

RAS 7528

March 30, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

BEFORE THE COMMISSION

March 31, 2004 (11:11AM)

In the Matter of )  
 )  
HYDRO RESOURCES, INC. )  
P.O. Box 777 )  
Crownpoint, NM 87313 )

OFFICE OF SECRETARY  
Docket No. 40-8968-MIRULEMAKINGS AND  
ADJUDICATIONS STAFF

NRC STAFF'S ANSWER TO HRI'S PETITION TO REVIEW LBP-04-03

INTRODUCTION

On March 15, 2004, Hydro Resources, Inc. (HRI) submitted a "Petition For Review of Presiding Officer's Initial Decision Regarding [HRI's] Section 8 Restoration Action Plan" (HRI Petition), requesting the Commission to review LBP-04-03, issued on February 27, 2004. The Staff files this answer, pursuant to 10 C.F.R. § 2.786(b)(3),<sup>1</sup> in support of the HRI Petition.

BACKGROUND

In its decision four years ago on financial assurance issues in this proceeding, the Commission found that the applicable regulation -- 10 C.F.R. Part 40, Appendix A, Criterion 9 -- required HRI to submit its financial assurance plans for NRC Staff review and approval before HRI would be permitted to use its 10 C.F.R. Part 40 materials license (SUA-1508) to perform *in situ* leach (ISL) uranium mining. See CLI-00-8, 51 NRC 227, 237-42 (2000). In its remand decision, the Commission directed HRI to "submit a decontamination, decommissioning, and reclamation plan with cost estimates on which a surety will be based." *Id.*, at 242. Accordingly, on November 21, 2000, HRI submitted what it termed its "Restoration Action Plan" (RAP) for Church Rock Section 8 (its initial intended mining site), containing the requested information.

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<sup>1</sup> The citation to 10 C.F.R. § 2.786(b)(3) is to the regulation in effect prior to the recent revision of the NRC's Rules of Practice in 10 C.F.R. Part 2, which became effective February 13, 2004. Because this proceeding commenced prior to the effective date of the revision, the former Part 2 rules still apply, and the former sections are referenced throughout this brief.

In March 2001, HRI submitted an amended RAP for Section 8. This amended RAP was approved by the Staff on April 16, 2001. Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"), challenged the adequacy of the Section 8 RAP, and in May 2001 were allowed to submit a second written presentation alleging deficiencies in the amended Section 8 RAP.

Following an extended unsuccessful effort to reach a settlement, LBP-04-03 was issued, finding certain deficiencies in the amended Section 8 RAP. Insofar as is relevant to the HRI Petition, the Presiding Officer ruled in Section II F(1) of LBP-04-03, that 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 would incur in decommissioning Section 8, if said contractors did not use HRI's equipment. See LBP-04-03, slip op. at 19-23. The Presiding Officer further ruled, in Section II F(2), that HRI improperly assumed, in deriving its cost estimates, that an independent contractor's laborers would be able to handle multiple tasks in restoring the Section 8 site. *Id.*, at 25-26.

## DISCUSSION

### I. Legal Standards Governing Petitions to Review Presiding Officer Decisions

Pursuant to 10 C.F.R. § 2.786(b)(1), "a party may file a petition for review with the Commission" within fifteen (15) days after service of a full or partial initial decision by a Presiding Officer. A petition for review under this provision must contain the following:

- (1) A concise summary of the decision or action of which review is sought;
- (2) A statement (including record citation) where the matters of fact or law raised in the petition for review were previously raised before the presiding officer and, if they were not why they could not have been raised;
- (3) A concise statement why in the petitioner's view the decision or action is erroneous; and
- (4) A concise statement why Commission review should be exercised.

