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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECURITY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of:)
)
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

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

Re: Leach Mining and Milling License

**MARILYN MORRIS AND GRACE SAM'S PETITION FOR REVIEW OF PARTIAL
INITIAL DECISION CONCERNING PERFORMANCE-BASED LICENSING ISSUES**

Pursuant to 10 C.F.R. §§ 2.786 and 2.1253, Intervenors Grace Sam and Marilyn Morris ("Ms. Sam and Ms. Morris") hereby petition the Commission for review of the Presiding Officer's Partial Initial Decision (Performance-Based Licensing Issues) (LBP-99-10) dated February 19, 1999, in the above-entitled Subpart L proceeding. The Presiding Officer ruled that the NRC's issuance of Materials License SUA-1508 [Notebook No. 11, Acc. No. 9801160076, 1/5/98] ("the license") to Hydro Resources, Inc. ("HRI") on January 5, 1998, complies with the requirements of 10 C.F.R. § 40.32. That license contains a performance-based license condition ("PBLC") which vests a Safety and Environmental Review Panel ("SERP"), composed of HRI employees, with the authority to determine whether HRI may make changes in its mining operations in lieu of seeking a license amendment from the NRC pursuant to 10 C.F.R. § 40.44. See Materials License SUA-1508 at 1-2, ¶ 9.4. Ms. Sam and Ms. Morris contend that the PBLC operates to delegate unlawfully to HRI the NRC's duty to ensure that HRI's operations under the license comply with the requirements of 10 C.F.R. § 40.32. See Second Written Presentation of Grace Sam and Marilyn Morris at 4-7 (December 11, 1998) ("Sam Brief"). Ms. Sam and Ms. Morris assert that the Commission should exercise review of the Presiding Officer's ruling

U.S. NUCLEAR REGULATORY COMMISSION
RULEMAKINGS & ADJUDICATIONS STAFF
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because it constitutes a “necessary legal conclusion ... without governing precedent” pursuant to 10 C.F.R. § 2.786(b)(4)(ii), and raises a “substantial and important question of law [and] policy” pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

I. SUMMARY OF DECISION

The license authorizes HRI to build and operate several in-situ leach (“ISL”) uranium mines and a uranium mill in and around Church Rock and Crownpoint, New Mexico. It permits mining on all four sites for which HRI sought permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), conditioning operations on compliance with certain license conditions and commitments made by HRI in its application materials. See generally Materials License SUA-1508 and Attachment A. The PBLC contained in the license permits HRI to implement changes in its operating procedures without going through the formalities of a license amendment proceeding. Id. at 1-2, ¶ 9.4.

On February 19, 1999, the Presiding Officer issued LBP-99-10, Partial Initial Decision (Performance-Based Licensing Issues) (“PID”), in which he concluded that “the license was properly issued to HRI pursuant to 10 C.F.R. Part 40.32.” LBP-99-10 at 9. The Presiding Officer issued this PID after considering the written presentations of Ms. Morris and Ms. Sam (filed December 11, 1998) and ENDAUM and SRIC (filed December 7, 1998), as well as the responses of HRI (filed January 11, 1999) and the NRC Staff (filed January 19, 1999). In their written presentation, Ms. Morris and Ms. Sam assert that the NRC unlawfully abdicated its statutory duty to safeguard against danger to human health, safety, and the environment by including the PBLC in the license because the PBLC imbues the SERP, consisting of HRI employees, with the authority to determine whether any operational changes which HRI proposes

pursuant to the PBLC require the filing of an application for a license amendment prior to implementation. See Sam Brief at 3-7; Materials License SUA-1508 at 1-2, ¶ 9.4.

