

November 11, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

November 12, 2004 (7:45am)

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

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Intervenors' Petition Interlocutory Review Of LBP-04-23 With Respect To Section 17

Pursuant to 10 C.F.R. § 2.786(g), Intervenors Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center (collectively "Intervenors") hereby petition for interlocutory review of the Licensing Board's October 22, 2004 Memorandum And Order (Ruling on Intervenors' Motions To Supplement The FEIS), LBP-04-23 (October 22, 2004), slip. op.¹ Intervenors seek interlocutory review of LBP-04-23 because it affects the basic structure of the proceeding in an unusual manner and is based on legal error.

I. FACTS AND PROCEDURE

On January 5, 1998, the Nuclear Regulatory Commission Staff ("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

¹ The Presiding Officer's Memorandum and Order was served via first class mail, October 22, 2004.

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

the Final Environmental Impact Statement, NUREG-1508 ("FEIS") that the Crownpoint Uranium Project ("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).

In 2003, counsel for Intervenors sent a letter to the Staff alerting the Staff 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 Intervenors requested that the Staff supplement the FEIS due to the SEP. Id. at 2. Attached to the letter was an Environmental Assessment ("EA") of the SEP. Id., attachment.

In November of 2003, the Staff responded to Intervenors' letter requesting supplementation of the FEIS, where it indicated that it would review the information regarding the SEP when it reviewed HRI's license renewal application. Letter from Gary Janosko to Eric D. Jantz at 1 (November 13, 2003). 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, without giving a technical rationale for its decision. Joint Status Report at 7 (March 26, 2004).

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

On May 14, 2004 Intervenors submitted a motion to the Presiding Officer requesting that he direct the Staff to supplement the FEIS for Section 17 because of the new circumstance of the

SEP. Intervenor's Motion To Supplement The Final Environmental Impact Statement For The Crownpoint Uranium Project Church Rock Section 17 (May 14, 2004). Intervenor's 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. Commission Order at 2 (May 26, 2004) (unpublished). Both HRI and the Staff 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 Board 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).

II. SUMMARY OF THE DECISION

In LBP-04-23, the Licensing Board denied both of the Intervenor's motions to supplement the FEIS. LBP-04-23, slip. op. at 2. The Board denied Intervenor's motions because it found that they 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.

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 the CUP 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 impacts related to, *inter alia*, environmental justice with respect to 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). The Board's decision with respect to Section 17, however, is not a final decision since there are NEPA issues still pending for that portion of the CUP.

III. THE COMMISSION SHOULD TAKE INTERLOCUTORY REVIEW OF LBP-04-23 WITH RESPECT TO SECTION 17

A. Standard Of Review

Pursuant to 10 C.F.R. § 2.786(g)³ the Commission may exercise its discretion to take interlocutory review of decisions. Interlocutory review of a licensing board decision is taken when either (1) the licensing board decision threatens the adversely affected party with immediate and irreparable impact, or (2) the licensing board decision affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.786(g)(1), (2); In the Matter of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-861, 25 NRC 129, 134 (1987).

The Commission should grant review of LBP-04-23 with respect to Section 17 because it affects the basic structure of the proceeding in a pervasive and unusual manner. In LBP-04-23,

³ The Commission has applied the criteria in § 2.786(g) to Subpart L proceedings. In the Matter of Hydro Resources, Inc., CLI-98-8, 47 NRC. 314, 320 (1998).

the Licensing Board determined whether the FEIS should be supplemented for both Section 8 and Section 17. As noted above, the Board's determination with respect to Section 8 is final decision, while its decision with respect to Section 17 is not. However, the factual and legal issues relevant to supplementation of the FEIS with respect to Section 17 are so intertwined with those of Section 8, the two are inseparable. LBP-04-23 therefore affects the basic structure of the proceeding in a pervasive and unusual manner in two ways. First, reviewing Section 8 and 17 separately would amount to an impermissible segmentation of the FEIS. Second, reviewing LBP-04-23 with respect to Sections 8 and 17 separately would result in undue confusion and delay.

B. LBP-04-23 Affects The Proceeding In An Unusual And Pervasive Manner.

1. Reviewing LBP-04-23 With Respect To Section 8 And Section 17 Separately Would Impermissibly Segment The CUP Under NEPA.

Generally, Federal agencies should not analyze licensing actions separately "if such separate actions are a part of a common action which has greater adverse consequences when viewed as a whole. In the Matter of North Atlantic Energy Service Corp. (Seabrook Station Unit No. 1), LBP-98-23, 48 NRC 157 [CITE] (1998). In analyzing whether a project is impermissibly segmented, a reviewing body will consider whether the proposed segment 1) has logical termini; 2) has substantial independent utility; 3) does not foreclose the opportunity to consider alternatives; and 4) does not irretrievably commit federal funds for closely related projects. Save Barton Creek Ass'n v. Federal Highway Admin., 950 F.2d 1129, 1140 (5th Cir. 1992).

