UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 11445 **DOCKETED 04/03/06**

COMMISSIONERS

SERVED 04/03/06

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield
Gregory B. Jaczko
Peter B. Lyons

In the Matter of	)	
	)	
HYDRO RESOURCES, Inc.	)	Docket No. 40-8968-ML
(P.O. Box 777	)	
Crownpoint, New Mexico 87313)	)	
	)	

CLI-06-11

MEMORANDUM AND ORDER

In LBP-05-26,[1] the Presiding Officer rejected cultural resource challenges to an *in situ* leach uranium mining license that the NRC Staff granted to Hydro Resources, Inc. ("HRI") in 1998. Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam, and Marilyn Morris (collectively, "Intervenors") have filed a petition for review.[2] HRI[3] and the NRC Staff[4] filed answers to the Petition for Review.

For the reasons discussed below, we decline to take review of LBP-05-26.

I. BACKGROUND

A. *Regulatory Framework*

The Commission's regulations at former 10 C.F.R. § 2.1253 authorize petitions for

[1]LBP-05-26, 62 NRC 442 (2005).

[2]Intervenors' Petition for Review of LBP-05-26 (October 5, 2005) ("Petition for Review").

[3]Response to Intervenors' Petition for Review of LBP-05-26 Regarding Historic and Cultural Resource Preservation (October 20, 2005).

[4]NRC Staff's Answer to Intervenors' Petition to Review LBP-05-26 (October 20, 2005).

review of a presiding officer's initial decision, using the general processes contained in 10 C.F.R. § 2.786.[5] "[A] party may file a petition for review with the Commission on the [following] grounds":[6]

> (i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
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> (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
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> (iii) A substantial and important question of law, policy or discretion has been raised;
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> (iv) The conduct of the proceeding involved a prejudicial procedural error; or
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> (v) Any other consideration which the Commission may deem to be in the public interest.[7]

The Commission has discretion to grant a petition for review, "giving due weight to the existence of a substantial question with respect to" any of these five grounds.[8] Our "[r]eview of an initial decision . . . is purely discretionary . . . ."[9]

B. *Procedural History and Presiding Officer Decision*

This proceeding commenced after the NRC Staff granted a materials license to HRI in

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[5]This order refers to the rule designations in our former Part 2, which now have been substantially revised and renumbered. *See* Final Rule, Changes to Adjudicatory Process, 69 Fed. Reg. 2182 (Jan. 14, 2004). The revised rules do not apply to this case, which began before their promulgation.

[6]10 C.F.R. § 2.786(b)(1).

[7]10 C.F.R. § 2.786(b)(4).

[8]*Id*.

[9]*Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-03-8, 58 NRC 11, 17 (2003), citing *Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-12, 46 NRC 52, 53 (1997).

January 1998, pursuant to 10 C.F.R. Part 40, to undertake *in situ* leach mining[10] at four sites in McKinley County, New Mexico.[11] The four sites are Section 8 and Section 17 in Church Rock and Crownpoint and Unit 1 in Crownpoint.[12] They cover a large area – approximately 3192 acres, of which the project may disturb 2498,[13] and access to the Unit 1 site is difficult.[14] HRI planned to develop and mine the four sites in phases over a twenty-year period.[15] In consultation with the New Mexico State Historic Preservation Office, the NRC Staff initiated the process required by section 106 of the National Historic Preservation Act ("NHPA").[16] Pursuant to that Act, the NRC Staff conducted a general review, developed a plan for completing NHPA review of the sites on an incremental – or phased – basis (based upon planned development of the mining sites), and published its evaluation and its plans for completing its section 106 review in its Final Environmental Impact Statement ("FEIS"). The Presiding Officer provides additional details of this evaluation and the phased approach in his decision.[17] HRI's license includes a condition that: "(1) prohibits HRI from performing any construction or development activities at any site until the NRC Staff has completed an appropriate NHPA review for that site, and (2) ensures the protection of any newly discovered cultural artifacts."[18]

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[10]LBP-05-26, 62 NRC at 450 n.4 provides an explanation of this mining process.

[11]*Id*. at 446-47 provides a more detailed history.

[12]Mining has not commenced at any of the sites. *Id*. at 447.

[13]*Id*. at 450-51.

[14]CLI-98-8, 47 NRC 314, 318 (1998).

[15]LBP-05-26, 62 NRC at 450.

[16]16 U.S.C. § 470f.

