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OFFICE OF SECRETARY
RULEMAKINGS AND
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
P.O. Box 15910	)	
Rio Rancho, New Mexico 87174	)	
	)	

NRC STAFF'S RESPONSE TO MARILYN MORRIS' AND GRACE SAM'S PETITION FOR COMMISSION REVIEW

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Counsel for NRC Staff

November 23, 1999

PDR ADOCK

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INTRODUCTION

By petition dated November 8, 1999, Marilyn Morris and Grace Sam (Petitioners) requested the Commission to review the Presiding Officer's October 19, 1999 "Memorandum and Order (Motion to Hold in Abeyance)," LBP-99-40, 50 NRC __ (Abeyance Order). *See* "Marilyn Morris and Grace Sam's Petition for Review of Presiding Officer's October 19, 1999 Memorandum and Order Granting HRI's Motion to Hold Hearing in Abeyance" (Sam's Review Petition). The Abeyance Order suspends further Board adjudication in this proceeding pending notification from Hydro Resources, Inc. (HRI) that it intends to conduct mining on its Section 17, Unit 1, or Crownpoint sites. *See* Abeyance Order, slip op. at 5. For the reasons discussed below, Sam's Review Petition should be denied.

BACKGROUND

This proceeding concerns HRI's license to conduct *in-situ* leach (ISL) uranium mining at its Church Rock Section 8 and 17 sites (located about five miles outside the town of Church Rock) and at two other sites located near the town of Crownpoint (designated as the Crownpoint and Unit 1 sites). *See* NUREG-1508, "Final Environmental Impact Statement to Construct and Operate the

Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico," dated February 1997 (FEIS), Figure 1.1 at 1-2. The Presiding Officer has so far authorized HRI to conduct ISL mining only on its Church Rock Section 8 site. *See* LBP-99-30, 50 NRC 77, 81 (1999). The development and operation of HRI's ISL sites are scheduled to occur incrementally (well field by well field) over a twenty-year period. Before conducting any ISL mining at the Unit 1 or Crownpoint sites, HRI is required to successfully demonstrate groundwater restoration at its Church Rock site. *See* FEIS "Summary and Conclusions," at xix-xx; and HRI License Condition 10.28. In addition to meeting several license conditions prior to conducting any ISL mining on the Church Rock Section 17, Crownpoint, or Unit 1 sites, HRI would also be required to provide the parties herein with eight months advance notice before any such mining occurs. *See* Abeyance Order, slip op. at 5. The Presiding Officer found that since HRI has no present plans to mine these sites, adjudicating issues pertaining thereto would be premature and wasteful of resources. *See id.*, slip op. at 2.

DISCUSSION

A. Standards for Interlocutory Review

Pursuant to 10 C.F.R. §§ 2.730(f) and 2.786(g), interlocutory review is generally disfavored. *See Safety Light Corp.* (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 158 (1992) (in connection with abolishment of Atomic Safety and Licensing Appeal Board, interlocutory review standard of 10 C.F.R. § 2.730(f) was codified in 10 C.F.R. § 2.786(g)). Interlocutory review may only be granted by the Commission if a presiding officer's ruling or order 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.

10 C.F.R. § 2.786(g)(1-2). These are stringent standards which are not often met. *See Safety Light Corp.* (Bloomsburg Site Decontamination and License Renewal Denials), CLI-92-13, 36 NRC 79, 85 (1992). Interlocutory review will be undertaken as a matter of discretion only in the most compelling circumstances. *See Sequoyah Fuels Corp. and General Atomics* (Gore Oklahoma Site), CLI-94-11, 40 NRC 55, 59 (1994). Although on its face the rule's applicability appears limited to situations where a presiding officer certifies questions or refers rulings to the Commission, 10 C.F.R. § 2.786(g) is read as also allowing an aggrieved party on their own to seek interlocutory review. *See Oncology Services Corp.*, CLI-93-13, 37 NRC 419, 420-21 (1993).

