

October 8, 1998
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

BEFORE THE PRESIDING OFFICER

In the Matter of)	
)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)	
2929 Coors Road, Suite 101)	Re: Leach Mining and Milling License
Albuquerque, New Mexico 87120)	

NRC STAFF RESPONSE TO ENDAUM AND SRIC REQUEST
FOR DIRECTED CERTIFICATION OF BIFURCATION ORDER

INTRODUCTION

On September 30, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed a request asking that the Presiding Officer certify to the Commission his decision to bifurcate the proceeding as stated in a Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order). ENDAUM's and SRIC's Request for Directed Certification of Bifurcation Order, dated September 30, 1998 (Request), at 1. For the reasons set forth below, the Staff opposes the motion.

BACKGROUND

This proceeding concerns the application of Hydro Resources, Inc. (HRI or Licensee) to construct and operate an in-situ mining project at Church Rock Sections 8 and 17, Crownpoint and Unit 1, located in McKinley County, New Mexico. LBP-98-9, 47 NRC 261, 264 (1998); NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico," dated February 1997 (FEIS), at 1-1. The development and operation of HRI's

19621

facilities are scheduled to occur incrementally (well field by well field) over a twenty-year period and are expected to begin at Section 8 at Church Rock inasmuch as the license prohibits HRI from injecting lixiviant at either Unit 1 or Crownpoint prior to successfully demonstrating groundwater restoration at Section 8. *See Hydro Resources, Inc. CLI-98-8, 47 NRC 314, 318-19 (1998).*¹

After the admission of Intervenor in the proceeding, HRI filed a motion requesting that the proceeding be bifurcated to consider Church Rock Section 8 issues first. *See 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, dated June 4, 1994, at 2-3 (Bifurcation Motion).* During a September 17, 1998, scheduling conference convened in Crownpoint, New Mexico, the Presiding Officer, *inter alia*, heard arguments concerning whether the proceeding should be bifurcated or conducted in phases.² In a Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated

¹ HRI can commence preinjection activities associated with the construction and operation of a processing facility at either Crownpoint or Unit 1 and may undertake ground-disturbing activities at all three sites (e.g., ground clearing, construction of access roads, and the digging of trenches for the installation of well field process fluid trunk lines and gathering lines). CLI-98-8, 47 NRC at 319.

² *See, e.g.,* Prehearing Conference Transcript at 154-165, 167-171, 175-188. The issue was also addressed in filings. *See NRC Staff's Response to July 30 Order, dated August 31, 1998, at 2; ENDAUM's and SRIC's Scheduling Conference Brief, dated September 2, 1998, at 6-25; Scheduling Conference Brief of Marilyn Morris and Grace Sam, dated September 2, 1998, at 2-13; HRI's Brief on Suggested Scheduling Submitted Pursuant to the Presiding Officer's July 30, 1998 Memorandum and Order, dated September 2, 1998, at 2-3; Marilyn Morris' and Grace Sam's Response to Briefs Filed by HRI and NRC Staff, dated September 9, 1998, at 1-2; ENDAUM's and SRIC's Response to Scheduling Briefs, dated September 9, 1998, at 1-2; HRI's Response to Scheduling Conference Briefs of All Petitioners, dated September 9, 1998, at 3-6; NRC Staff's Response to September 2 Intervenor Briefs, dated September 9, 1998, at 3-5.*

September 22, 1998 (unpublished) (September 22 Order), the Presiding Officer concluded that HRI's primary concern was that it not be required to undertake a detailed defense of portions of its project where licensed activities would not begin for a number of years.³ September 22 Order at 2. HRI's motion was supported by the Staff but opposed by Intervenor, who argued, in part, that bifurcation would require them to put on their case in a piecemeal and wasteful manner.⁴ After considering the arguments of the parties, the Presiding Officer concluded that

Intervenor would not be prejudiced if they are permitted to challenge the issuance of the HRI license but they are prohibited, on the ground of ripeness, from making detailed challenges to parts of the project that have been scheduled many years into the future and that will be completed only if conditions in the uranium market permit profitable mining at that time.

Id. The Presiding Officer further ruled that Intervenor could submit "written presentations, within the scope of their germane concerns, with respect to any issue that challenges the validity of the license issued to HRI," with respect to "any aspect of the HRI license concerning operations on Church Rock Section 8 or with respect to the transportation or treatment of material extracted from Section 8," and that "other concerns may not be

³ HRI argued that (unlike reactor licensing) the site-specific nature, as well as the well field by well field progression of in-situ leach mining projects, results in many technical details concerning operations being determined only when a well field has been constructed and is ready to begin production. *See* Bifurcation Motion at 2-11. The Staff supported this view in explaining the rationale behind various conditions in the HRI license. *See* NRC Staff Response to HRI's Motions for Reconsideration and Bifurcation, dated June 26, 1998 (Staff Bifurcation Response), at 4-13.

