

September 21, 2006

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 OPPOSITION TO
INTERVENORS' PETITION FOR REVIEW OF LBP-06-19

INTRODUCTION

On August 21, 2006, the Presiding Officer issued his Final Partial Initial Decision ("Final PID") in the above-captioned proceeding. *Hydro Resources, Inc.* (Crownpoint, NM Site), LBP-06-19, 64 NRC __ (2006). Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Grace Sam and Marilyn Morris (collectively, "Intervenors") petitioned for review of the Final PID on September 11, 2006¹, claiming that the Presiding Officer erred in rejecting the Intervenors' challenges to the sufficiency of the final environmental impact statement ("EIS") prepared by the NRC staff ("Staff") during its review of Hydro Resources, Inc.'s (HRI) application for a license to perform *in situ* leach (ISL) uranium mining operations at three sites in northern New Mexico. For the reasons set forth below, the Staff hereby opposes the Petition for Review.

BACKGROUND

This proceeding involves challenges to an application by HRI for a license to perform ISL mining operations in New Mexico. The decision on appeal stems from Phase II of the instant proceeding, which specifically addressed HRI's license insofar as it authorizes mining at three sites: Section 17, Unit 1, and Crownpoint. The Presiding Officer had previously issued Phase II

¹ "Intervenors' Petition for Review of LBP-06-19," September 11, 2006 ("Petition for Review").

decisions on challenges regarding: (1) groundwater protection and restoration, and surety estimates²; (2) cultural resources³; and (3) radiological air emission controls.⁴

On August 21, 2006, the Presiding Officer issued his fourth and final decision in Phase II of the proceeding (the Final PID), ruling on challenges to the adequacy of the Staff's EIS. The Intervenor's admitted contentions claimed that the EIS: (1) fails to adequately evaluate the cumulative environmental impacts of the project; (2) contains an invalid statement of purpose and need for the project; (3) provides an insufficient analysis of alternatives; (4) fails to evaluate the impact of proposed mitigation measures; and (5) requires supplementation and recirculation for public comment. The Presiding Officer found that HRI and the Staff had demonstrated that the Intervenor's challenges to the adequacy of the EIS did not provide a basis for invalidating HRI's license.

The Intervenor's petitioned for review of the Final PID on September 11, 2006. In its Petition for Review, the Intervenor's contend that the Presiding Officer's decision regarding the sufficiency of the EIS is in error. Specifically, the Intervenor's claim that: (1) the Presiding Officer violated NEPA by refusing to require that the EIS be supplemented; (2) the Presiding Officer erred in approving the EIS's consideration of cumulative impacts of airborne radiation; (3) the Presiding Officer erred in approving the EIS's consideration of cumulative impacts on ground water resources; (4) the Presiding Officer violated NEPA in finding that the FEIS adequately addressed mitigation measures for Crownpoint municipal water wells; and (5); the Presiding Officer erred in finding that the EIS adequately addressed land use impacts and mitigation

² *Hydro Resources, Inc.* (Crownpoint, New Mexico), LBP-05-17, 62 NRC 77 (2005); *pet. for review denied*, CLI-06-01, 63 NRC 1 (2006).

³ *Hydro Resources, Inc.* (Crownpoint, New Mexico), LBP-05-26, 62 NRC 442 (2005); *pet. for review denied*, CLI-06-11, 63 NRC 483 (2006).

⁴ *Hydro Resources, Inc.* (Crownpoint, New Mexico), LBP-06-01, 63 NRC 41, *aff'd* CLI-06-14, 63 NRC ___ (2006).

measures. As discussed further below, the Staff submits that the Intervenors have not shown that the Presiding Officer's determinations are in error.

DISCUSSION

I. Legal Standard Applicable to Commission Review

The Commission's regulations in 10 C.F.R. § 2.341(b)(4) provide that the Commission may, in its discretion, grant a petition for review upon consideration of the following considerations:

- (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (iii) A substantial and important question of law, policy, or discretion has been raised;
- (iv) The conduct of the proceeding involved a prejudicial procedural error; or
- (v) Any other consideration which the Commission may deem to be in the public interest.

See also Duke Energy Corp. (McGuire Nuclear Station, Units 1 & 2; Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 58 NRC 419, 422 (2003). Findings at the hearing level will not be overturned where the brief on appeal points to no error of law or abuse of discretion that might serve as grounds for reversal of a Licensing Board or Presiding Officer's decision. *See Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-00-21, 52 NRC 261, 265 (2000).

