UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

RAS 7808

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COMMISSIONERS:

SERVED 05/20/04

Nils J. Diaz, Chairman
Edward McGaffigan, Jr.
Jeffrey S. Merrifield

In the Matter of	)	
HYDRO RESOURCES, INC. (P.O. Box 15910 Rio Rancho, NM 87174)	)	Docket No. 40-8968-ML

CLI-04-14

MEMORANDUM AND ORDER

I. Introduction

This long-pending adjudicatory proceeding concerns a license for a proposed multiple-site *in situ* leach mining project in New Mexico that was issued to Hydro Resources, Inc. (HRI). In this proceeding initiated under 10 C.F.R. Part 2, Subpart L,[1] several intervenors challenge the validity of the license. The proceeding was held in abeyance for approximately two years pending unsuccessful settlement negotiations, and resumed last year. Recently, the Presiding Officer issued LBP-04-03, a financial assurance decision on the HRI Restoration Action Plan for the Church Rock Section 8 site. Currently before the Commission are two petitions for review of LBP-04-03, one filed by HRI and the other by the intervenors Eastern Navajo Diné Against

[1] The NRC recently amended its adjudicatory procedural rules in 10 C.F.R. Part 2. *See* Final Rule, "Changes to Adjudicatory Process," 69 Fed. Reg. 2182 (Jan. 14, 2004). The new procedural rules apply only to proceedings noticed on or after February 13, 2004, and therefore do not apply to this proceeding.

Uranium Mining (ENDAUM) and the Southwest Research and Information Center (SRIC). In this decision, we consider and grant both petitions for review.

II. Discussion

HRI's petition seeks Commission review of Presiding Officer findings on HRI's labor and equipment cost estimates. The Presiding Officer found that HRI's financial estimates should not have assumed that an independent contractor would have laborers capable of performing multiple functions (wearing "multiple hats"). He also found that HRI should not have assumed that "major" on-site equipment owned by HRI would remain available for an independent contractor to use for decommissioning activities in the event HRI were to abandon the project prior to the site's restoration. The NRC staff supports HRI's petition for review. The intervenors oppose it.

The Commission believes that the labor and equipment issues warrant review. Both issues present important questions on the proper interpretation and application of 10 C.F.R. Part 40, Appendix A, Criterion 9, which requires licensee decommissioning cost estimates to "take into account" the costs that would be incurred "if an independent contractor were hired to perform the decommissioning and reclamation work." The equipment availability issue also involves questions of creditor rights that have not been explored. Moreover, the Presiding Officer's call for new cost estimates (by two or more independent contractors) that are to include the costs of all "major equipment" necessary for decommissioning appears ill-defined and thus open to different interpretations. Nor is it obvious to the Commission, from what we have seen of the record, why HRI cannot assume that an independent contractor may have personnel that perform related albeit distinct functions. The more precise pertinent inquiry would seem to be whether the proposed labor categories appear reasonably sufficient in

number (*e.g.*, person hours) and expertise for the proposed restoration tasks and volume of restoration work. The Commission believes that the record on the labor and equipment issues merits further consideration and would benefit from further briefing. We therefore grant review of HRI's petition.

Intervenors ENDAUM and SRIC also seek review of LBP-04-03 based on two grounds. First, they challenge the Presiding Officer's "refus[al] to consider [their] evidence on the adequacy of HRI's pore volume estimate."[2] A "pore volume" is a term used by the *in situ* leach mining industry to "describe the quantity of free water in the pores of a given volume of rock." [3] It is used as a "unit of reference that a miner can use to describe the amount of circulation that is needed to leach an ore body, or [to] describe the [number of] times water must be flowed through a quantity of depleted ore to achieve restoration."[4] The intervenors seek to challenge the Restoration Action Plan's estimate of the number of pore volumes that will be necessary for restoration.

In LBP-04-03, the Presiding Officer found that the pore volume issue already has been litigated earlier in this proceeding. The Presiding Officer ruled that "[b]ecause this [pore volume] issue has been affirmed by the Commission, any challenges must be directed to the Commission and cannot be raised here."[5] HRI and the NRC staff agree that the pore volume issue has been fully litigated and resolved. They therefore oppose the intervenors' petition for review.

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[2] Intervenors ENDAUM and SRIC's Petition for Review of Memorandum and Order LBP-04-04, Ruling on Restoration Action Plan (Mar. 18, 2004)("Intervenor Petition" at 6).

[3] HRI Restoration Action Plan at E-2a.

[4] *Id.*

[5] LBP-04-03, slip op. at 9 (referencing the financial assurance decisions in LBP-99-13, 49 NRC 233 (1999) and CLI-00-08, 51 NRC 227 (2000)).

