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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF GENERAL
COUNSEL AND
ADJUDICATIONS STAFF

In the Matter)

HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

) Docket No. 40-8968-ML
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NRC STAFF'S RESPONSE
TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF LBP 99-10

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March 22, 1999

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INTRODUCTION

This Subpart L proceeding concerns the Staff's January 5, 1998 issuance of a materials license to Hydro Resources, Inc. (HRI), which authorized HRI to conduct *in situ* leach (ISL) mining in New Mexico after several license conditions are met. On February 19, 1999, the Presiding Officer issued LBP-99-10,¹ denying the request to revoke HRI's license made by intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) (collectively, "Petitioners") in their December 11, 1998 joint presentation on performance-based licensing (PBL) issues (Petitioners' PBL Brief).² On March 11, 1999, the Petitioners filed

¹ "Partial Initial Decision (Performance-Based Licensing Issues)," 49 NRC ____, slip op. (PBL Decision). Therein, the Presiding Officer ruled in favor of HRI and the Staff, denying various requests that action be taken against HRI's license.

² HRI filed its response to the Petitioners' PBL Brief on January 11, 1999. The Staff filed its response to the Petitioners' PBL Brief and HRI's response thereto on January 19, 1999 (Staff's PBL Response).

“ENDAUM’s and SRIC’s Petition For Review Of Presiding Officer’s Partial Initial Decision (Performance-Based Licensing)” (PBL Review Petition).

As discussed below, the PBL Review Petition fails to show that Commission review of the PBL Decision is warranted, pursuant to the standards of 10 C.F.R. §§ 2.1253 and 2.786(b)(4). Accordingly, the petition should be denied.

DISCUSSION

Petitioners Fail To Show Review of PBL Decision Is Warranted

The Commission should deny the PBL Review Petition because, as discussed below, it fails to meet the standards necessary to justify review.

A. Applicable Legal Standards

Pursuant to 10 C.F.R. § 2.1253,³ the standards governing the Commission’s exercise of its discretion to grant or deny petitions to review a presiding officer’s decisions are set forth in 10 C.F.R. § 2.786(b)(4)(i-v). In order to justify Commission review, the Petitioners here must raise a “substantial question” regarding at least one of the following five areas of consideration: (1) whether a finding of material fact in the underlying decision is clearly erroneous;⁴ (2) whether a necessary legal conclusion in that decision is without governing precedent, or departs from

³ See *Babcock And Wilcox Company* (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995).

⁴ To show that a factual finding in the PBL Decision was “clearly erroneous,” Petitioners must show that the finding was “not even plausible in light of the record viewed in its entirety.” *Kenneth G. Pierce* (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995), citing *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). See also *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972) (a licensing board’s factual findings may not be set aside simply because the appeal board might have found differently).

established law; (3) whether the Petitioners identify any substantial and important policy or legal questions; (4) whether the Petitioners identify any prejudicial procedural error in the proceeding to date; or (5) whether the Petitioners identify any other consideration which the Commission may deem to be in the public interest. *See* 10 C.F.R. § 2.786(b)(4)(i-v).

Under these standards, a petitioner has the burden “to raise questions that are sufficiently substantial to justify Commission review.” *Babcock And Wilcox, supra*, 41 NRC at 251. To emphasize the discretionary nature of Commission review, the regulations provide that if a review petition is granted, the Commission itself will specify the issues to be briefed on appeal. *See* 10 C.F.R. § 2.786(d).

B. PBL Review Petition Fails to Meet Review Standards

The Petitioners base their request for Commission review on claims that the PBL Decision contains errors of fact (*see* PBL Review Petition, at 3-7) and law (*see id.*, at 7-9); they further state that review is warranted based on the novel policy arguments made in the PBL Review Petition. *See id.*, at 9-10. As discussed below, the Petitioners fail to meet their burden to show that review of the PBL Decision is warranted pursuant to the standards of 10 C.F.R. § 2.786(b)(4)(i-v).

1. Alleged factual errors

As indicated above, most of the PBL Review Petition’s focus is on alleged factual errors made by the Presiding Officer in the PBL Decision. The first contention of such error concerns the Presiding Officer’s finding (*see* PBL Decision, at 8) that the license conditions HRI must meet are clearly set forth in HRI’s license. The Petitioners argue that this finding is factually erroneous by pointing to two examples of allegedly confusing license requirements. *See* PBL Review Petition,

at 3-5, and 6-7.⁵ The Staff's discussion of these two examples, including the argument that they represent concerns previously ruled to be not germane to this proceeding (*see* Staff's PBL Response, at 14-16),⁶ is ignored by the Petitioners. In thus failing to address the record established in this proceeding, the Petitioners do not meet their burden of establishing clear error. Accordingly, this allegation of factual error does not support the PBL Review Petition.

