January 19, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	
2929 Coors Road, Suite 101	)	Re: Leach Mining and Milling License
Albuquerque, New Mexico 87120	)	

NRC STAFF'S RESPONSE TO INTERVENORS' PRESENTATIONS ON PERFORMANCE-BASED LICENSING ISSUES

INTRODUCTION

On December 7, 1998, Intervenors Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) filed a joint written presentation on performance-based licensing (PBL) issues; and on December 11, 1998, Intervenors Grace Sam and Marilyn Morris filed their written presentation on PBL issues,[1] pursuant to 10 C.F.R. § 2.1233. In accordance with the Presiding Officer's Memorandum and Order (Scheduling and Partial Grant of Motion for Bifurcation), dated September 22, 1998 (unpublished) (September 22 Order), and the subsequent Joint Notice of Modification of Schedule for Written Presentations dated November 5, 1998, these December filings are part of a series of written presentations to be filed on issues involving the proposed in situ leach (ISL) uranium mining by licensee Hydro Resources, Inc. (HRI). Pursuant to the September 22 Order (as later modified by the Presiding Officer), HRI filed its response to

[1]The ENDAUM and SRIC December 7 brief regarding PBL issues will be referred to as SRIC's PBL Brief; the December 11 "Second Written Presentation of Grace Sam and Marilyn Morris" will be referred to as Sam's PBL Brief. ENDAUM, SRIC, Grace Sam, and Marilyn Morris will be referred to collectively as the Intervenors.

Intervenors' December filings on January 11, 1999; and the Staff hereby submits its response to these filings.[2]

As discussed below, the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (AEA), gives the Staff broad licensing authority, and the Intervenors' requests that action be taken against HRI's 10 C.F.R. Part 40 license (*see* SRIC's PBL Brief, at 31; and Sam's PBL Brief, at 9) should accordingly be denied.

DISCUSSION

The Intervenors rely on a number of AEA provisions, some of which are not relevant to the domestic licensing of source material, in arguing that HRI License Condition (LC) 9.3 and LC 9.4 improperly delegate to HRI authority held by the Staff. *See* SRIC's PBL Brief, at 6-16; Sam's PBL Brief, at 4-7. More specifically, ENDAUM and SRIC argue that HRI's license "permits HRI to change unilaterally the conditions under which it is permitted to operate," in violation of the AEA. SRIC's PBL Brief, at 15. As shown below, by their own terms, the effect of LC 9.3 and LC 9.4 is much narrower than the Intervenors seem to believe, and the Staff's issuance of HRI's license was well within the broad licensing authority conferred on the Staff by the AEA.[3]

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[2] While the Staff in large part agrees with HRI's arguments made in its January 11 PBL filing, the Staff does not agree that the use of PBL concepts in HRI's license is an informal Staff policy. *See* HRI's January 11 PBL filing, at 7-8. Rather, as discussed in Section B, *infra*, the use of PBL concepts is an outgrowth of the larger Commission policy, finalized in 1995, endorsing the NRC's use of probabilistic risk assessment techniques.

[3] Apparently, there are no federal court decisions which construe the AEA's source material licensing provisions, but many federal courts of appeal have noted the broad delegation of authority conferred on the NRC by the AEA in cases involving the licensing of nuclear power plants. *See Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771-72 (3rd (continued...)

A. Intervenors Misread HRI's License

LC 9.3 is a catch-all provision, available for use as an enforcement tool by the Staff, which by its own terms serves to supplement the other license conditions to better ensure that HRI will adhere to all applicable requirements. LC 9.3 states as follows:

> The licensee shall conduct operations in accordance with all commitments, representations, and statements made in its license application submitted by cover letter dated April 25, 1988 (as supplemented by the licensee submittals listed in Attachment A), and in the Crownpoint Uranium Project Consolidated Operations Plan (COP), Rev. 2.0, dated August 15, 1997 -- except where superseded by license conditions contained in this license. Whenever the licensee uses the words "will" or "shall" in the aforementioned licensee documents, it denotes an enforceable license requirement (emphasis added).

