

RAS 8981

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSIONERS:

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of)
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HYDRO RESOURCES, INC.)
(P.O. Box 15910)
Rio Rancho, NM 87174)
_____)

Docket No. 40-8968-ML

CLI-04-39

MEMORANDUM AND ORDER

I. Introduction

Before the Commission are petitions for review of LBP-04-23,¹ a Presiding Officer decision denying intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC)'s motions to supplement the Final Environmental Impact Statement (FEIS) for the Crownpoint Uranium Project (CUP). For the reasons given below, we deny the petitions for review of LBP-04-23.

I. Background

The intervenors' motions sought to have the NRC staff supplement the FEIS analysis of environmental impacts to Church Rock Sections 8 and 17, two of the four sites encompassed by the *in situ* leach uranium mining license challenged in this proceeding. The motions stem from a proposed 1,000-unit housing development named the Springstead Estates Project

¹ 60 NRC ____ (Oct. 22, 2004)(slip op.).

(SEP), which would be built southwest of the proposed mining operations in Church Rock Sections 8 and 17, approximately 2 miles from the southern boundary of Section 17. The intervenors' motions alleged potential hydro-geological, radiological, traffic, and environmental justice impacts from operations in Sections 8 and 17 stemming from the proposed housing development's proximity to the Crownpoint Uranium Project.²

In LBP-04-23, the Presiding Officer found that the intervenors had failed to present significant new information warranting supplementation of the FEIS. The Presiding Officer, assisted by two judges with technical expertise, reviewed the intervenors' motion and attached affidavits from experts, and the NRC staff and Hydro Resources, Inc. (HRI) responses. In a highly fact-based technical decision, the Presiding Officer found no evidence that the proposed housing development might cause effects that are significantly different from those already studied in the FEIS. The intervenors seek review of the Presiding Officer's decision.

² There were two motions to supplement the FEIS, one regarding the potential impacts of mining in Church Rock Section 8, and the other regarding Church Rock Section 17. The Presiding Officer instructed the intervenors to file a separate motion on Section 8 before the Commission, stating that it no longer had jurisdiction over Section 8-related issues because the hearing on environmental impacts from mining activities in Section 8 had concluded (the hearing on impacts related to Section 17 has yet to be held). Therefore, the intervenors filed a motion on Section 8 before the Commission and a similar motion on Section 17 before the Presiding Officer. Given that the motions contained virtually identical arguments, the Commission referred the motion on Section 8 to the Presiding Officer.

Before the Commission, the petitioners have filed separate petitions for review, one for interlocutory review of LBP-04-23 as it pertains to Section 17, and one for review of LBP-04-23 as a partial initial decision on Section 8-related environmental impacts. Commission review of interlocutory matters is governed by 10 C.F.R. § 2.786(g). *See, e.g., Hydro Resources, Inc., CLI-98-08, 47 NRC 314, 320 (1998)*. Review standards for full or partial initial decisions are under 10 C.F.R. § 2.786(b)(4). The intervenors argue that the Commission should take review of LBP-04-23 as to both Sections 8 and 17, and that it would cause confusion and delay to take review of LBP-04-23 as it relates to Section 8 but not take review of the Presiding Officer's decision as it pertains to Section 17. They point out that both the FEIS and the Presiding Officer in LBP-04-23 considered the impacts of both sites as one unit. We agree with the Presiding Officer that there is no reason warranting FEIS supplementation as to either site, and therefore deny both petitions.

III. Analysis

As the Commission outlined previously in this proceeding, “[a] Supplemental Environmental Impact Statement is not necessary ‘every time new information comes to light after the EIS is finalized.’”³ “The new information must present ‘a seriously different picture of the environmental impact of the proposed project from what was previously envisioned.’”⁴ In LBP-04-23, the Presiding Officer found that the intervenors had not shown how the proposed housing development might result in a “seriously different picture of the environmental impact” of the Crownpoint project.⁵

The intervenors’ petitions for review do not identify any clearly erroneous factual or legal conclusion in the Presiding Officer’s decision, nor provide any other reason warranting review.⁶ Moreover, where in consultation with technical experts a Presiding Officer reaches highly fact-specific findings following a review of technical information, the Commission will ordinarily defer to these findings, absent an indication of a “clearly erroneous” finding.⁷

In their petitions for review, the intervenors first claim that the Presiding Officer improperly shifted to them the “burden of proof” for determining whether the FEIS should be supplemented. Specifically, they claim that the Presiding Officer should not have directed them, in the first instance, to submit motions with expert affidavits outlining their arguments for

³ CLI-99-22, 50 NRC 3, 14 (1999)(quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989)).

⁴ *Id.* (quoting *Sierra Club v. Froehke*, 816 F.2d 205, 210 (5th Cir. 1987)); see also CLI-01-04, 53 NRC 31, 52 (1991).

⁵ LBP-04-23, slip op. at 8.

⁶ See 10 C.F.R. § 2.786(b)(4) and (g).

⁷ See, e.g., *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 and 2; Browns Ferry Nuclear Plant; Units 1, 2, and 3), CLI-04-24, 60 NRC 160, 189 (2004).

why supplementation was required. In the intervenors' view, once they informed the NRC staff of the proposed housing development, it was the staff's burden, as an initial matter, to conduct a detailed technical analysis, with expert opinions or affidavits, showing no need to supplement the FEIS.