The second contention of factual error involves the Presiding Officer's allegedly mistaken "reasoning" in the PBL Decision that HRI License Condition (LC) 9.4 "requires HRI to seek a license amendment if a proposed change conflicts with existing license requirements." PBL Review Petition, at 6, *citing* PBL Decision, at 6-7. The Presiding Officer's factual finding on this point is based on a simple recitation of the terms of LC 9.4. Accordingly, this allegation of factual error does not support the PBL Review Petition.

The last contentions of factual error (regarding HRI LC 10.6 and methods of liquid waste disposal) should not be considered here by the Commission. These issues were not raised in the

⁵ The Petitioners neglect to provide cites to their PBL Brief in this regard. However, the two examples of allegedly confusing requirements were discussed in Petitioners' PBL Brief, at 25-27 (whether Section 8 or 17 will be mined first at HRI's Church Rock site), and 29-30 (requirements regarding "retention ponds" and "evaporation ponds"). These contentions were part of Petitioners' argument made to the Presiding Officer that the Staff's issuance of a license to HRI was an arbitrary and capricious act. *See* Petitioners' PBL Brief, at 21-30. The Presiding Officer evidently found that the two examples were not material facts, as he did not discuss them in the PBL Decision.

⁶ Concerns regarding the allegedly disjointed nature of HRI's license application should not be given further consideration in this proceeding, based on an earlier ruling made by the Presiding Officer that such concerns are not germane. *See* Staff's PBL Response, at 14 n.17, *citing* LBP-98-9, 47 NRC 261, 280 (1998), *motion for reconsideration denied*, LBP-98-14, 47 NRC 376 (1998). Accordingly, the Petitioners' legal error argument that HRI's license "is arbitrary and capricious" because its license terms are "self-contradictory, disjointed, and confused" (PBL Review Petition, at 9), should not be accepted as supporting Commission review of the PBL Decision.

Petitioners' PBL Brief, and in making these contentions, the Petitioners fail to provide any citation to the record established in this proceeding. *See* PBL Review Petition, at 7. This failure violates the following portion of the Commission's 1998 policy statement on the conduct of adjudicatory proceedings (Adjudicatory Policy Statement):

Parties are also 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. Failure to do so may result in material being stricken from the record or, in extreme circumstances, in a party being dismissed.

63 Fed. Reg. 41872, at 41874 col. 2 (August 5, 1998).

As shown above, the Petitioners have not identified any factual errors in the PBL Decision which support the PBL Review Petition.

2. Alleged legal errors

The Presiding Officer's alleged legal errors in the PBL Decision are discussed in the PBL Review Petition, at 7-9. The first such contention is that the Presiding Officer erroneously failed to address each and every argument made in the Petitioners' PBL Brief. *See* PBL Review Petition, at 7-8, *citing* 10 C.F.R. § 2.1251(c)(1). However, as noted by the Petitioners, that provision only requires that findings be made on "all material issues."⁷ The Petitioners seem to believe that any issue they raise must be deemed a material one, no matter how lacking in merit. For example, the

⁷ The Staff found no NRC cases construing this regulatory wording, which is also used in 10 C.F.R. § 2.760(c)(1). This wording should be construed as giving presiding officers some discretion to weed out those arguments which are so trivial, inconsequential, or otherwise lacking in merit, that to address them would serve no useful purpose. Otherwise, parties seeking delay would be encouraged to submit overly lengthy written presentations in hopes that the presiding officer would overlook one or more points, thus producing a remand on appeal.

Petitioners again raise the argument that the Staff acted arbitrarily and capriciously in issuing a self-contradictory license to HRI. *See* PBL Review Petition, at 8-9. As discussed, *supra*, at n.6, the Presiding Officer had previously ruled in this proceeding that issues regarding the allegedly disjointed nature of HRI's license application were not germane, and the Staff had requested the Presiding Officer not to further consider such contentions. Accordingly, this was not a material issue on which a finding was required, and the Presiding Officer thus committed no legal error in this regard.