[17]LBP-05-26, 62 NRC at 450-54.

[18]*Id*. at 454. The Presiding Officer also provides the text of the condition (License

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The Presiding Officer granted Intervenors' hearing requests in May 1998. For purposes of cultural review (as well as for certain non-NHPA concerns not at issue in this decision), the Presiding Officer divided the proceeding into phases, based upon HRI's planned, geographically-based, initiation of its licensed mining operations. Phase I, limited to Section 8, concluded in February 2004. For Phase II of the proceeding,[19] the Presiding Officer grouped Intervenors' challenges into four categories, including the one at issue here – cultural resources. The Presiding Officer found "that HRI has carried its burden of demonstrating that the Intervenors' challenges relating to cultural resources do not provide a basis for invalidating HRI's license to perform ISL [*in situ* leach] uranium mining at Section 17, Unit 1, and Crownpoint."[20] Specifically, the Presiding Officer held that the "law of the case" doctrine barred Intervenors' contention that the NRC Staff violated the NHPA by using a phased compliance approach. (The Presiding Officer and the Commission had previously approved the Staff's phased approach.[21]) The Presiding Officer also rejected Intervenors' alternative argument that the NRC Staff's cultural resources review was inadequate. Finally, the Presiding Officer rejected Intervenors' argument that issuing a license to HRI violated the National Environmental Protection Act ("NEPA") because the NRC Staff's review of cultural resource impacts in its FEIS did not take the "hard look" required by NEPA.

II. ANALYSIS

Intervenors argue that the Commission should grant review of LBP-05-26 "because it contains 'errors of material fact', 'necessary legal conclusion[s]' which are 'in error', and a

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[18](...continued)
Condition 9.12). *Id*.

[19]Phase II covers the remaining sites: Section 17, Unit 1, and Crownpoint.

[20]*Id*. at 476.

[21]*See* CLI-98-8, 47 NRC 314 (1998), CLI-99-22, 50 NRC 3 (1999).

'substantial and important question of law, policy or discretion . . . . '"[22] For the reasons we give below in responding to Intervenors' specific arguments, and for the reasons given by the Presiding Officer, we agree with the Presiding Officer's holding in LBP-05-26, and see no basis for further review.

A. *Law of the Case Doctrine and NHPA Regulation Revisions*

Intervenors latch on to a recent revision of the NHPA regulations in a bid to reopen issues we decided in this proceeding several years ago – in 1998[23] and 1999.[24] In those decisions, we found that the NHPA regulations then in effect and applicable to the application allowed a phased (site-by-site) approach to cultural impact review.[25] Intervenors now argue that

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[22]Petition for Review at 4.

[23]CLI-98-8, 47 NRC at 323-24 ("[W]e are not convinced . . . that the NRC and HRI are prohibited from taking a 'phased review' approach to complying with the NHPA . . . .").

[24]CLI-99-22, 50 NRC at 12-13 ("While the previous adjudicatory decisions concerned a stay motion, we see no reason to depart from our fundamental conclusion that phased compliance is acceptable under applicable law.").

[25]At that time, the NHPA regulations disclaimed any intent "to prohibit phased compliance":

> Section 106 requires the Agency Official to complete the section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license or permit. The Council does not interpret this language to bar an Agency Official from expending funds on or authorizing nondestructive planning activities preparatory to an undertaking before complying with section 106, or to prohibit phased compliance at different stages in planning. The Agency Official should ensure that the section 106 process is initiated early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration. The Agency Official should establish a schedule for completing the section 106 process that is consistent with the planning and approval schedule for the undertaking.

36 C.F.R. § 800.3(c), Final Rule, Protection of Historic Properties, 51 Fed. Reg. 31,115, 31,120 (Sept. 2, 1986).

Moreover, the immediately preceding section endorsed a "flexible" implementation of NHPA requirements:

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we should revisit our earlier decisions because of subsequent revisions to the NHPA regulations.

