

RAS 7944

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED 06/15/04

BEFORE THE COMMISSION

In the Matter of

HYDRO RESOURCES, INC.
P.O. Box 777
Crownpoint, New Mexico 87313

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Docket No. 40-8968-ML

NRC STAFF'S BRIEF ON LABOR AND EQUIPMENT ISSUES

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June 14, 2004

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INTRODUCTION

By order dated May 20, 2004, the Commission granted two petitions for review of financial assurance rulings in LBP-04-3, which were disputed by licensee Hydro Resources, Inc. (HRI), and the lead intervenors in this proceeding, Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center (collectively, "Intervenors"). See, CLI-04-14, 59 NRC ___, (slip op.). With respect to the Presiding Officer's rulings on HRI's labor and equipment cost estimates,¹ HRI sought and was granted Commission review. See CLI-04-14, slip op., at 2. The Intervenors sought and were granted Commission review of the Presiding Officer's refusal to consider their objections to HRI's pore volume estimate,² upon which a large part of HRI's initial decommissioning cost estimate is based. *Id.*, slip op., at 3-4.

As set forth below, the Staff will show that HRI's labor and equipment cost estimates meet the applicable requirements of 10 C.F.R. Part 40, Appendix A, Criterion 9, and that the contrary rulings made by the Presiding Officer in LBP-04-3 should, accordingly, be reversed.

¹ See LBP-04-03, 59 NRC 84, 99-103 (2004).

² See LBP-04-03, 59 NRC at 90-93. Pursuant to the Commission's schedule, the Intervenors' brief on the pore volume issue is due by June 14, 2004. HRI and the Staff are to file their pore volume response briefs by July 12, 2004, to which the Intervenors may file a reply brief by July 26. Similarly, on the labor and equipment cost issues being briefed here, the Intervenors are to submit their response brief by July 12, 2004, to which HRI and the Staff may file reply briefs by July 26. See CLI-04-14, slip op., at 6-7.

BACKGROUND

A. Procedural History

In early 1998, the Staff issued to HRI a materials license, pursuant to 10 C.F.R. Part 40, authorizing *in situ* leach (ISL) uranium mining at sites in New Mexico.³ General financial assurance issues related to decommissioning -- of which the more specific labor and equipment issues now before the Commission are a subset -- were litigated in 1999 before the Presiding Officer⁴ and the Commission as part of a series of written presentations on several areas of concern raised by the Intervenors. In reviewing LBP-99-13, the Commission ruled that the financial assurance requirements applicable to ISL mining licenses are found in Criterion 9 of Appendix A to 10 C.F.R. Part 40 (hereafter, "Criterion 9"), and that the financial assurance requirements of 10 C.F.R. § 40.36 do not apply to HRI's license. See CLI-99-22, 50 NRC 3, 8-9 and 18 (1999).

In 2000, after further examining the rulemaking history of Appendix A to 10 C.F.R. Part 40, the Commission found that Criterion 9 "is best interpreted as requiring submission and approval of a financial assurance plan and cost estimates" before an ISL license is issued. CLI-00-8, 51 NRC 227, 239 (2000). Rather than revoking HRI's license, the Commission chose to impose a new license condition prohibiting use of the license until the cost estimate information was submitted, pursuant to Criterion 9, and a financial assurance plan was approved by the NRC Staff.

³ The license (SUA-1580) pertains to HRI's proposed ISL mining at three separate locations in New Mexico, *i.e.*, the Churchrock site (consisting of Section 8 and Section 17, contiguous land parcels about five miles north of the town of Church Rock), the Unit 1 site, and the Crownpoint site (these latter two sites being located in the vicinity of the town of Crownpoint, New Mexico, several miles northeast of Church Rock). After the Presiding Officer had issued his series of partial initial decisions in 1999 pertaining to Section 8, he suspended adjudication on the other mining sites pending word from HRI that it had immediate plans to mine those sites. See LBP-99-40, 50 NRC 273 (1999). The Commission later reversed this decision, ordering that the subpart L hearing be resumed to litigate issues pertaining to the Section 17, Unit 1, and Crownpoint sites. See CLI-01-4, 53 NRC 31, 38 and 71 (2001).

