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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED  
USNRC

July 29, 2004 (3:59PM)

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In the Matter of:

Hydro Resources, Inc.  
P.O. Box 777  
Crownpoint, NM 87313

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)  
) Docket No.: 40-8968-ML

) Date: July 26, 2004  
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REPLY OF HYDRO RESOURCES, INC. TO INTERVENORS' RESPONSE TO  
HYDRO RESOURCES, INC.'S APPEAL REGARDING SECTION 8  
RESTORATION ACTION PLAN

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July 26, 2004

Template = SECY-021

SECY-02

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HYDRO RESOURCES, INC.'S APPEAL REGARDING SECTION 8  
RESTORATION ACTION PLAN**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record and pursuant to a *Memorandum and Order* dated May 20, 2004 from the Commission, hereby submits this Reply to Intervenor's Response to Hydro Resources, Inc.'s Appeal Regarding Section 8 Restoration Action Plan (RAP) for HRI's Nuclear Regulatory Commission (NRC) 10 CFR Part 40 materials license to operate an *in situ leach* (ISL) uranium mining facility in Church Rock, New Mexico. For the foregoing reasons, HRI respectfully requests that the Presiding Officer's decision in LBP-04-03 with respect to his findings in Sections IIF(1) and IIF(2) are in error and should be reversed. Further, HRI respectfully requests that the Commission determine that HRI's Section 8 RAP financial assurance cost estimates are sufficient and that the prohibition on the use of HRI's source material license for Section 8 be lifted.

**BACKGROUND AND PROCEDURAL HISTORY**

On February 27, 2004, the Presiding Officer issued an Order in which HRI's use of its NRC license (SUA-1508) to conduct ISL uranium mining activities was prohibited pending resolution of three specific issues: (1) re-calculation of HRI's Section 8 surety

using the “tremie” line method for well-plugging, (2) re-calculation of labor costs using the estimated average costs projected by two independent contractors or the estimates provided by Intervenors without assuming employees would wear “multiple hats;” and (3) re-calculation of reclamation costs based on the average costs projected by two or more independent contractors, without assuming use of HRI’s “major” equipment. *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Memorandum and Order: Ruling on Restoration Action Plan*, LBP-04-03, at 34, ML040620318 (February 27, 2004) (hereinafter “LBP-04-03”).

In response to the Presiding Officer’s Order, on March 15, 2004, HRI submitted a Petition for Review addressing the latter two issues noted above in the Presiding Officer’s decision in LBP-04-03 requesting that the Commission grant review of HRI’s Petition and permit further briefing on the subject-matter of that Petition.<sup>1</sup>

On May 20, 2004,<sup>2</sup> the Commission granted review and requested further briefing on the two issues appealed by HRI.<sup>3</sup> On June 14, 2004, HRI and NRC Staff submitted their initial briefs regarding these two issues and, on July 12, 2004, Intervenors submitted their response to HRI’s initial brief.

In this Reply, HRI presents its response to the Commission’s request for briefs and asserts that the Presiding Officer’s decision in LBP-04-03, with respect to his

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<sup>1</sup> With respect to the first finding of the Presiding Officer regarding HRI’s proposed well-plugging method, HRI will address this issue outside the scope of this appeal by either amending its RAP to use the “tremie” line method to calculate well-plugging costs or by seeking approval of its proposed well-plugging method from the State of New Mexico Engineer’s office.

<sup>2</sup> *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Commission Order Extending Time to Rule on Petitions for Review of LBP-04-03*, Docket No. 40-8968-ML (May 19, 2004); *In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Commission Order Extending Time to Rule on Petitions for Review of LBP-04-03*, Docket No. 40-8968-ML (March 31, 2004).

