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LBP-98-14
June 30, 1998

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD PANEL

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

In the matter of

HYDRO RESOURCES, INC.
(2929 Coors Road
Suite 101
Albuquerque, New Mexico 87120)

Docket No. 40-8968-ML

Re: Leach Mining
and Milling License

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ASLBP No. 95-706-01-ML

MEMORANDUM AND ORDER
(ENDAUM and SRIC's Motion for Reconsideration of LBP-98-9)

MEMORANDUM

ENDAUM and SRIC (Intervenors) submitted a "Motion for Reconsideration of LBP-98-9" on June 5, 1998 (Motion).¹ The Motion is denied.

The first issue raised in the Motion is the allegedly improper exclusion of an area of concern that HRI's application is "disjointed, incoherent and self-contradictory." The Motion does not provide any reason to reverse the prior ruling. In LBP-98-9, I suggested that ENDAUM and SRIC speak with the Staff about how to assure that the hearing record

¹See HRI's "Response to ENDAUM's and SRIC's Motion for Reconsideration," June 15, 1998 and the Staff's "Response to ENDAUM/SRIC Joint Motion for Reconsideration," June 22, 1998. See also ENDAUM and SRIC's Motion to Partially Strike the NRC Staff's Response to Motion for Reconsideration or, in the Alternative, Motion to Respond (Expedited Review Requested), June 24, 1998.

that ENDAUM and SRIC speak with the Staff about how to assure that the hearing record is orderly and useful. Now that record has been filed.² It may be used by SRIC and ENDAUM to build their case. To the extent that material may be "disjointed, incoherent and self-contradictory," SRIC and ENDAUM may take advantage of those aspects of the record. Intervenor has not demonstrated why it is necessary or appropriate to litigate this as a separate area of concern when it is already litigable with respect to admitted areas of concern. 10 C.F.R. § 2.1209(a).

A possible implication of the Intervenor's concerns is that they expect the Presiding Officer to determine the adequacy of the Application, as filed and amended. Pursuant to established NRC practice, however, the Presiding Officer determines the validity of admitted areas of concern, not of the Application. In the course of that determination, the entire record is considered, including material added to the record when it is filed by a party (10 C.F.R. § 2.1233(d)) or developed by the Presiding Officer (10 C.F.R. § 2.1235).

Intervenor's second concern is that "the deferral of HRI's submission of material licensing information *until sometime after license issuance* deprives Intervenor of their right to a public hearing on all material licensing issues" [Emphasis added]. However, Commission regulations do not provide for a hearing prior to issuance of a license. Furthermore, Intervenor has tried and failed to obtain a stay of the effectiveness of the license. CLI-98-8, 46 NRC ____ (June 5, 1998).

The tentative plan that I have proposed for this proceeding defers the determination of certain issues but will not deprive Intervenor of anything. As the Court stated in *Union*

²Hearing File, attached to a letter to the administrative judges from John T. Hull, Counsel for NRC Staff, June 11, 1998.

of Concerned Scientists v. United States Nuclear Regulatory Commission, citing 5 U.S.C. §§ 554 and 557, 735 F. 2d 1437, 1447 (D.C. Cir. 1984), *cert denied* 469 U.S. 1132 (1985)(*UCS Case*):

we believe Congress vested in the public, as well as the NRC staff, a role in assuring safe operation of nuclear power plants. In sum, we find no basis in the statute or legislative history for NRC's position that Congress granted it discretion to eliminate from the hearing material issues in its licensing decision.

Although the *UCS Case* involved the licensing of a nuclear power plant, the principle is applicable here. Material issues must be determined in the licensing proceeding. *See Louisiana Energy Services, L.P.* (Claiborne Enrichment Center), CLI-97-2, 45 NRC 3, 5 (1997).

The tentative plan for this hearing would permit the immediate examination of HRI's current operations, using the supporting information that should already be available. The general principal governing this hearing is that HRI must demonstrate an adequate assurance of safety and protection of the environment. 10 C.F.R. § 40.32. At the upcoming prehearing scheduling conference, we may examine the readiness of HRI to demonstrate compliance with 10 C.F.R. § 40.32, both with respect to current operations and future operations. All scheduling issues will be considered at that conference. (The conference will be more fully defined in my determination of HRI's Motion for Reconsideration and for Bifurcation.)

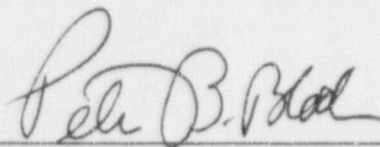
By way of clarification, let me state that there is no need to decide whether to change my determination that the area of concern related to Performance Based Licensing (PBL) is germane, as suggested by the Staff. This case is governed by the NRC regulations. The substantive regulation appears to require that HRI demonstrate an

adequate assurance of safety and protection of the environment with respect to the areas of concern submitted by Intervenors and found to be germane. 10 C.F.R. § 40.32. Although the area of concern related to PBL is germane, it may subsequently be dismissed if it is shown to be either without a basis or contrary to Commission regulations, which may not be challenged in this proceeding.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 30th day of June, 1998, ORDERED, that:

1. ENDAUM and SRIC's Motion for Reconsideration of LBP-98-9, June 5, 1998, is *denied*.
2. Appeals may no longer be deferred because of the pending motion for reconsideration.



Peter B. Bloch
Presiding Officer

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
HYDRO RESOURCES, INC.

Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB M&O (LBP-98-14) DTD 6/30 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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LB M&O (LBP-98-14) DTD 6/30

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Dated at Rockville, Md. this
1 day of July 1998

Adria T. Byrdson
Office of the Secretary of the Commission