UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

November 23, 1999

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

OPPOSITION OF HYDRO RESOURCES, INC. TO PETITION FOR INTERLOCUTORY REVIEW OF MEMORANDUM AND ORDER OF OCTOBER 19, 1999 (LBP-99-40)

I. INTRODUCTION

Hydro Resources, Inc. ("HRI"), respectfully opposes the Petition (hereinafter, "Petition") of Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (hereinafter, jointly, "Intervenors") requesting review of the Presiding Officer's Memorandum and Order of October 19, 1999 (LB-99-40), placing the remainder of the above-captioned hearing in abeyance (hereinafter, "Order"). HRI opposes the Petition on the grounds that Intervenors fail to show that review of this interlocutory Order is warranted.

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II. ARGUMENT

A. Intervenors Fail to Satisfy the Standard for Review

Intervenors concede that they are seeking interlocutory review of the Order placing in abeyance certain aspects of the instant hearing.[1] Petition at 1. The Order is simply a scheduling determination, "not a final decision of the whole controversy."[2]

An order of the Presiding Officer is final for appellate purposes where it either disposes of a major segment of a case or terminates a party's right to participate. Orders which do neither are interlocutory. Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-731, 17 NRC 1073, 1074-75 (1983); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-787, 20 NRC 1097, 1100 (1984). Interlocutory appellate review of a Presiding Officer's orders is disfavored and will be undertaken only in the most compelling circumstances. Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 2 and 3), ALAB-742, 18 NRC 380, 383 n.7 (1983), citing Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-271, 1 NRC 478, 483-86 (1975); Sequoyah Fuels Corp. and General Atomics (Gore, Oklahoma site), CLI-94-11, 40 NRC 55, 59 (1994).

"No interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." 10 C.F.R. § 2.730(f); see also In re HRI, 47 NRC 314, 325 (1999) ("Even legal error does not necessarily justify interlocutory review. Instead, Intervenors

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[1] Pursuant to the Presiding Officer's Memorandum and Order, Scheduling and Partial Grant of Motion for Bifurcation, slip op. at 2-3 (September 22, 1998), at Phase I of the hearing Intervenors have been entitled to address "any issue that challenges the validity of the license issued to HRI . . . .any aspect of the HRI license concerning operations on Church Rock Section 8 or with respect to the transportation or treatment of materials extracted from Section 8." Thus, on its face, the Presiding Officer's bifurcation order afforded Intervenors the opportunity to be heard on *any* issue having to do with the validity of HRI's license.

[2] Black's Law Dictionary defines "interlocutory" as: "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or

need to demonstrate that they are threatened with 'immediate and serious irreparable impact which, as a practical matter, could not be alleviated through a petition for review of the presiding officer's final decision.'") (internal citations omitted). Interlocutory appeal will be granted only where the Presiding Officer's order either (1) threatens the appellant with immediate and serious irreparable harm that could not be remedied by a later appeal, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. 10 C.F.R. § 2.786(g); Georgia Power Company (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). Intervenors have failed to make this showing.

1. Intervenors have not shown serious and irreparable harm.

Intervenors do not say how they suffer serious or irreparable harm by the Presiding Officer's Order deferring hearing on issues related specifically to phases of the Crownpoint project that may never be developed. Intervenors complain that as a result of placing the hearing of specified issues in abeyance, "it appears to be entirely within the Commission's discretion to consolidate and postpone pending petitions for review of any single aspect of the case until all aspects of the case . . . have been heard. . . . such a consolidated review could be put off for years, if not forever." Petition at 10.[3]

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matter, but is not a final decision of the whole controversy." *Black's Law Dictionary*, Fifth Edition, at 731 (1979).