⁴ See LBP-99-13, 49 NRC 233 (1999) (rejecting arguments that financial assurance requirements had not been met, and denying the Intervenors' request that the HRI license be revoked).

Id., at 238, and 241-42. In its 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 for the Staff’s review and approval what HRI termed its “Restoration Action Plan” (RAP) for Churchrock Section 8 (its initial intended mining site), containing the information referenced by the Commission in CLI-00-8.

In early 2001, responding to a Staff request for additional information, HRI revised its Section 8 RAP.⁵ The Staff found that the updated RAP, together with the information in revision 2 of HRI’s Consolidated Operations Plan (COP) -- submitted in 1997 as a supplement to the license application -- provided an acceptable cost estimate “for the decontamination, decommissioning, and restoration of the first well field” to be mined at Section 8.⁶ In the proceedings remanded to the Presiding Officer, the Intervenors challenged the adequacy of the Section 8 RAP.⁷ On January 22, 2001, HRI and the Staff filed replies to Intervenors’ First Response,⁸ and in May 2001

⁵ See HRI letter to the Staff dated March 16, 2001, enclosing updated pages for the Section 8 RAP.

⁶ Staff letter to HRI (“Acceptance of Restoration Action Plan for [HRI] In-Situ Uranium Mining Project, License SUA-1580”), dated April 16, 2001.

⁷ See “Intervenors’ Response to [HRI’s] Cost Estimates and [RAP] of November 21, 2000,” dated December 21, 2000 (Intervenors’ First Response), including as Exhibit 1 thereof an affidavit of Mr. Steven C. Ingle (Ingle Affidavit); and as Exhibit 2 thereof an affidavit of Dr. Richard J. Abitz (First Abitz Affidavit).

⁸ See “Reply of [HRI] to Intervenors’ Response to HRI’s Cost Estimates for Decommissioning and [RAP]” (HRI’s Reply); and “NRC Staff’s Response to Intervenors’ Financial Assurance Brief” (Staff’s Reply), respectively. Attached to HRI’s Reply was an “Affidavit of Mark S. Pelizza Responding To Affidavits of Steven Ingle And Richard Abitz” (Pelizza Reply Affidavit); and an “Affidavit of Richard A. Van Horn Responding To The Affidavits of Steven Ingle And Richard Abitz” (Van Horn Reply Affidavit). Attached to Staff’s Reply as Exhibit 1 was an “Affidavit of William H. Ford” (Ford Reply Affidavit).

the Intervenor's were allowed to submit a second written presentation alleging deficiencies in the updated Section 8 RAP.⁹

B. Financial Assurance Requirements Applicable to HRI

As set forth above, the Commission previously determined in this proceeding that Criterion 9 contains the financial assurance requirements applicable to HRI's license. These requirements are intended to ensure that adequate surety funds will be available for decommissioning purposes, and require HRI to provide cost estimates to be used by the Staff to determine the initial surety amount. In this regard, Criterion 9 states as follows:

The amount of funds to be ensured by such surety arrangements must be based on Commission-approved cost estimates in a Commission-approved plan for (1) decontamination and decommissioning of mill buildings and the milling site to levels which allow unrestricted use of these areas upon decommissioning, and (2) the reclamation of tailings and/or waste areas in accordance with technical criteria delineated in Section I of this Appendix. The licensee^[10] shall submit this plan in conjunction with an environmental report 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 (footnote added). Recognizing that changes occur over time as ISL mining progresses, due to both general economic conditions and the site-specific nature of such mining, Criterion 9 further states as follows:

The licensee's surety mechanism will be reviewed annually by the Commission to assure that sufficient funds would be available for completion of the reclamation plan if the work had to be performed by an independent contractor. The amount of surety liability should be adjusted to recognize any increases or decreases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs. Regardless of whether reclamation is phased through

⁹ See "Intervenor's Reply to the Responses of [HRI's] and NRC Staff's [RAP] Presentations of January 22, 2001 and Information Generated Subsequent to Those Presentations," dated May 24, 2001 (Intervenor's Second Response), including as Exhibit 1 thereof an affidavit of Ms. April Lafferty (Lafferty Affidavit); and as Exhibit 2 thereof an affidavit of Dr. Abitz (Second Abitz Affidavit).

