

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**DOCKETED 07/27/04**BEFORE THE COMMISSION

In the Matter of)

HYDRO RESOURCES, INC.)

P.O. Box 777)

Crownpoint, NM 87313)

Docket No. 40-8968-ML

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

By order dated May 20, 2004, the Commission granted two petitions for review of financial assurance rulings in LBP-04-3, which were disputed by the licensee, Hydro Resources, Inc. (HRI), and the Intervenor in this proceeding, Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors"). See CLI-04-14, 59 NRC ___, (slip op.). With respect to the Presiding Officer's ruling on HRI's labor and equipment cost estimates,¹ the licensee sought and was granted Commission review. See CLI-04-14, slip op. at 2. The Intervenor sought and were granted review of the Presiding Officer's refusal to consider their objections to HRI's pore volume estimate.² *Id.*, slip op. at 3-4. Both HRI and the Staff filed briefs regarding labor and equipment costs on June 14, 2004.³ The Intervenor filed their response on July 12, 2004.⁴ Pursuant to the Commission's schedule, the NRC Staff hereby replies to the Intervenor's response regarding labor and equipment issues. *Id.*, slip op. at 6.

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

² See *id.* at 90-93.

³ See "Hydro Resources, Inc.'s Initial Brief on Presiding Officer's Decision in LBP-04-03 Regarding Hydro Resources, Inc.'s Section 8 Restoration Action Plan" and "NRC Staff's Brief on Labor and Equipment Issues" (Staff's Initial Brief).

⁴ See "Intervenors' Response to HRI's and the NRC Staff's Initial Briefs on Review of LBP-04-03" (Intervenors' Response Brief).

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

BACKGROUND

Pursuant to a Commission Memorandum and Order imposing a new license condition prohibiting use of the license until the cost estimate information was submitted and a financial assurance plan was approved by the NRC Staff,⁵ HRI submitted its "Restoration Action Plan" (RAP) for Churchrock Section 8 (its initial intended mining site) on November 21, 2000. In early 2001, HRI revised its Section 8 RAP in response to a Staff request for additional information.⁶ The Staff determined that the amended RAP established an acceptable cost estimate for the decommissioning, decontamination, and restoration of the first well field to be mined at Section 8.⁷ The Intervenor challenged the adequacy of the Section 8 RAP in its December 21, 2000 response.⁸ HRI and the Staff filed replies to the Intervenor's First Response on January 22, 2001.⁹ After the Intervenor filed a second written presentation on the RAP,¹⁰ the Presiding Officer issued

⁵ See CLI-00-8, 51 NRC 227, 238 and 241-42 (2000).

⁶ See HRI letter to the Staff dated March 16, 2001, enclosing updated pages for the Section 8 RAP.

⁷ Staff letter to HRI ("Acceptance of Restoration Action Plan for [HRI] In-Situ Uranium Mining Project, License SUA-1580"), dated April 16, 2001.

⁸ See "Intervenor's Response to [HRI's] Cost Estimates and [RAP] of November 21, 2000," dated December 21, 2000 (Intervenor's First Response).

⁹ See "Reply of [HRI] to Intervenor's Response to HRI's Cost Estimates for Decommissioning and [RAP]" (HRI's Reply); and "NRC Staff's Response to Intervenor's Financial Assurance Brief" (Staff's Reply), respectively.

¹⁰ See "Intervenor's Reply to the Responses of [HRI] and the NRC Staff's [RAP] Presentations of January 22, 2001 and the Information Generated Subsequent to Those Presentations," dated May 24, 2001.

a decision indicating deficiencies on the labor and equipment cost estimates in the RAP.¹¹

ARGUMENT

The Staff maintains that the Intervenor's arguments set forth in their Response Brief should be rejected and the Presiding Officer's rulings in LBP-04-03 be reversed. Despite the Intervenor's arguments regarding the "plain language" of Criterion 9, the regulation does not support the Presiding Officer's decision on labor and equipment cost estimate issues. In addition, contrary to the Intervenor's statement, the Staff does not assert that the annual surety estimate update provision in Criterion 9 and License Condition (LC) 9.5, nor that the principles of Performance Based Licensing (PBL) are a substitute for a conservative initial surety cost estimate. To that end, the Staff maintains that the cost estimates submitted by HRI in its Section 8 RAP are reasonable and comply with the requirements of Criterion 9.¹²

I. Contrary to the Intervenor's Arguments Regarding the "Plain Language" of Criterion 9, the Regulation Does Not Support the Presiding Officer's Decision on Labor and Equipment Cost Estimate Issues

After offering a tutorial on interpretation of a regulation, the Intervenor's assert that Criterion 9 is a "plain directive" and that the Staff ignores its "plain meaning." See Intervenor's Response Brief, at 9-13. Criterion 9 requires that "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. According to the Intervenor's, Criterion 9 requires that HRI provide "conservative labor and equipment costs." Intervenor's Response Brief at 8. In evaluating HRI's Section 8 RAP, the Presiding Officer refused

¹¹ See LBP-04-03, 59 NRC 84, 99-103 (2004).