[3] Intervenors also state that because the U.S. Court of Appeals for the District of Columbia Circuit previously dismissed their petitions for review of four of the Presiding Officer's Partial Initial Decisions in this matter on the grounds that the issues addressed by those petitions were then pending before the Commission, the decision to place the remainder of this hearing in abeyance "calls into question whether Intervenors may seek judicial review of any single aspect of the HRI licensing decision until all aspects have been reviewed by the Commission." Petition at 10, n. 12. The Court of Appeals dismissal, however, appears to have been based on the fact that judicial review was inappropriate where Commission review of the same issues was pending. Surely, once the Commission renders a final order concluding Phase I of this

Intervenors appear to have forgotten that they already have requested Commission review of all issues addressed by Phase I of this hearing and that the Commission either already has considered (and ruled upon) or presently is considering those requests.

Intervenors argue that placing this matter in abeyance acts as an incentive for HRI to "wait out" the Intervenors' readiness to continue this license challenge and to go forward only after Intervenors' resources and/or resolve have been exhausted. Petition at 4-5. Intervenors' argument does not withstand scrutiny. First, as the Presiding Officer has noted, Intervenors may readily preserve the testimony of their experts at little cost or effort. Further, to suggest that HRI's determination regarding when and whether to go forward with the Crownpoint project beyond Section 8 will be based on anything other than market conditions and HRI's ability to capitalize on them strains credulity.[4] Intervenors state that the Order "irreparably injures the Intervenors' interest under NEPA in obtaining a full and fair review of the environmental impacts of the Crownpoint Project," but fails to say *how* they are "irreparably" injured and fails to cite any legal authority for this proposition.

2. Intervenors have failed to show that placing the hearing in abeyance will affect the proceeding in a pervasive and unusual manner.

a) Placing the hearing in abeyance does not violate the AEA or the APA.

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hearing, then Phase I of this hearing is complete and becomes a final agency action properly subject to appellate judicial review pursuant to the Hobbs Act.

[4] This argument is further undermined by the fact that Intervenors, or at least SRIC, have been involved in this matter for approximately ten years and have offered no indication that they will not continue their dogged attempt to stop this project by whatever means necessary. Inasmuch as the Order requires eight months' notice prior to commencing activity at any site other than Section 8, all parties will have ample time to prepare for the remainder of the hearing, should it become necessary.

Intervenors' argument that the deferral of further adjudication resulting from the Presiding Officer placing the remainder of the proceeding in abeyance violates the hearing requirements of the Atomic Energy Act (AEA) and the Administrative Procedures Act (APA) is without merit. Intervenors' reliance on Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C.Cir. 1984), cert. denied, 469 U.S. 1132 (1985) (Union of Concerned Scientists), and AEA section 189(a), 42 U.S.C. § 2239(a) is misplaced. As the Staff pointed out below (Staff Response to Motion to Place Hearing in Abeyance (hereinafter, Staff Abeyance Response) at 5), Union of Concerned Scientists concerned the two-step licensing procedure applicable to nuclear power plants. See Union of Concerned Scientists, 735 F.2d at 1438-39. The court cited, but expressed no disagreement with, City of West Chicago v. NRC, regarding AEA hearing requirements in materials licensing cases.

As also discussed by the Staff below,

> in licensing in situ leach mining operations, detailed information is not available on a well-field-specific basis until the well field is ready to be brought into production. The consequent absence of technical detail comports with the general licensing standards of 10 C.F.R. § 40.32, under which the Staff, in evaluating HRI's license application, determined (1) that sufficient hydrogeologic information is known about the general area in question to justify issuing a license; and (2) that the mining methods to be used are consistent with established ISL techniques. Pursuant to 10 C.F.R. § 40.32, ISL applicants must still demonstrate the general feasibility of conducting ISL mining in a geographic area in a safe and environmentally acceptable manner. However, in evaluating ISL license applications, the Staff does not require an ISL applicant to provide fully-detailed information on all planned well fields, since such information is not then available. Cf. Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159, 178 n.32 (1974) (in licensing nuclear plant, little value in considering

> decommissioning methods many years before the fact, at a time when decommissioning knowledge base low).

Staff's Abeyance Response at 5-6.

