

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

March 23, 2004 (9:32AM)

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:)	
Hydro Resources, Inc.)	Docket No.: 40-8968-ML
P.O. Box 777)	
Crownpoint, NM 87313)	Date: March 15, 2004

**PETITION FOR REVIEW OF PRESIDING OFFICER'S INITIAL DECISION
REGARDING HYDRO RESOURCES, INC.'S SECTION 8 RESTORATION
ACTION PLAN**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Petition for Review of Presiding Officer's Initial Decision Regarding HRI's Restoration Action Plan (RAP) under its Nuclear Regulatory Commission (NRC) 10 CFR Part 40 license to operate an *in situ leach* (ISL) uranium mining facility in Crownpoint, New Mexico. For the foregoing reasons, HRI respectfully requests that the Commission accept HRI's petition for review and establish a schedule allowing further written briefing and/or oral argument on the issues appealed.

I. BACKGROUND AND PROCEDURAL HISTORY

HRI obtained source material license SUA-1508 for a proposed ISL uranium mining operation in January of 1998. Several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM) and the Southwest Research Information Center (SRIC) (hereinafter the "Intervenors"), subsequently were allowed to intervene to challenge that license. One of the many issues raised by Intervenors was that the financial information and cost estimates submitted by HRI to satisfy 10 CFR Part 40, Appendix A, Criterion 9 financial assurance requirements were inadequate.

On May 25, 2000, the Commission issued an Order requesting that HRI submit, within 180 days of its receipt, “a decontamination, decommissioning and reclamation plan with cost estimates on which a surety will be based.”¹ The Commission further stated that, “[t]he plan in the first instance need only address the Section 8 site where HRI plans to begin operations first.”²

In accordance with the Commission’s Order, on November 21, 2000, HRI submitted the requested RAP and accompanying cost estimates. Per the Commission’s Order, HRI’s RAP and cost estimates addressed only the Section 8 portion of the Crownpoint Uranium Project (CUP). The RAP and accompanying cost estimates were prepared by HRI personnel responsible for groundwater restoration at Section 8, based upon their personal experience implementing successful groundwater restoration at two other ISL uranium mining facilities in Texas operated by HRI’s parent company, Uranium Resources, Inc. (URI).

After written and oral presentations regarding the Section 8 RAP and cost estimates and a substantial interval for settlement negotiations, on February 27, 2004, the Presiding Officer issued an Order which prohibited HRI from conducting ISL uranium mining activities pending resolution of three specific issues: (1) re-calculation of HRI’s Section 8 surety using the “tremie” line method for well-plugging, (2) re-calculation of reclamation costs based on the average costs estimated by two or more independent contractors would use, without assuming use of HRI’s “major” equipment, and (3) re-calculation of labor costs using the average costs estimated by two independent contractors or estimates provided by Interveners without assuming employees would wear “multiple hats.” *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Memorandum and Order: Ruling on*

¹ *In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-00-08, 51 NRC 227, *23 (May 25, 2000).

² *Id.*

Restoration Action Plan, LBP-04-03, at 34 (February 27, 2004) (LBP-04-03). Pursuant to 10 CFR §§ 2.1253, 2.786, and 2.763, HRI hereby submits this Petition for Commission Review and respectfully requests that the Commission accept HRI's petition for review and establish a schedule allowing further written briefing and/or oral argument on the issues appealed.

II. STANDARD OF REVIEW

10 CFR § 2.1253 refers aggrieved parties seeking Commission review to 10 CFR § 2.786 which states, "a party may file a petition for review with the Commission" within fifteen (15) days of the service of an initial or partial initial decision by the Presiding Officer. *See* 10 CFR § 2.786 (b)(1). The Commission may, as a matter of discretion, grant review of Licensing Board orders based on whether a "substantial question" exists in light of the following considerations:

- (1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) A substantial and important question of law, policy or discretion has been raised;
- (4) The conduct of the proceeding involved a prejudicial procedural error; or
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 CFR § 2.786(b)(4)(i-v); *see also In the Matter of Duke Energy*, (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 2003 NRC LEXIS 215, *5 (December 9, 2003). This standard of review has been fully incorporated into NRC's Subpart L regulations. *See* 10 CFR § 2.1253; *see also Babcock and Wilcox* (Pennsylvania Nuclear Service Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).

