

March 18, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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March 25, 2004 (9:24AM)

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)

HYDRO RESOURCES, INC.)
(PO Box 15910,)
Rio Rancho, New Mexico 87174))

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**INTERVENORS EASTERN NAVAJO DINÉ AGAINST URANIUM MINING
AND SOUTHWEST RESEARCH AND INFORMATION CENTER'S PETITION
FOR REVIEW OF MEMORANDUM AND ORDER LBP-04-03,
RULING ON RESTORATION ACTION PLAN**

Pursuant to 10 C.F.R. § 2.1253 and § 2.786, Intervenor Eastern Navajo Diné
Against Uranium Mining ("ENDAUM") and Southwest Research and Information
Center ("SRIC") hereby petition for review of the Presiding Officer's Memorandum
And Order (Ruling on Restoration Action Plan), LBP-04-03.¹ The Commission should
take review because LBP-04-03 is based on legal error and raises a substantial and
important question of policy and discretion.

I. FACTS AND SUMMARY OF DECISION

This Petition seeks to appeal LBP-04-03, which decided the adequacy of Hydro
Resources, Inc.'s ("HRI") November 21, 2000 Restoration Action Plan ("RAP") for its In
Situ Leach ("ISL") uranium mining operation located at Section 8, Township 16 North,

¹ LBP-04-03 served via first class mail, February 27, 2004.

Range 16 West, McKinley County, New Mexico ("Section 8"). HRI prepared the RAP in response to CLI-00-08, in which the Commissioners of the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") reversed LBP-99-13, a decision by the Presiding Officer holding that HRI did not need to demonstrate financial assurance for decommissioning prior to the issuance of a license. CLI-00-08, 51 NRC 227, 241 (2000), reversing in part and affirming in part LBP-99-13, 49 NRC 233 (1999). In CLI-00-08, the Commission held that for each of the four mine sites for which HRI has sought and obtained a license, HRI must submit, prior to licensing, a plan for decommissioning the site, including cost estimates.² *Id.*, 51 NRC at 239 citing 10 C.F.R. Part 40, Appendix A, Criterion 9.

As required by Criterion 9 of 10 C.F.R. Part 40, Appendix A ("Criterion 9"), HRI's RAP for Section 8 provided, for the first time, a surety amount that is based on an estimate of the cost for a third party to remediate the Section 8 site, including the aquifer underlying Section 8, in the event that HRI is unable to do so. 10 C.F.R. Part 40, Appendix A, Criterion 9. In the RAP, HRI also provided, for the first time, its rationale for its decommissioning cost estimate, including the number of "pore volumes" of water that will be required to be flushed through the aquifer to achieve

² On January 5, 1998, the NRC Staff granted HRI a source and byproduct materials license to build and operate several ISL mines and a uranium mill in Church Rock and Crownpoint, within the Navajo Nation. License No. SUA-1508. While the Commission did not revoke the license in CLI-00-08, it held that HRI must submit a financial assurance for decommissioning before it could implement the license. 51 NRC at 241-242.

restoration standards after mining is completed. RAP, Attachment E-2-1.³ HRI estimates that in order to remediate the aquifer at Section 8, it will have to flush the aquifer with nine pore volumes of water. RAP, §E.2.a.

In their response to the RAP, Intervenor presented testimony evaluating the basis for HRI's cost estimates.⁴ Intervenor argued that HRI had grossly underestimated the amount of water necessary to remediate the aquifer to restoration standards and thus underestimated the amount of money needed for financial assurance. Intervenor's Response to RAP at 14-17. In reality, the number of pore volumes required to flush the aquifer is likely to be two times greater, thus doubling HRI's cost estimate of \$7 million. Ingle Testimony at 13-14.

