September 28, 1999

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

Before Peter B. Bloch, Presiding Officer

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
P.O. Box 15910	)	
Rio Rancho, NM 87174	)	ASLBP No. 95-706-01-ML
	)	
	)	

INTERVENORS ENDAUM'S AND SRIC'S RESPONSE TO HRI'S MOTION TO HOLD HEARING IN ABEYANCE AND PROPOSED LITIGATION SCHEDULE FOR SECTION 17, UNIT 1, AND CROWNPOINT; OR, IN THE ALTERNATIVE, MOTION TO REVOKE HRI'S LICENSE FOR SECTION 17, UNIT 1, AND CROWNPOINT.

INTRODUCTION

Pursuant to the Presiding Officer's directive in LBP-99-30, Partial Initial Decision Concluding Phase I (August 20, 1999), Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby respond to Hydro Resources, Inc.'s ("HRI's") Motion to Place Hearing in Abeyance (September 14, 1999) ("HRI's Abeyance Motion") and submit their Scheduling Brief for Section 17, Unit 1, and Crownpoint. As discussed below, the motion should be denied, and the hearing should be resumed immediately, under the proposed schedule below. In the alternative, Intervenors request that the Presiding

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
OFFICE OF THE SECRETARY
OF THE COMMISSION

Document Statistics

Postmark Date 7/28/99
Copies Received 3
Add'l Copies Reproduced 0
Special Distribution
OGC, RIDS

Officer dismiss the portions of the HRI license application relating to Section 17, Unit 1 and Crownpoint, and hold that the licensing proceeding for the Crownpoint Project has now concluded.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, HRI applied to the Nuclear Regulatory Commission ("NRC") for a source and byproduct materials license to build and operate an in situ leach ("ISL") uranium mine and a uranium mill on Section 8 in Church Rock, New Mexico. Application for Materials License, Hearing Record ACN 8805200339 (April 13,1988). HRI later amended the application to include processing in Crownpoint, and mining at Church Rock Section 17, Unit 1, and Crownpoint. LBP-99-30 at note 3. The NRC gave public notice of the opportunity for a hearing on the HRI license application in November of 1994. See LBP-98-9, 47 NRC 261, 264. ENDAUM, SRIC and several other organizations and individuals immediately requested a hearing. Id. at 265. Between September of 1995 and December of 1997, the Presiding Officer held the proceedings in abeyance pending the Staff's completion of its review of the license application. Id. at 266. In August of 1997, and again in January of 1998, ENDAUM and SRIC amended their hearing request and provided additional detailed statements of the concerns they wished to raise in the hearing. Id. at 266-67.

On January 5, 1998, before the Presiding Officer had ruled on any of the hearing requests, the NRC Staff issued a license to HRI, SUA-1508. The license permits mining and milling at Section 8, 17, Unit 1, and Crownpoint, subject to certain license

conditions.

More than four months after the license issued, on May 13, 1998, the Presiding Officer granted the hearing requests filed by ENDAUM, SRIC, Marilyn Morris and Grace Sam. LBP-98-9, 47 NRC 261. The Presiding Officer also admitted most of the concerns raised by ENDAUM and SRIC, which pertain to the entire Crownpoint Project.

On June 4, 1998, HRI filed a request to "bifurcate" the proceeding geographically, so only concerns related to Section 8 would be heard at this time. HRI sought indefinite postponement of the litigation with respect to Section 17, Unit 1, and Crownpoint.[1] ENDAUM and SRIC vigorously opposed HRI's request and have also appealed the Presiding Officer's order granting the request.[2]

The Presiding Officer granted HRI's motion in a Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) (September 22, 1998) ("September 22 Order"). He ruled that Intervenors may submit their written

---

[1] HRI's Request for Partial Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding at 13, 16 (June 4, 1998) ("HRI's Bifurcation Motion").

[2] The Intervenors have presented briefs on this issue before the Presiding Officer three times. See ENDAUM and SRIC's Opposition to HRI's Request for Bifurcation (June 22, 1998); ENDAUM's and SRIC's Scheduling Conference Brief (September 2, 1998); ENDAUM'S and SRIC's Response to Scheduling Briefs, at 1-2 (September 9, 1998). In addition, on September 17, 1998, Intervenors presented their oral argument regarding bifurcation, and three weeks later, sought directed certification from the Commission on the legality of bifurcation. See, Petition for Interlocutory Review of Memorandum and Order (Schedule and Partial Grant of Motion for Bifurcation) of September 22, 1998 and Request for Stay (October 7, 1998). See also, Intervenors' Petition for Review of Partial Initial Decisions LBP-18, LBP-19, LBP-99-30 (September 3, 1999).

presentations with respect to 1) any issue that challenges the validity of the license issued to HRI and 2) any aspect of the license concerning operations on Church Rock Section 8, or transportation or treatment of materials from Section 8. Id. Concerns relating only to the license conditions affecting Church Rock Section 17 or Unit 1 or Crownpoint could not be presented. Id. at 3. At the conclusion of the hearing, a determination would be made "based in part on HRI's operating plans at that time," whether issues affecting Church Rock Section 17, Unit 1, Crownpoint would be determined immediately or placed "in suspense" because they are not yet ripe. Id. at 3.

