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NUCLEAR REGULATORY COMMISSION

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In the Matter of HYDRO RESOURCES, INC. P.O. Box 15910 Rio Rancho, NM 87174	Docket No. 40-8968-ML

CLI-00-12

MEMORANDUM AND ORDER

Hydro Resources, Inc. ("HRI"), is seeking a license for a proposed in situ mining project in New Mexico. The NRC staff granted the license, but several intervenors have challenged its validity in an adjudicatory proceeding initiated under 10 C.F.R. Part 2, Subpart L. Today's decision is another in a series of appellate decisions in that proceeding. See, e.g., Hydro Resources, Inc., CLI-00-08, 51 NRC (May 25, 2000).

In this decision, we consider petitions for review filed by intervenors Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and the Southwest Research and Information Center ("SRIC"). See 10 C.F.R. §§ 2.786 and 2.1253. Intervenors seek review of three Presiding Officer Partial Initial Decisions: LBP-99-18, 49 NRC 415 (1999) (technical qualifications); LBP-99-19, 49 NRC 421 (1999) (radioactive air emissions); and LBP-99-30, 50 NRC 77 (1999) (groundwater, cumulative impacts, National Environmental Policy Act, and environmental justice). Also before the Commission is a motion by ENDAUM and SRIC to reopen the record to consider an affidavit by Dr. John Fogarty that raises questions about an NRC standard applied in this case for determining the allowable concentration of uranium in drinking water. Both HRI and the NRC staff oppose the petitions for review and the motion to reopen.

After careful review of the petitions, the responses, and the record, the Commission has decided to deny review on all technical issues -- i.e., LBP-99-18, LBP-99-19, and the groundwater portion of LBP-99-30[(1)] -- and to deny the motion to reopen. We are, however, referring the generic issues raised by Dr. Fogarty's affidavit to the NRC staff for appropriate action. Finally, we direct the parties to submit briefs to the Commission providing further information on the practical and legal significance of a recent decision of the United States Court of Appeals for the Tenth Circuit. See Hydro Resources, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000).

A. Petitions for Review

The Presiding Officer's findings in LBP-99-18, LBP-99-19, and section II of LBP-99-30 rest heavily upon his analysis of the parties' fact-specific submissions and arguments. As we have held previously in this proceeding, "[b]ecause the Presiding Officer has reviewed the extensive record in detail, with the assistance of a technical advisor, the Commission is generally disinclined to upset his findings and conclusions, particularly on matters involving fact-specific issues or where the affidavits or submissions of experts must be weighed." Hydro Resources, Inc., CLI-99-22, 50 NRC 3 (1999). While we certainly have discretion to undertake a de novo factual review where appropriate, we ordinarily "'attach significance to [the presiding officer's] evaluation of the evidence and ... disposition of the issues,'" and we do not "second guess" his or her reasonable findings. Louisiana Energy Services, L.P. (Claiborne Enrichment Center), CLI-98-3, 47 NRC 77, 93 (1998), quoting Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-355, 4 NRC 397, 403-05 (1976).

With these principles of appellate review in mind, the Commission has carefully considered intervenors' challenge to the Presiding Officer's findings on radioactive air emissions, groundwater, and technical qualifications and find unpersuasive the arguments for Commission review of these findings. Intervenors have identified no "clearly erroneous" factual finding or important legal error requiring Commission correction. See 10 C.F.R. § 2.786(b)(4). Nor do we agree with intervenors that the Presiding Officer's procedural rulings prejudiced their ability to make their case. Accordingly, we see no reason to call for full briefing or for plenary Commission review. Two of intervenors' arguments, however, warrant brief special comment, as the Presiding Officer said little about them.