As finder of fact the Atomic Safety and Licensing Board, or, in this instance, the Presiding Officer, is afforded great discretion by the Commission. *See, e.g., Hydro Resources, Inc.*, CLI-01-4, 53 NRC 31, 45 (2001). A factual finding by the Presiding Officer will not be overturned unless the record compels a different result. *Carolina Power & Light Co.* (Shearon Harris Nuclear

Power Plant), CLI-01-11, 53 NRC 370, 388 (2001), *aff'g* LBP-00-12, 51 NRC 247, 269-280 (2000).

II. The Presiding Officer's Determination that the EIS Need Not Be Supplemented Is Consistent With NEPA

The Intervenor's assert that, due to the Navajo Nation's enactment of the Diné Natural Resources Protection Act (DNRPA), which prohibits uranium mining or processing within Navajo Indian Country, the EIS must be supplemented. The Presiding Officer considered this argument and rejected it for two reasons: (1) the Intervenor's were precluded from raising the issue, having agreed to limit their NEPA-related arguments to those previously raised in Phase I of the license challenge; and (2) the passage of the DNRPA does not constitute a significant new circumstance or substantial change requiring a supplement to the EIS under 10 C.F.R. § 51.92(a). The Presiding Officer reached the second determination after concluding that the "Intervenor's fail[ed] to provide evidence or argument to suggest that the DNRPA calls into question any of the environmental conclusions in the FEIS." Final PID at 59. In addition, the Presiding Officer, after considering the arguments of HRI and the Staff, was persuaded by HRI's argument that, while the DNRPA might affect whether or not HRI can ultimately carry out its proposed mining activities, nothing in the legislation affects the environmental concerns related to the impact of the proposed mining activities analyzed in the EIS. *Id.* at n. 40.

On appeal, the Intervenor's offer no argument that the Presiding Officer overlooked evidence or arguments at the hearing in making his factual determination that the DNRPA does not constitute a substantial change or significant new circumstance requiring supplementation pursuant to 10 C.F.R. § 51.92(a). Rather, the Intervenor's offer only a conclusory statement that the Presiding Officer's determination is in error. Petition for Review at 3. This alone is not enough to outweigh the discretion traditionally afforded by the Commission to findings of fact by the Presiding Officer, and the decisions necessarily flowing from these findings, where no legal error or significant policy issue is demonstrated. *See Hydro Resources, Inc.*, CLI-CLI-01-4, 53

NRC 31, 46 (2001) (criticizing appeals based on “generalized claims”); *see also Shearon Harris*, CLI-01-11, 53 NRC at 383. For this reason, the Commission should not accept the Intervenors’ request for review on this issue.

III. The Presiding Officer Did Not Err with Respect to the EIS’s Consideration of Impacts of Airborne Radiation

In the Final PID, the Presiding Officer determined that the Intervenors’ claims relating to cumulative impacts on radioactive air emissions lack merit. The Intervenors had argued that the EIS fails to adequately take into account the impact of previous uranium mining activities on radioactive air emissions. Based on a consideration of the evidence presented by the Intervenors and the information in the EIS and the adjudicatory record supplementing the EIS, the Presiding Officer determined that, as a matter of fact, the EIS does properly analyze the radiological impacts of ISL operations, including the cumulative impact on airborne radiation. Final PID at 11. This determination was based on a balancing of the facts and information presented by the parties.

The Intervenors claim that the EIS does not follow the explicit guidance of the Commission with regard to analyzing cumulative impacts of existing conditions and new actions, namely that:

cumulative impacts analysis looks to whether the impacts from a proposed project will combine with the existing, residual impacts in the area to result in a significant ‘cumulative’ impact—where, in other words, the new impact is significantly enhanced by already existing environmental effects.

Hydro Resources, Inc., CLI-01-04, 53 NRC at 60-61. The Intervenors point to the statement in the EIS that the Staff has looked at “incremental” changes in airborne radiation caused by new mining activities. Petition for Review at 5. The Intervenors argue that this means that the Staff has ignored the cumulative effects of both existing radiation at the site and the future effects of the proposed activities. *Id.* To the contrary, the Presiding Officer correctly interpreted the EIS, finding that the Staff has fully discussed the current conditions at the site, and has correctly

evaluated the radiological impacts from the proposed activities. Final PID at 15. In other words, in describing the Staff's evaluation of the incremental change between current radiation levels and radiation levels caused by the proposed action, the EIS has a description concerning whether the new activities significantly enhance the existing environmental conditions resulting from previous activities. This is directly in accordance with the Commission's previous decision in CLI-01-04, as discussed above, and the Intervenors have not shown that the Presiding Officer's decision in this regard was unreasonable or in error. CLI-01-04, 53 NRC at 60-61.

