RAS 7962

June 14, 2004

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

In the Matter of	)	
	)	
HYDRO RESOURCES, INC.	)	Docket No. 40-8968-ML
2929 Coors Road	)	
Suite 101	)	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120	)	
	)	

BRIEF OF INTERVENORS EASTERN NAVAJO DINÉ AGAINST URANIUM MINING AND SOUTHWEST RESEARCH AND INFORMATION CENTER

PETITION FOR REVIEW OF LBP-04-03

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INTRODUCTION

Pursuant to the Commission's Memorandum and Order, CLI-04-14, Eastern Navajo Diné Against Uranium Mining and Southwest Research and Information Center (collectively, "Intervenors") hereby submit the following brief.

QUESTION PRESENTED

Whether there is any significant issue on pore volumes that the Intervenors reasonably could not have raised before Hydro Resources, Inc. filed its Restoration Action Plan.

FACTUAL BACKGROUND

A. Regulatory Framework

1. Decommissioning Funding Requirements

The United States Nuclear Regulatory Commission ("NRC" or "Commission") has established specific regulations for the financing of decommissioning of *in situ* leach ("ISL") uranium mines, in Criterion 9 of Appendix A to 10 C.F.R. Part 40 ("Criterion 9).[1] The language of Criterion 9 creates a two-step process for the establishment of an adequate surety for milling operations. First, in conjunction with an environmental report, the applicant must submit "Commission-approved cost estimates in a Commission-approved plan". 10 C.F.R, Part 40, Appendix A, Criterion 9.

Second, surety arrangements that are consistent with the approved plan must be in place prior to the commencement of operations. Id. At a minimum, Criterion 9 requires that a licensee must maintain a surety that is at least sufficient at all times to cover the costs of

[1] The Commission determined that Criterion 9 applied to ISL mines in CLI-99-22, 50 NRC 3, 9 (1999).

decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal. Id.

2. Calculation Of Decommissioning Funding Estimates

The ISL uranium mining industry has a specific formula for calculating the volume of water needed to restore an aquifer. Intervenors' Response To Hydro Resources, Inc.'s Cost Estimates And Restoration Action Plan Of November 21, 2000 (December 21, 2000) ("Intervenors' Response to RAP"), Exhibit 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000) ("Ingle Testimony") at 8-9. This formula calculates the actual volume of water that is in a given pore volume. Id.

Generally, a pore volume is the total amount of water that occupies the spaces between the grains of sand in an aquifer. Ingle Testimony at 8. In the context of ISL mining, a pore volume is the total amount of water in an aquifer that must be treated or restored, during and after mining. Id. A pore volume at an ISL mine is calculated mathematically by multiplying the mine's wellfield area, the ore zone thickness, effective porosity, horizontal flare factor and vertical flare factor. Id. at 9. Effective porosity is the portion, or percentage, of void space between the grains of sand in an aquifer that are filled with water that can be removed. Id. at 9, fn. 4. The horizontal flare factor describes the portion of the aquifer that contains fluids, such as lixiviant, which have migrated, or "flared", laterally from the well pattern area during mining, but have remained undetected in the aquifer inside the perimeter monitor well ring. Id. at 8. All the constituent parts of a pore volume calculation are needed in order to arrive at the number of gallons of water that constitute the pore volume. Thus, the distinction between a pore volume

and the actual volume of water, in gallons, needed to restore an aquifer is important in the context of estimating costs for restoration surety.

A "pore volume" is not a constant unit of measure such as a liter or gallon. The amount of water in a pore volume can vary from circumstance to circumstance and from mine to mine. Instead, the actual number of gallons of water that are flushed through an aquifer in the course of restoration is the basis for the cost estimates for surety. Testimony of Mark Pelizza, Transcript of Hearing (Part 2, pp. 300-472) ("Tr.2") at 427 (November 8, 2001) (ACN ML013190584).

B. HRI's License Application And License

On April 13, 1988, Hydro Resources, Inc. ("HRI") filed a license application for ISL mining at three sites comprising the "Crownpoint Project": Church Rock, Unit 1, and Crownpoint. Application for Materials License (ACN 8805200339) (April 13, 1988). The application did not contain a decommissioning cost estimate or proposed surety amount for the restoration of any part of the Crownpoint Uranium Project ("CUP").

On March 16, 1993 HRI submitted an Environmental Report for the Church Rock site. Church Rock Revised Environmental Report (March 16, 1993) ("Church Rock Environmental Report") (ACN 9304130415). In Section 6, HRI described its planned restoration activities for its Church Rock operations[2]. Church Rock Environmental Report, Section 6. HRI reported that it conducted two "core leach" tests and one "batch" test to determine how many pore volumes would be needed to restore the groundwater at Church Rock. Id. at 280 Ultimately, HRI determined that baseline conditions for Total Dissolved Solids ("TDS"), Sodium, Bicarbonate, and Chloride could be achieved in 4.15 pore volumes. Id. at 296. HRI did not provide any

[2] The Church Rock Environmental Report evaluates Church Rock as a single site. In the context of this litigation, Sections 8 and 17 began being treated as separate and distinct sites pursuant to the Presiding Officer's Memorandum and Order granting HRI's June 4, 1998 request to bifurcate the proceeding. Memorandum and Order (Scheduling

information regarding flare factors, well field area, or ore zone thickness in the Church Rock Environmental Report. HRI never mentioned a porosity value in its analysis of groundwater restoration, but one table provides a porosity value of 25 per cent for HRI's core samples. Id. at 290, Table 6.6-1.