Under the review standard of 10 C.F.R. § 2.786(g)(1), the threat of harm must be immediate. *See, e.g., Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-95-15, 42 NRC 181, 184 (1995) (Commission reviewed licensing board ruling, entered in ongoing proceeding, which ordered release of notes claimed to be protected by the attorney-client privilege); and *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 193 (1994) (Commission reviewed licensing board order requiring immediate release of NRC investigatory report). Mere generalized representations by counsel or unsubstantiated assertions regarding "immediate and serious irreparable impact" will not suffice to meet the stringent standard for interlocutory review. *Sequoyah Fuels, supra*, CLI-94-11, 40 NRC at 61. Similarly, rulings which simply increase the length of licensing proceedings are not viewed as pervasively or unusually affecting the basic structure of such proceedings, so as to justify interlocutory review. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-675, 15 NRC 1105, 1112-13 (1982), and cases cited therein. Even an order expanding the issues to be decided in a proceeding was found not to justify the extraordinary step of the Commission taking interlocutory

review pursuant to 10 C.F.R. § 2.786(g)(2). *See Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), CLI-94-2, 39 NRC 91, 93 (1994). Similarly, the mere fact that a ruling may be "important or novel" does not necessarily alter the basic structure of a proceeding, so as to justify interlocutory review. *Sequoyah Fuels, supra*, CLI-94-11, 40 NRC at 63.

B. Petitioners Fail To Meet Interlocutory Review Standards

The Petitioners base their request for interlocutory review of the Abeyance Order on the 10 C.F.R. § 2.786(g)(2) standard. *See* Sam's Review Petition, at 3. The Petitioners do not discuss any of the above-cited decisions applying this review standard, or otherwise show why Commission review of the Abeyance Order is warranted pursuant to that standard. As discussed below, the Petitioners' request for interlocutory review is limited to a contention that the Presiding Officer erred in terming the Abeyance Order interlocutory. *See* Sam's Review Petition, at 9-10.[1]

The Petitioners support this claim of Presiding Officer error by contending that he acted "contrary to the Commission's expressed preference for a speedy disposition of this case." Sam's Review Petition, at 9, *citing* "49 N.R.C. 25" (an apparent reference to CLI-99-3, 49 NRC 25 (1999))[2]. The excerpt from this ruling on which the Petitioners rely references the Commission's "frequently expressed intention that this proceeding move to completion in an expeditious manner." *Id.*, 49 NRC at 26. The Commission also urged the Presiding Officer "to continue his effort to move

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[1] Based on the contention that the Abeyance Order, despite its express terms, is not interlocutory, the bulk of the Petitioners' argument (*see* Sam's Review Petition, at 4-9) seeks Commission review under the standards of 10 C.F.R. § 2.786(b)(4), applicable to the review of full or partial initial decisions made by the Presiding Officer. These arguments are addressed in Section C, *infra*.

[2] Therein, the Commission granted in part and denied in part a request for interlocutory review of the Presiding Officer's February 4, 1999 scheduling order. *See* CLI-99-3, 49 NRC 25, at 26-7.

this proceeding forward expeditiously." *Id.* When viewed in the proper context of earlier Commission rulings, it is obvious that the Commission's references to "this proceeding" refer not to the HRI case as a whole, but only to Phase I of the proceeding. In CLI-98-22, 48 NRC 215, 218 (1998), the Commission, in declining to disturb the Presiding Officer's decision to bifurcate this case into phases, stated in pertinent part as follows:

> The Presiding Officer has defined a category of issues that will fall into the first phase of litigation, *i.e*, all issues pertinent solely to Church Rock Section 8, and issues clearly relevant jointly to Section 8 and the other sites. This is enough of an outline to proceed with the first phase.

In accordance with this ruling, the parties began filing their Phase I written presentations, which led to a series of partial initial decisions issued by the Presiding Officer, culminating with the issuance of LBP-99-30, *supra*, concluding Phase I of this case. *See* 50 NRC at 81. During Phase I, the Commission determined that a January 21, 1999 scheduling order issued by the Presiding Officer improperly extended Phase I briefing deadlines, and the Commission vacated that order. *See* CLI-99-1, 49 NRC 1, at 2-3 (1999). In doing so, the Commission stated in pertinent part as follows:

> Our expectation is that the Presiding Officer will complete his series of merits decisions on all matters related to the Church Rock section 8 property -- the first area where Hydro Resources intends to engage in mining -- no later than June 15 [of 1999]. If he cannot do so, we ask that he issue an order stating the reasons why the June 15 date is impracticable and establishing an alternate final decision date.

Id., at 3-4. This is the context in which the references to "this proceeding" were made by the Commission in CLI-99-3.

In light of the above, it is evident that the Petitioners wrongly concluded that in expressing its "intention that this proceeding move to completion in an expeditious manner," the Commission was referring not to Phase I of the proceeding, but to the HRI case as a whole. *See* Sam's Review

Petition, at 9. And with respect to Phase I, it is unchallenged that the Presiding Officer completed that portion of the proceeding in a reasonably expeditious manner. Accordingly, this argument does not support interlocutory review of the Abeyance Order.