Ms. Morris and Ms. Sam maintain that “if the SERP decides that HRI need not obtain NRC permission before initiating a change, then NRC ... will have no authority to review the proposed changes prior to their implementation and, concomitantly, will have lost the ability to ensure that human health, safety and the environment are adequately protected.” Sam Brief at 6. Responding to this argument, the Presiding Officer concluded that the PBLC does not cede to HRI the NRC’s responsibility of safeguarding public health and the environment. The Presiding Officer apparently decided that the SERP has no real authority because “[t]he number and breadth of express requirements in HRI’s license restrict application of PBL to a very few, discrete operational changes[,]” LBP-99-10 at 7, and determined that, although “HRI might make low-risk changes in its mode of operation without advance approval[, it] **may not alter its license** or make high-risk changes in its operations.” *Id.* at 3-4 (emphasis in original). In conclusion, the Presiding Officer stated:

Whether 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. Intervenors argue that this “cedes” to HRI the authority to determine whether an amendment is necessary to safeguard human health, safety, and the environment. Sams Brief at 4. To the contrary, I have concluded that this process does not cede power to HRI since the NRC continues to have an important regulatory role. NRC may, after an annual review or an inspection, determine that the change did not satisfy the condition (and in fact required a license amendment) and bring an enforcement action against HRI.

Id. at 7-8. In reaching this conclusion, the Presiding Officer ignored one crucial fact: that a SERP decision, once implemented, but prior to its review by the NRC, could create a situation

where HRI's operations comply with the terms of the PBLC, but where the license no longer adequately protects human health, safety, and the environment in violation of 10 C.F.R. § 40.32. In other words, the PBLC creates the possibility for a lapse in the NRC's duty to adequately protect human health, safety, and the environment.

II. THE LICENSE FAILS TO COMPORT WITH THE REQUIREMENTS OF 10 C.F.R. § 40.32 BECAUSE THE PBLC UNLAWFULLY DELEGATES TO HRI THE DISCRETION TO IMPLEMENT OPERATIONAL CHANGES THAT MAY ULTIMATELY REQUIRE A LICENSE AMENDMENT.

Ms. Sam and Ms. Morris contend that the Commission should review and reverse the Presiding Officer's PID because it is erroneous. In concluding that the NRC did not unlawfully delegate its regulatory authority to HRI and that the license was properly issued pursuant to 10 C.F.R. § 40.32, the Presiding Officer ignored the fact that a lapse in the license's protection of human health, safety, and the environment could occur because of the PBLC's delegation of decision-making authority to the SERP.

With the authority to issue materials licenses which the NRC obtains from the Atomic Energy Act and its implementing regulations comes the countervailing duty to protect "the health and safety of the public," to "minimize danger to life or property," and "to protect environmental values." 10 C.F.R. § 40.32(c), (d) & (e). The requirements of section 40.32, which control the NRC's decision whether to issue a materials license, remain in force and must be satisfied throughout the license term. *Id.* § 40.41. In the event a licensee desires to make changes in its operations through a license amendment, it must demonstrate that the proposed amendment will comply with the requirements of section 40.32. *Id.* § 40.45. In short, the regulations place the responsibility of ensuring continued compliance with the requirements of section 40.32 on the

NRC. To fulfill this responsibility, the regulations authorize the NRC to conduct inspections of a licensee's operations, id. § 40.62, and, if necessary, take action against a licensee whose operations are out of compliance. Id. § 40.81.

In the PID, the Presiding Officer assumes that the SERP's authority to approve operational changes not requiring a formal license amendment is so limited by the language of License Condition ("LC") 9.3 that no change which the SERP might approve could possibly be the type of change ordinarily requiring the filing of an application for a license amendment.

License Condition 9.3 makes clear that "[W]henver the licensee uses the word 'will' or 'shall' in the aforementioned licensee documents" (i.e., the materials listed in Attachment A to the license Application and COP, Rev. 2), it denotes an enforceable license requirement. Thus, among HRI's 49 submittals listed in Attachment A there are extensive commitments, the many "wills" and "shalls." Pursuant to L.C. 9.3, these constitute enforceable license requirements. The performance-based license condition, 9.4, expressly states that the only changes, tests, or experiments allowable under the PBL must not conflict with any specifically stated license requirement. The number and breadth of express requirements in HRI's license restrict application of PBL to a very few, discrete, operational changes.

LBP-99-10 at 6-7. The Presiding Officer thus interprets LC 9.3 to strictly limit the type of operational changes the SERP has the authority to implement: "... HRI might make low-risk changes in its mode of operation without advance approval but **may not alter its license** or make high-risk changes in its operations." Id. at 3-4.