In February 1997, the Nuclear Regulatory Commission Staff ("NRC Staff" or "Staff") issued its final environmental impact statement for the CUP. NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project, Crownpoint, New Mexico (February 29, 1997) ("FEIS") (ACN 9703200270. In Section 4.3, the FEIS described environmental impacts to groundwater under the proposed alternative of mining the three sites at Church Rock, Unit 1, and Crownpoint. In the FEIS, the Staff expressed its "significant concerns" about HRI's use of a small number of small-scale core tests "to represent site-scale groundwater restoration demonstration." Id. at 4-29. The FEIS also concluded that HRI's estimate that it would take 4.15 pore volumes to restore the groundwater to average baseline or New Mexico drinking water standards was too low, and that achieving primary and secondary groundwater restoration goals would require "significantly more" than 4 pore volumes. Id. at 4-29, 4-40.

The FEIS noted that in all tests cited by HRI, the pore volumes required to achieve the "lower water quality of the secondary restoration standard" ranged from 1 to 28, but that little improvement was demonstrated after 8 to 10 pore volumes. Id. at 4-40. The FEIS stated that in a restoration conducted by Mobil Oil Company in 1979 and 1980 at Section 9, T17N, R12W, approximately one mile north of HRI's Unit 1 site ("Mobil Section 9"), total dissolved solids ("TDS") concentrations "were close to the secondary restoration goal" after 6.9 and 9.7 pore

and Partial Grant of Motion for Bifurcation) (September 22, 1998) (unpublished). Many documents prior to June 4, 1998, including the Final Environmental Impact Statement, evaluate Section 8 and Section 17 as one site.

volumes. Id. On this basis, the Staff concluded, "practical production scale groundwater restoration activities would at most require a 9 pore volume restoration effort." Id. Thus, the Staff "calculated groundwater impacts assuming the use of 9 pour [sic] volumes for groundwater restoration." Id. The Staff also stated that surety should be maintained at that level until HRI had demonstrated the number of pore volumes that would be needed to restore the aquifer. Id. The FEIS did not cite any decommissioning plan or decommissioning cost estimate by HRI.

On April 1, 1996 HRI submitted a set of responses to Requests for Additional Information ("RAI") from the NRC Staff.[3] HRI also provided a response to Question 59, which sought information on *cumulative groundwater consumption* during and after mining operations. RAI Q-59 (1996). The response stated that HRI assumed restoration circulation of 4 pore volumes. Id. It also contained an attachment that consisted of a table titled "Church Rock Project — Groundwater Restoration Volume Calculated by Zone." Id., Attachment 59-1. For Section 8, the table showed various variables for nine zones, including thickness, volume of the zone, porosity, and horizontal flare factor. Id. Total restoration volumes in gallons were calculated for each zone and for the entire Section 8. Id. Neither the text of the response itself, nor the table in Attachment 59-1, provided any basis for the selection of the variables used to estimate water consumption for the 100-percent groundwater sweep restoration method. RAI Q-59 at 2 and Attachment 59-1 at 1. Furthermore, neither the question posed by the NRC staff nor the response given by HRI addressed financial assurance for restoration or compliance with the surety requirements of Criterion 9 of 10 C.F.R. 40, Appendix A.

[3] Letter from Mark S. Pelizza to Joe Holonich, "Request For Additional Information, Questions 49-91" ("RAI Q-59") (April 1, 1996) (ACN 9604030208).

On April, 5, 1996 HRI submitted a lengthy response to the Staff's RAI Q-92,[4] which requested HRI to examine "costs and benefits" of four different processing options that were being considered in the NEPA review for each of the three proposed mining sites. (Again, at the time of HRI's response to Q-92, the Church Rock site was analyzed as one mining unit, not two; see, footnote 3, above.) The response was contained in five 4-inch binders and included four pages of narrative and an estimated 4,000 pages of spreadsheets that had no additional narrative explanation. RAI Q-92. By HRI's own description, the narrative and spreadsheet analyses comprised a "full cycle" cost feasibility study of designing and constructing plant and equipment, operating the mines, and dismantling each mine site for four different processing options. RAI, Q-92 at 1. Nowhere in either the narrative of the Q-92 response or the accompanying spreadsheets was the analysis called or described as a "financial assurance plan" or generated for the purpose of demonstrating compliance with Criterion 9 of 10 C.F.R. 40 Appendix A.

However, in the section of the Q-92 narrative entitled "Restoration and Reclamation", HRI stated that "[t]he Restoration and Reclamation schedule provides a restoration fluid balance based on circulating four pore volumes of processed water through the mine-out reservoir." RAI, Q-92 at 3. No basis, explanation or description was provided in the narrative or the accompanying spreadsheets for the use of four pore volumes. Additionally, in a table titled "Hydrology and Geologic" that appeared as page 7-1 of each scenario, the horizontal and vertical flare factors were combined and the number of pore volumes "to recovery" was assumed to be 40, not 4. RAI Q-92 at 7-1. Some of these factors were repeated in a table titled "Wellfield Details" that appeared on page 8-1 of each scenario in the Q-92 response spreadsheets. Again,

[4] Letter from Mark S. Pelizza to Joe Holonich, "Request for Additional Information, Question 92, Cost/Benefit Analysis for Hydro Resources, Inc. (HRI) Uranium Solution Mining License Application, Crownpoint, New Mexico

no basis for the selection or use of those factors was provided in either the narrative or the spreadsheets. No explanation or calculation for the number of pore volumes to recovery, 40, was given. Importantly, like HRI's response to Q-59, HRI's Q-92 response did not contain an estimate of the total volume of water that would be processed during restoration — the single most significant contribution to the cost of restoration, decommissioning and decontamination.

Buried in the thousands of pages of spreadsheets in HRI's response to Q-92 were estimates of the costs of restoration and reclamation for each mining site: $10.2 million for Church Rock, $6.5 million for Unit 1, and $12.3 million for Crownpoint. RAI Q-92 at 1-1 for each site. Neither the separate amounts for each site or the total of those estimates — $29 million — was reported by HRI or represented in the response as an estimate of the total surety needed to complete decommissioning, decontamination and reclamation at all three sites.