¹⁰ The Commission earlier construed the term "licensee" here to include a license applicant. See CLI-00-8, *supra*, 51 NRC at 239 and n.12.

the life of the operation or takes place at the end of operations, an appropriate portion of surety liability must be retained until final compliance with the reclamation plan is determined. This will yield a surety that is at least sufficient at all times to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal.

10 C.F.R. Part 40, Appendix A, Criterion 9.

As set forth above, Criterion 9 specifically authorizes use of a flexible method whereby the surety amount may be adjusted annually as circumstances require. Thus, HRI's initial cost estimates in its Section 8 RAP merely start an ongoing process of establishing and maintaining proper surety values.¹¹

This flexibility is consistent with the regulatory flexibility embodied in the performance based licensing (PBL) approach, which the Commission has endorsed in this proceeding as applied to ISL mining licenses.¹² The PBL approach is particularly suited to ISL mining, as such mining is less hazardous than conventional mining, and is wholly dependent upon the site-specific characteristics of individual well fields which are not known until the licensee is ready to commence mining operations. Moreover, the PBL approach is consistent with the Commission's general finding that financial assurance requirements applicable to materials licenses are not as rigorous as those applied to power reactors under 10 C.F.R. Part 50, due in part to the lower risks involved.¹³ See *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, at 306 and n.18 (1997) (license applicant was financially qualified based in part on fact that health and safety

¹¹ See also ¶¶ 3-4 of the Ford Reply Affidavit (attached as Exhibit 1 to Staff's Reply), discussing additional aspects of the surety requirements as applied to HRI.

¹² See CLI-99-22, *supra*, 50 NRC at 16-18.

¹³ A study comparing ISL mining operations with conventional milling operations is consistent with this finding. The study found that ISL mining decommissioning costs average about half the amount it costs to decommission a conventional uranium mining site (in 1994 dollars). See "Decommissioning of U.S. Uranium Production Facilities," DOE-EIA-0592 (February, 1995), published by the Energy Information Administration, Tables 3 and 6, at pages 17 and 38, respectively (attached as Staff Exhibit 1 to "NRC Staff's Response Brief on Financial Surety Issues," dated September 3, 1999).

risks associated with uranium enrichment are less than those associated with operation of nuclear reactors).

HRI License Condition (LC) 9.5 incorporates the above-referenced Criterion 9 requirements into HRI's license. LC 9.5 prohibits HRI from performing any ISL mining until an NRC-approved surety arrangement is in place.¹⁴ Pursuant to Criterion 9, LC 9.5 establishes a flexible method whereby the surety amount may be updated as circumstances require, and joins Criterion 9's requirements with the Staff's site-specific finding that the initial surety amount for Section 8 will be based on an assumed nine-pore-volume groundwater restoration effort to be undertaken at the initial well field there. This nine-pore-volume finding will govern only until a production-scale restoration effort more firmly establishes what HRI's groundwater restoration costs will be. In this regard, LC 9.5 states in pertinent part as follows:

As a prerequisite to operating under this license, the licensee shall submit an NRC-approved surety arrangement to cover the estimated costs of decommissioning, reclamation, and groundwater restoration. Generally, these surety amounts shall be determined by the NRC based on cost estimates for a third party completing the work in case the licensee defaults. Surety for groundwater restoration of the initial well fields shall be based on 9 pore-volumes. Surety shall be maintained at this level until the number of pore volumes required to restore the groundwater quality of a production-scale well field has been established by the restoration demonstration described in LC 10.28. If at any time it is found that well field restoration requires greater pore-volumes or higher restoration costs, the value of the surety will be adjusted upwards. Upon NRC approval, the licensee shall maintain the NRC-approved financial surety arrangement consistent with 10 CFR Part 40, Appendix A, Criterion 9.