C. Petitioners Fail To Meet 10 C.F.R. § 2.786(b)(4) Review Standards

As demonstrated in Section B, *supra*, the Petitioners' argument that the Presiding Officer erred in characterizing the Abeyance Order as interlocutory has no merit. The Abeyance Order is clearly procedural in nature, and contains no rulings on any technical or legal issues relating to the issuance of HRI's license. The Abeyance Order thus does not qualify as a full or partial initial decision of the type subject to the review standards of 10 C.F.R. § 2.786(b)(4). *See* 10 C.F.R. § 2.786(b)(1). The Commission previously described the different scopes of 10 C.F.R. § 2.786(b) and 10 C.F.R. § 2.786(g) as follows:

> The Commission may consider the criteria listed in section 2.786(b)(4) when reviewing interlocutory matters on the merits, but when determining whether to undertake such review the standards in section 2.786(g) control our determination.

Oncology Services Corp., supra, CLI-93-13, 37 NRC at 421. However, even if the Commission determines that the Abeyance Order qualifies as a collateral order (*see* Sam's Review Petition, at 4-5), and that the review standards of 10 C.F.R. § 2.786(b)(4) should therefore govern here,[3] the Petitioners have failed to show that review of the Abeyance Order is warranted.

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[3] In order to justify Commission review under these standards, a "substantial question" must be raised regarding at least one of the following five areas of consideration: (1) whether a finding of material fact in the contested decision is clearly erroneous; (2) whether a necessary legal conclusion in the contested decision departs from or is contrary to established law; (3) whether the petitioner identifies any substantial and important policy or legal questions; (4) whether the petitioner identifies any prejudicial procedural error in the proceeding to date; or (5) whether the petitioner identifies 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).

The Petitioners seek review of the Abeyance Order pursuant to the second and third criteria of 10 C.F.R. § 2.786(b)(4). *See* Sam's Review Petition, at 3. However, as discussed below, neither the Petitioners' National Environmental Policy Act (NEPA) argument (*see id.*, at 5-7), nor their Administrative Procedure Act (APA) argument (*see id.*, at 7-9), show that a necessary legal conclusion in the Abeyance Order departs from or is contrary to established law, or that the Abeyance Order raises any substantial and important policy or legal questions.

In their NEPA argument, the Petitioners make several vague references to the "NEPA process," but fail to establish a basis for their summary conclusion that the Abeyance Order "substantially departs from established law" and "presents an important question of law and policy." Sam's Review Petition, at 7. For example, the Petitioners cite *Calvert Cliffs Coordinating Committee v. U.S. Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971), stating that this decision "by implication" means that "the NEPA process does not end with [publication of] the FEIS, but continues through the entire agency review process," and that *Calvert Cliffs,* together with 10 C.F.R. § 51.104, puts the HRI licensing proceeding "squarely within the scope of the NEPA process." Sam's Review Petition, at 6-7. The Staff does not dispute the point that HRI's licensing falls within NEPA's scope. Obviously it does. Moreover, throughout Phase I of this proceeding, the Presiding Officer carefully considered the FEIS. For example, in his first Partial Initial Decision (PID) on liquid waste issues, the Presiding Officer stated that: "I have reviewed the FEIS carefully and I am impressed by its attention to technical detail and its thoughtful consideration of environmental risks." LBP-99-1, 49 NRC 29, 36. Similarly, in his final PID, the Presiding Officer's careful consideration of the FEIS' groundwater analyses is also evident. *See* LBP-99-30, *supra,* 50 NRC at 93-106, and 109 (addressing the groundwater issues raised and concluding that the relevant

FEIS analyses were thorough and correct). The Presiding Officer's consideration of the FEIS in his decision-making thus fully met the requirements of 10 C.F.R. § 51.104, and any "implied" holdings in *Calvert Cliffs, supra.*

Equally vague is the related charge that the NEPA process has been segmented, in violation of NEPA. *See* Sam's Review Petition, at 6, *citing Town of Huntington v. Marsh,* 859 F.2d 1134, 1142 (2nd Cir. 1988), and *Kleppe v. Sierra Club,* 427 U.S. 390, 410 (1976).[4] The rule against segmentation prohibits an agency from dividing a project into segments for purposes of avoiding the NEPA requirement to prepare an EIS. *See Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 298-99 (D.C. Cir. 1987). Similarly, if several foreseeable projects may occur in the same geographic region, the projects should be evaluated in a single EIS. *See City of Tenakee Springs v. Clough,* 915 F.2d 1308, 1312 (9th Cir. 1990). The Staff met these requirements when it issued the FEIS, which evaluated the full range of impacts of ISL mining at HRI's Church Rock, Unit 1, and Crownpoint sites, as encompassed by HRI's license application. 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). The Petitioners have not shown that phased development of HRI's project, as contemplated in the Abeyance Order, will violate the segmentation rule, or any other NEPA requirement.

