

August 9, 2005

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

August 16, 2005 (11:38am)

In the Matter of)
)
HYDRO RESOURCES, INC.)
(PO Box 777,)
Crownpoint, New Mexico 87313))
)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

INTERVENORS' PETITION FOR REVIEW OF LBP-05-17

Pursuant to 10 C.F.R. § 2.1253 and § 2.786, Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam and Marilyn Morris (collectively, "Intervenors") hereby petition for review of LBP-05-17, the Presiding Officer's Partial Initial Decision (Phase II Challenges to In Situ Leach Mining Materials License Regarding Groundwater Protection, Groundwater Restoration, and Surety Estimates) (July 20, 2005). The Commission should take review because LBP-05-17 is based on legal error and substantial factual errors.

I. BACKGROUND AND SUMMARY OF DECISION

A. Background

On January 5, 1998, the Nuclear Regulatory Commission ("NRC") Staff issued Hydro Resources, Inc. ("HRI") a source and byproduct material license authorizing HRI to conduct *in situ leach* ("ISL") uranium mining on four sites in Crownpoint and Church Rock in the Navajo Nation, New Mexico: Section 8 and Section 17 in Church Rock and Crownpoint and Unit 1 in Crownpoint.

In September 1998, the former Presiding Officer, Peter Bloch, bifurcated this proceeding, ordering that only issues relevant to Section 8 and “any issue that challenged the validity of the license issued to HRI” would be considered. Memorandum and Order at 2 (Sept. 22, 1998) (unpublished). Litigation on issues relevant to HRI’s proposed operations at Church Rock Section 8 concluded in December 2004. LBP-04-3, 59 NRC 84, 109 (2004). In 2005, pursuant to the Commission’s order, CLI-01-04, 53 NRC 31 (2001), the parties submitted evidentiary presentations and briefs concerning groundwater protection, groundwater restoration, and surety estimates pertaining to HRI’s proposed mining operations at Section 17 in Church Rock and Unit 1 and Crownpoint in the town of Crownpoint, New Mexico. See LBP-04-3, 59 NRC at 109.

B. Summary of LBP-05-17

This Petition seeks Commission review of LBP-05-17, which decided that HRI demonstrated by a preponderance of evidence that Intervenors’ challenges relating to groundwater protection, groundwater restoration, and surety estimates would not invalidate its license for its mining operations at Section 17, Unit 1, and Crownpoint. Id., slip op. at 2. The Presiding Officer’s decision was based on a number of factors.

First, the Presiding Officer concluded that license conditions permitting HRI to establish baseline groundwater quality, upper control limits (“UCLs”), and geophysical characteristics of the Westwater Canyon Aquifer (“Westwater”) after the conclusion of this proceeding did not abrogate Intervenors’ hearing rights. Id., slip. op. at 18-30.

Second, the Presiding Officer held the Intervenors’ challenges to the following were barred by the law of the case doctrine: Intervenors’ challenges to the Westwater’s geophysical characteristics at Section 17, LBP-05-17, slip op. at 49-52; Intervenors’

challenge to HRI's and the Staff's assertion that natural attenuation will assist with restoration at all sites, id. at 38.

Finally, the Presiding Officer held that even if the law of the case doctrine is inapplicable to any of the above issues, the Intervenor's arguments were without merit. Id., slip op. at 39, 52.

II. THE COMMISSION SHOULD GRANT REVIEW OF LBP-05-17

Pursuant to 10 C.F.R. §§ 2.1253 and 2.786(b)(4)(i) and (ii), the Commission should exercise its discretion to take review of LBP-05-17 because it contains "errors of material fact" and "necessary legal conclusion[s]" which are "in error."

A. The Presiding Officer Erred By Finding Intervenor's Hearing Rights Were Not Abrogated.

The Atomic Energy Act ("AEA") requires public hearings for any proceeding granting any license issued pursuant to the AEA. 42 U.S.C. § 2239(a)(1). Both the Commission and the United States Court of Appeals for the District of Columbia have interpreted this provision to require that all material aspects of a licensing decision must be subject to a public hearing. Wisconsin Power Co. and Wisconsin-Michigan Power Co. (Point Beach Nuclear Power Plant, Unit 2), CLI-73-4, 6 AEC 6 at 7 (1973).¹ Post-hearing resolution of licensing issues must not be used to obviate the basic findings prerequisite to a license, "including a reasonable assurance that the facility can be operated without endangering the health and safety of the public." Indian Point, 7 AEC at

¹ See also, Consolidated Edison Co. of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 951-952 (1974) ("Indian Point"); Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission, 735 F.2d 1437, 1438-1450 (D.C. Cir. 1984), *cert. denied* 469 U.S. 1132 (1985).