Contrary to the underlined wording, ENDAUM and SRIC argue that LC 9.3 converts HRI statements made in its license application into "prescriptive requirements of the license" (SRIC's PBL Brief, at 7 (footnote omitted)), and that due to inconsistencies among such HRI statements, HRI will be able to "pick and choose which of its assertions govern" its licensed operations. *Id.*, at 26-27. This reading of LC 9.3 leads to the faulty conclusion that the HRI license "does not set forth most of the conditions" that HRI must meet. *Id.*, at 1.

HRI's license contains 62 conditions.[4] Pursuant to LC 9.3, any HRI commitments, representations, and statements made in its license application are subordinate to these

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[3](...continued)
Cir. 1979), and cases cited therein. The Intervenors offer no reasons to conclude that the AEA's broad delegation of authority would be any narrower in the licensing area regulated by 10 C.F.R. Part 40.

[4] ENDAUM and SRIC variously contend, without explanation, that HRI's license actually contains "very few requirements" (SRIC's PBL Brief, at 24); or "only a few prescriptive requirements," but then proceeds to identify 16 such requirements. *Id.*, at 7.

62 conditions, which can only be changed by the license amendment process pursuant to 10 C.F.R. § 40.44. ENDAUM and SRIC misread LC 9.3 in arguing otherwise.[5]

LC 9.4 gives HRI a degree of flexibility in carrying out its day-to-day operations,[6] so long as those operations are within the envelope of requirements set forth in the license, and are otherwise in compliance with all applicable NRC regulations. LC 9.4A states as follows:

> The licensee may, without prior NRC review or approval: (i) make changes in the Crownpoint Project's facilities or processes as described in the COP (Rev. 2.0); (ii) make changes in its standard operating procedures; and (iii) conduct tests or experiments, if the licensee ensures that the following conditions are met:
>
> > (1) the change, test or experiment does not conflict with any requirement specifically stated in this license, or impair the licensee's ability to meet all applicable NRC regulations;
> >
> > (2) there is no degradation in the safety or environmental commitments made in the Crownpoint Uranium Project

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[5] SRIC and ENDAUM renew their earlier contention equating license application statements to license conditions, arguing that HRI's license "allows HRI to determine unilaterally whether a license amendment is required for a change to the license terms contained in its application." SRIC's PBL Brief, at 16. As previously shown by the Staff in this proceeding, HRI statements made in its license application should not be confused with license conditions. *See* "NRC Staff's Response To ENDAUM/SRIC Joint Motion For Reconsideration," dated June 22, 1998, at 3.

[6] Ms. Sam and Ms. Morris fear that LC 9.4 will give HRI unwarranted flexibility on the issue of liquid waste disposal, given the lack of any HRI "concrete plans" to dispose of this waste. Sam's PBL Brief, at 7. As discussed in the Staff's December 1997 SER, at 26, HRI has a number of waste disposal options in this regard. However, these Intervenors ignore LC 11.8, which will apply if HRI chooses the land application disposal option. Additionally, if HRI chooses other options (*e.g.*, deep well injection, discharge to surface waters), HRI would have to obtain approvals from other regulatory authorities pursuant to LC 9.14. *See also* 10 C.F.R. § 20.2007 (NRC approval of an option does not relieve HRI from having to comply with other federal, state, or local regulations that may be applicable).

> Consolidated Operations Plan (COP), Revision 2.0, or in the approved reclamation plan for the Crownpoint Project; and
>
> (3) the change, test, or experiment is consistent with NRC's findings in NUREG-1508, the Final Environmental Impact Statement (FEIS, dated February 1997) and the Safety Evaluation Report (SER, dated December 1997) for the Crownpoint Project.
>
> If any of these conditions are not met for the change, test, or experiment under consideration, the licensee is required to submit a license amendment application for NRC review and approval. The licensee's determinations as to whether the above conditions are met will be made by a Safety and Environmental Review Panel (SERP). All such determinations shall be documented, and the records kept until license termination. All such determinations shall be reported annually to the NRC, pursuant to LC 12.8. The retained records shall include written safety and environmental evaluations, made by the SERP, that provide the basis for determining whether or not the conditions are met (emphasis added).

