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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

In the Matter of)
)
HYDRO RESOURCES, INC.)
(PO Box 777,)
Crownpoint, New Mexico 87313))
_____)

Docket No. 40-8968-ML
ASLBP No. 95-706-01-ML

**INTERVENORS' RESPONSE TO HRI'S AND THE NRC STAFF'S INITIAL
BRIEFS ON REVIEW OF LBP-04-3**

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INTRODUCTION

Hydro Resources, Inc. ("HRI"), in its Initial Brief On Presiding Officer's Decision In LBP-04-3 Regarding Hydro Resources, Inc.'s Section 8 Restoration Action Plan ("HRI Review Brief") and the Nuclear Regulatory Commission ("NRC") Staff ("NRC Staff" or "Staff") in its Brief On Labor And Equipment Issues ("Staff Review Brief") make several arguments that the Presiding Officer's decision that HRI's labor and equipment cost estimates in its November 21, 2000 Restoration Action Plan ("RAP") is in error. Pursuant to the United States Nuclear Regulatory Commission's ("Commission") Memorandum and Order CLI-04-14, Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (collectively, "Intervenors") hereby submit their brief in response to HRI's and the Staff's Review Briefs.

The plain language of 10 C.F.R. Part 40, Appendix A, Criterion 9 requires that decommissioning cost estimates must cover the total costs for an independent contractor to decommission and reclaim a uranium mining facility. The evidence in the record shows that HRI's labor and equipment cost estimates are not based on the total costs for an independent contractor to decommission and reclaim HRI's Church Rock Section 8 facility. The Presiding Officer's determination that HRI's labor and equipment cost estimates are inadequate should therefore be affirmed.

I. BACKGROUND AND PROCEDURAL HISTORY

On April 13, 1988, HRI filed a license application for ISL mining at three sites comprising the "Crownpoint Project": Church Rock, Unit 1, and Crownpoint¹. Application for

¹ In the context of this litigation, Church Rock 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 and Partial Grant of Motion 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").

Intervenors requested a hearing on HRI's license application in December 1994, and amended their request after the Final Environmental Impact Statement 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, including the adequacy of HRI's financial surety. 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"). As recognized by the Presiding Officer in LBP-04-3, at that time, HRI had not presented any decommissioning plan or cost estimate that Intervenors could address in their presentation and testimony. LBP-04-3, 59 NRC 84, 93 n. 46 (2004).

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 all Intervenors' arguments. Id.

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.

On March 30, 1999, Intervenor petitioned for review of LBP-99-13. Intervenor's Petition For Review Of Presiding Officer's Partial Initial Decision On LBP-99-13, Financial Assurance For Decommissioning (March 30, 1999). Intervenor's Petition for Review was granted by the Commission on July 23, 1999. CLI-99-22, 50 NRC 3,5 (1999). In addition to granting Intervenor's Petition For Review, the Commission also determined that while Criterion 9 of 10 C.F.R., Part 40, Appendix A ("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, Intervenor submitted their brief on review of LBP-99-13. Brief Of Intervenor 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). Intervenor 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. Intervenor also challenged the adequacy of the information submitted to date by HRI to satisfy the requirements of Appendix A to Part 40. Id. at 17.

In CLI-00-08, the Commission agreed with Intervenor 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, Intervenor 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. The Commission instructed HRI to submit a decontamination, decommissioning, and reclamation plan with cost estimates within 180 days of service of its order. Id. at 242.

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 labor and equipment costs. RAP, § E.

In their response to the RAP, Intervenors presented testimony evaluating the basis for HRI’s cost estimates. Intervenors’ Response To Hydro Resources, Inc.’s Cost Estimates And Restoration Action Plan Of November 21, 2000 at 14-17 (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); 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) (“December 19 Abitz Testimony”). Intervenors argued that HRI had grossly underestimated labor costs. December 19 Abitz Testimony at 13-14. Intervenors also argued that HRI had not accounted for the cost of its brine concentration system. Intervenors’ Response to RAP at 23-24.

HRI and the Staff both submitted responses to Intervenors’ Response to RAP. Reply of Hydro Resources, Inc. To Intervenors’ Response To HRI’s Cost Estimates For Decommissioning And Restoration Action Plan (January 22, 2001); NRC Staff’s Response To Intervenors’ Financial Assurance Brief (January 22, 2001). Neither HRI nor the NRC Staff presented any

new evidence of labor cost estimates for restoration based on the costs of an independent contractor.