¹⁴ The Presiding Officer's earlier refusal to revoke HRI's license on grounds of inadequate financial assurance was based largely on the provisions of LC 9.5. See LBP-99-13, *supra*, 49 NRC at 236-37. The Commission, in reviewing LBP-99-13, upheld the findings made there that (1) the 10 C.F.R. § 40.36 surety requirements were not applicable to HRI's license; and (2) an established surety arrangement is not a prerequisite to issuing an ISL license, as Criterion 9 does not require that such a surety be in place until ISL operations are set to begin. See CLI-99-22, *supra*, 50 NRC at 18. In its earlier remand order, the Commission specifically referenced LC 9.5 in noting that the amount of the initial surety required may later be increased. See CLI-00-8, *supra*, 51 NRC at 245; see also *id.*, at 236 (summarizing the former Presiding Officer's finding "that the surety amount can be increased at any time if the NRC Staff determines that well-field restoration requires greater pore volumes or a higher cost").

Pursuant to Criterion 9, LC 9.5 requires annual updates of the surety amount. These updates take into account the rate of inflation, the results of HRI's initial well field restoration efforts, and any changes in HRI's operation not already factored into the existing surety amount. In this regard, LC 9.5 further states, in pertinent part, as follows:

Annual updates to the surety amount, required by 10 CFR Part 40, Appendix A, Criterion 9, shall be provided to the NRC at least 3 months prior to the anniversary date of the license issuance. If the NRC has not approved a proposed revision 30 days prior to the expiration date of the existing surety arrangement, the licensee shall extend the existing arrangement, prior to expiration, for 1 year. Along with each proposed revision or annual update of the surety the licensee shall submit supporting documentation showing a breakdown of the costs and the basis for the cost estimates with adjustments for inflation (i.e., using the approved Urban Consumer Price Index), maintenance of a minimum 15 percent contingency, changes in engineering plans, activities performed, and any other conditions affecting estimated costs for site closure.

The licensee shall provide an NRC-approved updated surety before undertaking any planned expansion or operational change which has not been included in the annual surety update. This surety update shall be provided to the NRC at least 90 days prior to the commencement of the planned expansion or operational change.

As argued below, the labor and equipment cost estimates contained in HRI's Section 8 RAP meet Criterion 9's requirements.

ARGUMENT

As stated by the Commission in its May 20, 2004 order, the Presiding Officer's rulings pertaining to HRI's labor assumptions and equipment cost estimates¹⁵ "present important questions" on how Criterion 9 (requiring an ISL licensee's 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") should be construed and applied here. CLI-04-14, *supra*, slip op., at 2. As summarized by the Commission, the Presiding Officer's labor and equipment rulings at issue here are as follows:

¹⁵ See LBP-04-03, 59 NRC 84, 99-103 (2004).

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.

Id.

Argument 1 below addresses the labor issues, and Argument 2 addresses the equipment issues. More specifically, Argument 1.A pertains to HRI's position that the Presiding Officer erred in ruling that HRI's labor assumptions in its Section 8 RAP were contrary to the terms of Criterion 9.¹⁶ Argument 2 pertains to HRI's position that the Presiding Officer erred in ruling that Criterion 9 required HRI to assume in its RAP that its major equipment necessary for decommissioning would not be available for an independent contractor's use, and that HRI was thus required to submit new cost estimates.¹⁷

1. The Labor Assumptions in HRI's Section 8 RAP Are Reasonable, and the Labor Categories Identified There Are Sufficient in Number, and Reflect Appropriate Areas of Expertise, to Adequately Restore the First Well Field Mined at Section 8 _____

As shown below, the Commission's premise that the present adjudicatory record supports HRI's Section 8 RAP assumption "that an independent contractor may have personnel that [can] perform related albeit distinct functions"¹⁸ is correct. Additionally, in Argument 1.B, the Staff will show that HRI's proposed labor categories are sufficient in number, and reflect appropriate areas of expertise, to reasonably ensure that at the time the first well field mined at Section 8 requires restoration, the necessary funds will be available to adequately accomplish the task.

¹⁶ See HRI's "Petition For Review of Presiding Officer's Initial Decision Regarding [HRI's] Section 8 [RAP]," dated March 15, 2004 (HRI's Petition), at 7-10.

¹⁷ See HRI's Petition, at 4-7.

¹⁸ CLI-04-14, *supra*, slip op., at 2.