The Intervenors argue that LC 9.4A improperly delegates authority to HRI (*see* SRIC's PBL Brief, at 8), giving HRI "the authority to regulate itself" by vesting in the SERP the power to implement changes "if the SERP decides that HRI need not obtain NRC permission before initiating a change." Sam's PBL Brief, at 5-6 (footnote omitted). In these circumstances, the Intervenors argue that the Staff will have no authority to make timely reviews of the proposed changes, and will have thus "lost the ability to ensure that human health, safety, and the environment are adequately protected." *Id.*, at 6. This reading of LC 9.4A leads to the faulty conclusions that the Staff is left "without any oversight" of HRI's operations (*id.*, at 2), and "with absolutely no authority to review and approve any change HRI proposes." *Id.*, at 7.

To the contrary, LC 9.4A specifies that the types of changes HRI may make without first submitting an amendment application to the Staff for review and approval are limited

to changes in (1) the Crownpoint Project's facilities or processes as described in the COP; and (2) HRI's standard operating procedures. Moreover, such changes are allowed only if the SERP finds that the change (a) does not conflict with any license condition,[7] or impair HRI's ability to meet NRC regulations; (b) involves no degradation in the safety or environmental commitments made in the COP, or in the approved reclamation plan for the Crownpoint Project; and (c) is consistent with the FEIS and SER findings. If any one of conditions (a) - (c) above is not met, LC 9.4A requires HRI to obtain Staff approval of a license amendment application before implementing the change. LC 9.4A further requires that all SERP determinations be documented by written safety and environmental evaluations, showing the basis for determining whether or not conditions (a) - (c) above are met, and that these SERP records be kept on file. The Intervenors fail to show that these provisions will not adequately ensure protection of human health, safety, and the environment.

The Intervenors' argument that LC 9.4 improperly permits HRI to change its license (*see* SRIC's PBL Brief, at 17-18; Sam's PBL Brief, at 8-9), expands the scope of LC 9.4 beyond its stated terms. As stated above, LC 9.4A specifies that the types of changes HRI may make are limited to changes in its facilities or processes, and changes in its standard operating procedures. The wording of LC 9.4 says nothing about allowing HRI to change license conditions without first obtaining Staff approval of a license amendment application. Accordingly, the Intervenors' reliance on *San Luis Obispo Mothers for Peace v. U.S.*

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[7] The description offered by Ms. Sam and Ms. Morris regarding what LC 9.4 permits (*see* Sam's PBL Brief, at 3), misses the mark by failing to include the limitation that the proposed change must not conflict with any license condition. *See* LC 9.4A (1).

Nuclear Regulatory Com'n., 751 F.2d 1287, 1314-1315 (D.C. Cir. 1984), *r'hrg. on other grounds* 789 F.2d 26 (D.C. Cir. 1986), *cert. denied,* 479 U.S. 923 (1986), is misplaced, since the court there was discussing license amendments.[8]

Moreover, the Intervenors also fail to take into account the Staff's inspection and enforcement functions. Since all SERP decisions must be documented, any SERP decision is subject to Staff review during onsite inspections. NRC Inspection Procedure 89001 is specifically applicable to the inspection of ISL mining operations, and instructs NRC inspectors to check whether SERP-authorized changes have eroded the basis for the Staff's licensing decisions.[9] As noted in Exhibit 4 of SRIC's PBL Brief (SECY-98-138),[10] Attachment 1, at 5, the use of PBL concepts does not supplant or displace the need to

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[8] Additionally, in their argument relying on *San Luis Obispo Mothers for Peace*, ENDAUM and SRIC misquote LC 9.4 in referencing the term "essential safety" commitments, stating that "the law does not countenance such qualifiers." SRIC's PBL Brief, at 17. Neither in LC 9.4A (2), or any other part of LC 9.4, is the word "essential" used to qualify the concept of safety commitments. In this portion of their brief, ENDAUM and SRIC also cite *Sholly v. NRC,* 651 F.2d 780, 791 (D.C. Cir. 1980). Their basis for doing so is not clear, since this decision was vacated and remanded by the Supreme Court. *See* 459 U.S. 1194 (1981).

