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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter)

HYDRO RESOURCES, INC.)

2929 Coors Road, Suite 101)

Albuquerque, New Mexico 87120)

) Docket No. 40-8968-ML
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NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP 99-9

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March 22, 1999

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INTRODUCTION

This Subpart L proceeding concerns the Staff's January 5, 1998 issuance of a materials license to Hydro Resources, Inc. (HRI), which authorized HRI to conduct *in situ* leach (ISL) mining in New Mexico after several license conditions are met. On February 19, 1999, the Presiding Officer issued LBP-99-9,¹ denying requests made by intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) to revoke HRI's license.² On March 11, 1999, ENDAUM and SRIC (collectively, "Petitioners") jointly filed "Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision LBP-99-9" (Review Petition).

¹ "Partial Initial Decision (Issues Related to the National Historic Preservation Act [16 U.S.C. §§ 470-470w-6] (NHPA), and the Native American Graves Protection and Repatriation Act [25 U.S.C. § 3001 *et seq.*] (NAGPRA), and Cultural Resources)," 49 NRC ____, slip op. (NHPA Decision). Therein, ruling in favor of HRI and the Staff, the Presiding Officer adopted many of the arguments contained in the Staff's January 19, 1999 NHPA response brief (Staff's NHPA Response), as well as many of the arguments contained in HRI's January 11, 1999 NHPA response brief.

² See the ENDAUM and SRIC joint brief on various cultural resource issues, dated December 7, 1998 (Petitioners' NHPA Brief), at 54.

As discussed below, the Review Petition fails to show that Commission review of the NHPA Decision is warranted, pursuant to the standards of 10 C.F.R. §§ 2.1253 and 2.786(b)(4). Accordingly, the Commission should deny the Review Petition.

DISCUSSION

Petitioners Fail To Show Review of PBL Decision Is Warranted

The Commission should deny the Review Petition because, as discussed below, it fails to meet the standards necessary to justify review.

A. Applicable Legal Standards

Pursuant to 10 C.F.R. § 2.1253,³ the standards governing the Commission's exercise of its discretion to grant or deny petitions to review a presiding officer's decisions are set forth in 10 C.F.R. § 2.786(b)(4)(i-v). In order to justify Commission review, Petitioners here must raise a "substantial question" regarding at least one of the following five areas of consideration: (1) whether a finding of material fact in the underlying decision is clearly erroneous;⁴ (2) whether a necessary legal conclusion in that decision departs from or is contrary to established law; (3) whether Petitioners identify any substantial and important policy or legal questions; (4) whether Petitioners identify any prejudicial procedural error in the proceeding to date; or (5) whether Petitioners identify any other consideration which the Commission may deem to be in the public interest. *See* 10 C.F.R. § 2.786(b)(4)(i-v).

³ *See Babcock And Wilcox Company* (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995).

⁴ To show that a factual finding in the NHPA Decision was "clearly erroneous," Petitioners must show that the finding was "not even plausible in light of the record viewed in its entirety." *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995), *citing Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). *See also Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972) (a licensing board's factual findings may not be set aside simply because the appeal board might have found differently).

Under these standards, a petitioner has the burden “to raise questions that are sufficiently substantial to justify Commission review.” *Babcock And Wilcox, supra*, 41 NRC at 251. To emphasize the discretionary nature of Commission review, the regulations provide that if a review petition is granted, the Commission will specify the issues to be briefed on appeal. *See* 10 C.F.R. § 2.786(d).

B. Review Petition Fails to Meet Review Standards

The Petitioners fail to meet their burden to show that review of the NHPA Decision is warranted, pursuant to 10 C.F.R. § 2.786(b)(4). Rather, the Petitioners simply repeat arguments previously made to the Presiding Officer and the Commission, without addressing the full record of this proceeding as it pertains to the issues raised in the Staff’s NHPA Response.⁵ *See* Review Petition, at 3-10. The five review standards of 10 C.F.R. § 2.786(b)(4) are addressed by the Petitioners in summary fashion only, with no meaningful discussion. *See* Review Petition, at 10.

The Petitioners’ summary discussion of the 10 C.F.R. § 2.786(b)(4) standards is deficient in that (1) while they may believe that the NHPA Decision contains “significant errors of law and fact” (Review Petition, at 10), the Petitioners fail to establish the presence of any substantial errors regarding material facts or necessary legal conclusions as required by 10 C.F.R. § 2.786(b)(4)(i-ii); (2) while this may be “the first time that an application for an ISL mine materials license has been adjudicated” (Review Petition, at 10), the Petitioners fail to show that the NHPA Decision raises any “substantial and important” questions meriting Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii); (3) no claim of procedural error is made; and (4) the bare conclusion that

⁵ The Petitioners contend that the NHPA Decision contains legal errors (*see* Review Petition, at 3-8), and material factual errors (*id.*, at 8-10). While acknowledging that HRI and the Staff filed responses to the Petitioners’ NHPA Brief (*see* Review Petition, at 2-3 nn. 2-3), the Petitioners do not address any of the HRI and Staff arguments which the Presiding Officer found persuasive. Their Review Petition arguments, therefore, should be given little, if any, weight by the Commission.