<sup>3</sup> *See Hydro Resources, Inc. (Crownpoint Uranium Project), Memorandum and Order*, CLI-04-14 (May 20, 2004). (hereinafter “CLI-04-14”)

findings in Sections IIF(1) and IIF(2), are in error and should be reversed. Further, HRI respectfully requests that the Commission determine that HRI's Section 8 RAP financial assurance cost estimates are adequate and that the prohibition on the use of HRI's source material license for Section 8 be lifted.

### **DISCUSSION<sup>4</sup>**

#### **I. Intervenor's Response Brief Does Not Demonstrate that HRI's Section 8 Restoration Action Plan is Insufficient**

Intervenors' Response brief ignores most of the substance of HRI's initial brief and, instead, focuses on two general allegations: (1) the "plain language" of 10 CFR Part 40, Appendix A, Criterion 9 (hereinafter "Criterion 9") demonstrates that HRI's financial assurance cost estimates are insufficient and (2) that annual surety updates cannot serve as a "substitute" for the type of surety estimate delineated by the Presiding Officer. Neither of these general allegations demonstrates that the Presiding Officer's decision below is correct.

#### **A. Intervenor's Reliance on the "Plain Language" of Criterion 9 is Without Merit**

Intervenors argue that the plain language of Criterion 9 demonstrates that the Presiding Officer's decision in LBP-04-03 regarding HRI's Section 8 RAP labor and equipment cost estimates was correct. *See* Intervenor's July 12, 2004, Response Brief at 10-11. For example, Intervenor alleges that "HRI did not identify any independent contractor whom it contacted for its estimate," and that "HRI [did not] identify any independent contractor on whose performance at other ISL sites its estimate was based."

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<sup>4</sup> HRI hereby incorporates its discussion of the appropriate standard of review for the instant appeal from its June 14, 2004, initial brief into this Reply by reference. *See* HRI June 14, 2004, Initial Brief at 4-5.

*Id.* at 14-15. Intervenors also allege that “[e]ach of the Staff’s arguments ignores Criterion 9’s plain meaning.” *Id.* at 13.

Intervenors’ *repeated conclusory* assertions that the “plain language” of Criterion 9 demonstrates the inadequacy of HRI’s Section 8 RAP financial assurance cost estimates for decommissioning associated with HRI’s proposed labor categories and site equipment does not reflect the language in Criterion 9 or *generally accepted industry practices*.

The “plain language” of Criterion 9 does not specifically address either the use of site employees performing multiple related, albeit different, tasks during groundwater restoration or the methodology by which a licensee may calculate financial assurance cost estimates for site equipment. Intervenors also fail to present any evidence that Criterion 9 explicitly or implicitly requires a 10 CFR Part 40 licensee to solicit specific price quotations from an independent contractor or to reference a specific independent contractor’s work at a previous site prior to submitting a RAP for review.<sup>5</sup> Criterion 9’s plain language only requires that financial assurance cost estimates be *sufficient* to support decommissioning activities completed by an independent contractor.<sup>6</sup> Without more, Intervenors have failed to demonstrate that Criterion 9’s “plain language” directly addresses any of these subjects.<sup>7</sup>

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<sup>5</sup> HRI notes for the record that it is unaware of any ISL uranium mining licensee that was required to solicit specific price quotations from an “independent contractor” prior to submitting a RAP.

<sup>6</sup> As noted in HRI’s initial brief, any potential “independent contractor” hired by HRI to provide a cost estimate for an ISL uranium mining site, particularly for a site which has not yet been made ready for production, much less for restoration, would create a paid consultant of HRI, rather than an *independent* contractor.

