

March 11, 1999

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

'99 MAR 29 P3:13

BEFORE THE COMMISSION

OFFICE OF THE SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

\_\_\_\_\_  
In the Matter of: )  
 )  
 )  
HYDRO RESOURCES, INC. )  
2929 Coors Road, Suite 101 )  
Albuquerque, NM 87120 )  
\_\_\_\_\_ )

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

**HYDRO RESOURCES, INC.'S OPPOSITION  
TO INTERVENORS' PETITIONS FOR REVIEW OF PARTIAL INITIAL DECISION  
REGARDING PERFORMANCE-BASED LICENSING (LBP-99-10)**

Intervenors Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") and Marilyn Morris and Grace Sam (collectively, "Intervenors") petitioned the Commission, on March 11, 1999, for review of the Presiding Officer's Partial Initial Decision (Performance-Based Licensing Issues, LBP-99-10), alleging that LBP-99-10 "is based on errors of law and fact and presents new legal issues" (ENDAUM and SRIC Brief at 1), the Decision "raises substantial and important issues of law, policy and discretion" (*id.*; Morris/Sam Brief at 2), and is "without governing precedent" (*id.*).

Hydro Resources, Inc. ("HRI"), licensee herein, opposes Intervenors' petitions, as they are completely without merit. Should the Commission be inclined to grant review, however, HRI respectfully requests that briefing and review of the issues raised by Intervenors' petitions

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be deferred until after the Presiding Officer has ruled on all issues presented below.<sup>1</sup> This will allow the consolidation on appeal of any issues that the Commission might accept for review, allowing for a more orderly and efficient process for all parties and the Commission.

### **SUMMARY OF DECISION**

HRI was issued a source materials license (SUA-1508) in January 1998, permitting HRI to conduct in situ leach ("ISL") uranium recovery and processing in the vicinity of Crownpoint and Churchrock, New Mexico (the "Crownpoint Uranium Project" or "CUP"). Petitioners sought a hearing on HRI's license, alleging multiple deficiencies that, according to Intervenors, warrant revocation of the license. One of the issues raised by Intervenors arises from their objections to a condition of HRI's license (LC 9.4) that results, according to Intervenors, in what they have called a "performance-based license" ("PBL"). On February 19, 1999, the Presiding Officer issued LBP-99-10,<sup>2</sup> denying Intervenors' requests to revoke HRI's license.

For the reasons set forth below, and as set forth in the NRC Staff's Response(s) to the Petitions for Review of LBP-99-10 filed by Intervenors, Intervenors' Petitions fail to satisfy the standards for Commission review at 10 C.F.R. §§ 2.1253 and 2.786(b)(4). Consequently, the Commission should deny Intervenors' Petitions for Review.

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<sup>1</sup> The Commission previously has ordered the Presiding Officer to rule on all issues raised by Intervenors not later than June 15, 1999. (CITE).

<sup>2</sup> "Partial Initial Decision (Performance-Based Licensing Issues)," 49 NRC \_\_, slip op. ("PBL Decision"). The Presiding Officer found in favor of the positions taken by HRI and the NRC Staff and denied the relief sought by Intervenors.

## ARGUMENT

### A. Applicable Legal Standards

The standards governing the Commission's exercise of its discretion to grant petitions for review of a Presiding Officer's decisions are contained in 10 C.F.R. § 2.786(b)(4)(i-v). To meet this standard, Intervenors must demonstrate

The existence of a substantive question with respect to: (i) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a substantial and important question of law, policy or discretion, (iv) 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). Intervenors assert that LBP-99-10 contains erroneous findings of fact and legal errors, and that their claims raise "substantial and important questions of law, policy, and discretion." ENDAUM & SRIC Brief at 6; see Sam's Petition at 2, 7. Intervenors' claims are without merit and their Petitions should be denied.

#### 1. **Intervenors fail to demonstrate substantial factual errors.**

Intervenors (ENDAUM & SRIC) seek to raise on appeal the same non-issues they previously have raised multiple times. They complain that the license is not sufficiently clear because it incorporates requirements from submittals made by HRI in support of the license application (e.g., the Consolidated Operations Plan or "COP"), that the precise sequence of proposed mining operations has changed between the license application and the COP, and that documents submitted in support of the license application use the terms "retention pond" and "evaporation pond" interchangeably. See ENDAUM & SRIC Brief at 3. Clearly, these complaints have nothing to do with whether or not HRI's is a "performance-based" license.