[9] *See* § 89001-2 of NRC Inspection Procedure 89001, in NRC Inspection Manual Chapter 2641, "In-Situ Leach Facilities Inspection Program." This document is available to the public on the NRC Internet home page.

[10] SRIC and ENDAUM cite this June 11, 1998 SECY, titled "Risk-Informed, Performance-Based and Risk-Informed, Less-Prescriptive Regulation in the Office of Nuclear Material Safety and Safeguards," in arguing that HRI's 10 C.F.R. Part 40 source materials license represents the implementation of "an informal policy developed by the Staff alone" without any authorization from the Commission. SRIC's PBL Brief, at 13 and n. 9. As discussed in Section B, *infra*, their argument is erroneous in this regard. Since the proposals discussed in SECY-98-138 may or may not be adopted, depending on whether or not the Commission chooses to issue a Staff Requirements Memorandum in response to SECY-98-138, today's filing does not discuss SECY-98-138 in great detail.

comply with NRC regulations, and does not displace the need for enforcement action if non-compliance is discovered during an inspection. Inspections of ISL operations occur once or twice a year, and licensees are subject to enforcement action if the inspection findings warrant such action. *See* Sam's PBL Brief, Exhibit 1 (transcript of Staff's July 29, 1996, Commission briefing) (Commission Tr.), at 41-42, and 46.[11] Accordingly, the conclusion that HRI may, pursuant to LC 9.4, "change the very foundation for the safety findings undergirding the license" (SRIC's PBL Brief, at 12) is not correct.

As shown above, the Intervenors have misread provisions of HRI's license, and the Staff therefore requests the Presiding Officer to reject their arguments regarding LC 9.3 and LC 9.4. Those arguments, taken to their logical conclusion, would mean that in order to be considered valid, every condition in a license would have to be specifically covered by a regulation. The site-specific nature of ISL operations would make such a licensing regime unworkable.

B. Intervenors Ignore Commission's 1995 Policy Statement

In their arguments, the Intervenors fail to consider the Commission's 1995 final policy statement, "Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities" (Policy Statement), which became effective on August 16, 1995. *See* 60 Fed.

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[11] However, as previously stated by the Staff in this proceeding, the Intervenors' arguments have tended to ignore the distinction between Staff enforcement actions and license amendment actions. *See* "NRC Staff's Response To HRI's Motions For Reconsideration And For Bifurcation," dated June 26, 1998, at 8-9 n.11; and "NRC Staff's Response To ENDAUM/SRIC Joint Motion For Reconsideration," dated June 22, 1998, at 5-6. The fact that HRI may take actions, pursuant to LC 9.4, and that such actions would be subject to inspection, does not mean that hearing rights attach to those actions. Only to licensee actions governed by the license amendment process do such hearing rights attach, pursuant to 10 C.F.R. §§ 2.1201(a), 2.1205, and 40.44.

Reg. 42622 (August 16, 1995). The Policy Statement and subsequent Commission statements contradict SRIC's and ENDAUM's charge that HRI's 10 C.F.R. Part 40 source materials license represents the implementation of "an informal policy developed by the Staff alone" without any authorization from the Commission. SRIC's PBL Brief, at 13. In the Policy Statement, the Commission made clear that use of probabilistic risk assessment concepts would be encouraged and applied in all nuclear regulatory matters, and that the policy encompassed changes to the licensing process. *See* 60 Fed. Reg. at 42628 col.3 to 42629 col.1. The Commission followed up its Policy Statement (in part) by issuing COMSECY-96-061 on December 23, 1996, discussing how best to implement the probabilistic risk assessment concept of PBL in Direction-Setting Issue (DSI) 12. In further follow-up, on April 15, 1997, the Commission issued a Staff Requirements Memorandum regarding DSI 12, to which the NRC's Office of Nuclear Material Safety and Safeguards responded in SECY-98-138 (*see* n.10, *supra*).