Between November 1998 and May 1999, the Intervenors submitted their evidentiary presentations regarding issues relating to Section 8 and the entire license. The Presiding Officer has ruled on all evidentiary issues, concluding with the issuance of LBP-99-30. In LBP-99-30, the Presiding Officer also ordered HRI to file a scheduling brief for the remainder of the case by September 14, 1999. Phase I Decision at 77. In place of a scheduling brief, HRI filed a Motion to place issues concerning Section 17, Unit 1, and Crownpoint in abeyance because "HRI does not intend to go forward with operations at Section 17, Crownpoint, and/or Unit 1 at this time." HRI's Abeyance Motion at 2. HRI states that License SUA-1508 does not require them to provide notice to Intervenors or the NRC Staff before beginning operations at Section 17, Unit 1, or Crownpoint, but that it would provide 30 days notice. Id. at 2, fn. 4.

ARGUMENT

I. TO HOLD THE REMAINDER OF THIS PROCEEDING IN ABEYANCE WOULD BE UNLAWFUL, UNREASONABLE, AND INEFFICIENT.

For over a year and a half, HRI has held a license to mine and mill uranium at the entire Crownpoint Project site. Under the Atomic Energy Act ("AEA"), the Intervenors are entitled to a timely hearing on the license. The National Environmental Policy Act ("NEPA") also requires timely consideration of environmental issues, *i.e.*, before the taking of potentially adverse actions. Despite these clear legal requirements, HRI repeatedly has sought to postpone the completion of a hearing on a large portion of the license it already holds. Its first request, in the June 4, 1998 Bifurcation Motion, was couched inaptly as a request for "bifurcation" of the hearing, but amounted to nothing more than a request for indefinite postponement of the hearing on Sections 17, Unit 1, and Crownpoint.[3] ENDAUM and SRIC correctly recognized that HRI was seeking an indefinite postponement, and demonstrated in their response that the relief requested would violate the Atomic Energy Act ("AEA"), the Administrative Procedure Act ("APA"), and the National Environmental Policy Act ("NEPA"); and that it would deprive ENDAUM and SRIC of due process of law. SRIC's Scheduling Conference Brief (September 2, 1998) ("Scheduling Conference Brief").

Now, HRI has dropped the term "bifurcation" and more candidly seeks the

---

[3] HRI's Request for Partial Clarification or Reconsideration of Presiding Officer's Memorandum and Order of May 13, 1998; and Request for Bifurcation of the Proceeding at 13, 16 (June 4, 1998).

indefinite postponement of the rest of the hearing. For the same reasons that ENDAUM and SRIC set forth in their Scheduling Brief, to hold the remainder of this proceeding in abeyance would serve no lawful purpose.[4] HRI must be required to defend the license it has received.

A. Holding this Proceeding in Abeyance Would Violate the AEA.

Intervenors are entitled to continue this proceeding on the license that HRI has already received because a hearing under the AEA must offer an opportunity for *meaningful public participation.* Union of Concerned Scientists v. NRC, 735 F.2d 1437, 1446 (D.C.Cir. 1984), cert. denied, 469 U.S. 1132 (1985), quoting Belloti v. NRC, 725 F.2d 1380, 1389 (D.C.Cir. 1983) (emphasis in original). In order to be considered meaningful, the hearing provided under Section 189(a)(1) of the AEA must include an opportunity to be heard on "all material factors bearing on the licensing decision raised by the hearing requester." Union of Concerned Scientists v. NRC, 735 F.2d 1443; Atomic Energy Act, 42 U.S.C. § 2239(a)(1)(A) (1994). Moreover, it must be timely.