Intervenors note correctly that the AEA and APA mandate that an interested party is entitled to a meaningful hearing conducted in a timely manner. Petition at 7-8. Intervenors cannot reasonably argue that they have not been afforded a meaningful hearing on all issues associated with the validity of HRI's license and the first phase of contemplated operations or that that hearing has not been conducted in a reasonably timely manner. See September 22, 1998 Order. The AEA and APA do not mandate that a hearing must be conducted presently on facts not yet adduced and thus not in current controversy. The Presiding Officer determined that deferring litigation of factual issues alleged to be associated with contemplated future phases of this project that may never be effectuated was reasonable to avoid potentially needless litigation and its attendant wasted resources. Such scheduling determinations do not deprive Intervenors of their right to a timely, meaningful hearing; Intervenors do not demonstrate how this violates the AEA or the APA.

Finally, in a footnote on page 8, Intervenors assert a due process claim stating that LBP-99-40 would violate Intervenors' due process right to a prompt hearing on their health and safety and environmental concerns. Their due process argument is flawed, and does not form a basis for the relief sought.

As the Staff argued below, the City of West Chicago v. NRC is controlling on the question of whether Intervenors have constitutionally protected liberty and property interests at stake here. In City of West Chicago, the court reviewed the NRC's approval of a Part 40 licensee's decommissioning plan, under which the licensee began storing

contaminated material onsite, including tailings from the milling of thorium ore. See 701 F.2d at 637. In addressing the City's argument that the NRC wrongfully denied it a formal, trial-type adjudication,[5] the court stated, in pertinent part:

> The City argues that the NRC proceedings deprived it of liberty or property interests without due process of law. Yet generalized health, safety and environmental concerns do not constitute liberty or property subject to due process protection.

City of West Chicago v. NRC, supra, 701 F.2d at 645. Notably, Intervenors fail to distinguish, or otherwise explain, why this rule is not controlling here.

Assuming, arguendo, that Intervenors stated a valid due process claim, their argument still must fail. Intervenors cannot reasonably claim that they have been denied a hearing on their concerns. A hearing record exceeding 20,000 pages puts the lie to any such claim. By the Order placing this hearing in abeyance, Intervenors have been denied only the right to litigate now facts that, having not yet been adduced or placed in controversy, cannot now be litigated. Moreover, the Order expressly recognizes Intervenors' right to additional hearing when and if Intervenors' stated concerns with contemplated future phases of the project actually are implicated.

Accordingly, Intervenors' due process argument fails to provide an adequate basis for the relief sought.

b) Placing the hearing in abeyance does not violate NEPA.

Intervenors declare that placing the proceedings in abeyance violates NEPA because "[R]egardless of whether the Staff's FEIS considered the Crownpoint Project as

[5] During the fall of 1981, the City and the licensee were allowed to submit written arguments only. *See Kerr-McGee Corporation, supra*, CLI-82-2,15 NRC 232, at 241-44.

whole (sic), the crucial fact remains that the Presiding Officer has not considered the project as a whole in this adjudicatory proceeding." Petition at 8. Intervenors' allegation is contradicted by the Presiding Officer's own statements and is incorrect. Additionally, Intervenors misapprehend NEPA and the cases interpreting it.

The National Environmental Policy Act, 42 U.S.C. § 4321 et seq., requires that all federal agencies use a "systematic, interdisciplinary approach" to incorporate environmental considerations "in decision-making which may have an impact on man's environment." 42 U.S.C. § 4332. For any "major Federal actions significantly affecting the quality of the human environment," a detailed Environmental Impact Statement ("EIS") must be prepared. Id.

Interpreting NEPA, the courts have made clear that "environmental factors, as compiled in the (EIS), be considered through agency review processes." Calvert Cliffs' Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F. 2d 1109, 1118 (D.C. Cir. 1971). Moreover, the courts have made clear that consideration of environmental consequences in an EIS may not be confined to discrete component parts of a contemplated project.