In LBP-04-03, the Presiding Officer refused to consider Intervenor's arguments regarding the inadequacy of HRI's pore volume estimate, on the ground that the issue had been decided against Intervenor in LPB-99-13 and CLI-00-08. *Id.*, slip op. at 11-

³ A pore volume describes the amount of water needed to flow through a body of depleted ore to achieve restoration of the groundwater. LBP-04-03, slip op. at 7. A pore volume is calculated by multiplying the wellfield area by the horizontal flare factor, average ore thickness, vertical flare factor, and porosity of the ore zone. *Id.*, slip op. at 7-9. A flare factor is a multiplier used by the ISL industry to account for the horizontal and vertical spread of lixiviant outside the specified boundaries of the calculated ore zone. *Id.*, slip op. at 7.

⁴ Intervenor's Response To Hydro Resources, Inc.'s Cost Estimates And Restoration Action Plan Of November 21, 2000 at 14-17 (December 21, 2000) (hereinafter "Intervenor's Response to RAP"); Exhibit 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenor's Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000) (hereinafter "Ingle Testimony"); Exhibit 2, Written Testimony of Dr. Richard J. Abitz in Support of Intervenor's Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000) (hereinafter "Abitz Testimony").

12, citing LBP-99-13, 49 NRC at 236-237; CLI-00-08, 51 NRC at 244-245. Id. at 11-12, n. 46. Therefore, the Presiding Officer held that any challenges to HRI's pore volume estimates must be addressed to the Commission. Id., slip op. at 11. Nevertheless, the Presiding Officer ruled that Intervenors had failed to preserve their appeal of the issue to the Commission. Id. at 11-12, n. 46.

The Presiding Officer also found several inadequacies in the RAP, but ruled that they could be remedied without further hearing. Id., slip op. at 33-34. Finally, the Presiding Officer commented that after years of litigation and the expenditure of significant amounts of resources, it remains "far from certain that HRI will ever be able to use its license." Id., slip op. at 35, n. 154. Noting that the parties vigorously dispute the question of whether HRI has or can obtain a valid aquifer exemption permit under the Safe Drinking Water Act, which is a prerequisite to mining any of HRI's sites, the Presiding Officer suggested that, "as a matter of sound administration and fiscal policy," the Commission may wish to "reconsider its current position that an applicant or licensee, such as HRI, need not first obtain required aquifer exemptions before the agency will docket an initial application involving ISL mining." Id.

II. THE COMMISSION SHOULD TAKE REVIEW OF LBP-04-03

Pursuant to 10 C.F.R. § 2.786(b)(4), the Commission may exercise its discretion to take review of decisions which raise: (i) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a

substantial and important question of law, policy or discretion, (iv) prejudicial procedural error, or (v) any other consideration which the Commission may deem to be in the public interest.⁵

A. The Presiding Officer Erred By Refusing To Consider Intervenors' Evidence Regarding The Inadequacy Of HRI's Decommissioning Cost Estimate.

The Presiding Officer's refusal to consider Intervenors' arguments regarding the inadequacy of HRI's pore volume estimate violates the Commission's mandate in CLI-00-08 to grant Petitioners a hearing on the adequacy of HRI's decommissioning cost estimate. Therefore, LBP-04-03 should be reversed.

In CLI-00-08 the Commission determined that Criterion 9 requires an applicant for a source and byproducts materials license to submit for Staff approval a decommissioning plan including cost estimates, prior to the issuance of a license. 51 NRC at 239. In making this ruling, the Commission declared that submission of a complete and final decommissioning and financial assurance plan is critical to ensure a "meaningful hearing opportunity on all substantive issues material to the agency's licensing decision." *Id.* at 240 (emphasis added).

As demonstrated in the RAP's table of decommissioning and restoration costs, the number of pore volumes required to flush the aquifer constitutes a significant portion of the decommissioning budget. *Id.*, Attachment E-2-1, Groundwater Restoration Budget.

⁵ The standards for Commission review in 10 C.F.R. § 2.786(b)(4) have been incorporated into Subpart L proceedings in 10 C.F.R. § 2.1253. See *Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.)* CLI -95-4, 41 NRC 248, 249 (1995).

Thus, there can be no doubt that the adequacy of HRI's pore volume estimate must be included among the "substantive issues material to the agency's licensing decision." CLI-00-08, 51 NRC at 240. Accordingly, the Presiding Officer should have considered Intervenor's evidence.

