

November 30, 2004 (3:15pm)

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of:	)	
	)	
Hydro Resources, Inc.	)	Docket No.: 40-8968-ML
P.O. Box 777	)	
Crownpoint, NM 87313	)	Date: November 22, 2004
	)	

**HYDRO RESOURCES, INC.'S RESPONSE TO INTERVENORS' PETITION FOR INTERLOCUTORY REVIEW OF LBP-04-23 WITH RESPECT TO SECTION 17**

**I. INTRODUCTION**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenor's Petition for Interlocutory Review of LBP-04-23 With Respect to Section 17 regarding HRI's Nuclear Regulatory Commission (NRC) source material license to operate an *in situ leach* (ISL) uranium recovery facility in Church Rock, New Mexico. For the reasons discussed below, HRI respectfully requests that the Commission deny Intervenor's Petition for Interlocutory Review, because the Presiding Officer's decision below with respect to Section 17 does not warrant Commission review.

**II. BACKGROUND AND PROCEDURAL HISTORY**

HRI obtained a source material license (SUA-1580) for its proposed Crownpoint Uranium Project (CUP) from the NRC. As part of NRC Staff's review process, a draft and final environmental impact statement (FEIS) were prepared addressing various potential impacts from HRI's proposed CUP. After HRI's NRC license was approved by NRC Staff, several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM) and the Southwest Research Information Center (SRIC) (hereinafter the "Intervenors"), were allowed to intervene to challenge that license. During the hearing, the Presiding Officer at that time (Judge Peter Bloch) bifurcated the proceeding to address HRI's four proposed ISL mining sites under its NRC license separately: (1) Church Rock Section 8, (2) Church Rock Section 17; (3) Crownpoint Unit One,

and (4) Crownpoint. As a result, most of the issues raised by Intervenors with respect to Section 8 were decided by Judge Bloch and, subsequently, by the Commission on appeal.

One final issue remained on which Intervenors appealed to the Commission where they alleged that HRI had not submitted necessary financial information and cost estimates required for a license. On May 25, 2000, the Commission issued an Order requesting that HRI submit, within 180 days of its receipt, "a decontamination, decommissioning and reclamation plan with cost estimates on which a surety will be based."<sup>1</sup> The Commission further stated that, "[t]he plan in the first instance need only address the Section 8 site where HRI plans to begin operations first."<sup>2</sup>

In accordance with the Commission's May 25, 2000 Order, on November 21, 2000, HRI submitted the requested Section 8 Restoration Action Plan (RAP) and accompanying cost estimates addressing only the Section 8 portion of the Crownpoint Uranium Project (CUP). On February 16, 2001, NRC Staff issued a Request for Additional Information (RAI) asking HRI to answer questions regarding specific issues associated with the Section 8 RAP.<sup>3</sup> On March 16, 2001, HRI submitted its response to NRC Staff's RAI.<sup>4</sup> On April 16, 2001, NRC Staff completed its review of HRI's Section 8 RAP and determined that the financial assurance cost estimates set forth therein were acceptable.<sup>5</sup> Then, on July 24, 2001, HRI submitted a RAP for its Section 17 site and, subsequently, RAPS for Unit One and Crownpoint. These RAPs and accompanying cost estimates were prepared by HRI personnel who would be responsible for groundwater restoration at Sections 8 and 17, based upon their personal experience implementing groundwater restoration

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<sup>1</sup> See *In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-00-08, 51 NRC 227, \*16 (May 25, 2000).

<sup>2</sup> CLI-00-08 at \*23.

<sup>3</sup> See *Hydro Resources, Inc., Request for Additional Information Concerning Restoration Costs for Hydro Resources In-Situ Uranium Mining Project*, ML010520228 (February 16, 2001).

<sup>4</sup> See *Hydro Resources, Inc., Response to Request for Additional Information Concerning Restoration Costs for Hydro Resources In-Situ Uranium Mining Project*, ML010810221 (March 16, 2001).

<sup>5</sup> See *Hydro Resources, Inc. Acceptance of Restoration Action Plan for Hydro Resources In Situ Uranium Mining Project, License SUA-1580*, ML011270156 (April 16, 2001).

at other ISL uranium mining facilities in Texas operated by HRI's parent company, Uranium Resources, Inc. (URI).

