

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

HYDRO RESOURCES, INC.)

P.O. Box 777)

Crownpoint, NM 87313)

Docket No. 40-8968-ML

NRC STAFF'S ANSWER TO INTERVENORS' PETITION TO REVIEW LBP-04-03

INTRODUCTION

On March 18, 2004, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), submitted "[ENDAUM] and [SRIC's] Petition For Review of Memorandum and Order LBP-04-03, Ruling On Restoration Action Plan" (Intervenors' Petition), requesting the Commission to review the Presiding Officer's February 27, 2004 decision. The Staff files this answer, pursuant to 10 C.F.R. § 2.786(b)(3),¹ opposing the Intervenors' Petition.

BACKGROUND

In its decision four years ago on financial assurance issues in this proceeding, the Commission found that the applicable regulation -- 10 C.F.R. Part 40, Appendix A, Criterion 9 -- required Hydro Resources, Inc. (HRI) to submit its financial assurance plans for NRC Staff review and approval before HRI would be permitted to use its 10 C.F.R. Part 40 materials license (SUA-1508) to perform *in situ* leach (ISL) uranium mining. See CLI-00-8, 51 NRC 227, 237-42 (2000). In its remand decision, the Commission directed HRI to "submit a decontamination, decommissioning, and reclamation plan with cost estimates on which a surety will be based."

¹ The citation to 10 C.F.R. § 2.786(b)(3) is to the regulation in effect prior to the recent revision of the NRC's Rules of Practice in 10 C.F.R. Part 2, which became effective February 13, 2004. Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply, and the former sections are referenced throughout this brief.

Id., at 242. Accordingly, on November 21, 2000, HRI submitted what it termed its "Restoration Action Plan" (RAP) for Church Rock Section 8 (its initial intended mining site), containing the requested information. In March 2001, HRI submitted an amended RAP for Section 8. This amended RAP was approved by the Staff on April 16, 2001. The Intervenor challenged the adequacy of the Section 8 RAP, and in May 2001 were allowed to submit a second written presentation alleging deficiencies in the amended Section 8 RAP.

Following an extended unsuccessful effort to reach a settlement, the Presiding Officer issued his decision, LBP-04-03, finding certain deficiencies in the amended Section 8 RAP. But insofar as is relevant to the Intervenor's Petition, the Presiding Officer concluded that the Intervenor "may not now challenge HRI's use of 9 pore volumes in the RAP." LBP-04-03, slip op. at 11-12.² In addition to seeking review of this legal conclusion (*see* Intervenor's Petition, at 5-9), the Intervenor also seek review of certain suggestions made by the Presiding Officer in a footnote,³ arguing that these suggestions raise an important policy question meriting review by the Commission (*i.e.*, whether pursuing litigation in the above-captioned proceeding is a wise use of time and money, given various existing uncertainties). *See* Intervenor's Petition, at 9-10.

² As previously noted by the Commission, the term "pore volume" refers to the volume of water needed to completely fill the voids in a given volume of porous matrix (*e.g.*, an aquifer). In restoring Section 8 well fields following ISL mining, HRI will initially be required to use nine pore volumes of water to expel from the underlying aquifer the lixiviant used in ISL mining. *See* CLI-00-8, 51 NRC at 236 n. 7.

³ The Presiding Officer's suggestions pertain to the uncertainty about the continuing validity of the 1989 aquifer exemption for Section 8 due to jurisdictional questions, and the wisdom of docketing ISL mining-related applications in the face of any such uncertainty. *See* LBP-04-03, slip op. at 35, n. 154.

DISCUSSION

I. Legal Standards Governing Petitions to Review Presiding Officer Decisions

Pursuant to 10 C.F.R. § 2.786(b)(1), “a party may file a petition for review with the Commission” within fifteen (15) days after service of a full or partial initial decision by a Presiding Officer. A petition for review under this provision must contain the following:

- (1) A concise summary of the decision or action of which review is sought;
- (2) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;
- (3) A concise statement why in the petitioner’s view the decision or action is erroneous; and
- (4) A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv). As a matter of its discretion, the Commission may grant review of Presiding Officer decisions based on whether a “substantial question” exists regarding the following considerations:

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

10 C.F.R. § 2.786(b)(4)(i-v); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001). These standards are incorporated into Subpart L proceedings by 10 C.F.R. § 2.1253. *See Babcock and Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).

