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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)

HYDRO RESOURCES, INC.)

2929 Coors Road, Suite 101)

Albuquerque, New Mexico 87120)

Docket No. 40-8968-ML

Re: Leach Mining and Milling License

NRC STAFF RESPONSE TO ENDAUM AND SRIC PETITION
FOR REVIEW OF SEPTEMBER 22 ORDER AND REQUEST FOR STAY

Mitzi A. Young
Counsel for NRC Staff

October 19, 1998

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NUCLEAR REGULATORY COMMISSION

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INTRODUCTION

On October 7, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed a petition for interlocutory review, and request for a stay pending Commission review, of the Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order).¹ For the reasons set forth below, the Staff opposes the Petition and stay request.

¹ Petition for Interlocutory Review of Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998 and Request for Stay, dated October 7, 1998 (Petition).

Recently, the Presiding Officer denied Intervenors' motion for certification of the decision to proceed first with litigation of general challenges to the license and concerns about Church Rock, Section 8 (the site where mining activities must begin) and motion for reconsideration of the February 1, 1999, deadline for submission of Intervenors' written presentations on such issues. *See* Memorandum and Order (Reconsideration of the Schedule for the proceeding), dated October 13, 1998 (October 13 Order) (unpublished); ENDAUM's and SRIC's Request for Directed Certification of Bifurcation Order, dated September 30, 1998; Joint Motion for Reconsideration by ENDAUM, SRIC,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. The Presiding Officer noted that the decision to proceed with these matters "was to provide a reasonable and efficient way to proceed with this litigation by taking first those issues that relate either to HRI's license or to the first site that it plans to operate." October 13 Order at 3. This order prompted Intervenors to file "ENDAUM's and SRIC's Request for Expedited Review of Petition for Review," dated October 16, 1998.

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 facilities are scheduled to occur incrementally (well field by well field) over a twenty-year period and will 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).²

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). After considering arguments on the matter³ and cognizant of HRI's concern that it not be

² Pursuant 10 C.F.R. § 40.32(e) and its license, 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). *See* CLI-98-8, 47 NRC at 319.

³ *See, e.g.,* Prehearing Conference Transcript, dated September 17, 1998, at 154-165, 167-171, 175-188. *See also* 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 (continued...)

required to provide detailed information about some aspects of the project that will not begin for a number of years,⁴ the Presiding Officer, in a Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order), concluded that

Intervenors 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.

September 22 Order at 2. The Presiding Officer further ruled that Intervenors 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 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

³ (...continued)

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. Intervenors opposed HRI's motion, arguing, in part, that bifurcation would require them to put on their case in a piecemeal and wasteful manner. See 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.

⁴ See September 22 Order at 2. 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 by explaining the rationale behind various conditions in the HRI license and supported HRI's request. See NRC Staff Response to HRI's Motions for Reconsideration and Bifurcation, dated June 26, 1998 (Staff Bifurcation Response), at 4-16.

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 now seek Commission review of this decision and request that the Commission issue a stay of the decision pending Commission review. Petition at 1-2, 9-10. The Staff's opposition to the Petition is presented below.

DISCUSSION

A. Standards for Petitions for Interlocutory Review and Stay Requests

Interlocutory review⁵ is disfavored and generally not allowed by the Commission's regulations. *See* 10 C.F.R. § 2.730(f). Such review may be granted under 10 C.F.R. § 2.786(g), which provides for review if a ruling 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.

Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91 (1994); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-15, 40 NRC 319 (1994); *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).

Interlocutory review will be undertaken as a matter of discretion only in the most compelling circumstances. *Sequoyah Fuels Corp.* (Gore Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994); *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). Neither the granting or filing of a petition

⁵ Pursuant to 10 C.F.R. § 2.1253, a party may only file a petition for review of an *initial decision* of a presiding officer.

for review will stay the effect of the decision or action of the presiding officer, unless otherwise ordered by the Commission. 10 C.F.R. § 2.786(f).

In order to obtain review under the first standard in 10 C.F.R. § 2.786(g), the challenged action must involve exceptional circumstances which are difficult to remedy at the end of the proceeding. *See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-95-15, 42 NRC 181, 184 (1995) (Commission reviewed order to release notes claimed to be protected by the attorney-client privilege); *Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2)*, CLI-94-5, 39 NRC 190, 193 (1994) (Commission reviewed order releasing an NRC investigatory report). Mere generalized representations by counsel or unsubstantiated assertions regarding immediate and serious irreparable impact will not suffice to meet the stringent threshold for interlocutory review. *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61.

