

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD PANEL

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

Administrative Judge  
Thomas D. Murphy, Special Assistant

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
12750 Merit Drive	)	
Suite 1210 LB12	)	ASLBP No. 95-706-01-ML
Dallas, TX 75251	)	
	)	January 10, 1998

**ENDAUM'S AND SRIC'S THIRD AMENDED HEARING REQUEST AND  
PETITION TO INTERVENE**

**Introduction**

Pursuant to the Presiding Officer's order of December 18, 1997, Petitioners Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), submit this amended hearing request. Memorandum and Order (Lifting Hearing Suspension and Schedule for Filing Amended Hearing Petitions) at 3 (hereinafter "Order of December 18, 1997"). This Third Amended Request summarizes and incorporates by reference Petitioners' previously filed hearing requests, supporting affidavits, and other exhibits thereto, as well as the affidavits and other exhibits submitted with ENDAUM and SRIC's Motion for Stay, Request for Preliminary Hearing, and Request for Temporary Relief (hereinafter "Stay Motion").

Petitioners have diligently pursued a hearing in this matter since December 1994. Initially acting without the assistance of counsel, they struggled to comply with the Commission's regulations and with the Presiding Officer's orders. They succeeded admirably, explaining their interests in the proceeding, describing their areas of concern, and stating their reasonable expectations of injury. They have waited nearly three years for a hearing, but they have not waited idly. They have obtained legal counsel and expert consultants, and with this assistance they have reviewed thousands of pages of documents and have painstakingly amended their filings. They have done all this because of their sincere and legitimate concern for the preservation of their sole source of drinking water, the protection of their homes and grazing lands from radiological contamination, the survival of their cultural traditions, and the health and safety of their families and community. To deny them a hearing would be not only unjust, but also contrary to their right to a hearing under the Atomic Energy Act ("AEA"), 42 U.S.C. § 2239(a), and the Commission's regulations and policies.

### **Procedural History**

On April 25, 1988, Hydro Resources, Inc. (hereinafter "HRI" or "Applicant") submitted an application for in situ leach (hereinafter "ISL") mining at Church Rock, New Mexico, a rural, predominately Navajo, low-income community. Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508 (February 1997)



(hereinafter "FEIS") at 1-1, 3-78 to 3-79. Over the next four years, HRI amended its application to include uranium recovery processing at Crownpoint and ISL mining on allotted lands in the Crownpoint area (Unit 1) and in Crownpoint itself. Id. at 1-1. The Nuclear Regulatory Commission ("NRC" or "Commission") Staff deferred review of HRI's application at HRI's request during this four-year period of amendments "due to a tentative uranium market." Draft Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico, NUREG-1508, October 1994 (hereinafter "DEIS"), at 1-3.

On November 14, 1994, the NRC published a notice of the availability of the DEIS and the opportunity for members of the public to request a hearing. 59 Fed. Reg. 56557. Within 30 days of this notice, SRIC and a representative of the group that later took the name ENDAUM filed requests for hearing pro se. Letter from Bernadine Martin to John C. Hoyle, NRC, December 13, 1994 (hereinafter "Martin's Request"); Letter from Wm. Paul Robinson and Chris Shuey, SRIC, to Secretary, NRC, December 14, 1994 (hereinafter "SRIC's Request"). Five other groups and individuals also filed requests for a hearing.

Recognizing that most of these petitioners' ability to comply with ASLB procedures and pleading requirements was hindered by lack of experience with Subpart L of 10 C.F.R. Part 2, the Licensing Board subsequently afforded them an opportunity to amend their petitions. Memorandum and Order (Setting Schedule for Filings) (January 9, 1995) at 3, 5. Along with several other petitioners, ENDAUM

filed an amended petition pursuant to the Presiding Officer's order of January 9, 1995 and Memorandum and Order (Revising Schedule for Filings) of January 20, 1995 (hereinafter "Order of January 20, 1995"). Petitioner Eastern Navajo Diné Against Uranium Mining Request for Evidentiary Hearing and Petition for Leave to Intervene, February 15, 1995 (hereinafter "ENDAUM's Amended Request"). ENDAUM's Amended Request amended Martin's Request, which was submitted on behalf of the group of concerned citizens that later took the name ENDAUM.<sup>1</sup> SRIC did not file an amended Petition, but elected to stand on the petition it had previously filed.

