

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

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

OFFICE OF THE SECRETARY
RULES AND REGULATIONS
ADJUTANT GENERAL
Docket No. 40-8968-ML

NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP 99-13

John T. Hull
Counsel for NRC Staff

April 14, 1999

20245

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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 March 10, 1999, the Presiding Officer issued LBP-99-13,¹ denying requests made by intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM), and Southwest Research and Information Center (SRIC) to revoke HRI's license. On March 30, 1999, ENDAUM and SRIC (collectively, "Petitioners") jointly filed "Intervenors' Petition for Review of Presiding Officer's Partial Initial Decision On LBP-99-13, Financial Assurance For Decommissioning" (Review Petition).

¹ "Partial Initial Decision (Financial Assurance For Decommissioning Issues), 49 NRC _____, slip op. (Financial Decision). Therein, the Presiding Officer considered the written presentations made by (1) intervenors Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center in their joint "Financial Assurance For Decommissioning" brief, dated January 11, 1999 (Intervenors' Financial Brief); (2) HRI in its "Technical And Financial Qualifications And Financial Assurance For Decommissioning" brief, dated February 11, 1999 (HRI's Financial Brief); and (3) the Staff in its "Response To Intervenors' Presentations On Technical Qualification, Financial, and Decommissioning Issues" brief, dated February 18, 1999 (Staff's Financial Brief). The Presiding Officer denied the relief sought (*i.e.*, the revocation of HRI's license). *See* Financial Decision, at 6; and Intervenors' Financial Brief, at 21.

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

DISCUSSION

Petitioners Fail To Show Review of Financial Decision Is Warranted

The Commission should deny the 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, 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).² In order to justify Commission review, 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;³ (2) whether a necessary legal conclusion in that decision departs from or is contrary to established law; (3) whether Petitioners identify any substantial and important policy or legal questions; (4) whether Petitioners identify any prejudicial procedural error in the proceeding to date; or (5) whether Petitioners identify any other consideration which the Commission may deem to be in the public

² See *Babcock And Wilcox Company* (Pennsylvania Nuclear Services Operations), CLI-95-4, 41 NRC 248, 250-51 (1995).

³ To show that a factual finding in the Financial 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).

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 will specify the issues to be briefed on appeal. *See* 10 C.F.R. § 2.786(d).

B. Review Petition Fails To Meet Review Standards

The Petitioners fail to meet their burden to show that review of the Financial Decision is warranted, pursuant to 10 C.F.R. § 2.786(b)(4). As discussed below, claims that the Presiding Officer failed to consider material issues of fact, and that the Financial Decision contains legal, factual, and procedural errors (*see* Review Petition, at 3-9), lack merit, and should be rejected by the Commission.⁴ The five review standards of 10 C.F.R. § 2.786(b)(4) are addressed by the Petitioners in summary fashion only, and supporting claims lack specificity. *See* Review Petition, at 1, and 9-10.⁵

⁴ In making these claims, the Petitioners do not address any of the HRI and Staff arguments made in their respective Financial Briefs. Their Review Petition arguments, therefore, should be given little, if any, weight by the Commission.

⁵ For example, the Petitioners state that the Financial Decision “poses new legal issues” (Review Petition, at 1), without ever specifying what those issues are. Additionally, while this may be “the first time that an application for an ISL mine materials license has been adjudicated” (Review Petition, at 10), the Petitioners fail to show that the Financial Decision therefore raises “substantial and important” questions meriting Commission review pursuant to 10 C.F.R. § 2.786(b)(4)(iii). Similarly, the statement that Commission review “is in the public interest” (Review Petition, at 1) fails to provide supporting discussion showing why the Financial Decision merits review pursuant to 10 C.F.R. § 2.786(b)(4)(v).

1. Alleged failure to consider factual issues

The Petitioners initially argue that the Presiding Officer failed to consider two material issues of fact, in violation of 10 C.F.R. § 2.1251(c)(1). *See* Review Petition, at 3-4, and 10. Regarding the first such issue, the Petitioners incorrectly characterize the Financial Decision in stating that it fails to acknowledge their contentions concerning the applicability of the financial assurance requirements set forth in 10 C.F.R. §§ 40.36, 40.32, and 10 C.F.R. Part 40 Appendix A, Criterion 9. *See* Review Petition, at 3-4, *citing* Intervenors' Financial Brief, at 11-13, and 17-19.⁶ On the contrary, the Presiding Officer squarely considered, and rejected, the ENDAUM and SRIC arguments regarding these financial assurance requirements. *See* Financial Decision, at 2-3, ruling that (1) the requirements of 10 C.F.R. Part 40 Appendix A, Criterion 9, apply to HRI, while the requirements of 10 C.F.R. § 40.36 do not apply to HRI; and (2) issuance of HRI's license accordingly did not violate the health and safety requirements of 10 C.F.R. § 40.32.