In general, Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically demands, the record compels a different result. *See e.g., General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). Although the Licensing Board is the

primary-fact-finder, the Commission may make factual findings based on its own review of the record and decide the case accordingly. *See Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3) ALAB-732, 17 NRC 1076, 1087 n.12 (1983)*. In addition, 10 CFR § 2.763 permits the Commission, in its discretion, to “allow oral argument upon the request of a party made in petition for review or brief on review, or upon its own initiative.” 10 CFR § 2.763.

III. ARGUMENT

A. The Presiding Officer’s Decision that HRI’s Section 8 Financial Assurance Estimates Cannot Account for the Availability of “Major” Equipment Should Be Reviewed

1. The Presiding Officer’s Decision is Without Governing Precedent

In his February 27, 2004, Order, the Presiding Officer states, “HRI, having improperly assumed the availability of onsite equipment in calculating its surety estimate, must recalculate its reclamation costs based on the average costs that two or more independent contractors,³ without using HRI’s equipment, would accrue in decommissioning....” LBP-04-03 at 34. With respect to this issue, the Presiding Officer apparently bases his decision on the fact that “[t]o conclude otherwise ignores the plain language of [10 CFR Part 40, Appendix A] Criterion 9 that ‘the licensee’s cost estimates must take into account the *total costs* that would be incurred if an *independent contractor* were hired to perform the decommissioning and reclamation work.” *Id.* at 23 (emphasis in original). According to the Presiding Officer, this means that “it cannot be assumed that the *major equipment* necessary for decommissioning is available.” *Id.* The Presiding Officer’s decision is without governing precedent and should be reviewed.

³ HRI questions whether an “independent contractor” can be found to prepare a restoration estimate in a yet to be defined well-field that will not be restored for several years without paying a substantial fee, in which case, he/she is a “consultant” and no longer an “independent contractor.”

Initially, the Presiding Officer's finding is inconsistent with *generally accepted industry practices* regarding financial assurance for ISL uranium mining facilities and, thus, is without governing precedent. NRC's NUREG-1569 entitled *Standard Review Plan for In Situ Leach Uranium Extraction License Applications* (ISL SRP), which provides guidance for ISL licensees, states that assumptions for surety analyses and cost estimates are acceptable if they are based "on experience from *generally accepted industry practices*, from research and development activities at the site, or from previous operating experience in the case of a license renewal." ISL SRP at 6-24. As stated by HRI personnel during each stage of the proceeding below, surety estimates were calculated based on several *generally accepted industry practices* such as utilizing existing well-fields and well-field systems, reverse osmosis unit(s), brine concentrators, and ion-exchange columns during groundwater restoration. Thus, if the Presiding Officer's decision below is affirmed, ISL licensees can no longer rely on NRC's guidance to rely upon *generally acceptable industry practices*.

In light of the above, the ISL SRP appears to be internally inconsistent when it states that, "[e]quipment owned by the licensee...should not be considered in the estimate, to reduce cost calculations." ISL SRP at Appendix C, C-5 (emphasis added). Although this statement appears to be even broader than the Presiding Officer's reference to "major equipment," neither the ISL SRP nor the Presiding Officer's decision define what is meant by the terms "equipment" or "major equipment." HRI is not aware of any *generally acceptable industry practice* or, for that matter, Commission precedent that assumes, for surety purposes, replacement of all "major" equipment during groundwater restoration which, at a minimum, would include all wells in existing well-fields, all pipes in existing well-field systems, reverse osmosis units, brine concentrators, and ion-exchange columns. Additionally, after production ceases, if a licensee is financially unable to perform restoration, all such equipment would automatically become 11e.(2) byproduct material which could not be recovered or sold in

bankruptcy until decontaminated (if it is even practical to do so) in accordance with NRC release requirements.⁴ Thus, since there appears to be a substantial conflict in existing NRC guidance, the Presiding Officer's decision, and existing surety assumptions at all ISL uranium recovery facilities, the Presiding Officer's decision below should be reviewed and reversed or the economic viability of ISL uranium mining will be severely and materially impacted.

