

January 13, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

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' MOTION
FOR ISSUANCE OF A SUBPOENA FOR THE PRODUCTION
OF DOCUMENTS AND MOTION FOR STAY OF PROCEEDINGS

INTRODUCTION

On December 30, 2004, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), submitted "Intervenors' Motion for Issuance of a Subpoena for the Production of Documents and to Supplement the Hearing Record and Motion for Stay of Proceedings" (Intervenors' Motion).¹ Pursuant to 10 C.F.R. §§ 2.1237(a)² and 2.730(c), the Staff files this answer. As discussed below, the Intervenors have failed to establish that a subpoena for the production of documents is warranted. Consequently, the Intervenors' Motion should be denied.

BACKGROUND

The Intervenors request that the Presiding Officer issue a subpoena requiring Hydro Resources Inc. (HRI) to produce fence diagrams and structural cross-sections, borehole

¹ Although the hard copy of the Intervenors' Motion is dated December 29, 2004 and was received January 3, 2005, the motion was actually emailed to and received by the Staff on December 30, 2004. Accordingly, Staff was treating the Intervenors' Motion as dated December 30, 2004. However, the Staff is filing this answer in accordance with the 3:00 pm EST January 13, 2005 deadline established by the Presiding Officer. See January 11, 2005 Order (unpublished).

² Because this proceeding commenced prior to the revision of the NRC's Rules of Practice in 10 C.F.R. Part 2, which became effective February 13, 2004, the former Part 2 rules still apply, and the former sections are referenced throughout this answer.

information, driller's logs, pump test information, and water level information for certain wells on HRI's Section 17, Crownpoint and Unit 1 mining sites. Intervenor's Motion, at 1-3. They further redundantly request that the Presiding Officer issue an order requiring HRI and the Staff to supplement the hearing file with those records. *Id.*

This is not the first time that the Intervenor's have submitted a motion for subpoena and to supplement the record. On December 10, 1998, ENDAUM and SRIC requested that the hearing file be supplemented with structural cross sections, driller's log information and borehole information.³ The Presiding Officer denied the motion after determining that there was not yet a need for relief. See "Memorandum and Order (Motion for Subpoena and to Supplement the Hearing File)" at 2-3 (December 16, 1998) (unpublished). Specifically, the Presiding Officer allowed that the Intervenor's could continue to show in their written presentations that there were essential evidentiary gaps in the record and that, therefore, the licensee failed to meet the burden of proof assigned by NRC regulations. *Id.* Ultimately, the Presiding Officer rejected their arguments on this point with respect to Section 8. See LBP-99-30, 50 NRC 77, 84-93 (1999).

More recently, the Intervenor's renewed their attempts to obtain the same information they now request. See "Joint Status Report," at 1-9 (March 26, 2004); "Joint Status Report," at 2-5 (April 30, 2004). Since that time, the Intervenor's and HRI have apparently been unable to negotiate acceptable terms of a protective order that would allow the Intervenor's access to any of the requested documents that may exist. See April 14, 2004 Tr. at 35-36.

³ See "Intervenor's Motion for Issuance of a Subpoena for the Production of Documents, Or, Alternatively, To Supplement the Hearing Record And to Postpone the Deadline for Filing Written Presentations on Groundwater Issues and NEPA Issues; Expedited Consideration Requested," at 13 (December 10, 1998).

DISCUSSION

The Intervenors' Motion should be denied because (1) NRC regulations specifically prohibit discovery in Subpart L proceedings; (2) the requested documents – if they exist – are not required to be part of the hearing file; and (3) any information such documents may contain is not necessary for a fair hearing on the issues involved. More specifically, the Intervenors do not show that the Staff, in preparing NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico" (FEIS), relied on any documentary material that the Intervenors have not had access to. Accordingly, the Intervenors have not shown that use of the Presiding Officer's subpoena powers is warranted here, and a stay is thus not warranted.

A. Intervenors' request for documents is contrary to NRC regulations and should be denied

The Intervenors' request for documents is not permitted by the regulations governing Subpart L proceedings, which prohibit discovery. See 10 C.F.R. § 2.1231(d). Parties simply have no right to discovery unless discovery procedures are authorized by agency regulations. Further, as discussed below, the requested documents are not necessary for the full and fair exploration of the issues involved.