Here, neither of these requirements would be met by the indefinite postponement of the remainder of this hearing. Because HRI has already received a license, there is no legal impediment whatsoever to its implementing the license, without notice to the NRC or any of the parties. As HRI itself has stated, "thirty days is more than adequate notice as, at present, HRI is not required to provide any notice to the parties before commencing

---

[4]ENDAUM and SRIC will not repeat in detail the arguments made in the Scheduling Conference Brief, but rather summarize them here.

operations at Section 17, Crownpoint, and/or Unit 1." HRI Abeyance Motion, September 14, 1999, at 2, fn. 4 (emphasis in original). Thus, the indefinite "postponement" of the litigation of Section 17, Unit 1, and Crownpoint would likely result in the elimination of those areas from the hearing altogether.

Moreover, the proposed postponement of the hearing would make a mockery of the concept of timeliness. HRI has now held a license for over a year and a half. Having received it, and being in the position of fully enjoying the rights it conveys, HRI must also be prepared to defend it. The delay proposed by HRI is not required for judicial economy, or for the efficient conduct of this licensing proceeding. The only purpose of the proposed delay is to serve HRI's economic convenience. This is not a purpose recognized by the Atomic Energy Act. In fact, it is a gross miscarriage of justice to require the Intervenors to stand at the ready for a period of years, waiting to see when or whether the litigation will be resuscitated, at the whim of HRI.[5]

Aside from the fact that the indefinite postponement of this case would unfairly require Intervenors to have their time and resources constantly marshaled and in readiness to respond to HRI's next whim, there are many significant aspects in which Intervenors' ability to present their case effectively and meaningfully would be severely

---

[5] The period of waiting could easily be longer than the term of HRI's license, which is five years. Under the timely renewal doctrine, *see* 10 C.F.R. § 2.109, a license automatically will be extended pending a renewal decision, if the licensee applies for renewal on a timely basis. The extension is for as long as it takes the NRC to renew the license. Moreover, the NRC has no deadline for making renewal decisions. Thus, as a practical matter, the HRI license may be extended indefinitely, now that it has been granted.

prejudiced by the postponement of the rest of this proceeding. Throughout this proceeding, Intervenors consistently stated that their concerns with the project could not be broken into disparate, geographic parts as the Presiding Officer has permitted through the bifurcation. There are numerous issues common to all of the mining sites, which are most efficiently addressed in a single proceeding rather than in separate proceedings. The safety and environmental findings undergirding the issuance of the license are not restricted to any particular part of the Crownpoint Project, but cover all aspects of the Project.[6] Should the hearing on Section 17, Unit 1 and Crownpoint go forward now, Intervenors will be more likely able to use the same groundwater scientists, economists, cultural resource experts and other experts that they used for Section 8. However, the longer the remainder of the hearing is delayed, the chance grows that Intervenors would have to hire different witnesses for separate phases that would be held at some unknown point in the future when HRI decides to go forward with the remaining components. Intervenors would be severely prejudiced in this way. Exacerbating the effect of bifurcation by holding this proceeding in abeyance would effectively dilute the Intervenors' arguments by segregating them artificially along geographic lines, effectively denying them a meaningful hearing on the significant and material licensing issues that they have raised.

---

[6] *See, e.g.,* FEIS, at 4-120 - 4-127 (cumulative impact assessment evaluates entire project), 5-1, 4-97, Table 4.27 (cost-benefit analysis includes calculation of royalty income,which will not be generated at Church Rock), Table 5.4 (annual project benefits analysis does not distinguish between mine sites).

B. Holding this Proceeding in Abeyance Would Violate the APA.

The Administrative Procedures Act requires that agencies, *"within a reasonable time, shall set and complete proceedings* required to be conducted . . . and shall make its decision." 5 U.S.C. § 558(c) (emphasis added).[7] Postponing significant portions of this proceeding, at the discretion of the licensee, frustrates the mandate of the APA to conclude a timely hearing on the Crownpoint Project. The Presiding Officer has no lawful basis for indefinitely postponing most of the hearing on a license that has issued.

C. Holding this Proceeding in Abeyance Would Violate NEPA.

As discussed at length in ENDAUM's and SRIC's Scheduling Conference Brief at 19-24, HRI's proposal to delay the completion of this hearing would result in the unlawful segmentation of the NEPA analysis of the Crownpoint Project. NEPA unequivocally requires that the environmental impacts of a proposed project be considered in their entirety, rather than evaluated piecemeal. Here, as recognized in the FEIS, the impacts of all aspects of the Crownpoint Project, including Sections 8 and 17, Unit 1 and Crownpoint, must be considered together, as a whole. Moreover, in order to avoid irretrievable impacts before the analysis is complete, consideration of the entire project must be completed before any single piece of the project commences.

