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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

Before Administrative Judge Peter B. Bloch, Presiding Officer

_____)	
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))	
_____)	

**ENDAUM AND SRIC'S MOTION FOR RECONSIDERATION
OF LBP-99-15**

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") move the Presiding Officer to reconsider LBP-99-15 (the Memorandum and Order issued on March 18, 1999) and to vacate its request for more information from the NRC Staff on the adequacy of the Final Environmental Impact Statement's treatment of the impacts of radiation from the Crownpoint Uranium Project and elevated radiation levels in the Project area.¹ LBP-99-15 at 11. This motion is made pursuant to 10 C.F.R. §§2.730 and 2.1237 on three grounds.

First, LBP-99-15 provides the NRC Staff with a second opportunity, which it has not requested, to present arguments on an issue which already has been addressed.

¹ ENDAUM and SRIC do not object to the other questions posed by LBP-99-15.

U.S. NUCLEAR REGULATORY COMMISSION
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This is contrary to the Commission's January 29, 1999 instructions for the conduct of this proceeding. Second, the question posed to the Staff in LBP-99-15 is not an appropriate request for additional information under 10 C.F.R. §2.1233. Third, LBP-99-15 constitutes assistance to the Staff in the presentation of its case. This violates the Presiding Officer's duty to conduct a fair and impartial hearing.

Counsel for Intervenors Marilyn Morris and Grace Sam has informed counsel for ENDAUM and SRIC that Ms. Morris and Ms. Sam support this motion. Counsel for ENDAUM and SRIC have not contacted counsel for HRI and the Staff, but because of the nature of this motion, presume that those parties oppose this motion.

FACTUAL BACKGROUND

On January 11, 1999, pursuant to the briefing schedule established by the Presiding Officer in this matter, ENDAUM and SRIC filed written presentations regarding radioactive air emissions at the Crownpoint Uranium Project ("CUP").² As provided by the schedule, HRI filed its written presentation in response to ENDAUM and SRIC on February 11, 1999.³ Also in accordance with the schedule, the Staff filed its written presentation on February 18, 1999.⁴ The Staff neither complained of

² ENDAUM's and SRIC's January 11, 1999, Brief Regarding Radioactive Air Emissions at the Crownpoint Project ("ENDAUM's and SRIC's Air Emissions Brief").

³ HRI's Response to ENDAUM's and SRIC's January 11, 1999 Brief Regarding Radioactive Air Emissions at the Crownpoint Project (HRI's Response").

⁴ NRC Staff's Response to Intervenors' Presentation on Air Emission Issues (Staff's Response").

insufficient time to prepare its written presentation nor requested an opportunity to supplement or to amend its presentation since it was filed.

After receiving all of the parties' presentations, the Presiding Officer issued LBP-99-15.⁵ It sets forth a discussion and an analysis of the presentations by the parties, and addresses the discussion in the Final Environmental Impact Statement⁶ of radiation from the CUP and in the CUP area. LBP-99-15 points out that HRI disputes the points made by ENDAUM and SRIC concerning that discussion, and that the Staff did not respond to ENDAUM's and SRIC's points. *Id.* at 2-5.⁷ On that basis, LBP-99-15 orders that the parties respond to several questions, including the following:

6. Has the FEIS adequately addressed the combined impacts of radiation from the project and from elevated levels of radiation in the area of the project?

Id. at 11. LBP-99-15 also indicates that HRI, ENDAUM, and SRIC have addressed this question and that they need not answer it again although they can file responses on that issue. *Id.*

⁵ ENDAUM and SRIC filed a Motion to Reply on February 26, 1999, which the Presiding Officer has not ruled upon. ENDAUM's and SRIC's Motion for Leave to Submit Reply Brief and Rebuttal Testimony in Response to HRI's and Staff's Initial Presentations Regarding Air Emissions, filed February 26, 1999 ("Motion to Reply").

⁶ NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February, 1997) ("FEIS") (ACN 9703200270).

⁷ ENDAUM and SRIC do not concede the validity of any of the arguments presented by HRI on this issue.

ARGUMENT

I. LBP-99-15 VIOLATES THE COMMISSION'S DIRECTION FOR THE CONDUCT OF THIS PROCEEDING.

A. The Commission has directed that this proceeding not be delayed absent a request by one of the parties for additional time.

The Commission has made it clear that it expects this proceeding to be conducted expeditiously, and that "it does not advance that goal to stretch out briefing deadlines well beyond what even the hard-pressed parties themselves need or request." CLI-99-1; January 29, 1999. The Commission made that statement in its *sua sponte* review of the Presiding Officer's January 21, 1999 Order extending to March 5, 1999 the deadline for the Intervenors to file their final presentations. The Commission reversed that January 21, 1999 Order on the grounds that the goal of resolving this matter expeditiously was not advanced by extending the time for filing those briefs beyond what the Intervenors had requested. CLI-99-1 at 3.