The second contention of legal error involves the Presiding Officer's holding that since PBL is not prohibited by the Atomic Energy Act or its implementing regulations, issuing a PBL license is a lawful exercise of the Staff's authority. *See* PBL Review Petition, at 8, *citing* PBL Decision, at 4-5. The Petitioners argue that there is no precedent for this holding, and that it "violates the principle that differently written NRC regulations have different meanings." PBL Review Petition, at 8, *citing Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331 (1996).⁸ Even assuming this principle is good law, it would not be applicable here, since there is no 10 C.F.R. Part 40 regulation to construe which is comparable to other NRC regulations (*see* 10 C.F.R. §§ 50.59(a) and 72.48) having PBL attributes. Accordingly, this allegation of legal error does not support the PBL Review Petition.

⁸ The cite Petitioners use to this decision, 46 NRC 294 (1997), is erroneous. Moreover, LBP-96-25 has been largely discredited by the Commission. *See Louisiana Energy Services* (Claiborne Enrichment Center), CLI 98-3, 47 NRC 77, 83 n.1, 99, 102, and 110 (1998), reversing in part and remanding LBP-96-25. The Petitioners are aware of this Commission decision, as they cite it in their February 19, 1999 cumulative impacts brief, at n.27 therein, but ignore it here.

The Petitioners' further arguments regarding alleged legal error lack any citations to specific parts of the PBL Decision, or to any other portions of the record established in this proceeding. *See* PBL Review Petition, at 8-9. These arguments thus violate the portion of the Adjudicatory Policy Statement referenced *supra*, and may be disregarded on this basis alone. More significantly, the contention asserted therein that HRI's license was issued in the absence of any Commission policy regarding PBL is simply wrong. The Petitioners made this argument to the Presiding Officer (*see* Petitioners' PBL Brief, at 13-15), and the Staff demonstrated that the argument was factually incorrect. *See* Staff's PBL Response, at 8-10.⁹ In thus ignoring the record on which the Presiding Officer issued the PBL Decision, the Petitioners fail to meet their burden of showing that Commission review is warranted.

Accordingly, as demonstrated above, the Petitioners have not identified any legal errors in the PBL Decision which support the PBL Review Petition.

3. Policy arguments do not support PBL Review Petition

The Petitioners' policy arguments lack any citations to specific parts of the PBL Decision, or to any other portions of the record established in this proceeding. *See* PBL Review Petition, at 9-10. To the extent this section D raises any new policy issues not presented to the Presiding

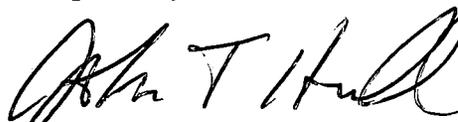
⁹ Therein, the Staff pointed out that the Commission's 1995 final policy statement, "Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities" (Policy Statement), and subsequent Commission statements, contradicted Petitioners' charge that PBL for materials licensees was an informal Staff policy implemented without any authorization from the Commission. On the contrary, the Commission's Policy Statement made clear that use of probabilistic risk assessment concepts would be encouraged and applied in all nuclear regulatory matters, and that the policy encompassed changes to the licensing process. *See* 60 Fed. Reg. at 42628 col.3 to 42629 col.1. In COMSECY-96-061, the Commission discussed how best to implement the probabilistic risk assessment concept of PBL in Direction-Setting Issue 12.

Officer for his consideration, such issues do not form a proper basis to support the PBL Review Petition. However, for the most part, section D relies on the same flawed contention discussed *supra* (i.e., that HRI's license was issued in the absence of any Commission policy regarding PBL). As discussed in the Staff's PBL Response, at 9-10, the development of PBL was carried out as part of the NRC's larger public process to enhance traditional regulation techniques, and make its functions more efficient. The charge that the public was not given an opportunity to comment on this process (see PBL Review Petition, at 10) has no basis, and does not support the PBL Review Petition.

CONCLUSION

As discussed above, the PBL Review Petition fails to show that Commission review of the PBL Decision is warranted, pursuant to the standards of 10 C.F.R. § 2.786(b)(4). The Petitioners have the burden of raising questions "that are sufficiently substantial to justify Commission review." *Babcock And Wilcox, supra*, CLI-95-4, 41 NRC at 251. The Petitioners here, having failed to address the record established in this proceeding, have failed to meet this burden. See *Kenneth G. Pierce, supra*, CLI-95-6, 41 NRC at 382. Accordingly, the Commission should deny the PBL Review Petition.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 22nd day of March 1999

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NUCLEAR REGULATORY COMMISSION

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OFFICE OF THE SECRETARY
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF LBP 99-10" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by double asterisks via e-mail and express mail this 22nd day of March 1999:

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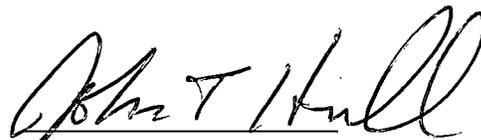
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