On February 25, 1995, HRI filed a lengthy response to the original and amended requests for hearing by Petitioners and other requestors, opposing all requests. Response of Hydro Resources, Inc. to Requests for Hearing, February 25, 1995. ENDAUM responded to HRI on March 20, 1995, pursuant to the Order of January 20, 1995, answering HRI's arguments, and providing clarification and elaboration of its concerns. See ENDAUM's Motion/Response at 1-2.

The Licensing Board did not rule on these requests for hearing. Rather, on September 13, 1995, the Licensing Board issued an order staying the proceeding until the Staff completes its review of the license application and makes a decision to grant or deny the application, and the hearing file is updated to reflect the Staff's

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<sup>1</sup> ENDAUM's Amended Request at 12; Martin's Request; Affidavit of Bernadine Martin (March 17, 1995), ¶¶ 9-10 (hereinafter "Martin Affidavit"), attached as Exhibit B to Motion of Eastern Navajo Diné Against Uranium Mining to Respond to the Request of Hydro Resources Inc. to Deny All Petitions for an Evidentiary Hearing (hereinafter "ENDAUM's Motion/Response").



conclusions. Memorandum and Order (Proceeding Status), September 13, 1995.

While this proceeding was in abeyance, Petitioners obtained legal counsel and expert consultant assistance. See Petitioners ENDAUM and SRIC's Motion for Leave to Amend Requests for Hearing, Petition to Intervene, and Statement of Concerns and Brief in Support of Motion (August 19, 1997) at 18-21 (hereinafter "Motion to Amend"). With this assistance, Petitioners reviewed many of the voluminous amendments to the license and additions to the docket. On August 19, 1997, Petitioners' submitted their Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns (hereinafter "Second Amended Request") containing new and amended statements of concern and standing information. After initially granting an extension to HRI to file a response, the Presiding Officer ruled that Petitioners' amendment was "premature" because the proceeding was still in abeyance. Memorandum and Order (Admission of Staff and Scheduling) at 5-6. The Presiding Officer reiterated his previous order that the proceeding should remain in abeyance until issuance of the Safety Evaluation Report ("SER"). Id. He further allowed Petitioners to resubmit their Second Amended Request upon completion of the hearing file, "a status that will occur with the issuance of the SER". Id. at 3, 5-6.

By letter dated December 5, 1997, the Staff transmitted the SER to the Presiding Officer, his Assistant, and the parties, and advised the Presiding Officer that it had decided to issue the license "in 30 days." Letter from John T. [redacted] counsel for NRC Staff, to Judge B. Paul Cotter, Jr. In response to the Staff's notice

of issuance of the SER and the Presiding Officer's Order of September 19, 1997, Petitioners filed a Notice of Resubmission of ~~Second~~ Amended Request and Motion to Amend on December 15, 1997.

On December 18, 1997, the Presiding Officer authorized all petitioners to amend their hearing requests "on the basis of any new information found in the SER<sup>1</sup>, the Final Environmental Impact Statement (FEIS) released in February, 1997, and other documents exchanged between the applicant and the NRC Staff." Order of December 18, 1997, at 2-3 (footnote omitted). Such amended requests "shall adhere strictly to the requirements of 10 C.F.R. § 2.1205(e) and should address the determinations the Presiding Officer is required to make by 10 C.F.R. § 2.1205(h) in deciding whether to admit a petitioner as a party to this proceeding." Id. at 2. The Presiding Officer deemed ENDAUM's and SRIC's resubmitted pleadings filed effective December 18, 1997, and provided that ENDAUM and SRIC "may amend that filing" in accordance with his Order of December 18, 1997. Id. at 2-3.

Also on December 18, 1997, Petitioners requested a housekeeping stay of the license issuance to preserve the status quo until Petitioners filed, and the Presiding Officer ruled upon, a motion for a stay pursuant to 10 C.F.R. 2.1263. The Presiding Officer denied Petitioners' motion without prejudice on December 31, 1997. On January 5, 1998, the staff issued the license, and on January 15, 1998, Petitioners filed their Stay Motion.



## **Petitioners Meet the Standing Requirements of 10 C.F.R. §§ 2.1205(h)**

### **a. Standing Requirements**

A petitioner for an informal hearing on a materials license application under Subpart L of 10 C.F.R. Part 2 has standing if the petitioner "meets the judicial standards for standing," considering, "among other factors--

- (1) The nature of the requestor's right under the [Atomic Energy] Act to be made a party to the proceeding;
- (2) The nature and extent of the requestor's property, financial, or other interest in the proceeding; and
- (3) The possible effect of any order that may be entered in the proceeding upon the requestor's interest.