However, the Presiding Officer never directly addresses Ms. Sam's and Ms. Morris's main point of contention: that the NRC has delegated some of its decision-making responsibility under 10 C.F.R. § 40.32 to a private entity, HRI's SERP, whose objectivity must be questioned on grounds of conflict of interest. See Sam Brief at 6 (citing Sierra Club v. Sigler, 695 F.2d 957, 962 n. 3 (5th Cir. 1983)). It is through this delegation of authority that the PBLC creates the

possibility for a lapse in the protection of human health, safety, and the environment required by section 40.32. The Presiding Officer provides no explanation of why it is appropriate for a non-NRC body, particularly one whose members are employees of the licensee, to have the initial authority to determine whether proposed operational changes are “low-risk” or “high-risk” and thus whether an operational change is subject to license amendment procedures. See LBP-99-10 at 3-4. Although the Presiding Officer concludes that the “express requirements in HRI’s license restrict application of PBL to a very few, discrete, operational changes,” id. at 7, it is in essence HRI, through the SERP, that has the initial authority to decide whether these express requirements are applicable to any proposed changes. In short, by giving the SERP the initial authority to decide what is “low-risk” and what is “high-risk,” the PBLC gives HRI the discretion to implement operational changes without NRC approval that ultimately, after NRC review of the SERP’s decision, may require a license amendment. This clearly amounts to a breach of NRC’s duty under 10 C.F.R. § 40.32 to protect “the health and safety of the public,” to “minimize danger to life or property,” and “to protect environmental values.”

The Presiding Officer concludes that the NRC does not “cede” power to HRI since “NRC may, after an annual review or an inspection, determine that the change did not satisfy the condition (and in fact required a license amendment) and bring an enforcement action against HRI.” Id. at 7-8. Yet, the Presiding Officer ignores Ms. Sam’s and Ms. Morris’s contention that once an enforcement action is initiated by the NRC, changes may have already occurred producing detrimental effects to health safety and the environment. Sam Brief at 7. Whether an enforcement action is brought later is irrelevant; implementation of the PBLC already may have created the potential that a SERP decision, made in compliance with the PBLC, will have caused

a violation of section 40.32 that would have been avoided if the NRC had not delegated some of its decision-making authority to HRI.

III. CONCLUSION

The Presiding Officer's decision that the PBLC does not unlawfully delegate NRC regulatory authority to HRI and create a situation under which the license is inadequate to protect human health, safety, and the environment presents an important legal question of first impression. Considering that resolution of the issue may directly affect the health and safety of members of the communities of Church Rock and Crownpoint, New Mexico, where HRI plans to mine and process uranium, it also presents a substantial policy question. Therefore, Ms. Sam and Ms. Morris request that the Commission grant their Petition and review the Presiding Officer's Partial Initial Decision (Performance-Based Licensing Issues) (LBP-99-10) dated February 19, 1999.

Dated: March 11, 1999

Respectfully submitted,



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NUCLEAR REGULATORY COMMISSION
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| In the Matter of |) | |
| |) | |
| HYDRO RESOURCES, INC. |) | Docket No. 40-8968-ML |
| 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 the following:

**MARILN MORRIS AND GRACE SAM'S PETITION FOR REVIEW OF PARTIAL
INITIAL DECISION CONCERNING 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 e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

Office of the Secretary
U.S. Nuclear Regulatory Commission*
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications
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Shirley Ann Jackson, Chairman
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March 11, 1999

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U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001
Attn: Rulemakings and Adjudications Staff

Re: Docket No. 40-8968; ASLBP No. 95-706-01-ML
In the Matter of Hydro Resources, Inc.

Dear Sir:

Enclosed please find an original and two conforming copies of Marilyn Morris and Grace Sam's Petition for Review of Partial Initial Decision Concerning Performance-Based Licensing Issues. These are being submitted to be filed in the above stated case. I have also enclosed an extra copy. Please return a conforming copy to me with the enclosed self-addressed stamped envelope. If there are any problems, please contact me at (520) 871-5643. Thank you for your attention in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Roderick Ventura', written in a cursive style.

Roderick Ventura
Attorney at Law

Enclosure