1. Discovery is prohibited in Subpart L proceedings

One of the principal attributes of Subpart L proceedings is the prohibition on discovery in 10 C.F.R. § 2.1231(d). That section states that a party to a Subpart L proceeding "may not seek discovery from any other party, § 2.1211(b) participant, or the NRC or its personnel, whether by document production, deposition, interrogatories, or otherwise." Moreover, the Commission has stated that discovery is not necessary to afford a full and fair hearing for Subpart L proceedings. See "Final Rule: Informal Hearing Procedures for Materials Licensing Adjudications," 54 Fed. Reg. 8269, 8270 (Feb. 28, 1989). Despite this clear prohibition, the Intervenors' Motion

is fundamentally a request for discovery. The Intervenors seek fence diagrams and structural cross-sections, specific borehole information, and specific information for two wells in addition to the information that is already included in the Hearing File. The Intervenors are apparently attempting to obtain this additional information, at least in part, to resurrect their previously discredited sand channel theory.⁴ The prohibition on discovery is designed to prevent just this sort of fishing expedition.

The Intervenors point to 10 C.F.R. § 2.1209(h) for support for their motion for subpoena. Intervenors' Motion, at 10. However, the Intervenors mistake the Presiding Officer's general power to issue subpoenas to compel testimony or produce documents with the power to impose procedures other than those authorized under Subpart L. According to the Commission, the purpose of § 2.1209(h) is to make clear that the Presiding Officer has the authority under the Atomic Energy Act, § 161c, 42 U.S.C. § 2201(c), to issue a subpoena if it is found that the information is necessary for the full and fair exploration of the issues involved, and if it is further found that the information will not be supplied voluntarily. See 54 Fed. Reg. 8269, *supra*, at 8273. This power, however, is not "a vehicle to aid an intervenor, prohibited by the rules from engaging in discovery, in preparing the written presentation in which it bears the responsibility for adding the factual meat to the bare bones of any previously unsubstantiated concerns." *Rockwell International Corp.* (Rocketdyne Division), CLI-90-05, 31 NRC 337, 339 (1990). Instead, this section authorizes a presiding officer to subpoena critical information or testimony if the presiding officer (as opposed to intervenors) determines that such information is essential to reaching a licensing decision, but is lacking from the record. Thus, a presiding officer can require submission of additional information upon a determination that there is insufficient information in the hearing file to support a licensing decision, but a presiding officer should not use his subpoena power to aid an intervenor

⁴ See Intervenors' Motion, at 6-8. The Presiding Officer did not agree with the sand channel theory. See LBP-99-30, 50 NRC at 84-88.

in developing written presentations. Here, if the Presiding Officer decides that this proceeding (or the Intervenor's written presentations) could be aided by resort to more traditional means of discovery, the appropriate course of action would be to recommend to the Commission that procedures other than those authorized by Subpart L be used here. See 10 C.F.R. § 2.1209(k); *see also Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 86-87 (1992) (determining that the Presiding Officer exceeded his authority by not seeking Commission approval prior to approving alternate hearing procedures which included the use of discovery). The Intervenor cannot use the Presiding Officer's subpoena power as a surrogate for discovery in order to circumvent the Commission's clear prohibition on discovery. Accordingly, the Intervenor's subpoena request for the production of documents should be denied.

2. The requested documents are not required to be part of the hearing file

Although formal discovery is prohibited in Subpart L proceedings, the Intervenor is not without access to significant sources of information. In lieu of the usual discovery tools, 10 C.F.R. § 2.1231 requires the NRC Staff to make a hearing file available to the parties. The hearing file consists of "the application and any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and any NRC report and any correspondence between the applicant and the NRC that is relevant to the application." 10 C.F.R. § 2.1231(b). Since the Hearing File here contains the documents relied upon by the Staff in preparing the FEIS, this obviates the need for discovery.

a. The Staff did not rely upon or cite the requested documents

The Intervenor asserts that the data and information they seek via a subpoena "should be part of the hearing file" since the Staff relied on that information in granting the license. Intervenor's Motion at 5, 15. Alternatively, the Intervenor argues, without citation, that they should be able to review the information since it is cited in application documents. *Id.* The Intervenor's arguments lack any foundation in the record. As previously stated by the Staff, the information of

interest to the Intervenor is contained in documents referenced in the FEIS, and these documents are already part of the Hearing File. See "Joint Status Report," dated April 30, 2004, at 1-2.