10 C.F.R. § 2.1205(h). The request for hearing must describe in detail the interest of the requestor in the proceeding and how the results of the proceeding may affect that interest "including the reasons why the requestor should be permitted a hearing, with particular reference to the factors set out in paragraph (h) of [10 C.F.R. § 2.1205]." Id. §§ 2.1205(e)(1) and (2).

When the petitioner for hearing is an organization:

it must show injury in fact to its organization interests or to the interests of members . . . who have authorized it to act for them. Where the organization is depending upon injury to the interest of its members or sponsors to establish standing, the organization must provide with its petition identification of at least one member or sponsor who will be injured, a description of the nature of that injury, and an authorization for that organization to represent that individual in the proceeding. The injury in fact must be arguably within the zone of interest protected by statutes covering the proceeding.

Curators of the University of Missouri, LBP-90-18, 31 NRC 559, 565 (1990),

quoting Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 41 (1990).

To establish "injury in fact," the "petitioner need not prove that he will be injured in fact," but instead must "demonstrate the basis for his reasonable expectation" of injury. Id. at 566 (emphasis in original). In other words, threatened injury can constitute injury in fact. Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations), LBP-94-4, 39 NRC 47, 49 (1994). Moreover, Subpart L does "not require a detailed showing . . . such as might be expected in a formal evidentiary hearing rather than at this early phase of an informal adjudication." Id. at 567.

**b. ENDAUM has standing**

ENDAUM has identified by name six ENDAUM members (Mitchell W. Capitan, Larry J. King, Grace A. Tsosie, Herbert Enrico Sr., Calvin Murphy and Bernadine Martin) who are threatened by immediate and substantial injury that is directly traceable to the Crownpoint Uranium Project, is within the zone of interests of the applicable statutes, and would be directly affected by a favorable ruling in this proceeding. ENDAUM has submitted affidavits from each of these individuals authorizing ENDAUM to represent him or her in this proceeding.<sup>2</sup>

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<sup>2</sup> ENDAUM's Amended Hearing Request of February 20, 1995, attached affidavits from Capitan, Enrico, Tsosie, and Murphy as Exhibits A, B, C, and D, respectively. Each of these individuals was listed as a member of ENDAUM in Exhibit E to the Amended Hearing Request. Their affidavits described the proximity of their home to the proposed project and the injuries that each affiant reasonably expected from the project. Each of these



These ENDAUM members, with the exception of M.J. Martin, live inside or within one half mile of the project boundaries.\* Mr. King resides and plans to reside

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affidavits were sworn and signed by the affiant, and witnessed and dated by a notary public. However, the authorization for ENDAUM to represent the individual in this proceeding appeared below the notarized signature.

Any doubt about the validity of these affidavits was resolved by ENDAUM's submission of additional affidavits of each of these individuals with its Motion/Response of March 15, 1995. ENDAUM's Motion/Response Exhibits A, C, D, and H. The March 1995 sworn affidavits reaffirm the earlier affidavits and expressly authorize ENDAUM to represent the affiant over the properly notarized signature of each affiant. ENDAUM's Motion/Response also included the affidavit of Bernadine Martin, who submitted ENDAUM's original hearing request (*see supra* p. 4 n.1), authorizing ENDAUM to represent her in this proceeding. *Id.* Exhibit B. In addition, ENDAUM submitted the affidavit of Larry J. King authorizing ENDAUM to represent him in this proceeding. *Id.* Exhibit I.

On January 15, 1998, ENDAUM submitted recent affidavits of Capitan, Enrico, Tsosie, Murphy, and King reaffirming and updating their earlier affidavits, and correcting minor errors in the descriptions of the locations of their homes and other property. Affidavit of Mitchell W. Capitan (January 7, 1998), Exhibit 6 to Stay Motion (hereinafter "Capitan 1998 Affidavit"); Affidavit of Grace A. Tsosie (January 11, 1998), Exhibit 7 to Stay Motion (hereinafter "Tsosie 1998 Affidavit"); Affidavit of Calvin Murphy (January 7, 1998), Exhibit 8 to Stay Motion (hereinafter "Murphy 1998 Affidavit"); Affidavit of Herbert Enrico Sr. (January 8, 1998), Exhibit 9 to Stay Motion (hereinafter "Enrico 1998 Affidavit"); Affidavit of Larry J. King (October 8, 1997), Exhibit 10 to Stay Motion (hereinafter "King 1998 Affidavit"). The final paragraph of each of those affidavits reaffirms the individual's authorization of ENDAUM to represent them in this proceeding. Thus, there is no question that ENDAUM has met the requirement to provide the authorization of an interested member.

