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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

**UNITED STATES OF AMERICA**  
**NUCLEAR REGULATORY COMMISSION**

**BEFORE THE COMMISSION**

In the Matter of:  
Hydro Resources, Inc.  
P.O. Box 777  
Crowpoint, NM 87313

)  
)  
) Docket No.: 40-8968-ML  
)  
) Date: August 24, 2005  
)

**RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-05-17**  
**REGARDING GROUNDWATER, GROUNDWATER RESTORATION, AND**  
**FINANCIAL ASSURANCE**

**SUBMITTED ON BEHALF OF HYDRO RESOURCES, INC. BY:**

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**RESPONSE TO INTERVENORS' PETITION FOR REVIEW OF LBP-05-17  
REGARDING GROUNDWATER, GROUNDWATER RESTORATION, AND  
FINANCIAL ASSURANCE**

Hydro Resources, Inc. (HRI), by its undersigned counsel of record, hereby submits this Response to Intervenor's Petition for Review of the Presiding Officer's decision in LBP-05-17 regarding groundwater, groundwater restoration, and financial assurance issues for HRI's NRC-licensed Crownpoint Uranium Project (CUP) located in Church Rock and Crownpoint, New Mexico. For the reasons discussed below, HRI respectfully requests that the Commission reject Intervenor's Petition for Review.

**I. INTRODUCTION AND PROCEDURAL HISTORY**

HRI obtained source material license SUA-1508 for a proposed ISL uranium recovery operation in January of 1998. Several parties, including the Eastern Navajo Dine Against Uranium Mining (ENDAUM) and the Southwest Research Information Center (SRIC) (hereinafter the "Intervenors"), subsequently were allowed to intervene to challenge that license.

After several years of litigation, on February 3, 2005, the Presiding Officer approved a revised briefing schedule under which Intervenor, HRI, and NRC Staff were required to submit written presentations regarding four (4) areas of concern: (1) groundwater, groundwater restoration, and financial assurance, (2) historic and cultural resource

preservation, (3) environmental impact statement adequacy, and (4) radioactive air emissions.<sup>1</sup> On March 7, 2005, Intervenors submitted their written presentation regarding groundwater, groundwater restoration, and financial assurance. In response, on April 21, 2005, HRI submitted its written presentation in opposition to Intervenors' arguments. On April 29, 2005, NRC Staff submitted its written presentation.

On July 20, 2005, the Presiding Officer issued LBP-05-17 and held that HRI's NRC license and its health and safety commitments encompassed therein with respect to groundwater, groundwater restoration, and financial assurance adequately protect public health and safety. The Presiding Officer determined that the law of the case doctrine precluded several of Intervenors' arguments. Further, the Presiding Officer held that Intervenors' arguments were substantively insufficient to warrant revocation or modification of HRI's NRC license.

The Presiding Officer's decision also held that HRI and NRC Staff must revise the applicable secondary groundwater standard to reflect new United States Environmental Protection Agency (EPA) Safe Drinking Water Act (SDWA) requirements and that HRI's restoration action plans (RAPs) for the Church Rock Section 17, Unit One, and Crownpoint uranium recovery sites must be revised to provide financial assurance cost estimates for surveying and offloading of wastes and decontamination of transport containers at licensed disposal sites. *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project)*, LBP-05-17 at 62 (July 20, 2005) (hereinafter "LBP-05-17").

On August 9, 2005, Intervenors submitted a Petition for Review to the Commission requesting that the Presiding Officer's decision in LBP-05-17 be reversed for a number of

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<sup>1</sup> While these areas of concern were directed at the Church Rock Section 17, Unit One, and Crownpoint sites, the air emissions area of concern was directed only at the Section 17 site.

reasons. In response to Intervenor's Petition for Review, HRI hereby submits this Response and respectfully requests that the Commission reject Intervenor's Petition for Review.

