

October 20, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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' PETITION TO REVIEW LBP-05-26

INTRODUCTION

On October 5, 2005, Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), Grace Sam and Marilyn Morris (collectively, "Intervenors"), requested that the Commission review LBP-05-26,¹ in which the Presiding Officer rejected their cultural resource areas of concern.² These concerns pertain primarily to the National Historic Preservation Act, 16 U.S.C. §§ 470-470w-6 (NHPA), but include National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) (NEPA) issues. See "Intervenors' Petition For Review of LBP-05-26" (Petition). The Staff files this answer, pursuant to 10 C.F.R. § 2.786(b)(3), opposing the Petition.

BACKGROUND

In 1988, Hydro Resources Inc. (HRI) submitted a license application, pursuant to 10 C.F.R. Part 40, for authority to conduct *in situ* leach (ISL) uranium mining at its Church Rock site (contiguous portions of Sections 8 and 17) in New Mexico. HRI later amended its

¹ See LBP-05-26, "Partial Initial Decision (Phase II Cultural Resources Challenges To In Situ Leach Uranium Mining License)," 62 NRC ____ (slip op. dated September 16, 2005).

² This proceeding commenced prior to February 13, 2004 – the effective date of the substantial revisions to the NRC's Rules of Practice in 10 C.F.R. Part 2. This proceeding is thus governed by the former Part 2, Subpart L hearing procedures, under which "areas of concern" rather than contentions are litigated. Accordingly, throughout this filing, the former Part 2 rules are cited.

application to include additional lease areas known as the Unit 1 and Crownpoint sites (in and around Crownpoint, New Mexico), and to propose that processing of licensed material be conducted at a facility located at its Crownpoint site.³ In 1997 the NRC Staff published NUREG-1508, the “Final Environmental Impact Statement to Construct and Operate [HRI’s] Crownpoint Uranium Solution Mining Project” (FEIS), and in early January of 1998 the Staff issued a materials license to HRI. The lead Intervenor moved for a stay,⁴ arguing in part that the issuance of HRI’s license was unlawfully premature under the NHPA. Various temporary stays were thereafter imposed by the Presiding Officer and the Commission; eventually the Commission -- without reaching the merits of the Intervenor’s NHPA argument -- lifted its final temporary stay, finding that the required showings of immediate and irreparable NHPA injury had not been made. See CLI-98-8, 47 NRC 314, 321-24 and nn. 8-16 (1998).

The Presiding Officer subsequently admitted the NHPA’s areas of concern for consideration on their merits. See LBP-98-09, 47 NRC 261, 282 (1998). In LBP-05-26, slip op. at 12, later in 1998, the Presiding Officer bifurcated this proceeding (see unpublished orders dated September 22, 1998 and October 13, 1998), requiring that issues pertaining to HRI’s Church Rock Section 8 site be adjudicated first. On this basis, the Intervenor submitted their initial NHPA written presentation in December 1998; in February 1999 the Presiding Officer rejected these NHPA concerns. See LBP-99-9, 49 NRC 136, at 139-43 (1999) (ruling that HRI’s and the Staff’s phased compliance approach for identifying cultural resources met the requirements of the NHPA and its regulations). The Commission granted the Intervenor’s petition to review LBP-99-9, and affirmed the Presiding Officer’s NHPA findings for the Church

³ HRI’s processing facility (on Crownpoint Section 24) would be used to dry and package the uranium yellowcake slurry to be transported from the Church Rock Section 8 and 17 sites once ISL mining there begins.

⁴ See “ENDAUM’s and SRIC’s Motion For Stay, Request For Prior Hearing, and Request For Temporary Stay,” dated January 15, 1998.

Rock Section 8 site. See CLI-99-22, 50 NRC 3, at 12-13 (1999).⁵

On April 28, 2005, the Intervenors submitted their NHPA concerns for the Church Rock Section 17, Unit 1 and Crownpoint sites.⁶ The Presiding Officer rejected these concerns in LBP-05-26, finding that they were largely governed by prior Presiding Officer and Commission decisions. The Intervenors subsequently filed their Petition that is the subject of this filing.