In this case, analyzing Section 17 separately would lead to impermissibly segmenting the project, because the two Church Rock sections are so interrelated that there is no logical terminus between one site and the other. First, the original FEIS analyzes Sections 8 and 17 as one unit. FEIS at 2-26. Second, Section 8 and Section 17 are contiguous - there are no natural features separating the two parcels. FEIS at 2-29, fig. 2.10. Third, the CUP at Sections 8 and 17 will draw water from the same aquifer and the environmental impacts on groundwater will therefore inevitably overlap. FEIS at 3-22. Because Sections 8 and 17 are so interrelated, analyzing each separately for the purposes of determining whether the FEIS should be supplemented would result in improper segmentation of the project under the National Environmental Policy Act ("NEPA").

2. Reviewing LPB-04-23 Separately With Respect To Sections 8 And 17 Separately Will Lead To Delay And Confusion.

The factual issues surrounding Sections 8 and 17 are so intertwined that they are very difficult to separate. In fact, the FEIS analyzes both parcels as one. See eg., FEIS at 2-26. In their respective presentations on the supplementation issue, all the parties analyzed the CUP's impacts on Springstead Estates simultaneously for both sites. Finally, the Commission itself implied that Sections 8 and 17 are so interconnected as to be inseparable when it referred Intervenors' motion to supplement the FEIS for Section 8 to the Licensing Board.

If Sections 8 and 17 are reviewed separately, there will be undue delay in rendering a final decision on whether to supplement the FEIS. Section 8 will be decided now by the Commission while Section 17 may not be decided for months or years. Deciding the

supplementation issue for the parcels separately will also lead to confusion. Months or years in the future after Section 8 has been decided, the parties and Licensing Board will be left to sort out which issues are relevant solely to Section 17 and which are relevant to Section 8 and have already been litigated.

C. On Interlocutory Review, The Commission Should Reverse The Licensing Board's Decision Not To Require Supplementation Of The FEIS.

On review of LBP-04-23 with respect to Section 17, the Commission should reverse the Licensing Board's decision for three reasons, as explained more fully in *Intervenors' Petition For Review Of LBP-04-23 With Respect To Section 8*.⁴ 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 EIS that would be subject to public comment.

1. 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

⁴The criteria for review are at 10 C.F.R. § 2.786(b)(4). See Intervenors' Petition For Review Of LBP-04-23 at 5.

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 Intervenor’s motions, the Staff had refused to supplement the FEIS, without giving any technical basis for its decision. When the Licensing Board required Intervenor to submit detailed affidavits showing why the FEIS should be supplemented due to the SEP, it impermissibly shifted the burden of supplementing the FEIS to the Intervenor. 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 Intervenor 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, the Presiding Officer directed the Intervenor to submit motions with detailed expert affidavits showing that supplementation was required, thus shifting the burden that supplementation was required to the Intervenor. 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). Under NEPA, this task is clearly the Staff's responsibility, not the Intervenors'. LBP-04-23 should therefore be reversed.

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

The non-discrimination directive of President Clinton's 1994 Executive Order is generally implemented via NEPA in projects regulated by the NRC. 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, relying on the existing analysis in the FEIS.⁵ LBP-04-23, slip. op. at 24. The Licensing Board erred, however, because it ignored the increased density and proximity of the 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.

⁵ 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. 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.

3. 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. 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 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 has also foreclosed the possibility of input from the very entities that could put to rest the questions 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.⁶ 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.

IV. CONCLUSION

For the foregoing reasons, Intervenor respectfully request that the Commission grant interlocutory review of LBP-04-23 with respect to Section 17.

⁶The Staff complains that Intervenor 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 Intervenor, should have undertaken.

Dated November 11, 2004.



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Petition For Interlocutory Review Of Memorandum And Order LBP-04-23 With Respect To Section 17" 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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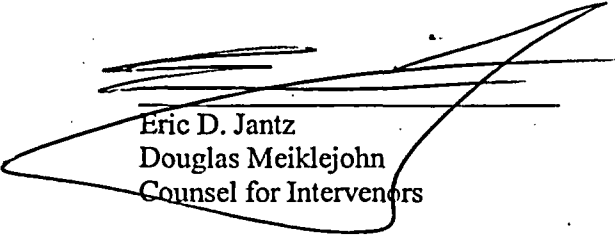
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NEW MEXICO
ENVIRONMENTAL LAW CENTER

November 11, 2004

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

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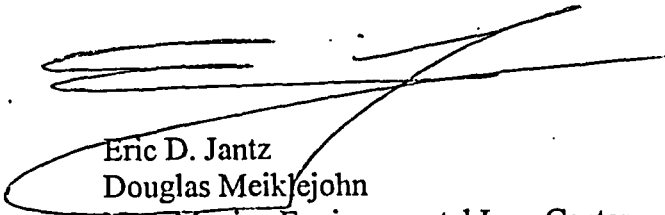
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Petition For Interlocutory Review of Memorandum And Order LBP-04-23 With Respect To Section 17". 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
Douglas Meiklejohn
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Enclosures

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