Thus, contrary to SRIC's and ENDAUM's argument, the use of PBL concepts in HRI's license cannot fairly be characterized as an improper implementation of an informal Staff policy, but was instead part of a larger agency effort to make its functions more efficient, while still ensuring that an adequate level of public health and safety is maintained.

SRIC and ENDAUM further erroneously charge that the Staff began applying the PBL concept to ISL licensees in 1994, which improperly overturned an established policy without any public input, contrary to *Citizens Awareness Network v. NRC,* 59 F.3d 284, 291

(1st Cir. 1995). *See* SRIC's PBL Brief, at 13-15.[12] To the contrary, as recognized by Ms. Morris and Ms. Sam (*see* Sam's PBL Brief, at 2 n.1), the Staff only began issuing ISL licences incorporating PBL concepts in August, 1995. *See* Commission Tr., at 47. Moreover, the type of policy reversal made without public input, as found by the court in *Citizens Awareness Network, supra*, 59 F.3d at 291, is absent here. The Policy Statement describes the public process by which it was formulated, and shows that the new policy represents not a reversal of established practice but an extension and enhancement of traditional regulation. *See* 60 Fed. Reg., at 42623-42628.

Accordingly, the Staff requests the Presiding Officer to find that issuance of HRI's license does not represent the implementation of an improperly-adopted Staff policy.

C. Intervenors Misapply AEA Provisions

In their arguments against LC 9.4, the Intervenors confuse the Staff's AEA licensing authority to issue materials licenses with other AEA provisions, and otherwise fail to show that the Staff's issuance of HRI's license violated the AEA. *See* SRIC's PBL Brief, at 10-11, 15-17; and Sam's PBL Brief, at 4-6, 8-9. Accordingly, as discussed further below, their AEA arguments should be rejected.

The Staff's issuance of a combined byproduct and source materials license to HRI is governed by AEA Sections 62 and 81, 42 U.S.C. §§ 2092 and 2111. *See* preamble to

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[12] The Staff's rebuttal of this argument (and others made by the Intervenors) should not be viewed as a waiver of the objection that the Intervenors are improperly challenging general NRC policies and/or regulations, rather than the licensing action at issue in this proceeding. *See* LBP-98-14, 47 NRC 376, 379 (1998).

10 C.F.R. Part 40 (list of authorities).[13] Consistent with the broad licensing authority found by the courts (*see* n. 3, *supra*), these AEA provisions are general and broadly-worded. Section 62 states in pertinent part as follows:

> Unless authorized by a general or specific license issued by the Commission, which the Commission is hereby authorized to issue, no person may ... receive possession of or title to ... any source material after removal from its place of deposit in nature.

42 U.S.C. § 2092. The language of Section 81 is similarly broad, stating in pertinent part as follows:

> The Commission is authorized to issue general or specific licenses to applicants seeking to use byproduct material for research or development purposes, for medical therapy, industrial uses, agricultural uses, or such other useful applications as may be developed.

42 U.S.C. § 2111. While it is true that AEA Section 69, *supra*, applies to the domestic licensing of source material, its wording is equally broad, and the Intervenors fail to show that its terms have been violated here.[14]

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[13] Instead of citing Section 62, *supra*, the Intervenors rely on AEA Section 69, 42 U.S.C. § 2099 (*see* SRIC's PBL Brief, at 10, 15; Sam's PBL Brief, at 4, 9), which is not included in the 10 C.F.R. Part 40 preamble's list of statutory authorities for the domestic licensing of source material. AEA Section 69 states as follows:

> The Commission shall not license any person to transfer or deliver, receive possession of or title to, or import into or export from the United States any source material if, in the opinion of the Commission, the issuance of a license to such person for such purpose would be inimical to the common defense and security or the health and safety of the public.

