

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'99 APR 15 P4:20

In the Matter of)
)
HYDRO RESOURCES, INC.)
2929 Coors Road, Suite 101)
Albuquerque, New Mexico 87120)
)

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF
Docket No. 40-8968-ML

NRC STAFF'S RESPONSE TO MOTION FOR LEAVE TO REPLY

John T. Hull
Counsel for NRC Staff

April 15, 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 requests made by intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), Southwest Research and Information Center (SRIC), Marilyn Morris, and Grace Sam, to revoke HRI's license based on PBL concerns. On March 11, 1999, ENDAUM and SRIC (collectively, "Petitioners") jointly filed with the Commission "ENDAUM's and SRIC's Petition For Review Of Presiding Officer's Partial Initial Decision (Performance-Based Licensing)" (PBL Review Petition). On March 22, 1999, the "NRC Staff's Response To ENDAUM's and

¹ "Partial Initial Decision (Performance-Based Licensing Issues)," 49 NRC ____, slip op. (PBL Decision). Therein, the Presiding Officer considered the written presentations filed by (1) intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) in their December 7, 1998, performance-based licensing (PBL) joint brief (E/S's PBL Brief); (2) intervenors Marilyn Morris and Grace Sam in their December 11, 1998 PBL joint presentation; (3) HRI, in its combined response to the intervenors' PBL briefs, dated January 11, 1999; and (4) the Staff, in its combined response to the intervenors' PBL briefs, dated January 19, 1999.

SRIC's Petition For Review Of LBP-99-10" (Staff's Response) was filed, opposing the PBL Review Petition. The Petitioners, by motion dated April 1, 1999,² seek leave to file a reply to the Staff's Response, and to the response filed on behalf of HRI.

As discussed below, the arguments made in support of the E/S Motion are either repetitive of those already made to the Presiding Officer and the Commission, or otherwise lack merit. The Commission should accordingly deny the E/S Motion.

DISCUSSION

The Petitioners first argue that the Presiding Officer acted improperly in not addressing all of Petitioners' issues raised in E/S's PBL Brief. *See* E/S Motion, at 3. Although phrased somewhat differently than in their PBL Review Petition,³ this argument essentially repeats the one which is already pending before the Commission, to which the Staff has already responded. *See* PBL Review Petition, at 7-8, and Staff's Response, at 5-6 and n.7.

² "ENDAUM's and SRIC's Motion For Leave To Reply To The Responses Filed By HRI And The NRC Staff To ENDAUM's and SRIC's Petition For Review Of LBP-99-10 (Performance-Based Licensing)" (E/S Motion). The E/S Motion properly states that the Commission has discretion to allow such replies when considering petitions for review, pursuant to 10 C.F.R. § 2.786(b)(3). *See* E/S Motion, at 1-2.

³ In the PBL Review Petition, at 7, the Petitioners cited 10 C.F.R. § 2.1251(c)(1) in support of their argument that all issues raised must be addressed by the Presiding Officer. In the E/S Motion, at 3, the Petitioners instead cite *Consumers Power Co.* (Midland Plant, Units 1 and 2), ALAB-691, 16 NRC 897, 910 (1982), regarding what issues should be considered "material" by the Presiding Officer, and state that "an argument is material if it would be considered by a reasonable individual in reaching a decision." The Staff notes that the *Midland* decision discussed the meaning of the term "material false statement" contained in section 186a of the Atomic Energy Act, 42 U.S.C. § 2236a, and is thus not on point.

Similarly, the Petitioners' second argument, regarding issues not specifically addressed by the Presiding Officer in his PBL Decision, repeats in nearly verbatim fashion the same claims which are already pending before the Commission. *See* E/S Motion, at 3, which states as follows:

The issues not considered by the Presiding Officer in LBP-99-10 are material; these issues include ENDAUM's and SRIC's arguments that performance based licensing violates the Atomic Energy Act and the Administrative Procedures Act because there is no regulation or policy adopted pursuant to those statutes authorizing such licensing. Also not addressed by LBP-99-10 were arguments by ENDAUM and SRIC that HRI's license violates the Administrative Procedures Act because the license is so confused and self-contradictory that it is arbitrary and capricious, and that the license violates the National Environmental Policy Act by eliminating NRC review of changes in the Project before those changes are made. These issues are material and should have been considered. ENDAUM and SRIC therefore should be able to present arguments on these points in a reply.

