

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

COMMISSIONERS:

'98 SEP 15 P4:43

Shirley Ann Jackson, Chairman  
Nils J. Diaz  
Edward McGaffigan, Jr.

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

In the Matter of )  
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HYDRO RESOURCES, INC. )  
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(2929 Coors Road Suite 101, )  
Albuquerque, NM 87120 )  
)

**SERVED SEP 15 1998**

Docket No. 40-8968-ML

CLI-98-16

**MEMORANDUM AND ORDER**

In this proceeding, various intervenors challenge Hydro Resources Inc.'s NRC license to conduct an in situ leach mining project in McKinley County, New Mexico. The Commission already has issued two decisions in this proceeding<sup>1</sup> and is continuing to monitor it to "ensure that agency proceedings are conducted efficiently and focus on issues germane to the proposed actions under consideration." See Statement of Policy on Conduct of Adjudicatory Proceedings, CLI-98-12, 48 NRC \_\_\_\_ (July 28, 1998); 63 Fed. Reg. 41,872 (Aug. 5, 1998). We have identified one area that requires immediate Commission guidance. In issuing this guidance, the Commission is exercising its inherent supervisory authority over the conduct of adjudicatory proceedings. See Baltimore Gas & Electric (Calvert Cliffs Nuclear Power Plant, Units 1 and 2), CLI-98-15, 48 NRC \_\_\_\_ (Aug. 26, 1998), slip op. at 4-5.

In LBP-98-9, the Presiding Officer admitted as an area of concern "failure to obtain proper permits from the Navajo nation." 47 NRC 261, 281 (1998). The Presiding Officer gave

<sup>1</sup> CLI-98-4, 47 NRC 111 (1998); CLI-98-8, 47 NRC 314 (1998).

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only the following explanation for admitting this area of concern: “[p]roper local permits must be obtained. 10 C.F.R. §20.2007; Materials License § 9.14.” For the reasons discussed below, we find that neither section 20.2007 nor condition § 9.14 supports admissibility of an area of concern on the Navajo nation’s permitting authority and we reverse the Presiding Officer’s decision in LBP-98-9 to admit it.

Whether non-NRC permits are required is the responsibility of bodies that issue such permits, such as the federal Environmental Protection Agency, the Navajo nation or state and local authorities. To find otherwise would result in duplicate regulation as both the NRC and the permitting authority would be resolving the same question, i.e., whether a permit is required. Such a regulatory scheme runs the risk of Commission interference or oversight in areas outside its domain. Nothing in our statute or rules contemplates such a role for the Commission.

Interpreting section 20.2007 to require the Commission to ensure that NRC licensees obtain required permits from other agencies goes well beyond that provision’s plain meaning. Section 20.2007 states:

Nothing in this subpart relieves the licensee from complying with other applicable Federal, State, and local regulations governing any other toxic or hazardous properties of materials that may be disposed of under this subpart.

The statement that “nothing in this subpart relieves the licensee from complying with other ... regulations” cannot be reasonably interpreted to mean that the Commission intended to take affirmative action to determine whether other agencies’ permits are required or to enforce other agencies’ requirements. Instead, the language in our rule suggests only that an applicant may not rely on its license from the NRC as a waiver of its obligation to obtain permits required by other agencies. This reading of section 20.2007 is consistent with the Commission’s discussion of this provision in the Statement of Consideration accompanying the rule. There, the

Commission stated that section 20.2007 is "advisory and is not intended to imply that the NRC will take enforcement action for violations of other environmental protection regulations issued under statutes other than the Atomic Energy Act." Standards for Protection Against Radiation: Final Rule, 56 Fed. Reg. 23,360, 23,382 (May 21, 1991).

Condition 9.14 of the license at issue here also does not contemplate NRC enforcement of permitting requirements established and administered by other regulatory bodies. The Condition states that "[p]rior to injection of lixiviant, the licensee shall obtain all necessary permits and licenses from the appropriate regulatory authorities." In our view, the Condition serves simply to reinforce the basic principle underlying section 20.2007 -- namely, that an NRC license does not preempt other environmental agencies' regulatory jurisdiction. Notably, Condition 9.14 does not suggest that the NRC will determine what permits are "necessary" or what regulatory authorities are "appropriate." Congress granted us authority merely to regulate radiological and related environmental concerns. It gave our agency no roving mandate to determine other agencies' permit authority. Our regulation and our license condition show due respect to our sister agencies' responsibilities but do not add to our own regulatory jurisdiction.

In short, we do not think it necessary or proper to decide in an NRC adjudication whether Hydro Resources must obtain a permit from the Navajo nation or from any other body.<sup>2</sup> In view of our understanding of 10 C.F.R. §20.2007 and Condition 9.14, we direct the Presiding Officer not to adjudicate questions of Navajo, EPA or state and local regulatory jurisdiction. Those bodies are responsible for determining whether to require a permit under their own law and for initiating appropriate enforcement action. As for other areas of concern that the Presiding Officer found admissible in LBP-98-9, the Presiding Officer should narrowly construe their

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<sup>2</sup> Apparently, Hydro Resources is planning to file for an Underground Injection Control permit "to cooperate fully with EPA and to insure that the current jurisdictional dispute [over the Navajo nation's authority] does not frustrate its [Hydro's] development plans." See HRI's [Hydro's] response to Petitions to Intervene, at 37 (Feb. 19, 1998).

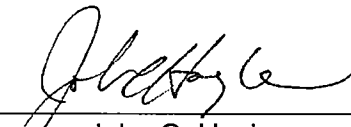
scope to avoid where possible the litigation of issues which are the primary responsibility of other agencies and whose resolution is not necessary to meet our statutory responsibilities.<sup>3</sup>

In conclusion, the Commission determines that the Presiding Officer erred in admitting as an area of concern "failure to obtain proper permits from the Navajo nation." Accordingly, we reverse the finding in LBP-98-9 on that issue.

IT IS SO ORDERED.



For the Commission

  
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John C. Hoyle  
Secretary of the Commission

Dated at Rockville, Maryland,  
this 15<sup>th</sup> day of September, 1998.

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<sup>3</sup> Cf. Tennessee Valley Authority (Yellow Creek Nuclear Plant, Units 1 and 2), ALAB-515, 8 NRC 702 (1978). We add a cautionary note. Our decision today is a narrow one and addresses one area of concern. We intimate no views on any other issue in the case. In addition, our decision ought not be understood to mean that environmental or other permits issued by other regulatory bodies have no bearing on NRC licensing decisions. See, e.g., 10 C.F.R. § 51.45(d)(licensee environmental report required to list other required approvals and status of compliance). We hold simply that our adjudicatory tribunal is not the proper forum for litigation and resolution of controversies about other agencies' permitting authority.

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Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMM MEMO & ORDER (CLI-98-16) have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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COMM MEMO & ORDER (CLI-98-16)

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