First, intervenors complain that, after the initial pleadings and submissions, the Presiding Officer posed additional written questions to the parties on technical qualifications, radioactive air emissions, groundwater, and NEPA issues. As the intervenors' complaint goes, the additional questions unfairly permitted HRI and the NRC staff to cure fatal deficiencies in their initial written presentations. We have reviewed the questions posed by the Presiding Officer, along with the parties' answers. The questions seem to us a legitimate effort to obtain clarification or elaboration of assertions in existing pleadings. Our rules expressly empower presiding officers, on their "own initiative," "to submit written questions to the parties." 10 C.F.R. § 2.1233(a). This has been a complex, lengthy proceeding with a host of highly technical issues, many of which overlap. We cannot fault the Presiding Officer for seeking additional focused discussion, analysis, or other clarification to assist him in making his ultimate findings.

Second, intervenors fault the Presiding Officer for finding HRI's technical qualifications acceptable even though HRI's license application did not identify particular personnel for safety-sensitive positions. Intervenors say that "there are five key positions in HRI's structure, but [that] the individuals whom HRI has cited for their experience will fill only three of those positions." See Intervenors' Petition for Review, at 5 (Sept. 3, 1999). But it is hardly surprising that HRI has not yet hired a full staff. HRI forthrightly has acknowledged that it has no immediate plan to begin in situ mining at the licensed site. As the NRC staff has explained, Part 40 license applicants need not provide, "as part of the application process, the names of individuals who will fill positions within its organization." See NRC Staff's Response to Petition for Review, at 10 (Sept. 17, 1999). A commitment to hire qualified personnel prior to operations suffices. The NRC staff's ongoing enforcement role is well-suited to verifying that HRI satisfies all license-imposed minimum qualifications requirements when HRI hires employees to fill vacant positions.

Here, the NRC staff evaluated and found adequate HRI's proposed organizational structure, "including the expertise and training requirements of key HRI corporate positions." Id. at 9. License conditions control the specific qualifications (education, training, and experience) necessary for HRI's Radiation Safety Officer and any Radiation Safety Technician, and further outline the requirements of HRI's radiation safety training program for all site employees. See License Condition 9.7. Additional license conditions govern written standard operating procedures, and any corporate changes that may affect the assignments or responsibilities of radiation safety personnel. See License Conditions 9.8; 9.10. License conditions also dictate the minimum education and experience requirements for other key positions -- the Vice President of Health, Safety, and Environmental Affairs, the Vice President of Technology, and the Environmental Manager. See License Condition 9.3 (incorporating minimum qualifications for these positions, listed in HRI's Consolidated Operations Plan (COP), Rev. 2.0, at 132-33 (Aug. 15, 1997).[(2)]

There is, in short, no good reason for the Commission to review the findings made by the Presiding Officer in LBP-99-18, LBP-99-19 and Part II of LBP-99-30, and we decline to do so.

B. Motion to Reopen

Recently, during the appellate phase of this proceeding, intervenors ENDAUM and SRIC came to the Commission with a motion to reopen the record concerning the "secondary" groundwater restoration standard for drinking water. In this case, the NRC staff used as the secondary standard 0.44 milligram per liter ("mg/l") for natural uranium. See License Condition 10.21(A). Intervenors' motion to reopen attacks this standard and relies on an affidavit of Dr. John D. Fogarty. Dr. Fogarty's affidavit, which was not submitted to the Presiding Officer, raises questions about the 0.44 mg/l secondary standard, and points to several studies of uranium chemical toxicity. He argues that the 0.44 mg/l secondary restoration standard is excessively high, chemically toxic if ingested on a long-term basis, and thus unprotective of public health and safety.

We decline to reopen the adjudicatory record. Where, as in this case, a litigant in a licensing proceeding attempts to introduce new factual or expert evidence in an untimely fashion,[(3)] we will reopen the record only when the new evidence raises an "exceptionally grave issue" calling into question the safety of the licensed activity. See 10 C.F.R. § 2.734(a); see generally Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-886, 27 NRC 74, 76-79 (1988). After reviewing Dr. Fogarty's affidavit and supporting material, we find no "exceptionally grave issue" warranting reopening here. Some context and background are necessary to understand the basis for our finding.

