

April 12, 2004 (9:22AM)

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of:

Hydro Resources, Inc.

P.O. Box 777

Crownpoint, NM 87313

Docket No.: 40-8968-ML

Date: April 2, 2004

**HYDRO RESOURCES, INC.'S RESPONSE TO INTERVENORS' PETITION FOR
COMMISSION REVIEW**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenor's Petition for Commission Review regarding HRI's Nuclear Regulatory Commission (NRC) license to operate *in situ leach* (ISL) uranium mining facilities in New Mexico as part of HRI's Crownpoint Uranium Project (CUP). For the foregoing reasons, HRI respectfully requests that the Commission deny Intervenor's Petition for Commission Review for failure to demonstrate that the issues appealed meet the Commission's standard for review.

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 Intervenor's 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 addressing only the Section 8 portion of the CUP. The RAP and accompanying cost estimates were prepared by HRI personnel, who would be responsible for groundwater restoration at Section 8, based upon their personal experience implementing successful groundwater restoration at two 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 stated, *inter alia*, that (1) HRI’s nine pore volume estimate for groundwater restoration at Section 8 could not be challenged by Intervenor, because it already had been approved by the Licensing Board and affirmed, on appeal, by the Commission, and (2) that the Commission may wish to consider whether, as a matter of policy, NRC should docket and consider any ISL operating license prior to the issuance of aquifer exemptions from relevant authorities. *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Memorandum and Order: Ruling on Restoration Action Plan*, LBP-04-03, at 11 & 36, fn. 154 (February 27, 2004) (LBP-04-03). On March 18, 2004, Intervenor submitted, *via regular mail only*, a Petition for Commission Review requesting that the Presiding Officer’s decision should be reviewed, because it did not adequately consider Intervenor’s evidence regarding HRI’s pore volume estimate and because it

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

² *Id.*

presented a significant policy question. Pursuant to 10 CFR §§ 2.1253 and 2.786, HRI hereby submits this Response and respectfully requests that the Commission deny Intervenors' Petition for Commission Review for failure to demonstrate that the issues appealed meet the Commission's standard for review.

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).

III. ARGUMENT

A. Intervenor's Allegation that the Presiding Officer's Decision Fails to Adequately Consider Evidence Regarding HRI's Pore Volume Estimate Should be Precluded from Review Based on Collateral Estoppel

Intervenors' allegation that the Presiding Officer failed to consider evidence regarding HRI's pore volume estimate should be precluded from review by the doctrine of collateral estoppel. The doctrine of collateral estoppel precludes the re-litigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. *See Alabama Power Co. (Joseph M. Farley Nuclear Plant, Units 1 & 2)*, ALAB-182, 7 AEC 210, remanded on other grounds, CLI-74-12, 7 AEC 203 (1974). Principles of collateral estoppel may be applied in administrative adjudicatory proceedings. *See U.S. v. Utah Construction and Mining Co.*, 384 U.S. 394, 421-22 (1966). As in judicial proceedings, the purpose of the administrative repose doctrine "is to prevent continuing controversy over matters finally determined and to save the parties and boards the burden of re-litigating old issues." *See Carolina Power and Light Co. (Shearon Harris Nuclear Power Plant)*, ALAB-837, 23 NRC 525, 536 (1986).

Application of collateral estoppel traditionally requires the presence of four elements:

- (1) The issue sought to be precluded must be the same as that involved in the prior action,
- (2) The issue must have been actually litigated,
- (3) The issue must have been determined by a valid and final judgment, and
- (4) The determination must have been essential to that prior judgment.

See Carolina Power and Light Co. and North Carolina Eastern Municipal Power Agency (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986).

The prior tribunal also must have had jurisdiction to render the decision, and the party against whom the doctrine of collateral estoppel is asserted must have been a party to the earlier litigation. *See Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and*

2), LBP-85-11, 21 NRC 609-620 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986).

Intervenors' allege that "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.'" *See In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project) Intervenors' Petition for Review of Memorandum and Order LBP-04-03, Ruling on Restoration Action Plan, at 6 (March 18, 2004) (hereinafter "Intervenors' Petition for Review"). In support of their appeal, Intervenors claim that "HRI...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...." *Id.* at 2 (emphasis added). According to Intervenors, this leads to the conclusion that "HRI did not make any attempt to justify its nine pore volume estimate until it submitted the section 8 RAP [restoration action plan] on November 21, 2000." *Id.* at 6.