951-952. Moreover, post-hearing resolution of issues should be employed sparingly and only in clear cases. Id. at 952.

As the court recognized in Union of Concerned Scientists v. NRC, pursuant to the Administrative Procedure Act, an exception to the prior hearing requirement is made for decisions that “rest solely on inspections, tests, or elections.” Id. at 735 F.2d at 1449, citing 5 U.S.C § 554(a)(3). This exception is designed for “on the spot decisions made by a qualified inspector” who saw, tested, or examined the evidence himself. Id. Where the central decision maker’s decision relies on evaluation of questions of credibility, conflicts and sufficiency, a hearing is required. Id. at 1450.

The Presiding Officer’s decision in LBP-05-17 is inconsistent with the AEA and the judicial and NRC precedents interpreting it, because it allows HRI to establish basic parameters for the operation on its ISL mine through post-licensing groundwater and hydrological tests to be conducted pursuant to license conditions and HRI’s Consolidated Operations Plan (“COP”). In particular, the Presiding Officer approved two license conditions which allow HRI to establish baseline groundwater quality for the purpose of setting primary restoration goals and upper control limits. LBP-015-17, slip op. at 19; see also, LCs 10.21 and 10.22. The Presiding Officer also approved two other license conditions that allow HRI to determine, after the license is issued and this proceeding has concluded, whether the Westwater is vertically confined and free of fractures. Id., slip op. at 27; see also, LCs 10.23 and 10.31. The Presiding Officer based his decision on the conclusion that the methodology for determining baseline groundwater quality, UCLs, and the Westwater’s geophysical characteristics is sufficiently “detailed” and “prescriptive” that assuming HRI complies with the methodology, it will provide a

“reasonable assurance” that HRI’s determinations will not endanger public health and safety. Id. at 20, n.11, quoting 10 C.F.R. § 2.104(c)(3), Indian Point, 7 AEC at 952.

In reaching his decision, however, the Presiding Officer ignored the substantial evidence presented by the Intervenors that the methodology prescribed by HRI’s license and the COP does, in fact, leave room for the exercise of judgment or discretion by HRI in establishing baseline groundwater quality, UCLs, and whether the Westwater is vertically confined and free of fractures. Intervenors’ Written Presentation in Opposition to Hydro Resources, Inc.’s Application for a Materials License With Respect to Groundwater Protection, Groundwater Restoration and Surety Estimates at 43-47 (March 7, 2005) (“Intervenors’ Groundwater Presentation”). Intervenors’ evidence shows that issues of credibility, conflicts and sufficiency are present in the license protocols. Id.

For example, in his Declaration, Dr. Abitz demonstrates how determining normal, lognormal, and non-normal distribution of groundwater quality data could lead to artificial inflation of groundwater quality baseline. Declaration of Dr. Richard J. Abitz at ¶¶ 30-39 (March 3, 2005) (“Abitz Declaration”). This determination is left up to HRI and is not circumscribed by either license conditions or the COP. Further, Mr. Wallace demonstrates how placement of pump test wells used to determine the hydrological characteristics of the Westwater can affect the conclusions that are drawn from the pump tests. Affidavit of Michael G. Wallace at ¶¶ 46-50 (March 1, 2005) (“Wallace Declaration”). Neither the license conditions governing how HRI conducts pump tests to determine the hydrological properties of the Westwater nor COP provisions limit HRI’s discretion in siting pump test wells or significantly infringing on how it conducts those tests. See, LBP-05-17, slip op. at 29-30.

Finally, the Presiding Officer erroneously contends that Intervenors' hearing rights are not abrogated by HRI's license conditions because Intervenors could, in the future, request an enforcement action from the NRC Staff if they have a factual basis for suspecting that HRI has not adhered to the methodology in its license or the COP. Id., slip op. at 21. It is well-established, however, that ordinary citizens have no rights whatsoever in NRC enforcement action, because the NRC has virtually unfettered discretion to deny enforcement petitions. See, e.g., Massachusetts Public Interest Group v. NRC, 852 F.2d 9, 14-16 (1st Cir. 1988). In contrast, in a licensing proceeding, an intervenor has the right to demand that the applicant satisfy its burden of proving that it will conduct its operations in compliance with NRC requirements for protection of public health and safety. 10 C.F.R. § 2.1237(b).