On August 15, 1997, HRI submitted Revision 2 to the Crownpoint Uranium Project Consolidated Operations Plan ("COP"). In Section 10.4, entitled "Groundwater Restoration," HRI stated that: "[p]rior to conducting mining operations, HRI will develop an updated groundwater restoration plan for the entire project. At a minimum, this plan will include a refined restoration schedule, and a general description of updated methodology of the restoration, and post-restoration groundwater monitoring for the entire project." COP-161. In Section 10.4.4, entitled "Documentation of Effectiveness," HRI described a demonstration project that would be commenced upon inception of mining, in order to "demonstrate the number of pore volumes required to restored a production-scale wellfield." Id. at COP-167. In the meantime, surety bonding for groundwater restoration of the initial wellfields would be based on 9 pore volumes. Id. In Section 10.4.6, entitled "Restoration Surety," HRI states that the 9 pore volume estimate is "based on the submitted data," and repeats a portion of the text of the FEIS at page 4-

("RAI, Q-92") (April 5, 1996) (ACN 9604260063).

40. The COP did not contain any decommissioning cost estimate, or any information regarding porosity, flare factors, or any other factors that HRI intended to use to calculate the actual cost of decommissioning the initial wellfields or any other part of the Crownpoint project.

On January 5, 1998, the NRC Staff issued a license to HRI. Letter from Joseph J. Holonich, NRC, to Richard F. Clement, Jr., HRI, re: Issuance of Source Material License SUA-1508, for the In Situ Leach Uranium Mining Project at Crownpoint, New Mexico. (ACN 9801160066). Condition 9.5 of the license allowed HRI to submit its surety arrangements and decommissioning cost estimate after issuance of the license, but before mining began. SUA-1508, License Condition ("LC") 9.5. Condition 9.5 also stated that the "surety for groundwater restoration of the initial well fields" would be "based on 9 pore volumes." Id.

License Condition 10.28 further provided that before injecting lixiviant at either Unit 1 or Crownpoint, the licensee must "submit NRC-approved results of a groundwater restoration demonstration conducted at the Church Rock site." SUA-1508, LC 10.28. The demonstration must be conducted at a "large enough scale" to determine the "number of pore volumes that shall be required to restore a production-scale well field." Id.

As discussed below in Section C, the parties litigated the issue of HRI's compliance with NRC decommissioning funding requirements in 1999 and 2000. On November 21, 2000, in response to the Commission's remand in CLI-00-08, HRI filed its Restoration Action Plan ("RAP Section 8. Hydro Resources, Inc. Church Rock Section 8/Crownpoint Process Plant Restoration Action Plan (November 21, 2000). As required by Criterion 9 and CLI-00-08, HRI's RAP for Section 8 provided, for the first time, a surety amount that is based on an estimate of the cost for a third party to remediate the Section 8 site, including the aquifer underlying Section 8, in the event that HRI is unable to do so. In the RAP, HRI also provided, for the first time, in the

context of cost estimates for surety, its rationale for its decommissioning cost estimate, including the volume of water that HRI believes will be required to be flushed through the aquifer to achieve restoration standards after mining is completed, and the estimated dollar cost of that water. RAP, § E.2, Table 1 RAP, Attachment E-2-1. While HRI had submitted some of this information in its 1996 responses to RAI Q-59 and RAI Q-92, *see* discussion, *supra,* at 6-7, there were significant differences. First, the porosity figure proposed by HRI in the RAP was higher than the figure proposed in 1996, thus increasing the estimate of the number of gallons of water required from about 124 million to about 147 million. RAP, § E.2, Table 1. Second, for the first time, the RAP attached a dollar value to the number of gallons required. Id. at § E.2.

C. Procedural Background

Intervenors requested a hearing on HRI's license application in December 1994, and amended their request after the FEIS was issued on February 29, 1997. ENDAUM and SRIC's Second Amended Request For Hearing, Petition To Intervene, And Statement Of Concerns (August 15, 1997). On January 5, 1998, Staff issued license SUA-1508. More than four months later, the Presiding Officer issued an order granting ENDAUM and SRIC standing as parties and admitting a number of their concerns for adjudication. LPB-98-9, 47 NRC 261, 266 (1998).

On January 11, 1999 Intervenors filed a written presentation on their admitted concerns regarding the adequacy of HRI's financial surety. Eastern Navajo Diné Against Uranium Mining's And Southwest Research And Information Center's Brief In Opposition To Hydro Resources Inc.'s Application For A Materials License With Respect To: Financial Assurance For Decommissioning ("Financial Assurance Presentation"). Intervenors' Financial Assurance Presentation was supported by the testimony of Dr. Michael F. Sheehan ("Sheehan Testimony"). Id. at Exhibit 1.

As recognized by the Presiding Officer in LBP-04-03, at that time, HRI had not presented any decommissioning plan or cost estimate that Intervenors could address in their presentation and testimony. LBP-04-03, slip. op. at 11, n. 46 (February 27, 2004). Thus, in their Financial Assurance Presentation, Intervenors criticized the absence of these documents and addressed the inadequacies of the information that had been provided in the few documents that gave any information about HRI's plans for decommissioning Section 8: the COP; HRI's RAI Responses of April 1 and April 5, 1996; the FEIS; and HRI's license. Intervenors therefore argued, *inter alia*, that HRI did not satisfy the requirements of Criterion 9 because it had failed to submit any evidence of a surety arrangement and cost estimates for restoration by a third party contractor prior to licensing. Id. at 17-19. Intervenors also argued that the 9 pore volume figure required by LC 9.5 was not based on safety concerns but rather on the financial convenience to the applicant. Id. at 15-16.