The intervenors, however, confuse the burden of coming forward with initial information on why FEIS supplementation is warranted with the "burden of proof" on the factual evidence presented. We find no error in the Presiding Officer having directed the intervenors to provide a basis for their motion to supplement the FEIS. If the NRC staff were obligated to conduct a detailed technical analysis of every potential novel circumstance after an FEIS has been issued, simply on the basis of generalized or unsupported assertions of significant environmental impact, the staff's environmental review could prove limitless.⁸ The Presiding Officer merely directed the intervenors, as the parties requesting a hearing, to set forth how the proposed housing development represents a significant "new set of circumstances" compared to the environmental impacts already studied in the FEIS.⁹ It was not unreasonable to ask the intervenors to come forward with support for their supplementation request, a burden akin under our practice to a petitioner's initial obligation to come forward with sufficient basis for a contention.¹⁰

Thus, the Presiding Officer did not shift the "burden of proof" on the evidence presented to the intervenors. It merely outlined the intervenors' initial burden of coming forward with

⁸ The staff already had examined the Environmental Assessment for the proposed housing development, and reviewed FEIS evaluations and the adjudicatory record, but had determined that the FEIS was not deficient. See Joint Status Report (Mar. 26, 2004).

⁹ See Transcript, Telephone Conference (4/14/2004) at 61.

¹⁰ See 10 C.F.R. § 2.714 (former rules); *cf.* 10 C.F.R. 2.309 (current rules, but not applicable to this case). See *generally*, *Yankee Atomic Elec. Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 248-49 (1996).

specific arguments on the need for FEIS supplementation, to which the staff and applicant could then respond. Later, based on its review of the technical written presentations ultimately provided by the intervenors, the applicant, and the NRC staff, the Presiding Officer found that the intervenors' had not shown any significantly new potential impact from the proposed development.

The intervenors also claim that the NRC staff failed to take a hard look at "environmental justice" issues because of the "increased density and proximity of the low-income Native American population" that the proposed housing development may bring to the area.¹¹ The Presiding Officer found this argument unpersuasive. Significantly, he found that the intervenors presented "no evidence" that the proposed development presented any "*additional* environmental justice concerns not already addressed by the FEIS in its current form."¹² The Presiding Officer emphasized that the "FEIS addresses in substantial detail the minority and low-income population in the same area as the Church Rock sites," and "evaluates the impact of the HRI operations within an 80 kilometer radius of the site – an area predominantly inhabited by Native Americans."¹³ Indeed, earlier in this proceeding the Commission itself summarized at length the extensive FEIS analysis and discussion of the "special areas of concern involving the Native American population."¹⁴ We also noted the FEIS's acknowledgment that the population surrounding the proposed sites is "almost entirely Navajo,"

¹¹ Intervenors' Petition for Review of LBP-04-23 With Respect to Section 8 ("Intervenors Petition/Section 8")(Nov. 11, 2004) at 9; *see also* Intervenors' Petition for Review of LBP-04-23 With Respect to Section 17 ("Intervenors' Petition/Section 17")(Nov. 11, 2004) at 9.

¹² LBP-04-23, slip op. at 24 (emphasis added).

¹³ *Id.*

¹⁴ CLI-01-04, 53 NRC 31, 65 (2001); *see also id.* 53 NRC at 64-71.

and that hundreds of residents live within 3 miles of Church Rock.¹⁵ The intervenors do not suggest how the additional population from the proposed housing development would make any material difference to the extensive discussion and analysis already provided in the FEIS. Moreover, in LBP-04-23 the Presiding Officer simply found no persuasive evidence that the proposed housing development would significantly bear on the Crownpoint mining project or significantly alter any of its potential impacts as already described in the FEIS.

As their final argument, the intervenors claim that the Presiding Officer's decision is "contrary to NEPA's public participation goal."¹⁶ They state that "by deciding that the FEIS should not be supplemented, the Licensing Board [sic] also foreclosed the possibility of input" from various entities, such as the Navajo Housing Authority or the Federal Housing and Urban Development Department. These entities could have "comment[ed] on the [housing] project" and "potentially clarif[ied] issues" about the project had the staff circulated FEIS supplementation documents publicly, the intervenors argue.¹⁷ But the staff need not prepare a supplement to an FEIS *unless* it has first determined, pursuant to 10 C.F.R. § 51.92, that a supplement is warranted. Here the staff found that the proposed housing development would not significantly alter the environmental analysis and conclusions of the FEIS and therefore that supplementation would be unnecessary.

¹⁵ *Id.*, 53 NRC at 65, 70.

¹⁶ Intervenors' Petition/Section 8 at 10; Intervenors' Petition/Section 17 at 10.

¹⁷ Intervenors' Petition/Section 8 at 11; Intervenors' Petition/Section 17 at 10-11.

The Commission denies the petitions for review.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 14th day of December, 2004.

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Docket No. 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-39) have been served upon the following persons by deposit of paper copies in the U.S. mail, first class, or through NRC internal distribution with copies by electronic mail as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 14th day of December 2004