---

[7] As provided in 5 U.S.C. § 706(1), APA § 558 is enforceable. See North American Van Lines, Inc., v. U.S. Interstate Commerce Commission, 412 F. Supp. 782, 793 (N.D. Ind. 1976) (unreasonable delay of administrative action becomes reviewable "where the decision to delay or withhold action has become concrete, and where the agency's firm commitment to the decision is evidenced by affirmative actions on its part").

The NEPA analysis of the Crownpoint Project will not be complete until the Presiding Officer issues his decision and the Commission either declines or concludes its review on all contested NEPA issues, concerning all aspects of the project.[8]

In their 1998 Scheduling Conference Brief, ENDAUM and SRIC set forth the manner in which the then-proposed "bifurcation" of the proceeding would violate NEPA. As they noted, by allowing construction and operation to go forward on Section 8 before completing the review of the entire project, the Presiding Officer risks taking a wrongly favorable view of the rest of the project. Segmentation of the project is particularly harmful to the environmental justice interests of Native American people in the Crownpoint area, because they have already been subjected to many years of exposure to uranium from abandoned uranium mines. Moreover, consideration of the groundwater impacts of mining on Section 8 and 17 will be distorted by piecemeal consideration of these hydrologically related areas. Nothing that has occurred in this proceeding has abated the concerns raised in the Intervenors' Scheduling Conference Brief, and thus they are adopted and incorporated by reference herein.

In fact, the current circumstances only serve to further illustrate the gravity of the NEPA violation that is already in process now, and would be further exacerbated

---

[8] See, 10 C.F.R. § 51.94 (the FEIS must "accompany the application . . . through, and be considered in, the commission's decision making process." See also, Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1117-1118 (D.C. Cir. 1971) (concluding that Congress intended "that environmental factors, as compiled in the "detailed statement," [*i.e.*, the FEIS], be *considered* through any agency review process" (emphasis in original)).

by the granting of HRI's Motion. The Presiding Officer has already examined the Section 8 operation piecemeal, in isolation from the rest of the Crownpoint Project, and found it to be acceptable. Although the Presiding Officer has acknowledged that there may be potential unacceptable environmental impacts from other parts of the Crownpoint Project, he has failed to examine the impacts of mining in the context of the entire Crownpoint Project. See, e.g., LBP-99-19, slip op. at 8-9 (May 13, 1999), in which the Presiding Officer notes a possible radium risk from Section 17, but postpones consideration of the risk to another time.

By segmenting his decision making in this way, the Presiding Officer sets up a distorted view of the Crownpoint Project. Rather than looking at the impacts of the Crownpoint Project as a whole, each small piece of the project must have a significant impact to be worthy of consideration. This kind of myopic decision making violates NEPA. NEPA and its implementing regulations require consideration of the cumulative effects of a project, and define cumulative effect as "the incremental impact of the action when added to other past, present, and reasonably foreseeable actions."[9]

Moreover, if construction and operation of Section 8 go ahead, their now prospective impacts will become past impacts, and mitigative measures and alternatives for the site will have been foreclosed. Under the circumstances, Section 8 may as well

---

[9] 40 C.F.R. § 1508.7. The regulations also state that "[c]umulative impacts can result from *individually minor* but collectively significant actions taking place over a period of time." *Id.*

have been independently licensed and reviewed in complete isolation from the rest of the Crownpoint Project. This would make a mockery of the Staff's effort to ensure consideration of the Crownpoint Project as a whole, by addressing the entire project in one FEIS.

Finally, given HRI's pattern of conduct so far, HRI seems very likely to continue to try to splinter the environmental analysis of the Crownpoint Project into as many small sections as possible. It appears that HRI would like to take this legal proceeding one small piece at a time, with each incremental operational step resulting in a separate licensing review. Thus, one can expect that if HRI ever decides to go ahead with the proceeding beyond Section 8, the next request will be for just Section 17, followed by just Unit 1, followed by just Crownpoint. As a result, the entire Crownpoint Project will have been broken down into separate licensing proceedings, without any of the cumulative and comprehensive environmental review required by NEPA. The Presiding Officer should not countenance any such further violation of NEPA.

D. Holding this Proceeding in Abeyance Would Violate the Intervenors' Due Process Rights.

Intervenors' liberty interests will be violated if they are denied a prompt hearing on all the issues raised with regard to HRI's already existing license. In Armstrong v. Manzo, 380 U.S. 545 (1965) the Supreme Court noted that due process includes the right to be heard in a "meaningful time and a meaningful manner." 380 U.S.

552.

Accordingly, the Presiding Officer should deny HRI's Motion to place this proceeding in abeyance and continue with the orderly resolution of the Intervenors' issues consistent with the proposed schedule.