On March 16, 2001 at the request of the Staff, HRI submitted additional information supplementing its RAP. Letter from Mark Pelizza to Philip Ting, with attachments (March 16, 2001) (ACN ML 010810221) ("March 16 RAI Responses"). In May 2001, Intervenors filed a reply to HRI's and the Staff's responses of January 22, 2001 as well as the new information provided by HRI supplementing the RAP. Intervenors' Reply To The Responses Of Hydro Resources, Inc.'s And NRC Staff's Restoration Action Plan Presentations Of January 22, 2001 And Information Generated Subsequent To Those Presentations (May 24, 2001) ("May 24 Reply"); Exhibit 1, Written Testimony Of April Lafferty In Support Of Intervenors' Reply To HRI's And NRC Staff's January 22, 2001 Responses To Intervenors' Presentation On HRI's Restoration Action Plan And Cost Estimates (May 23, 2001) ("Lafferty Testimony"); Exhibit 2, Written Testimony Of Dr. Richard J. Abitz In Support Of Intervenors' Reply To HRI's And NRC Staff's January 22, 2001 Responses To Intervenors' Presentation On HRI's Restoration Action Plan And Cost Estimates (May 23, 2001) ("May 23 Abitz Testimony"). In their May 24 Reply, Intervenors again took HRI to task regarding its cost estimates for labor, arguing that HRI's labor cost estimates were not based on the costs to an independent contractor, and that its labor costs should be correlated to the amount of water to be processed during restoration. May 23 Abitz Testimony at 9-10, 12-13. Dr. Abitz' testimony was based on his experience with independent contractors at a Department of Energy restoration site in Ohio that is treating groundwater heavily contaminated with uranium. Id. at 9.

On November 8, 2001, a live hearing on HRI's RAP and cost estimates was held in Rockville, Maryland. At that hearing, Intervenors presented evidence concerning the costs, with

respect to both labor and equipment that an independent contractor would likely incur in decommissioning and restoring the groundwater at Section 8. See eg., Transcript of Hearing (Part 2, pp. 300-472) (“Tr.2”) at 339, 345-346 (November 8, 2001) (ACN ML013190584). In contrast, neither HRI nor the Staff presented any new evidence regarding labor or equipment cost estimates for an independent contractor to decommission Section 8 and restore the aquifer.

On February 27, 2004, the Presiding Officer issued a decision regarding HRI’s RAP. LBP-04-3, 59 NRC 84 (2004). In his decision, the Presiding Officer determined that Criterion 9 requires that HRI take into account the total costs that would be incurred if an independent contractor had to perform the decommissioning and restoration work at Section 8. Id. at 99. However, the Presiding Officer found that HRI based its surety cost estimates on its own estimated operating, labor, and maintenance costs. Id. Thus, HRI’s cost estimates were insufficient under Criterion 9. Id. at 101.

On March 15, 2004 HRI petitioned the Commission for review of LBP-04-3, arguing that the Presiding Officer erred in requiring HRI to account for the costs of decommissioning and restoration of Section 8 by an independent contractor. Petition For Review Of Presiding Officer’s Initial Decision Regarding Hydro Resources, Inc.’s Section 8 Restoration Action Plan (March 15, 2001). The Commission granted review. CLI-04-14, slip. op. at 2 (May 5, 2004).

II. ARGUMENT

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 adjudicatory 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).

Both HRI and the Staff contend that the Presiding Officer erred in determining that HRI’s labor and equipment cost estimates for decommissioning and reclamation were inadequate. Despite HRI’s and the Staff’s lengthy arguments challenging the Presiding Officer’s decision, LBP-04-3 should be affirmed with respect to the inadequacy of HRI’s labor and equipment cost estimates for three reasons.

First, both HRI and the Staff ignore the plain language of Criterion 9. Criterion 9 plainly requires that “[i]n 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. Despite the plain directive of Criterion 9, both HRI and the Staff devote a considerable portion of their Review Briefs arguing that the cost estimates for labor and equipment provided by HRI, based on operations experience of HRI’s personnel, are reasonable. HRI Review Brief at 7-12; Staff Review Brief at 8-15. However, the Presiding Officer’s conclusion that Criterion 9’s requirement that a licensee’s cost estimates be based on the costs to an independent contractor is clear and that HRI did not provide cost estimates based on the costs to an independent contractor, is in accord with Criterion 9’s plain language and should be affirmed.

Second, given that Criterion 9’s plain language requires cost estimates based on the decommissioning and restoration costs of an independent contractor, the record supports the Presiding Officer’s decision with respect to HRI’s labor and equipment cost estimates. Neither HRI nor the Staff provided any substantial evidence during the course of this proceeding

regarding an independent contractor's costs for labor and equipment to decommission and reclaim Section 8. In contrast, Intervenor, as shown below, on a number of occasions, provided such evidence. The Presiding Officer's decision is fully supported by the evidence in the record. The record does not compel a different result and the Presiding Officer's conclusion that HRI's labor and equipment cost estimates are inadequate should be affirmed.