We agree with the Presiding Officer that the "law of the case" doctrine forecloses Intervenors' arguments. Briefly stated, legal determinations made on appeal in a case are controlling precedent, becoming the "law of the case," for all later decisions in the same case.[26] The "law of the case" doctrine is "a salutary rule of policy and practice, grounded in important considerations related to stability in the decision[-]making process, predictability of results, proper working relationships between trial and appellate courts, and judicial economy."[27] Intervenors argue that the "law of the case" doctrine is a flexible concept,[28] with exceptions that apply here. However, "[t]he litany of exceptional circumstances sufficient to sidetrack the law of the case is not only short, but narrowly cabined."[29] A "prior decision should be followed unless: (1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2)

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[25](...continued)
The Council recognizes that the procedures for the Agency Official set forth in these regulations may be implemented by the Agency Official in a flexible manner relfecting [sic] differing program requirements, as long as the purposes of section 106 of the Act and these regulations are met.

36 C.F.R. § 800.3(b), 51 Fed. Reg. at 31,120.

In reaching our early NHPA decisions we evaluated these two sections of the NHPA regulations. *See* CLI-98-8, 47 NRC at 323-24, CLI-99-22, 50 NRC at 12-13.

[26]*See Cohen v. Brown University,* 101 F.3d 155, 167-68 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997); *Rainbow Magazine, Inc. v. Unified Capital Corp.*, 77 F.3d 278, 281 (9th Cir. 1996); *Delong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1196 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993)*; United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir.), *cert. denied*, 502 U.S. 862 (1991)*; Safety Light Corp*. (Bloomsburg Site Decontamination), CLI-92-9, 35 NRC 156, 159-60 (1992).

[27]*Rivera-Martinez*, 931 F.2d at 151.

[28]Intervenors cite *Cohen*, 101 F.3d at 168, *United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991), and *Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979).

[29]*Rivera-Martinez*, 931 F.2d at 151.

intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial."[30] We find that none of the exceptions applies here.

Intervenors argue that certain recent revisions of the NHPA regulations amount to controlling "new authority" that justifies reconsidering our earlier decisions because the revisions clarify language we previously found ambiguous. Alternatively, Intervenors maintain, the "new authority," even if not controlling, would have led to a different outcome had it been available at the time of our earlier decisions. Neither argument has merit. For Intervenors' arguments to prevail, the "new authority" clarifying the prior "ambiguity" would have to indicate that our earlier interpretation of the NHPA regulations was wrong. Instead, the new regulations confirm that our interpretation was correct: the NHPA regulations continue to expressly *permit* a phased approach to cultural resource review.

As Intervenors concede,[31] the new regulations merely provide details on how to *implement* a phased NHPA review[32]; for Intervenors' argument to make sense, the revisions

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[30]*Rainbow Magazine*, 77 F.3d at 281. *See Rivera-Martinez*, 931 F.2d at 151; *Cohen*, 101 F.3d at 168.

[31]Petition for Review at 6, 7-8.

[32]The Advisory Council on Historic Preservation made the relevant revisions to the NHPA regulations in 2000. Under the revised regulations, the discussion of phased compliance is moved from C.F.R. § 800.3 to § 800.4. The new language provides:

> *Phased identification and evaluation*. Where alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency offical may also defer final identification and evaluation of historic properties if it is specifically provided for in a memorandum of agreement executed pursuant to § 800.6, a programmatic agreement executed pursuant to § 800.14(b), or the documents used by an agency official to comply with the National Environmental Policy Act pursuant to § 800.8. The process should establish the likely presence of historic properties within the area of potential effects for each alternative or inaccessible area through background

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would have had to *prohibit* phased NHPA evaluations. As our 1998 decision makes clear, the "ambiguity" we noted in the NHPA regulations was not an ambiguity with respect to how to implement a phased approach, but rather an ambiguity over the more basic question of whether the NHPA permits a phased approach at all:

> Finally, as to the irreparability of NHPA harm, we are not convinced by Petitioners' argument that the NRC and HRI are prohibited from taking a "phased review" approach to complying with the NHPA – the legal position that forms the foundation of Petitioners' NHPA arguments regarding severe, immediate, and irreparable injury. The statute itself contains no such prohibition, federal case law suggests none, and the supporting regulations are ambiguous on the matter, even when read in the light most favorable to Petitioners.[33]

The "clarification" Intervenors rely on does not alter our original interpretation that the NHPA

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[32](...continued)
> research, consultation and an appropriate level of field investigation, taking into account the number of alternatives under consideration, the magnitude of the undertaking and its likely effects, and the views of the [State Historic Preservation Officer/Tribal Historic Preservation Officer] and any other consulting parties. As specific aspects or locations of an alternative are refined or access is gained, the agency official shall proceed with the identification and evaluation of historic properties in accordance with paragraphs (b)(1) and (c) of this section.

