

October 6, 1998

DOCKETED
USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OCT -6 P4:32

BEFORE THE PRESIDING OFFICER

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

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 OPPOSITION TO INTERVENOR'S JOINT MOTION
FOR RECONSIDERATION OF SEPTEMBER 22 ORDER

INTRODUCTION

On September 30, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), and Marilyn and Grace Sam filed a joint motion asking that the Presiding Officer reconsider his decision requiring Intervenors to file their evidentiary presentations by February 1, 1999, and asking that the date be extended to August 1, 1999. Motion at 1-2. Intervenors (1) claim they cannot meet the February 1, 1999 deadline, (2) present, for the first time, more detailed information concerning their proposed schedule, and (3) argue that the Commission's decision in *Baltimore Gas & Electric Co.* (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-18, 48 NRC ____ (September 17, 1998), justifies the relief requested. See Motion at 1-2, 6-16. For the reasons set forth below, the Staff opposes the motion.

BACKGROUND

Intervenors were admitted on May 13, 1998, to this proceeding concerning the application of Hydro Resources, Inc. (HRI or Licensee) to construct and operate an in-situ leach mining project that was noticed in the *Federal Register* on November 14, 1994. See LBP-98-9, 47 NRC 261, 264

19612

(1998).¹ In that decision, the Presiding Officer proposed a tentative schedule that included having Intervenor submit written submissions (and possibly contentions) within 28 days after the Staff made the hearing file available to participants in the proceeding. *Id.* at 286. By letter dated June 11, 1998, the Staff distributed the hearing file. Letter from John Hull to Administrative Judges, dated June 11, 1998.

In orders, dated June 30, July 1, 1998, motions for reconsideration or clarification were decided. *See* LBP-98-14, 48 NRC ___ (June 30, 1998) (denied ENDAUM and SRIC's Motion for Reconsideration of LBP-98-9); Memorandum and Order (HRI Motion for Reconsideration and Motion for Partial Clarification), dated July 1, 1998 (unpublished) (July 1 Order). The July 1 Order, *inter alia*, provided that the tentative agenda of an upcoming scheduling conference with the parties would include "[t]he plan of analysis that Intervenor plan to implement in order to prepare contentions or written presentations within their areas of concern." July 1 Order at 4.

In a "Memorandum and Order (Announcing Scheduling Conference in Crownpoint, New Mexico, August 25-27; Reporting on Content of July 10 Scheduling Conference)," dated July 13, 1998 (served July 14, 1998) (July 13 Order), at 2, the Presiding Officer indicated that during a July 10th conference with the parties, he "asked Intervenor for an analysis plan the would permit me to assess the amount of time that they need to prepare their contentions (should I require them) and their written filings."

During September 15-17, 1998, there were limited appearance statements, a tour of the Church Rock, Crownpoint and Unit 1 sites, a prehearing conference in McKinley County, New

¹ The Staff issued the requested materials license (SUA-1508) on January 5, 1998. Intervenor ENDAUM and SRIC filed a stay request, with supporting affidavits, on January 16, 1998, which was ultimately denied. *See* LBP-98-5, 47 NRC 119, *temporarily stayed*, CLI-98-4, 47 NRC 111, *petition for review denied and temporary stay lifted*, CLI-98-8, 47 NRC 314 (1998).

Mexico. See Prehearing Conference Transcripts dated September 15 and 17. On September 17, 1998, the Presiding Officer heard arguments concerning whether the proceeding should be "bifurcated" or conducted in phases such that issues related to Church Rock, Section 8, are considered first, and arguments concerning the schedule for the proceeding.

In a Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order), the Presiding Officer considered the ENDAUM and SRIC proposal that they be permitted to file 10 separate written presentations concerning intervenor concerns between October 30, 1998 and December 20, 1999, as opposed to the Staff's recommendation, supported by Hydro Resources Inc. (HRI or licensee), that intervenors submit all of their presentations by October 30, 1998. See September 22 Order at 3; ENDUAM's and SRIC's Scheduling Conference Brief, dated September 2, 1998, at 32; NRC Staff Response to July 30 Order, dated August 31, 1998, at 7 n.15; HRI's Brief On Suggested Scheduling Submitted Pursuant To The Presiding Officer's July 30, 1998 Memorandum and Order, dated September 2, 1998.² The Presiding Officer balanced the claims of the parties and concluded, *inter alia*, that (1) "Intervenors shall divide their presentation into four roughly equal segments that will be filed on four dates that are roughly equally spaced between now and February 1, 1999," and (2) Intervenors "may include in their last presentation . . . a motion to make additional filings, supported by a statement of good cause. September 22 Order at 4.