In his supporting testimony, Dr. Sheehan criticized HRI's failure to submit a decommissioning plan or decommissioning cost estimate. Sheehan Testimony at 18-19. He also criticized the "restoration and reclamation" cost estimate provided by HRI in its 1996 response to RAI Q-92 on the ground that it was based on 4 pore volumes rather than the 9 pore volumes as required by LC 9.5. Id. at 15. Dr. Sheehan pointed out that if the total costs estimated for reclamation and restoration (i.e., 29 million) were extrapolated to the full 9 pore volumes, the cost of restoration would be $63 million. Id. at 18.

HRI filed its response to Intervenors' Financial Assurance Presentation on February 11, 1999. Hydro Resources, Inc.'s Response To Intervenors' Briefs With Respect To Hydro Resources, Inc.'s Technical And Financial Qualifications And Financial Assurance For Decommissioning ("HRI Financial Assurance Response"). The NRC Staff responded on

February 18, 1999. NRC Staff's Response To Intervenors' Presentations On Technical Qualification, Financial, And Decommissioning Issues ("Staff Financial Assurance Response").

In its response, HRI defended its refusal to submit a financial assurance plan or decommissioning funding estimate at the time of licensing. HRI Financial Assurance Response at 19. In response to Intervenors' criticism that it had not provided any information regarding estimated decommissioning costs, HRI simply referred to "detailed plans" that it had allegedly included in its 1996 RAI response.[5] Id. In another part of its response, however, HRI admitted that in reality, it was postponing a "detailed cost analysis" until the initial mine unit was installed:

> HRI has not even completed wellfield delineation as yet. Any attempt at a detailed cost analysis now would be a wasted effort, as the analysis would have to be re-done at the time the initial mine unit was installed.

HRI Financial Assurance Response at 21.

In its response, the NRC argued that HRI was not required to submit its surety arrangements or the decommissioning plan on which they were based until after licensing. Staff Financial Assurance Response at 3. In a footnote, the Staff referred to two letters submitted by HRI in 1997 and 1998, and not included in the hearing file for this proceeding, that contained surety estimates. Id., n. 4. The Staff attached the letters to its response. The first letter, dated June 25, 1997, contains as an attachment a "Financial Assurance Plan" for Church Rock Section 8. Under the heading of "Groundwater Restoration (9 P.V.) & Surface Reclamation," the plan provides estimated cost figures over a time period of 12 months for various factors, including labor, electrical and water, and chemicals. No information is given regarding the assumptions or calculations that were used to arrive at the largest cost in the estimate, the cost of electrical and

[5] In fact, as discussed above in Section B, the 1996 RAI Q-92 response did not contain any "detailed plans." *See*

water. Moreover, the cost estimates are not extrapolated to the license term of five years, as required by Criterion 9.

The Staff's response does not represent the contents of the June 25, 1997 letter as satisfying Criterion 9; in fact, other than the footnote, the letter is not discussed at all in the Staff's response. The Staff merely states in the footnote that it is "in the process of reviewing surety materials submitted by HRI." Staff Financial Assurance Response at 3, n.4.

On March 9, 1999 the Presiding Officer issued his partial initial decision regarding financial assurance for decommissioning issues. LPB-99-13, 49 NRC 233 (1999). In his decision, the Presiding Officer rejected Intervenors arguments regarding pore volumes. 49 NRC at 236. The Presiding Officer noted that the NRC Staff's determination of nine pore volumes was greater than HRI's estimate of four pore volumes, and was calculated on the basis of the data submitted by HRI. Id. citing FEIS at 4-40. Ultimately, and without analysis of any calculations provided by HRI and the Staff, the Presiding Officer concluded that there was no merit to the Intervenors' argument that the Staff improperly used 9 pore volumes as a standard for calculating the amount of surety. Id. at 237. The Presiding Officer did not make any decision regarding HRI's flare factor values, aquifer porosity, wellfield dimensions, or ore zone dimensions, much less a decision on the total number of gallons of water needed to restore the groundwater at Section 8 or the dollar figure assigned to that number.

On March 30, 1999, Intervenors petitioned for review of LBP-99-13. Intervenors' Petition For Review Of Presiding Officer's Partial Initial Decision On LBP-99-13, Financial Assurance For Decommissioning (March 30, 1999). Intervenors' Petition for Review was granted by the Commission on July 23, 1999. CLI-99-22, 50 NRC 3,5 (July 23, 1999). In

discussion, *supra*, at 6-7. Instead, it provided a number of "life cycle cost" analyses for different mining scenarios. Moreover, the cost estimate provided by HRI in 1996 was based on 4 pore volumes, not 9.

addition to granting Intervenors' Petition For Review, the Commission also determined that while Criterion 9 does not require license applicants to provide an actual surety arrangement prior to licensing, it does require a financial assurance plan, based on NRC approved cost estimates. Id. at 18.

On August 13, 1999, Intervenors submitted their brief on review of LBP-99-13. Brief Of Intervenors Eastern Navajo Diné Against Uranium Mining And Southwest Research And Information Center On Review Of Partial Initial Decision LBP-99-13, Financial Assurance For Decommissioning ("Financial Assurance Review Brief") (August 13, 1999). Intervenors challenged HRI's failure to submit Commission-approved cost estimates or to establish surety arrangements based on those estimates, before issuance of the license. Financial Assurance Review Brief at 8-17. Intervenors also challenged the adequacy of the information submitted to date by HRI to satisfy the requirements of Appendix A to Part 40, criticizing HRI's 1996 RAI response and the Financial Assurance Plan submitted by HRI in June of 1997 as "deficient in terms of the scope of the surety proposed, the lack of relevant cost estimates for a third party contractor, lack of contingency cost information, and the lack of explanation to support any of the cost estimates that are provided." Id. at 17. In addition, Intervenors argued that the Presiding Officer's rejection of their argument that the 9 pore volume figure was inadequate in light of other restoration experiences at other ISL mines was in error because he overlooked the evidence they presented. Id. at 23. Finally, Intervenors argued that under LC 9.5, HRI would only be required to provide surety for restoration of the "initial wellfields" in Section 8. Id. at 20.