A claim that a ruling is legally erroneous is not sufficient to satisfy the second standard in 10 C.F.R. § 2.786(g) since legal error does not show that the structure of the proceeding has been fundamentally altered. *Sequoyah Fuels*, CLI-94-11, 40 NRC at 61. In addition, the mere fact that a ruling is important or novel is not sufficient to justify interlocutory review. *Id.* at 63.

In order to succeed in obtaining a stay of a decision or action of the presiding officer, the request must be filed within 10 days after service of the decision (10 C.F.R. 2.788(a)) and the movant must prevail on the factors set forth in 10 C.F.R. 2.788(e).⁶ A party who fails to show irreparable harm must make a strong showing on the other stay factors in order to prevail. *Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2)*, CLI-90-3, 31 NRC 219, 260

⁶ The stay criteria are (1) whether the moving party has made a strong showing that it is likely to prevail on the merits, (2) whether the party will be irreparably injured unless a stay is granted, (3) whether the granting of a stay would harm other parties; and (4) where the public interest lies. 10 C.F.R. § 2.788(e). Intervenors do not address or otherwise mention these criteria in their filing.

(1990); Sequoyah Fuels Corp. (Gore Oklahoma Site), CLI-94-9, 40 NRC 1, 6 (1994). Mere litigation expense or economic loss does not constitute irreparable injury. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Units 1, 2, and 3), CLI-92-4, 35 NRC 69, 81 (1992) (economic loss), *citing, Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 291 (6th Cir. 1987); *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-395, 5 NRC 772, 779 (1977) (substantial and unrecoverable litigation expense); *Uranium Mill Licensing Requirements (10 C.F.R. Parts 30, 40, 70 & 150)*, 13 NRC 460 (1981) (expense of an administrative proceeding), *citing Meyers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51(1938) and *Hornblower & Weeks-Hemphill Noyes Inc. v. Csaky*, 427 F. Supp. 814 (S.D.N.Y. 1977).

The Commission has recently indicated that it will ensure that standards for interlocutory are met. *Statement of Policy on Conduct of Adjudicatory Proceedings*, CLI-98-12, 48 NRC 18, 23 (1998) (Policy Statement).

As discussed below, the decision to first address concerns regarding HRI's license (*e.g.*, performance based licensing issues) and issues having a logical nexus to Church Rock, Section 8, 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. Neither Interlocutory Review Nor a Stay Is Warranted

Intervenors' Petition should be denied inasmuch as it fails to meet the requirements for interlocutory review and the issuance of a stay under 10 C.F.R. §§ 2.786 and 2.788(e).

Intervenors claim that the September 22 Order causes serious and irreparable impacts and affects the proceeding in a pervasive and unusual manner in that it illegally postpones completion

of the proceeding by (1) unlawfully segmenting the environmental decision process contrary to NEPA and (2) denying precluding the completion of material licensing issues within a reasonable time period under the AEA. Petition at 1-2, 3-7 *citing* section 42 U.S.C. 2239(a) and 5 U.S.C. §558(c). In addition, Intervenor claim (1) that the NEPA issue raised is novel and warrants Commission review, Petition at 4-5, *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), and (2) that the record of decision in the proceeding will be segmented and lead to a distorted view of the project. Petition at 4-5, 7.

The Counsel on Environmental Quality (CEQ) regulation, NRC regulations and NEPA cases Intervenor cite do not support a finding that the September 22 Order warrants interlocutory review due to improper segmentation of environmental issues.⁷ CEQ regulations, while entitled to deference, are not binding on the NRC. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1, CLI-91-02, 33 NRC 61, 72 n.3 (1991). In addition, the scheduling decision to hear Section 8 issues first is consistent with the license requirement that there be a satisfactory demonstration at Section 8 before mining can occur at Unit 1 and Crownpoint (areas for which detailed information will not be available for years) does not violate NEPA segmentation concerns

