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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STATE

_____)	
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)	
_____)	

HYDRO RESOURCES, INC.'S OPPOSITION
TO INTERVENORS' PETITION FOR REVIEW OF LBP-99-9

INTRODUCTION

This proceeding under 10 C.F.R. Part 2, Subpart L, concerns the materials license, SUA-1538, issued to Hydro Resources, Inc. ("HRI") by the NRC Staff on January 5, 1998. The license authorizes HRI to conduct in situ leach mining and milling operations near Church Rock and Crownpoint, New Mexico. This matter is presently before the Commission based on intervenors Eastern Navajo Dine' Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC") (jointly, hereinafter "Intervenors" or "Petitioners") March 11, 1999 petition for review of the Presiding Officer's February 19, 1999, LBP-99-9,¹ denying requests by Intervenors to revoke HRI's license due the failure to comply with the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470-470w-6, the Native American Graves

¹ "Partial Initial Decision (Issues Related to the National Historic Preservation Act (NHPA), and the Native American Graves Protection and Repatriation Act (NAGPRA), and Cultural Resources)," 49 NRC _____, slip op. (NHPA Decision) (rejecting Intervenors' NHPA, NAGPRA and cultural resources argument thereby ruling in favor of HRI and the Staff).

U.S. NUCLEAR REGULATORY COMMISSION
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Protection and Repatriation Act (“NAGPRA”), 25 U.S.C. §§ 3001 et seq., and Cultural Resources.²

As discussed in detail below, Petitioners’ petition should be denied as it fails to meet the standards set forth at 10 C.F.R. § 2.1253 and 2.786(b)(4).³

BACKGROUND AND SUMMARY OF DECISION

In 1988, HRI applied for a source materials license to conduct in situ leach (“ISL”) uranium recovery and processing near Church Rock, New Mexico. Later, HRI amended its license application to include ISL activities near Crownpoint, New Mexico and Unit 1, situated near Crownpoint. HRI proposed that its recovery and processing activities at the Crownpoint Uranium Project (“CUP”), which includes all operations near Church Rock and Crownpoint, were to occur in phases over a twenty year period.

In January 1998, HRI was issued a source materials license, SUA-1508, permitting it to conduct ISL uranium recovery and processing at the CUP. The license is for a five year term, subject to renewal, and requires HRI to first begin operations at Church Rock Section 8. Specifically, the license prohibits HRI from proceeding with recovery operations (i.e., injecting lixivient) at Crownpoint or Unit 1 prior to successfully demonstrating groundwater restoration at Section 8. Within days of the issuance of the license, Petitioners sought a hearing on HRI’s license, alleging multiple deficiencies that, according to Intervenors, warrant revocation of the

² See Intervenors’ Petition for Review of Presiding Officer’s Partial Initial Decision LBP-99-9, dated March 11, 1999 (Petitioners’ Brief).

³ Should the Commission decide to grant review, HRI respectfully requests that briefing and review of the issues subject to review be deferred until after the Presiding Officer has ruled on all
Footnote continued on next page

license. One of the issues raised by Petitioners arises from their objections to HRI's and the NRC Staff's NHPA, NAGPRA, and cultural resources review.

Pursuant to the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation) of September 22, 1998 ("September 22 Order"), and the Joint Notice of Modification of Schedule for Written Presentations of November 5, 1998 (jointly, the "Orders"), all intervenors were permitted to submit written presentations during Phase I of this proceeding relating to HRI's proposed ISL operations on Church Rock Section 8. See September 22 Order at 2-3.

In accordance with the Orders, Petitioners presented a brief and supporting documentation to the Presiding Officer on December 7, 1998 regarding cultural resource issues. See 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: Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and Related Cultural Resource Issues (Dec. 7, 1998).

HRI filed its response to Petitioners' presentation on January 11, 1999. See Hydro Resources Inc.'s Response to Intervenors' December 7, 1998 Briefs In Opposition to Application for a Materials License with Respect to Compliance with the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, and Related Cultural Resource Issues (Jan. 11, 1998). The NRC Staff responded on January 19, 1999, arguing that Petitioners motion

Footnote continued from previous page

issues pending below as this will permit consolidation on appeal of any issues that the Commission may deem appropriate for review.

should be dismissed. See NRC Staff's Response to ENDAUM and SRIC Presentation on NHPA and NAGPRA Issues (Jan. 19, 1998).

On February 19, 1999, the Presiding Officer issued a decision denying Petitioners relief with respect to NHPA, NAGPRA and cultural resource issues. See LBP-99-9, Partial Initial Decision (Waste Disposal), (Feb. 3, 1999) slip op. at 2 ("February 3 Order").