IV. The Presiding Officer Did Not Err in Approving the EIS's Consideration of Cumulative Impacts on Ground Water Resources

The Presiding Officer examined the EIS's consideration of cumulative impacts on ground water resources, balancing the information provided by the Intervenors with the information in the EIS itself. Final PID at 22-25. Although noting some deficiencies in the information provided by HRI, the Presiding Officer found that, overall, the Staff's analysis was sufficient. *Id.* The Intervenors claim that, because of the admitted deficiencies in HRI's initial modeling information, the entire consideration of ground water impacts is insufficient. Petition for Review at 6-7. However, other than highlighting deficiencies already explicitly recognized and considered by the Presiding Officer, the Intervenors have not shown that the Presiding Officer's final determination of sufficiency for the ground water impacts analysis in its entirety is unreasonable as a matter of fact or law, particularly in light of the strong deference to be given to hearing-level decisions on matters of law, as discussed above. Therefore, the Intervenors' Petition for Review should not be accepted based on the Presiding Officer's discussion of ground water impacts.

V. The Presiding Officer Was Correct in Finding that the EIS Adequately Addresses Mitigation Measures for Crownpoint Municipal Water Wells

The Intervenors claimed that the EIS does not adequately address the proposed mitigation measures for the impact of the proposed action on the Crownpoint, New Mexico municipal water wells. Pursuant to NEPA, the responsible federal agency must take a "hard look"

at all proposed mitigation measures. However, a proposed “mitigation plan ‘need not be legally enforceable, funded or even in final form to comply with NEPA’s procedural requirements.’”

Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 472 -473 (9th Cir. 2000), *citing National Parks & Conservation Ass’n v. United States Dep’t of Transp.*, 222 F.3d 677, 681 n. 4 (9th Cir.2000). While it is true that the analysis of mitigation measures must be grounded by analytical data, *id.*, the Presiding Officer specifically found that the EIS contains the very data the Intervenor’s claim is missing from the EIS.⁵ Final PID at 45-47; Petition for Review at 8. Because the Intervenor’s have not set forth sufficient grounds not to afford deference to the Presiding Officer’s careful decision on the factual matter of the sufficiency of the consideration of mitigation measures, the Petition for Review should be denied with respect to this issue.

VI. The Presiding Officer Did Not Err in Finding that the EIS Adequately Addressed Land Use Impacts and Mitigation Measures

The Intervenor’s next claim that the EIS does not adequately address land use impacts and related mitigation measures, and that the Presiding Officer erred in finding the EIS adequate in this regard. Petition for Review at 8-10. On the contrary, the Presiding Officer presents a full accounting of the information in the EIS related to the impacts of the proposed mining activities on the areas around the site. Final PID at 28-31. Based on this information, the Presiding Officer found that the discussion was adequate, and that the Intervenor’s’ challenges to the information are without merit.⁶ *Id.* As with the claims above, the Intervenor’s have not shown that, on a balancing of all the evidence presented, the Presiding Officer’s determination is unreasonable or

⁵ The EIS specifically discusses the following aspects of the proposed mitigation measure of replacing Crownpoint’s municipal water wells: (1) potential suitable locations for replacement wells; (2) the agencies and regulatory authorities with whom HRI must coordinate the siting of new wells; (3) plans for local involvement in determining suitable sites for new wells; and (4) the impacts of losing the current wells on the future needs of the community. Final PID at 45-46.

⁶ Specifically, the Presiding Officer noted the FEIS’s treatment of: (1) the impact of the proposed mining activities will have on available grazing land; (2) the potential relocation of individuals currently living on the site to be mined; and (3) planned financial compensation for any relocated individuals.

contrary to law. Nor have the Intervenor presented any argument strong enough to deny the traditional deference shown to determinations made by Presiding Officers on these factual issues. The Intervenor have also failed to present any overriding policy issue justifying review of these determinations. Thus, the Commission should deny the Intervenor's Petition for Review based on the discussion of land use impacts.

CONCLUSION

The Intervenor argue that the Final PID should be reversed because several of the factual findings reached by the Presiding Officer in the Final PID were, they contend, in error. However, as discussed above, the Intervenor have failed to show that any of the findings made by the Presiding Officer are clearly erroneous, result in an error of law, or raise a policy issue justifying Commission review. Therefore, the Staff respectfully submits that the Intervenor's Petition for Review should be denied.

Respectfully submitted,

/RA by Margaret J. Bupp/

Margaret J. Bupp
Counsel for NRC Staff

Dated at Rockville, Maryland
this 21st day of September, 2006

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S OPPOSITION TO INTERVENORS' PETITION FOR REVIEW OF LBP-06-19" 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 21st day of May, 2006.

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