² Intervenors Grace Sam and Marilyn Sam Morris also objected to an October 30, 1998 deadline for filing written presentations and suggested that written presentations be submitted from October 30, 1998 to October 1999. See Marilyn Morris's and Grace Sam's Response to Briefs Filed by HRI and NRC Staff; Scheduling Conference Brief of Marilyn Morris and Grace Sam, dated September 2, 1998, at 16-19.

Intervenors seek reconsideration of the requirement to file their presentations in four installments by February 1, 1999 deadline (e.g., November 1 and December 1, 1998, and January 1 and February 1, 1999. See Motion at 1-2, 4-5. Intervenors propose instead that their filings be submitted February, May and August 1999. Motion at 18-19.

DISCUSSION

A. Standards for Motions for Reconsideration

Pursuant to 10 C.F.R. § 2.771 and 2.1259(b), a litigant in a 10 C.F.R. Part 2, Subpart L proceeding may seek reconsideration of a final determination by the Commission or a presiding officer by stating that the grounds upon which the decision is based are erroneous and indicating the relief sought. See *Babcock & Wilcox* (Apollo, Pennsylvania Fuel Fabrication Facility), LBP-92-35, 36 NRC 355, 357 (1992). Motions to reconsider an order are to be associated with requests for reevaluation of a decision in light of elaboration or refinement of arguments previously advanced by the movant since they are not an opportunity for advancing an entirely new theory. See *Central Electric Power Coop., Inc.* (Virgil C. Summer Nuclear Station, Unit No. 1), CLI-81-26, 14 NRC 787, 790 (1981); *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-93-12, 37 NRC 355, 359-360 (1993). Mere repetition of arguments previously advanced does not present a basis for reconsideration. *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980).

Thus, unless it can be shown that there is some overlooked principle of law or misapprehension of the facts in the decision which is the subject of the motion, the motion should be denied. E.g., *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-94-31, 40 NRC 137, 140 (1994).

B. The February 1 Deadline Will Not Deny Intervenors A Meaningful Opportunity to Participate In the Proceeding

Intervenors' motion for reconsideration should be denied as it fails to identify any factual or legal error in the decision of the Presiding Officer. Intervenors claim that, in good faith, they did not interpret the July 1 and July 13, 1998 Orders of the Presiding Officer as requiring detailed elaboration of their witnesses' schedules or the time needed for testimony preparation for their case and admit that they present, for the first time, "detailed information" to justify the reasonableness of their requested schedule. Motion at 6. Intervenors argue (1) that the brevity of the schedule deprives them of a meaningful opportunity to litigate their concerns, (2) that the Presiding Officer failed to balance the interests of the parties, (3) that statements that the Presiding Officer made concerning a Commission directive to complete license renewal cases within ten months were erroneous since the Commission contemplates that such proceedings would be resolved 30 months from issuance of the initial hearing notice, and (4) that the Commission recently allowed an intervenor additional time to prepare contentions because its experts were unable to complete their review under the schedule prescribed by the Board. Motion at 7-9.³

Intervenors' reliance on the *Calvert Cliffs* decision is misplaced. In stark contrast to the six month extension (from February 1 to August 1, 1999) requested here, there the intervenor sought an extension from September 11, 1998 to mid-November 1998 for the filing of contentions and was afforded only 19 additional days from the Licensing Board's deadline. *See Calvert Cliffs*,

³ Intervenors also express reluctance to disclose detailed information regarding its case preparation (including the names of experts), claiming that opposing parties would have an unfair advantage. *See* Motion at 10. It is difficult to understand why such disclosure would be undesirable. Clearly, knowing the identity of experts would allow the Presiding Officer and the parties to discern the length of time that such experts have had to examine information available in this proceeding, particularly if such experts signed affidavits appended to the ENDAUM and SRIC stay filings submitted January 16, 1998.

CLI-98-18, at 2; Petitioner's Motion for Enlargement of Time (Docket Nos. 50-317 and 50-318), dated August 21, 1998. The Commission specifically noted the 134-day period of time between the contention deadline and the publication of the *Federal Register* notice of docketing the license renewal application, the 112-day period since the beginning of the public scoping process for the environmental review, the 84-day period since publication of the notice of opportunity for hearing (84 days), and the 134-day period of availability of the docketed application and detailed information about the license renewal process.