B. The Presiding Officer Erred by Improperly Applying the Law of the Case Doctrine.

As recognized by the Presiding Officer, the law of the case doctrine is not applicable where "substantially different evidence is adduced at a subsequent state of the proceeding." LBP-05-17, slip op. at 11. Despite acknowledging this exception to the law of the case doctrine, the Presiding Officer broadly applied decisions from the previous litigation on Section 8 to very different factual evidence regarding Section 17, Unit 1 and Crownpoint. In particular, the Presiding Officer ruled that Intervenors' arguments regarding the Westwater's geophysical properties at Section 17 were barred by the law of the case because the former Presiding Officer had already ruled on the issues with respect to Church Rock Section 8. Id., slip op. at 49-52. Additionally, the Presiding Officer concluded that the Intervenors' arguments regarding the Westwater's geochemical properties were also barred by the law of the case doctrine. Id., slip op. at 38.

In deciding that Intervenors' argument that the Westwater at Section 17 is comprised of stacked, interbraided stream channels is barred by the law of the case, the Presiding Officer characterized this issue as having been "extensively litigated". *Id.*, slip op. at 50, citing LBP-99-30, 50 NRC 77 at 85, 88 (1999). The Presiding Officer erroneously concluded that because Section 17 is adjacent to Section 8 and that the former Presiding Officer determined that Section 8 is homogeneous, Intervenors' contention that Section 17 is heterogeneous is barred. *Id.* at 49-50.

However, Intervenors presented site-specific evidence for Section 17. The Intervenors presented evidence showing local variability of the aquifer geology and showing how that variability could occur over relatively short lateral spaces, i.e., between Section 8 and Section 17. Declaration of Spencer G. Lucas at ¶¶ 40-46 (February 25, 2005) ("Lucas Declaration"). The Presiding Officer ignored this evidence and applied Judge Bloch's Section 8 decision generically. LBP-05-17 slip op. at 49-50.

With respect to vertical confinement at Section 17, the Presiding Officer decided that Judge Bloch's determination regarding vertical confinement at Section 8 precluded consideration of Intervenors' arguments, because Intervenors failed to explain why the size or characteristics of the "regional" Recapture member would vary between Sections 8 and 17. *Id.*, slip op. at 52. However, this conclusion ignores the site-specific evidence Intervenors presented with respect to vertical confinement of the Westwater at Section 17.

For example, Intervenors presented evidence that the Recapture member, which HRI and the Staff asserts acts as a confining layer at Section 17, is discontinuous locally over very short lateral distances. Lucas Declaration at ¶ 21. Additionally, Intervenors

presented evidence showing how HRI's own geophysical logs, when properly interpreted, support the argument that the Recapture member is not a confining feature at Section 17. Id. at ¶¶ 27-35.

The Presiding Officer similarly determined that Judge Bloch's decision regarding the Westwater's geochemical environment at Section 8 was equally applicable to Section 17, Unit 1 and Crownpoint, concluding that Intervenors' had presented no viable reason for revisiting the issue. LBP-05-17, slip op. at 38-39. However, the Presiding Officer again Intervenors' ignores site-specific arguments and application of evidence. For example, Dr. Abitz presented evidence to support Intervenors' contention that natural attenuation would not be sufficient for HRI to avoid contamination of underground sources of drinking water using site specific groundwater quality data from Section 17. Abitz Declaration at ¶¶ 65-68. Dr. Abitz used similar site-specific characteristics in his analysis of natural attenuation processes at Crownpoint. Id. at ¶¶ 77-80. Moreover, Dr. Abitz's analysis of the Westwater's geochemistry relies upon *ongoing* geochemical trends occurring over time in the Westwater and therefore is necessarily different from the evidence Intervenors presented with respect to Section 8. Id., ¶¶ 56-57.

C. The Presiding Officer Erred By Ignoring Important Aspects of Intervenors' Presentation and Ignoring Contradictions In HRI's and the NRC Staff's Evidence.

Finally, where the Presiding Officer considered Intervenors' evidence and made factual determinations about their contentions, the Presiding Officer ignored critical evidence and arguments. Moreover, the Presiding Officer also ignored important contradictions in HRI's and the Staff's evidence. Considering Intervenors' evidence and the contradictions in HRI's and the Staff's evidence would have resulted in a

different conclusion about the safety of HRI's proposed operations at Section 17, Unit 1 and Crownpoint.