Third, HRI and the Staff's argument that the annual surety updates provided for in Criterion 9 and the Staff's argument that the annual surety update provision in SUA-1508 License Condition ("LC") 9.5 are sufficient to satisfy Criterion 9's cost estimates for surety requirement is without merit. HRI and the Staff argue that Criterion 9, which provides that HRI's surety amount is subject to annual updates to account for inflation, changes in engineering plans, or changes in activities performed, allow HRI to adjust its cost estimates in the future to account for any changes in costs. HRI Review Brief at 12-14; Staff Review Brief at 4-7. The Staff also argues that LC 9.5, which also provides that HRI's surety amount is subject to annual adjustments, is sufficient to insure an adequate surety amount. Staff Review Brief at 6-7. However, neither the annual surety update requirements of Criterion 9 nor LC 9.5 is a substitute for an initial conservative surety estimate. The surety adjustments advocated by HRI and the Staff undermine both the letter and spirit of Criterion 9's mandate to have a surety that will adequately protect the public health at all times. The Presiding Officer's decision requiring HRI to provide conservative labor and equipment costs meets this requirement and is consistent with the mandates of Criterion 9. LBP-04-3 should therefore be affirmed with respect to the inadequacy of HRI's labor and equipment cost estimates for decommissioning and reclamation of Section 8.

A. HRI And The NRC Staff Ignore Criterion 9's Plain Language Mandating Surety Cost Estimates That Take Into Account The Total Costs Of An Independent Contractor.

The starting point for analyzing any regulation is the language of the regulation itself.

Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Unit 1), LPB-95-17, 42 NRC 237, 143 (1995) citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288 (1988). When a regulation's language is legislative² in nature, the rules of interpretation applicable to statutes are equally germane to determining that regulation's meaning. Id. (citation omitted). It is well settled that when the plain language of a statute or regulation is clear, all inquiry as to its meaning must end there and the statute or regulation must be applied as written. Textron, Inc. v. Commissioner of Internal Revenue, 336 F.2d 26, 31 (1st Cir. 2003) citing Comm'r v. Soliman, 506 U.S. 168, 174 (1993). Moreover, unless the plain language of a regulation leads to an absurd result, interpretation from regulatory guidance may not conflict with the plain meaning of the wording used in a regulation, which in the end must prevail. In the Matter of Graystar, Inc., LBP-01-7, 53 NRC 168, 185-186 (2001) citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-900, 28 NRC 275, 288-90 (1988).

Criterion 9 provides, in relevant part, that "[i]n 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 (emphasis added). On its face, Criterion 9's plain

² Administrative rules are divided into two separate classes – legislative and interpretive: Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952). Legislative rules are those which create law, usually complementary to an existing law, while interpretive rules are statements as to what the administrative officer thinks the statute or legislative rule means. Id. In this case, Criterion 9, which is part of the regulatory scheme implementing the Atomic Energy Act and creates financial surety requirements for materials license applicants and licensees, is clearly legislative in nature.

language clearly requires cost estimates based on the costs for an independent contractor, not the costs for the licensee or applicant, and regardless of the licensee's or applicant's experience elsewhere, to decommission the mining facilities and restore the groundwater at Section 8.

Because the plain language is clear, all further inquiry into the meaning of the regulation must cease. Textron, Inc. v. Commissioner of Internal Revenue, 336 F.2d at 31. The Presiding Officer recognized this and based his decision on HRI's labor and equipment cost estimates on Criterion 9's plain language. LBP-04-3, 59 NRC at 100-101. The Presiding Officer stated:

Given the specificity of the language of Criterion 9, which unequivocally states that the surety arrangement must account for all the costs of an independent contractor to restore the site, coupled with HRI's inability to demonstrate that it has fully accounted for the costs of an independent contractor in the RAP, I conclude that the portions of the RAP based on upon HRI's own estimated decommissioning costs cannot be accepted.

Id.

Given the clarity of Criterion 9's language, HRI's arguments are inapposite. Nowhere in its Review Brief does HRI address the Presiding Officer's interpretation of Criterion 9's plain language. Nor does HRI argue that the plain language leads to an absurd result³. Instead HRI devotes a substantial amount of space to the argument that its labor cost estimate and equipment cost estimate should be based on "generally accepted industry practice." HRI Review Brief at 6, 17-18. Without defining "generally accepted industry practice" or pointing to any authority⁴ that

³ HRI does argue that the Presiding Officer's decision with respect to labor could lead to inefficient use of the surety bond. HRI Review Brief at 11-12. The Staff makes a similar argument. Staff Review Brief at 13. However, these arguments ignore the fact that the Presiding Officer never held that assigning an employee to conduct different, albeit related tasks was *per se* impermissible. The Presiding Officer instead held that HRI had not presented any credible evidence that an independent contractor might utilize its labor force in this manner. LBP-04-3, 59 NRC at 101.