¹² The Intervenor's argue that "the Presiding Officer's determinations that HRI's labor and equipment cost estimates do not satisfy the requirements of Criterion 9 is supported by evidence in the record." See Intervenor's Response Brief at 13-16. The Staff does not address this argument herein, but rather refers the Commission to its arguments to the contrary in its Initial Brief. See *generally* Staff's Initial Brief at 7-17.

to accept HRI's assumption that an independent contractor would be able to utilize "multiple hat laborers" and onsite "major equipment" in performing site decommissioning activities and found its RAP estimate insufficient. See *generally* LBP-04-03, 59 NRC at 99-103. Rather, the Presiding Officer held that HRI must submit revised cost estimates to account for the labor costs of an independent contractor and the cost of leasing "major equipment." *Id.*

The "plain language" approach urged by the Intervenors is of no assistance in supporting their argument for two reasons. First, Criterion 9 is silent with respect to the composition of the labor force and the cost of leasing "major equipment" needed for decommissioning purposes. Moreover, Intervenors offer no explanation of the phrase in Criterion 9 --"take into account"-- that would require the licensee to include any additional costs in the financial assurance plan which it submitted and the Staff approved. Thus, in spite of the Intervenors' "plain language" argument, they have failed to establish that there is a basis for the additional measures required by the Presiding Officer.

In the Intervenors' discussion of "plain language," they offer no discernable argument indicating why HRI's assumption that decommissioning and restoration personnel would perform multiple tasks is "erroneous" or "inconsistent" with Criterion 9. See Intervenors' Response Brief, at 9-12. Intervenors merely claim that the Staff ignores Criterion 9's "plain meaning" and offer nothing more. *Id.* at 13. While Intervenors fail to concede that Criterion 9 provides no explicit directive on labor costs, Intervenors do concede that the text of the regulation does not contain the term "equipment." *Id.* However, in support of the Presiding Officer's ruling that HRI's RAP estimate must include the cost of leasing major equipment,¹³ Intervenors cite to a 1980 generic environmental document on uranium milling.¹⁴ *Id.* This document provides no support for the

¹³ See LBP-04-03, 59 NRC at 101.

¹⁴ "Final Generic Environmental Impact Statement on Uranium Milling," NUREG-0706 (continued...)

Presiding Officer's determination regarding the cost of "major equipment." The document merely offers staff *proposals* for a rulemaking regarding the financial aspects of decommissioning. See "Final Generic Environmental Impact Statement on Uranium Milling," NUREG-0706 at 14-10 (1980) (emphasis added). In fact, the term "major equipment" is not included in the proposed rule for Part 40, Appendix A, Criterion 9. See 44 Fed. Reg. 50015, 50021-22 (Aug. 24, 1979).

Despite Intervenor's position that the Presiding Officer's ruling in LBP-04-03 is based on the "plain language" of Criterion 9, the regulation does not support his findings on labor and equipment costs. Rather than relying on the Staff's judgment, the Presiding Officer imposes additional requirements on HRI which are not contained within the language of Criterion 9, nor otherwise justified on the basis of the record of this proceeding. In essence, the Intervenor is asking the Commission to import additional labor and equipment cost requirements into Criterion 9 -- requirements that the drafters did not put there -- and then interpret the regulation's "plain language" as if it were written with complete clarity. As such, the Commission should reject the Intervenor's argument and reverse the Presiding Officer's decision.

II. The Staff Does Not Assert that the Annual Surety Estimate Update Provision in Criterion 9 and License Condition 9.5 Nor the Principles of Performance Based Licensing Are a Substitute For a Conservative Initial Surety Cost Estimate

In its discussion of financial assurance requirements applicable to HRI, the Staff explains the annual surety estimate update provisions in Criterion 9¹⁵ and HRI License Condition (LC)

¹⁴(...continued)
(1980).

¹⁵ 10 C.F.R. Part 40, Appendix A, Criterion 9 provides, in part: "The licensee's surety mechanism will be reviewed annually by the Commission to assure that sufficient funds would be available for completion of the reclamation plan if the work had to be performed by an independent contractor. The amount of the surety liability should be adjusted to recognize any increases or decreases resulting from inflation, changes in engineering plans, activities performed, and any other conditions affecting costs."