The Presiding Officer most notably ignores Intervenors' argument that HRI's operations will contaminate underground sources of drinking water ("USDW") *adjacent* to HRI's mine sites at Section 17, Unit 1 and Crownpoint. See, Intervenors' Groundwater Presentation at 73-89. Rather than addressing Intervenors' technical arguments regarding the Westwater's geophysical and geochemical properties on a *local* scale, the Presiding Officer analyzes the Westwater's geophysical and geochemical properties on a *regional* scale. See, e.g. LBP-05-17, slip op. at 3-4; 38-39; 52. Indeed, the Presiding Officer never specifically addresses one of Intervenors' main contentions – that on a *local* scale, HRI's proposed operations could contaminate adjacent and nearby underground sources of drinking water such that a primary federal drinking water regulation would be violated. See, Intervenors' Groundwater Presentation at 73-89; Lucas Declaration at ¶¶ 40-51. A determination as to whether HRI's operations would result in contamination of adjacent and nearby USDW such that a federal drinking water standard is violated is critical to deciding whether: 1) HRI's operations comply with applicable federal law; and 2) HRI's operations will result in endangerment of public health and safety. Because the Presiding Officer only drew conclusions regarding contamination of the Westwater on a regional scale, LBP-05-17 is in error.

Furthermore, the Presiding Officer ignores the evidence presented by Intervenors concerning the preponderance of the scientific literature on the Westwater that shows that the Westwater consists of heterogeneous interbraided stream channels. See, e.g.

Lucas Declaration at ¶ 44; Abitz Declaration at ¶ 43. Had the Presiding Officer relied on the majority of the published articles on the Westwater's geophysical environment, he would have reached the conclusion that the Westwater is heterogeneous.

Finally, the Presiding Officer accepts without critical analysis, contradictory evidence presented by HRI and the Staff. Primarily, the Presiding Officer did not question testimony by HRI and the Staff asserting that while the Westwater Canyon Aquifer is lithologically heterogeneous, it is hydrologically homogeneous. Both HRI and the Staff make this unsupported and contradictory assertion on several occasions. See, Pelizza Affidavit at ¶ 138; Affidavit of Stephen J. Cohen at ¶ 25 (April 29, 2005); Affidavit of William von Till at ¶ 18 (April 29, 2005).² Had HRI's and the Staff's contradictory evidence been carefully evaluated, the Presiding Officer could not have reached the conclusion that the Westwater is hydraulically homogeneous.

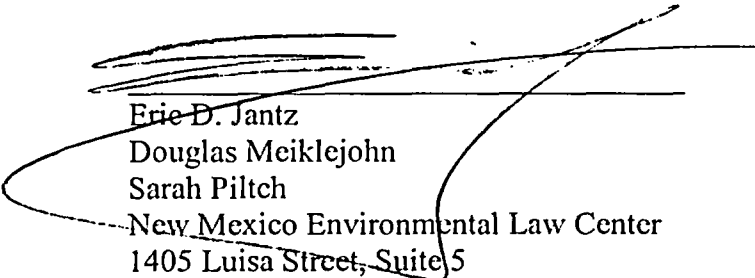
V. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Commission grant review of LBP-05-17 and reverse.

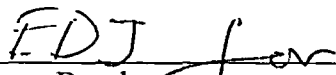
² In contrast, the Intervenors have consistently argued that the Westwater is both lithologically and hydrologically heterogeneous. See e.g., Lucas Declaration at ¶¶ 45-46. Curiously, the Presiding Officer accepts HRI's and the Staff's assertion that Dr. Lucas did not address the hydrological properties of the Westwater – an untenable assertion in light of Dr. Lucas' actual testimony. See, Lucas Declaration at ¶ 45.

Dated August 9, 2005.

Respectfully Submitted,



Erie D. Jantz
Douglas Meiklejohn
Sarah Piltch
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, New Mexico
(505) 989-9022



Laura Berglan
DNA People's Legal Services, Inc
PO Box 765
Tuba City, Arizona 86045
(928) 283-3211

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)
HYDRO RESOURCES, INC.) Docket No. 40-8968-ML
(P.O. Box 777) ASLBP No. 95-706-01-ML
Crownpoint, New Mexico 87313))

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Petition For Review Of LBP-05-17 in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 9th day of August 2005:

Administrative Judge, E. Roy Hawkens*
Presiding Officer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: erh@nrc.gov

Administrative Judge*
Richard F. Cole, Special Assistant
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Mail Stop T-3 F23
Washington, D. C. 20555
Email: rfcl@nrc.gov

Jep Hill, Esq.
Jep Hill and Associates
P.O. Box 30254
Austin, TX 78755

Mark S. Pelizza, President*
Uranium Resources Inc.
650 S. Edmonds Lane
Lewisville, TX 75067
Email: mspelizza@msn.com

Eastern Navajo-Diné Against
Uranium Mining
P.O. Box 150
Crownpoint, New Mexico 87313