On February 19, 1999, the Presiding Officer issued LBP-99-9, denying Intervenors' requests to revoke HRI's license. "Partial Initial Decision (Issues Related to the National Historic Preservation Act (NHPA), and the Native American Graves Protection and Repatriation Act (NAGPRA), and Cultural Resources)," 49 NRC ____, slip op. ("NHPA Decision").

For the reasons set forth below, and as set forth in the NRC Staff's response, Petitioners' brief fails to satisfy the standards for Commission review at 10 C.F.R. §§ 2.1253 and 2.786(b)(4). Accordingly, Petitioners' request for relief should be denied.

ARGUMENT

A. Legal Standard.

The standards governing the Commission's exercise of its discretion to grant petitions for review of a Presiding Officer's decisions are set forth at 10 C.F.R. § 2.786(b)(4)(i-v).⁴ Pursuant to that section, to warrant review, Petitioners bear the burden of raising "a sufficiently substantial question"⁵ regarding at least one of the following:

⁴ See 10 C.F.R. § 2.1253; see also Babcock and Wilcox Company (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995) (standards governing Commission's exercise of its discretion to grant or deny petitions for review are set forth in 10 C.F.R. § 2.786(b)(4)(i-v)).

⁵ Babcock and Wilcox, supra, 41 NRC at 251.

(i) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding⁶; (ii) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law; (iii) A substantial and important question of law, policy or discretion has been raised; (iv) the conduct of the proceeding involved a prejudicial procedural error; or (v) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4)(i-v). A petition for review will not be granted to the extent it relies on matters that were not raised before the presiding officer. 10 C.F.R. § 2.786(b)(5). Should the Commission grant the petition, it may specify the issues to be addressed by the parties on appeal.

See 10 C.F.R. § 2.786(d).

B. Petitioners' Brief Fails to Meet the Applicable Standard, Thus Does Not Warrant Review.

Petitioners assert that LBP-99-9 contains "erroneous findings of fact and legal errors," Petitioners' Brief at 10, that their claims raise "substantial and important" questions of law and policy, id., and that Commission review "lies within the public interest, id."⁷ Petitioners' claims are wholly based on re-statements of their arguments that they previously have raised multiple times, ignore the entire record of this proceeding, are factually and legally inaccurate, and fail to meet the standard set forth in 10 C.F.R. § 2.786(b)(4).

⁶ For as factual finding to be "clearly erroneous," Petitioners' bear the burden of showing that it 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).

⁷ Intervenors do not make any claims regarding procedural errors. See 10 C.F.R. § 2.786(b)(4)(iv).

1. Petitioners fail to demonstrate significant factual errors.

On pages 8-10 of the brief, Petitioners argue that the Presiding Officer made errors of material fact, thus warranting Commission review. For errors of fact to be the basis for Commission review, Petitioner must show that the “finding of material fact is clearly erroneous.” 10 C.F.R. § 2.786(b)(4)(i). In addition, for a factual finding to be “clearly erroneous,” Petitioners’ bear the burden of showing that it 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). Moreover, a licensing board’s factual findings may not be set aside simply because the appeal board might have found differently. See Wisconsin Electric Power Co. (Point Beach Nuclear Power Plant, Unit 2), ALAB-78, 5 AEC 319, 322 (1972). Petitioners fail to meet their burden.

First, Petitioners argue that the Presiding Officer erred in stating that Church Rock Section 8 is “not federal or tribal land” because the U.S. EPA has asserted jurisdiction over Section 8 on behalf of the Navajo Nation pursuant to the Safe Drinking Water Act and there is a dispute over tribal and state jurisdiction. Petitioners’ Brief at 8-9. Petitioners’ argument lacks merit as it is based on a misunderstanding of the legal distinction between the ownership of the land and the issue of which entity has jurisdiction over the land.

Second, Petitioners’ challenge the Presiding Officer’s decision because it fails to address issues regarding NHPA at all sites in the CUP. Petitioners’ Brief at 9-10. Petitioners ignore the fact that the Presiding Officer and the Commission have ruled that at this phase of the proceeding the area of concern is Church Rock Section 8. The portions of land within the CUP that are the subject of completed NHPA section 106 reviews are Church Rock Sections 8 and 17, and Crownpoint Section 12. When, and if, other sections of land are to be involved in HRI’s project,

they will first have to be surveyed pursuant to NHPA before use. Accordingly, the Presiding Officer was correct in refusing to address Petitioners' arguments concerning issues unrelated to Section 8. Decision at 10.