<sup>7</sup> NRC Staff’s June 14, 2004, initial brief also disputes Intervenors’ conclusions regarding Criterion 9’s “plain language.” For example, NRC Staff states, “[n]either in this [cited] provision, nor in any other portions of Criterion 9, does the regulation delve into details regarding assumptions to be made on an independent contractor’s labor requirements” and “[t]he word ‘equipment’ appears nowhere in the text of Criterion 9, and thus, on its face, criterion 9 cannot

Intervenors also fail to account for NRC Staff's interpretation of Criterion 9 in the provisions of NUREG-1569 (ISL SRP). As a general matter, NRC Staff is charged with interpretation and application of NRC's regulations (i.e., 10 CFR Part 40, Appendix A) with respect to NRC licensees. To help licensees fulfill these responsibilities, NRC Staff traditionally issues guidance documents (e.g., NUREGs) for licensees to follow when submitting applications for licensing actions. NRC licensees traditionally rely on such guidance documents when preparing regulatory submittals such as RAPs, because such guidance documents reflect NRC Staff's interpretation of the Commission's regulations.

The ISL SRP specifically discusses the manner in which financial assurance is to be calculated. This discussion includes the statement that financial assurance cost estimates are acceptable if "[t]he applicant has based the assumptions for financial surety analysis on site conditions, including experiences with *generally accepted industry practices*...." ISL SRP at 6-26 (emphasis added); *see also id.* at 6-24. Nowhere in their brief do Intervenors refute the fact that HRI can properly rely on *generally accepted industry practices* to prepare its Section 8 financial assurance cost estimates. Without attempting to address the details of HRI's financial assurance cost estimates, Intervenors merely suggest that, based on HRI's initial brief, "any cost estimate proffered by HRI would be consistent with generally accepted industry practice." Intervenors' July 14, 2004, Response Brief at 11 (emphasis omitted). HRI relied on its experienced staff to prepare its detailed cost estimates in a manner that reflects industry practices which, to its knowledge, have never required a licensee to "hire" an independent contractor to develop

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fairly be read as requiring a consideration of how much it would cost to lease certain pieces of equipment." NRC Staff June 14, 2004, Initial Brief at 10 & 17.

such estimates. Thus, Intervenor's allegations regarding the "plain language" of Criterion 9 are without merit.

**B. HRI Has Presented Substantial Evidence That Its Financial Assurance Cost Estimates With Respect to Its Proposed Labor Categories and Site Equipment for Decommissioning are Sufficient**

HRI's Section 8 RAP provides substantial evidence that its financial assurance cost estimates are sufficient for an independent contractor to perform decommissioning activities. As stated in HRI's initial brief, the Section 8 RAP contains a complete list of cost estimates for each of HRI's proposed labor categories and for maintenance, repair, and, in many instances, *replacement* of site equipment used for groundwater restoration. These cost estimates were calculated using "life-cycle" worksheets, which are commonly used in the mining industry, utilizing company data from several previously mined *and restored* ISL uranium mining sites and site-specific data from the Church Rock site to project costs of production and restoration over the life of the mining unit.

Intervenor's make no attempt to refute HRI's evidence that most tasks associated with ISL uranium mining and groundwater restoration are automated<sup>8</sup> and, thus, generally rely on limited manpower performing multiple related, albeit different, tasks. In its initial brief, HRI provided evidence that its proposed labor categories, on which its financial assurance cost estimates are based, require that all employees performing one or multiple tasks must be *fully qualified* for each such task and that such categories were based on experience at four (4) ISL uranium mining projects where groundwater restoration has been fully completed or is currently ongoing. HRI's June 14, 2004, Initial

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<sup>8</sup> HRI reiterates that the Presiding Officer determined in LBP-04-03 that HRI's proposed system of using a "combination of manpower and machine," would be acceptable. See LBP-04-03 at 24-25.

Brief at 11. Thus, Intervenor's have failed to demonstrate that HRI's assessment of its proposed labor categories and associated cost estimates are not consistent with *generally accepted industry practice* and, thus, Criterion 9.