[14] For example, Ms. Morris and Ms. Sam rely on 42 U.S.C. § 2099 in arguing that LC 9.4 improperly delegates authority to HRI in violation of the AEA (*see* Sam's PBL Brief, at 4-5), but support this argument by citing federal court decisions which did not undertake to construe any AEA provisions, and which did not have anything to do with the AEA. *See* Sam's PBL Brief, at 6.

SRIC and ENDAUM also misapply AEA Section 84, 42 U.S.C. §2114(c), in arguing that LC 9.4 improperly permits HRI to determine whether a license amendment is required. *See* SRIC's PBL Brief, at 16. Although this AEA section is included in the 10 C.F.R. Part 40 preamble's list of statutory authorities for the domestic licensing of source material, this statutory provision is not relevant to SRIC's and ENDAUM's argument. Section 84 allows ISL and traditional uranium mining licensees to "propose alternatives to specific requirements adopted and enforced by the Commission" under the AEA. 42 U.S.C. §2114(c) (emphasis added). As found in *Environmental Defense Fund v. NRC*, 866 F.2d 1263, 1268 (10th Cir. 1989),[15] the AEA's reference here to Commission requirements was to NRC regulations and U.S. Environmental Protection Agency standards. As discussed, *supra*, at 4-6, LC 9.4A (1) does not authorize the SERP to approve changes which "impair the licensee's ability to meet all applicable NRC regulations." Accordingly, contrary to SRIC's and ENDAUM's argument, 42 U.S.C. §2114(c) is not relevant to changes HRI would be authorized to make under LC 9.4.[16]

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[15] The Staff notes that SRIC was one of the petitioners in *Environmental Defense Fund*, and should thus have been familiar with the court's finding in this regard.

[16] As SRIC and ENDAUM acknowledge, the wording of LC 9.4, and the changes it authorizes, are similar to operational changes 10 C.F.R. Part 50 and 70 licensees may make pursuant to 10 C.F.R. §§ 50.59 and 72.48. *See* SRIC's PBL Brief, at 10-11. SRIC and ENDAUM fail to explain the relevance of the Commission decision they cite in this portion of their brief, *Louisiana Energy Services* (Claiborne Enrichment Center), CLI-97-15, 46 NRC 294, 300 (1997), since there the Commission was discussing how the wording of financial qualification regulations in 10 C.F.R. Parts 50 and 70 differed, a subject seemingly unrelated to the similarity between PBL-like wording in 10 C.F.R. §§ 50.59 and 72.48, and the wording of LC 9.4.

The Intervenors mistakenly rely on AEA Section 189a, 42 U.S.C. §2239(a)(1)(A), in support of their PBL arguments. *See* SRIC's PBL Brief, at 16-17; and Sam's PBL Brief, at 8-9. This AEA hearing provision is not included in the 10 C.F.R. Part 40 preamble's list of statutory authorities for the domestic licensing of source material, and the Intervenors thus confuse the Staff's AEA licensing authority with the statute's provisions regarding an intervenor's hearing rights. In further support of their argument in this regard, Ms. Morris and Ms. Sam cite *Citizens Awareness Network, supra,* 59 F.3d 284, at 294-95 (*see* Sam's PBL Brief, at 8-9), where the court stated that if 42 U.S.C. §2239(a)(1)(A) is to serve its intended purpose,

> surely it contemplates that parties in interest be afforded a meaningful opportunity to request a hearing before the Commission retroactively reinvents the terms of an extant license by voiding its implicit limitations on the licensee's conduct.... The claimed right to deny such a hearing request undermines the integrity of the licensing process.

Citizens clearly has no application here, since as discussed, *supra*, at 4-6, LC 9.4A does not authorize HRI to change the terms of its license; and here, unlike in *Citizens,* hearing requests were granted rather than denied.

As shown above, the Intervenors have not correctly applied, or misinterpret, the AEA provisions applicable to the issuance of HRI's license, and the Staff therefore requests the Presiding Officer to reject their AEA arguments.