1A. The Section 8 RAP and Hearing Record Support HRI's Labor Assumptions

In refusing to accept HRI's assumption that an independent contractor would be able to use a similar number of employees as would HRI in performing site restoration activities, the Presiding Officer ruled as follows:

[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. As previously explained, Criterion 9 requires surety estimates to be based upon the total costs of an independent contractor completing the decommissioning project. 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.

LBP-04-03, 59 NRC at 102-03 (footnote omitted). As shown below, this ruling is supported by neither the terms of Criterion 9, nor the record established to date in this proceeding.

The Presiding Officer read too much into the generally-worded Criterion 9 provision that cost estimates must take into account the "total costs that would be incurred if an independent contractor were hired to perform the decommissioning and reclamation work." Neither in this provision, nor in any other portions of Criterion 9, does the regulation delve into details regarding assumptions to be made on an independent contractor's labor requirements. The Presiding Officer's rigid and prescriptive interpretation of Criterion 9 thus finds no support in its stated terms. The better course is to instead follow the same type of "case-by-case approach" as was previously endorsed by the Commission on a different Intervenor area of concern in this proceeding.¹⁹ In addition to running counter to the inherent flexibility of Criterion 9's general terms, the Presiding Officer's ruling at issue here ignores the PBL concept, which, as noted above, the Commission previously found was applicable to HRI's license. See CLI-99-22, 50 NRC at 16-18.

¹⁹ See CLI-99-22, *supra*, 50 NRC at 9 (rejecting Intervenor's concerns about waste disposal issues, finding that HRI's license conditions ensured compliance with the general health and safety provisions in 10 C.F.R. §§ 40.32(c) and (d)).

Moreover, in Section E of HRI's Section 8 RAP, "Cost Details For Restoration And Reclamation Activities," HRI begins its detailed budget description by stating its adherence to the Criterion 9 requirements. HRI asserts that its cost figures are "based on an independent contractor performing the decommissioning and reclamation work," and further states in a footnote that in arriving at its estimated costs, it had included as contractor profit "15% of the total cost for groundwater restoration" (as well as other activities including equipment removal), and "25 % of the total cost for wellfield [decontamination and decommissioning], building [decontamination and decommissioning], and surface reclamation."²⁰

The following excerpt from Section E-2(d) of HRI's Section 8 RAP, "Groundwater Restoration Budget Assumptions," fairly summarizes the specific labor assumptions now at issue here:

For the purpose of the Financial Assurance Plan, HRI assumed employment of technical professionals whose expertise is needed on a limited basis during the restoration mode. Anticipated positions are listed in the Restoration Budget rows 1-15. 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. ... For example, in the restoration mode, a qualified geologist will be required to verify the configuration of restoration patterns to assure efficient results. ... [T]he time commitment by the geologist to this task may only be several hours per week. Therefore, to maximize the use of the geologist [sic] 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.

HRI's reliance on these labor assumptions in its Section 8 RAP is appropriate, and does not violate the terms of Criterion 9.²¹ In replying to Intervenor's First Response, HRI supported its use of these labor assumptions through Mr. Pelizza, who testified that HRI's sister company had two ISL mines

²⁰ Section E.1 of HRI's Section 8 RAP, and n.3 (as revised March 16, 2001).

²¹ Without citing any legal authority to support its position, the Intervenor simply stated that the NRC "cannot, nor should it, assume multiple responsibilities for individual employees." Intervenor's First Response, at 28. This portion of the Intervenor's presentation focused instead on their connected claim that HRI improperly failed to budget for restoration operations on a 24-hour basis. See *id.*, at 27-28. As detailed below in Argument 1.B, the Presiding Officer rejected this claim.

in full-scale restoration mode in Texas which -- using individuals in multiple roles consistent with the above-described labor assumptions -- were “running smoothly with fewer personnel than are planned for the Churchrock location.” Pelizza Reply Affidavit, at 19 (¶ D.15). Neither the Lafferty Affidavit nor the Second Abitz Affidavit (attached as Exhibits 1 and 2, respectively, to Intervenors’ Second Response) address or otherwise contradict this testimony of Mr. Pelizza.