In any event, a member's authorization may be presumed when "the sole or primary purpose of the petitioner organization (Georgians Against Nuclear Energy) was to oppose nuclear power in general or the facility at bar in particular." Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 & 2), LBP-91-33, 34 NRC 138, 140-41 (1991). ENDAUM's purpose is to oppose HRI's project (*see infra* pp.13-14). Hence, the authorization of ENDAUM's members to represent them in this proceeding may be presumed. Moreover, the signature of Bernadine Martin -- who was selected on December 12, 1994, by the ENDAUM members as their official representative to request a hearing (ENDAUM's Amended Request at 4-6) -- on ENDAUM's December 14, 1994 request, coupled with her personal interests, is enough to confer standing on ENDAUM. Consolidated Edison Co. of New York (Indian Point, Unit No. 2) and Power Authority of the State of New York (Indian Point, Unit No. 3), LBP-82-25, 15 NRC 715, 728-729, (1982).

for the rest of his life on land he occupies under homesite leases from the Navajo Nation located within the Church Rock site. Affidavit of Larry J. King (October 8, 1997) ¶ 4, Exhibit 10 to Stay Motion (hereinafter "King October 1997 Affidavit"); Affidavit of Marvin Resnikoff (January 13, 1998), ¶ 19, Exhibit 13 to Stay Motion (hereinafter "Resnikoff Affidavit"). Ms. Tsosie resides on allotted land adjacent to the Unit 1 mining site. Cf. Tsosie 1998 Affidavit, ¶ 2, with FEIS Figure 2.9 at 2-27. Mr. Murphy resides within one half mile of the Crownpoint Site. Cf. Murphy 1998 Affidavit, ¶ 2, with FEIS Figure 2.9 at 2-27. Mr. Capitan lives within approximately one quarter to one half mile of the Crownpoint site. Cf. Capitan 1998 Affidavit, ¶ 2, with FEIS Figure 2.9 at 2-27. Mr. Enrico lives within approximately one half mile of the Crownpoint site. Cf. Enrico 1998 Affidavit, ¶ 2, with FEIS Figure 2.9 at 2-27. Ms. Martin, who lives in Gallup, regularly visits relatives in Crownpoint and often works there. Martin Affidavit, ¶ 1.

ENDAUM members also have property interests in grazing permits located inside or next to the proposed project. Mr. King grazes cattle on land located within the Church Rock site under a permit issued to him by the Bureau of Indian Affairs (BIA). King October 1997 Affidavit, ¶ 5; Resnikoff Affidavit, ¶ 19; King Family Grazing Permit, Stay Motion, Exhibit 11. Ms. Tsosie and Mr. Murphy also have a grazing permit for lands located adjacent to the Unit 1 site. Cf. Murphy 1998 Affidavit, ¶ 6 and Tsosie 1998 Affidavit, ¶ 5, with FEIS Figure 2.9 at 2-27.



Injury in fact may be inferred from the proximity of petitioners' homes to a facility where there is a clear risk that the facility could cause offsite contamination, or may be established through the allegation of specific injury to the petitioner.

Babcock and Wilcox Co. (Pennsylvania Nuclear Services Operations), 39 NRC at 50-51. Both tests are met here. First, the aforementioned facilities pose significant risk of offsite radiological contamination that threatens the health and safety of ENDAUM's members. See, e.g., Second Amended Request at 39, 109-112.

Second, the hearing requests and affidavits of ENDAUM's members demonstrate the threat of concrete, particularized injury to their health, safety, and property which is directly traceable to the proposed project. For example, ENDAUM members are concerned that the mining operations will contaminate the Crownpoint municipal water system, their sole source of drinking water; that releases of contaminants to the air from HRI's central uranium processing plant and evaporation ponds would adversely affect their health; and that accidents involving HRI trucks hauling uranium along local roads will injure them or their livestock. See, e.g., Second Amended Request at 3-7 and citations therein.