DISCUSSION

I. Legal Standards Governing Petitions to Review Presiding Officer Decisions

Pursuant to 10 C.F.R. §§ 2.1253 and 2.786(b)(1), “a party may file a petition for review with the Commission” within fifteen (15) days after service of a full or partial initial decision by a presiding officer. See *Babcock and Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995). A petition for review must contain:

- (1) A concise summary of the decision or action of which review is sought;
- (2) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;
- (3) A concise statement why in the petitioner’s view the decision or action is erroneous; and
- (4) A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv).

As a matter of its discretion, the Commission may grant review of presiding officer decisions if a “substantial question” exists indicating that:

- (1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;

⁵ The Commission termed its action as one which only partially affirmed LBP-99-9, because it did not rule on the portions of LBP-99-9 relating to bifurcation issues. The Commission fully affirmed LBP-99-9’s NHPA findings. See CLI-99-22, 50 NRC at 5 and n.2, and 12-13.

⁶ See “[Intervenors’] Written Presentation in Opposition to [HRI’s] Application for a Material License With Respect to: Cultural Resources Issues” (April 28 Brief). The April 28 Brief was supported in part by the Declaration of Dr. Thomas F. King (King Declaration).

- (3) A substantial and important question of law, policy or discretion has been raised;
- (4) The conduct of the proceeding involved a prejudicial procedural error;
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4)(i-v); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001). As stated by the Commission in this proceeding, issues not raised with the presiding officer cannot be argued on appeal. *See* CLI-00-8, 51 NRC 227, 243 (2000). *See also Sequoyah Fuels Corp.* (Gore, Oklahoma Site), CLI-97-13, 46 NRC 195, 221 (1997) (failure to raise arguments before licensing board bars argument on appeal); *Yankee Atomic Electric Co.* (Yankee Nuclear Power Station), CLI-96-7, 43 NRC 235, 260 (1996) (argument for a contention cannot be initially raised on appeal).

II. Intervenors Fail to Meet 10 C.F.R. § 2.786(b) Review Standards

The Intervenors state that pursuant to 10 C.F.R. §§ 2.786(b)(4)(i-iii) and 2.1253, the Commission should review LBP-05-26 because the decision (1) contains “errors of material fact”; (2) contains “necessary legal conclusions” which are erroneous; and (3) raises a “substantial and important question of law, policy or discretion.” Petition, at 4. The Intervenors then set forth their NHPA-based arguments (*id.*, at 4-8) and a NEPA-based argument. *Id.*, at 8-10. But these arguments do not identify any “errors of material fact” in LBP-05-26, nor do they identify any “substantial and important question of law, policy or discretion” that LBP-05-26 is said to raise. Finally, the Intervenors also fail to establish that LBP-05-26 contains necessary legal conclusions which are “without governing precedent,” or are “a departure from or contrary to established law.” Thus, they do not provide a sufficient basis for the Commission to review LBP-05-26, and their Petition should therefore be denied.

A. Intervenors’ NHPA Arguments Fail to Establish Requisite Legal Error

The Intervenors acknowledge that the Commission previously found in this proceeding that the phased approach taken by HRI and the Staff with respect to conducting cultural

resource reviews (at the sites which may later be affected by ISL mining) is “permissible under the NHPA.” Petition at 2, *citing* CLI-99-22, 50 NRC at 12-13.⁷ But the Intervenor’s NHPA arguments thereafter focus on the Commission’s 1998 stay ruling (discussing the regulations promulgated by the Advisory Council On Historic Preservation (ACHP) at 36 C.F.R. §§ 800.1 *et seq.*), arguing that the phased approach used here is now prohibited by the post-1998 amendments to the ACHP regulations implementing the NHPA. See Petition, at 4-8.

The Intervenor’s focus on CLI-98-8 (and, to a lesser extent, CLI-99-22) is misplaced. The decision which is the proper subject of this Petition is LBP-05-26. Yet, other than quoting part of the Presiding Officer’s discussion – which the Intervenor appears to endorse – of case law pertaining to the law-of-the-case doctrine (see Petition, at 4), the Intervenor’s NHPA argument contains only one reference to LBP-05-26. See Petition, at 7, *citing* LBP-05-26, slip op. at 18-19 and n. 10. As shown below, no legal error meeting the 10 C.F.R. § 2.786(b)(4)(ii) standard exists in regard to this portion of LBP-05-26.