In the instant case, Intervenors attempt to equate the *technical adequacy* of HRI's pore volume estimate with the financial bases for estimating the cost of groundwater restoration at Section 8, in which the number of pore volumes plays a significant role. Thus, Intervenors' allegations regarding the adequacy of HRI's pore volume estimate is nothing more than a somewhat disingenuous attempt to re-litigate the Commission's *final* decision regarding that issue and, as such, should be barred by collateral estoppel.

Applying the traditional standard for collateral estoppel demonstrates that, as a matter of law, Intervenors' allegations regarding HRI's pore volume estimate should be precluded from review. First, Intervenors seek to re-litigate the Commission's affirmance of Judge Bloch's ruling that HRI's nine pore volume estimate was adequate. In LBP-99-13, Judge Peter Bloch held that "[t]here is no merit to Intervenors' argument that the Staff improperly utilizes 9 pore volumes as a standard for calculating the amount of surety that is required

before commencing operations.” *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), LBP-99-13, 49 NRC 233, *7 (March 9, 1999). The Commission affirmed Judge Bloch’s decision in CLI-00-08 by stating, “[w]e interpret the Presiding Officer’s language...merely as a finding that intervenors’ analysis and expert testimony were not as convincing as those of the staff on the issue of groundwater restoration.” *In the Matter of Hydro Resources, Inc.*, CLI-00-08, 51 NRC 227, *28-29 (May 25, 2000). Thus, based on this conclusion, the Commission affirmed Judge Bloch’s finding that NRC Staff’s conclusion that nine pore volumes was an adequate estimate of the number of pore volumes required for groundwater restoration at the Section 8 site. *Id.* at *29. Therefore, Intervenor’s attempt to re-litigate the NRC Staff/Licensing Board-approved pore volume estimate, that was affirmed by the Commission in CLI-00-08, meets the first prong of the collateral estoppel standard.

Intervenor was given a full and fair opportunity to present written arguments and expert testimony regarding the *technical adequacy* of the nine pore volume estimate in LBP-99-13 and CLI-00-08. Indeed, as noted by the Presiding Officer, “the Intervenor *attacked* the 9 pore volume standard by arguing the standard was established for the convenience of the applicant rather than based on technical support,” and presented the alleged expert testimony of Dr. Sheehan arguing that HRI’s pore volume estimate was inadequate. LBP-04-03 at 12, fn 46 (emphasis added). After consideration of Intervenor’s arguments, as well as HRI’s and NRC Staff’s responses, Judge Bloch determined that HRI’s nine pore volume estimate was adequate. The Commission affirmed and specifically addressed Intervenor’s “expert” testimony, on appeal, stating, “we agree with the Presiding Officer that Dr. Sheehan’s testimony is unconvincing.” CLI-00-08 at *28. Thus, Intervenor’s allegations meet the second prong of the collateral estoppel standard.

HRI’s pore volume estimate was determined by a valid and final judgment before a tribunal of competent jurisdiction (i.e., the Commission). Judge Bloch’s decision was

appealed to the Commission by Intervenor and, on the basis of the record and the appellate briefs, the Commission found that there was no reason to disturb Judge Bloch's finding that HRI's nine pore volume estimate was adequate. *See generally* CLI-00-08. Even though the Commission remanded certain issues to the Licensing Board, the *technical adequacy* HRI's pore volume estimate was *technically* adequate was *not* remanded to the Licensing Board for further consideration. In fact, the Commission's decision in CLI-00-08 specifically states, "it makes a good deal of policy sense...for the NRC to consider a license applicant's *cost estimates for cleaning up the mining site, and its plan to pay for cleanup*, prior to issuing a license." *Id.* at *23 (emphasis added).³ Thus, the *technical adequacy* of HRI's nine pore volume estimate was the subject of a *valid* and *final* judgment and was not included in the *financial cost estimate* issue remanded to the Licensing Board for further consideration. Therefore, the Commission's affirmance of HRI's nine pore volume estimate was a *valid* and *final* judgment.