The fact that these threatened injuries are actual and imminent, and are not merely speculative, is further demonstrated by affidavits submitted in support of Petitioners' Stay Motion. For example, these affidavits indicate that immediately after mining commences, contaminated mining solutions will escape from the minefields and will migrate rapidly from the Unit 1 site to the wells that supply the

Crownpoint municipal water system, causing those wells to exceed drinking water standards and acceptable concentrations of uranium rapidly after mining commences. Affidavit of Richard J. Abitz, (January 9, 1998), ¶¶ 11-13, 20, and 26, Exhibit 4 to Stay Motion (hereinafter "Abitz Affidavit"); Affidavit of Michael G. Wallace (January 13, 1998), ¶¶ 16, 27, 42, and 46, Exhibit 12 to Stay Motion (hereinafter "Wallace Affidavit"). Moreover, the radiation dose to local residents, such as Mr. King, from land application of wastewater is likely to exceed regulatory limits. Resnikoff Affidavit ¶¶ 19-24.

In addition, ENDAUM's concern about the threat of additional truck traffic from HRI's operations is an injury in fact recognized by the Licensing Board as sufficient to confer standing. Energy Fuels Nuclear, Inc., LBP-94-33, 40 NRC 151, 157 (1994) (standing established where license amendment may increase truck trips on road used by petitioner and family living five miles from tailings disposal facility). Thus, the threatened injuries alleged by ENDAUM constitute injury in fact to these ENDAUM members which is directly traceable to HRI's proposed project.

These ENDAUM members' alleged injuries are within the zones of interests protected by the statutes governing this proceeding. In this case, the governing statutes are not only the AEA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.,<sup>3</sup> but also the National Historic Preservation Act, 16 U.S.C. §§ 470f and 470a(d)(6)(B) (hereinafter "NHPA"). The members' concerns

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<sup>3</sup> Babcock and Wilcox, 39 NRC at 49.



that HRI's project will adversely affect their health and safety, by inter alia, exposing them to radiological contamination, and that ~~r~~EIS grossly understates these and other environmental impacts are squarely within the zones of interest protected by the AEA and NEPA. See, e.g., Second Amended Request at 17, 29-30, 33-34, 70-71, 76-77, 96, 102, 106, 109, 132-140, 145, 159. The NHPA, like NEPA, is a procedural statute with which the NRC must comply in issuing licenses. See 16 U.S.C. § 470f (requiring any federal agency issuing a license to take into account the effects on historic properties prior to license issuance). The historic preservation concerns expressed by ENDAUM (see Second Amended Request at 116-126) are within the zone of interests protected by the NHPA. Vieux Carre Property Owners, Residents & Associates, Inc. v. Brown, 875 F.2d 453, 458-459 (5th Cir. 1989), cert. denied, 110 S.Ct. 720.

Moreover, any order in this proceeding upholding or striking down issuance of the license would concretely affect the property and personal health and safety interests of ENDAUM members. For example, an order striking down the license or placing additional conditions on mining to ensure compliance with the Commission's regulations would help protect their drinking water and property from radiological contamination.

Finally, this adjudication falls squarely within the organizational purpose of ENDAUM. Concerned citizens who reside in the vicinity of the proposed project formed ENDAUM:

for the purpose of voicing our collective opposition to these [HRI] mines because of the threats they pose to our local water supply and to the regional water resources of the Navajo people, and to the health and well-being of families who live along the roads where uranium materials and wastes will be hauled."

Capitan March 1995 Affidavit, ¶ 22.<sup>4</sup> Accordingly, ENDAUM has standing under 10 C.F.R. § 2.1205(h).

c. **SRIC has Standing**

SRIC has identified by name a member of its Board, LaLora Charles, and a member of its staff, Raymond Morgan, who are threatened by immediate and substantial injury that is directly traceable to the Crownpoint Uranium Project, is within the zone of interests of the applicable statutes, and would be directly affected by a favorable ruling in this proceeding. See Second Amended Request at 9-12; SRIC's Request at 2 (identifying Raymond Morgan); Affidavit of Raymond Morgan (October 7, 1997), Exhibit 1 hereto, ¶¶ 8-10 (hereinafter "Morgan October 1997 Affidavit"); Affidavit of LaLora Charles (October 6, 1997), Exhibit 2 hereto, ¶¶ 9-11 (hereinafter "Charles October 1997 Affidavit").<sup>5</sup>

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<sup>4</sup> Although ENDAUM attached as Exhibit F to ENDAUM's Amended Request a resolution of the organization affirming its opposition to the proposed project which stated the name of the organization as "Eastern Navajo Diné Against Uranium Mining, Inc.," ENDAUM has never been incorporated and hence does not have articles of incorporation.