10 C.F.R. § 2.786(b)(2)(i-iv). As a matter of its discretion, the Commission may grant review of Presiding Officer decisions based on whether a “substantial question” exists regarding 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;
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 C.F.R. § 2.786(b)(4)(i-v); *see also Northeast Nuclear Energy Co.* (Millstone Nuclear Power Station, Unit 3), CLI-01-3, 53 NRC 22, 28 (2001). These standards are incorporated into Subpart L proceedings by 10 C.F.R. § 2.1253. *See Babcock and Wilcox* (Pennsylvania Nuclear Services Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).

II. Review of LBP-04-03

A. Section II.F(1) of LBP-04-03

HRI seeks review of LBP-04-03's Section II.F(1), “Credit For Existing On-site Equipment.” *See HRI’s Petition*, at 4-7 (arguing that this portion of LBP-04-03 is not consistent with generally accepted industry practices, and fails to specify what is meant by “major equipment”). In finding that portions of the Section 8 RAP improperly rely on estimates of what it would cost HRI to decommission its site -- rather than on what it would cost an independent contractor -- the Presiding Officer ruled as follows:

HRI must submit an amended RAP, for NRC Staff approval, that provides the costs of decommissioning based upon the averaged estimates of two or more independent contractors to decommission and restore the site. In determining such costs, it cannot be assumed that the major equipment necessary for decommissioning is available, and therefore, the revised estimates for the surety should account for the cost of at least leasing the major equipment. Basing the surety on the averaged cost of two or more independent contractors and factoring in the cost of leasing the equipment meets fully the requirements of Criterion 9 by

ensuring that appropriate funds for site decommissioning are not subject to the vagaries of the bankruptcy law or a host of other unforeseen circumstances.

LBP-04-03, slip op. at 22-23. As discussed below, because this ruling imposes requirements which are not supported by the terms of Criterion 9 of 10 C.F.R. Part 40, Appendix A, and because it departs from the framework for resolving financial assurance issues set forth in CLI-00-8, the Staff supports Section III.A of HRI's Petition.

In its discussion of financial assurance issues, the Commission stated that Criterion 9 is ambiguous on timing questions pertaining to when HRI -- in the context of a licensing hearing -- had to submit its financial assurance plans for NRC Staff review and approval. See CLI-00-8, 51 NRC at 237-38. In remanding the case, the Commission clarified these timing issues to allow this proceeding "to reach an orderly conclusion," and laid out "the framework for Intervenor's pursuit of a hearing on financial assurance plan issues." *Id.* at 238. In doing so, the Commission did not impose on HRI the types of additional financial assurance requirements set forth in the Presiding Officer's above-quoted ruling. For example, CLI-00-8 did not dictate how, pursuant to Criterion 9, the cost estimates were to be determined.<sup>2</sup> Rather, the Commission found Criterion 9 to be "clear enough" on what HRI must ultimately provide to demonstrate financial assurance, "*i.e.*, a financial assurance plan, including cost estimates," as well as "an actual surety arrangement based on the cost estimates." *Id.*, at 237.<sup>3</sup>

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<sup>2</sup> The Staff views this lack of specific direction on how cost estimates were to be determined as being consistent with the Commission's earlier ruling in this proceeding approving performance-based licensing for ISL uranium mining, wherein the Commission noted its efforts over the years "to allow reasonable flexibility in its regulatory framework." CLI-99-22, 50 NRC 3, 16 (1999).

<sup>3</sup> As to the surety arrangement itself, the Commission made clear that, based on Criterion 9's terms, it need not be submitted for approval until after completion of the licensing hearing. This is because a surety arrangement is a prerequisite to operating, rather than a prerequisite to licensing. See CLI-00-8, 51 NRC at 240 n. 15. In approving the Section 8 RAP, the Staff told HRI that before any ISL mining occurs on Section 8, an updated RAP must be submitted and approved as part of establishing the NRC-approved surety arrangement, pursuant to License Condition 9.5. Staff letter to HRI dated April 16, 2001, at 1.