The Intervenor nonetheless now assert that their self-styled set of "Requested Documents" (see Intervenor's Motion at 2-3) are ones which were "presumably reviewed by the Staff," and should thus be subject to review by the Intervenor as well. Intervenor's Motion, at 10. But in the Presiding Officer's view, the standard for determining whether a document is one that should be part of the hearing file, pursuant to 10 C.F.R. § 2.1231, is whether the document is referenced or cited in a Staff-produced document such as the FEIS. See March 4, 2004 Tr. at 28; April 14, 2004 Tr. at 39. Under this standard (and assuming the following are discrete items held by HRI), neither the fence diagrams and/or structural cross-section information, the borehole 2.8/17/7 data, the pump test and water level information for Wells CP-1 and CP-4, nor the driller's logs for Wells CP-1 through CP-10, qualify for inclusion in the hearing file.

Regarding the fence diagrams and/or structural cross-sections for Section 17, Unit 1, and Crownpoint, the Intervenor state that this information is referred to in revision 0.0 of HRI's Consolidated Operations Plan (COP); in an Analysis of Hydrodynamic Control, HRI, Inc., Crownpoint and Church Rock New Mexico Uranium Mines (Geraghty and Miller, 1993) (Hydrodynamic Analysis); and on FEIS p. 3-15. While the cited FEIS page contains the phrase ["a]ssociated cross-sections," no document containing this information is cited or otherwise referenced there. Presumably, the Staff was referring there to the data in the COP and/or the Hydrodynamic Analysis.⁵ But in any event, both the COP (cited elsewhere in the FEIS as "HRI

⁵ However, in reviewing the text on FEIS p. 3-15, the lack of any direct tie between data in the COP and/or the Hydrodynamic Analysis and this portion of the FEIS is evident. Contrary to what the Intervenor imply (see Intervenor's Motion, at 2), the FEIS here contains no site-specific determinations regarding the lack of inter-aquifer connections caused by changes in geologic strata; nor any discussion about whether mine fluids will affect any underlying or overlying fresh water aquifers.

1996m”)⁶ and the Hydrodynamic Analysis (cited elsewhere in the FEIS as “HRI 1993c”)⁷, are already part of the Hearing File. Indeed, the Intervenor use excerpts from the COP and the Hydrodynamic Analysis as Exhibits 1 and 2, respectively, to the Motion. Accordingly, assuming the fence diagrams and/or structural cross-section information are part of some separate unidentified HRI document or data set, there is no evidence that such a document or data set was ever submitted to the NRC Staff as part of the license application.

Regarding information for Borehole 2.8/17/7, the Intervenor cite FEIS Fig. 3.7, and FEIS p. 3-35, and attach copies of these FEIS excerpts as Exhibit 3 to their Motion. FEIS Fig. 3.7 does not identify its source of information, but the accompanying text (FEIS p. 3-18) indicates that Fig. 3.7 is based on a combination of data submitted in HRI’s initial environmental report, and on several cited studies in the geological literature. While the text at FEIS p. 3-35 does reference “drill hole 2.8/17/7” as having “penetrated the total section of Recapture Shale,” the text there makes no reference back to FEIS Fig. 3.7, and no document containing information on drill hole 2.8/17/7 is cited or otherwise referenced.⁸ Accordingly, assuming that information on drill hole 2.8/17/7 is or was part of some separate unidentified HRI document or data set, there is no evidence that such a document or data set was ever submitted to the NRC Staff as part of the license application.

⁶ See FEIS, at p. 7-7. The COP is in Hearing File Notebook 9.10, and carries accession number 9701160104.