LBP-99-15's order concerning the information provided in the FEIS should be reconsidered and vacated because it does essentially the same thing: it provides the Staff with an opportunity to amend its written presentation for the purpose of providing information that could have and should have been presented in that written presentation, and it invites the Staff to submit such information.⁸

⁸ ENDAUM and SRIC assume for purposes of this motion that the Staff may present information asserting that the FEIS has adequately addressed that question, but they do not waive their argument that the FEIS has not done so.

The Staff has not requested this opportunity; nor did it request any extension of time in which to make its presentation initially. Moreover, all of the parties have had ample opportunity to address the issue of the FEIS's treatment of radiation impacts. In addition, as is reflected in LBP-99-15, ENDAUM and SRIC and HRI have addressed this issue, and the Staff has chosen not to address it.

Unlike the other questions posed in LBP-99-15, which ENDAUM and SRIC do not oppose, LBP-99-15's question 6 amounts to an extension of the deadlines for the Staff's presentation, an extension that the Staff has not requested. This is contrary to the Commission's direction. That portion of LBP-99-15 therefore should be vacated, and the Presiding Officer should rule on the adequacy of the FEIS's treatment of this issue on the basis of the information that has been submitted by the parties.

B. The parties have had ample opportunity to address the FEIS's treatment of the combined impacts of radiation.

The adequacy of the FEIS's treatment of the combined impacts of radiation has been raised as an issue, and each of the parties has had an opportunity to address the issue. LBP-99-15 itself points out that ENDAUM and SRIC and HRI have addressed the issue of the FEIS's treatment of the combined impacts of radiation from the CUP and that the Staff has chosen not to do so. Referring to the question posed to the Staff, LBP-99-15 states: "HRI, ENDAUM and SRIC, which have already submitted a responsive discussion, need not answer this question." LBP-99-15 at 11, n. 6.

LBP-99-15 is correct. ENDAUM and SRIC addressed this issue extensively in

their Air Emissions Brief. *See* ENDAUM and SRIC Air Emissions Brief at 9-11 (radon), 12-14 (gamma radiation), and 19-23 (requirements of the National Environmental Policy Act ["NEPA"] and deficiencies in the FEIS); *see also* report of Bernd Franke.⁹ In addition, HRI addressed this issue. *See* HRI Response at 13-14 and Affidavit of Alan Eggleston¹⁰ at 7-15.

LBP-99-15 also points that the Staff has not addressed the issue. The concluding sentence of LBP-99-15's discussion of the issues is: "The NRC Staff does not address any of the Intervenors allegations concerning the FEIS." *Id.* at 5. LBP-99-15 essentially extends the time in which the Staff may address this issue by giving the Staff a second chance to submit a presentation of no more than 12 pages and supporting evidence of up to 30 pages. *Id.* at 11. That is not called for by the schedule for the case, and it is contrary to the Commission's direction in CLI-99-1.

II. LBP-99-15'S REQUEST FOR AN ADDITIONAL FILING BY THE STAFF VIOLATES THE PROCEDURAL RULES GOVERNING SUBPART L PROCEEDINGS.

The NRC regulations provide that the Presiding Officer may ask questions of the parties, but it is not appropriate for the Presiding Officer to do so when the parties

⁹ "Crownpoint Uranium Solution Mining Project: Review of Outdoor Radon Levels and External Gamma Radiation", Exhibit 2 to Testimony of Bernd Franke, Attachment A to ENDAUM's and SRIC's Air Emissions Brief ("Franke Report").

¹⁰ February 10, 1999 Affidavit of Alan C. Eggleston, Ph.D., attachment to HRI Response.

have already had opportunities to address and have addressed the issues involved.¹¹ In explaining the manner in which a Subpart L proceeding is to be conducted, the Commission has pointed out that a Presiding Officer's use of questions pursuant to 10 C.F.R. §2.1233 should be for the purpose of following up on and clarifying the information that parties provide in their written presentations, not to put matters into controversy initially. *See Rockwell International Corporation (Rocketdyne Division)*, ALAB-925, 30 NRC 709, 717-718 (1989). In that case, the Appeal Board instructed the Presiding Officer "to comply with both the letter and intent of the Subpart L rules."

The Appeal Board stated that:

In particular, pursuant to 10 C.F.R. §2.1251(d), the Presiding Officer is to examine and decide only those issues properly put into controversy by the parties, absent some basis for invoking the exception found in that same provision.