Section 8 RAP issues were under consideration by the Presiding Officer when Intervenors filed a request to supplement the FEIS for HRI's CUP with NRC Staff based on a proposed housing project to be located in Fort Defiance, New Mexico (hereinafter the Springstead Estates Project or "SEP"), which is approximately two miles from the southern restricted site boundary of the Section 17 mining site. On November 13, 2003, NRC Staff issued a letter indicating that it would review Intervenors' request. After the Presiding Officer issued LBP-04-03 and during a telephone conference regarding the status of the remaining Section 8 litigation, NRC Staff stated that they had reviewed Intervenors' request to supplement the FEIS and had determined that such a supplement was not necessary. As a result, Intervenors' indicated that they wished to file their Motion to Supplement the FEIS with the Licensing Board. The Presiding Officer indicated that such a motion with respect to Section 17 could be filed with the Licensing Board, however, the Presiding Officer stated that such a motion with respect to Section 8 would have to be filed with the Commission, because the Licensing Board no longer had jurisdiction over Section 8 matters.

On May 14, 2004, Intervenors filed a motion requesting that the Presiding Officer direct NRC Staff to supplement the FEIS with respect to Section 17. Intervenors' also filed a separate motion with the Commission requesting that NRC Staff be directed to supplement the FEIS with respect to Section 8. On May 26, 2004, the Commission issued an Order referring Intervenors' Motion to supplement the FEIS with respect to Section 8 to the Presiding Officer to be considered in conjunction with Intervenors' Motion to supplement the FEIS with respect to Section 17.

Subsequently, Intervenors' filed an additional motion requesting that the Presiding Officer re-open the administrative record with respect to Section 8 to be considered in conjunction with their Motion to Supplement the FEIS with respect to Section 8. In response to those (3) motions, HRI submitted its response asserting that, *inter alia*, the proposed SEP was too

speculative to require a supplement to the FEIS. On October 22, 2004, the Presiding Officer denied Intervenors' Motions and determined that Intervenors had not met the substantive legal requirements for the supplementation of an FEIS.<sup>6</sup> Then, on November 11, 2004, Intervenors filed their Petition for Review with the Commission. In response, HRI submits this Response and respectfully requests that the Commission deny Intervenors' Petition for Interlocutory Review, because the Presiding Officer's decision below with respect to Section 17 was not based on legal error.

### III. STANDARD OF REVIEW

With the exception of an appeal by a petitioner from a total denial of its petition to intervene or an appeal by another party on the question of whether the petition to intervene should have been wholly denied, there is no right to appeal any interlocutory ruling by a Licensing Board. *See* 10 CFR § 2.714(a); *see also Long Island Lighting Co.*, (Shoreham Nuclear Power Station, Unit 1), LBP-83-21, 17 NRC 593, 597 (1983). Interlocutory appellate review of Licensing Board orders is generally disfavored and will be undertaken as a discretionary matter *only in the most compelling circumstances*. *See Arizona Public Service Co.*, (Palo Verde Nuclear Generating Station, Units 2 & 3), ALAB-742, 18 NRC 380, 383, n.7 (1983), *citing Public Service Co. of New Hampshire*, (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975). The Commission generally disfavors interlocutory review recognizing an exception where the disputed ruling threatens the aggrieved party with serious, immediate and irreparable harm where it will have a "pervasive or unusual effect" on the proceedings below. *See Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-02-8, 55 NRC 222, 224 (2002). As a general proposition, the Commission has limited the grant of petitions for interlocutory review to scenarios where the decision below has improperly added additional litigation steps to a proceeding or if such decision changes a Subpart L proceeding to a Subpart G

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<sup>6</sup> *See In the Matter of Hydro Resources, Inc.'s*, Memorandum and Order: Ruling on Intervenors' Motions to Supplement the FEIS, LBP-04-23, (October 22, 2004).

proceeding. *See Private Fuel Storage, LLC*, (Independent Spent Fuel Storage Installation), CLI-98-7, 47 NRC 307, 310 (1998); *see also Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-13, 36 NRC 79, 85-86 (1992). The fact that legal error may have occurred does not of itself justify interlocutory appellate review in the teeth of the longstanding articulated Commission policy generally disfavoring such review. *See Public Service Co. of New Hampshire*, (Seabrook Station, Units 1 & 2), ALAB-734, 18 NRC 11, 15 (1983).