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[4] The Petitioners do not explain how these decisions support their segmentation argument. In *Marsh,* the court ruled that the Army Corps of Engineers had wrongly viewed the scope of its environmental impact statement (EIS) as being limited to the designation of a waste disposal site for dredged mud, and that the Corps should also have evaluated the impacts of issuing permits to use the site, which would entail the dumping of several thousand cubic yards of mud. *See Marsh,* 859 F.2d at 1135-36, and 1142. In *Kleppe,* the Court ruled that an agency's EIS must comprehensively evaluate the environmental consequences of related actions pending before the agency. *See Kleppe,* 427 U.S. at 409-10. Here, the Staff's FEIS fully met this requirement.

In their APA argument (*see* Sam's Review Petition, at 7-9), the Petitioners argue that the Abeyance Order is arbitrary and capricious, claiming that it departs from established NRC policy in violation of §10(e) of the APA, and that the Commission should, therefore, grant review pursuant to 10 C.F.R. §2.786(b)(4)(iii). As discussed below, the three specified examples of "established NRC policy" are erroneous, and the APA argument, accordingly, does not support Commission review of the Abeyance Order.

The first purported policy identified by the Petitioners is that the NRC has never permitted segmenting a proceeding by geographic region, but only by issue. *See* Sam's Review Petition, at 7-8, *citing Long Island Lighting Company* (Shoreham Nuclear Power Station Unit 1), LBP-83-30, 17 N.R.C. 1132, 1136 (1983). The Board's discussion in *Shoreham* did not create general policy applicable in all NRC adjudications, and the Presiding Officer here was conducting the first NRC adjudication pertaining to an ISL mining license. Thus, even if actions taken by the Presiding Officer here are unprecedented, they cannot reasonably be viewed as being arbitrary and capricious. Moreover, the discussion in *Shoreham, supra*, at 1136-37, referenced cases involving nuclear plants located at single geographic sites. It is, therefore, hardly surprising that *Shoreham* did not discuss segmentation by geographic site. In contrast to the reactor cases referenced in *Shoreham*, here, HRI's planned ISL mining operations involve the development of several well fields on different sites.

The second purported policy is said to be contained in the 10 C.F.R. §51.104(a)(3) requirement that a presiding officer decide matters put into controversy by the parties that are within NEPA's scope. *See* Sam's Review Petition, at 8. Here, all such matters relevant to Phase I were addressed by the Presiding Officer, and the Petitioners fail to show that bifurcation violates any Commission policy governing the consideration of evidence. *See* 10 C.F.R. §51.104(a)(1-2).

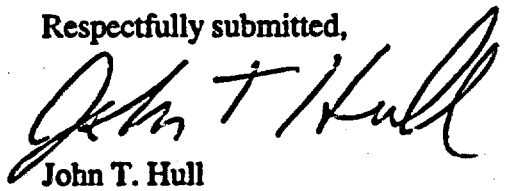
The third purported policy relied upon by the Petitioners is the Commission's ruling in CLI-99-3, discussed in Section B, *supra*. *See* Sam's Review Petition, at 8. As discussed in Section B, *supra*, the Petitioners misconstrue the reference to "this proceeding" by taking the Commission's ruling out of context. Moreover, the Commission's directions in CLI-99-3 for managing part of a single case do not qualify as the type of general policy referenced in 10 C.F.R. §2.786(b)(4)(iii).

As shown above, neither the Petitioners' NEPA argument, nor their APA argument, supports Commission review of the Abeyance Order pursuant to the standards of 10 C.F.R. § 2.786(b)(4). No showing is made that the Abeyance Order departs from or is contrary to established law, or that the Abeyance Order raises any substantial and important policy or legal questions.

CONCLUSION

For the reasons discussed above, Sam's Review Petition meets neither the Commission's standards for granting interlocutory review of orders pursuant to 10 C.F.R. § 2.786(g)(2), nor the review standards of 10 C.F.R. § 2.786(b)(4), applicable to partial and final decisions. Accordingly, their petition should be denied.

Respectfully submitted,



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Dated at Rockville, Maryland
this 23rd day of November 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MARILYN MORRIS' AND GRACE SAM'S PETITION FOR COMMISSION REVIEW" in the above-captioned proceeding have been served on all of the following by U.S. Mail, first class, except for those indicated by a single asterisk who have been served through deposit in the Nuclear Regulatory Commission's internal mail system (those indicated by double asterisks have also been served with an unsigned copy via e-mail), this 23rd day of November 1999:

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