Intervenor's do not address the ambiguity in the Presiding Officer's limitation on the availability of site equipment to *major equipment*. Indeed, as stated in HRI's initial brief, "HRI is unaware of any ISL uranium mining project in the United States where its financial assurance cost estimates have required that funding be set aside to account for potential replacement of *all major equipment* such as...wells, [pumps], ion-exchange columns, yellowcake dryers, brine concentrators, reverse osmosis units, etc.)."<sup>9</sup>

On the other hand, HRI has presented evidence that, by utilizing *generally accepted industry practice*, HRI can develop estimates to address potential maintenance, repair, and replacement of any or all site equipment in the context of the life-cycle of the project and based on experience with the types of equipment in question. Indeed, as stated in HRI's initial brief, "any assumption about replacement of a...piece of equipment necessarily must consider whether it is the type of equipment that is likely to be repaired or replaced periodically (e.g., a reverse osmosis unit) or one that almost never requires repair or replacement (e.g., a brine concentrator)." See HRI June 14, 2004, Initial Brief at 17. HRI's Section 8 RAP provides an accounting of the types of equipment to be utilized at the Section 8 mining site, including funds to be set aside for the maintenance, repair, and/or replacement of such equipment. See Section 8 RAP at

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<sup>9</sup> Intervenor's also do not even attempt to address HRI's argument that the Presiding Officer's decision below could be interpreted to permit an independent contractor to expend otherwise finite financial assurance resources during decommissioning.

E.2.d. This methodology represents *generally accepted industry practice* modeled on previously mined and/or restored ISL uranium mining sites and should be deemed sufficient.

**C. Intervenor's Allegation that Annual Surety Updates Cannot Provide Adequate Safeguards for Maintaining Adequate Financial Assurance Cost Estimates is Without Merit**

Intervenors allege that Criterion 9's requirements for annual surety updates are limited to situations where "changes in operations occur." Intervenor's July 12, 2004, Response Brief at 19. Quoting Criterion 9's language regarding annual surety updates, Intervenor's claim that, "[t]his provision of Criterion 9 should not be interpreted...to mean that important matters of financial assurances should be ignored until after a hearing on the matter." *Id.*

Intervenors' statement that Criterion 9 requirements only apply to changes in operations is incorrect and flies in the face of a flexible approach to financial assurance. Indeed, as suggested by Intervenor's, one annual adjustment that is made every year is based on changes in the cost of living index to cover inflation. But, it is incontrovertible that licensees are required to account for the costs of labor and equipment associated with decommissioning an ISL uranium mining site. *See* ISL SRP at C-4. ("For each area, estimates should include costs for equipment; materials; labor and overhead; licenses; permits and miscellaneous site-specific costs."). Intervenor's cannot seriously allege that financial assurance cost estimates to account for changes in labor or equipment estimates are not a matter for annual surety updates as appropriate. Indeed, Intervenor's specifically cite to Criterion 9's language stating that financial assurance cost estimates should account for, *inter alia*, "*any other conditions affecting cost.*" *See* 10 CFR Part 40,

Appendix A, Criterion 9 (emphasis added). NRC Staff also states that “[t]hese updates take into account the rate of inflation, the results of HRI’s initial well field restoration efforts, and *any changes in HRI’s operation not already factored into the existing surety amount.*” NRC Staff June 14, 2004, Initial Brief at 7. Such potential changes could include, for example, HRI foregoing the practice of groundwater sweep and going directly to reverse osmosis and re-injection of purified water to reduce the pore volumes and, thus, accelerate the restoration process. HRI July 12, 2004, Response at 24, fn.23. It is apparent that changes in the required labor costs and maintenance, repair, and/or replacement of site equipment would be a “condition affecting cost” of the site reclamation plan.<sup>10</sup> Thus, Intervenor’s allegation regarding the insufficiency of annual surety updates to maintain adequate financial assurance cost estimates is without merit.