⁴ Staff Bifurcation Response at 1-2, 13-16; ENDAUM's and SRIC's Opposition to HRI's Request for Reconsideration or Clarification of LBP-98-9 and HRI's Request for Bifurcation, dated June 22, 1998, at 1, 14-21.

presented in this phase of the proceeding. September 22 Order at 2-3. The Presiding Officer explained (*id.* at 3):

[C]oncerns relating only to the license conditions affecting Church Rock Section 17 or to Unit One or to one of the Crownpoint sections, may not now be presented as part of the first phase of this proceeding. A determination will be made at the conclusion of the first phase of the proceeding, based in part on HRI's operating plans at that time, whether [such issues] would be determined immediately or would be placed in suspense because they are not yet ripe for determination.

Intervenors seek directed certification of the Presiding Officer's decision to bifurcate the proceeding. Request at 1.

DISCUSSION

A. Standards for Motions for Seeking Certification to the Commission

The presiding officer "may refer [a] ruling promptly to the Commission" upon notification of the parties in writing, "when in the judgment of the presiding officer [a] prompt decision is necessary to prevent detriment to the public interest or unusual delay or expense. 10 C.F.R. § 2.1237⁵ and 2.730 (f); *See also Puerto Rico Water Resources Authority* (North Coast Nuclear Power Plant, Unit 1) ALAB-361, 4 NRC 625 (1976).⁶ Unless ordered otherwise, neither the filing of a motion requesting certification nor the certification of a question to the Commission stays the proceeding or extends the time for

⁵ This section provides that motions presented in a Subpart L proceeding must be presented and disposed of in accordance with 10 C.F.R. § 2.730(a) - (g).

⁶ For example, the fact that a movant could not recoup the time and financial expense needed to litigate late-filed contentions is a factor present when any contention is admitted and thus does not provide the type of unusual delay that warrants interlocutory review. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-706, 16 NRC 1754, 1758 n. 8 (1982), *citing, Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 114 (1982).

the performance of any act. 10 C.F.R. § 2.730(g). The movant has the burden of proof to show that the motion should be granted unless the presiding officer orders otherwise. 10 C.F.R. § 2.1237(b).

The regulations also provide that discretionary interlocutory review of a referred ruling pursuant to 10 C.F.R. §§ 2.730(f) and 2.786(g) is warranted if the petitioner shows that the matter either (1) threatens the party adversely affected by it 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, or (2) affects the basic structure of the proceeding in a pervasive or unusual manner. *Safety Light Corp.* (Bloomburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992); *Hydro Resources, Inc.*, CLI-98-8, 47 NRC 314, 320 (1998).

Generally speaking, a presiding officer should only certify those legal or policy questions that, in his judgment, are significant and require prompt appellate resolution. *Statement of Policy on Conduct of Licensing Proceedings*, CLI-81-8, 13 NRC 452, 456 (1981); *Virginia Electric and Power Co.* (North Anna Power Station, Units 1 and 2), ALAB-741, 18 NRC 371, 375 (1983); *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), ALAB-791, 20 NRC 1579, 1583 (1984). Traditionally, the authority to certify questions to the Commission should be exercised sparingly since, absent a compelling reason, certification will be declined. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-421, 6 NRC 25, 27 (1977).

On the otherhand, the Commission recently encouraged boards "to certify novel legal or policy questions related to admitted issues to the Commission as early as possible

in the proceeding" and indicated that the Commission will evaluate any matter put before it to ensure that interlocutory review is warranted. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (Policy Statement).

As discussed below, however, the decision to conduct this proceeding in phases is basically a scheduling order, which is a matter of discretion of the presiding officer and should not be disturbed absent extraordinary circumstances. *See Virginia Electric Power & Co.* (North Anna Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 467 (1980); *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 95 (1986).

B. Certification of the Presiding Officer's Decision Is Not Warranted

Intervenors' motion for directed certification should be denied inasmuch as a compelling reason for certification is not discernible.

Intervenors claim (1) that referral to the Commission is warranted because bifurcation would be detrimental to the public interest and would create unusual delay because it "indefinitely postpones a hearing" on a license that has already issued and concerning which the Intervenors are "prepared to go ahead with their case," and (2) that the basic structure of the proceeding has been affected in a pervasive or unusual manner. Request at 4-5. Intervenors further argue that the environmental segmentation issue it seeks to raise is appropriate for interlocutory review and is similar in consequence to a segmentation issue currently being addressed by a Commission *sua sponte* review. *See* Request at 5-6, *citing Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and

2), CLI-77-8, 5 NRC 503 (1977); *North Atlantic Energy Service Corp.* (Seabrook Station, Unit No. 1), CLI-98-18, 48 NRC ____ (September 17, 1998).

