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USMRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

'98 JAN 23 P2:48

ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Before Chief Administrative Judge
B. Paul Cotter, Jr., Presiding Officer

Administrative Judge
Thomas D. Murphy, Special Assistant

SERVED JAN 23 1998

In the Matter of:

HYDRO RESOURCES, INC.
2929 Coors Road, Suite 101
Albuquerque, NM 87120

Docket No. 40-8968-ML

ASLBP No. 95-706-01-ML

January 23, 1998

MEMORANDUM AND ORDER

(Granting Temporary Stay of Staff Licensing Action
and Ruling on Motions)

On January 15, 1998, Petitioners Eastern Navajo Diné
Against Uranium Mining (ENDAUM) and Southwest Research and
Information Center (SRIC) (Petitioners) filed a request
entitled "ENDAUM's and SRIC's Motion for Stay, Request for
Prior Hearing, and Request for Temporary Stay" (Stay
Motion). The motion requests the Presiding Officer to stay
the effectiveness of the Staff's issuance on January 5,
1998, of a materials license to Hydro Resources, Inc. (HRI
or Applicant) for an *in situ* leach mine and milling

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operation in Church Rock and Crownpoint, New Mexico, pending the completion of: (1) a hearing on the application; and (2) an historic properties review. Petitioners further request in their Motion that the Presiding Officer immediately grant a temporary stay to preserve the status quo without waiting for the filing of any answers to the Stay Motion.

Two other filings are relevant here. On January 21, 1998, Petitioner Mervyn Tilden filed a multi-purpose pleading which included a request for a temporary restraining order. Mr. Tilden filed a similar, second pleading by telefax on January 20, 1998. In addition, on January 5, 1998, a Petition for Leave to Intervene was faxed to the Presiding Officer on behalf of the Eastern Navajo Allottees Association (Allottees). Members of the Allottees have leased a portion of their land at issue here to HRI for the production of uranium concentrates.

Subsequent to the filing of the Petitioners' Stay Motion, the NRC Staff filed with the Presiding Officer a Request for Extension of Time dated January 20, 1998 (Staff Request). The Staff Request seeks an extension of time

until Friday, February 20, 1998, in which to: (1) file a response to the Intervention Petition of the Eastern Navajo Allottees Association; and (2) file a response to the merits of the ENDAUM/SRIC Stay Motion. Staff's Request also argues against the Petitioners' request for an immediate temporary stay to preserve the status quo.

By Telefax copy dated January 20, 1998, Petitioners ENDAUM and SRIC filed a second request entitled "ENDAUM's and SRIC's Motion for Leave to Respond to Eastern Navajo Allottees Association's Intervention Petition and Response to NRC Staff's Request for Extension of Time" (Petitioners' Motion). In its second Motion, Petitioners request that they also be given until February 20, 1998 to respond to the Allottees Intervention Petition, the same extended response date the NRC Staff seeks in its Request. Petitioners' Motion also responds to the Staff's objection to the Petitioners' request for a temporary stay.

Temporary Stay Request

Petitioners' January 15, 1998, Motion for Stay requests the Presiding Officer to grant, pursuant to 10 C.F.R.

§§ 2.1263 and 2.788(f) (1997), a temporary stay to preserve the status quo without waiting for the filing of any answers to their Stay Motion by the Staff or the Applicant. Section 2.1263 provides in pertinent part that "Applications for a stay of ... any action by the NRC Staff in issuing a license in accordance with § 2.1205(m) are governed by § 2.788..." Section 2.788 specifies the requirements for an application for a stay. In addition, Section 2.788(f) authorizes the Presiding Officer to grant a temporary stay to preserve the status quo without waiting for the filing of answers "[i]n extraordinary cases, where prompt application is made under this section." 10 C.F.R. § 2.788(f); *see also* 10 C.F.R. § 2.1263 (1997).

Petitioners allege in their Stay Motion that historic surveys have not been completed in violation of selected provisions of the National Historic Preservation Act, 16 U.S.C. § 470 (1966). Petitioners find the absence of these surveys to present the necessary "extraordinary" case justifying a temporary stay. Petitioners allege that there will be potential irreparable harm to natural, historic and religious resources resulting from ground clearing

operations which they further allege may take place prior to the Applicant receiving all the approvals it needs to commence its mining activities. Stay Motion at 7-8; 7, n. 9; and 10, n. 11; Petitioners' Motion at 6 and n. 3.

Applicant has not offered any response to Petitioners' stay request, and Staff's response is at best conclusory.

According to Staff,

SRIC/ENDAUM provided no basis showing that, pursuant to 10 C.F.R. § 2.788(f), this is an "extraordinary" case requiring a temporary stay "to preserve the status quo," and since the Stay Request does not specify the length of the requested temporary stay, Staff opposes the SRIC/ENDAUM request for a temporary stay.

Staff Request at 3, n. 5. Staff's filing is silent on Petitioners' claims of irreparable injury as a result of noncompliance with the NHPA. Moreover, Staff cites no regulatory basis for a petitioner to establish the length of time for a temporary stay.

At present, neither Petitioners' Motion nor the Staff Request alleges that pre-mining clearing activities are currently underway, nor that a temporary stay would adversely affect Applicant's pre-mining activities. As

noted, Applicant has not offered any objection to the temporary stay request.