In CLI-00-08, the Commission agreed with Intervenors that HRI had failed to satisfy the requirements of Criterion 9 because it had not filed a financial surety plan with cost estimates prior to issuance of its license. CLI-00-08, 51 NRC 227, 239 (2000). In reaching its decision,

the Commission stated that in situations where, as in the current proceedings, a license is issued before a hearing on the license is complete, Intervenors are logically entitled to *prehearing* receipt of all information critical to the license, including the full terms of the license itself and its associated financial assurance plan. Id. at 240 (emphasis in original). The Commission determined that HRI had not provided a financial assurance plan, stating "[t]he long and the short of the matter is that, at this writing, the record before us reveals no final estimates, no final plan, and no final NRC Staff review." Id. at 241.

However, the Commission also affirmed that portion of LBP-99-13 determining the 9 pore volume figure to be sufficient for restoration. Id. at 244. The Commission reasoned that the Presiding Officer correctly decided that Dr. Sheehan's testimony concerning pore volumes was unconvincing because it amounted to a footnote alluding to the fact that two other ISL projects required significantly more pore volumes. Id. Finally, the Commission noted with approval the Presiding Officer's determination that LC 9.5 allows the Staff to increase the number of required pore volumes and surety amount prior to HRI beginning operations. Id. at 245. Like the Presiding Officer, the Commission made no determination regarding HRI's estimates for flare factor values, aquifer porosity, ore zone thickness, wellfield dimensions, total number of gallons of water needed to restore the aquifer or the dollar figure assigned to that number.

On November 21, 2000 HRI filed its RAP for Section 8 pursuant to CLI-00-08. In the RAP, HRI provided, for the first time, in the context of cost estimates for surety, its rationale for its decommissioning cost estimate, including the volume of water that will be required to be flushed through the aquifer to achieve restoration standards after mining is completed. RAP, § E.2 Table 1 RAP, Attachment E-2-1. The groundwater restoration estimate provided by HRI in

the RAP represented the first time in the course of the proceedings where all the specific elements of its groundwater restoration calculations were revealed for the entirety of Section 8.

In their response to the RAP, Intervenors presented testimony evaluating the basis for HRI's cost estimates.[6] Intervenors argued that HRI had grossly underestimated the amount of water necessary to remediate the aquifer to restoration standards and thus underestimated the amount of money needed for financial assurance. Intervenors' Response to RAP at 14-17. In reality, the number of gallons of water required to flush the aquifer is likely to be substantially greater, thus doubling HRI's cost estimate of $7.2 million. Ingle Testimony at 13-14.

On November 8, 2001, a live hearing on HRI's RAP and cost estimates was held in Rockville, Maryland. At the hearing, several important facts were established. First, it was established that HRI's Section 8 restoration demonstration project would encompass only one wellfield, not the entirety of Section 8. Transcript of Hearing (Part 1, pp. 138-299) ("Tr.1") at 289, lines 16-18 (November 8, 2001) (ACN ML013190566). Second, it became apparent that HRI itself had not meaningfully connected pore volumes to a cost estimate until it was forced to generate the RAP. Tr.2 at 447; See also, Tr.2 at 455. Third, it became apparent that HRI never had a technical basis for its flare factor values, but instead back calculated the 1.5 horizontal flare factor value and the 1.3 vertical flare factor value from the total number of gallons of water that Mobil used to remediate Section 9. Tr. 2 at 425, lines 2-3.

On February 27, 2004, Presiding Officer issued a decision regarding HRI's RAP. LBP-04-03 (February 27, 2004).. In his decision, the Presiding Officer refused to consider

[6] Intervenors' Response To Hydro Resources, Inc.'s Cost Estimates And Restoration Action Plan Of November 21, 2000 at 14-17 (December 21, 2000); Exhibit 1, Written Testimony of Mr. Steven C. Ingle in Support of Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000); Exhibit 2, Written Testimony of Dr. Richard J. Abitz in Support of Intervenors' Response to Hydro Resources Inc.'s Cost Estimates and Restoration Action Plan of November 21, 2000 (December 19, 2000) ("Abitz Testimony").

Intervenors' arguments regarding the inadequacy of HRI's groundwater restoration cost estimate, on the ground that the issue had been decided against Intervenors in LPB-99-13 and CLI-00-08. Id, slip op.at 11-12, citing LBP-99-13, 49 NRC at 236-237, CLI-00-08, 51 NRC at 244-245. Id. at 11-12, n. 46. The Presiding Officer found that despite the fact that neither HRI nor the Staff provided a technical explanation for the 9 pore volume figure, the previous Presiding Officer, Judge Bloch, nonetheless found the estimate sufficient based on deference to the Staff's "professional judgment" and because LC 9.5 allows adjustment in surety. Id. at 11-12, n. 46.

STANDARD OF REVIEW

The Commission reviews the legal findings of licensing boards *de novo*. Factual determinations may be reversed if the record compels a different result. General Public Utilities Nuclear Corporation (Three Mile Island Nuclear Station, Unit 2), ALAB-926, 31 NRC 1, 13 (1990) citing Niagra Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit2), ALAB-264, 1 NRC 347, 357 (1975). The Commission, however, has "inherent authority to review and act upon any ad judicatory matter before a Commission tribunal – subject only to the constraints of action on the record and reasoned explanation of the conclusions." Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516 (1977).