## II. STANDARD OF REVIEW

10 CFR § 2.1253 refers aggrieved parties seeking Commission review to 10 CFR § 2.786 which states, "a party may file a petition for review with the Commission" within fifteen (15) days of the service of an initial or partial initial decision by the Presiding Officer. See 10 CFR § 2.786 (b)(1). The Commission may, as a matter of discretion, grant review of Licensing Board orders based on whether a "substantial question" exists in light of the following considerations:

- (1) A finding of material fact is clearly erroneous or in conflict with a finding as to the same fact in a different proceeding;
- (2) A necessary legal conclusion is without governing precedent or is a departure from or contrary to established law;
- (3) A substantial and important question of law, policy or discretion has been raised;
- (4) The conduct of the proceeding involved a prejudicial procedural error; or
- (5) Any other consideration which the Commission may deem to be in the public interest.

10 CFR § 2.786(b)(4)(i-v); see also *In the Matter of Duke Energy*, (McGuire Nuclear Station, Units 1 & 2, Catawba Nuclear Station, Units 1 & 2), CLI-03-17, 2003 NRC LEXIS 215, \*5 (December 9, 2003). This standard of review has been fully incorporated into NRC's Subpart L regulations. See 10 CFR § 2.1253; see also *Babcock and Wilcox* (Pennsylvania Nuclear Service Operations, Parks Township, PA), CLI-95-4, 41 NRC 248, 249 (1995).<sup>2</sup>

Licensing Board findings may be rejected or modified if, after giving the Licensing Board's decision the probative force it intrinsically demands, the record compels a different result. See e.g., *General Public Utilities Nuclear Corp.* (Three Mile Island Nuclear Station,

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<sup>2</sup> 10 CFR § 2.786 requirements for Commission review of Presiding Officer initial decisions are now codified at 10 CFR § 2.341 and are substantially the same. However, since this proceeding commenced prior to the promulgation of Section 2.341, Section 2.786 requirements should apply.

Unit 2), ALAB-926, 31 NRC 1, 13-14 (1990). However, a finding by a Licensing Board will not be overturned simply because a different result could have been reached. *See Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit 2), ALAB-254, 8 AEC 1184, 1187-1188 (1975). Generally, as stated in this proceeding, the Commission normally attaches “significance to the presiding officer’s evaluation of the evidence.” *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-00-12, 52 NRC 1, 3 (citations omitted). Thus, the Commission generally does not “second-guess” a Presiding Officer’s “reasonable findings.” *Id.*

### III. ARGUMENT

#### A. The Presiding Officer’s Decision Properly Determines That Intervenors’ Hearing Rights Were Not Abrogated

First, Intervenors’ argue that the Presiding Officer’s decision improperly allows HRI to “establish basic parameters for the operation on its ISL mine through post-licensing groundwater and hydrological tests *pursuant to license conditions*” and *licensee commitments* (e.g., Consolidated Operations Plan (COP)). Intervenors’ Petition for Review at 4 (emphasis added). As a result, Intervenors’ argue that the Presiding Officer’s decision is inconsistent with the Atomic Energy Act of 1954 (AEA), as amended, and NRC precedent because they have been deprived of their right to a future hearing regarding HRI’s actions to establish baseline groundwater quality, upper control limits (UCLs), and Westwater geophysical characteristics. *Id.* at 4-5.

Intervenors’ do not demonstrate an error of law or fact warranting Commission review. The Presiding Officer evaluated Intervenors’ arguments in light of the written presentations with attached testimony as well as evidence presented in the prior litigation for the Church Rock Section 8 site. *See* LBP-05-17 at 21. Based on this evaluation, the Presiding Officer determined that Intervenors’ arguments are fundamentally flawed.