In accordance with the Commission's decision, HRI submitted its Section 8 RAP -- including its financial assurance plan with cost estimates -- and, as indicated above, the NRC Staff approved the Section 8 RAP's cost estimates in April, 2001, finding them acceptable "for the decontamination, decommissioning, and restoration" of the first well field to be developed at Section 8. Staff letter to HRI dated April 16, 2001, at 2. The Staff submits that its approval of HRI's cost estimates is consistent with CLI-00-8, and that the Presiding Officer's cost estimate findings depart from the Commission's "framework" for resolving financial assurance plan issues in this remanded proceeding. CLI-00-8, 51 NRC at 238.

Additionally, the above-quoted ruling is not consistent with the terms of Criterion 9, as it imports into Criterion 9 stricter standards than its stated terms support. In establishing a surety amount, Criterion 9 requires that the cost estimates take into account the "total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work." The Presiding Officer based his above-quoted ruling on this "plain language" in Criterion 9. LBP-04-03, slip op. at 23. But the Presiding Officer identifies no basis for construing this requirement to mean that HRI must base its initial surety amount on the "averaged estimates of two or more independent contractors." Nor is any basis identified which supports a requirement that HRI revise its Staff-approved estimate for the Section 8 surety by showing how much it would cost to lease the "major equipment" needed to decommission Section 8. LBP-04-03, slip op. at 22. On its face, Criterion 9 requires neither factoring in the cost of leasing equipment, nor the use of estimates from two or more independent contractors, in determining whether the surety cost estimates are appropriate. If these additional requirements are to be read into Criterion 9, such action should be based on a Commission decision. Moreover, if there is a need to modify or supplement the requirements in Criterion 9, the appropriate way to accomplish this is through a rulemaking pursuant to the Administrative Procedure Act. See 5 U.S.C. § 553.

Furthermore, the Presiding Officer does not make clear what his use of the term "major equipment" covers. The issue of on-site equipment was briefly addressed by the Staff on November 8, 2001, during a transcribed session<sup>4</sup> held to answer the Presiding Officer's questions pertaining to HRI's Section 8 RAP. In response to a question, the Staff stated that in its review of the Section 8 RAP, it assumed<sup>5</sup> that all major equipment used during HRI's operation on the site would still be there during any site restoration, and that such equipment "would not be stripped out, taken away, [so that] an independent contractor would have to buy a whole new set." Tr., at 326. On this point, an HRI representative had earlier stated that, at least with respect to the brine concentrator, this piece of equipment would "stay with the site" even if HRI should "disappear and the NRC have to get a contractor to clean the site up." Tr., at 323. The requirement that HRI revise its Staff-approved estimate for the Section 8 surety by showing how much it would cost to lease the "major equipment" needed to decommission Section 8 is contrary to this November 8, 2001 hearing record. Moreover, given the recognition that Criterion 9 already contains ambiguities (see CLI-00-8, 51 NRC 227, at 239 and n. 12), introducing additional uncertainty in this area should be avoided.

Similarly, justifying imposition of these new requirements as a means of avoiding "the vagaries of the bankruptcy law or a host of other unforeseen circumstances" (LBP-04-03, slip op. at 22-23) imports into Criterion 9 considerations which are evident in neither its terms, nor the stated reasons underlying its adoption as an NRC requirement.

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<sup>4</sup> The Presiding Officer references the November 8 transcript in LB-04-03, slip op. at 19-21, and nn. 86-96.

<sup>5</sup> The Staff's reliance on assumptions is supported by the Staff's 1988 branch technical position "Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-Term Surveillance and Control of Uranium Recovery Facilities" (portions of which were read into the record by HRI counsel), stating that the "staff will consider financial assurances on a case-by-case basis," based in part on unit "costs, calculations, references and assumptions on equipment and operator efficiencies" provided by the applicant. Tr., at 336.

Accordingly, the Staff believes that review of the above-quoted ruling in LBP-04-03 is warranted, pursuant to 10 C.F.R. § 2.786(b)(4)(ii). The ruling is not supported by the governing precedent provided by CLI-00-8, departs from the terms of Criterion 9, and is contrary to the hearing record.