A look at the record confirms that the intervenors did in fact previously raise a challenge to HRI's pore volume estimate, not only in their financial assurance briefs but also, and *primarily*, in their briefs on technical groundwater claims. In their review petition, however, the intervenors stress that HRI's Restoration Action Plan, filed *after* relevant Presiding Officer and Commission rulings on pore volumes, provided "for the first time, [HRI's] rationale for ... the number of 'pore volumes' of water that will be required to be flushed through the aquifer to achieve restoration standards after mining is completed."[6] The intervenors insist that prior to submission of the Restoration Action Plan, HRI never made "any attempt to justify its nine pore volume estimate," and therefore that any prior rulings on pore volumes were made on an "admittedly incomplete and legally infirm record," which should not be held to prevent the intervenors from challenging new information presented later by HRI .[7] As an example of the new information, said to have been made available for the first time in the Restoration Action Plan, the intervenors point to Attachment E-2-1 of HRI's Plan.[8]

Based on our preliminary review of the record, however, it is unclear what information from Attachment E-2-1, if any, was not already available in the record and thus subject to challenge -- in either the groundwater or financial assurance portions of the proceeding (or both) -- long before HRI filed its Restoration Action Plan.[9] Yet due to the complexity and disjointed nature of the case record on the pore volumes issue, the Commission believes that a close look at the record is warranted. We therefore grant the intervenors' petition for review.

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[6] Intervenor Petition at 2-3.

[7] *See id.* at 6-7.

[8] *Id.* at 3.

[9] *See, e.g.*, HRI's Response to Intervenors' Brief in Opposition to HRI's Application for a Materials License with Respect to Groundwater Issues (Feb. 19, 1999), Exh. 1, Pelizza Affidavit at 12-14, and Exh. 1, Pelizza Aff., Attachment 3, Church Rock Pore Volume Calculation.

Our review will be focused, however, on the limited question of whether there is any significant issue on pore volumes that the intervenors reasonably could not have raised before HRI filed its Plan.

In short, the intervenors already have challenged HRI's nine pore volume estimate in both the financial assurance and technical groundwater portions of this proceeding. They clearly are not entitled now to an additional opportunity to raise arguments that either have been or *could have been* raised previously. Briefs on review therefore should focus on this point.

The intervenors' petition also claims that review is warranted because in LBP-04-03 the Presiding Officer raised a significant policy question. Specifically, the Presiding Officer suggested that because HRI might never obtain required aquifer exemptions, the NRC and the parties might squander resources in proceeding with this lengthy and complex litigation. He therefore proposed that the Commission "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, a license amendment application, or a renewal application for a Part 40 license involving ISL [*in situ* leach] mining."[10] Based on these statements, the intervenors now request the Commission to hold the proceeding in abeyance to consider this concern on review. We deny this request.

HRI received a license for four sites: Sections 8 and 17 in Church Rock, New Mexico, and the Unit 1 and Crownpoint sites in Crownpoint, New Mexico. To date, the parties have only litigated the Section 8 site. HRI has had the option of applying for a license amendment to reduce the scope of its license, but has chosen instead to proceed with litigation on the remaining sites. In doing so, HRI has "proactively assume[d] the risk that it cannot obtain

[10] LBP-04-03, slip op. at 29 n.154.

appropriate aquifer exemptions in the future."[11] Moreover, even if HRI *were* to obtain all required permits, it may decide for market reasons not to proceed with mining in one, two, or even all of the proposed sections. The Commission has no control over such business choices. Hence, uncertainties do exist here, but there are risks and expenses inherent in litigation for all sides, particularly in a case as complex as this one has proven to be. It has not been our general policy to place proceedings on hold simply because one or more other regulatory agencies might ultimately deny a necessary permit or approval.[12] Instead, absent extraordinary reasons for delay, the NRC acts as promptly as practicable on all applications it receives. We therefore deny the intervenors' request to place this proceeding in abeyance.[13]

III. Scheduling of Briefs

Pursuant to 10 C.F.R. § 2.786(d), the Commission sets forth the following briefing schedule:

(1) HRI and the NRC staff shall file their respective briefs on the labor and equipment issues on or before June 14, 2004. The briefs shall be no longer than 25 pages. The intervenors shall file their responsive brief, limited to 30 pages, on or before July 12, 2004. (We allow additional pages for the intervenors' response given that they will be responding to two briefs.) HRI and the staff may each file a reply brief, limited to 10 pages, on or before July 26, 2004.

(2) Intervenors ENDAUM and SRIC shall file their brief on the "pore volumes" issue on or before June 14, 2004. The brief shall be no longer than 25 pages. The NRC staff and HRI shall file their responsive briefs, limited to

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[11] HRI Response to Intervenors' Petition for Commission Review (Apr. 2, 2004) at 10.

[12] *See, e.g., Pacific Gas & Elec. Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 334 (2002).

[13] Ironically, at a previous stage in this proceeding it was HRI that wished to place the proceeding in abeyance and the intervenors who, on fairness grounds, objected to doing so. *See* CLI-01-04, 53 NRC 31, 35-37 (2001). We denied HRI's request, just as we deny the intervenors' request today.

25 pages, on or before July 12, 2004. ENDAUM and SRIC may file a reply brief, limited to 10 pages, on or before July 26, 2004.

IV. Conclusion

For the reasons given in this order, the Commission *grants* the HRI and ENDAUM and SRIC petitions for review of LBP-04-03, and sets forth a schedule for briefs.

IT IS SO ORDERED.

For the Commission

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004.

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMORANDUM AND ORDER (CLI-04-14) have been served upon the following persons by deposit in the U.S. mail, first class, or through NRC internal distribution, with copies by electronic mail as indicated.

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[Original signed by Evangeline S. Ngbea]

Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 20th day of May 2004