Moreover, the Presiding Officer's rationale for refusing to consider Intervenor's evidence on the adequacy of HRI's pore volume estimate is erroneous. According to the Presiding Officer, Judge Bloch ruled on the adequacy of HRI's pore volume estimate in LBP-99-13, and the Commission affirmed his decision in CLI-00-08. LBP-04-03, slip op. at 10. As the Presiding Officer acknowledges, however, prior to the submission by HRI of the Section 8 RAP, on remand by CLI-00-08, HRI had never provided any technical basis for its decommissioning cost estimate. Id., slip op. at 11 n. 46. See also CLI-00-08, 51 NRC at 241 ("the record before us reveals no final estimates, no final plan, no final NRC Staff review"). HRI did not make any attempt to justify its nine pore volume estimate until it submitted the Section 8 RAP on November 21, 2000. Thus, any ruling that the Presiding Officer may have made in 1999 on an admittedly incomplete and legally infirm record may not lawfully be held to prevent Intervenor from challenging the adequacy of evidence presented by HRI in 2000 in support of its decommissioning cost estimate.

Additionally, the Presiding Officer reads CLI-00-08 too broadly. In CLI-00-08, the Commission ruled that the evidence submitted by HRI and the Staff at that time regarding HRI's pore volume estimate was more persuasive than the evidence submitted

by Intervenor. The Commission clearly anticipated that HRI would submit a decommissioning funding estimate in compliance with Criterion 9 of Appendix A to Part 40, on which Intervenor would be free to submit evidence material to the adequacy of the decommissioning cost estimate. Id., 51 NRC at 240-41.

The Presiding Officer also erred in finding that Intervenor did not fully litigate the basis for HRI's nine pore volume estimate because of Intervenor allegedly failed to raise the issue in their appeal of LBP-99-13, the Licensing Board's denial of their February 26, 1999, motion to file a reply to HRI and the NRC Staff's Responses to their initial presentation. Id. slip op. at 11-12, n. 46 citing ENDAUM And SRIC's Motion For Leave To File A Reply Brief And Rebuttal Testimony On Issues Of Financial Assurance For Decommissioning And Financial And Technical Qualifications Or, In The Alternative, To Strike Documents Submitted On Those Issues (February 26, 1999) ("Motion to Reply").

The Presiding Officer is incorrect. Intervenor properly raised the issue that nine pore volumes was not supported by technical evidence before the Commission. Brief of Intervenor Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center on Review of Partial Initial Decision LBP-99-13 Financial Assurances For Decommissioning at 22-23 (August 13, 1999). The Motion to Reply is irrelevant to the determination of whether Intervenor had the opportunity to fully litigate the pore volume and attendant cost estimates issue. There, Intervenor requested the opportunity to reply to HRI and the Staff's Responses on three grounds. First,

Intervenors sought the opportunity to address exhibits to the Staff's Response that were omitted from the Hearing File. Motion to Reply at 4. Second, Intervenors sought to reply to criticisms to their expert's qualifications. Id. at 6. Third, Intervenors sought to challenge technical evidence offered by HRI's counsel in its Response. Id. at 7. These three bases were the sole bases for Intervenors' Motion to Reply. HRI's pore volume estimate and attendant cost estimates were not at issue. Moreover, in his Memorandum and Order denying Intervenors' Motion To Reply, the Presiding Officer explicitly noted that he did not rely on the new information in the Responses in making his determination. Memorandum and Order (Denial of Motion to Reply on Financial Assurances for Decommissioning) (March 10, 1999) (unpublished) at 1.

B. LBP-04-03 Raises An Important Policy Question.

Review is also warranted because the Presiding Officer raised an important question of policy and/or discretion. In footnote 154, the Presiding Officer questioned whether it is the best use of parties' and the NRC's resources to docket an ISL license application, license amendment application, or license renewal application before an applicant has secured an aquifer exemption under the relevant Tribal, Federal, or State underground injection control ("UIC") program. LBP-04-03 slip op. at 35, n. 154. The Presiding Officer noted that issuance of an aquifer exemption by the appropriate Federal, Tribal, or State agency is a prerequisite to an applicant being able to mine. Id.