The Intervenor claims that the Presiding Officer in this part of his decision misconstrued their position as one seeking the retroactive application of the amended ACHP regulations (*i.e.*, 36 C.F.R. § 800.4(b)(2), which replaced 36 C.F.R. § 800.3(c)), when in fact the Intervenor had not sought the retroactive application of these regulations.⁸ See Petition, at 7. The Intervenor states that their position has always been “that the new regulations clarify the old regulations,” which the Commission in 1998 found were ambiguous. *Id.*

⁷ The Intervenor abandons their previous argument (see, e.g., April 28 Brief, at 2, and 11-12) that this approach is prohibited by Section 106 (16 U.S.C. § 470f) of the NHPA.

⁸ In support of this claim, the Intervenor points to the King Declaration, in which Dr. King states that the NHPA regulations were amended to clarify what phased identification and evaluation of cultural resources entails. See Petition, at 7, *citing* King Declaration at ¶ 42. This portion of the King Declaration was not referenced in the April 28 Brief submitted to the Presiding Officer. The Intervenor may not raise new issues on appeal that were not presented to the Presiding Officer. See *Sequoyah Fuels*, *supra*, CLI-97-13, 46 NRC at 221 (failure to raise arguments with a licensing board bars consideration on appeal).

This argument does not support taking review of LBP-05-26. The Presiding Officer thoroughly discussed why he was rejecting the Intervenors' tacit invitation to retroactively apply the amended ACHP regulations (see LBP-05-26, slip op. at 18-20), and the Intervenors identify no legal errors in this discussion. The Presiding Officer then reviewed the Commission's basis for finding, in CLI-99-22, that phased compliance with NHPA was lawful (*i.e.*, phased compliance was consistent with statute, regulations, case law, and administrative practice applicable to the pending matter), and ruled that this constituted the law-of-the-case with respect to this matter, which, applied here, required rejection of the Intervenors' NHPA areas of concern. See LBP-05-26, slip op. at 21-22, *citing* CLI-99-22, 50 NRC at 13.

Moreover, the Intervenors' related discussion of phased compliance improperly makes new arguments that were not presented to the Presiding Officer for his consideration. For example, the Intervenors claim that the approved phased compliance process "suffers from a focus on the mining sites as autonomous areas," and that pursuant to the NHPA these areas should instead be evaluated "as one contiguous landscape." Petition, at 8, *citing* 16 U.S.C. § 470(b). This cited portion of the NHPA statute was not referenced in the April 28 Brief submitted to the Presiding Officer, and this argument, thus, should not be considered now by the Commission. See *Sequoyah Fuels, supra*, CLI-97-13, 46 NRC at 221.

A similar shortcoming in the Petition is the Intervenors' reliance on case law (pertaining to the law-of-the-case doctrine) which was not cited in the April 28 Brief, and which was not contained in LBP-05-26. See Petition, at 4-6.⁹ The Intervenors argue that an exception to the

⁹ The newly-cited cases are *DiLaura v. Power Auth. Of the State of N.Y.*, 982 F.2d 73, 77 (2d Cir. 1992); *Petitions of the Kinsman Transit Co.*, 388 F.2d 821, 825 n. 9 (2d Cir. 1968); *Cohen v. Brown University*, 101 F.3d 155, 168 (1st Cir. 1996); *Irving v. United States*, 49 F.3d 830, 833-34 (1st Cir. 1995); *United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991); *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979), *cert. denied*, 446 U.S. 919 (1980); *United States v. Rivera-Martinez*, 931 F.2d 148, 150-51 (1st Cir.) *cert. denied*, 502 U.S. 862 (1991); and *Northeast Utils. Serv. Co. v. Federal Energy Regulatory Comm'n*, 55 F.3d 686, 688 (1st Cir. 1995).

law-of-the-case doctrine applies where “newly emergent authority” provides a “convincing reason” for a court to depart from a prior decision. Petition, at 5, *quoting Cohen v. Brown University*, 101 F.3d 155, 168 (1st Cir. 1996). However, the Intervenors do not mention that immediately preceding the portion of the decision they quote, the court states that such authority is typically viewed as limited to subsequent “Supreme Court opinions, *en banc* opinions [of the First Circuit Court of Appeals], or statutory overrulings.” *Cohen*, 101 F.3d at 168 (citation omitted). Should the Commission view *Cohen* as a decision that can properly be considered here, the Staff submits that a mere change in the ACHP regulations – as opposed to a change in the NHPA statute – is not the type of “newly emergent authority” on which an exception to the law-of-the-case doctrine can properly be based.