As part of their first argument, the Petitioners also claim that the Presiding Officer improperly failed to analyze HRI's financial assurance plan. *See* Review Petition, at 3-4.⁷ The Staff is in the process of evaluating this plan, which was recently amended by HRI in response to

⁶ Therein, ENDAUM and SRIC argued that the requirements of 10 C.F.R. § 40.36 applied to HRI (*see* Intervenors' Financial Brief, at 11-12); that HRI's license issuance violated the requirements of 10 C.F.R. § 40.32 (*see id.*, at 12-13); and that HRI's license application did not meet the requirements of 10 C.F.R. Part 40 Appendix A, Criterion 9. *See id.*, at 17-19.

⁷ The Petitioners also refer here, inconsistently, to the Staff's financial assurance plan. *See* Review Petition, at 4 n.5. The Staff is evaluating HRI's plan, pursuant to HRI License Condition 9.5 and Criterion 9 of Appendix A, and is not advocating any plan of its own. *See generally* the Staff's Financial Brief, at 5-7, discussing HRI License Condition 9.5 and its relationship to Criterion 9 of Appendix A.

comments received from the State of New Mexico.⁸ *See* HRI's letter to Staff dated March 19, 1999. Accordingly, until the Staff completes and documents its evaluation of HRI's surety arrangements, the record on which the Presiding Officer must base his decisions will be incomplete in this regard, and the issue is thus not yet ripe for his review. In short, there was nothing for the Presiding Officer to analyze in this regard, contrary to the Petitioners' implication.

The second issue of material fact which the Presiding Officer allegedly failed to consider concerns the argument that a surety arrangement focused on HRI's Section 8 operations is too narrow. *See* Review Petition, at 4. The underlying argument made by ENDAUM and SRIC to the Presiding Officer was based on a cryptic citation to "53 Fed. Reg. 24,018." Intervenors' Financial Brief, at 16. This cite refers to the first page of the Statement of Considerations, published on June 27, 1988, which accompanied the publication of 10 C.F.R. § 40.36. As discussed above, the Presiding Officer rejected arguments that the requirements of 10 C.F.R. § 40.36 applied to HRI, so there was no need for him to address this contention.

Accordingly, there are no material factual issues which the Presiding Officer failed to consider, and Petitioners' arguments in this regard do not support the Review Petition.

2. There was no prejudicial procedural error

The Petitioners' second line of attack is that the Financial Decision was issued without providing them an opportunity to be heard on the adequacy of HRI's financial surety arrangements to cover decommissioning costs, and that this constitutes a prejudicial procedural error. *See* Review Petition, at 4-6. The Presiding Officer addressed this issue in recognizing that ENDAUM and SRIC,

⁸ The New Mexico official was commenting on HRI's December 1998 financial submittal. States may be involved with the financial surety approval process pursuant to Criterion 9 of Appendix A. *See also* HRI License Condition 9.5.

by contesting the postponement of the determination whether HRI's surety arrangements adequately cover decommissioning costs, were improperly seeking to challenge the NRC's regulatory scheme set forth in 10 C.F.R. § 40.36 and 10 C.F.R. Part 40 Appendix A, Criterion 9. *See* Financial Decision, at 5. These provisions take ISL mining operations outside the scope of the 10 C.F.R. § 40.36 financial requirements, and allow the relevant financial findings to be delayed until "prior to the commencement of [ISL] operations," pursuant to 10 C.F.R. Part 40 Appendix A, Criterion 9. *See* Staff's Financial Brief, at 3-7.⁹

Accordingly, the Presiding Officer made no error, procedural or otherwise, in this regard. The Petitioners' claim of procedural error therefore does not support the Review Petition.

3. Financial Decision contains no legal errors

The Petitioners argue that the Presiding Officer made four legal errors in the Financial Decision. *See* Review Petition, at 6-8. The initial argument in this regard asserts that (a) an ISL mine is a "subsurface source materials facility" subject to the requirements of 10 C.F.R. § 40.36 (Review Petition, at 6, *citing* Intervenors' Financial Brief, at 3); and (b) the milling component of the operation is subject to the requirements of 10 C.F.R. Part 40 Appendix A, Criterion 9. *See* Review Petition, at 6-7, *citing* Intervenors' Financial Brief, at 17-19. The Petitioners continue to ignore the definitions of "uranium milling" and "byproduct material" stated in 10 C.F.R. § 40.4, and the use of these terms in 10 C.F.R. § 40.36, as explained by the Presiding Officer. *See* Financial Decision, at 2-3. *See also* Staff's Financial Brief, at 4. The regulatory scheme in place is not consistent with the dual regulatory approach advocated by the Petitioners. Only if the Petitioners'

⁹ Therein, the Staff incorrectly quoted 10 C.F.R. Part 40 Appendix A, Criterion 9, as stating "before beginning operations," rather than the correct "prior to the commencement of operations." *See* Staff's Financial Brief, at 3, and 6.

concept of a “subsurface source materials facility” is adopted would any “significant regulatory loophole” be created. Review Petition, at 6-7. Accordingly, this argument does not support the Review Petition.