<sup>5</sup> SRIC previously submitted affidavits of Mr. Morgan and Ms. Charles. Affidavit of Raymond Morgan (August 14, 1997), Exhibit 43 to Second Amended Request; Affidavit of LaLora Charles (August 15, 1997), Exhibit 42 to Second Amended Request. The October 1997 affidavits, the originals of which were filed on October 14, 1997, in the United States Court of Appeals for the Tenth Circuit in New Mexico Environment Department v. USEPA, No. 97-9557 (August 27, 1997), correct minor errors in the August 1997 affidavits.

Ms. Charles has a property interest that would be affected by the project. She has an interest in land located between Mariano Lake and Smith Lake through which Navajo Highway 49 passes. Charles October 1997 Affidavit, ¶ 5. Hence, HRI's trucks hauling yellowcake slurry from Church Rock to Crownpoint would pass through her land. See id. ¶ 11; FEIS Figure 2.6 at 2-13.

Both Mr. Morgan and Ms. Charles obtain their drinking water from the Crownpoint municipal water supply system. Charles October 1997 Affidavit, ¶ 10; Morgan October 1997 Affidavit, ¶ 3. Consequently, they have a reasonable expectation of actual and imminent injury to their drinking water that is directly traceable to the proposed project. Abitz Affidavit, ¶¶ 11-13, 20, and 26; Wallace Affidavit, ¶¶ 16, 27, 42, and 46. Mr. Morgan and Ms. Charles are also threatened by injury from radiological contamination and personal injury resulting from accidents involving trucks hauling yellowcake for HRI on roads they regularly travel, and from contamination or other damage to Ms. Charles' land by a truck accident on the yellowcake haul route. Charles October 1997 Affidavit, ¶¶ 6, 10, and 11; Morgan October 1997 Affidavit, ¶¶ 3, 5 and 6. Ms. Charles is also reasonably concerned that the yellowcake hauling would injure her by directly interfering with her traditional cultural practices on lands next to the haul route. Charles October 1997 Affidavit, ¶¶ 7 and 11. Mr. Morgan frequently visits the Crownpoint and Church Rock communities in the course of this work, and he is the guardian of a child who rides a school bus along roads that will comprise the haul route to Crownpoint. Morgan



October 1997 Affidavit ¶¶ 8-9. See also SRIC's Request at 2.

Thus, any order in this proceeding upholding or striking down issuance of the license would concretely affect the property and personal health and safety interests of SRIC members. Such an order would also address their concerns that the project would adversely affect traditional cultural properties such as the areas used by Ms. Charles and other historic properties. Moreover, these interests are within the zones of interest protected by the AEA, NEPA, and NHPA. See supra pp. 12-13.

Mr. Morgan and Ms. Charles have authorized SRIC to represent them in this proceeding. Charles August 1997 Affidavit, ¶ 13; Morgan August 1997 Affidavit, ¶ 8. This adjudication is within the purpose of SRIC, a nonprofit organization based in Albuquerque, New Mexico. Morgan October 1997 Affidavit, ¶ 5. In carrying out its mission,<sup>6</sup> SRIC has assisted ENDAUM in reviewing and understanding technical documents concerning the proposed project and in presenting ENDAUM's views on the project to tribal, federal, and state agencies. Id., ¶¶ 5-6, 8; SRIC's Request at 2. Hence, participation in this proceeding on behalf of its own local Navajo members, Mr. Morgan and Ms. Charles, and as a co-petitioner with ENDAUM is within the organizational purposes of SRIC. Accordingly, SRIC meets the authorization and

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<sup>6</sup> "SRIC's mission is to provide timely, accurate information to the public on matters that affect the environment, human health, and communities in order to protect natural resources, promote citizen participation, and ensure environmental and social justice now and for future generations." Morgan October 1997 Affidavit, ¶ 5. The matters on which SRIC provides information include "those related to the development of uranium resources underlying Indian lands within the state of New Mexico." SRIC Original Request at 2.

organizational purpose tests.