These complaints were addressed by the Presiding Officer and clearly do not raise a substantial question regarding an error of material fact. The Staff and the Presiding Officer have not found these “issues” to be issues at all; Intervenors’ disinclination to carefully review the license application materials (as NRC Staff and the Presiding Officer have done) does not entitle Intervenors to take their shopworn complaints to a new forum.

**2. Intervenors fail to raise substantial legal errors or policy questions.**

All Intervenors allege that the inclusion of a performance-based license condition (LC 9.4) in HRI’s license violates the Atomic Energy Act (“AEA”), its implementing regulations, and the Administrative Procedures Act (“APA”), and, in so doing, is contrary to public policy. See ENDAUM & SRIC Brief at 6-9; Sam’s Brief at 6-8. ENDAUM & SRIC allege that the Presiding Officer failed to address every argument raised in their brief below. ENDAUM & SRIC Brief at 7-8. As noted by NRC Staff in their Brief opposing Intervenors’ request for review, Intervenors apparently assume that every issue that they raise must be “material.” The Presiding Officer must necessarily have the discretion to determine what are “material issues” under 10 C.F.R. § 2.1251(c)(1). Where issues clearly are lacking in merit or have previously been ruled not germane (see Staff’s Brief opposing review at 5-6) they do not constitute material issues that require a finding by the Presiding Officer.

Likewise, ENDAUM & SRIC’s second allegation of legal error is meritless. ENDAUM & SRIC argue (Brief at 8), as do Sams (broadly) (Brief at 4-7), that incorporating a performance-based license condition in HRI’s license exceeds NRC’s authority and thus is violative of the AEA, its implementing regulations, and the APA. Additionally, all Intervenors assert that the

subject license condition is contrary to public policy. ENDAUM & SRIC Brief at 8-9; Sam's Brief at 4-7. These allegations also are without merit and do not warrant Commission review.

As articulated in NRC Staff's Brief opposing review (NRC Staff Brief responding to ENDAUM & SRIC at 6), ENDAUM & SRIC's second allegation of legal error takes issue with the Presiding Officer's finding that because PBL is not prohibited by the AEA or its implementing regulations, it does not exceed the Staff's exercise of its lawful authority. See PBL Decision at 4-5. As NRC Staff points out, ENDAUM & SRIC's complaint that this holding "violates the principle that differently written NRC regulations have different meanings" is meaningless and consequently, does not warrant Commission review. See NRC Staff Brief in response to ENDAUM & SRIC at 6.

Similarly, the arguments raised by all Intervenors regarding public policy are without merit. HRI defers to NRC Staff on the public policy issues alleged by all Intervenors.

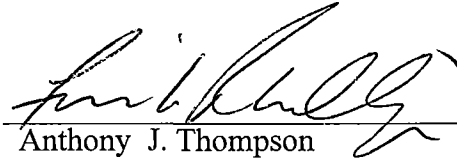
## **CONCLUSION**

ENDAUM & SRIC and the Sams raise here the same complaints they did below: they are opposed to the PBL license condition in HRI's license because 1) they generally are opposed to HRI's license, irrespective of its specific terms; 2) they believe that the PBL license condition is contrary to law; and 3) they allege, with no particularized support, that incorporating a PBL license condition in HRI's license is sure to unleash a parade of horrors. The Presiding Officer's decision adequately addresses items 2 and 3; none of these complaints satisfies the standard for Commission review.

For the foregoing reasons, and for the reasons set forth in the NRC Staff briefs opposing the ENDAUM & SRIC and Sam's petitions for review, HRI respectfully requests that

Intervenors' petitions for review of the Presiding Officer's decision on Performance-Based Licensing be DENIED.

Respectfully submitted this 26<sup>th</sup> day of March, 1999



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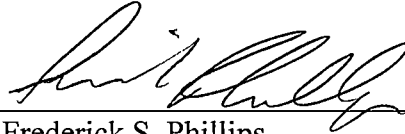
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