Furthermore, even if the Commission’s 1998 and 1999 decisions (CLI-98-8 and CLI-99-22) were now subject to challenge in the Petition, the Intervenors misunderstand these decisions. For example, the Intervenors mistakenly characterize the Commission’s 1998 stay ruling as a “holding” that the ACHP regulations were ambiguous about whether a phased approach is permissible. Petition at 5, *citing* CLI-98-8, 47 NRC at 323-24. Similarly, the Commission is said to have relied upon the ambiguity of the ACHP regulations “to uphold the NRC Staff’s phased compliance NHPA review.” Petition at 7, *citing* CLI-98-8, 47 NRC at 323-24. The Commission, in its 1998 stay ruling, did not reach the merits of the NHPA arguments (*id.*, at 322 n. 10),¹⁰ and thus made no final findings there on NHPA issues.

Rather, it was in CLI-99-22 that the Commission held that phased compliance with NHPA was lawful, finding that this approach was consistent with statute, regulations, case law,

¹⁰ The Intervenors previously acknowledged that CLI-98-8 did not reach the merits of their NHPA arguments. See April 28 Brief, at 10.

and administrative practice. See CLI-99-22, 50 NRC at 13 and nn. 37 & 38.¹¹ The Intervenor's vague assertion that "[p]revious decisions in this case" have relied upon the old and ambiguous ACHP regulations discussing phased compliance (Petition, at 5)¹² ignores the fact that CLI-99-22's NHPA holding was not based solely on the ACHP regulations, but rather reached a conclusion based on the Commission's careful evaluation of the entire framework of authority impacting the acceptability of the phased approach.

CLI-99-22 sets forth the NHPA law-of-the-case. The Presiding Officer properly applied this law in LBP-05-26. The Intervenor's NHPA arguments establish no legal error in LBP-05-26. The Commission should therefore deny the Petition with respect to the NHPA issues.

B. Intervenor's NEPA Argument Fails to Establish Requisite Legal Error

The Intervenor also take issue with the Presiding Officer's finding that the completion of the NHPA review need not coincide with completion of the NEPA review. See Petition, at 8, *citing* LBP-05-26, slip op. at 35. The Presiding Officer ruled there as follows:

Contrary to the Intervenor's understanding, the "hard look" required by NEPA is not to be equated with completion of the NHPA review. Although an agency may coordinate and, where practicable, integrate its NEPA and NHPA review efforts (see 10 C.F.R. § 51.70(a); 36 C.F.R. § 800.14(a)), the two statutes impose separate and distinct obligations. See, e.g., *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). There is no requirement in NEPA, or in the NRC's regulations implementing NEPA (10 C.F.R. Part 51), to complete the NHPA review in order to satisfy the obligations imposed by NEPA.

¹¹ Additionally, in CLI-99-22, the Commission found no reason to consider the former presiding officer's NHPA findings in detail, stating that the Intervenor had "offered no compelling argument" against phased compliance, and that they had "failed to identify any significant defect in the Staff's NHPA compliance." CLI-99-22, 50 NRC at 12. The Commission also found it significant that New Mexico and Navajo Nation officials had concurred in the Staff's conclusion "that there would be 'no effect' on all cultural resources" identified within HRI's Church Rock Section 8 and 17 sites, and its Section 12 irrigation site at Crownpoint. CLI-99-22, 50 NRC at 13 n. 38, *citing* LBP-99-9, 49 NRC at 142.

¹² The Petition contains other vague statements that (1) "intervening authority" makes reconsideration of "the prior decision" appropriate; and (2) "new authority" shows that "previous rulings" were erroneous. Petition, at 5. The lack of clarity makes the Intervenor's NHPA arguments hard to follow.