To date HRI has not secured aquifer exemptions under any UIC program for its proposed ISL operations on any site⁶.

Because HRI has not been issued aquifer exemptions for any of its proposed mining sites and is not guaranteed an aquifer exemption for any of those sites, HRI may never be able to use its materials license for part or all of its operations. Given that HRI may not be able to use part or all of its materials license, Intervenor share the Presiding Officer's concern about whether the present proceedings are the best use of the parties' and the NRC's resources. Before committing additional resources to the above-captioned proceedings, Intervenor believe this important policy question should be settled. Until this question is settled, the Commission should hold the above-captioned proceeding in abeyance.

V. CONCLUSION

For the foregoing reasons, Intervenor respectfully request that the Commission grant review of LBP-04-03 and reverse the decision with respect to the issue of whether the Licensing Board should have entertained arguments concerning HRI's pore volume estimates and attendant cost estimates. Intervenor further request that the Commission reconsider its policy of not requiring aquifer exemptions and underground injection

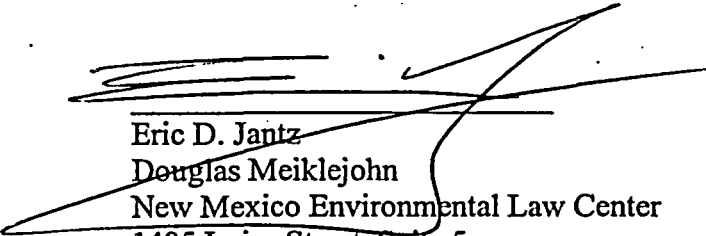
⁶ HRI purports to have a 1989 aquifer exemption for Section 8 issued by the state of New Mexico. Tr. at 198. However, the U.S. Court of Appeals for the Tenth Circuit was very clear that the jurisdiction to issue an aquifer exemption for Section 8 was disputed and the U.S. Environmental Protection Agency must make a determination about which agency has jurisdiction to issue an aquifer exemption. HRI, Inc. v. Environmental Protection Agency, 198 F.3d 1224, 1254 (10th Cir. 2000). Until such a determination is made, HRI does not have a valid aquifer exemption.

control permits prior to issuing source and byproduct materials licenses for ISL mines.

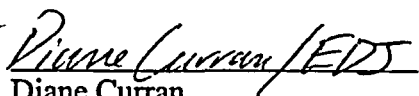
Should the Commission decide that such permits are required prior to issuance of a source and byproduct materials license, Intervenor request that the Commission place the above-captioned hearing in abeyance until HRI secures aquifer exemptions and UIC permits for all its proposed mine sites.

Dated March 18, 2004.

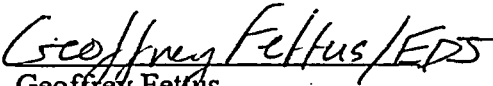
Respectfully Submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of

HYDRO RESOURCES, INC.
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Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Eastern Navajo Diné Against Uranium Mining And Southwest Research And Information Center's Petition For Review Of Memorandum And Order LBP-04-03 Ruling On Restoration Action Plan" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 18th day of March, 2004:

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March 18, 2004

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

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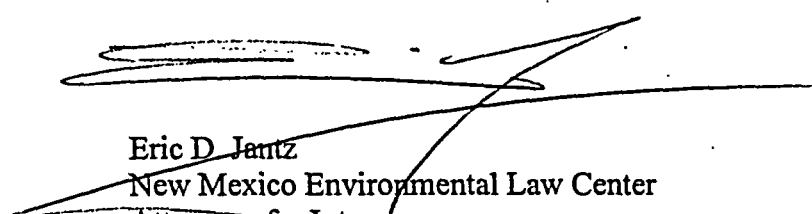
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find attached for filing Intervenor Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center's 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 attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022.
Thank you for your attention to this matter.

Sincerely,



Eric D. Jantz
New Mexico Environmental Law Center
Attorneys for Intervenor

Enclosures

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