⁴ HRI argues that NUREG-1569, Standard Review Plan for In Situ Leach Uranium Extraction License Applications ("ISL SRP"), provides that financial assurance cost estimates are acceptable if the applicant based its estimates on site conditions, including experiences with generally accepted industry practices. HRI Review Brief at 6. To the extent that language in the ISL SRP conflicts with the plain language of Criterion 9, it must be disregarded. Matter of Graystar, Inc., 53 NRC at 185-186.

defines the concept, HRI argues that its assumption that an independent contractor's personnel would perform multiple related, albeit different tasks, should be accepted as consistent with generally accepted industry practice because they are based on the experience of HRI personnel who are "standard setters" for the ISL industry. *Id.* at 7. In essence, HRI seems to be arguing that because HRI personnel are self described "standard setters" in the ISL industry, "generally accepted industry practices" are whatever HRI says they are. Thus, *any* cost estimate proffered by HRI would be consistent with generally accepted industry practice.

HRI further argues, incorrectly, that the generally accepted industry practice standard should be applied to its equipment cost estimate. *Id.* at 17-18. HRI asserts that generally accepted industry practice with respect to equipment cost estimates utilizes "life-cycle" projections to plan for repair and replacement of equipment. *Id.* at 16. Moreover, HRI asserts that the experience of its personnel supports its characterization of "generally accepted industry practices"⁵. *Id.* at 18.

HRI's arguments miss the mark entirely. The Presiding Officer did not decide that independent contractor labor and equipment cost estimates could never make assumptions based on generally accepted industry practice. He simply held that HRI presented insufficient evidence that its cost estimates were based on the costs of an independent contractor and not on its own costs. LBP-04-3, 59 NRC at 100-101. Thus, the Presiding Officer never reaches the question whether an independent contractor might be justified in assuming that its own employees might wear "multiple hats" or that it might use life-cycle projections for equipment. Thus, HRI's arguments do not address the Presiding Officer's decision.

⁵ As with its labor cost estimate argument, HRI argues that the ISL SRP supports its equipment cost estimate. HRI Review Brief at 18. Again, to the extent that language in the ISL SRP conflicts with Criterion 9's plain language, Criterion 9's language must prevail. *Matter of Graystar, Inc.*, 53 NRC at 185-186.

Unlike HRI, the Staff does address the Presiding Officer's interpretation of Criterion 9's language, although its arguments are unconvincing. The Staff claims that the Presiding Officer read too much into the "generally-worded" Criterion 9 provision that cost estimates must take into account an independent contractor's total costs for decommissioning and restoration costs. Staff Review Brief at 9. The Staff argues neither that provision nor any other provision of Criterion 9 "delves into details regarding assumptions to be made on an independent contractor's labor requirements". Id. The Staff incorrectly concludes that the "Presiding Officer's rigid and prescriptive interpretation of Criterion 9 thus finds no support in its stated terms." Id. Thus, asserts the Staff, HRI's assumption that decommissioning and restoration personnel would perform multiple related, albeit different tasks is reasonable and does not violate Criterion 9. Id. at 10.

The Staff also argues that the Presiding Officer's ruling on HRI's equipment cost estimates is contrary to Criterion 9. The Staff posits that because the word "equipment" does not appear in the text of Criterion 9, that regulation, on its face, cannot be fairly read to require a consideration of how much it would cost to lease certain pieces of equipment⁶. Id. at 16. Additionally, the Staff relies on HRI's assertion that in the event that HRI could not fulfill its decommissioning and restoration obligations, its equipment would remain on-site to argue that the record does not support the Presiding Officer's conclusion that HRI's cost estimates are inadequate. Id. at 16-17.

⁶ While the word "equipment" does not appear in the text of Criterion 9, Criterion 9's regulatory history supports the Presiding Officer's determination that HRI's cost estimate should include the cost of replacement for major equipment. In the Final Generic Environmental Impact Statement On Uranium Milling the NRC Staff suggested a regulation, which eventually became Criterion 9, that would require that cost estimates be "based on contractor costs to perform [decommissioning and tailings disposal]; therefore, *they should include equipment, labor, profit, etc.*" Final Generic Environmental Impact Statement On Uranium Milling, NUREG-0706 (1980) (emphasis added).