SUMMARY OF THE ARGUMENT

The Presiding Officer's determination that Intervenors are barred from challenging HRI's groundwater restoration estimates should be reversed for three reasons. First, HRI's groundwater restoration estimates based on 9 pore volumes apply only to HRI's groundwater restoration demonstration project and not the entirety of Section 8. Because Criterion 9 requires that a surety be sufficient to cover restoration costs until the license is renewed, in this case five

years, Intervenors should be permitted to challenge the groundwater restoration cost estimates based on that figure, for any amount beyond that of the Section 8 demonstration project.

Second, critical components of HRI's groundwater restoration calculations changed throughout the hearing. Specifically, the actual number of gallons of water that HRI estimated it would need to flush through the aquifer changed from one part of the hearing to another. Because the components of HRI's calculations for the volume of water it will need to restore the aquifer were constantly changing, Intervenors were denied a meaningful opportunity to participate in these proceedings.

Third, HRI's RAP represents the first time in these proceedings that HRI presented its technical basis for its groundwater restoration cost estimates. While some of the constituent parts of HRI's groundwater restoration cost estimates were buried throughout the record, they were presented in different contexts and were by no means complete or final. These circumstances required Intervenors to assemble, from different parts of a voluminous record, some of the calculations HRI might have used for cost estimates that HRI itself had not yet generated. This scenario stifles meaningful public participation in this NRC proceeding in contravention of the Atomic Energy Act and fundamental notions of fairness in adjudications.

ARGUMENT

Section 189 of the Atomic Energy Act ("AEA") provides, "[i]n any proceeding under this chapter, for the granting, suspending, revoking of any license or construction permit ... the Commission shall grant a hearing upon request of any person whose interest may be affected by the proceeding ..." 42 U.S.C § 2239(a)(1)(A). The United States Court of Appeals for the District of Columbia Circuit interpreted this provision to require meaningful public participation in NRC proceedings. Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission,

735 F.2d 1437, 1446 (D.C. Cir. 1984) citing Bellotti v. U.S. Nuclear Regulatory Commission 725 F.2d 1380, 1389 (D.C. Cir. 1983) (Wright, J., dissenting).. Thus, while the NRC has the freedom to structure its proceedings so as to maintain their integrity, one of its goals must be to assure that there is meaningful public participation. Id. Moreover, the court noted that administrators may not lightly sidestep procedures that involve the public in deciding important questions of public policy. Id., citing Environmental Defense Fund, Inc. v. Ruckleshaus, 439 F.2d, 584, 594 (D.C. Cir. 1971).

At a minimum, meaningful public participation should include fundamental principles of fairness. See e.g., Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1584 (10th Cir. 1994), citing Garvey v. Freeman, 397 F.2d 600, 612 (10th Cir.1968) (hearings and appeals under 7 C.F.R. § 780 must conform to basic concepts of fair play, including full, albeit informal, discussion of the pertinent issues with the rights of confrontation and cross-examination); Oberstar v. FDIC, 987 F.2d 494, 504 (8th Cir. 1993). ("The statute [18 U.S.C. § 1818(i)(2)(H)] provides that a respondent who makes a timely hearing request ... 'shall be afforded an agency hearing'. Implicit in that is a mandate that the hearing be fundamentally fair."). Meaningful public participation must also include access to all material evidence. Greene v. Babbitt, 64 F.3d. 1266, 1274 (9th Cir. 1994) (Indian tribe's due process rights were violated by the United States Department of Interior where, in the course of a tribal recognition proceeding, the tribe did not have access to all of the material evidence and therefore had to speculate whether its materials adequately addressed materials submitted by others).

Moreover, the Presiding Officer's refusal to consider Intervenors' challenge to HRI's pore volume calculations is in contravention of the Commission's order in CLI-00-08. In CLI-00-08 the Commission determined that Criterion 9 requires an applicant for a source and

byproducts materials license to submit for Staff approval a decommissioning plan including cost estimates, prior to the issuance of a license. 51 NRC at 239. In making this ruling, the Commission declared that submission of a complete and final decommissioning and financial assurance plan is critical to ensure a "meaningful hearing opportunity on all substantive issues material to the agency's licensing decision." Id. at 240 (emphasis added).

As demonstrated in the RAP's table of decommissioning and restoration costs, the volume of water required to flush the aquifer constitutes a significant portion of the decommissioning budget. Id., Attachment E-2-1, Groundwater Restoration Budget. Thus, there can be no doubt that the adequacy of HRI's groundwater restoration estimate must be included among the "substantive issues material to the agency's licensing decision." CLI-00-08, 51 NRC at 240. Accordingly, the Presiding Officer should have considered Intervenors' evidence.

In this case, Intervenors were denied meaningful public participation under the AEA for three reasons. First, the 9 pore volume figure applies only to HRI's restoration demonstration project and not the entire Section 8 operation. By applying the nine pore volume figure to the entire Section 8 restoration cost estimate, the NRC has denied Intervenors the opportunity to meaningfully challenge HRI's RAP.

Second, HRI did not provide a consistent porosity value or number of gallons of water to be used in its pore volume calculation until it submitted its RAP. Until November 21, 2000, Intervenors had no consistent formula with which to evaluate the number of gallons of water encompassed by the 9 pore volume figure. The Presiding Officer's determination that Intervenors should be prohibited from challenging HRI's cost estimates based on the nine pore volume figure should therefore be reversed.

Third, the calculations for the pore volume figure were never introduced in one place in the context of cost estimates for groundwater restoration. Instead, the calculations were spread throughout the record and were used in a number of different contexts. This amounted to finding a needle in a haystack. The Intervenors's right to a meaningful hearing on the issues was denied.