According to HRI's license, lixiviant may not be injected into a well field before additional groundwater data is collected and analyzed to establish groundwater restoration goals for each monitored aquifer of the wellfield. For each water quality parameter measured -- uranium concentration is one of them -- the primary groundwater restoration goal is to return the parameter to its average original baseline level. See License Condition 10.21. Therefore, the primary restoration goal for uranium, as well as for all parameters, will be to return to the average "pre-lixiviant injection level[]." Id.

The secondary water restoration goal only becomes an issue if HRI cannot restore the water to the primary goal. For uranium concentration, the NRC staff set the secondary restoration goal at 0.44 mg/l. The 0.44 mg/l standard is the focus of Dr. Fogarty's concerns. But for the Church Rock Section 8 site -- the only site considered by the Presiding Officer -- it is unlikely that the secondary restoration standard will ever come into play. The Final Environmental Impact Statement estimates the current average level of uranium at Section 8 to be 1.8 mg/l, a level well above the secondary restoration goal of 0.44 mg/l. See FEIS 3-36. HRI will not be required to restore the uranium level in Section 8 to a cleaner, more stringent level than the average level already existing in Section 8. The 1.8 mg/l estimate is the average for uranium drawn from water sampling data collected thus far.

We are mindful that HRI has yet to collect the additional data necessary to establish a definitive baseline for uranium at Section 8. See License Condition 10.21. It is conceivable that in the end the Section 8 baseline will prove lower than 1.8 mg/l or even lower than 0.44 mg/l. But our hearing process does not provide a forum for litigating all conceivable outcomes, no matter how remote and speculative. Here, considering the water quality data already collected, the Commission believes it is

highly unlikely that the baseline level of uranium in Section 8 will prove to be so much lower than 1.8 mg/l that it falls under the secondary restoration standard of 0.44 mg/l.

Thus, given that: (1) HRI may not inject lixiviant into a well field before additional groundwater data have been collected and primary restoration goals have been established; and (2) the challenged secondary restoration goal appears unlikely ever to even be an issue for Section 8, the first section to be mined, the Commission finds that Dr. Fogarty's affidavit does not raise immediate safety concerns and is unlikely even in the long term to have safety significance at the Section 8 site. In short, there are no "exceptionally grave" exigent circumstances sufficient to warrant the extraordinary step of reopening the record and restarting the hearing process.[4]

C. Tenth Circuit Decision

Another groundwater-related issue also warrants discussion. Intervenors ENDAUM and SRIC have filed a motion to supplement the record, claiming that a recent Tenth Circuit decision established HRI's lack of either a valid underground injection control ("UIC") permit or a valid aquifer exemption under the Safe Drinking Water Act ("SDWA") for the Section 8 site. See Hydro Resources, Inc. v. EPA, 198 F.3d 1224 (10th Cir. 2000), rehearing en banc denied, No. 97-9566 (Mar. 30, 2000). Intervenors maintain that "[a]ny findings by the Presiding Officer that rest on the presumption of a validly issued aquifer exemption or UIC permit must be reversed." See Motion to Supplement the Record at 3 (Jan. 27, 2000).

The Tenth Circuit decision -- of which we may take judicial notice without "supplementing" the record -- upheld EPA's decision to treat Section 8 as "disputed" Indian Country. When land in question holds "Indian country" status, the applicable UIC requirements are those of the federal UIC program. If, however, Section 8 were found not to be Indian country, then New Mexico's state-administered IUC program would apply. HRI obtained a UIC permit for Section 8 from New Mexico in 1989, but has not obtained a federal permit. The Tenth Circuit decision found that "Section 8 lands are subject to a jurisdictional dispute requiring implementation of the direct federal UIC program under the SDWA." See 198 F.3d at 1254. Consequently, because of this as-yet- unresolved jurisdictional dispute, "HRI must now obtain a permit from EPA prior to commencing underground injection on Section 8." See id. at 1237. HRI and the NRC staff maintain that the Tenth Circuit decision is irrelevant to the licensing issues at stake in this case.