Hence, SRIC, as well as ENDAUM, has standing to request a hearing. 10  
C.F.R. § 2.1205(h).<sup>7</sup>

### Areas of Concern

Petitioners' areas of concern are the 13 concerns contained in Petitioners' Second Amended Request. To the extent that those concerns raise issues not stated in Petitioners' previously filed petitions, those additional issues are based on new

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<sup>7</sup> Even if the Presiding Officer were to determine that either ENDAUM or SRIC, or both organizations, lack standing under judicial standing concepts, the Presiding Officer should nevertheless exercise his discretion to admit them to this proceeding. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 616 (1976). Discretionary intervention is appropriate here because, first, Petitioners would be inadequately represented by other parties to this proceeding. The interests of the Staff, which issued the license over Petitioners' strenuous objections to HRI's and the Staff's failure to comply with NRC regulations or follow NRC guidances, are diametrically opposed to the interests of Petitioners. Similarly, if the Eastern Navajo Allottees Association is admitted as a party, that organization supports HRI's application and hence cannot represent the interests of Petitioners. See Memorandum in Support of Petition for Leave to Intervene (January 5, 1998) at 6. Nor do the various other petitioners adequately represent the interests of ENDAUM and SRIC. While those petitioners' stated their opposition to the licensing in their hearing requests, those requests do not raise the range of issues stated in ENDAUM's and SRIC's 13 areas of concern. Even if they shared all of ENDAUM's and SRIC's concerns, none of those parties are represented by counsel in this proceeding, and hence they are not equipped to litigate ENDAUM's and SRIC's concerns.

Second, discretionary intervention is appropriate on the basis of the potential significant contribution Petitioners can make to the hearing on substantial issues of law and fact that will not otherwise be raised or presented. Virginia Electric Power Co. (North Anna Power Station, Units 1 & 2), ALAB-363, 4 NRC 631 (1976). Petitioners' cogent, detailed analysis of the serious health and safety issues raised by the licensed activities in their Second Amended Request and in the carefully reasoned affidavits of Petitioners' experts submitted with the Stay Motion demonstrate the potential contribution they can make on substantial issues that are ignored and glossed over by HRI and the Staff. The importance and immediacy of these issues, such as the protection of a community's sole source of drinking water and the preservation of cultural resources, is amply demonstrated in Petitioners' pleadings and expert affidavits. See, e.g., Stay Motion at 5-7.



information in the FEIS and other documents exchanged between HRI and the Staff that Petitioners obtained while this proceeding was in abeyance, and reflect the assistance of counsel and experts retained during that period. See Motion to Amend at 10-16. Additional new information is contained in the SER, the license, and correspondence exchanged between HRI and the Staff since the Second Amended Request was prepared. However, the documents that Petitioners have had the opportunity to review indicate that the new information raises issues already encompassed by the 13 areas of concern stated in the Second Amended Request. Accordingly, Petitioners have elected not to further amend their statements of concern at this time.<sup>8</sup>

#### **Petitioners Areas of Concern are Germane**

In ruling on a Subpart L request for hearing, the Presiding Officer must determine whether the petitioner's "specified areas of concern are germane to the subject matter of the proceeding." 10 C.F.R. § 2.1205(h). As the Commission has explained:

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<sup>8</sup> Due to the extremely unwieldy, disorganized, and self-contradictory nature of the record for HRI's license application, Petitioners have not received a meaningful opportunity to review the record and prepare a statement of concerns. See Second Amended Request at 17-28. As evidenced by the license itself, which references 49 separate HRI submittals as containing binding license conditions except where superseded by the license, neither HRI nor the Staff has fixed this problem. See License Number SUA-1508, Attachment A, submitted to the Presiding Officer by letter from John T. Hull, NRC Staff counsel (January 5, 1998). Therefore, Petitioners reserve the right to amend their areas of concern after they have gained access to, and have had sufficient time to review, a reasonably organized and coherent docket and hearing file. Petitioners also reserve the right to amend their statement of concerns based on any new information to which Petitioners have not yet had access.



This statement of concerns need not be extensive, but it must be sufficient to establish that the issues the requestor wants to raise regarding the licensing action fall generally within the range of the matters that properly are subject to challenge in such a proceeding.

Pathfinder, 31 NRC at 46-47, quoting 54 Fed. Reg. 8269, 8272 (February 28, 1989) (emphasis by the Licensing Board).

