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March 11, 1999 NRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

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

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF
Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**ENDAUM'S AND SRIC'S PETITION FOR REVIEW
OF PRESIDING OFFICER'S
PARTIAL INITIAL DECISION (PERFORMANCE-BASED LICENSING)**

Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC"), petition the Commission for review of LBP-99-10, Partial Initial Decision (Performance-Based Licensing Issues).¹ The Commission should review LBP-99-10 because it is based on errors of law and fact and presents new legal issues. Review also should be taken because this is the first adjudication of an application for an *in situ* leach ("ISL") source materials operation, and it raises substantial and important issues of law, policy and discretion, resolution of which is in the public interest.

I. SUMMARY OF DECISION AND ARGUMENTS BELOW.

Hydro Resources, Inc. ("HRI") applied for a source and byproduct materials license to build and operate ISL mines and a mill in Crownpoint and Church Rock, NM. The Final Environmental Impact Statement ("FEIS") and the Safety Evaluation

¹ LBP-99-10 was served by first class mail on February 19, 1999. LBP-99-10 Certificate of Service at 1.

U.S. NUCLEAR REGULATORY COMMISSION
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Report ("SER") for the Crownpoint Uranium Project² were issued by the Nuclear Regulatory Commission ("NRC") Staff in February and December, 1997. *Id.*, 47 NRC at 266. In January, 1998 the Staff issued to HRI License SUA-1508 ("HRI License"); it allows HRI to mine on all four sites it applied for (Crownpoint, Unit 1, and Church Rock Sections 8 and 17), subject to conditions. This is a performance based license; it allows HRI to make certain post-licensing changes to its operation without seeking a license amendment or an environmental review by the NRC Staff.

ENDAUM's and SRIC's concerns on performance based licensing ("PBL") were admitted. LBP-98-9, 47 NRC 261, 281 (1998). ENDAUM and SRIC filed written presentations on those concerns, including the arguments presented herein, on December 7, 1998, and HRI and the Staff filed responses on January 11 and January 19, 1999.³ On February 19, 1999 the Presiding Officer issued LBP-99-10, denying ENDAUM and SRIC any relief with respect to PBL issues. LBP-99-10 at 13.

II. THE COMMISSION SHOULD REVIEW LBP-99-10.

A. The standard for taking review.

The Commission's discretionary decision on granting review should be guided

² The project is known as the Crownpoint Uranium Project or "CUP". Hydro Resources Inc., LBP 98-9, 47 NRC 261, 263-267 (1998).

³ *Id.* Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Performance Based Licensing Issues ("ENDAUM's and SRIC's PBL Brief"); Hydro Resources, Inc.'s Brief in Opposition to the Briefs Submitted by Intervenors Eastern Navajo Diné Against Uranium Mining, Southwest Research and Information Center, Grace Sam, and Marilyn Morris on the Issue of Performance-Based Licensing; and NRC Staff's Response to Intervenors' Presentations on Performance-Based Licensing Issues.

by:

the existence of a substantive question with respect to: (i) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a substantial and important question of law, policy or discretion, (iv) prejudicial procedural error, or (v) any other consideration which the Commission may deem to be in the public interest.

10 CFR §2.786(b)(4).⁴ The Commission should grant review here because LBP-99-10 is based on material factual and legal errors, including the failure to address all of the material issues raised below as is required by 10 CFR §1.1251(c)(1). LBP-99-10 also involves substantial and important questions of law, policy, and discretion. Finally, the public interest will be served by review.

A. LBP-99-10 is based on erroneous findings of fact.

LBP-99-10 asserts erroneously that HRI's license sets forth the important license conditions clearly. LBP-99-10 at 8. On the contrary, the license conditions that are set forth are confusing at best and self-contradictory at worst. In addition, several important issues are simply not addressed by the license.