#### IV. ARGUMENT

##### A. **Intervenors Have Failed to Demonstrate That The Separate Review of Section 8 and 17 Issues in LBP-04-23 Would Affect This Proceeding in a Pervasive or Unusual Manner**

In their Petition, Intervenors allege that evaluation of FEIS supplementation issues associated with HRI's Sections 8 and 17 mining sites 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." Intervenors' November 11, 2004, Petition for Interlocutory Review, Section 17 at 5. Intervenors' also allege that separation of issues associated with the two mining sites would lead to "undue delay in rendering a final decision on whether to supplement the FEIS." *Id.* at 6.

In the initial stages of this proceeding, the Presiding Officer at the time (Judge Peter Bloch) decided to bifurcate the CUP's proposed mining sites in HRI's license application and to litigate each site separately. As a result, issues associated with the Section 8 mining site were litigated first, prior to any discussion of the other three proposed mining sites. At the completion of the litigation on HRI's RAP for Section 8, the final issue for that proposed mining site, Intervenors requested that the FEIS be supplemented for that mining site and the Section 17 mining site. Thus, due to the unorthodox nature of this proceeding, as set forth by Judge Bloch and as discussed by the current Presiding Officer, Intervenors now are required to file separate motions for each mining site. Therefore, evaluation of issues associated with these two mining

sites separately will not disrupt this proceeding in any manner and will not affect the current structure of this proceeding.

Further, in receiving and reviewing Intervenors' two Petitions, the Commission may evaluate the public health and safety issues associated with each site separately or may combine its analysis to address each site together. Should the Commission determine that Intervenors' Petitions are without merit, the status of the proceeding with respect to the remaining mining sites (Unit 1, and Crownpoint) would remain unchanged. Should the Commission determine that Intervenors' Petitions have merit and that the FEIS should be supplemented, the issue of FEIS supplementation can be evaluated in the future litigation regarding Section 17 because, as stated by Intervenors, "the two Church Rock sections are so interrelated that there is no logical terminus between one site and the other." *Id.* at 5. Therefore, evaluation of Intervenors' two Petitions separately will not affect this proceeding in a pervasive or unusual manner and, as such, does not warrant interlocutory review by the Commission.

**B. The Licensing Board Was Not in Error When It Required Intervenors to Submit Written Motions Regarding FEIS Supplementation**

In their Petition, Intervenors allege that "[w]hen 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 Intervenors." Intervenors' November 11, 2004 Petition for Interlocutory Review at 7. Intervenors also allege that the Licensing Board should have required NRC Staff to "at least justify its position with expert opinions or technical affidavits." *Id.* at 8.

Intervenors' allegations mischaracterize the requirements for disputing licensing decisions rendered by NRC Staff. Intervenors correctly state that NRC Staff declined to supplement the FEIS based on the proposed SEP and the environmental assessment prepared by the United States Department of Housing and Urban Development (HUD). However, Intervenors incorrectly state that NRC Staff was required to make an affirmative showing, using expert

affidavits and testimony, that a supplement to the FEIS was not required. Intervenors have failed to provide one modicum of statutory or regulatory authority demonstrating that NRC Staff was required to complete and distribute analyses using expert affidavits and testimony.

Further, the Presiding Officer correctly directed Intervenors to submit motions (written challenges) to NRC Staff finding that the FEIS did not require supplementation in accordance with standard NRC licensing processes. As the expert regulatory agency for the management of nuclear materials, NRC Staff is responsible for conducting the initial review of requests for licensing actions, including proposed supplementation of a FEIS. As such, NRC Staff is required to make a decision regarding the merit of a party's request for licensing action. Each of these procedural steps is in accordance with standard NRC administrative practices.

In the instant case, NRC Staff reviewed Intervenors' request for FEIS supplementation and the accompanying EA from HUD. After this review, NRC Staff determined that Intervenors' request should be denied, because the analyses in the original FEIS were sufficient to account for the presence of the proposed SEP, should it ever be constructed and occupied. Based on this and in the interests of administrative finality and because of the extraordinary nature of Intervenors' request for supplementation of the FEIS, the Presiding Officer correctly directed Intervenors to submit written motions setting forth a *prima facie* case for supplementation of the FEIS. If the Presiding Officer did not issue such a requirement for Intervenors, it is possible that there could be no finality in administrative proceedings involving the preparation and evaluation of any FEIS.