Cf. PBL Review Petition, Section B.1, at 7-8, which states in pertinent part as follows:

LBP-99-10 does not address ENDAUM's and SRIC's arguments that use of PBL violates the AEA and the Administrative Procedures Act, 5 U.S.C. §§551-559, 701-706 ("APA") because PBL is not authorized by any regulation or policy adopted pursuant to those statutes. *See* ENDAUM's and SRIC's PBL Brief at 10-15. LBP-99-10 also does not deal with ENDAUM's and SRIC's point that HRI's PBL license violates the APA because the license is so self-contradictory and confused that it is arbitrary and capricious. *Id.* In addition, LBP-99-10 does not address the point that the use of PBL violates NEPA because it eliminates NRC review of changes before those changes are made. *Id.* at 18-21.

Such repetitive argument serves no meaningful purpose, and does not support the E/S Motion.

Next, the Petitioners contend that the Staff inaccurately argued to the Commission in the Staff's Response that two issues raised in the PBL Review Petition had not been raised before the Presiding Officer, and cited pages 21-30 of the E/S PBL Brief as proof to the contrary. *See* E/S Motion, at 4 and n.4. The Staff has reviewed pages 21-30 of the E/S PBL Brief again, and repeats its previous argument. The only topics discussed there regard arguments concerning the development sequence of well fields at HRI's Church Rock site (*see* E/S PBL Brief, at 25-27),

baseline water quality samples (*id.*, at 28-29), and the meaning of the terms “retention ponds” and “evaporation ponds.” *Id.*, at 29-30. Issues regarding HRI License Condition 10.6, and methods for disposal of liquid waste, are not discussed there, or elsewhere, in the E/S PBL Brief.⁴ Accordingly, these issues should not be considered by the Commission on appeal (assuming *arguendo* that the PBL Review Petition is granted).

The Petitioners’ final argument similarly charges that the Staff’s Response contains an inaccuracy (regarding the effect of a prior 1998 ruling by the Presiding Officer concerning the incorporation into HRI’s license of allegedly internal contradictions in HRI’s application, and whether this concern is germane). *See E/S Motion*, at 4-5.⁵ The Petitioners admit that the Presiding Officer previously ruled that their “concern about HRI’s application being ‘disjointed, incoherent, and contradictory’ was not germane.” *E/S Motion*, at 4. In attempting to clarify their argument, the Petitioners merely repeat the contention already pending before the Commission that the issuance

⁴ The Petitioners may be contending that items relevant to HRI License Condition 10.6, and methods for disposal of liquid waste, are discussed somewhere in the many documents referenced in E/S’s PBL Brief, at 22-23, nn. 15-18. If so, and even assuming such discussions are contained therein, the Petitioners had a duty to bring such items to the attention of the Presiding Officer by discussing them in their written presentation. The Commission can conduct no meaningful review of issues which were never brought to the attention of the Presiding Officer. *See generally* the Commission’s 1998 adjudicatory policy statement, cited in the Staff’s Response, at 5.

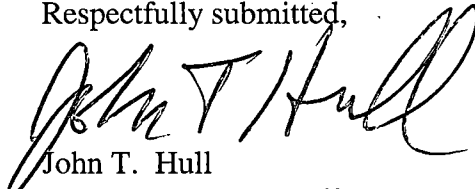
⁵ The Staff argument pending before the Commission on this point is that Petitioners’ argument that issuance of HRI’s license was arbitrary and capricious should not be considered by the Commission, because that argument rests on the contention that HRI’s license terms are “self-contradictory, disjointed, and confused,” a concern which the Presiding Officer ruled was not germane in LBP-98-9. *See Staff’s Response*, at 4 n.6, *quoting* PBL Review Petition, at 9.

of HRI's license "violates applicable law and regulations." *Id.*, at 5. *Cf.* PBL Review Petition, at 8.⁶ The Staff's Response, at 6, addressed these arguments. Again, such repetitive argument serves no meaningful purpose, and does not support the E/S Motion.

CONCLUSION

As shown by the above discussion, the E/S Motion simply repeats arguments previously made, and is lacking in merit. Granting the E/S Motion will only obfuscate, rather than clarify, the record. PBL issues have been fully briefed, and allowing the type of repetitive argument foreshadowed by the E/S Motion will serve no useful purpose. Accordingly, the Commission should deny the E/S Motion.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 15th day of April, 1999

⁶ The Petitioners argue there that the PBL Decision wrongly held that PBL is legal so long as it is not prohibited by the Atomic Energy Act ("AEA") or its regulations, *citing* PBL Decision, at 4-5; that the PBL Decision violates the AEA and the scheme of the 10 CFR Part 40 regulations; and that the PBL Decision violates the AEA and the Administrative Procedures Act, because HRI's PBL license was issued without any Commission regulations or policy adopted pursuant to those statutes. *See* PBL Review Petition, at 8.

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO MOTION FOR LEAVE TO REPLY" 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 15th day of April 1999:

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