Conditions of the license are set forth not only in the license, but also in the 49 submittals listed in license Attachment A.⁵ LBP-99-10 at 6-7. These HRI

⁴ These standards have been incorporated into Subpart L proceedings in 10 C.F.R. §2.1253. See Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.) CLI-95-4, 41 NRC 248, 249 (1995).

⁵ As LBP-99-10 points out, all of the commitments made in those submittals using the words "will" and "shall" are binding license requirements. *Id.* at 7. Those submittals consist of thousands of pages of HRI's assertions and commitments filed during almost ten years. Determining the actual license condition on any given point therefore can be quite difficult. See ENDAUM's and SRIC's PBL Brief at 21-24.

submittals containing license conditions include contradictory statements. For example, the Church Rock Environmental Report (which is one of the 49 submittals [HRI license, Attachment A]) indicates that mining at Church Rock will be conducted in Section 17 first and Section 8 second.⁶ The Consolidated Operations Plan ("COP") for the CUP asserts, however, that mining will begin in Section 8 first and be followed by mining in Section 17.⁷ This is important for restoration of the two sites because Section 17 is hydraulically upgradient of Section 8.⁸ LBP-99-10 does not address this significant contradiction; rather, it dismisses ENDAUM's and SRIC's arguments on this point as relating to specific license conditions. LBP-99-10 at 5.

⁶ Church Rock Revised Environmental Report Section 3.1.4 at 175 (Revised: October 11, 1993). Table 3.1-3 shows the mining sequence to be Wellfield #1 followed in order by Wellfields #2, #3, #4 and #5. Figure 3.1-6 shows that Wellfield #1 is located entirely in Section 17. Wellfield #2 is shown to be located partially in Section 17 and crossing the section line into Section 8.

HRI first submitted the Church Rock Revised Environmental Report on March 16, 1993, under cover of a letter from Mark Pelizza, HRI, to Ramon Hall, NRC (ACNs 9304130415 and 9304130421). The Report was revised again in October of 1993, under cover of a Memorandum from Mark S. Pelizza to Distribution List (October 11, 1993) (ACN 9312140083).

⁷ Rev. 2 to Crownpoint Uranium Project Consolidated Operations Plan at 17 (August 15, 1997) (ACN 9708210179).

⁸ Third Affidavit of Michael G. Wallace at 9-10 (September 1, 1998), filed with ENDAUM's and SRIC's September 2, 1998 Scheduling Conference Brief. Section 17 also has significant underground mine workings whose effects on the hydrology of the area must be taken into account before mining commences. Because Section 17 is upgradient of Section 8, mining and restoring Section 8 first would be extremely imprudent. Once Section 8 has been restored, it may become recontaminated by contaminated groundwater flowing downgradient from Section 17, thus raising the cost and difficulty of restoring Section 8. *Id.*

Another significant contradiction ignored by LBP-99-10 relates to the use of retention and evaporation ponds. In the COP Rev. 2.0, HRI states that initially two or more "retention ponds" occupying up to six acres will be built at each site for the purpose of retaining waste or restoration water until it can be treated. COP Rev. 2.0 at 28-29. COP Rev. 2.0 also refers to "evaporation ponds", and states that approximately 100 acres of such ponds will be required for disposal of waste water during restoration "at a given location." *Id.* at 59. Contradicting this assertion, HRI's Response to Request for Additional Information ("RAI") No. 29⁹ asserts that two ponds of four acres each will be build at the satellite plants and the six acres of ponds at Crownpoint will be used. *Id.* at 3. HRI does not identify these ponds as either retention or evaporation ponds, nor does it address the discrepancy in the amount of acreage described in the various documents. Thus it is impossible to determine what the HRI license requires for retention and evaporation ponds.