⁷ The rule against segmenting or piecemealing prohibits an agency from avoiding the NEPA requirement to prepare an environmental impact statement (EIS) for an action that significantly affects the quality of the human environment by dividing a project into segments with less significant impacts. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298 (D.C. Cir. 1987) (four-mile transit project held to be an independent, first leg of a larger project). After the issuance of an EIS, a 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). Also, Intervenor bare claim that litigation of Church Rock, Section 8 issues first, runs afoul of NRC regulations regarding an environmental record of decision, *see* 10 C.F.R §§ 51.94, 51.102(a), and 50.103, is speculative since it cannot be assumed, at this point, that the environmental aspects of the entire project, *i.e.*, cumulative impacts, will not be addressed before the record is closed in the proceeding since the Presiding Officer's order is silent on such matters.

regarding preparation of an EIS since (1) the FEIS has already issued, (2) it is not an unreasonable or unfair schedule, (2) it will not unreasonably skew the consideration of environmental impacts of the entire project since Section 8 mining can be done independent of the other areas, and (3) resolution of concerns about the adequacy of the FEIS cannot be resolved until the overall impacts of the mining project are considered later.

Intervenors' conclusory assertions provide no basis to conclude that the conduct of the proceeding in phases will be a detriment to the public interest, will cause unusual delay or expense, threaten Intervenors with immediate and serious irreparable impact that could not be alleviated by review of the final decision in the proceeding, or will 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 Church Rock, 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 scheduling order presents a logical way of addressing a phased project, enabling all participants to conserve resources by focusing on general challenges to the licensing scheme for in-situ leach mining and limiting the evidentiary showing to the initial area unless related or cumulative impacts can be shown in other areas. Moreover, the environmental impacts of the entire project have been considered in the FEIS and have not been found to be significant.

Thus, even if the ruling is erroneous, Intervenors fail to show that the matter is not capable of being remedied at the end of the proceeding by consideration of overall impacts of the mining

project prior to decision as to whether or not to uphold the issuance of the license.⁸ See 10 C.F.R. § 2.786(g)(1). Intervenors repeatedly ignore that although HRI has the requisite NRC approvals to begin mining at Section 8, 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. Intervenors' 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, 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.").

Neither does the mere fact that Intervenors allege that the September 22 Order will result in a greater expenditure of economic resources show that the proceeding has been affected in a pervasive or unusual manner since economic considerations are not sufficient.⁹ See *Shoreham*, CLI-92-4, *supra*.¹⁰

⁸ If Intervenors were to prevail on their challenge to the performance based licensing scheme, the authority to mine even at Section 8 would be rescinded by the Presiding Officer since he has the jurisdiction to reject or modify the HRI license.

⁹ The Staff does not agree that the consideration of Section 8 and general challenges to the license will be wasteful. See Petition at 8-9. To the contrary, this approach will result in a record that includes legal rulings and evidentiary findings that are applicable to the other two sites and, thus could conserve the resources of all of the parties.

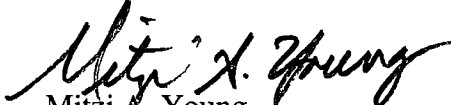
¹⁰ Church Rock is located about 18 miles west of the Unit 1 site, which is few miles east of the Crownpoint site. See FEIS at 1-2, Fig. 1-1. Mining at Church Rock (Sections 8 and 17), Unit 1 or Crownpoint can be conducted as wholly independent operations due to the site-specific nature constructing well 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 (continued...))

As for the stay request, Intervenor's have wholly failed to address (or even mention) the 10 C.F.R. § 2.788(e) standards for a stay in asking that the Commission "direct the Presiding Officer to halt all proceedings" pending Commission review. *See* Petition at 9-10. Thus, Intervenor's have not shown irreparable harm from a scheduling order that requires them, to address in writing, long-standing concerns about HRI's project beginning with the area that can be mined independently and where a satisfactory demonstration is required before mining can occur in other areas. Therefore, this request, which, in effect, seeks to delay the filing of their written presentations concerning their voluminous concerns, should be denied.

CONCLUSION

The Request should be denied as Intervenor's 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 19th day of October, 1998

¹⁰ (...continued)

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.

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RULEMAKING AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO ENDAUM AND SRIC PETITION FOR REVIEW OF SEPTEMBER 22 ORDER AND REQUEST FOR STAY" 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 19th day of October, 1998:

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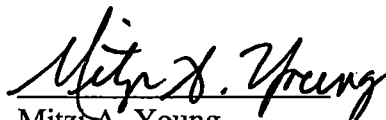
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