Each of the Staff's arguments ignores Criterion 9's plain meaning. The Presiding Officer looked at Criterion 9's plain language and applied it to the record before him. The Presiding Officer's decision had nothing to do with how an independent contractor would perform decommissioning and reclamation. Instead, the Presiding Officer simply determined that neither HRI nor the Staff had provided sufficient evidence that HRI had based its labor and equipment cost assumptions on information from an independent contractor and therefore was not in compliance with Criterion 9. LBP-04-3, 59 NRC at 100-101. The Presiding Officer's decision with respect to HRI's labor and equipment cost estimates should therefore be affirmed.

B. The Presiding Officer's Determination That HRI's Labor And Equipment Cost Estimates Do Not Satisfy The Requirements Of Criterion 9 Is Supported By Evidence In The Record.

Given that Criterion 9's plain language requires that HRI's cost estimates be based on the total costs of an independent contractor completing the decommissioning project, the Presiding Officer's decision that HRI's labor and equipment cost estimates are inadequate is supported by the record. In this case, neither HRI nor the Staff presented any meaningful evidence that HRI's labor and equipment cost estimates were based on information from or the experience of an independent contractor. In contrast, Intervenors did present evidence of independent contractor costs in analogous situations. The Presiding Officer's decision regarding HRI's labor and equipment cost estimates are fully supported by the administrative record and should be affirmed.

1. Evidence Regarding HRI's Labor Cost Estimate.

In LBP-04-3 the Presiding Officer determined that:

the current record does not support HRI's decision to require employees to wear multiple hats to decrease the costs of decommissioning ... HRI ... 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.

59 NRC at 102-103. Likewise, the Presiding Officer found that the NRC Staff's response to Intervenors' challenges to HRI's RAP was "silent with respect to the Intervenors' concerns about the RAP's inadequate labor budget." *Id.* at 102.

The record itself supports the Presiding Officer's findings. Nowhere in the voluminous record in this proceeding did HRI present any meaningful evidence that its labor cost estimate is based on anything other than the restoration experience of HRI or Uranium Resources, Inc.

("URI"), HRI's parent company, personnel.

In fact, HRI has made only unsupported assertions on the record that its estimates were based on the costs to an independent contractor. In its RAP, HRI states that "the estimate puts the costs of restoration by an independent contractor at \$ 9,457,893 over a five year period ..." RAP at § A, p. 1. HRI makes the same assertion later in the RAP, but offers no evidence that its calculations are based on information from an independent contractor. *Id.*, § E.1, n.3. HRI did not identify any independent contractor whom it contacted for its estimate. Nor did HRI identify any independent contractor on whose performance at other ISL sites its estimate was based.

In its March 16, 2001 response to the Staff's request for additional information, HRI stated that in the event that HRI was unable to conduct restoration activities, HRI believes that an independent contractor would provide staffing for radiation surveys and monitoring similarly to HRI. March 16 RAI Responses at Question 2. HRI makes a similar assertion in the context of purchase of back-up equipment. *Id.* at Question 4. However, nowhere in the RAI Responses does HRI support its assertion that an independent contractor's costs would be identical to HRI's costs. HRI did not identify any independent contractor whom it contacted for its estimate. Nor

did HRI identify any independent contractor on whose performance at other ISL sites its estimate was based.

The Staff likewise provided no credible evidence regarding the labor cost estimates of an independent contractor. In fact, in the November 8, 2001, hearing before the Presiding Officer, the Staff acknowledged that it did not have “any experience with an independent contractor working restoration on an ISL.” Tr. 2 at 345.

Intervenors, however, presented substantial evidence that independent contractor costs for labor would likely be higher than those estimated by HRI and approved by the Staff. In his December 19, 2001 testimony, Intervenors’ expert Dr. Richard Abitz testified that HRI significantly underestimated its labor costs compared to those at a comparable Department of Energy groundwater restoration project in Ohio that is treating groundwater heavily contaminated with uranium. December 19 Abitz Testimony at 13-14, ¶ 22. There, Dr. Abitz sensibly argued that rather than calculate labor costs based on a set number of labor categories that assume employees will perform multiple different, but related tasks, labor cost estimates should instead be tied to the amount of water that is treated during restoration. *Id.* at 14. Dr. Abitz reiterated his position that HRI underestimated its labor costs in his May 23, 2001 testimony. May 23 Abitz Testimony at 9-10, 12-13. Dr. Abitz also made clear that his labor cost estimate is based on that of an independent contractor, while HRI’s labor estimate is based on URI’s experience at its Texas ISL facilities⁷. *Id.* at 9-10, ¶ 15.