⁷ *Id.*, at p. 7-6. The Hydrodynamic Analysis is in Hearing File Notebook 6.7, and carries accession number 9312160178. Its HRI cover letter, dated October 18, 1993, carries accession number 9312150298.

⁸ As indicated by HRI, the FEIS reference to “drill hole 2.8/17/7” may be based on Figure 2.6-4 of HRI’s revised environmental report, dated October 11, 1994. See Hydro Resource Inc.’s Response to Intervenor’s Motion for Issuance of a Subpoena for the Production of Documents and to Supplement the Hearing Record and Motion for Stay of the Proceedings, at 8 (January 10, 2005) (HRI’s Response to Motion). Alternatively, the reference may be based on an undocumented oral exchange of information between HRI and the Staff. Regarding the Intervenor’s further request for “down-borehole camera images, rock cores, core photos, drillers notes and loggers notes” for drill hole 2.8/17/7, HRI states that no such information is available. *Id.*

Regarding documentation of driller's logs, pump test information, water level information for Wells CP-1 and CP-4, and documentation of well completion difficulties for Well CP-4, the Intervenor state that this information is referred to in HRI's 1992 Crownpoint Technical Report, at pages 46, 49-55 and at Appendix A, Table 4, copies of which are attached to the Intervenor's Motion as Exhibit 4. The Intervenor further state that HRI's aquifer testing efforts "of which these wells were a part is explicitly referred to" at FEIS p. 3-29. Intervenor's Motion, at 3. On this latter point, a review of the text on FEIS p. 3-29 shows that it contains no references, explicit or otherwise, to Wells CP-1 or CP-4. While the text there does discuss aquifer testing, the Staff cites to HRI's 1992 Crownpoint Technical Report (cited here and elsewhere in the FEIS as "HRI 1992b"),⁹ a document which is already part of the Hearing File. Accordingly, assuming that information specific to Wells CP-1 and CP-4 is or was part of some separate unidentified HRI document or data set, there is no evidence that such a document or data set was ever submitted to the NRC Staff as part of the license application.

Similarly, with regard to the driller's logs for Wells CP-1 through CP-10, apart from HRI's 1992 Crownpoint Technical Report which is already part of the Hearing File, the Intervenor provide no evidence that the Staff relied on other information. If there is or was some separate unidentified HRI document or data set containing driller's logs for Wells CP-1 through CP-10, there is no evidence that such a document or data set was ever submitted to the NRC Staff as part of the license application. Accordingly, the Staff did not rely upon or cite the documents and data sought by the Intervenor.

- b. The requested information is not required to be part of the hearing file

The Intervenor also assert that the plain language of § 2.1231(b) reaches documents

⁹ See FEIS, at p. 7-5. The Crownpoint Technical Report is in Hearing File Notebook 5.1, and carries accession number 9509080094.

which HRI purportedly referred to “throughout” its application, even if such documents were not submitted to the Staff. Intervenors’ Motion, at 13. However, there is no requirement that an applicant submit, as part of a license application, all information it holds, and the NRC Staff obviously cannot put into a hearing file documents which it does not possess. Instead, items in the hearing file, such as an applicant’s environmental analysis, are reports using selected information. A hearing file is not a comprehensive collection of every piece of information held by an applicant. If the Staff determines that it has sufficient information to make a licensing decision, then only the application and related analyses will become part of the hearing file. On the other hand, if the Staff determines that it requires more information on a particular topic, it can request that additional information from the applicant, and that information would then become part of the hearing file pursuant to 10 C.F.R. § 2.1231(b). Significantly, the Intervenors have not identified a single document as being in the Staff’s possession but withheld from the hearing file. Instead, all of the documents and data that Intervenors now seek fall into two categories: (1) those which never existed or are no longer held by HRI; and (2) those held by HRI but not submitted to the NRC Staff. See HRI’s Response to Motion, at 6. Neither category qualifies for inclusion in the hearing file since 10 C.F.R. § 2.1231(b) only reaches documents in the NRC Staff’s possession.