As a short-hand reference to HRI’s labor assumptions, the Presiding Officer used the phrase “multiple hats” several times in LBP-04-3.²² But the Presiding Officer did not state whether he gave any weight to Mr. Pelizza’s unchallenged testimony quoted above;²³ and, even more significantly, the Presiding Officer did not tie any analysis of HRI’s labor assumptions to his more general ruling regarding the adequacy of HRI’s labor cost estimates. Instead, the Presiding Officer simply noted Criterion 9’s requirement that ISL licensees must base their surety estimates on what it would cost an independent contractor to decommission the site,²⁴ and ruled that “the labor cost estimates of the current RAP cannot be accepted.”²⁵ The Presiding Officer thus did not articulate how HRI’s reliance on an assumption that one employee could provide multiple services violated the terms of Criterion 9. The Presiding Officer’s failure to directly address the evidence provided by HRI in support of its labor assumptions undercuts the basis for his above-quoted ruling.

Similarly, while citing portions of the November 2001 hearing transcript which support the

²² See, e.g., LBP-04-03, 59 NRC at 100 and n. 93, *citing* Section E-2(d) of HRI’s Section 8 RAP and ¶ D.15 of the Pelizza Reply Affidavit; *see also* 59 NRC at 102.

²³ The Presiding Officer did not discuss this testimony of Mr. Pelizza’s, stating only in general that HRI had provided “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.*, at 103.

²⁴ *Id.*, at 102-03.

²⁵ *Id.*, at 103.

Staff's reliance on HRI's labor assumptions,²⁶ the Presiding Officer fails to articulate any basis he may have had for discounting the significance of this evidence. The Staff's reliance on labor assumptions in the context of considering financial assurances of ISL operators is specifically endorsed by a 1988 branch technical position (BTP), portions of which were read into the record by HRI's counsel on November 8, 2001.²⁷ Moreover, during this 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 it did not assume that an independent contractor would assign different individuals to each separate decommissioning task.²⁸ As further support on this point, the Staff cited 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.²⁹ 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."³⁰ Thus, 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 -- and was justified in relying on HRI's labor assumptions. The Presiding Officer's rejection of HRI's labor assumptions is contrary to the above evidence.

²⁶ *Id.* at 100, and nn. 94 and 96, *citing* Tr., at 344, and 349, respectively.

²⁷ The 1988 BTP, titled "Technical Position on Financial Assurances for Reclamation, Decommissioning, and Long-Term Surveillance and Control of Uranium Recovery Facilities," states in relevant part 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 ISL operator. See Tr., at 336. The BTP was referenced by the Intervenor as providing applicable guidance to the consideration of HRI's RAP. See Intervenor's First Response, at 32-33.

²⁸ See Tr., at 344-45.

²⁹ *Id.*, at 349.

³⁰ *Id.*, at 350.

Additionally, on policy grounds, the ruling at issue here is unsound. Left standing, the Presiding Officer's ruling would effectively require the Staff, in estimating an ISL mining site's decommissioning costs, to factor in the inefficient use of well field labor. As shown above, neither the terms of Criterion 9, nor the lengthy hearing record established in this adjudication, support factoring in the inefficient use of well field labor in arriving at financial assurance estimates.

Accordingly, the Staff supports HRI's request³¹ that the Commission reverse the Presiding Officer's rulings refusing to accept the RAP's labor assumptions and related cost estimates.

1B. RAP Section E-2(d) Identifies Appropriate Labor Categories and Areas of Expertise Ensuring Adequate Funding For Restoration of HRI's First Section 8 Well Field

Below, the Staff addresses the Commission's inquiry about whether HRI's proposed labor categories are sufficient in number, and whether HRI's Section 8 RAP reflects appropriate areas of expertise,³² to accomplish the work that will be necessary to restore HRI's first Section 8 well field. As shown below, the Intervenors provided no evidence that an ISL uranium mining operation -- staffed by personnel qualified to fill the 11 labor categories identified by HRI -- would need additional personnel in order to adequately restore a well field.