In addition to these errors concerning the content and clarity of the HRI license, LBP-99-10 also incorrectly implies that members of the public will have an adequate opportunity to be heard regarding amendments to the HRI license. LBP-99-10 at 3. To reach this conclusion, the Presiding Officer erroneously rejects ENDAUM's and SRIC's argument that the HRI license allows HRI to change its licensed operation unilaterally without seeking a license amendment. LBP-99-10 asserts that the license requires HRI to seek a license amendment if a proposed

⁹ See letter from M.S. Pelizza, HRI, to J. Holonich, NRC (February 20, 1996) (ACN 9602220389) forwarding 296 page response to RAIs 1-48.

change conflicts with existing license requirements, would degrade the environment, or would be inconsistent with the FEIS or the SER. *Id.* at 6-7. This reasoning ignores the plain fact that HRI, and HRI alone, may determine whether its proposed changes would trigger the requirement for a license amendment under the standards contained in the license. Moreover, HRI need give the NRC Staff no advance notice of the changes. As LBP-99-10 itself states:

[w]hether any proposed operational change satisfies the license condition would have to be determined by HRI's three-member Safety and Environmental Review Panel ("SERP"). All such determinations must be documented and reported annually to the NRC.

Id. at 7.

Thus, the public and the NRC may not find out about changes in the mining operation for as much as a year after the changes are made, when HRI makes its annual report. LBP-99-10 therefore is simply wrong when it asserts that the HRI license does not provide HRI with the authority to determine whether a change in the CUP requires a license amendment. LBP-99-10 at 7-8. Moreover, if HRI fails to apply for a license amendment and the NRC has to bring an enforcement action, the public will have no opportunity to participate because neither the AEA nor the regulations provides for public involvement in enforcement actions.

LBP-99-10 also incorrectly asserts that the "number and breadth of the express conditions in HRI's license limit HRI to a very few, discrete, operational changes." LBP 99-10 at 7. That is not accurate. The license contains no provision stating which statements govern the sequence of mining, the use of retention and evaporation ponds, and other issues on which the license submittals referenced in Attachment A

set forth contradictory statements. The license therefore leaves to HRI, for example, the decision whether to begin mining at Section 8 or Section 17.

The license also leaves other matters to HRI by default. Although the license requires that there be a generator at the Crownpoint site (License Condition 10.6), there is no requirement that any generating capacity be maintained at the other mining sites. HRI therefore presumably can determine whether to provide for emergency electric power at the other three sites and how that will be accomplished if it is done.

Finally, the license does not specify, and therefore gives HRI discretion to decide, whether liquid waste will be disposed of by means of land application or in evaporation ponds.

B. LBP-99-10 is based on legal error.

1. LBP-99-10 fails to address issues raised below.

NRC Regulations require that a Presiding Officer's initial decision include "[f]indings, conclusions, and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record." 10 CFR §1.1251(c)(1). In violation of this fundamental requirement of administrative law, LBP-99-10 fails entirely to address several substantive issues raised below.

LBP-99-10 does not address ENDAUM's and SRIC's arguments that use of PBL violates the AEA and the Administrative Procedures Act, 5 U.S.C. §§551-559, 701-706 ("APA") because PBL is not authorized by any regulation or policy adopted pursuant to those statutes. *See* ENDAUM's and SRIC's PBL Brief at 10-15. LBP-99-10 also does not deal with ENDAUM's and SRIC's point that HRI's PBL license

violates the APA because the license is so self-contradictory and confused that it is arbitrary and capricious. *Id.* In addition, LBP-99-10 does not address the point that the use of PBL violates NEPA because it eliminates NRC review of changes before those changes are made. *Id.* at 18-21.

2. LBP-99-10 violates applicable laws and regulations.

NRC regulations permit PBL for certain types of licenses (*see* 10 CFR §§50.59(a), 72.48), but not for source materials licenses. Ignoring this distinction, LBP-99-10 holds that performance based licensing is legal so long as it is not prohibited by the Atomic Energy Act ("AEA") or its regulations. LBP-99-10 at 4-5. There is no precedent for that holding, and it violates the principle that differently written NRC regulations have different meanings. *See Louisiana Energy Services* (Claiborne Enrichment Center), LBP 96-25, 46 NRC 294, 299-300 (1997).