Additionally, Intervenors' citation to 10 CFR § 2.732<sup>7</sup> and supporting case law is nothing more than a thinly veiled attempt to mischaracterize the type of licensing decision rendered by NRC Staff. NRC Staff received a request for a licensing action from Intervenors when the request for FEIS supplementation was submitted. Denial of their request provided Intervenors

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<sup>7</sup> Indeed, even if Intervenors' reliance on 10 CFR § 2.732 is not misplaced, the regulation specifically states that the Presiding Officer may order that the burden of proof on an order be shifted. See 10 CFR § 2.732.

with an avenue to challenge NRC Staff's decision, but, as the Presiding Officer correctly determined, Intervenors were required to file motions demonstrating a *prima facie* case for supplementation.

Obviously, therefore, the Presiding Officer is not required to *sua sponte* order NRC Staff to have provided a technical justification tailored to satisfy Intervenors. The Presiding Officer's decision is firmly in accordance with standard NRC administrative practices regarding the burden of proceeding with a challenge to NRC Staff decisions and should not be considered legal error. Thus, Intervenors allegation that the Presiding Officer impermissibly shifted the burden of proof to Intervenors is without merit and does not warrant review.

**C. NRC Staff Did Not Fail to Take a "Hard Look" at Environmental Justice Issues**

Intervenors allege that NRC Staff failed to take a "hard look" at environmental justice issues pursuant to National Environmental Policy Act (NEPA) requirements. Intervenors' November 11, 2004, Petition for Interlocutory Review at 7-8. Even though Intervenors' allegation is directed at NRC Staff, Intervenors also allege that the Licensing Board ignored Intervenors' expert affidavits and other evidence demonstrating that the proposed SEP will affect the populations surrounding the CUP and that both NRC Staff and HRI only rely on analyses from the FEIS, which was drafted prior to the proposed SEP. *Id.* at 8-9.

Intervenors' allegations here are incorrect as they fail to account for the Presiding Officer's analysis in LBP-04-23 and the substance of HRI's and NRC Staff's response to Intervenors' motions below. The Presiding Officer's decision in LBP-04-23 with respect to environmental justice focuses on the analyses in the FEIS regarding the potential effects of the CUP on an area within *an 80 kilometer radius* of the HRI facility, including the area where the proposed SEP is to be located. *See* LBP-04-23 at 24. The FEIS analyses are supplemented by the current analyses provided by HRI's and NRC Staff's responses regarding the speculative status of the proposed SEP and the fact that groundwater flow and wind direction are away from the



proposed SEP with no likelihood that either can or will be reversed by ISL mining operations at the CUP. *See generally id. at 13, see also In the Matter of Hydro Resources, Inc., Hydro Resources, Inc.’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, at 7-8, Affidavit of Craig Bartels (June 21, 2004).*<sup>8</sup> Based on this, the Presiding Officer determined that “the SEP presents no additional environmental justice concerns *not already addressed by the FEIS* and the Intervenors *have presented no evidence to the contrary.*” LBP-04-23 at 24. Therefore, Intervenors’ allegation regarding a failure to take a “hard look” at environmental justice concerns does not warrant Commission review.

**D. The Licensing Board’s Decision Below Did Not Violate NEPA’s Public Participation Requirements**

Intervenors allege that “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.” Intervenors’ November 11, 2004, Petition for Interlocutory Review at 9. Intervenors further allege that, “because...the [NRC] 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.” *Id.* at 10.