II. Review of LBP-04-03

A. Use of Nine Pore Volumes in the Section 8 RAP

The Intervenors, pursuant to 10 C.F.R. § 2.786(b)(4)(ii), seek review of the Presiding Officer's legal conclusion⁴ that they are no longer in a position to challenge HRI's use of nine pore volumes in the Section 8 RAP. See Intervenors' Petition, at 5-9. The Presiding Officer's legal conclusion is properly based on the governing law of this case.⁵ As discussed further below, the Commission should therefore refuse to review the Presiding Officer's nine pore volume ruling.

In arguing that the Presiding Officer erred in refusing to consider the nine pore volume issue, the Intervenors' key claim is that "there can be no doubt" that this issue is material to the NRC's licensing decision, and is one which the Commission thus had in mind when it stated the need to ensure on remand that the Intervenors are given "a meaningful hearing opportunity." Intervenors' Petition, at 6, *quoting* CLI-00-8, 51 NRC at 240. But while the nine pore volume issue may indeed have been material to the NRC's licensing decision, it is one which has already been fully litigated and previously resolved -- including review by the Commission -- a point which the Intervenors effectively concede.

For example, the Intervenors state that the nine pore volume issue was "properly raised" in their 1999 brief to the Commission⁶ (Intervenors' Petition, at 8), and acknowledge that in CLI-00-8, the Commission ruled that HRI's and the Staff's evidence on the pore volume issue "was

⁴ See LBP-04-03, slip op. at 11-12.

⁵ The Presiding Officer reviewed the 1999-2000 litigation history of this case, during which time the Intervenors' nine pore volume arguments were considered and rejected by both the (former) Presiding Officer and the Commission. See LBP-04-03, slip op. at 9-11, and nn. 38-46, *citing* LBP-99-13, 49 NRC 233 (1999), and CLI-00-8.

⁶ CLI-00-8 reflects this fact. As stated there, among the issues the Commission requested briefs on was whether the (former) Presiding Officer erred in finding that the Intervenors did not provide any evidence "casting doubt on the NRC Staff's estimates that it will take 9 pore volumes for proper restoration of groundwater." CLI-00-8, 51 NRC at 237 n. 9.

more persuasive than the evidence submitted by Intervenor.” Intervenor’s Petition, at 7.⁷ If, as the Intervenor argues, the nine pore volume issue is one which the Commission had in mind when it stated the need to ensure on remand that there is a meaningful hearing opportunity, they fail to explain why the Commission would nonetheless have ruled as it did in CLI-00-8 on this issue. There, the Commission stated its agreement with the Presiding Officer in finding that the Intervenor’s expert opinion testimony on the nine pore volume issue was “unconvincing.”⁸ CLI-00-8, 51 NRC at 244. The Commission based this finding, in part, on the expert’s failure to establish that other ISL projects he referenced were geologically analogous to HRI’s project. *Id.*, at 244-45. Notwithstanding that the Commission remanded a matter for further consideration by the Presiding Officer, that matter did not include the nine-pore issue which was fully resolved by the Commission in CLI-00-8.

The nine pore volume issue is also one of which the Intervenor has had notice for several years. In LBP-04-03, the Presiding Officer referenced the fact that the Intervenor’s arguments were based on the nine pore volume standard established by the Staff in 1997, when NUREG-1508, the “Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico” (FEIS), was published. See LBP-04-03, slip op. at 10. In its FEIS, the Staff established the nine pore volume standard --

⁷ Indeed, on this issue, the Commission in CLI-00-8 first stated that the NRC Staff’s finding that proper restoration of groundwater would require nine pore volumes “affects the amount of surety funds HRI will be required to set aside,” and further noted that the surety amount can be increased should it later turn out that well field restoration requires more than nine pore volumes. CLI-00-8, 51 NRC at 236 (summarizing LBP-99-13, 49 NRC at 236-37). Later in its decision, the Commission affirmed LBP-99-13 on the nine pore volumes issue. See CLI-00-8, 51 NRC at 244-45. See also LBP-04-03, slip op. at 10-11.

⁸ In this ruling, the Commission cited and rejected the testimony of Dr. Michael Sheehan on the nine pore volume issue. See CLI-00-8, 51 NRC at 244-45. The Intervenor now rely on the testimony of Mr. Steven Ingle on the very same point. See Intervenor’s Petition, at 3-4. If the Commission had intended to give the Intervenor two bites at the same apple, it would have made this intent clear in its remand decision.

as opposed to HRI's initial estimate of four pore volumes -- as being "necessary to achieve groundwater restoration, and consequently as the initial baseline for determining the surety amount." LBP-04-03, slip op. at 10.⁹ While the Intervenor's reference year 2000 testimony of Mr. Ingle that the number of pore volumes required to flush the aquifer underlying Section 8 is likely to be two times greater than nine pore volumes (*see* Intervenor's Petition, at 3-4), they fail to explain why Mr. Ingle could not have stated the same opinion in 1999.