The statement of concerns should provide the Presiding Officer with the "minimal" information needed to ensure that the concerns are germane. 54 Fed. Reg. 8272. Indeed,

[t]he very phrase "areas of concern" suggests the kind of broad interpretation sought by the Commission. A petitioner need not even state concerns. Just areas of concern.

Curators of the University of Missouri, 31 NRC at 568. Nor must the areas of concern necessarily correspond to a specific NRC regulation. Babcock and Wilcox Co., (Pennsylvania Nuclear Services Operations), LBP-94-12, 39 NRC 215, 221 (1994) (where soil testing might be required as a condition of license renewal as a result of evidence adduced in the proceeding, concern regarding soil testing admissible despite no NRC regulation requiring soil testing). Thus, "[t]he threshold for pleading an area of concern is very low." Advanced Medical Systems, Inc. (Cleveland, Ohio), LBP-95-3, 41 NRC 195, 199 n.17 (1995).

ENDAUM and SRIC's statement of their areas of concern far exceeds this standard. Petitioners' 13 concerns span 170 pages. Each concern contains a specific statement of the issues raised, and includes supporting factual and legal citations.

Thus, Petitioners have provided the Presiding Officer with ample basis to determine that their concerns are germane.

### **Petitioners' Request is Timely**

Petitioners have timely filed requests for hearing pursuant to 10 C.F.R. § 2.1205(h), and have previously briefed this timeliness issue. ENDAUM's Amended Request at 12-15; ENDAUM's Motion/Response at 3-6; SRIC's Request at 3. Those arguments are incorporated by reference herein. Briefly, Petitioners filed timely requests in response to the original notice of opportunity to hearing, 59 Fed. Reg. 56557 (November 14, 1994). See supra p. 3. Petitioner ENDAUM also timely filed an amended request in February 1995, while Petitioner SRIC elected to stand on its original request at that time. See supra pp. 3-4. In its March 1995 response to HRI's response to ENDAUM's Amended Request, ENDAUM provided additional affidavits from its members and further explained its concerns. See supra p. 4. This Third Amended Request, and the Second Amended Request incorporated by reference herein, are timely pursuant to the Presiding Officer's Order of December 18, 1997, authorizing petitioners to file amendments to be received by January 16, 1998. See supra p. 6.<sup>9</sup>

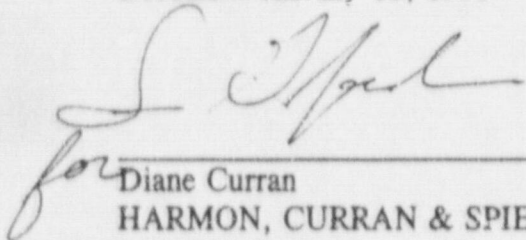
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<sup>9</sup> Even if the Presiding Officer somehow determined that Petitioners' requests for hearing were not timely, Petitioners' request should be granted pursuant to 10 C.F.R. § 2.1205(i). First, any delay in Petitioners' pro se submission of their amended requests and supporting affidavits was excusable. See ENDAUM's Amended Request at 12-15; ENDAUM's Motion/Response at 3-6. Second, granting Petitioners' request will not unduly injure or prejudice any other party, since the delays in this proceeding are of the Applicant's and the Staff's own making, and all parties have been on notice since at least March 1995 of

## Conclusion

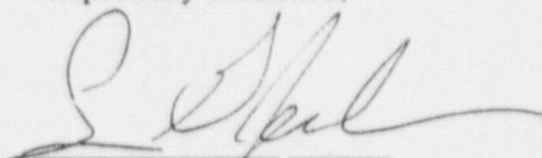
For the foregoing reasons, Petitioners respectfully request that they be granted a hearing on the 13 areas of concern stated in their Second Amended Request, and in the alternative, that they be granted discretionary intervention and that their 13 areas of concern be admitted.

DATED: January 16, 1998



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Respectfully submitted,



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virtually all the areas of concern that Petitioners intend to litigate. See Motion to Amend at 22-24. Moreover, the fact that the license has now issued should not be weighed in the determination of prejudice because, through no fault of Petitioners, this proceeding was in abeyance until the Staff's issuance of the SER on December 5, 1997. Petitioners promptly resubmitted their Second Amended Request pursuant to the judge's order of September 19, 1997.