Intervenors neglect to mention that while the Commission's schedule included the goal of having a decision on the license renewal application in about two and one-half years after docketing of the application, the schedule included time for the completion of discovery and cross-examination in a formal trial-type proceeding (which are not available in a 10 C.F.R. Part 2, Subpart L proceeding), and the issuance of the final safety evaluation report and environmental impact statement. See *Calvert Cliffs*, CLI-94-14, 48 NRC ____ (August 19, 1998), at 4-5; 10 C.F.R. § 2.1231(d) ("[a] party may not seek discovery from any other party, or the NRC, whether by document production, deposition, interrogatories, or otherwise");⁴ 10 C.F.R. §§ 2.1233 (written presentations), 2.1209(k). Moreover, the Commission's guidelines to the Board in *Calvert Cliffs* concerning the complexities of reactor license renewal established milestones that testimony be filed

⁴ Intervenors' request that additional materials be added to the hearing file in this proceeding is still being reviewed by the Staff. See Letter from J. Matanich to Counsel for NRC Staff, dated September 29, 1998. Unless, the materials requested can be viewed as the application, any amendment thereto, any NRC environmental impact statement or assessment relating to the application, and "any NRC report and any correspondence between the applicant and the NRC that is relevant to the application, the request is an impermissible attempt to obtain discovery in this proceeding and, in essence, delay the schedule set by the Presiding Officer. See 10 C.F.R. § 2.1231(b).

within 90 days (three months), and the decision in the proceeding issued within 220 days (less than eight months), after of the issuance of the SER and FES. *Id.* at 5-6.

By contrast, this proceeding has been ongoing (except for a suspension to allow completion of the FEIS and safety evaluation) since publication of the November 1994 *Federal Register* notice. Issuance of NUREG-1508 in February 1997, issuance of the license (with the Technical Evaluation Report) on January 5, 1998, and dissemination of the hearing file on June 11, 1998, provided Intervenor's with considerable detailed information concerning HRI's mining project. ENDAUM's and SRIC's filings in this proceeding demonstrate that they and their experts are conversant with detailed information concerning the mining project.

Intervenor's admission that their concerns have not focused on Church Rock Section 8, however, is revealing. *See* Motion at 16 ("Intervenor's still have quite a bit of work remaining to develop arguments related to Section 8."). It is not consistent with fairness to allow Intervenor's the time requested to develop arguments concerning a parcel that Intervenor's payed scant attention prior the Presiding Officer's decision to address, in large part, Section 8 issues first in this proceeding. *See* September 22 Order at 2-3.

Furthermore, Intervenor's' assertions that they did not appreciate the need to present detailed information about the time needed for their case preparation and presentation is not credible given that they have known since May 13, 1998, that the Presiding Officer wanted to establish a schedule for completion of the proceeding and the request was repeated in the July 1 and July 13 Orders, as well as during the September 17, 1998 prehearing conference. *See* LBP-98-9, at 286; July 1 Order at 4 (Intervenor plan of analysis for written presentations and proposals for fair and efficient scheduling of the case); July 13 Order at 2 (asked for Intervenor analysis plan in order to assess the time needed to prepare written filings); September 17, 1998 Prehearing Conference Transcript at 145.

Thus, it is difficult to understand why Intervenors were not prepared to present such information at the scheduling conference held September 17.

Moreover, given the voluminous nature of the concerns filed by ENDAUM and SRIC⁵ and the apparent familiarity of experts whose affidavits were appended to the January 16, 1998 stay request,⁶ it is difficult to believe that the schedule established by the Presiding Officer denies them a meaningful opportunity to participate in the proceeding because their experts do not have time to devote to the proceeding. *See Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 19-21 (1998) (boards and presiding officers are to instill discipline in the hearing process and ensure a prompt yet fair resolution of contested issues in adjudicatory proceedings; parties are to satisfy their obligations). Given their admission to the proceeding as early as May 13, 1998, and the various scheduling orders issued by the Presiding Officer in July 1998,

⁵ These intervenors are, in practical terms, the lead intervenors in this proceeding and described their issues as "13 concerns span[ning] over 170 pages. Each concern contains a specific statement of the issues raised, and includes supporting factual and legal citations." *See* ENDAUM and SRIC's Third Amended Hearing Request And Petition To Intervene, dated January 16, 1998, at 19. That second amended petition was over 180 pages in length with almost three inches of attachments, including an printed index of the materials license docket, dated July 3, 1997 (Exhibit 1), and Crownpoint Uranium Project Consolidated Operations Plan, Revision 1.0, dated May 12, 1997 (Exhibit 12). *See* Petitioners ENDAUM and SRIC's Second Amended Request for Hearing, Petition To Intervene, and Statement of Concerns, dated August 19, 1997.