Similar to their first allegation discussed above, Intervenors’ allegation here mischaracterizes the proper procedures for addressing licensing actions. As stated above, since

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<sup>8</sup> HRI recently submitted a letter from the Ft. Defiance Housing Corporation stating that they have relinquished control over the project and will not be performing work to construct such a housing development unless the Navajo Housing Authority requests their assistance. *See In the Matter of Hydro Resources, Hydro Resources, Inc.’s Submission of Information Potentially Relevant to This Proceeding, (September 27, 2004).* Further, HRI’s responses to Intervenors’ motions below specifically state that the proposed SEP has not engaged any regulatory or oversight authorities to conduct the required studies and assessments for the project prior to commencement of construction. *See In the Matter of Hydro Resources, Inc., Hydro Resources, Inc.’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, at 7-8 (June 21, 2004).*

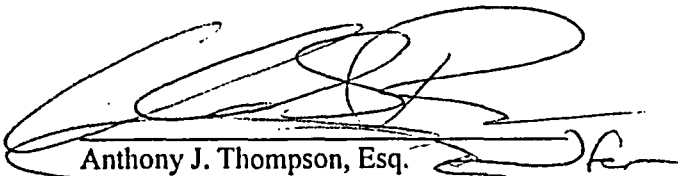
NRC is the expert regulatory agency for the management of nuclear materials, NRC Staff is responsible for reviewing requests for licensing actions such as the supplementation of an FEIS. Only after NRC Staff has reviewed a request for an initial EIS or for the supplementation of an existing FEIS and determined that such an action is warranted will NEPA public participation requirements be triggered and will publication for comment of the appropriate EIS or supplementation documents be necessary. Thus, Intervenor's allegation improperly mischaracterizes the role of NRC Staff in the evaluation of FEIS supplementation requests.

Further, Intervenor's claim that several groups, if included in the public participation process, could have clarified the status of the SEP and the timeline along which the project would have been constructed and occupied and that, because they were not parties to the proceedings, they could not participate. This statement ignores the fact that Intervenor's could have solicited affidavits from these organizations in support of their motions below but, without such support, have no authority to represent them. The organizations' themselves has the right to participate in the publicly-noticed NRC hearing process had they so desired. As such, Intervenor's allegation regarding potential violation of NEPA public participation requirements is without merit and does not warrant review.

## V. CONCLUSION

Based on the discussion above, HRI respectfully requests that the Commission deny Intervenor's Petition for Interlocutory Review of LBP-04-23 with respect to Section 17.

Respectfully Submitted,



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

**Before the Presiding Officer:**

**Thomas S. Moore, Presiding Officer  
Richard F. Cole, Special Assistant**

In the Matter of:	)	
Hydro Resources, Inc.	)	
P.O. Box 777	)	
Crownpoint, NM 87313	)	Docket No.: 40-8968-ML
	)	Date: November 22, 2004
	)	

**CERTIFICATE OF SERVICE**

THIS IS TO CERTIFY that a copy of the foregoing Hydro Resources, Inc.'s Response to Intervenors' Petition for Interlocutory Review of LBP-04-23 with Respect to Section 17 in the above-captioned matter has been served upon the following via electronic mail, and U.S. First Class Mail on this 22<sup>nd</sup> day of November, 2004.

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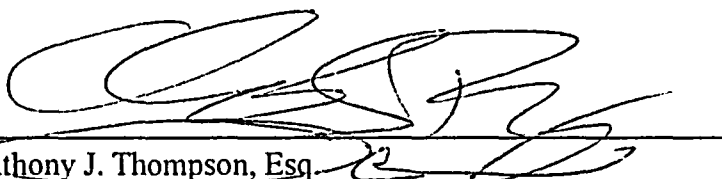
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(hydro resourcesCERTIFICATEOFSERVICE w commiss.doc)

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November 22, 2004

**BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL**

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Attn: Rulemaking and Adjudications Staff  
Mail Stop: OWFN-16C1  
Washington, DC 20555

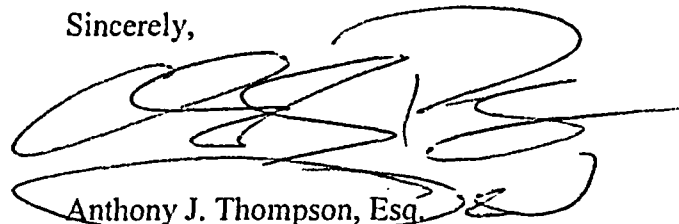
Re: In the Matter of: Hydro Resources, Inc.  
Docket No: 40-8968-ML  
ASLBP No: 95-706-01-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Petition for Interlocutory Review of LBP-04-23 with Respect to Section 17 in the above-captioned matter. 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 self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.  
Thank you for your time and consideration in this matter.

Sincerely,



Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Law Offices of Anthony J. Thompson, P.C.  
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER.doc)