John T. Hull*
Tyson R. Smith
U.S. Nuclear Regulatory Commission
Office of the General Counsel
Mail Stop O-15D21
Washington, DC 20555
Fax: 301-415-3725
Email: jth@nrc.gov
Email: trs1@nrc.gov

W. Paul Robinson
Chris Shuey
Southwest Research and Information Center
P. O. Box 4524
Albuquerque, NM 87106

Anthony J. Thompson, Esq.*
Christopher Pugsley, Esq.*
Anthony J. Thompson, P.C.
1225 19th Street, N.W., Suite 300
Washington, D. C. 20036
Fax: (202) 496-0783
E-mail: ajthompson@athompsonlaw.com
E-mail: cpugslev@athompsonlaw.com

Office of the Secretary*
Attn: Rulemakings and Adjudications Staff
U.S. Nuclear Regulatory Commission
Mail Stop: OWFN-16 C1
Washington, D. C. 20555
E-mail: hearingdocket@nrc.gov

Administrative Judge, Robin Brett *
2314 44th Street, N.W.
Washington, D.C. 20007
Fax: (703) 648-4227
E-mail: rbrett@usgs.gov

Louis Denetsosie, Attorney General
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, AZ 86515

William Zukosky *
DNA-People's Legal Services, Inc.
201 East Birch Ave., Ste 5
Flagstaff, AZ 86001-5215
E-mail: wzukosky@dnalegalservices.org

Laura Berglan *
DNA-People's Legal Services, Inc.
P.O. Box 765
Tuba City, AZ 86045
E-mail: lberglan@dnalegalservices.org

Office of Commission Appellate
Adjudication
U.S. Nuclear Regulatory Commission
Mail Stop: O-16G15
Washington, D.C. 20555

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Atomic Safety and Licensing Board
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Mail Stop: T-3F23
Washington, D.C. 20555

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Mail Stop: T-3 F23
Washington, D. C. 20555

David C. Lashway, Esq. *
Hunton & Williams, LLP
1900 K Street, NW
Washington, D.C. 20006-1109
E-mail: dlashwav@hunton.com

Geoffrey H. Fettus *
Natural Resources Defense Counsel
1200 New York Ave, N.W.
Suite 400

Washington, D.C. 20005
E-mail: gfettus@nrdc.org

U.S. Nuclear Regulatory Commission
Attn: Chairman Nils J. Diaz*
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: cmrdiaz@nrc.gov

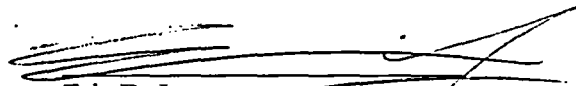
U.S. Nuclear Regulatory Commission
Attn: Jeffery S. Merrifield*
Mail Stop O-16C1
One White Flint North
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: cmrmerrifield@nrc.gov

U.S. Nuclear Regulatory Commission
Attn: Gregory Jaczko*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Jacki Raines, jkr@nrc.gov

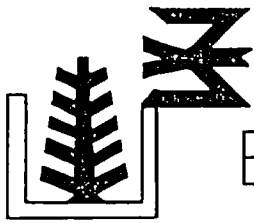
U.S. Nuclear Regulatory Commission
Attn: Peter Lyons*
Mail Stop O-16C1
11555 Rockville Pike
Rockville, MD 20852-2738
E-mail: Vicki Ibarra, vai@nrc.gov

Susan C. Stevenson-Popp *
ASLB Panel
U.S. NRC
Mail Stop T-3 F23
Washington, DC 20555
E-mail: scs2@nrc.gov

Karen Valloch*
E-mail: ksv@nrc.gov



Eric D. Jantz
Sarah Piltch
Douglas Meiklejohn
Counsel for Intervenors



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August 9, 2005

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
One White Flint North
11545 Rockville Pike
Rockville, MD 20852

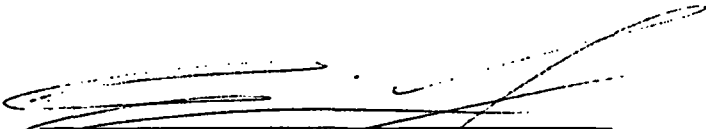
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing "Intervenors' Petition for Review of LBP-05-17". Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy of the enclosed filing in the attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022. Thank you for your attention to this matter.

Sincerely,



~~Eric D. Jantz~~
~~Sarah Piltch~~
~~Douglas Meiklejohn~~
New Mexico Environmental Law Center
Attorneys for Intervenors

Enclosures

1405 Luisa Street, Suite 5, Santa Fe, New Mexico 87505
Phone (505) 989-9022 Fax (505) 989-3769 nmelc@nmelc.org