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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

March 31, 2004 (11:11AM)

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

Pursuant to 10 C.F.R. § 2.1253 and § 2.786, Intervenors Eastern Navajo Diné  
Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center  
("SRIC") hereby submit their answer to Hydro Resources, Inc.'s ("HRI") Petition For  
Review Of Presiding Officer's Initial Decision Regarding Hydro Resources, Inc.'s  
Section 8 Restoration Plan (March 15, 2004) (hereinafter "HRI Petition"). HRI seeks  
reversal of LPB-04-03, Memorandum and Order (Ruling on Restoration Action Plan)  
(February 27, 2004). The Nuclear Regulatory Commission ("NRC" or "Commission")  
should deny HRI's Petition for Review because it is based on a misinterpretation of  
existing Nuclear Regulatory Commission Staff guidance, which needs no clarification.  
Additionally, HRI misreads the Presiding Officer's Memorandum and Order. Because of  
HRI's misinterpretation of Staff guidance and misreading of LBP-04-03, no policy  
question exists.

## I. FACTS AND SUMMARY OF DECISION

HRI obtained a source and byproduct material license for a proposed in situ leach (“ISL”) uranium mining operation on January 5, 1998, authorizing it to conduct ISL mining operations at four sites in Crownpoint and Church Rock within the Navajo Nation. Source and Byproduct Materials License SUA-1508. Intervenors ENDAUM and SRIC (collectively “Intervenors”) were granted leave to intervene in the above proceedings to challenge the license. LBP-98-9 at 38, 47 NRC 261 (May 13, 1998).

In CLI-00-08, the 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.<sup>1</sup> *Id.*, 51 NRC at 239 citing 10 C.F.R. Part 40, Appendix A, Criterion 9.

In response to CLI-00-08, HRI submitted a Restoration Action Plan (“RAP”) for Section 8 in Church Rock on November 21, 2000. As required by Criterion 9 of 10 C.F.R. Part 40, Appendix A (“Criterion 9”), the RAP provided, for the first time, a surety

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<sup>1</sup> 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.

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.

In their response to the RAP, Intervenors presented testimony evaluating the basis for HRI's cost estimates.<sup>2</sup> Intervenors argued, *inter alia*, that HRI underestimated the costs of restoration because it wrongly assumed that a third party contractor would use HRI's existing equipment and that a third party contractor's employees would wear "multiple hats" in decommissioning a mine site. Intervenors' Reply To The Responses Of Hydro Resources, Inc.'s And The NRC Staff's Restoration Action Plan Presentations Of January 22, 2001 And Information Generated Subsequent To Those Presentations, attachment B-3 (May 24, 2001); Intervenors' Response To Hydro Resources, Inc.'s Cost Estimates And Restoration Action Plan Of November 21, 2000 at 27 (December 21, 2000).

In LBP-04-03, the Presiding Officer held that HRI's cost estimates for decommissioning could not assume that a third party contractor would use HRI's major equipment. LBP-04-03, slip op. at 22. The Presiding Officer also held that in estimating its restoration and decommissioning costs, HRI could not assume that an third party contractor's employees would wear "multiple hats" in the course of decommissioning a

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<sup>2</sup> Intervenors' Response To Hydro Resources, Inc.'s Cost Estimates And Restoration Action Plan Of November 21, 2000. (December 21, 2000) (hereinafter "Intervenors' Response to RAP"); Exhibit 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenors' 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 Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000) (hereinafter "Abitz Testimony").

site. Id., slip op. at 25. Therefore, the Presiding Officer required HRI to revise its decommissioning cost estimates, in accordance with LBP-04-03, and submit them to the Staff for approval. Id., slip op. at 33-34.

### **III. HRI'S PETITION FOR REVIEW DOES NOT MEET THE COMMISSION'S STANDARDS FOR REVIEW.**

HRI contends that review is warranted because LBP-04-03 is "without governing precedent" and raises a "significant policy question". HRI Petition at 4-6, citing 10 C.F.R. §§786(b)(2) and (3). Neither of these arguments has merit. According to HRI, by precluding HRI from assuming that an independent contractor would use HRI's major equipment in cleaning up Section 8, the Presiding Officer ignored "generally accepted industry practices regarding financial assurance for ISL uranium mining facilities." HRI Petition at 5. Thus, HRI argues, LBP-04-03 is "without governing precedent". Id.

Similarly, HRI challenges the Presiding Officer's determination that in estimating decommissioning costs, HRI may not assume that an independent contractor's employees will "wear multiple hats", i.e., conduct more than one task in order to shave costs, is without governing precedent. Id. at 7. According to HRI, this decision is also inconsistent with "generally accepted industry practices," and is therefore "without governing precedent." Id. at 8.

Finally, HRI argues that both aspects of the Presiding Officer's decision should be reviewed as a matter of policy, because they would impose inappropriate costs on the struggling ISL industry. HRI Petition at 7, 9. HRI's arguments are without merit and its Petition for Review should be denied.