Section E-2(d) of the Section 8 RAP, "Groundwater Restoration Budget Assumptions," identifies and describes the job responsibilities of the following 11 personnel positions, each of which is budgeted for in HRI's financial assurance plan: (1) Operations Manager; (2) Environmental Manager; (3) Radiation Safety Officer; (4) Chemist; (5) Senior Geologist; (6) Wellfield Foreman; (7) Electrician; (8) Plant Operator; (9) Truck Driver; (10) Wellfield Operator; and (11) Pump Hoist Operator.³³

³¹ See HRI's Petition, at 7.

³² See CLI-04-14, slip op., at 2-3.

³³ As further specified in Mr. Pelizza's Table 3, titled "Labor Comparisons URI & HRI" (see (continued...))

With no discussion or explanation showing that HRI's budgeting for these 11 labor categories was in any way inadequate -- and without referencing any of the 11 job descriptions provided -- the Intervenor simply made the bald assertion that RAP Section E-2(d) was somehow "unclear regarding the positions needed to run the operation, the cost, and the number of shifts contemplated."³⁴ As referenced in footnote 21, *supra*, rather than addressing the 11 labor categories identified by HRI, the Intervenor instead pursued their claim that HRI improperly failed to budget for restoration operations on a 24-hour basis.³⁵ This claim was rejected by the Presiding Officer, who ruled as follows:

HRI's explanation of site restoration operating continually by using a combination of manpower and machine is satisfactorily supported in the record before me. I find that HRI's intention to rely on automated machinery with automatic shutdowns to supplement its workforce, along with a budget for a single eight-hour shift per day is sufficient to operate the decommissioning project around the clock and does not violate the surety requirements established in Criterion 9.

LBP-04-03, 59 NRC at 102.

By limiting their presentation to a single, unsupported assertion, the Intervenor provided no evidence that RAP Section E-2(d) was insufficiently clear on the job positions needed to run Section 8 restoration operations and the costs of filling the labor categories HRI identified there. Indeed, the "pertinent inquiry" here is on whether HRI's proposed labor categories are sufficient in number, and whether HRI's Section 8 RAP reflects appropriate areas of expertise, to accomplish

³³(...continued)

Pelizza Reply Affidavit, at 19 (¶ 15)), labor categories (1) through (6) are salaried positions, while personnel in categories (7) through (11) would receive wages for hours worked during Section 8 restoration activities. Similar to the situation described in Argument 1A, *supra*, neither the Lafferty Affidavit nor the Second Abitz Affidavit (see Intervenor's Second Response, Exhibits 1 and 2, respectively) provide any testimony or other evidence addressing or otherwise refuting the accuracy of Table 3.

³⁴ Intervenor's First Response, at 28.

³⁵ See *id.*, at 27-28; see also Ingle Affidavit, ¶ 29 (attached to Intervenor's First Response as Exhibit 1).

the necessary restoration work.³⁶ RAP Section E-2(d) provides information sufficient to answer these questions in the affirmative.

Accordingly, the present adjudicatory record supports a finding by the Commission that the labor categories identified in HRI's Section 8 RAP are sufficient in number, and reflect appropriate areas of expertise, to accomplish the work that will be necessary to restore HRI's first Section 8 well field. The Staff therefore requests that the Commission approve HRI's Section 8 RAP.

2. The Presiding Officer's Ruling Pertaining to Equipment is Contrary to Criterion 9's Requirements

The Presiding Officer ruled that HRI failed to meet Criterion 9's requirements in assuming that its "major equipment necessary for decommissioning" would remain available for an independent contractor's use if HRI abandoned its ISL project, and that HRI was thus required to submit new cost estimates factoring in "the cost of leasing" such equipment.³⁷ HRI took exception to this ruling, and requested that the Commission reverse it.³⁸ On the grounds that the ruling misconstrues Criterion 9's requirements, the Staff supports HRI's request that the ruling be reversed.

The above-referenced ruling imposes requirements which are not supported by the terms of Criterion 9, which states that the cost estimates to be included in a reclamation plan must 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 the ruling at

³⁶ CLI-04-14, slip op., at 2-3.