Commission review "lies within the public interest" (Review Petition, at 10) is made without any supporting discussion on this point. Accordingly, the Review Petition should be denied.

The Petitioners' failure to address the full record of this proceeding is particularly evident in the Petitioners' contention that the Presiding Officer made a legal error in failing to adopt their NHPA arguments. *See* Review Petition, at 5-7, *citing* generally to pages 13-44 of the Petitioners' NHPA Brief, and to the affidavits of Dr. Klara Kelley and Mr. William Dodge attached thereto. In responding to those arguments, the Staff gave a detailed factual account of its many NHPA-related filings (*see* Staff's NHPA Response, at 2-6), followed by a legal analysis showing that it had complied with NHPA regulations (*id.*, at 7-9), followed by a rebuttal of the proffered expert testimony (*id.*, at 10-14). Even though much of the Staff's analysis in this regard was adopted by the Presiding Officer (*see* NHPA Decision, at 6-7, and nn. 5-7; and 9), the Petitioners ignore the record on this matter, choosing instead to argue points previously made and rejected. For example, the Staff's analysis referenced above showed that given the factual record, it had no obligation under the NHPA regulations to consult with the Advisory Council on Historic Preservation. Yet the Petitioners simply repeat their contention that in failing to engage in such consultation, the Staff violated NHPA. *See* Review Petition, at 5 n.9. Similarly, the Petitioners treat as an established "fact" that the Staff "deviated" from the NHPA regulations, again ignoring the Staff's NHPA analysis. Review Petition, at 6.

The Petitioners vaguely argue that the Presiding Officer improperly applied the doctrines of *collateral estoppel* and *res judicata*, thus preventing them from fully litigating their NHPA and

related claims. See Review Petition, at 3-4, and n.5.⁶ Far from preventing a full airing of those claims, the Petitioners were allowed to submit a 54-page brief, 50 pages of expert opinion affidavits, and hundreds of additional pages of supporting attachments and exhibits. While much of this material was repetitive (see Staff's NHPA Response, at 6-7, and 11-13), this tactic reflects a choice made by the Petitioners as part of their litigation strategy, and in no way supports an argument that the Presiding Officer committed legal error. Moreover, neither the Presiding Officer nor the other parties even mentioned the doctrines of *collateral estoppel* and *res judicata* in their filings. This "legal error" argument thus raises no issues justifying Commission review.

Similarly without merit is the Petitioners' repeated contention that the Staff issued HRI its license before sufficiently considering impacts on cultural resources, in violation of the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (NEPA). See Review Petition, at 7-8.⁷ Again, the Petitioners fail to address the Staff's NEPA argument. See Staff's NHPA Response, at 17-19. Therein, the Staff explained that after the Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-

⁶ Therein, the Petitioners argue, in part, that the Presiding Officer improperly relied on earlier decisions regarding their motions for stays, and they conclude that their cultural resource issues were thus precluded from the hearing.

⁷ The argument that the bifurcation of this proceeding constitutes "illegal segmentation" under NEPA (Review Petition, at 7 n.11) should not be considered here by the Commission, since this issue was not raised in the Petitioners' NHPA Brief. Even if this procedural defect is overlooked, the argument has no merit. The rule against segmentation prohibits an agency from dividing a project into segments for purposes of avoiding the NEPA requirement to prepare an environmental impact statement (EIS). See *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-99 (D.C. Cir. 1987). Once 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). Accordingly, the segmentation rule is not applicable here, since the Staff has already prepared and issued an EIS which evaluated the combined impacts of ISL mining at the Church Rock, Unit 1, and Crownpoint sites.

1508 (FEIS) was published in February 1997, the Staff, in April 1997, received from HRI a report authored by the Museum of New Mexico's Office of Archaeological Studies (MNM Report), which had been prepared in compliance with NHPA requirements. On June 19, 1997, the Staff sent full copies of the MNM report for review and comment to (1) the New Mexico State Historic Preservation Office (SHPO); (2) the Navajo Nation Historic Preservation Department (NNHPD); (3) Roger Anyon, Director of the Pueblo of Zuni Heritage and Historic Preservation Office; and (4) Leigh Jenkins, Director of the Hopi Cultural Preservation Office. On November 20, 1997, the New Mexico SHPO concurred with the MNM Report's findings.