At the November 8, 2001 hearing before the Presiding Officer, Intervenors presented still more evidence that HRI’s labor estimate was unrealistic and not based on the work of an

⁷ HRI’s evidence is even less convincing in light of the fact that URI was unable to restore the groundwater at its Benevides and Longoria mines without the Texas Water Commission substantially relaxing groundwater restoration standards for uranium. May 23 Abitz Testimony at 21-22 and Attachment C.

independent contractor. In response to questions from the Presiding Officer about labor cost estimates, Intervenor's expert April Lafferty noted that in her experience with the Bison Basin⁸ ISL project in Wyoming, independent contractors often hired one person to do one job and did not ask employees to wear "multiple hats" as HRI assumed based on the operator experience of its personnel. Tr. 2 at 345-346. Indeed, Ms. Lafferty testified, "multiple hats does [sic] not work when you hire a third party from reclamation experience in Wyoming." Id. at 346.

2. Evidence Regarding HRI's Equipment Cost Estimate.

The record in this proceeding likewise supports the Presiding Officer's decision that HRI's cost estimate for equipment is inadequate. In making his finding that HRI's equipment cost estimate is inadequate, the Presiding Officer reasoned that Criterion 9's conservative approach to surety cost estimates is designed to eliminate the need to predict the future condition of the licensee's reclamation equipment. LBP-04-3, 59 NRC at 100. The Presiding Officer also found that evidence presented on the Bison Basin ISL project in Wyoming supported his conclusion. Id., n. 97. There, a report prepared by the Wyoming Department of Environmental Quality noted that some of the licensee's equipment was in disrepair and needed to be replaced. Id., citing Staff Response, Ford Attachment A, Bison Basin Decommissioning Project, Phase I (Aquifer Restoration) (June 1998), at 1. The equipment needed for site reclamation that had to be replaced or repaired included three reverse osmosis units, contract pumps, well heads, and wellfield lines⁹. Id.

⁸ Bison Basin was a uranium ISL facility in Fremont County, Wyoming. Lafferty Testimony, Attachment B-3 at 1. The ISL operator abandoned the facility and the State of Wyoming was forced to restore the site using money from a letter of credit. Lafferty Testimony at 22, ¶ 30.

⁹ In its Order granting review, the Commission noted that the equipment availability issue involves questions of creditor rights that have yet to be addressed in this proceeding. CLI-04-14, slip. op. at 2. While no specific creditor rights issue has been raised, the Presiding Officer's decision accounts for any plausible scenario. The Presiding Officer noted that:

As with HRI's labor cost estimate, neither HRI nor the Staff has presented any credible evidence that HRI's equipment cost estimate is based on information from an independent contractor. Instead, HRI based its equipment cost estimates on the cost of maintenance and repair of equipment throughout the equipment's life. HRI Review Brief at 17-18. This estimate was based on the operator experience of HRI's personnel. Id. at 18.

Intervenors, in contrast, presented evidence that independent contractors may need to replace a licensee's equipment in order to decommission an ISL site. Again citing her experience with Bison Basin, Ms. Lafferty testified that independent contractors could not assume that a licensee's equipment will be available for use, or that the equipment will be in working order. Tr. 2 at 339. This assumption is based on the fact that when a permit holder or licensee is in financial trouble, it might not properly maintain its equipment. Id.

Additionally, both Intervenors and the NRC Staff presented a decommissioning report by the Wyoming Department of Environmental Quality on Bison Basin. See, May 23 Lafferty Testimony, attachment B-3; NRC Staff's Response To Intervenors' Financial Assurance Brief (January 22, 2001), Ford Attachment A. As noted by the Presiding Officer, that report showed that the independent contractor at the Bison Basin ISL project needed to replace several pieces of equipment in order to complete decommissioning. LBP-04-3, 59 NRC at 100, n. 97.

Unlike the site-specific physical factors that are evaluated during the application process, the surety estimate, based upon the total costs of an independent contractor, is designed to eliminate the need to evaluate and predict the current and future financial status of each licensee and foresee the future physical condition of the licensee's reclamation equipment, *or discern and address the intricacies and vagaries of bankruptcy law*. LBP-04-3, 59 NRC at 100 (emphasis added).

Thus, an initial surety amount based on conservative cost estimates, including replacement costs of equipment, avoids the need to consider creditor rights issues.

Because the record supports the Presiding Officer's finding that HRI did not base its labor and equipment cost estimates on the cost to an independent contractor, LBP-04-3 should be affirmed with respect to the inadequacy of those cost estimates.

C. Neither Criterion 9's Annual Surety Update Requirement Nor The Principles Of Performance Based Licensing Are A Substitute For A Conservative Initial Surety Cost Estimate.