36 C.F.R. § 800.4(b)(2), Final Rule; Revision of Current Regulations, Protection of Historic Properties, 65 Fed. Reg. 77,698, 77,729 (Dec. 12, 2000).

> The explanation for the revision was as follows:
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> This new section is also intended to provide Federal agencies with flexibility when several alternatives are under consideration and the nature of the undertaking and its potential scope and effect has therefore not yet been completely defined. The section also allows for deferral of final identification and evaluation if provided for in an agreement with the SHPO/THPO or other circumstances. Under this phased alternative, Agency Officials are required to follow up with full identification and evaluation once project alternatives have been refined or access has been gained to previously restricted areas. Any further deferral of final identification would complicate the process and jeopardize an adequate assessment of effects and resolution of adverse effects.

65 Fed. Reg. at 77,719 (footnote omitted).

[33]CLI-98-8, 47 NRC at 323-24.

permits a phased approach to the evaluation of cultural impacts. In fact, the "clarification" confirms that we correctly resolved the ambiguity.[34] Thus, no change in law justifies reexamining our earlier decision, and no exception to the law of the case doctrine applies.

B. *Adequacy of NHPA Review under Prior NHPA Regulations*

Intervenors insist that they do not seek retroactive application of the new NHPA regulations. They argue that the new regulations illuminate the old regulations, making it "clear" that the phased cultural review plan we approved earlier in this proceeding is not consistent with the NHPA.[35] In other words, Intervenors advocate using the new regulations to show what the original drafters intended when they drafted the old regulations. Intervenors go on to argue that once we know, via the *new* regulations, what a phased approach under the *old* regulations was supposed to look like, we will understand that the NRC Staff's NHPA phased review approach was inadequate, *under the old regulations*. We reject this circular interpretation.

Courts construe regulations in the same manner as they do statutes: by ascertaining the plain meaning of the regulation.[36] "[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that a statute should be construed so that effect is given to all its provisions . . . ."[37] A "regulation should be construed to effectuate the intent of the enacting body. Such intent may be ascertained by considering the language used and the overall

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[34]While, as the Presiding Officer indicated, applying the new NHPA regulations in the instant proceeding could only be considered retroactive, it is not at all clear that the phased compliance process established in this proceeding would fail to satisfy the new regulations if they did apply. *See* LBP-05-26, 62 NRC at 459 nn.9-10 and accompanying text.

[35]Petition for Review at 7-8.

[36]*See, e.g., Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339, 1346 (Fed. Cir. 2005), *Time Warner Entertainment Co. L.P., v. Everest Midwest Licensee, L.L.C.*, 381 F.3d 1039, 1050 (10th Cir. 2004).

[37]*Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3rd Cir. 1995) (internal quotation and citation omitted). *See also Florez v. Callahan*, 156 F.3d 438, 443 (2nd Cir. 1998), *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3rd Cir. 1998).

purpose of the regulation, and by reflecting on the practical effect of the possible interpretations."[38] "[A]dministrative history and other available guidance may be consulted for background information and the resolution of ambiguities in a regulation's language . . . ."[39] Thus, when we initially considered the NHPA issue, we could appropriately examine the language of the NHPA regulation, and any legislative and rulemaking history, to aid us in interpreting the regulation. On the other hand, we could not base our decision on speculation about future changes that drafters might make. Nor should we now retroactively attribute certain motivations to the original drafters based on later revisions to the regulations.

Because the Presiding Officer's decision, like ours, hinges upon the law of the case doctrine, the Presiding Officer did not construe the new regulations, but "assume[d] (without deciding) the correctness of the Intervenors' assertion that the phased compliance approach toward NHPA review in HRI's license is unlawful under the new regulations."[40] Before the Presiding Officer, Intervenors argued that the new regulations prohibit phased compliance if operational sites have been selected and alternatives regarding "large land areas" are no longer under consideration.[41] Thus, in Intervenors' view, the NRC Staff ought not have issued a license to HRI until after the entire NHPA review was complete. But, as the Presiding Officer correctly understood, Intervenors' argument goes beyond suggesting a "change in controlling authority" and in fact advocates retroactive application of the new regulations. As the Presiding

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[38]*United States v. Christensen*, 419 F.2d 1401, 1403-04 (9th Cir. 1969) (citation omitted).