Based on the above sequence of events, the Staff requested that the Presiding Officer reject the NEPA arguments (*see* Staff's NHPA Response, at 17-19), since there was (1) no basis to conclude that the action of issuing a license to HRI in January, 1998, had been taken before sufficient NHPA-related information had been collected and distributed for comment; (2) no basis to conclude that such action had not been a fully-informed one; and (3) ample basis to find that NEPA values identified by the Supreme Court (*see Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)) were satisfied. The Presiding Officer agreed, and rejected the Petitioners' NEPA argument. *See* NHPA Decision, at 11. The Petitioners' argument that this was a legal error by the Presiding Officer has no merit, and does not support the Review Petition.

The Petitioners' argument that the Presiding Officer made an error of material fact in his Native American Graves Protection and Repatriation Act (NAGPRA) analysis (*see* NHPA Decision, at 10), in finding that Section 8 at HRI's Church Rock site is not federal or tribal land, confuses ownership of the land with the question of which governmental entity has jurisdiction over the land. *See* Review Petition, at 8-9. This argument also overlooks the fact that as part of his NAGPRA analysis, the Presiding Officer found 43 C.F.R. § 10.4(b) to be applicable to HRI's planned activities.

See NHPA Decision, at 10 n. 15. This implementing regulation of the NAGPRA applies when inadvertent discoveries of "human remains, funerary objects, sacred objects, or objects of cultural patrimony" are made. Staff's NHPA Response, at 17. The Petitioners' NHPA Brief, at 45-49, had ignored this provision, and had presented a misleading picture of the NAGPRA regulations by only discussing 43 C.F.R. § 10.3 (applicable to intentional disturbances such as would occur during archaeological excavations), and 43 C.F.R. § 10.5 (requiring that prior to such disturbances, various consultations and concurrences be obtained). No such requirements are contained in 43 C.F.R. § 10.4. Since HRI's planned activities fall within the scope of 43 C.F.R. § 10.4, the advance consultation and concurrence requirements applicable to intentional excavations (upon which Petitioners' NAGPRA argument was based (*see* Petitioners' NHPA Brief, at 45-49)), are not applicable to HRI's ISL mining-related activities. Accordingly, no error of material fact was made, and this argument does not support the Review Petition.

The second (and last) factual error alleged by the Petitioners criticizes the Presiding Officer for not addressing issues regarding NHPA compliance on lands which have not yet been evaluated under the NHPA section 106 process. *See* Review Petition, at 9-10. The only parcels of land within HRI's proposed project area for which the NHPA section 106 process is complete are Sections 8 and 17 at Church Rock, and Section 12 at Crownpoint. *See* Staff's NHPA Response, at 6. Other lands may become relevant in later phases of this bifurcated proceeding, but the Presiding Officer has correctly refused to address Petitioner arguments "that are broader than the subject-matter of this portion of the case." NHPA Decision, at 10.⁸

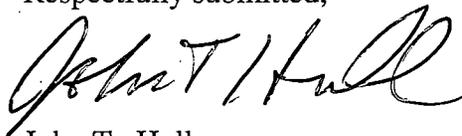
⁸ Should HRI later decide to conduct ISL mining at its Unit 1 or Crownpoint sites, additional areas would first have to be surveyed pursuant to NHPA. *See* Staff's NHPA Response, at 9 n.14.

Accordingly, none of the arguments made by the Petitioners in their Review Petition establish that Commission review of the NHPA Decision is warranted.

CONCLUSION

As discussed above, the Review Petition fails to show that Commission review of the NHPA Decision is warranted, pursuant to the standards of 10 C.F.R. § 2.786(b)(4). Petitioners have the burden of raising questions "that are sufficiently substantial to justify Commission review." *Babcock And Wilcox, supra*, CLI-95-4, 41 NRC at 251. The Petitioners here, having failed to address the record established in this proceeding, have failed to meet this burden. *See Kenneth G. Pierce, supra*, CLI-95-6, 41 NRC at 382. Accordingly, the Commission should deny the Review Petition.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of March 1999

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'99 MAR 22 P12:46

BEFORE THE COMMISSION

OFFICE OF THE CHIEF OF STAFF
RULE AND PRACTICE
ADJUDICATIONS STAFF

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

CERTIFICATE OF SERVICE

Thereby certify that copies of "NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP 99-9" 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 by double asterisks via e-mail and express mail this 22nd day of March 1999:

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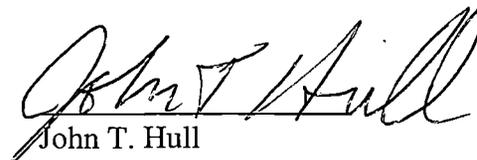
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