B. Section II.F(2) of LBP-04-03

HRI further seeks review of a portion of LBP-04-03's Section II.F(2) discussion of "Labor Costs." See HRI's Petition, at 7-9. Specifically, HRI takes issue with the following ruling that, in estimating the costs of an independent contractor performing ISL site reclamation work, HRI improperly assumed that the laborers would be able to handle multiple tasks:

... [T]he current record does not support HRI's decision to require employees to wear "multiple hats" to decrease the costs of decommissioning as being in accord with the requirements of Criterion 9. ... HRI, however, 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. ... Accordingly, the labor cost estimates of the current RAP cannot be accepted.

LBP-04-03, slip op. at 25 (footnote omitted). As discussed below, the above-quoted ruling on labor costs raises a substantial and important question of policy and discretion pertaining to the proper implementation of the NRC's financial assurance requirements. Review of this portion of LBP-04-03 is thus warranted, pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

As it now stands, this ruling would effectively require reliance on the unfounded assumption that labor at an ISL well field would be used inefficiently. The hearing record does not support such a result. In the Section 8 RAP approved by the Staff, HRI states as follows:

... HRI assumed employment of technical professionals whose expertise is needed on a limited basis during the restoration mode. ... However, to justify their full time status and utilize their time on the job, it is assumed that they are required to provide a multitude of services, i.e., every employee will be wearing multiple hats. As such, individual job descriptions are difficult. For example, in the restoration mode, a qualified geologist will be required to verify the configuration of restoration patterns to assure efficient results. While this task requires unique geological expertise, the time commitment by the geologist to this task may only be several hours per week. Therefore, to maximize the use of the

geologist[s] time, he or she will be assigned to many other tasks for which he or she will be qualified such as lab analyst, well sampler, and plant operator.

Church Rock Section 8/Crownpoint Process Plant Restoration Action Plan (Nov. 17, 2000, as revised March 16, 2001), at E-2(d). During the November 2001 question-and-answer session, the Staff stated that in approving the Section 8 RAP, it found HRI's estimated labor costs to be reasonable, and that in doing so the Staff did not assume that an independent contractor would assign different individuals to each separate decommissioning task. *See* Tr. at 344-45. As further support on this point, the Staff cited ISL industry experience at the Bison Basin, Wyoming, ISL mining site, where the independent contractor hired to clean up the abandoned site was led by a former Bison Basin employee. *Id.*, at 349. Given the reasonable assumption that such restoration situations will involve laborers already familiar with the site, one would not expect "to have one guy just sitting out there turning a well field valve and then not do something else." *Id.*, at 350.

The Staff submits that it would be unsound regulatory policy to factor in, as part of estimating ISL surety costs, the inefficient use of well field labor. In approving the Section 8 RAP's estimated labor costs, the Staff properly exercised its discretion and judgment, based on its knowledge of ISL industry practice. Moreover, neither the terms of Criterion 9, nor the stated reasons underlying its adoption as an NRC requirement, support the result reached by the Presiding Officer. Accordingly, the Staff supports Section III.B of HRI's Petition, which should be granted pursuant to 10 C.F.R. § 2.786(b)(4)(iii).

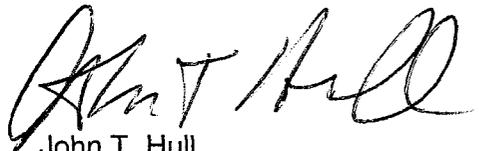
CONCLUSION

For the reasons stated above, the Staff supports the HRI Petition requesting that the Commission review LBP-04-03.

Respectfully submitted,



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Dated at Rockville, Maryland  
this 30<sup>th</sup> day of March, 2004

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of )  
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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO HRI'S PETITION TO REVIEW LBP-04-03" in the above-captioned proceeding have been served on the following persons this 30th day of March, 2004, by deposit into the U.S. Mail, first class (or as indicated by an asterisk, through the Nuclear Regulatory Commission's internal mail system), and by electronic mail (except as indicated by a double asterisk).

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