2. The Presiding Officer's Decision Raises a Significant Policy Question That the Commission Should Review

The issues addressed in Section IIIA(1) also demonstrate that the Presiding Officer's decision raises a significant policy question which should be addressed by the Commission. As discussed above, the Presiding Officer's decision requires HRI to calculate surety estimates without accounting for the availability of its "*major equipment.*" LBP-04-03 at 34. Taken to its logical extreme, the Presiding Officer's decision would require every ISL licensee to calculate its surety estimate based on replacing all *moveable equipment* such as front-end loaders, bulldozers, and vehicles *as well as all stationary equipment* such as existing wells, well-field systems (e.g., pipes), and process equipment (i.e., brine concentrators, ion-exchange columns, reverse osmosis unit(s)).⁵ This interpretation also would render the licensee's *life of project* cost estimates (which includes repair and replacement of *moveable* and *stationary* equipment), the required contingency percentage (i.e., additional funds to cover unexpected increases in costs of remediation activities),⁶ and

⁴ HRI is prepared to offer written and/or oral testimony from several NRC licensees regarding *generally accepted industry practices* regarding surety calculations if the Commission grants review.

⁵ Indeed, when discussing this issue, the Presiding Officer specifically addressed HRI's reverse osmosis unit, which is a significant piece of equipment in HRI's plan to conduct groundwater restoration, but no more significant than ion-exchange columns.

⁶ The ISL SRP recommends that a 15 percent contingency percentage is acceptable for surety estimates, while HRI's RAP includes a contingency percentage of 25 percent.

the mandatory *annual* surety updates irrelevant. If the Commission affirms the Presiding Officer's interpretation, *every ISL licensee* will be required to calculate new or to revise existing surety estimates to effectively assume the unnecessary purchase of the mine's "*major equipment*" twice at a cost that potentially would make uranium mining cost-prohibitive. Given the current state of both the economics of the uranium production industry and the surety market for the mining industry after "September 11, 2003," it is unlikely that any ISL or conventional uranium recovery licensee will be able to afford sufficient surety even if a surety provider willing to post such surety for remediation activities could be found.⁷ Thus, based on these factors, the Presiding Officer's decision below presents a significant policy question that should be reviewed by the Commission.

B. The Presiding Officer's Decision Labor Costs Using Site Personnel Wearing "Multiple Hats" Should be Reviewed and Reversed

In his February 27, 2004, Order, the Presiding Officer states, "HRI, having assumed improperly that the laborers an independent contractor would wear 'multiple hats,' can either accept the cost estimates proposed by the Intervenors in recalculating its labor costs or, alternatively, use the average cost estimates proposed for labor by two or more independent contractors." LBP-04-03 at 34. This decision is based on the Presiding Officer's statement that "HRI...has put forth no persuasive evidence that supports its assumption that an independent contractor will assign one employee to several tasks in the same manner as HRI intends to manage its employees." *Id.* at 26. This decision should be reviewed by the Commission, because it is without governing precedent and raises a significant policy question for the uranium mining industry.

⁷ HRI is prepared to present evidence regarding the surety market for mining industry remediation bonds demonstrating that this market has all but disappeared if the Commission grants review.

1. The Presiding Officer's Decision is Without Governing Precedent and Should be Reviewed and Reversed

The Presiding Officer's decision to order HRI to revise its surety estimates in a manner that does not account for the use of employees wearing "multiple hats" (i.e., multi-tasking) is without governing precedent. With respect to this issue, NRC's ISL SRP states that "the availability of licensee staff should not be considered in the estimate, to reduce cost estimates." ISL SRP at C-5. However, the availability of *licensee staff* has nothing to do with independent contractor employees wearing "multiple hats." Common sense and *generally accepted industry practices* (including specifically past operating history) indicate that any independent contractor would have employees with ISL mining experience and skills whether they are former employees of the licensee or not.

Generally accepted industry practices at ISL and conventional uranium mining facilities (indeed at all types of mining facilities) traditionally use employees to perform multiple tasks. Given that any independent contractor would understand that the available surety amount is fixed and finite, it is unrealistic to assume a contractor will be inefficient and pay employees to not work until their specialized skills are necessary. Also, the presumed existence of a host of single-tasked employees conflicts with the Presiding Officer statement that, "HRI's intention to rely on automated machinery with automatic shutdowns to supplement its workforce...does not violate the surety requirements established in Criterion 9." LBP-04-03 at 25. ISL facilities traditionally rely on automated systems which do not require oversight by multiple single-tasked, highly specialized workers during both the mining and restoration phases of the operation. Indeed, similar to HRI's RAP, many domestic ISL and conventional uranium recovery facilities operate with minimal staff during groundwater restoration, even relying on automated notification of relevant personnel in case of system failure on a weekend. Further, Criterion 9's express language merely requires