30 NRC at 723.

This is consistent with the Commission's 1998 Policy on Conduct of Adjudicatory Proceedings. In that Policy, the Commission directed that:

parties are obligated in their filings before the board and the Commission to ensure that their arguments and assertions are supported by appropriate and accurate references to legal authority and factual basis, including, as appropriate, citation to the record.

NRC Policy on Conduct of Adjudicatory Proceedings; Policy Statement (August 5,

¹¹ Although LBP-99-15 does not refer to 10 C.F.R. §2.1233, ENDAUM and SRIC assume that it is the section of the regulations that is relied on by the Presiding Officer for the request for additional information from the Staff.

1998), 63 FR 41872, 41874.

A party that chooses to address an issue in a specific manner or not to address the issue has made a choice and should be prepared to live by it. *See* Curators of the University of Missouri (Trump-S Project), LBP-91-14 (ASLBP No. 90-613-02-MLA), 33 NRC 265, 266 (1991) (denying because of a lack of a specific enough showing a motion for leave to respond to an NRC Staff response to the Presiding Officer's request for information). The purpose of requests for additional information pursuant to 10 C.F.R. §2.1233 should be to insure a complete record, not to provide parties with additional opportunities to address issues. *Cf.* Curators of the University of Missouri (Trump-S Project), CLI-95-1, 41 NRC 71, 116-117 (1995) (upholding a Presiding Officer decision that denied intervenors who had already submitted presentations an opportunity to submit rebuttal evidence as well).

Moreover, this is particularly true when the parties involved are represented by counsel, especially counsel who have experience. The Commission does not hold *pro se* parties to the high standards it expects attorneys to achieve (*see* Metropolitan Edison Company (Three Mile Island Nuclear Station, Unit 1), ALAB-772, 19 NRC 1193, 1246-1247 [1984] [remanding a licensing proceeding to the Licensing Board for further hearing on several issues, including the adequacy of a training program, and granting an intervenor group's motion to reopen the record for hearing on allegations of improper leak rate practices]), but it expects even those parties to conduct their cases

appropriately. Attorneys, on the other hand, particularly experienced attorneys, are held to high standards. *See Kansas Gas and Electric Company* (Wolf Creek Generating Station, Unit No. 1) (vacating a Licensing Board decision and remanding to the Board with instructions to dismiss an intervention petition for lack of specificity required by Commission's rules), ALAB-279, 1 NRC 559, 576-577 (1975).

In this case, the Presiding Officer should hold the Staff to the highest standards because its counsel appear to be experienced and to have significant backgrounds in NRC proceedings. The Presiding Officer therefore should not be in the business of providing the Staff with second opportunities to make their presentations, particularly when it has not requested such an opportunity.

III. LBP-99-15 PROVIDES INEQUITABLY FAVORABLE TREATMENT TO THE STAFF.

The final basis for reconsideration of LBP-99-15 is that it gives the Staff inequitably favorable treatment. LBP-99-15 finds that the Staff has not addressed the adequacy of the FEIS's treatment of the impacts of combined radiation. On that basis, LBP-99-15 gives the Staff a second opportunity to address that issue, and to invites it to provide information on that issue. That is not the treatment that has been afforded to ENDAUM and SRIC in this matter.

There are several factual issues on which the Presiding Officer has determined that ENDAUM and SRIC have not submitted adequate information to support their positions. For example, in LBP-99-9, the February 19, 1999 Partial Initial Decision on

Issues Related to the National Historic Preservation Act (NHPA) and the Native American Graves Protection and Repatriation Act (NAGPRA) and Cultural Resources ("Cultural Resources Decision"), the Presiding Officer found that the testimony of a witness presented by ENDAUM and SRIC (William Dodge) was not helpful, and that their brief "did not explain what official action was taken by the NRC and what regulations apply to that action." Cultural Resources Decision at 6.

The Presiding Officer did not, however, request that ENDAUM and SRIC provide more helpful testimony or more information on these issues. Rather, on the basis of those and other findings, the Presiding Officer found that ENDAUM and SRIC had "not demonstrated that there is a defect in the NRC's proof of compliance with 36 C.F.R. §800.4(d)." *Id.* at 9. That finding was one of the grounds for the Presiding Officer's ruling denying ENDAUM and SRIC any of the relief they requested in their brief on the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act, and related cultural resources issues. Cultural Resources Decision at 12.