The Commission's affirmance of HRI's nine pore volume estimate was essential for HRI to comply with the Commission's decision in CLI-00-08 to submit a RAP for Section 8, given that this estimate plays a significant role in the cost estimate upon which HRI's surety is to be based. In CLI-00-08, the Commission set forth a detailed filing schedule whereby HRI was required to submit RAPs for each of its proposed mining sites for NRC Staff's consideration. *See* CLI-00-08 at *23. If NRC Staff determined that HRI's RAPs were sufficient, Intervenor could then challenge that determination. *See id.* To provide detailed cost estimates for the required RAPs, HRI had to rely on an *approved, technically adequate*

³ It is worth noting that the Presiding Officer has stated that, "to whatever degree the Intervenor may not have had an opportunity to fully litigate, they failed properly to appeal this matter to the Commission." LBP-04-03 at *28. On the basis of fundamental fairness, HRI should not be required to expend time and financial resources re-litigating its pore volume estimate due to the failure of Intervenor to properly appeal this matter to the Commission almost five (5) years ago.

pore volume estimate to calculate the required financial assurance amount and to construct a detailed plan for conducting groundwater restoration for NRC Staff's review.⁴ Without an *approved, technically adequate* pore volume estimate, HRI's RAPs would have been based on an estimate that was still subject to scrutiny. Based on this, the Commission likely would have remanded that estimate to the Licensing Board for further review prior to requesting that HRI submit RAPs and cost estimates.

Finally, for purposes of an NRC licensing proceeding under the Atomic Energy Act of 1954, as amended, the Commission is a competent tribunal with jurisdiction over the issues appealed in CLI-00-08. Therefore, since Intervenor's appeal of HRI's nine pore volume estimate satisfies the requirements for collateral estoppel, as a matter of law, the Commission should bar Intervenor's request to appeal HRI's nine pore volume estimate. In any event, as stated by the Presiding Officer below, "[a]s a practical matter...completion of the required commercial demonstration at Section 8...will moot any challenge to the pore volume estimate because it will provide a pore volume number based on the best possible, site-specific data." *Id.* Due to the requirement in HRI's NRC license that a commercial demonstration project must be performed,⁵ NRC will have the opportunity to adjust HRI's pore volume estimate, as necessary, to assure adequate protection of public health and safety and the environment as part of an annual surety review.⁶ As a result, the Presiding Officer correctly concluded that, "any potential unfairness to the Intervenor can be cured [as necessary] without now re-visiting the Commission's decision in CLI-00-08 affirming the 9 pore volume standard." *Id.*

⁴ It is worth noting that the Presiding Officer below has stated, "[t]he Commission has ruled that 9 pore volumes are sufficient with respect to Section 8, thus closing the door to any further challenge to the underlying technical issues concerning the 9 pore volumes here." *See* LBP-04-03 at 12, fn 46.

⁵ *See* SUA-1508, License Condition 10.28.

⁶ *See* License Condition 9.5.

B. Intervenor's Claim that LBP-04-03 Raises An Important Policy Question Regarding the Issuance of Aquifer Exemptions Does Not Warrant Commission Review

Intervenors' allegation in Section IIB of their brief addresses the issue of whether, as a matter of policy, NRC should docket and consider an ISL license application prior to the issuance of necessary aquifer exemptions for ISL mining sites per the Presiding Officer's opinion in LBP-04-03. *See* Intervenor's Petition for Review at 8; *see also* LBP-04-03 at 36, fn 154. Intervenor's assert that this issue should be decided by the Commission before any further proceedings are conducted regarding HRI's proposed mining sites.⁷ *Id.* at 8-9.

At the time HRI's license application was docketed and considered, NRC's existing policies and guidance permitted potential ISL license applicants to seek an NRC license prior to receiving necessary aquifer exemptions. It would be unfair and impractical at this stage of HRI's licensing activities to change such policies and guidance. Whatever the Commission decides to do in the future with respect to its procedures for docketing and considering ISL license applications, applying such a decision to HRI in this proceeding would be grossly unfair and prejudicial.⁸

The instant case is analogous to CLI-00-08 where the Commission noted that, "[t]he NRC Staff's error in issuing HRI a license prematurely was 'procedural'" and that a potential remedy would be to invalidate HRI's license. CLI-00-08 at *22. Instead of imposing an

⁷ HRI notes for the record that it would be an interesting legal question as to whether NRC can refuse to entertain a license application pending decisions regarding activities over which NRC has no jurisdiction. Indeed, the Commission has held that an NRC adjudication is not the proper forum in which to litigate jurisdictional questions pertaining to underground injection control (UIC) permits. *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, CLI-98-16, 48 NRC 119, 120-22 & fn 2-3 (1998).