I. The 9 Pore Volume Figure Cannot Serve As The Basis For HRI's Groundwater Restoration Cost Estimates For All Section 8 Wellfields.

The Commission has established that Criterion 9 of Part 40, Appendix A of 10 C.F.R, applies to ISL mining. CLI-99-22, 50 NRC at 18. Thus, HRI is required to comply with all Criterion 9's requirements. Id. Criterion 9 provides, in relevant part:

> Regardless of whether reclamation is phased through 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 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 (emphasis added).

The NRC's groundwater restoration surety requirements for HRI are incorporated in HRI's materials license in License Conditions 9.5 and 10.28. License Condition 9.5 provides, in relevant part:

> 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.

SUA-1508, LC 9.5. License condition 10.28 provides that HRI is required to provide the results of groundwater restoration demonstration conducted at the Church Rock site prior to injecting lixiviant at either the Unit 1 or Crownpoint site. SUA-1508, LC 10.28.

In prohibiting Intervenors from challenging the 9 pore volume figure and attendant cost estimates for the entire Church Rock Section 8 site, the Presiding Officer denied them a meaningful hearing on all issues relevant to HRI's RAP in contravention of the AEA and CLI-00-08. License Condition 9.5 provides that restoration of HRI's initial wellfields will be based on 9 pore volumes and will be maintained at this level until the number of pore volumes needed to restore the groundwater quality at a production scale well field has been established by the groundwater restoration demonstration described in LC 10.28. SUA-1508, LC 9.5. However, Criterion 9 requires that a licensee maintain a surety that is at least enough to cover the costs of decontamination and decommissioning for the area the licensee expects to disturb before its next license renewal, in this case five years. 10 C.F.R. Part 40, Appendix A, Criterion 9. If the licensee must maintain a surety in an amount *at least* sufficient to cover the costs of decommissioning and reclamation of the areas that are expected to be disturbed before the next license renewal, the licensee's restoration plan and attendant cost estimates should logically reflect this requirement. The cost estimates for that surety must also be submitted to the NRC prior to licensing. Id., CLI-00-08, 51 NRC at 239. Therefore, HRI is required to submit decommissioning cost estimates, including those for groundwater restoration, at least sufficient to cover areas it will disturb over a five-year period.

In this case, HRI's cost estimate for the entirety of Section 8 is based on a groundwater restoration estimate that encompasses a project that will last only 4.47 years. RAP, Attachment E-2-1. HRI estimates its costs for the *entire* Section 8 groundwater restoration surety on the

number of gallons of water based on 9 pore volumes. RAP, Section E.2 However, the groundwater restoration demonstration required by LC 10.28 will encompass only one wellfield in Section 8. Tr.1 at 289, lines 16-18.

This is impermissible under Criterion 9. License Condition 9.5 allows HRI to base its surety for its *initial wellfields* on 9 pore volumes. However, if the groundwater demonstration project required by LC 10.28 shows that the amount of water used by 9 pore volumes is insufficient to restore the groundwater, the surety will be adjusted[7]. Id. The practical effect of this language is to restrict the groundwater restoration estimates based on 9 pore volumes to the restoration demonstration. Because HRI has said its restoration demonstration will encompass only one wellfield, the groundwater restoration estimate based on 9 pore volumes cannot apply to the entirety of Section 8. Section 8 encompasses nine wellfields. RAP, § E.2, Table 1.

Because Intervenors were prohibited from challenging HRI's basis for its cost estimates for the entirety of Section 8, they have been denied a meaningful hearing on all issues relevant to groundwater restoration for Section 8. The Presiding Officer's decision in LBP-04-03 barring Intervenors from challenging the 9 pore volume figure should be reversed.

II. Intervenors Could Not Meaningfully Challenge HRI's Groundwater Restoration Volume Estimates Because HRI Did Not Provide Consistent Data.

As discussed, *supra,* at 2-3, in order to determine the volume of water needed to restore an aquifer, there are many variables that must be considered, including the number of pore volumes needed to flush the aquifer; the thickness and porosity of the aquifer; and horizontal and vertical flare factors. Ingle Testimony at 9. In addition, to estimate the cost of this volume of

[7] While the language of LC 10.28 currently prohibits injection of lixiviant at Crownpoint and Unit 1 until HRI has conducted a restoration demonstration, this License Condition was written prior to bifurcation. When created this Condition was intended to prevent HRI from mining any additional sites prior to conducting a commercial scale restoration at its initial site. LPB-04-03, slip. op. at 14. Recognizing this, the Presiding Officer concluded that LC

water, a dollar value must be assigned to each gallon of water. Tr. 2 at 427. During the course of this proceeding, Intervenors did not have a meaningful opportunity to challenge HRI's cost estimates based on 9 pore volumes because HRI did not provide a single value for porosity or the total number of gallons of water it would use to restore the aquifer until it submitted its RAP. Thus, until the RAP was submitted, Intervenors did not know what porosity value HRI was using for its pore volume calculation and could not challenge it. Intervenors likewise did not know how many gallons of water HRI would flush through the aquifer at Section 8 until the RAP was filed.

Prior to submitting its RAP pursuant to CLI-00-08, neither HRI nor the Staff had presented a consistent porosity value for HRI's pore volume calculation. In HRI's response to the Staff's RAI Q-59, HRI represented the porosity of the aquifer at Section 8 as 21 percent. RAI Q-59, Attachment 59-1. In its response to Q-92, HRI reported the porosity for the entire Church Rock site as 25 percent. RAI Q-92 at 7-1 (contained in Hearing Record Books 9.5 and 9.6 for Church Rock scenarios). The Staff represented the porosity of the aquifer as 28 per cent in the FEIS. Tr.2 at 43; FEIS 4-122. Finally, in the RAP, the porosity value given was 25 per cent. RAP, § E.2, Table 1. Thus, the RAP was the first time that HRI settled on a porosity figure of 0.25, or 25 per cent. Intervenors could not have made a meaningful criticism of HRI's decommissioning funding estimate before November 2000 when HRI provided a final version of this crucial multiplier.