Similarly, in LBP-99-10, the February 19, 1999 Partial Initial Decision on Performance Based Licensing Issues ("Performance Based Licensing Decision"), the Presiding Officer rejected arguments presented by all of the Intervenors to the effect that license condition 9.4 (the performance based license condition) grants HRI authority to modify its operations. Specifically, the Presiding Officer determined that:

"[t]he number and breadth of express requirements in HRI's license restrict application of PBL [Performance Based Licensing] to a very few, discrete, operational changes.

Performance Based Licensing Decision at 6-7.

The Presiding Officer did not, however, request that the Intervenors answer questions about what changes HRI is permitted to make unilaterally under the performance based licensing condition. Instead, he rejected the Intervenors' claims. *Id.* at 12. The Presiding Officer also ruled on other factual issues raised by the Intervenors concerning performance based licensing. For example, the Presiding Officer rejected their claims concerning the record on which the license is based and their arguments concerning the scope of the license's delegation of authority to HRI. *Id.* at 5-8. On none of these or any other issues did the Presiding Officer pose questions to the parties that would have given ENDAUM and SRIC an additional opportunity to present their positions.

ENDAUM and SRIC do not agree with the Presiding Officer's findings on these and other issues on which he has ruled against ENDAUM and SRIC in the three partial initial decisions that have been issued. Nevertheless, ENDAUM and SRIC understand that having made those findings, the Presiding Officer has an obligation to rule on the basis of them. It is not equitable, however, for the Presiding Officer to refuse to rule on the basis of findings that are made against the Staff.

The Presiding Officer has "the duty to conduct a fair and impartial hearing

according to law" (10 C.F.R. §2.738), which means that he must accord the same treatment to HRI and the Staff as he does to ENDAUM and SRIC. For that reason, if the Presiding Officer finds that the Staff has not addressed an issue, he must make his ruling on that basis, just as he has ruled against ENDAUM and SRIC on the basis of his findings about their presentations. The Presiding Officer has violated his principal duty by favoring the Staff. Although he found that it had not addressed the issue of the impacts of combined radiation, he chose not to rule on that basis but to point out to the Staff that it had not provided information on the issue and gave it an opportunity to do so.

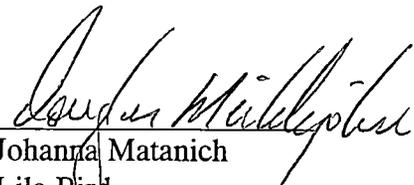
This is particularly egregious because the Staff has the burden of proof to demonstrate that there has been compliance with NEPA. Duke Power Company (Catawba Nuclear Station, Units 1 and 2), CLI 93-19, 17 NRC 1041, 1049 (1983); Louisiana Energy Services (Claiborne Enrichment Center). LBP-96-25, 44 NRC 331, 338 (1996). ENDAUM and SRIC have met their burden of going forward and have shown that the FEIS does not adequately analyze the impacts of combined radiation levels; the Staff must therefore meet its burden of showing that the FEIS's analysis is adequate. The Staff did not do this, and it is not appropriate for the Presiding Officer to provide the Staff with a second opportunity to do so.

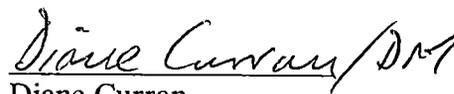
CONCLUSION AND REQUEST FOR RELIEF

LBP-99-15 violates the Commission's direction for the conduct of this

proceeding, and is an improper use of the Presiding Officer's authority to request additional information. Moreover, LBP-99-15 provides inequitable assistance to the Staff in the presentation of its case by giving it a second chance to provide information that the Staff chose not to submit. ENDAUM and SRIC therefore request that the Presiding Officer vacate the portion of that Order that requests additional information from the Staff on the adequacy of the FEIS's analysis of the impacts of combined radiation. ENDAUM and SRIC further request that the Presiding Officer act on the basis of the information addressing the adequacy of the FEIS with respect to air emissions that has been presented by the parties to date.

Dated: March 22, 1999.


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RULEMAKING AND
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Before Administrative Judge Peter B. Bloch, Presiding Officer

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2929 Coors Road)	
Suite 101)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120)	
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CERTIFICATE OF SERVICE

I hereby certify that:

On March 22, 1999, I caused to be served copies of the following:

ENDAUM AND SRIC'S MOTION FOR RECONSIDERATION OF LBP-99-15

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:

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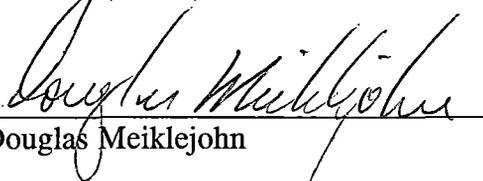
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