As a general proposition, Intervenor's concerns about the abrogation of hearing rights ignores that HRI's license is a performance-based license which has been explicitly approved by the previous Presiding Officer and the Commission.<sup>3</sup> *See In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), CLI-99-22, 50 NRC 3 (1999); *In the Matter of Hydro Resources, Inc.* (Crownpoint Uranium Project), LBP-99-10, 49 NRC 145 (1999). The Presiding Officer determined that NRC-imposed license conditions (i.e., health and safety requirements) and HRI commitments in its COP, which are subject to "NRC Staff's continuing regulatory oversight and enforcement authority," provide sufficient procedural and substantive safeguards to ensure that CUP ISL uranium recovery operations are adequately protective of public health and safety. *See* LBP-05-17 at 21. All NRC licenses are based on the presumption that the licensee will comply with mandatory license conditions or risk enforcement penalties, potentially including suspension or termination of the license. Additionally, the Presiding Officer properly noted that Intervenor's argument would "effectively transmogrify license proceedings into open-ended enforcement actions" and that no such outcome was contemplated by Congress when enacting the AEA or by NRC when promulgating its regulations pursuant thereto. *Id.* at 20 & n.4.<sup>4</sup>

Intervenor also asserts that the Presiding Officer ignores their evidence showing that issues of credibility, conflicts and sufficiency are present in spite of the license protocols. However, the Presiding Officer fully evaluated Intervenor's written presentation and attached testimony and determined that their submission is not convincing in light of previous analyses and HRI's and NRC Staff's written presentations. For example, with respect to

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<sup>3</sup> Intervenor further ignores the provisions of the Administrative Procedure Act (APA) that do not require that materials license proceedings be formal "on-the-record" proceedings. *See generally* 5 U.S.C. § 554; *see also City of West Chicago v. NRC*, 701 F.2d 632, 643 (7<sup>th</sup> Cir. 1983).

<sup>4</sup> The Presiding Officer also properly notes that, in Phases I and II of this proceeding, Intervenor has availed themselves of the opportunity to challenge HRI's and NRC Staff's license conditions and procedures or protocols thereunder. *See* LBP-05-17 at 19-20.

HRI's methodology for determining baseline water quality values, the Presiding Officer evaluated Intervenors' arguments and concluded that they are without merit because "the premise of their challenge...is refuted by HRI's Consolidated Operations Plan, NRC's guidance document [NUREG-1569], and representations made under oath by HRI and the NRC Staff." LBP-05-17 at 25. The Presiding Officer assessed Intervenors' evidence on other issues, including the potential skewing of UCL sampling results and the establishment of hydrological properties of uranium recovery sites, and determined that Intervenors' evidence (e.g., Abitz and Wallace declarations) provides an insufficient basis for overturning or modifying HRI's NRC license. Therefore, the Presiding Officer does not *ignore* Intervenors' submission, but rather *reviews* and *rejects* such submission as lacking merit.<sup>5</sup>

**B. The Presiding Officer's Decision Correctly Applied The Law of the Case Doctrine**

Second, Intervenors argue that the Presiding Officer improperly applied the law of the case doctrine to several of Intervenors' arguments. Intervenors' Petition for Review at 6-8. Intervenors claim that the Presiding Officer should not applied the law of the case doctrine to their "very different factual evidence" regarding the Westwater aquifer's geophysical and geochemical properties and vertical confinement at Church Rock Section 17. *Id.*

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<sup>5</sup> Intervenors are also incorrect in their statement that "ordinary citizens have no rights whatsoever in NRC enforcement action..." Intervenors' Petition for Review at 6. Intervenors fail to note that their cited precedent, *Massachusetts Public Interest Research Group v. NRC*, shows that NRC's provisions for enforcement action petitions provide citizens with the opportunity to request enforcement proceedings and to present evidence regarding a licensee's failure to fulfill its license requirements. See generally 852 F.2d 9 (July 15, 1988). Further, *Massachusetts Public Interest Group* also notes that citizens may obtain judicial review of agency actions, such as denials of enforcement petitions, when an agency policy "is so extreme as to amount to an abdication of its statutory responsibilities." See 852 F.2d at \*19 quoting *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Indeed, the Presiding Officer states that "members of the public, including Intervenors, may—if future circumstances warrant—file a request to institute an enforcement proceeding." LBP-05-17 at 21.