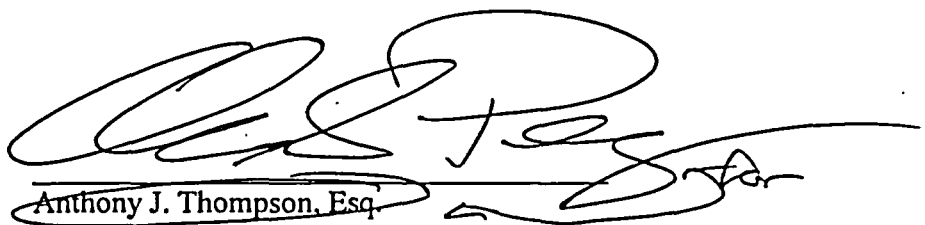
⁸ The decision from the United States Court of Appeals for the 10th Circuit referenced by the Presiding Officer in LBP-04-03, to the contrary notwithstanding, no aquifer exemption, whether pursuant to a delegated-State program or not, is valid without Environmental Protection Agency (EPA) approval, and there are no provisions in relevant law or EPA regulations that provide for revocation of an aquifer exemption once granted. *See* LBP-04-03 at 36, fn. 154.

unreasonably harsh remedy, the Commission fashioned a sensible remedy by conditioning HRI's license on the successful approval of its RAPs for each mining site. *Id.* at *21-22. Should the Commission review Intervenor's claim and decide to cease all litigation activities below, HRI potentially may have wasted considerable time and valuable financial resources litigating its license based on NRC Staff's allegedly "premature" decision to issue HRI a license if appropriate aquifer exemptions cannot be obtained. HRI should be permitted to litigate the remaining issues regarding its mining sites and proactively assume the risk that it cannot obtain appropriate aquifer exemptions in the future. As noted above, the Commission refused to penalize HRI for NRC Staff's actions by invalidating its license, and penalizing HRI now for the same NRC Staff action would fly in the face of the flexibility demonstrated by the Commission in CLI-00-08. Thus, Intervenor's claim that the Commission's policies regarding the docketing and consideration of ISL license applications prior to the issuance of aquifer exemptions raises an important policy question does not warrant Commission review.

III. CONCLUSION

For the reasons described above, HRI respectfully requests that the Commission deny Intervenor's Petition for Commission Review for failure to demonstrate that the issues appealed meet the Commission's standard for review.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, likely belonging to Christopher S. Pugsley, is written over the typed name and address.

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COUNSEL FOR HYDRO RESOURCES, INC.

**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: April 2, 2004
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Amended 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 2nd day of April, 2004.

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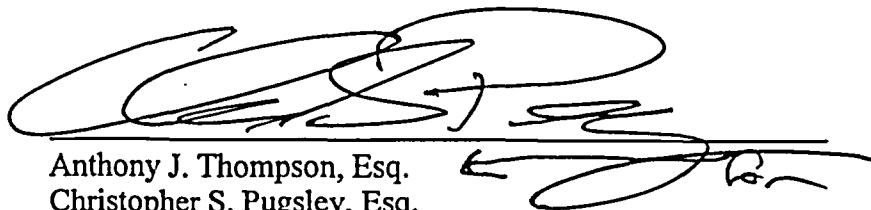
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April 2, 2004

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

U.S. Nuclear Regulatory Commission
Office of the Secretary
Attn: Rulemaking and Adjudications Staff
Mail Stop: OWFN-16C1
Washington, DC 20555

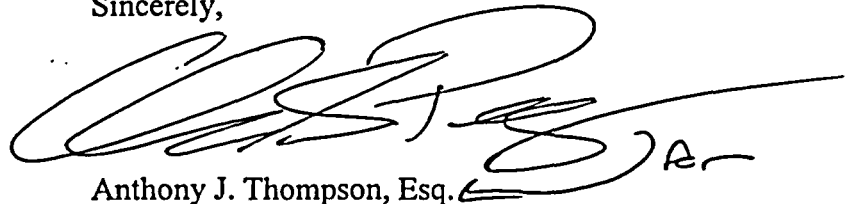
Re: In the Matter of: Hydro Resources, Inc.
Docket No: 40-8968-ML
ASLBP No: 95-706-01-ML

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Petition for Commission Review 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,

A large, stylized handwritten signature in black ink, appearing to read 'AJT' followed by a flourish.

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)