A. The Presiding Officer's Decision Is Governed By Precedent.

HRI's argues that the Presiding Officer's determination regarding an independent contractor's use of HRI's equipment and the costs of an independent contractor's labor is without governing precedent. HRI Petition at 4,8. The precedent guiding the Presiding Officer's decision on these issues, however, is clear.

1. Decision Regarding Cost Of Equipment.

As noted by the Presiding Officer in LBP-04-03, Criterion 9 "unequivocally" requires that decommissioning cost estimates must be based on decommissioning costs that would be incurred by an independent contractor, not the licensee. Id., slip op. at 22<sup>3</sup>. The question raised by HRI in its Petition is whether the Presiding Officer followed governing precedent in ruling that the estimate could not be based on an assumption that the independent contractor would use the licensee's own major equipment.

As recognized by HRI, the Standard Review Plan For In Situ Leach Uranium Extraction License Applications (2003) ("ISL SRP") specifically provides that equipment owned by the licensee should not be considered in the cost estimate in order to reduce cost estimates. HRI Petition at 5 citing ISL SRP at Appendix C, C-5. Thus, the NRC itself has established explicit guidance supporting the Presiding Officer's decision. HRI argues that the language of Appendix C is contradicted by § 6.5.3.4. of the ISL SRP, which recommends that "to the extent possible", a surety estimate should be based on

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<sup>3</sup> Criterion 9 provides, "In establishing specific surety arrangements, the licensee's cost estimates must take into account total costs that would be incurred if an **independent contractor** were hired to perform the decommissioning and reclamation work." 10 C.F.R., Part 40, Appendix A, Criterion 9, emphasis added.

“generally accepted industry practices.” This extremely general and conditional language, however, cannot reasonably be found to contradict the more explicit language in Appendix C. In fact, HRI’s argument is inconsistent with traditional rules of statutory interpretation, which provide that each part of a statute or regulation is to be given effect and all provisions are to be interpreted so that they do not conflict. In the Matter of Safety Light Corp., LPB-92-16A, 36 N.R.C. 18, 23 (July 17, 1992).<sup>4</sup> Thus, the “substantial” conflict between Appendix C and § 6.5.3.4 that HRI alleges simply does not exist. See, HRI Petition at 6.

Finally, the Presiding Officer explicitly considered the arguments made by HRI in its Petition, and rejected them as inconsistent with the purpose of Criterion 9:

Requiring a surety amount adequate to cover the costs of third party reclamation and decommissioning allows the NRC to mitigate the potentially devastating damages that could arise should a licensee become insolvent or abandon a site. Unlike the site-specific physical factors that are evaluated during the application process, the surety estimate, based upon the total costs of an independent contractor, is designed to eliminate the need to evaluate and predict the current and future financial status of each licensee and foresee the future physical condition of the licensee's reclamation equipment, or to discern and address the intricacies and vagaries of bankruptcy law. Arriving at this estimate without regard to a potential licensee's financial success or failures is essential to ensure that all sites are adequately protected.

LBP-04-03 slip op. at 21-22 (footnote omitted). The Presiding Officer also noted a specific case, cited by Intervenors, in which some equipment used to decommission a site

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<sup>4</sup> In the Matter of Safety Light Corp. dealt with principles of statutory interpretation applying to NRC regulations. 36 N.R.C. at 23. However, these same principles should apply to interpretation of regulatory guidance drafted by the NRC. Even if the Commission determines that the rules of statutory interpretation do not apply to NRC regulatory guidance, the Intervenors’ interpretation of NUREG-1659 should still prevail because it is more consistent and logical than the interpretation advanced by HRI.

in Wyoming was in need of repair. Id., n. 97. HRI has failed completely to explain where the fallacy lies in the Presiding Officer's reasoning.

2. Decision Concerning Labor Costs Using Site Personnel Wearing "Multiple Hats".

HRI contends that the Presiding Officer's determination that HRI decommissioning cost estimates cannot assume that an independent contractor's employees will work at multiple tasks is without precedent because it is contrary to generally accepted industry practices. HRI Petition at 8. However, HRI misreads the Presiding Officer's decision.

The Presiding Officer determined that the record did not support HRI's contention that in estimating decommissioning costs, HRI could assume that an independent contractor's employees would wear multiple hats. LPB-04-03, slip op. at 25. The Presiding Officer noted 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.

In contrast, Intervenors presented evidence that at other ISL operations an estimate that assumed single tasks for independent contractor employees was warranted. Transcript of November 8, 2001 informal hearing ("Tr.") at 345-346; see also LBP-04-03, slip op. at 19-20. There, an expert for Intervenors testified that her experience as an ISL regulator in Wyoming showed her that a cost estimate that did not assume that an independent contract contractor's employees would perform multiple tasks was reasonable and appropriate. Id. Therefore, the Presiding Officer's decision was based on

the regulatory experience in Wyoming, to which HRI offered no persuasive evidence to the contrary. HRI's contention that the Presiding Officer's decision is without precedent is meritless.

