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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF GENERAL COUNSEL
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of)
)
HYDRO RESOURCES, INC.) Docket No. 40-8968-ML
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)

NRC STAFF'S RESPONSE
TO SAM'S PETITION FOR REVIEW OF LBP 99-10

John T. Hull
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March 22, 1999

SECY-EAD-006

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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 requests to revoke HRI's license made by Marilyn Morris and Grace Sam (Petitioners) in their December 11, 1998 joint presentation on performance-based licensing (PBL) issues (Sam's PBL Brief).² On March 11, 1999, the Petitioners filed "Marilyn Morris and Grace Sam's Petition For Review Of Partial Initial Decision Concerning Performance-Based Licensing Issues" (Sam's Review Petition).

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

As discussed below, Sam's 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 Sam's 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 established law; (3) whether the Petitioners identify any substantial and important policy or legal questions; (4) whether the Petitioners identify any

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).

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. Sam's Review Petition Fails to Meet Review Standards

The Petitioners claim that Commission review is warranted pursuant to 10 C.F.R. § 2.786(b)(4)(ii), because the PBL Decision raises an important legal question regarding the applicability of PBL concepts to a 10 C.F.R. Part 40 licensee; and that the PBL Decision raises a substantial and important policy question justifying review pursuant to 10 C.F.R. § 2.786(b)(4)(iii). *See* Sam's Review Petition, at 2, and 7. As discussed below, the Petitioners fail to meet their burden to show that review of the PBL Decision is warranted under these standards.

In the PBL Decision, the Presiding Officer broke no new legal ground, and the need for Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(ii) has thus not been established. The Petitioners cannot point to any examples in the PBL Decision where the Presiding Officer relied on any novel legal theories or new interpretations of existing law. Instead, the Presiding Officer's PBL Decision is largely based on a simple reading of the terms of HRI's license. In this regard, the Presiding Officer stated, in relevant part, as follows:

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.

PBL Decision, at 7. *See also* PBL Decision, at 3, and n.2.

The Presiding Officer also applied existing case law, as opposed to formulating any new legal approaches. He found that PBL is consistent with *Citizens Awareness Network v. United States Nuclear Regulatory Commission*, 59 F.3d 284, 287 (1st Cir. 1995), wherein the court approved an analogous practice for nuclear power reactors, as follows:

The Commission has issued regulations specifically allowing a licensee to modify its facilities without NRC supervision, unless the modification is inconsistent with the license or involves an "unreviewed safety question." 10 C.F.R. § 50.59(a)(1). If the proposed change is inconsistent with the license, or does involve an unreviewed safety question . . . the licensee must apply to the Commission for a license amendment. . . .

See PBL Decision, at 4. *See also id.*, at 4 n.5.

Nor does the Presiding Officer's finding that there is no statutory law to apply break any new legal ground. In this regard, the Presiding Officer stated as follows:

The assertion that PBL is not adopted in the regulations is irrelevant. There is no requirement of law that there be a regulation adopting Performance Based Licensing. What is required is that the Staff continue to conform to the existing regulations in the administration of any licensing regime, including PBL.

PBL Decision, at 4-5. The Presiding Officer concluded that HRI's license was properly issued pursuant to 10 C.F.R. § 40.32. *See* PBL Decision, at 9.

While the Petitioners claim that Commission review is warranted because the PBL Decision raises an important legal question, this claim is not supported by any citations to

the PBL Decision. Accordingly, the Petitioners have not shown that the standards of 10 C.F.R. § 2.786(b)(4)(ii) have been satisfied, and Commission review pursuant thereto is thus not warranted.

The PBL Decision does not raise any substantial and important policy questions which would justify review pursuant to 10 C.F.R. § 2.786(b)(4)(iii). The only grounds for such review provided by the Petitioners is their claim that the PBL Decision “may directly affect the health and safety of members of the communities of Church Rock and Crownpoint, New Mexico.” Review Petition, at 7. This bare conclusion, even if read generously in light of their other arguments discussed below, fails to meet Petitioners’ burden to show that review of the PBL Decision is warranted under this standard.

For the most part, the Petitioners simply repeat arguments they previously made to the Presiding Officer, without addressing the full record of this proceeding as it pertains to the issues raised in the Staff’s PBL Response. *See* Sam’s Review Petition, at 2-6. For example, the Petitioners argue that the Presiding Officer ignored the effect of HRI License Condition (LC) 9.4, under which HRI could implement decisions

prior to [their] review by the NRC, [which] could create a situation where HRI’s operations comply with the terms of [LC 9.4], 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, [LC 9.4] creates the possibility for a lapse in the NRC’s duty to adequately protect human health, safety, and the environment.

Review Petition, at 3-4. *See also id.*, at 4, 5-6, and 6-7 (repeating the same argument). This argument is tantamount to an observation that an NRC licensee’s actions may sometimes violate license requirements. Regardless of how conditions in a license are worded, licensee violations are always a possibility. This is not a “PBL problem,” but instead involves the

much more general issue of compliance.⁵ The Presiding Officer properly concluded that LC 9.4

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.

PBL Decision, at 7-8. The Presiding Officer thus did not ignore the effect of LC 9.4, as charged by the Petitioners, and, accordingly, this argument does not support the Review Petition.

The Petitioners further argue that the Presiding Officer did not address their contention that LC 9.4 improperly allows HRI to determine “whether an operational change is subject to license amendment procedures.” Review Petition, at 6, *citing* PBL Decision, at 3-4. To the contrary, the Presiding Officer addressed this contention by referring to approved practices for nuclear power reactors, taken pursuant to 10 C.F.R. § 50.59(a)(1), and cited *Citizens Awareness Network, supra*, 59 F.3d at 287, in support. *See* PBL Decision, at 4. Accordingly, this argument does not support the Review Petition.

Finally, the Petitioners assert that the Presiding Officer ignored their 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.” Review Petition, at 6,

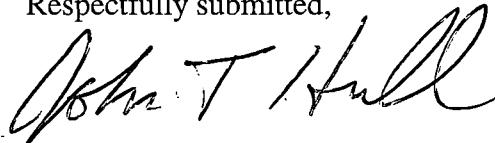
⁵ In this regard, the Petitioners erroneously state that “the regulations place the responsibility of ensuring continued compliance with the requirements of section 40.32 on the NRC.” Review Petition, at 4-5. To the contrary, it is a licensee’s responsibility to act in accordance with the terms of its license.

citing Sam's PBL Brief at 7. Neither in the Review Petition, nor in Sam's PBL Brief, are any such "changes" specified. Thus, this argument does not support the Review Petition.

CONCLUSION

As discussed above, the 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 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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OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO SAM'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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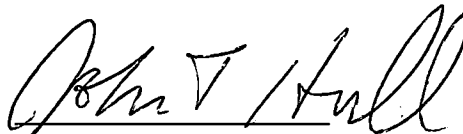
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