the environmental justice issues relevant to the SEP and the Licensing Board erred in failing to require supplementation based on that fact.

President Clinton's 1994 Executive Order requires federal agencies to conduct its programs, policies, and activities so that they do not discriminate against persons, including populations, because of their race, color, or national origin. Executive Order 12898, 59 Fed. Reg. 7629 at 2-2 (Feb.11, 1994). This requirement extends to the NRC and is generally implemented via NEPA. LES, 47 NRC at 100-101 (1998). In this case, NEPA requires an environmental justice analysis of the disparate impacts of the CUP on the surrounding low-income minority community.

In LBP-04-23 the Licensing Board found that the FEIS adequately addressed environmental justice issues in the context of NEPA, even in light of the SEP. LBP-04-23, slip. op. at 24. In support of its decision the Licensing Board relied on the existing analysis in the FEIS, noting that the FEIS evaluates the impacts of HRI's operations within an 80 kilometer radius of the site - "an area predominately inhabited by Native Americans." Id.

The Licensing Board erred, however, because it ignored the increased density and proximity of the low-income Native American population that the SEP will bring to the area. The relatively low density of the environmental justice population figured heavily in the former

Presiding Officer's determination that the FEIS took the requisite "hard look" at environmental justice impacts. LBP-99-30, 50 NRC 77, 123 (1999). Additionally, the FEIS itself bases its analysis on the fact that HRI's Church Rock operations are "far away from any towns, and any operating private wells in the area are widely dispersed." FEIS at 3-31. The SEP, however, will substantially increase the density and proximity of the environmental justice population and thus warrants a second look.

Finally, neither the Staff nor HRI meaningfully addressed intervenors' environmental justice concerns. The Staff simply relies on the past decision of the Presiding Officer on environmental justice issues as its rationale for refusing to supplement the FEIS. Staff Answer at 3. HRI likewise relies on the findings of FEIS and the Presiding Officer's prior decision on environmental justice issues. HRI Answer at 15-16. Both the FEIS and the Presiding Officer's previous decisions were generated long before the SEP was planned. However, because the SEP was not planned at the time the FEIS was drafted or the Presiding Officer issued his previous decision, they could not have analyzed the environmental justice issues presented by this large and more densely concentrated environmental justice population. The Licensing Board erred by not requiring the FEIS to be supplemented for environmental justice concerns.

C. . . The Licensing Board's Decision In LBP-04-23 Is Contrary To NEPA's Public Participation Goal.

One of NEPA's fundamental goals is to allow the public a chance to review and comment on the proposal and thus participate in the decision making process. LES, 47 NRC at 88; Methow Valley, 490 U.S. at 349-350. In LBP-04-23, the Licensing Board undermined this

foundation of NEPA. One of the Board's primary reasons for refusing to require supplementation of the FEIS was because it found that development of the SEP was speculative, as was the water source for the development. LBP-04-23 at 13. However, by deciding that the FEIS should not be supplemented, the Licensing Board also foreclosed the possibility of input from the very entities that could put to rest the questions of whether and how the SEP would be developed. Entities such as the Navajo Housing Authority, the Federal Housing and Urban Development Department, the Church Rock Chapter, and the Ft. Defiance Housing Corporation could have provided a clearer picture of how the SEP would be developed.⁵ However, because none of these entities is a party to this proceeding and the Staff did not circulate any draft supplementation documents publicly, nor did it attempt to contact those entities, those entities were unable to comment on the project and thus potentially clarify issues. The Licensing Board therefore erred in failing to require a supplement to the FEIS that would be subject to public comment.

III. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Commission grant interlocutory review of LBP-04-23.

⁵The Staff complains that Intervenors did not submit any affidavits of any person associated with the SEP. Staff Answer at 8. However, this task is clearly within the purview of an EIS process – one which the Staff, not the Intervenors, should have undertaken. See Section II.A., above.

Dated November 11, 2004.



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Eastern Navajo Diné Against Uranium Mining's And Southwest Research And Information Center's Petition For Review Of Memorandum And Order LBP-04-23 With Respect To Section 8" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 11th day of November, 2004:

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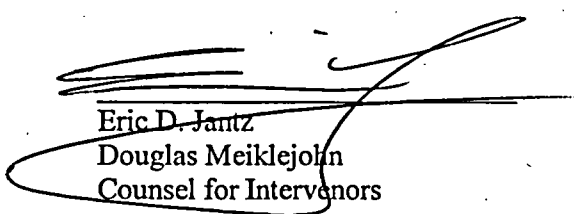
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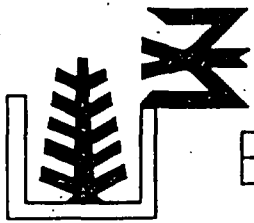
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NEW MEXICO
ENVIRONMENTAL LAW CENTER

November 11, 2004

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

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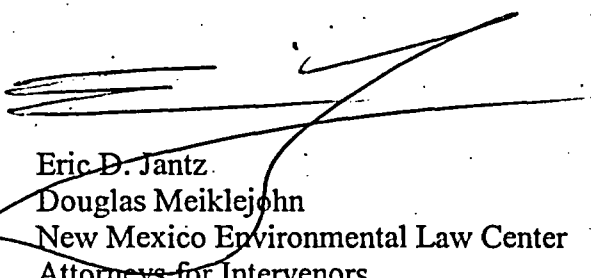
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors Eastern Navajo Diné Against Uranium Mining And Southwest Resource And Information Center's Petition For Review of Memorandum And Order LBP-04-23 With Respect To Section 8". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the attached self-addressed, postage prepaid envelope.

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

Sincerely,



Eric D. Jantz
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Enclosures

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