[39]*Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (citations omitted), *review denied*, CLI-88-11, 28 NRC 603 (1988). *See also Connecticut Yankee Atomic Power Co.* (Haddam Neck Plant), LBP-01-25, 54 NRC 177, 184 (2001).

[40]LBP-05-26, 62 NRC at 459 n.9.

[41]*Id*. at 458.

Officer stated,[42] we cannot apply the new regulations retroactively absent clear evidence that Congress authorized under the NHPA the issuance of retroactive regulations, and that the NHPA intended the regulations to be applied retroactively. We, like the Presiding Officer, do not find such clear evidence here. Furthermore, as discussed above, the phased approach is consistent with the regulations in place when the NRC Staff made its licensing decision, and is consistent with the purposes and goals of the NHPA.

C. *Adequacy of NEPA Review of Cultural Resources in the NRC Staff's FEIS*

Intervenors also criticize the adequacy of the NRC Staff's cultural resource evaluation under NEPA. But, as with the closely-related NHPA issues, the "law of the case" doctrine bars Intervenors' complaints about the adequacy of the phased identification and evaluation approach adopted in the NRC Staff's FEIS. Again, Intervenors are asking us, essentially, to reevaluate the "phased" concept approved in our prior decisions. For the reasons given in our earlier decisions, and for the reasons set forth above, we decline to revisit the validity of the "phased" approach.

Intervenors argue that the NRC Staff has not taken the "hard look" required under NEPA because evaluating the cultural resource impact on a section-by-section basis fails to look at the cumulative effect of the entire project. In Intervenors' view, workers could make a significant archaeological find on each parcel, but evaluators could miss the full significance of the individual discoveries because the phased approach will not evaluate the "whole."

Intervenors point to the NEPA definition of "cumulative impact" to support their argument. Under NEPA, a "'[c]umulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person

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[42] *Id*. at 462.

undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[43] Intervenors argue that to take the NEPA-required "hard look" at all significant consequences of the project,[44] the consequences of the entire project must be examined at one time,[45] and cannot be looked at piecemeal.[46] But Intervenors treat the reservation of certain NHPA considerations (on a phased, site-specific basis) as though the FEIS failed to evaluate the overall impacts on cultural resources of the entire project for NEPA purposes. Intervenors' position ignores the comprehensive NEPA evaluation conducted by the NRC Staff, documented in the FEIS, and approved by the Presiding Officer.[47]

Intervenors argue that because agencies may coordinate their NHPA and NEPA responsibilities, the Presiding Officer erred when he said that "the 'hard look' required by NEPA is not to be equated with completion of the NHPA review."[48] We disagree with Intervenors and find that the Presiding Officer correctly analyzed the interaction between the NHPA regulations and our NEPA regulations.[49] While agencies may coordinate their NEPA and NHPA reviews, the reviews remain separate, and the regulations associated with each Act must be independently satisfied – "coordination" does not mean that NEPA regulations govern NHPA

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[43]40 C.F.R. § 1508.7. *See generally* CLI-01-4, 53 NRC 31, 57-64 (2001).

[44]Petition for Review at 8, citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

[45]Petition for Review at 10, citing *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990).

[46]Petition for Review at 10, citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

[47]*See* LBP-05-26, 62 NRC at 472-76.

[48]Petition for Review at 8, quoting LBP-05-26, slip op. at 35 (now, 62 NRC at 472).

[49]*See* LBP-05-26, 62 NRC at 472.

analysis or vice versa. While the FEIS is a useful vehicle for setting out the NRC's NHPA review, using the FEIS device does not oblige the agency to complete all its NHPA work prior to licensing when a "phased" approach is appropriate.

The Presiding Officer described the NRC Staff's NEPA review in detail,[50] and concluded that the NRC Staff took the "hard look" required under NEPA: "Staff explained the purpose of its inquiry, described its methods for conducting the inquiry, identified cultural resources in and near the project area, considered HRI's proposed project and alternatives, discussed mitigation measures, provided the DEIS for public comments, responded to those comments, and ultimately concluded that HRI's project posed no significant risk of harm to cultural resources."[51] We agree with the Presiding Officer's analysis of the adequacy of the NRC Staff's NEPA analysis.

CONCLUSION

For the foregoing reasons, we deny Intervenors' Petition for Review of LBP-05-26.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 3rd day of April, 2006.

[50] *Id*. at 472-476.

[51] *Id*. at 476.