The Presiding Officer did not commit reversible error in applying the law of the case doctrine. The law of the case doctrine may be applied when “the decision of an appellate tribunal should ordinarily be followed in all subsequent phases of the case, provided that the particular question in issue was ‘actually decided or *decided by necessary implication....*’” *In the Matter of Hydro Resources Inc. (Crownpoint Uranium Project)*, LBP-05-17 (July 20, 2005) *citing Safety Light Corp. (Bloomsburg Site Decontamination)*, CLI-92-09, 35 NRC 156, 159-160 & n.5 (1992) (emphasis added).

With respect to the characterization of the Westwater as *homogeneous*, Intervenor’s allege that site-specific evidence for Section 17 refutes the Presiding Officer’s application of law of the case. This refutation is premised on an exception to the law of the case doctrine “where ‘substantially different evidence is adduced at a subsequent state of the proceeding.’” LBP-05-17 at 11 *citing e.g., In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9<sup>th</sup> Cir. 1996). However, based on the previous Presiding Officer’s evaluation of Intervenor’s Section 8 arguments, the Presiding Officer determined that Intervenor’s “channelization” claims for the Westwater at Church Rock<sup>6</sup> offer essentially the same evidence as that for Section 8. *Id.* at 50 *quoting* 50 NRC at 84-86. For example, regarding Intervenor’s reliance on Section 17 technical literature, the Presiding Officer stated:

“Intervenor thus fail to show that the technical literature *is inconsistent* with the former Presiding Officer’s finding that ‘[o]n a broad scale, that

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<sup>6</sup> It is important to note that the Church Rock uranium recovery site includes *Sections 8 and 17*. Indeed, the Final Environmental Impact Statement (FEIS or NUREG-1508) analyzed the Church Rock Sections 8 and 17 sites as one site. *See United States Nuclear Regulatory Commission, NUREG-1508, Final Environmental Impact Statement to Construct and Operate the Crownpoint Uranium Solution Mining Project Crownpoint, New Mexico*, (February, 1997). Indeed, Intervenor previously have acknowledged that the Church Rock Sections 8 and 17 sites have been analyzed as *one site*. *See In the Matter of Hydro Resources, Inc. (Crownpoint Uranium Project), Intervenor’s Motion to Supplement the Final Environmental Impact Statement for the Crownpoint Uranium Project Church Rock Section 8*, (May 14, 2004) (ACN ML041450289).

of the proposed mining operation, the Westwater may be approximated as homogeneous.”

*Id.* at 51, n.24.

Factors such as this led the Presiding Officer to conclude, after a full evaluation of Intervenors’ evidence, that “[t]he Intervenors fail to provide a convincing reason to revisit that conclusion.” *Id.* at 51. The Presiding Officer utilized similar reasoning regarding Intervenors’ vertical confinement arguments. LBP-05-17 at 52-61.

In addition, even if the Commission determines that law of the case is inapplicable, the Presiding Officer also evaluated Intervenors’ technical evidence and determined that it is insufficient to alter previous decisions. The Presiding Officer evaluates Intervenors’ new evidence regarding the study of outcrops as well as the repetitive arguments regarding the existence of channels and natural attenuation processes and determined that such evidence does not refute data and testimony provided by HRI and NRC Staff. The Presiding Officer also noted that HRI and NRC Staff are still required to perform additional tests and other work to ensure that all technical conclusions drawn from existing data are correct. *See id.* at 57 (stating that additional pump tests will be required to ensure that the Westwater aquifer at Section 17 is vertically confined); *see also* NRC License No. SUA-1508, License Condition 10.23. Further, the Presiding Officer noted that HRI is required to monitor for potential excursions and engage in immediate corrective action if such excursions occur. *Id.* at 57. Thus, Intervenors’ claim that the Presiding Officer improperly applied the law of the case doctrine is without merit or, in the alternative, constitutes harmless error.