³⁷ LBP-04-03, 59 NRC at 101. The Commission criticized the Presiding Officer's use of the term "major equipment" in his ruling that HRI must submit new cost estimates, stating that the term "appears ill-defined and thus open to different interpretations." CLI-04-14, slip op., at 2. This criticism is consistent with the Commission's previous recognition in this proceeding that Criterion 9 already contains ambiguities. See CLI-00-8, *supra*, 51 NRC 227, at 239 and n. 12.

³⁸ See HRI's Petition, at 4 and 6.

issue on this “plain language” in Criterion 9,³⁹ but identified no basis for construing this requirement to mean that HRI, in making its initial cost estimates, must designate certain pieces of equipment needed for future ISL restoration activities as being “major equipment,” and then assume that an independent contractor hired to perform site decommissioning would have to either buy or lease such equipment. The word “equipment” appears nowhere in the text of Criterion 9, and thus, on its face, Criterion 9 cannot fairly be read as requiring a consideration of how much it would cost to lease certain pieces of equipment.

Moreover, in its previous discussion of financial assurance issues, 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.” CLI-00-8, *supra*, 51 NRC at 237.⁴⁰ The Staff submits that its approval of the Section 8 RAP (including HRI’s equipment cost estimates stated therein) was consistent with both the requirements of Criterion 9, and the Commission’s statements in CLI-00-8 construing those requirements.

Additionally, the requirement that HRI revise its Staff-approved estimate for Section 8 by showing how much it would cost to lease major equipment is contrary to the record established during the above-referenced November 2001 hearing, 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 that all major equipment used during HRI’s operation on

³⁹ LBP-04-03, 59 NRC at 101.

⁴⁰ 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. See Staff letter to HRI dated April 16, 2001, at 1.

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 326.⁴¹ 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 323.⁴²

As shown above, neither the wording of Criterion 9, nor the adjudicatory record developed to date in this proceeding, provides a basis for the Presiding Officer’s ruling that HRI must revise its Staff-approved RAP by showing how much it would cost to lease certain pieces of equipment needed for the future decommissioning of Section 8. The Staff therefore supports the request made by HRI⁴³ that the Commission reverse the Presiding Officer’s ruling that the RAP’s equipment cost estimates cannot be accepted.⁴⁴

⁴¹ As noted in Argument 1.A above, the Staff’s reliance on such assumptions is supported by the 1988 BTP. The BTP statement 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, was read into the record by HRI counsel. See Tr., at 336.

⁴² In its Order granting review, the Commission noted, without amplification, that the equipment availability issue “involves questions of creditor rights that have not been explored” in this proceeding. See CLI-04-14, slip op., at 2. This observation is fundamentally correct, there having been no issue specifically raising the matter in response to which an evidentiary record would have been created, beyond an extended colloquy between HRI counsel and the Presiding Officer involving creditor rights and related issues. See *generally* Tr. at 323-40. In light of this, there is no basis to believe that concerns involving creditor rights are anything more than speculation, absent evidence suggesting that actual creditors could adversely affect HRI’s equipment availability. While one can theorize and postulate a number of creditor-rights scenarios, none has been described on the record of the instant proceeding which would call for or, for that matter, even permit, a specific evaluation.

⁴³ See HRI’s Petition, at 4 and 6.

⁴⁴ See LBP-04-03, 59 NRC at 101.

CONCLUSION

The Staff requests the Commission to take the following actions: (1) reverse the Presiding Officer's rulings that the RAP's labor assumptions and related cost estimates cannot be accepted,⁴⁵ for the reasons stated in Argument 1.A; (2) approve HRI's Section 8 RAP, for the reasons stated in Argument 1.B; and (3) reverse the Presiding Officer's ruling that the RAP's equipment cost estimates cannot be accepted,⁴⁶ for the reasons stated in Argument 2.

Respectfully submitted,

/RA by John Hull for/

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/RA/

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Dated at Rockville, Maryland
this 14th day of June, 2004

⁴⁵ *Id.*, at 102-03.

⁴⁶ *Id.*, at 101.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)
) Docket No. 40-8968-ML
HYDRO RESOURCES, INC.)
)
P.O. Box 777)
)
Crownpoint, NM 87313)

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF ON LABOR AND EQUIPMENT ISSUES" in the above-captioned proceeding have been served on the following persons this 14th day of June, 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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