3. Intervenors delayed unreasonably in filing their present motion

Properly viewed, the Intervenors’ Motion is simply a delaying tactic. The Intervenors have long had access to the hearing file which contains all of the information required by 10 C.F.R. § 2.1231(b). The Intervenors also have access to experts who have assisted them in developing written presentations and supporting their pleadings. Moreover, the Intervenors have provided no justification for waiting to file the subpoena and stay motion until just three weeks before their initial written presentation on Section 17, Unit 1 and Crownpoint is due. Intervenors have been aware that the information they seek was not part of the hearing file since at least 1998, and they raised this issue again in March 2004. The Intervenors should not be permitted to use

an urgency of their own making to force a delay in a proceeding that has already spanned several years. Otherwise, an Intervenor refusing to agree to a protective agreement could leverage the failure to reach a *voluntary* agreement into a *mandatory* discovery order. Intervenors should not be allowed to subvert the Commission's prohibition on discovery through their own actions.

As discussed above, because the information now requested is not necessary for a full and fair exploration of the issues, the Intervenors' Motion should be denied.

B. Since the request for documents is contrary to NRC regulations, a stay should not be granted

Since the Intervenors are not entitled to the discovery that they seek and therefore should not be obtaining any additional documents, their request for an extension of time within which to analyze the documents should be denied. Nevertheless, as discussed below, the Intervenors have failed to demonstrate that a stay should be granted.

Pursuant to 10 C.F.R. § 2.1263 and 2.788(e), the Presiding Officer will consider the following in determining whether to grant a stay: (1) whether the moving party has made a strong showing that it is likely to prevail on the merits; (2) whether the moving party will be irreparably injured unless a stay is granted; (3) whether the grant of the stay will harm the other parties; (4) where the public interest lies. Factors (1) and (2) are the most important; should these factors be shown not to favor a stay, factors (3) and (4) are of lesser importance. See *Sequoyah Fuels* (Gore, Oklahoma Site), CLI-94-9, 40 NRC 1, 6-8 (1994). None of the factors favors the Intervenors.

First, the Intervenors are unlikely to prevail in their efforts to use discovery to obtain additional documents in light of the prohibition on discovery at 10 C.F.R. § 2.1231(d). As discussed *supra*, Intervenors have not described a single document in the possession of the Staff that is not in the hearing file nor have they provided any legal support for their argument that documents in the sole possession of HRI must be included in the hearing file. In short, there is little chance that Intervenors will prevail on the merits.

Second, Intervenor cannot be irreparably harmed by the failure to obtain documents that they are not entitled to in the first instance.

Third, grant of a stay may cause irreparable harm to HRI. See HRI's Response to Motion, at 14. Although the Intervenor asserts that HRI does not plan to commence operations at its Church Rock site until 2007, the HRI argues that any additional delay in commencing operations could result in monetary damages now that the price of uranium has risen. *Compare* Intervenor's Motion, at 15; HRI's Response to Motion, at 14.

Fourth, the Intervenor argues that the public interest favors a stay to insure a fair and impartial hearing process. Intervenor's Motion, at 15. Intervenor relies on their purported need for additional discovery to support their notions of fairness and impartiality. However, the Commission has clearly spoken on this issue: discovery is not necessary to afford a full and fair hearing for Subpart L proceedings. 54 Fed. Reg. 8269, *supra*, at 8270. Thus, the Staff believes that public interest is best served by continued adherence to the procedures outlined in Subpart L.

Having failed to meet any of the 10 C.F.R § 2.788(e) factors, Intervenor has not shown that a stay, pending the review of certain documents, is justified. Intervenor requests for a stay should therefore be denied.

CONCLUSION

For the reasons stated above, the Intervenor's Motion should be denied.

Respectfully submitted,

/RA/

Tyson R. Smith
Counsel for NRC Staff

Dated at Rockville, Maryland
this 13th day of January, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
P.O. Box 777)
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' MOTION FOR ISSUANCE OF A SUBPOENA FOR THE PRODUCTION OF DOCUMENTS AND MOTION FOR STAY OF PROCEEDINGS" in the above-captioned proceeding have been served on the following persons this 13th day of January, 2005, 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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