"A comprehensive impact statement may be necessary in some cases . . . thus, when several proposals . . . that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together." Kleppe v. Sierra Club, 427 U.S. 390, 410; 96 S.Ct. 2718, 2730; 49 L.Ed. 2d 576 (1976). "'Segmentation' or 'piecemealing' occurs when an action is divided into component parts, each involving action with less significant environmental effects. (citation omitted). Segmentation is to be avoided in

order to 'insure that interrelated projects [,] the overall effect of which is environmentally significant, not be fractionalized into smaller, less significant actions. (citation omitted). . . . proposals should be included in the same EIS if they are 'connected,' that is, if they are 'closely related' such that they are 'interdependent parts of a larger action and depend on the larger action for their justification. 40 C.F.R. § 1508.25(a)(1)(iii) (citations omitted). Town of Huntington v. Marsh, 859 F.2d 1134, 1142 (2d Cir. 1988).

NEPA, and the cases interpreting it, make clear that the FEIS is to assess the entire contemplated project and may not break up or segment the project into component parts. As noted by the Staff in its Response to the Petition, "[O]nce an adequate EIS covering an entire project is issued, as is the case here, the project may be completed in stages. See Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 447-48 (7th Cir. 1990), citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1990)." Staff Response to Intervenors' Petition for Interlocutory Review at 8.

In this case, the FEIS assesses the contemplated project in its entirety and Intervenors have had an opportunity to challenge the entire FEIS. That the Presiding Officer has considered the FEIS throughout this proceeding is made clear in his Partial Initial Decisions. See, e.g., Partial Initial Decision Concluding Phase I, LBP-99-30, at 56-73.

NEPA requires that NRC take a "hard look" at the entirety of the proposed project, that that "hard look" be memorialized in an FEIS, and that that FEIS be considered by the NRC throughout the decision-making process. NEPA's requirements have been adhered to in this case. NEPA does not preclude deferring "current litigation of matters not in current controversy." Order at 4.

c) Commission and judicial review are not foreclosed by the abeyance order.

Intervenors' final argument, that they are entitled to interlocutory review because placing the hearing in abeyance pervasively and unusually frustrates Commission and judicial review of HRI's license, also misses the mark and provides no basis for Intervenors' requested review. On its face, the Order seems to have no bearing on the issue of Commission review of the Presiding Officer's PIDs. As noted above (and as the Commission is, of course, aware), the Commission previously has considered Intervenors' request for review of the initial PIDs and presently has pending Intervenors' request to review LBP-99-30; Intervenors fail to demonstrate how placing the remainder of this hearing in abeyance has any bearing on the prior or pending requests for Commission review of PIDs previously issued by the Presiding Officer.

Intervenors' misguided and speculative musings concerning what the Commission may do in response to Intervenors' substantive review petitions likewise fail to establish that the Order frustrates judicial review. Intervenors offer little support for this claim. In any event, as discussed herein at footnote 3 (at 3-4), Intervenors fail to explain how the Order precludes judicial review of a final order of the Commission disposing of Phase I of this proceeding.

III. CONCLUSION

For all of the reasons discussed above, Intervenors' Petition for Interlocutory Review fails to satisfy the Commission's standards for granting interlocutory review of the Presiding Officer's Order. Accordingly, Intervenors' Petition should be denied.

Respectfully submitted this 23rd day of November, 1999.

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NUCLEAR REGULATORY COMMISSION

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HYDRO RESOURCES, INC. P.O. Box 15910 Rio Rancho, New Mexico 87174	)	Docket No. 40-8968-ML ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing documents, Opposition to Marilyn Morris' and Grace Sam's Petition for Review of Presiding Officer's October 19, 1999, Order To Hold Hearing In Abeyance and Opposition to EDNAUM and SRIC's Petition for Interlocutory Review of Memorandum and Order of October 19, 1999, in the above-captioned proceeding have been served on the following by electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 23rd day of November, 1999.

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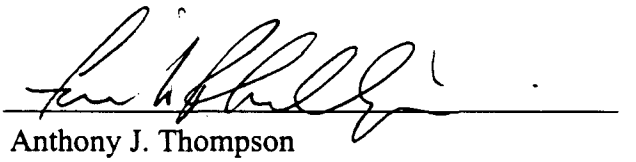

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