On the other hand, Petitioners' claims of irreparable injury to natural, historic and religious resources from pre-mining ground clearing activities presents the type of potentially harmful activities the temporary stay provision was meant to prevent. Potentially harmful action may be stayed until such time as a ruling can be made on the merits of a motion to stay the effectiveness of a Staff action, usually until such time as the other parties have been given an opportunity to provide their answers. With respect to the temporary stay relief sought, Petitioners' Stay Motion is supported by affidavits and otherwise meets the pertinent requirements as to contents specified in 10 C.F.R. § 2.788 (1997).

Therefore, the effectiveness of the Staff's action in granting Hydro Resources, Inc. a license for its proposed *in situ* mining operations at Church Rock and Crownpoint, New Mexico shall be temporarily stayed until such time as the Presiding Officer has ruled on the Petitioners' Stay Motion or if, in the Presiding Officer's judgement, intervening

circumstances warrant lifting the temporary stay. If the Presiding Officer rules in favor of Petitioners' Stay Motion, the temporary stay could automatically evolve into a stay pending completion of the hearing on the merits of the Applicant's license application.

Extension of Time to Answer Petitioners' Stay Motion

Staff's Request for an extension of time in which to answer the Petitioners' Stay Motion gives as its sole justification that the Motion contains over 220 pages of material. Accordingly, Staff states that the "voluminous nature of the Stay Request justifies a liberal extension of time to make an adequate response." Staff Request at 3. Staff further tells the Presiding Officer that Allottees' Attorney does not object to this extension (Staff Request at 2, n. 4), that Applicant intends to file its answer on January 26, 1998, (the regulatory filing date) but that Applicant has no objection to the extension for the Staff. Staff Request at 3. Staff tried to negotiate approval from Petitioners for the extension, but the effort was not successful because Staff refused to approve Petitioners'

temporary stay request. Staff Request at 3, n. 5; Petitioners' Motion at 5-7. Staff's posture is somewhat peculiar since the potential harm from a temporary stay would affect Applicant's planned activities and not the activities of the Staff.

The grant of Petitioners' request for a temporary stay effectively eliminates its reasons for objecting to the extension the Staff seeks. Accordingly, Staff shall have until February 20, 1998 to answer Petitioners' Stay Motion.

Petitioners' Motion to Respond to Allottees'

Intervention Petition

Petitioners move the Presiding Officer to allow them to respond to the Allottees' Intervention Petition. Allottees seek intervention in support of Applicant's license application. Because the Commission's regulations do not specifically address intervention by proponents of licensing actions, the regulations are silent with regard to the filing of responses to these petitions from parties other than the Applicant and the NRC Staff. See 10 C.F.R.

§ 2.1205(g). Allottees request participation because no other party is likely to address the issues Allottees may raise as proponents of the mining operations.

Significantly, Petitioners also advise that none of the other potential parties objects to its filing a response. Petitioners' Motion at 3-4. Under these circumstances, Petitioners' Motion to file a response to the Allottees' intervention petition is granted.

Extension of Time to Respond to Allottees'

Intervention Petition

Petitioners approve of Staff's request to extend the time for responding to the Allottees' Intervention Petition as long as Petitioners are granted the same time for their response. There are no objections to these requests from the other potential parties. Petitioners and the NRC Staff shall have until close of business, Friday, February 20 to have in the hands of the Presiding Officer and the other potential parties to the proceeding their responses to the Allottees' Intervention Petition.

Appropriate Heading for Proceeding

As a further housekeeping matter, by Notice dated December 13, 1996, Jep Hill, Esquire, Counsel for HRI informed the potential parties to this proceeding that the address for Hydro Resources, Inc. had changed from its Dallas, Texas location to one in Albuquerque, New Mexico. The style for the papers filed in this proceeding should have reflected that change, but they have been inconsistent over the last year. Therefore, all potential parties to this proceeding shall adopt the caption with the HRI address in Albuquerque, New Mexico as set out at the top of this Memorandum and Order.

ORDER

For all the foregoing reasons, it is, this 23rd day of January, 1998

ORDERED

1. Pursuant to 10 C.F.R. §§ 2.1263 and 2.788(f), effective immediately, the effectiveness of the NRC Staff's action in granting Hydro Resources, Inc. a license to conduct *in situ* leach mining activities at Church Rock and Crown Point, New Mexico is temporarily stayed until such time as the Presiding Officer rules on the Petitioners' Stay Motion or intervening circumstances cause the Presiding Officer to lift this temporary stay;


2. NRC Staff shall have until close of business, Friday, February 20, 1998, to have in the hands of the Presiding Officer and the other potential parties to the proceeding its response to the Petitioners' Stay Motion;

3. Petitioners ENDAUM and SRIC may respond to the intervention petition of the Eastern Navajo Allottees Association, and they and the NRC Staff shall have until close of business, Friday, February 20, 1998, to have in the hands of the Presiding Officer and the other potential

parties to the proceeding their responses to the Allottees' Intervention Petition;

4. All potential parties to this proceeding shall reflect the address of Hydro Resources, Inc. in the caption of their pleadings as:

HYDRO RESOURCES, INC.
2929 Coors Road, Suite 101
Albuquerque, New Mexico 87120



B. Paul Cotter, Jr.
ADMINISTRATIVE JUDGE

Rockville, Maryland

January 23, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
HYDRO RESOURCES, INC.

Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LBP-98-3 GRANTING TEMP. STAY have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
23 day of January 1998


Office of the Secretary of the Commission