9.5.¹⁶ See Staff's Initial Brief at 4-7. The Staff notes that Criterion 9 provides a flexible method whereby the surety amount may be adjusted annually. See *id.* at 5. This flexibility, the Staff asserts, is consistent with the Performance Based Licensing (PBL) approach. *Id.*

Intervenors argue that annual surety updates and the principles of PBL are not a substitute for a "conservative initial surety cost estimate." Intervenors' Response Brief, at 18. Intervenors claim that the Staff discusses Criterion 9's annual surety update provision as well as LC 9.5 in an attempt to "obviate[e] the need for a conservative initial surety estimate" *Id.*

For legal authority on this point, the Intervenors' cite to a Commission decision in the *HRI* proceeding. Intervenors' Response Brief, at 20 *citing* CLI-00-08, 51 NRC at 240. Intervenors assert that the Commission "has specifically held that in the context of ISL mining, questions about financial assurance plans cannot be left for later resolution or a second round of hearings closer to the time of operations." *Id.* Thus, the Intervenors reason, "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." *Id.*

Again, the Intervenors misconstrue the Staff's argument. The Staff agrees with the

¹⁶ LC 9.5 incorporates the above-referenced Criterion 9 requirements into HRI's license. It states, in pertinent part, "Annual updates to the surety amount, required by 10 C.F.R. Part 40, Appendix A, Criterion 9, shall be provided to the NRC at least 3 months prior to the anniversary date of the license issuance. If the NRC has not approved a proposed revision 30 days prior to the expiration date of the existing surety arrangement, the licensee shall extend the existing arrangement, prior to expiration, for 1 year. Along with each proposed revision or annual update of the surety the licensee shall submit supporting documentation showing a breakdown of the costs and the basis for the cost estimates with adjustments for inflation (i.e. using the approved Urban Consumer Price Index), maintenance of a minimum 15 percent contingency, changes in engineering plans, activities performed, and any other conditions affecting estimated costs for the site closure.

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

Intervenors that a conservative initial surety cost estimate is appropriate.¹⁷ Furthermore, the Staff does not argue that annual surety updates are a “substitute for a conservative initial surety estimate.” Intervenors’ Response Brief, at 18. In its discussion of the annual surety update requirement in Criterion 9 and LC 9.5, the Staff articulated the financial assurance requirements applicable to HRI. See Staff’s Initial Brief, at 4-7. The Staff explained that the licensee’s surety amount will be reviewed annually by the Commission to ensure that it is adjusted as circumstances require. See *id.* In addition, the Staff indicated, in its argument on the adequacy of HRI’s labor assumptions, that Criterion 9 provides inherent regulatory flexibility. *Id.* at 9. Because changes occur over time during the ISL mining process, the applicable regulations provide a flexible method by which the surety amount can be adjusted as necessary.

Furthermore, Intervenors fail to appreciate that in CLI-00-08, the Commission was addressing the question of when a financial assurance *plan* must be submitted for NRC review and approval -- either before or after issuance of the license. See 51 NRC at 239-40. In fact, the Commission states, “This does not mean that some matters may not be left for post-licensing action, particularly activities that are simply ministerial or *by their very nature require post-licensing verification by our Staff*, but we do not consider the financial assurance plan among them.” CLI-00-08, 51 NRC at 240 (emphasis added). In this decision, the Commission was not discussing the annual surety update as described in Criterion 9 or LC 9.5. As such, CLI-00-08 does not support the Intervenors’ claim that “financial surety *issues* should not be left for post-hearing resolution.” Intervenors’ Response Brief at 21 (emphasis added).

In their brief, Intervenors also criticize the Staff’s argument regarding performance based licensing (PBL) and its applicability to HRI’s cost estimates. Intervenors’ Response Brief, at 20-21.

¹⁷ During a transcribed session before the Presiding Officer, NRC Staff members and the Presiding Officer discussed the conservatism and contingency amount built into the HRI surety estimate. See November 8, 2001, Transcript at 349-351. In addition, the licensee noted that it submitted “conservative” cost estimate assumptions. See *id.* at 347.

Intervenors assert, "Performance based licensing is not a substitute for a conservative initial surety cost estimate." *Id.* at 20. Intervenors again cite to the Commission's ruling in CLI-00-08 to buttress their argument that "financial surety issues should not be left for post hearing resolution." *Id.* at 21 *citing* CLI-00-08, 51 NRC at 240.

Once more, Intervenors misconstrue the Staff's argument and the Commission's decision. In its initial brief, the Staff noted that the flexibility of Criterion 9 is consistent with a regulatory scheme which the Commission has already endorsed in this proceeding -- PBL. Staff's Initial Brief, at 5, 9. The Staff does not argue that PBL is a substitute for a conservative initial surety. Rather, the Staff argues that the Presiding Officer's ruling in LBP-04-03 is inconsistent with Criterion 9's flexibility and ignores the Commission endorsement of the PBL approach. *Id.* As noted above, in CLI-00-08, the Commission addressed the timing of submission of the financial assurance plan to the Staff -- not the validity or adequacy of the annual surety update. 51 NRC at 240.

CONCLUSION

For the foregoing reasons, the Staff respectfully requests that the Commission reverse the Presiding Officer's rulings that the RAP's labor assumptions and equipment cost estimates cannot be accepted.

Respectfully submitted,

/RA/

Mauri T. Lemoncelli
Counsel for NRC Staff

Dated at Rockville, Maryland
this 26th day of July, 2004

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO 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 persons this 26th day of July, 2004, by deposit into the U.S. Mail, first class (or as indicated by an asterisk, through the Nuclear Regulatory Commission's internal mail system), and by electronic mail (except as indicated by a double asterisk).

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