Further, Intervenor’s fail to address the reference to *generally accepted industry practice* in the ISL SRP for a *15-percent contingency* to be included in restoration financial assurance cost estimates to provide additional funds for unanticipated events. As stated in HRI’s initial brief, this contingency amount, coupled with HRI’s intentional listing of more “salaried” employees in its proposed labor categories and life-cycle analysis of repair and replacement costs, provide sufficient assurance that adequate funds will be available if an independent contractor must be hired to perform decommissioning. Therefore, both annual surety updates and the 15 percent contingency fund provide

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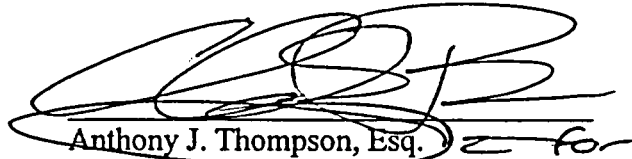
<sup>10</sup> In addition, as NRC Staff correctly points out in its argument regarding performance-based licensing, Intervenor’s rigid interpretation of Criterion 9’s language should not be accepted. “Criterion 9 specifically authorizes use of a flexible method whereby the surety may be adjusted annually *as circumstances require*....This flexibility is consistent with the regulatory flexibility embodied in the performance based licensing (PBL) approach, which the Commission has endorsed in this proceeding as applied to ISL mining licenses.” NRC Staff June 14, 2004, Initial Brief at 5.

sufficient assurance that adequate funds will be available for decommissioning by an independent contractor.

### CONCLUSION

For the aforementioned reasons, HRI respectfully requests that the Presiding Officer's decision in LBP-04-03 with respect to his findings in Sections IIF(1) and IIF(2) are in error and should be reversed. Further, HRI respectfully requests that the Commission determine that HRI's Section 8 RAP financial assurance cost estimates are sufficient and that the prohibition on the use of HRI's source material license for Section 8 be lifted.

Respectfully Submitted,

A large, stylized handwritten signature in black ink, appearing to be "CPugsley", is written over the printed name of Christopher S. Pugsley.

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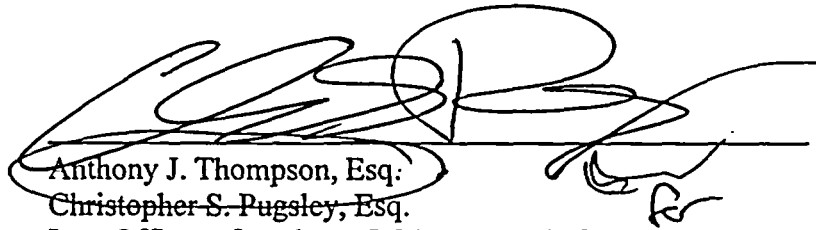
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July 29, 2004 (3:59PM)

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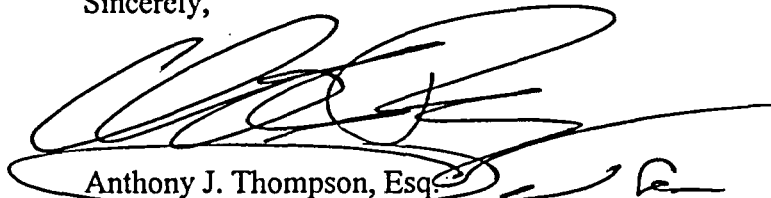
Re: In the Matter of: Hydro Resources, Inc.  
Docket No: 40-8968-ML  
ASLBP No: 95-706-01-ML

Dear Sir or Madam:

Please find attached for filing the Reply of Hydro Resources, Inc. to Intervenor's Response to Hydro Resources, Inc.'s Appeal Regarding Section 8 Restoration Action Plan in the above-captioned matter. 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 self-addressed, postage prepaid envelope attached herewith.

If you have any questions, please feel free to contact me at (202) 496-0780.  
Thank you for your time and consideration in this matter.

Sincerely,



Anthony J. Thompson, Esq.  
Christopher S. Pugsley, Esq.  
Law Offices of Anthony J. Thompson, P.C.  
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER.doc)