⁶ Exhibits to the stay request included affidavits by William Dodge, a cultural resource consultant, Klara Kelly, Ph.D., a professional anthropologist, Richard Abitz, a geochemical consultant, Michael Wallace, a hydrologist (who was at counsel table during the September 17, 1998 prehearing conference), and Marvin Resnikoff, a physicist, each of whom listed numerous licensing documents (including the Final Environmental Impact Statement) they reviewed in formulating their opinions. *See* ENDAUM and SRIC's Motion for Stay, Request for Prior Hearing, and Request for Temporary Stay, dated January 15, 1998 (Exhibits 2-4, 12-13). In addition, Messrs. Wallace, Abitz, and Resnikoff, as well as Peter Noyes, a supervisor of the Cultural Resource Compliance Section of the Navajo Nation Historic Preservation Department, provided affidavits in support of Intervenors' reply to stay responses filed by HRI and the Staff. *See* ENDAUM and SRIC's Reply to HRI's and Staff's Responses to Stay Motion, dated March 6, 1998.

Intervenors should have kept their experts actively preparing to address the concerns filed in this proceeding in short order.

Thus, Intervenors provide no sound basis for the Presiding Officer to reconsider his ruling. Therefore, the motion should be denied.

CONCLUSION

The Motion should be denied as the delay Intervenors seek is not necessary for meaningful participation in the proceeding, thus there has been no showing that the Presiding Officer misapprehended law or fact.

Respectfully submitted,


Mitzi A. Young
Counsel for NRC Staff

Dated at Rockville, Maryland
this 6th day of October, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'98 OCT -6 P4:32

BEFORE THE PRESIDING OFFICER

In the Matter of)
)
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Docket No. 40-8968-ML
(Leach Mining License)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF OPPOSITION TO INTERVENOR'S JOINT MOTION FOR RECONSIDERATION OF SEPTEMBER 22 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 6th day of October 1998:

Administrative Judge
Peter B. Bloch*
Presiding Officer
Atomic Safety and Licensing Board
Mail Stop T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555
FAX: 301-415-5595

Mervyn Tilden
P.O. Box 457
Church Rock, New Mexico 87311

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 2254
Austin, Texas 78768-2254

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

Richard F. Clement, Jr.
President
Hydro Resources, Inc.
2929 Coors Road
Suite 101
Albuquerque, New Mexico 87120

Diane Curran, Esq.**
Harmon, Curran, Spielberg,
& Eisenberg, L.L.P.
2001 S Street, N.W., Suite 430
Washington, D. C. 20009
FAX: 202-328-6918

Lila Bird, Executive Director
Water Information Network
P.O. Box 4524
Albuquerque, New Mexico 87106

Mitchell W. Capitan, President
Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 471
Crownpoint, New Mexico 87313

Lori Goodman
Diné CARE Navajo Nation
10 A Town Plaza, S-138
Durango, Colorado 81301

Mary Lou Jones, President
Zuni Mountain Coalition
P.O. Box 39
San Rafael, New Mexico 87051

Douglas Meiklejohn, Esq.**
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
FAX: 505-989-3769

W. Paul Robinson
Chris Shuey
Southwest Research
and Information Center
P.O. Box 4524
Albuquerque, New Mexico 87106

Anthony J. Thompson, Esq.**
Counsel for Hydro Resources, Inc.
Shaw, Pittman, Potts & Trowbridge
2300 N Street, N.W.
Washington, D. C. 20037-1128
FAX: 202-663-8007

Jon J. Indall
Comeau, Maldegen, Templeman
and Indall, LLP
141 East Palace Avenue
Santa Fe, New Mexico 87504-0669

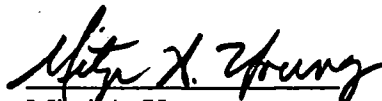
Roderick Ventura**
Samuel D. Gollis
DNA - People's Legal Services, Inc.
P.O. Box 306
Window Rock, AZ 86515
FAX: 520-871-5036

Office of Commission Appellate
Adjudication*
Mail Stop: OWFN-16 C-1
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Atomic Safety and Licensing Board
Panel*
Mail Stop: T-3 F23
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

Secretary* (2)
Attn: Rulemakings and
Adjudications Staff
Mail Stop: OWFN-16 C1
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555


Mitzi A. Young
Counsel for NRC Staff