The governing law of this case on the nine pore volume issue is articulated in CLI-00-8, and the Presiding Officer properly applied this law in LBP-04-03. Accordingly, the Commission should find that the Intervenor's have not met the requirements of 10 C.F.R. § 2.786(b)(4)(ii), and deny Section II.A of Intervenor's Petition.

B. Validity of the 1989 Aquifer Exemption

The Intervenor's seek review of the Presiding Officer's discussion pertaining to the uncertainty about the continuing validity of the 1989 aquifer exemption for Section 8, and the wisdom of docketing ISL mining-related applications in the face of any such uncertainty. *See* Intervenor's Petition, at 9-10. The Intervenor's argue that this discussion, and the closely-related issue of which authority -- the Navajo Nation, the State of New Mexico, or the federal Environmental Protection Agency (EPA) -- has jurisdiction to issue an underground injection control (UIC) permit for Section 8, raises an important policy question. *See* Intervenor's Petition, at 9, *citing* LBP-04-03, slip op. at 35, n. 154. The Intervenor's request that this proceeding be held in abeyance until the UIC permit question is settled. *See* Intervenor's Petition, at 10. As discussed

⁹ The Presiding Officer noted that in a 1999 brief, HRI asserted that "[t]he 9 pore volume number represents NRC's best professional judgment based on the [S]taff's experience that more than 9 pore volumes typically achieves negligible returns." LBP-04-03, slip op. at 11 n. 46, *citing* "Hydro Resources, Inc.'s Response to Intervenor's Briefs with Respect to Hydro Resources, Inc.'s Technical and Financial Qualifications and Financial Assurance for Decommission," at 19.

further below, the Commission should refuse to find that the Presiding Officer's discussion pertaining to the 1989 aquifer exemption raises an important policy question.

The Intervenors fail to address the fact that, as noted by the Presiding Officer, the Commission in this proceeding *sua sponte* reversed the (former) Presiding Officer's admission of an area of concern¹⁰ regarding HRI's lack of a UIC permit issued by the Navajo Nation. See LBP-04-03, slip op. at 35, n. 154, *citing* CLI-98-16, 48 NRC 119 (1998). The Commission held that an NRC adjudication is not the proper forum in which to litigate jurisdictional questions pertaining to UIC permits. See CLI-98-16, 48 NRC at 120-22 and nn. 2-3. The Commission cited the risk of "duplicate regulation" if the NRC interfered "in areas outside its domain" (*id.*, at 120), and thus directed the Presiding Officer "not to adjudicate questions of Navajo, EPA, or state and local regulatory jurisdiction." *Id.*, at 121. The Intervenors identify no reasons why these same considerations no longer apply, noting only that due to its need for a UIC permit, HRI may never be able to use part or all of its NRC license. See Intervenors' Petition, at 9-10. But this is simply a business risk that HRI faces, and is not a matter within the scope of this proceeding.

As discussed above, the Commission has already decided the UIC issue. The Commission should therefore refuse to find that an important policy question is presented here. The Commission should also reject the Intervenors' related request that this proceeding be held in abeyance until the UIC permit question is settled.

¹⁰ See LBP-98-9, 47 NRC 261, 281 (1998).

CONCLUSION

For the reasons stated above, the Intervenors have failed to satisfy the requirements of 10 C.F.R. § 2.786 so as to warrant Commission review. Accordingly, the Staff recommends that the Intervenors' Petition be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John T. Hull", is written over the typed name and title.

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 2nd day of April, 2004

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO INTERVENORS' PETITION TO REVIEW LBP-04-03" in the above-captioned proceeding have been served on the following persons this 2nd day of April, 2004, by deposit into the U.S. Mail, first class (or as indicated by an asterisk, through the Nuclear Regulatory Commission's internal mail system), and by electronic mail (except as indicated by a double asterisk).

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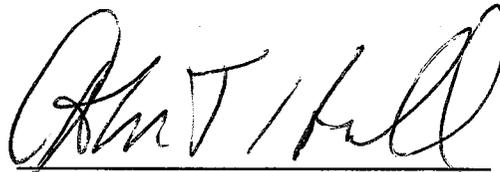
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