The Petitioners’ allegations regarding the other three legal errors in the Financial Decision are vague (*e.g.*, failure to address whether “certain requirements” of Criterion 9 have been met; “the Staff’s approach violates the letter and intent” of Criterion 9 and the Atomic Energy Act), or repeat contentions discussed above. Review Petition, at 7-8.¹⁰ These arguments, therefore, do not support the Review Petition.

4. Financial Decision contains no factual errors

Finally, the Petitioners argue that the Presiding Officer made two errors of material fact in the Financial Decision. *See* Review Petition, at 8-9. The first such contention is that the Presiding Officer overlooked a citation ENDAUM and SRIC made to a February, 1998, pleading filed on behalf of HRI, regarding when HRI will establish a surety amount to cover all decommissioning costs.¹¹ The alleged error is claimed to be material because the cited pleading was filed after HRI’s license was issued. *Id.* This contention ignores HRI’s February, 1999, clarification made to the Presiding Officer on this point, *i.e.*, that it “will establish financial surety based on 9 pore volumes,

¹⁰ The claim that deferral of the surety evaluation violates Petitioners’ hearing rights (*see* Review Petition, at 7-8) repeats the procedural error argument. *Id.*, at 4-6. Similarly, the argument that the requirements of 10 C.F.R. § 40.36 apply to HRI (*id.*, at 8) repeats the legal error argument made at 6-7.

¹¹ The citation to the Financial Decision provided by the Petitioners here is incorrect. The proper cite is to page 4, not page 8, of the decision.

as required, before commencing operations.” HRI’s Financial Brief, at 19.¹² Thus, this contention only illustrates the Petitioners’ continued failure to address the record, and does not support the Review Petition.

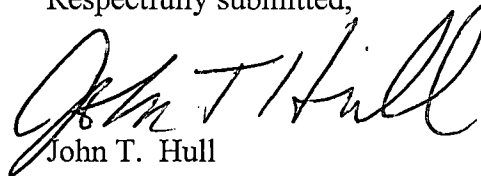
The Petitioners’ second claim of a material factual error in the Financial Decision (the Presiding Officer’s finding, at 5-6, that the Staff’s estimate of nine pore volumes to restore groundwater was not rebutted) is similarly deficient. *See* Review Petition, at 9, *citing* Intervenors’ Financial Brief, at 17, and the proffered testimony of Dr. Michael Sheehan. As reflected in the Presiding Officer’s finding at issue here, Dr. Sheehan’s testimony is focused on criticizing HRI’s estimate of four pore volumes to restore groundwater. *See* Intervenors’ Financial Brief, Exhibit 1, at 14-16. As properly noted by the Presiding Officer, the Staff did not adopt HRI’s four-volume estimate, and is relying on a more conservative nine-pore volume estimate instead. *See* Financial Decision, at 5. Accordingly, the Petitioners’ argument on this point does not support the Review Petition.

¹² On this point, the Financial Decision’s citation to page 19 of the Staff’s Financial Brief is incorrect (there is no such page). *See* Financial Decision, at 4. The proper cite is to page 19 of HRI’s Financial Brief.

CONCLUSION

As discussed above, the Review Petition fails to show that Commission review of the Financial 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, and having otherwise failed to advance meritorious arguments, have failed to meet their burden. *See Kenneth G. Pierce, supra*, CLI-95-6, 41 NRC at 382. Accordingly, the Commission should deny the Review Petition.

Respectfully submitted,



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Dated at Rockville, Maryland
this 14th day of April, 1999

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NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

In the Matter of)
) Docket No. 40-8968-ML
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CERTIFICATE OF SERVICE

Thereby certify that copies of "NRC STAFF'S RESPONSE TO PETITION FOR REVIEW OF LBP 99-13" 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 14th day of April 1999:

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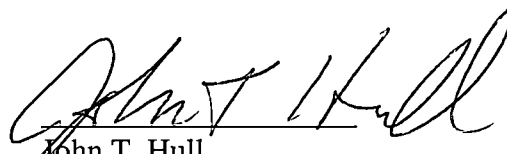
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