surety estimates that account for *total costs* for D&D and not *total costs* based on unrealistic assumptions that labor costs will be managed inefficiently. Thus, the Presiding Officer's decision presuming that Criterion 9 mandates that an independent contractor would not D&D an ISL facility in a cost-efficient manner is contrary to common sense and *generally accepted industry practices*. Therefore, the Presiding Officer's decision is without governing precedent and should be reviewed.

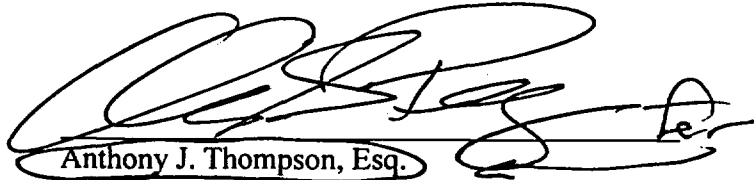
2. The Presiding Officer's Decision Presents a Significant Policy Question That Should be Reviewed by the Commission

The Presiding Officer's decision regarding HRI's labor cost estimates also raises a significant policy issue that should be reviewed by the Commission. By requiring HRI to recalculate its labor cost estimates to exclude the use of employees performing multiple tasks, the Presiding Officer has interpreted Criterion 9 in a manner that is inconsistent with *generally accepted industry practices* utilized by many, if not all, ISL and conventional uranium recovery licensees, as well as all other mining operations. If the Presiding Officer's decision is affirmed, *all* uranium recovery licensees will be forced to increase their financial assurance to reflect hiring multiple single-task employees, including the costs for training such employees on the site-specific features at each facility. It defies common sense to assume that any independent contractor, working with a finite surety amount, is going to hire, for example, a plumber to not work until a pipe begins to leak or a pump fails. Indeed, it requires the assumption that NRC will allow payment for such inefficient contractor activities from the surety funds it oversees, which is unlikely to and should not occur. Therefore, the Commission should review the Presiding Officer's decision, because it poses a significant policy question for the uranium mining industry.

IV. CONCLUSION

For the reasons discussed above, HRI respectfully requests that the Commission accept HRI's petition for review and establish a schedule allowing further written briefing and/or oral argument on the issues appealed.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, which appears to be "Chris Pugsley". The signature is written over a horizontal line that underlines the text below it.

Anthony J. Thompson, Esq.

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**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

Before the Presiding Officer:

**Thomas S. Moore, Presiding Officer
Richard F. Cole, Special Assistant**

In the Matter of:
Hydro Resources, Inc.
P.O. Box 777
Crownpoint, NM 87313

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) Docket No.: 40-8968-ML
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)
) Date: March 15, 2004
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Petition for Review of Presiding Officer's Initial Decision Regarding Hydro Resources, Inc.'s Section 8 Restoration Action Plan in the above-captioned matter has been served upon the following via electronic mail, facsimile and U.S. First Class Mail on this 15th day of March, 2004.

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March 15, 2004

BY ELECTRONIC MAIL, FACSIMILE AND U.S. FIRST CLASS MAIL

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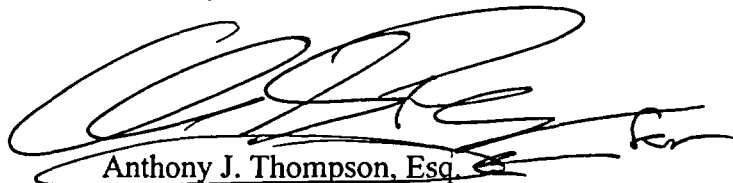
Re: In the Matter of: Hydro Resources, Inc.
Docket No: 40-8968-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc. Petition for Review of Presiding Officer's Initial Decision Regarding Hydro Resources, Inc.'s Section 8 Restoration Action Plan in the above-captioned matter. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.
Thank you for your time and consideration in this matter.

Sincerely,



Anthony J. Thompson, Esq.
Christopher S. Pugsley, Esq.
Law Offices of Anthony J. Thompson, P.C.
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER.doc)