We frankly are uncertain about the relevance of the Tenth Circuit decision to our case. The Presiding Officer referred to the aquifer exemption in a number of places in his decision below. See, e.g., 50 NRC at 108 ("[t]his exemption means that ... there is no drinking water to be protected at this site"). See also id. at 102, 109. Despite intervenors' motion to supplement the record and the responses of HRI and the NRC staff, it remains unclear to us what effect there would be, if any, upon the Presiding Officer's findings if Section 8 were found conclusively to fall within "Indian country," and HRI no longer possessed a valid aquifer exemption or UIC permit.

Accordingly, the Commission requests the parties to answer the following questions: (1) Did the Presiding Officer rely upon a current valid aquifer exemption or UIC permit for any of his technical groundwater findings? (2) If so, would any of these findings be undermined if Section 8 ultimately were found conclusively to fall within "Indian country" and thus within the jurisdiction of the federal UIC program? (3) Was it even necessary for the Presiding Officer to address whether the HRI project would comply with the Safe Drinking Water Act? (4) What practical effect does the Tenth Circuit's decision have upon HRI's schedule or plans for mining Section 8?

The parties shall respond to these questions in 15 pages or less. Responses shall be filed simultaneously, and within 30 days of this order.

CONCLUSION

For the foregoing reasons, the Commission (a) *denies* the petitions for review challenging LBP-99-18, LBP-99-19 and section II of LBP-99-30, (b) *denies* the motion to reopen, and (c) *directs* the parties to file responses to the Commission's questions on the effect of the Tenth Circuit's decision in Hydro Resources, Inc. v. EPA.

IT IS SO ORDERED.

For the Commission[5]

/RA/

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Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 10th day of July, 2000.

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1. The remainder of LBP-99-30 deals with NEPA, environmental justice and other issues that the Commission still is considering and does not resolve here. The Commission also has not yet completed its consideration of the Presiding Officer's

decisions to "bifurcate" the proceeding by site and to hold in abeyance all litigation on issues not involving the "Section 8" site. See Hydro Resources, Inc., CLI-00-08, 51 NRC at , Slip op., at 17.

2. Indeed, the staff in its review found unacceptable HRI's originally-proposed minimum qualifications for Radiation Safety Technicians. The staff accordingly imposed a specific license condition to heighten the minimum level of education and experience for Radiation Safety Technicians. See Safety Evaluation Report at 6-7; License Condition 9.7.

3. The intervenors concede their motion to re-open is untimely. The studies Dr. Fogarty primarily relies upon were published well before the hearing on Section 8 closed, and before the intervenors submitted their written presentation on groundwater protection. Nonetheless, the intervenors claim that they could not have presented these studies without the sponsorship of Dr. Fogarty. This claim is unpersuasive. Just as Dr. Fogarty conducted a "literature research" on uranium's chemical toxicity, the intervenors (or their technical experts) likewise could have done so.

4. We note that Dr. Fogarty's concerns may bear on the other three sites covered by the HRI license. Since the record is not closed concerning those sites, the petitioners may raise this groundwater issue in the hearing on those sites. See Hydro, CLI-00-08, 51 NRC ___, slip op. at 16 (5/25/00); Hydro, LBP-99-40, 50 NRC 273, 276 (1999). There is no immediate health and safety concern because HRI has stated it has no current plans to mine those sites in the near future and, moreover, HRI may not begin mining those sites without first fulfilling various legal obligations. See id. Because Dr. Fogarty's concerns raise generic issues regarding secondary groundwater standards, the Commission is referring this issue to the staff for appropriate action. If later Board proceedings or staff findings suggest that rulemaking or other licensing actions are necessary, the Commission remains free to take such action.

5. Commissioner Dicus was not available for the affirmation of this Order. Had she been present, she would have affirmed the Order.