**C. The Presiding Officer’s Decision Does Not Ignore Intervenors’ Written Presentation or Alleged Contradictions in HRI’s and NRC Staff’s Evidence**

Finally, Intervenors argue that the Presiding Officer improperly ignored portions of Intervenors’ written presentation and alleged contradictions in HRI’s and NRC Staff’s

evidence. Intervenors' Written Presentation at 8-10. Intervenors claim that the Presiding Officer improperly addressed their arguments regarding contamination of adjacent aquifers on a regional scale and ignored their evidence regarding the heterogeneous nature of the Westwater aquifer. *Id.* at 9. Further, Intervenors' claim that HRI and NRC Staff presented "unsupported and contradictory" evidence regarding the homogenous nature of the Westwater aquifer. *Id.* at 9-10.

The Presiding Officer did not commit reversible error in his evaluation of the parties' written presentations. As stated in Section IIIB above, the Presiding Officer provided a detailed evaluation of Intervenors' technical evidence regarding several issues, including potential excursions from the uranium recovery zone to adjacent non-exempt aquifers. *See* LBP-05-17 at 49-61. This evaluation included examination and rejection of Intervenors' technical evidence and testimony about scientific literature regarding the Westwater's hydrological characteristics and site-specific assessments of such conditions at each proposed site. *See id.* Thus, contrary to Intervenors' assertions, the Presiding Officer's decision did not *ignore* Intervenors' evidence and testimony, but rather *reviewed* and *rejected* such evidence and testimony.

Finally, HRI and NRC Staff testimony regarding the homogeneous hydrological and geological nature of the Westwater is *not* contradictory testimony. The Presiding Officer's decision is based on testimony from HRI and NRC Staff stating that the Westwater, *as a geologic unit*, acts homogeneously, despite having some characteristics of heterogeneity. This statement is not internally inconsistent because, based on the testimony of Mr. Mark S. Pelizza, Mr. Craig Bartels, Mr. Stephen J. Cohen, and Mr. William von Till, aquifers may act as a *homogeneous unit* while being geologically heterogeneous in specific locations. The Presiding Officer reviewed these statements and correctly determined that HRI and NRC

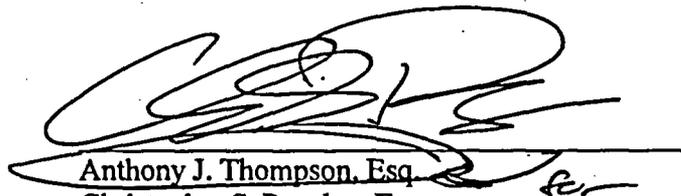
Staff evidence and testimony are more reliable than Intervenors' evidence and testimony.

Therefore, Intervenors' argument on this issue does not warrant Commission review.

#### IV. CONCLUSION

For the reasons discussed above, HRI respectfully requests that the Commission reject Intervenors' Petition for Review.

Respectfully Submitted,



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of: )  
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P.O. Box 777 )  
Crownpoint, NM 87313 ) Date: August 24, 2005

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a copy of the foregoing Hydro Resources, Inc.'s Response to Intervenors' Petition for Review of LBP-05-17 Regarding Groundwater, Groundwater Restoration, and Financial Assurance in the above-captioned matter has been served upon the following via electronic mail, and U.S. First Class Mail on this 24th day of August, 2005.

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U.S. FIRST CLASS MAIL**

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

Dear Sir or Madam:

Please find attached for filing Hydro Resources, Inc.'s Response to Intervenors' Petition for Review of LBP-05-17 Regarding Groundwater, Groundwater Restoration, and Financial Assurance 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.  
Thompson & Simmons, PLLC.  
Counsel of Record to HRI

Enclosures

(hydro resourcesCOVERLETTTER 8-24-05.doc)