E. Proposed Schedule for Conclusion of this Proceeding.

The following schedule for presentations on the remaining areas of concern:

Area of Concern	Intervenors' Filing Deadline
Performance Based Licensing, Financial Assurance for Decommissioning, Financial and Technical Qualifications	November 30, 1999[10]
Liquid Waste Disposal	January 15, 2000
Cumulative Impacts and Segmentation, Other NEPA Issues	February 15, 2000
Cultural Resources Protection, Environmental Justice	March 15, 2000
Radiological Air Emissions	April 15, 2000
Groundwater Protection	May 15, 2000

II. IF THE PRESIDING OFFICER DECIDES NOT PROCEED WITH THE HEARING, HRI'S LICENSE FOR SECTION 17, UNIT 1, AND CROWNPOINT SHOULD BE REVOKED.

There is no obstacle to litigation of HRI's license other than HRI's reluctance to

[10] Intervenors have grouped these three issues together on the basis that they have completed most of their briefing on these issues. However, supplemental briefing may be necessary to address issues relating specifically to Section 17, Unit 1, and Crownpoint.

defend that license. If HRI is not prepared to defend the Crownpoint, Unit 1, and Section 17 portions of the license it now enjoys, then the Presiding Officer should require that those portions of the license be revoked. Abeyance may not be used as a shield against the complete and timely licensing hearing to which the Intervenors are entitled.

Therefore, if the Presiding Officer decides not to go ahead with the hearing on Section 17, Crownpoint, and Unit 1, he should dismiss the license application and thereby impel the revocation of HRI's license for those portions of the Crownpoint Project. If HRI wishes to mine any of these areas at some point in the future, it must be required to submit a new application.

III. CONCLUSION

For all the foregoing reasons, the Presiding Officer should deny HRI's Motion to Place Hearing in Abeyance and follow Intervenors' suggested schedule for litigating Section 17, Unit 1, and Crownpoint. In the alternative, the Presiding Officer should dismiss HRI's application for a license for Section 17, Unit 1, and Crownpoint.

Respectfully submitted,

Geoffrey H. Fettus
Douglas Meiklejohn
Lila Bird
NM ENVIRONMENTAL LAW CENTER
1405 Luisa Street, Suite 5
Santa Fe NM 87505
(505) 989-9022

Diane Curran
HARMON, CURRAN, SPIELBERG,
& EISENBERG, LLP
1726 M Street, N.W., Suite 600
Washington DC 20036
(202) 328-6874

September 28, 1999

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 15910	)	ASLBP No. 95-706-01-ML
Rio Rancho, NM 87174	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 1999, I caused to be served copies of the foregoing:

RESPONSE TO HRI'S MOTION TO HOLD HEARING IN ABEYANCE AND PROPOSED LITIGATION SCHEDULE FOR SECTION 17, UNIT 1, AND CROWNPOINT; OR, IN THE ALTERNATIVE, MOTION TO REVOKE HRI'S LICENSE FOR SECTION 17, UNIT 1, AND CROWNPOINT

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff

Office of Commission Appellate Adjudication
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Administrative Judge
Peter B. Bloch*
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington D.C. 20555

Administrative Judge
Thomas D. Murphy*
Special Assistant
Atomic Safety and Licensing Board
Mail Stop - T-3 F23
U.S. Nuclear Regulatory Commission
Washington DC 20555

Jep Hill, Esq.
Jep Hill & Associates
P.O. Box 2254
Austin, TX 78768

Mitzi Young, Esq.
John T. Hull, Esq.
Office of the General Counsel*
Mail Stop - O-15 B18
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Eric Jantz, Esq.
DNA - People's Legal Services
PO Box 116
Crownpoint, NM 87313-0116

Diane Curran, Esq.
HARMON, CURRAN, SPIELBERG &
EISENBERG, LLP*
1726 M Street, N.W., Suite 600
Washington DC 20036

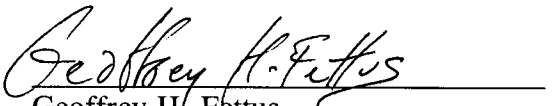
Levon Henry, Attorney General
Steven J. Bloxham, Esq.
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

Anthony J. Thompson, Esq.
Frederick Phillips, Esq.
David Lashway, Esq.
SHAW PITTMAN
2300 "N" Street, N.W.
Washington, D.C. 20037-1128

William Paul Robinson
Chris Shuey
SRIC
P.O. Box 4524
Albuquerque, NM 87106

Kathleen Tsosie
ENDAUM
P.O. Box 150
Crownpoint, NM 87313

Dated at Santa Fe, New Mexico,
September 28, 1999,



Geoffrey H. Fettus