B. LBP-04-03 Does Not Present A Significant Policy Issue.

HRI argues that the Presiding Officer's decision that HRI's restoration and decommissioning cost estimates cannot assume that an independent contractor will use HRI's equipment raises a significant policy question because, taken to its logical extreme, the Presiding Officer's rationale would force every ISL licensee to calculate its surety estimate based on replacing all moveable equipment such vehicles. HRI Petition at 6. HRI contends that the Presiding Officer's decision would make uranium mining costs prohibitive and would make mandatory annual surety updates irrelevant. Id. at 6-7.

HRI's argument should be rejected, because it raises a specter that does not exist. As recognized in LBP-04-03, the decommissioning cost estimate may factor in the cost of leasing equipment, not necessarily replacing it. Id., slip op. at 22. Obviously, the cost of leasing equipment is both reasonable and considerably lower than the cost of replacing it. HRI completely fails to explain why making such an estimate would be impossible.

The Commission should also reject HRI's argument that the Presiding Officer's decision that its cost estimate for decommissioning Section could not assume that an independent contractor's employees would perform multiple tasks raises a significant policy question. HRI's Petition for Review at 9. HRI argues that if the Presiding Officer's decision is affirmed, all uranium recovery licensees will be forced to increase



their financial assurance to include the costs of an independent contractor's single tasking employees. Id.

It is too late for HRI to make this argument. The Presiding Officer based his decision on HRI's failure to offer any persuasive evidence to support its decommissioning cost estimates with respect to labor costs. LBP-04-03, slip op. at 25. In fact, the Presiding Officer makes the specific point that HRI "presented no cost estimates associated with an independent contractor performing any of the functions of decommissioning." Id. HRI does not cite to any part of the record where it raised the argument before the Presiding Officer that a decision to preclude HRI from assuming an independent contractor's employees will wear multiple hats will force all uranium mine operators to increase their financial assurance cost estimates. To allow HRI to obtain review, based on arguments not made before the Presiding Officer, would violate 10 C.F.R. § 2.786(b)(5)<sup>5</sup>.

Moreover, LBP-04-03 does not have policy implications for the entire ISL industry for the simple reason that the Presiding Officer did not make a determination on the merits of HRI's position. Thus, the Presiding Officer's decision was clearly based on the record of the above-captioned proceedings and is limited to HRI. It does not reflect a general interpretation of NRC policy. Other licensees and license applicants who satisfactorily support their cost estimates would not necessarily be required to increase their cost estimates to account for single tasking independent contractor employees.

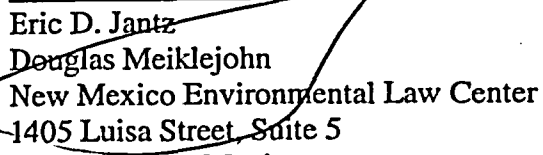
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<sup>5</sup> 10 C.F.R. § 2.786(b)(5) provides, "[a] petition for review will not be granted to the extent that it relies on matters that could have been but were not raised before the presiding officer."

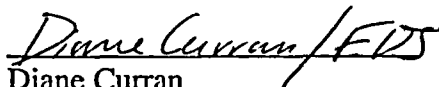
VI. CONCLUSION

For the foregoing reasons, Intervenor respectfully request the Commission deny HRI's Petition For Review of Presiding Officer's Initial Decision Regarding Hydro Resources Inc.'s Section 8 Restoration Action Plan.


Respectfully Submitted,



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	ASLBP No. 95-706-01-ML
(P.O. Box 15910	)	
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CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Eastern Navajo Diné Against Uranium Mining And Southwest Research And Information Center's Answer To Hydro Resources, Inc.'s Petition For Review Of Presiding Officer's Initial Decision Regarding Hydro Resources Inc.'s Section 8 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 25th day of March, 2004:

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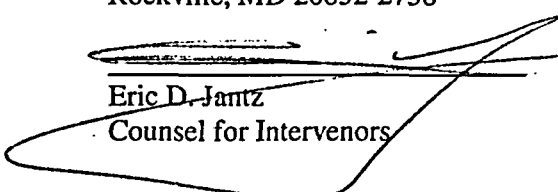
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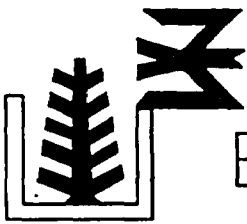
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Counsel for Intervenors



NEW MEXICO  
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March 25, 2004

**BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL**

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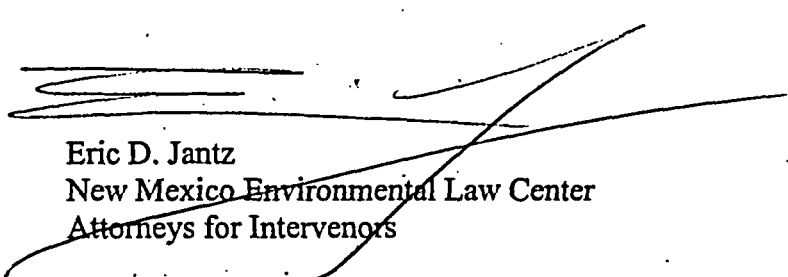
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find attached for filing Intervenors' Answer To Hydro Resources, Inc.'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 Intervenors

Enclosures

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