Finally, Petitioners fail to offer any support for their arguments that the Presiding Officer erred in concluding that NMSHPO and the NNHPD concur in a "no effect" finding, that Becenti is a qualified expert, and that Francisco's testimony does not identify traditional cultural properties or conflicts with Becenti's testimony. Petitioners' Brief at 10, fn. 13. Accordingly, their bald assertions should be dismissed as not warranting Commission review.

2. Petitioners fail to demonstrate significant legal errors.

For the reasons set forth in the Staff's response to the petition for review at pages 4-6, Petitioners' arguments that the Presiding Officer erred in finding that HRI's license neither violates NHPA, NAGPRA nor NEPA lack merit. Accordingly, Petitioners have failed to identify substantial legal errors warranting Commission review.

3. Petitioners fail to show that decision raises a substantial question of law or policy.

Petitioners claim that review is warranted because "this is the first time that an application for an ISL mine materials license has been adjudicated in an informal Subpart L proceeding," thus, it raises important questions of law and policy. Petitioners' Brief at 10. While indeed important, the Presiding Officer's ruling, however, does not raise any new issues of law or policy. The application of NHPA and NAGPRA and regulations designed to protect cultural resources to NRC licensing activities is not novel. In fact, the Staff has substantial

experience in this area. In addition, the application of these laws and regulations to HRI's ISL mining activity poses no new legal or policy issues warranting Commission review.

4. Petitioners fail to show that review lies within the public interest.

On page 10 of their brief, Petitioners claim that due to the project areas cultural significance, Commission review lies within the public interest. Petitioners' Brief at 10. Here again, Petitioners offer no support for their argument. In addition, they ignore the fact that HRI's license requires it continue to comply with NHPA and NAGPRA throughout the lifetime of the project, including requiring HRI to comply with regulations governing inadvertent discoveries of "human remains, funerary objects, sacred objects, or objects or cultural patrimony."

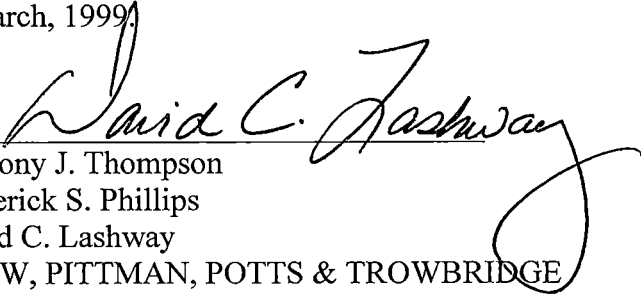
C. In the Event the Commission Grants Review, Briefing Should be Deferred and All Issues to be Reviewed Should be Consolidated.

Should the Commission decide to grant Intervenors' petition for review, the Commission should defer briefing of the issues until the Presiding Officer has resolved all pending matters in the current hearing and the Commission has decided which of the issues, if any, will be granted review. Failure to defer briefing is likely to result in a waste of the Commission's resources and the resources of the parties, as Intervenors are wont to revisit issues again and again in successive presentations. As it is likely that other Commission decisions regarding partial initial decisions may later be appealed to the Court of Appeals, the Commission's deferral and consolidation of issues for Commission appeal would avoid serial Commission decisions on individual issues and potential presentation of those issues seriatim to the Court of Appeals.

CONCLUSION

For the aforementioned reasons, Petitioners' request that the Commission grant review of LBP 99-9 should be DENIED.

Respectfully submitted this 29th day of March, 1999.


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ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, HYDRO RESOURCES, INC.'S OPPOSITION TO INTERVENORS' PETITION FOR REVIEW OF LBP-99-9, in the above-captioned proceeding has been served on the following by over-night mail on this 29th day of March, 1999.

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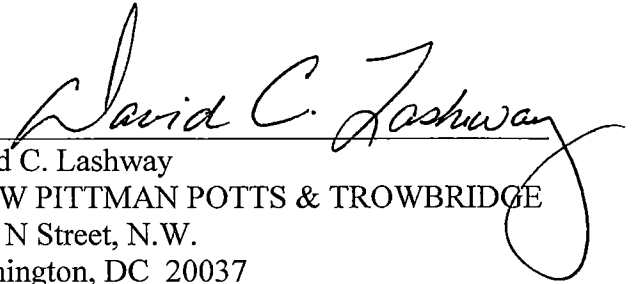
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A handwritten signature in cursive script that reads "David C. Lashway". The signature is written in black ink and is positioned above a horizontal line.

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