While the Staff does not dispute that Commission guidance on a matter of law or policy is helpful to adjudicatory boards,⁷ the instant request does not appear to satisfy the requirements for referral or certification. The Request contains conclusory assertions that proffer no basis to conclude that the conduct of the proceeding in phases will be a detriment to the public interest, cause unusual delay or expense, threaten Intervenor's with immediate and serious irreparable impact, which could not be alleviated by review of the final decision in the proceeding,⁸ or affect the basic structure of the proceeding in a pervasive or unusual manner. *See* 10 C.F.R §§ 2.730(f) and 2.786(g). In circumstances where a project will be conducted in phases over twenty years and mining at sites other than Section 8 can only occur after satisfactory demonstration of certain activities at Section 8, claims regarding unusual delay or expense are not credible. While the order is silent on when the litigation on the other areas would proceed, the Presiding Officer clearly stated that he would determine at a later date, "based in part on HRI's operating plans," when to proceed with other litigation. September 22 Order at 3. Rather than cause unnecessary expenditure of resources, the order enables all participants to conserve resources by focusing on general challenges to the licensing scheme for in-situ leach mining, but first limiting the evidentiary

⁷ Should the Presiding Officer deny the instant request, the Commission has the power to exercise its inherent supervisory authority over adjudicatory proceedings and step in and provide guidance on important issues of law or policy. *See Pacific Gas & Electric Co.* (Diablo Canyon Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4-5 (1986); *Policy Statement*, CLI-98-12, 48 NRC at 20, 23, 25.

⁸ Intervenor's do not mention this criterion.

showing to a smaller geographic area unless related or cumulative impacts can be shown in other areas. It is reasonable for an inquiry into the acceptability of a project that will proceed in stages to consider component mining areas before considering the cumulative impacts of the entire project.⁹ This is particularly sound where the environmental impacts of the entire project have been considered and have not been found to be significant.

Nor do Intervenor's assertions that the issue of whether conduct of the proceeding in phases constitutes illegal segmentation that violates the National Environmental Policy Act, 42 U.S.C. § 4231 *et seq.* (NEPA), *see* Request at 6-7, justify certification of the September 22 Order, since they fail to show immediate harm or that such alleged error cannot be redressed at the end of the proceeding. *See* 10 C.F.R. § 2.786(g)(2). Intervenor's repeatedly ignore that HRI's license does not confer an unconditional right to mine at any of its sites. For example, HRI must successfully demonstrate groundwater restoration activities at Section 8 and may have to move town drinking water wells before mining at Crownpoint. *See, e.g.*, License Conditions 10.28, 10.27. Intervenor's arguments are little more than an attempt to postpone addressing issues concerning mining in areas that neither they nor their experts have focused on. *See* Joint Motion for Reconsideration by ENDAUM,

⁹ Church Rock is located about 18 miles west of the Unit 1 site, which is few miles east of the Crownpoint site. *See* FEIS at 1-2, Fig. 1-1. Mining at Church Rock (Sections 8 and 17), Unit 1 or Crownpoint can be conducted as wholly independent operations due to the site-specific nature constructing well fields and extracting uranium, but roadways between the mines would be used to transport resins that would be processed at an existing facility at Crownpoint. *See* Affidavit of Mark Pelizza, dated September 8, 1998 (appended to HRI's Response to Scheduling Conference Briefs of All Petitioners, dated September 9, 1998), at 7, 8-10; FEIS at 1-1. In evaluating alternatives to the project, the FEIS also considered that mining would take place only at one or two of the proposed sites and scrutinized the environmental impacts in terms of the Church Rock, Unit 1 and Crownpoint sites being subunits of the proposed project. *See, e.g.*, FEIS at 2.2, 4.2.2, 4.7.2, 4.11.2.


SRIC, Marilyn Morris and Grace Sam of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998, dated September 30, 1998, at 16 ("Intervenors still have quite a bit of work remaining to develop arguments related to Section 8.").

Inasmuch as Intervenors have not met their burden to satisfy the standards for certification or referral of a ruling, the Presiding Officer should deny their request.

CONCLUSION

The Request should be denied as Intervenors have failed to satisfy the standards for certification or referral of a ruling to the Commission.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 8th day of October, 1998

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE PRESIDING OFFICER

In the Matter of)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101) (Leach Mining and Milling License)
Albuquerque, New Mexico 87120)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ENDAUM AND SRIC REQUEST FOR DIRECTED CERTIFICATION OF BIFURCATION ORDER" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated with double asterisks by facsimile transmission, this 8th day of October 1998:

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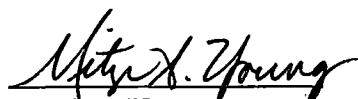
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