Likewise, prior to submitting its RAP, HRI did not provide a consistent number of gallons of water that HRI would use to restore the aquifer. In HRI's RAI Q-59, HRI represented the volume of water in one "revised" pore volume at Section 8 as 124.2 million gallons. RAI Q-

10.28 should be amended to prohibit HRI from injecting lixiviant at Crownpoint, Unit 1, or Section 17 until it has conducted a commercial scale restoration demonstration on Section 8. Id. at 15.

59, Attachment 59-1. Four years later, HRI represented in the RAP the total number of gallons in a "corrected" pore volume at Section 8 as 147.8 million gallons.[8] RAP, § E.2, Table 1.

Until it submitted its RAP in November 2000, HRI had not presented a definitive porosity value or total number of gallons needed to restore the aquifer. Until November 21, 2000, Intervenors were unable to challenge all the variables that HRI used to arrive at its groundwater restoration cost estimate. Intervenors did the best with what they were given, but ultimately, the process afforded them offended fundamental notions of fairness. Without the basic principles of fairness present in the hearing process, the Intervenors were denied their right of meaningful participation in the process guaranteed by the AEA and CLI-00-08.

III. Intervenors Could Not Meaningfully Challenge HRI's Groundwater Restoration Estimates Because HRI Did Not Provide Its Calculations Of That Estimate In The Context Of Financial Assurance.

Intervenors were also denied meaningful participation in these proceedings because the components of HRI's groundwater restoration cost estimates that were provided prior to the RAP submission were not provided in the context of cost estimates for surety. Analyzing the number of gallons of water in a pore volume for the purpose of generating cost estimates for surety is very different than analyzing pore volumes in other contexts because of the emphasis put on the actual number of gallons being flushed through the aquifer and the dollar amounts attached to each gallon. HRI's responses to Q-59 and Q-92 are prime examples of this problem. In both responses, the total volume of water needed for restoration was not explicitly calculated or labeled as such. This was for good reason because, as explained in Section B, above, developing cost estimates for financial assurance was not the *purpose* of those responses. It was not until HRI presented the total restoration water volume of 1.33 billions gallons (based on circulating 9

[8] The terms "revised" and "corrected" pore volumes are synonymous because they both incorporate horizontal and vertical flare factors in the calculation.

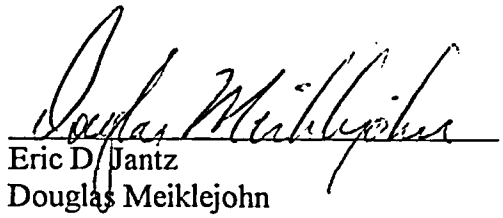
pore volumes) in the November 2000 RAP that Intervenors were able to evaluate HRI's cost estimates *in the context of financial assurance.* In fact, prior to HRI submitting its RAP, the NRC Staff itself conceded that HRI had not provided adequate information for it to approve a surety arrangement. In its response brief to Intervenors' briefing on their petition for review of LBP-99-13, the NRC Staff stated, "[t]o date, HRI has not provided the Staff with sufficiently detailed cost-estimate information and the Staff is thus not yet in a position to approve a surety arrangement ..." NRC Staff's Response Brief On Financial Surety Issues at 13 (Sept. 3, 1999).

To force Intervenors to litigate HRI's cost estimates for groundwater restoration before HRI had presented any detailed cost estimates at all is fundamentally unfair. This is particularly true in light of HRI's burden of proving that its license is not inimical to the public health and safety and meets all regulatory requirements. Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 & 3), ALAB-566, 10 NRC 527, 529 (1979). Intervenors have been put in the untenable position of having to scour a voluminous record for small and discreet pieces of information scattered throughout the record, put together a cost estimate scenario that HRI might be likely to submit, and then challenge that estimate.

CONCLUSION

For the foregoing reasons, the Commission should reverse the Presiding Officer's decision in LBP-04-03 barring Intervenors from challenging HRI's cost estimates for groundwater restoration for Section 8.

Respectfully submitted this 14th day of June, 2004.



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	ASLBP No. 95-706-01-ML
(P.O. Box 15910	)	
Rio Rancho, New Mexico 87174)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors Eastern Navajo Diné Against Uranium Mining's And Southwest Research And Information Center's Brief On Review Of LBP-04-03 " in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by an asterisk, by electronic mail and U.S. Mail, first class, this 14th day of June, 2004:

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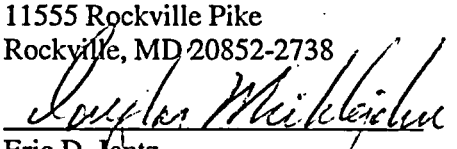

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NEW MEXICO
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June 14, 2004

BY ELECTRONIC MAIL AND U.S. FIRST CLASS MAIL

U.S. Nuclear Regulatory Commission
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Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing Intervenors Eastern Navajo Diné Against Uranium Mining's And Southwest Research And Information Center's Brief On Review Of LBP-04-03. Copies of the enclosed have been served on the parties indicated on the enclosed certificate of service. Additionally, please return a file-stamped copy in the attached self-addressed, postage prepaid envelope.

If you have any questions, please feel free to contact me at (505) 989-9022. Thank you for your attention to this matter.

Sincerely,

Douglas Meiklejohn

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Enclosures

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