Both HRI and the NRC Staff rely on Criterion 9's annual surety update requirement in arguing that the Presiding Officer erred in ruling that HRI's labor and equipment cost estimates are inadequate. HRI Review Brief at 13-14, 19-20; Staff Review Brief at 9. Additionally, the Staff argues that the Presiding Officer's decision is inconsistent with the principles of Performance Based Licensing ("PBL"). Staff Review Brief at 9. However, annual surety updates, whether mandated by Criterion 9 or offered under PBL concepts, are no substitute for a conservative initial cost estimate and surety amount. Thus, HRI's and the Staff's arguments must be rejected.

1. Criterion 9's Annual Surety Review And Adjustment Provision Is Not A Substitute For A Conservative Initial Surety Cost Estimate.

Both HRI and the Staff argue that Criterion 9's annual surety update provision, which is embodied in LC 9.5¹⁰, allows HRI to adjust its initial surety requirements, thus obviating the need for a conservative initial surety estimate. HRI Review Brief at 12-14, 19-20; Staff Review Brief at 5-7. However, HRI's and the Staff's arguments ignore Criterion 9's plain language and Commission and Licensing Board decisions regarding financial surety plans.

Criterion 9 allows for annual surety updates to adjust for inflation, *changes* in engineering plans, activities performed and any other conditions affecting cost. 10 C.F.R. Part 40, Appendix A, Criterion 9 (emphasis added). Criterion 9's plain language therefore clearly

¹⁰ LC 9.5 substantially tracks the language of Criterion 9.

contemplates annual surety adjustments only when changes in operations occur. Thus, if HRI, for example, decided during its first year of operation that it would not mine the entirety of Section 8, then the surety amount would be adjusted accordingly. This provision of Criterion 9 should not be interpreted, however, to mean that important matters of financial assurances should be ignored until after a hearing on the matter.

Additionally, both the plain language of Criterion 9's other provisions as well as prior Commission and Licensing Board decisions refute HRI's and the Staff's interpretation of Criterion 9. Criterion 9's plain language requires that a licensee post a surety that covers the total cost of an independent contractor conducting decommissioning and reclamation prior to commencing operations. 10 C.F.R. Part 40, Appendix A, Criterion 9. Cost estimates must also guarantee a surety sufficient at all times to cover the costs of decommissioning for all areas expected to be disturbed before the licensee's next license renewal, in this case five years. Id. Criterion 9, by its terms, also requires that cost estimates be submitted at the time of application. Id.; See also, CLI-00-08, 51 NRC 227, 240 (2000). Hence, financial assurance matters, because of their critical importance to public health and safety, must be adjudicated up front and cannot be left for post-hearing resolution. Consolidated Edison Company of New York, Inc. (Indian Point Station, Unit No. 2), CLI-74-23, 7 AEC 947, 952 (1974); Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Unit 1 and 2), ALAB-461, 7 NRC 313, 318 (1978). Moreover, when there are unresolved aspects of a licensing review, post-hearing resolution is only suitable for "minor procedural deficiencies." Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-57, 18 NRC 445, 543-544 quoting Consolidated Edison Company of New York, 7 AEC at 951-952 and note 8.

Additionally, the Commission has specifically held that in the context of ISL mining, questions about the financial assurance plan cannot be left for later resolution or a second round of hearings closer to the time of operations. CLI-00-08, 51 NRC at 240. Hence, all meaningful aspects of HRI's financial surety cost estimates, including labor and equipment cost estimates, must be adjudicated now and cannot be left for resolution by means of Criterion 9's annual surety update provision. HRI's and the Staff's interpretation allowing the annual surety updates under Criterion 9 to substitute for a conservative initial surety estimate should be rejected.

2. Performance Based Licensing Is Not A Substitute For A Conservative Initial Surety Cost Estimate.

The NRC Staff, in its Review Brief, argues that HRI's initial cost estimates in its Section 8 RAP "merely start an ongoing process of establishing and maintaining proper surety values." Staff Review Brief at 5. The Staff asserts that the "flexibility" of this approach is consistent with the regulatory flexibility embodied in the Performance Based Licensing approach. *Id.* The Staff further asserts that the PBL approach is applicable to financial assurance cost estimates because the Commission has endorsed the PBL approach as applied to HRI's license. *Id.* at 9, citing CLI-99-22, 50 NRC at 16-18.

Performance Based Licensing, however, is inapplicable to HRI's cost estimates for surety. Performance Based Licensing principles are integrated into HRI's license via LC 9.4. License Condition 9.4 provides that HRI may: make changes in the Crownpoint Project's facilities or processes as described in HRI's Consolidated Operations Plan; make changes in its standard operating procedures; and conduct tests and experiments, if certain conditions are met. SUA-1508, LC 9.4(A). On its face, LC 9.4 does not contemplate foregoing a conservative initial surety estimate in favor of post-hearing adjustments to a surety.