LBP-99-10 also violates the AEA and the scheme of the 10 CFR Part 40 regulations, which require that before issuing a license the Staff must determine that issuance "will not be inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. §2099; 10 CFR §40.32(c). By allowing HRI to make unilateral changes in its operation after licensing, LBP-99-10 makes meaningless the requirement of a determination of compliance by the Staff prior to licensure.

In addition, LBP-99-10 violates the AEA and the APA because HRI's PBL license was issued without any Commission regulations or policy adopted pursuant to those statutes. *See Citizens Awareness Network v. United States Nuclear Regulatory Commission*, 59 F.3d 284, 291 (1st Cir. 1995). LBP-99-10's approval of the PBL

license violates the APA for a second reason; the license terms are so self-contradictory, disjointed, and confused that the license is arbitrary and capricious.

LBP-99-10 violates as well the requirement of the National Environmental Policy Act, 42 U.S.C. §§4321 *et seq.* ("NEPA"), that the NRC determine, prior to changes in HRI's operations, whether those changes are substantial enough to require additional environmental analysis. *See Greene County Planning Board v. Federal Power Commission*, 455 F.2d 412, 420 (2nd Cir.), *cert. denied* 409 U.S. 849 (1972).

D. This appeal raises substantial and important questions of law, policy, and discretion.

The NRC has never adopted either regulations or a formal policy allowing such licensing to be used for source materials licenses.¹⁰ The use of PBL for source materials licenses is an informal policy developed by the Staff alone that changed more than 30 years of established policy. The use of this informal policy without any basis in law raises significant legal issues.

The use of this policy also involves substantial issues of discretion. The PBL policy gives to the licensee discretion to determine initially whether a particular change in operations requires a license amendment. This is discretion that was formerly exercised by the NRC.

Consideration in this appeal of the use of PBL also is a matter of great public interest. The change to PBL was made without any authorization from the NRC and

¹⁰ ENDAUM and SRIC do not concede that the Commission or the Staff has the authority to implement performance based licensing through the adoption of a policy as opposed to a regulation. Even if the Commission or the Staff did have that authority, however, neither has exercised it.

without any process providing public notice or permitting input from the public affected by the change. The public therefore has not had any opportunity to be heard on this issue. Moreover, the basic issue posed by PBL is a matter of public interest. The question is the extent to which source materials operations should be licensed on the basis of performance rather than with prescriptive requirements spelled out in a license. Because of the ways in which PBL delegates decisions to licensees, specifically the Safety Environmental Review Panels established pursuant to PBL, and limits public involvement, this appeal is of great interest to members of communities in which those source materials operations are proposed and to the public generally.

Finally, this is a precedent setting case. This is the first adjudication of an application for a source materials ISL license. It also is among the first cases involving an application filed under 10 C.F.R. Subpart L. The issues raised by this Petition are novel, and Commission action in this matter will establish precedent.

V. CONCLUSION

For the foregoing reasons, the Commission should grant review of LBP-99-10 and reverse that ruling.

Dated: March 11, 1999.


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| (2929 Coors Road, Suite 101 |) | ASLBP No. 95-706-01-ML |
| Albuquerque, NM 87120) |) | |
| |) | |

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 1999 I caused to be served copies of:

**ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF LBP-99-10,
PRESIDING OFFICER'S PARTIAL INITIAL DECISION (PERFORMANCE-
BASED LICENSING)**

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. §2.712. Service was also made via facsimile to the parties marked below with a + and by electronic mail to the parties marked below by an asterisk. The envelopes for first class mail service were addressed as follows:

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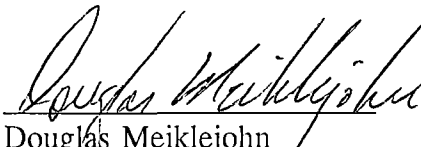
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