The Intervenor do not show that this portion of LBP-05-26 contains either (1) necessary legal conclusions which are without governing precedent, or (2) that it departs from or is contrary to established law. Instead, they state that “coordination between [NEPA and NHPA] reviews is expected to be coordinated as appropriate.” Petition, at 8, *citing* 36 C.F.R. § 800.8.¹³ The April 28 Brief does not cite this ACHP regulation, and this argument need not be considered now by the Commission.¹⁴ Even if this regulation is considered here, its requirement is not stated in mandatory terms, and only provides that reviews should be completed in a “timely and efficient manner,” not simultaneously.

The Presiding Officer thoroughly summarized the FEIS’ evaluations of cultural resource issues (see LBP-05-26, slip op. at 36-40, summarizing pertinent portions of FEIS pages 3-65 to 3-77, 4-109 to 4-112, and FEIS Appendix A), and concluded as follows:

The above evidence demonstrates that the Staff took a “hard look” at the impacts of HRI’s project on cultural resources. The Staff ... identified cultural resources in and near the project area, considered HRI’s proposed project and alternatives, discussed mitigation measures, provided the DEIS for public comments, responded to those comments, and ultimately concluded that HRI’s project posed no significant risk of harm to cultural resources.

Although the Staff recognized that additional work was necessary to complete the NHPA review (FEIS at 3-74, 4-112), it concluded that its cultural resources review satisfied NEPA’s “hard look” requirement. I agree.

LBP-05-26, slip op. at 41. The Intervenor fail to show that the Presiding Officer’s reliance on the detailed FEIS evaluations of cultural resources constitutes legal error justifying Commission review under the 10 C.F.R. § 2.786(b)(4)(ii) standard. Instead, the Intervenor’s NEPA argument here relies on the claim that the phased NHPA approach violates cumulative impact and

¹³ This regulation states in relevant part that federal agencies “should consider their [NHPA] section 106 responsibilities as early as possible in the NEPA process, and plan their public participation, analysis, and review in such a way that they can meet the purposes and requirements of both statutes in a timely and efficient manner.” 36 C.F.R. § 800.8 (emphasis added).

¹⁴ See *supra*, note 8.

segmentation provisions set forth in Council on Environmental Quality (CEQ) regulations, and embodied in NEPA case law.¹⁵ But the April 28 Brief contains no cumulative impact or segmentation arguments, and no references to the CEQ regulations and NEPA case law set forth in the footnote. These arguments should thus not now be considered by the Commission.¹⁶

The Intervenor's NEPA arguments establish no legal error in LBP-05-26, and, therefore, the Commission should deny the Petition with respect to the NEPA issues.

CONCLUSION

For the reasons set forth above, the Commission should deny the Petition.

Respectfully Submitted,

/RA/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 20th day of October, 2005

¹⁵ See, e.g., Petition, at 8-9 (*citing* 40 C.F.R. §§ 1508.7 (CEQ definition of cumulative impacts) and 1508.27(b)(7) (improper to break action down into small component parts); and Petition, at 10 (*citing* *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990); *Sierra Club v. Penfold*, 857 F.2d 1307, 1320-21 (9th Cir. 1988); and *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998)).

¹⁶ The Staff notes that the Intervenor's made cumulative impact and segmentation arguments earlier in this proceeding, and that such arguments were rejected by both the Presiding Officer and the Commission. See LBP-99-30, 50 NRC 77, 119-21 (1999), *aff'd.*, CLI-01-4, 53 NRC 31, 57-64 (2001). The Commission specifically affirmed the Presiding Officer's cumulative impact rulings with respect to Section 8 (*id.*, at 60-62), while giving the Intervenor's the opportunity – not taken in the April 28 Brief – to pursue the issue of interregional cumulative effects involving Section 17, Unit 1 and the Crownpoint sites. *Id.*, at 57-60. The cumulative impact rulings in LBP-99-30 and CLI-01-4 are, of course, not properly subject to challenge in the Petition.

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P.O. Box 777)
Crownpoint, NM 87313)
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NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney herewith enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

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Respectfully submitted,

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Dated at Rockville, Maryland
this 20th day of October, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' PETITION TO REVIEW LBP-05-26" and "NOTICE OF APPEARANCE" of Margaret J. Bupp in the above-captioned proceeding have been served on the following persons by deposit in the United States mail; through deposit in the Nuclear Regulatory Commission's internal system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**), on this 20th day of October, 2005.

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