Furthermore, in analyzing the applicability of PBL, the Commission noted that LC 9.4, which embodies the PBL approach in HRI's license, merely "identifies types of *minor* operational modifications, without *significant* safety or environmental impact, that HRI may make without obtaining a license amendment from NRC." CLI-99-22, 50 NRC 3, 16 (1999) (emphasis added). The Commission's decision in CLI-99-22 clearly does not suggest that PBL allows a significant issue, such as labor and equipment cost estimates for surety purposes, to be left for resolution during the course of operations. Moreover, reading CLI-99-22 in the broad manner suggested by the Staff undermines NRC policy, as stated in other proceedings and the Commission in CLI-00-08, that financial surety issues should not be left for post hearing resolution. In short, nothing in CLI-99-22 contradicts the Commission's later determination in CLI-00-08 that financial assurance matters should not be left for post-hearing resolution. CLI-00-08, 51 NRC at 240.

Finally, the PBL approach, as applied to HRI's license, only permits changes that are consistent with existing license conditions and applicable regulations. CLI-99-22, 50 NRC at 17. As explained in Section II.C.1, *supra*, Criterion 9's plain language and Commission and Licensing Board decisions concerning the importance of financial assurances show that financial assurance matters should not be left to post-hearing resolution. Therefore, the PBL approach is inapplicable to HRI's cost estimates for financial surety. The Staff's argument should be rejected and the Presiding Officer's determination that HRI's equipment and labor cost estimates for decommissioning and reclaiming Section 8 are inadequate should be affirmed.

CONCLUSION

The plain language of 10 C.F.R. Part 40, Appendix A, Criterion 9 requires that decommissioning cost estimates must cover the total costs for an independent contractor to decommission and reclaim a uranium mining facility. The evidence in the record shows that HRI's labor and equipment cost estimates are not based on the total costs for an independent contractor to decommission and reclaim HRI's Church Rock Section 8 facility, but are instead based on HRI personnel's experience as ISL facility operators. Further, Criterion 9's requirement that a licensee update its surety annually and the principles of Performance Based Licensing cannot substitute for a conservative initial decommissioning and reclamation cost estimate. The Presiding Officer's determination that HRI's Section 8 labor and equipment cost estimates for decommissioning and reclamation are inadequate should therefore be affirmed.

Dated: July 12, 2004.


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of)

HYDRO RESOURCES, INC.)

(P.O. Box 777)

Crownpoint, New Mexico 87313))

Docket No. 40-8968-ML

ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of "Intervenors' Response To HRI's And The NRC Staff's Initial Briefs On Review Of LBP-04-3" 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 12th day of July, 2004:

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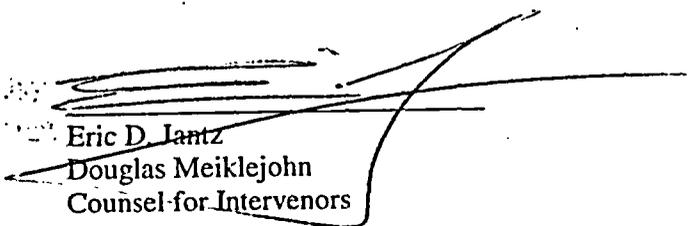
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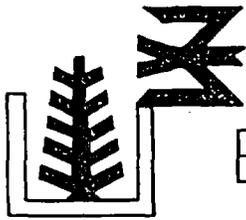
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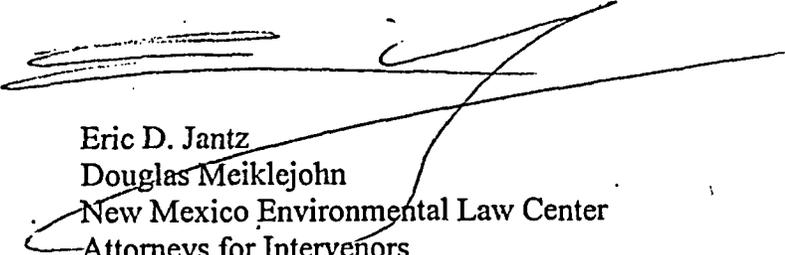
Re: In the Matter of: Hydro Resources, Inc.; Docket No: 40-8968-ML

Dear Sir or Madam:

Please find enclosed for filing Intervenors' Response To HRI's And The NRC Staff's Initial Briefs On Review Of LBP-04-3. 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,



Eric D. Jantz
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Enclosures

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