D. License Issuance To HRI Complied With NEPA

ENDAUM and SRIC argue that LC 9.4 violates the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (NEPA). *See* SRIC's PBL Brief, at 18-21. In doing so, ENDAUM and SRIC wrongly equate any actions HRI may take pursuant to LC 9.4 to the

type of major federal action which triggers NEPA's procedural requirements. *See* SRIC's PBL Brief, at 18. Under the advocated approach, which would involve re-writing 10 C.F.R. § 51.92(a), the Staff would constantly be preparing supplemental EISs. *See* SRIC's PBL Brief, at 19 and n. 14. The Presiding Officer should not accept the boilerplate recitation of NEPA case law (*see* SRIC's PBL Brief, at 20) as a substitute for showing how changes made by HRI pursuant to LC 9.4 would trigger the Staff's NEPA obligations. The Staff's February 1997 FEIS fully met its NEPA obligations regarding the proposed HRI project.

Since the proffered NEPA argument lacks any reasoned basis, the Staff requests the Presiding Officer to reject it.

E. License Issuance To HRI Did Not Violate 5 U.S.C. § 706(2)

ENDAUM and SRIC contend that the Staff's action in issuing a license to HRI was an arbitrary and capricious act, thereby violating 5 U.S.C. § 706(2). *See* SRIC's PBL Brief, at 21-30. As shown below, the arguments made in support of this contention, to the extent those arguments should even be considered,[17] are either based on speculation, lack an adequate technical basis, or are not founded on common sense.

ENDAUM and SRIC argue that any future mining in Section 17 of HRI's Church Rock site cannot properly be done, as such mining would contaminate the restored, post-mining groundwater quality in the adjoining Section 8, based on the fact that Section 17 is

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[17] The Presiding Officer previously ruled in this proceeding that concerns regarding the disjointed nature of HRI's license application were not germane. *See* LBP-98-9, 47 NRC 261, 280 (1998), *motion for reconsideration denied*, LBP-98-14, 47 NRC 376 (1998). Much of ENDAUM's and SRIC's APA arguments (*see, e.g.*, SRIC's PBL Brief, at 21-26), appear to be based on these same concerns, and they should accordingly not be considered further in this proceeding.

up gradient from Section 8. *See* SRIC's PBL Brief, at 27, and n.22. This argument ignores the fact that monitor wells will encircle HRI's well fields, regardless of where the ISL mining occurs (*e.g.*, in Section 8 or Section 17). Therefore, any movement of lixiviant down gradient or in any other direction will be detected. Should such an excursion of lixiviant be detected in any direction, HRI would be required to correct the excursion. Accordingly, as provided for by several conditions in HRI's license, should ISL mining occur in Section 17, there will be adequate protection of the groundwater outside those well fields. *See* HRI License Conditions 10.12, 10.13, 10.17, 10.20, 10.23, 10.25, 10.29, 10.30, 10.31, and 10.32. ENDAUM and SRIC fail to show how the issuance of a license to HRI with all of these protective conditions could possibly be viewed as an arbitrary and capricious act.

The argument that the HRI license, as written, will lead to confusion over what prior HRI commitments are enforceable (*see* SRIC's PBL Brief, at 26-27, and 30), is speculative, and lacks an adequate basis. Even assuming that HRI has made conflicting statements in its license application over a ten-year period, the argument that issuing HRI's license was therefore arbitrary and capricious, based on the fact that there is no license provision specifically stating that HRI's more recent commitments will override contrary ones previously made, is not founded on common sense.[18]

ENDAUM and SRIC fear that HRI will fail to take the required number of baseline water quality samples. *See* SRIC's PBL Brief, at 28-29. HRI LC 10.21A governs this

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[18] The Staff notes that HRI understands the commonly-accepted idea that to the extent two statements conflict, the more recent statement would control. *See* HRI's January 11, 1999 filing on PBL issues, at 19.

matter. Should it later be determined that HRI has failed to meet this requirement, this failure would be subject to enforcement action. The argument that HRI may later try to assert a distinction between this license condition and a COP provision is mere speculation. Similarly speculative is the argument that there is "the possibility that HRI may argue that it has discretion to choose among widely varying commitments made over a space of almost ten years." *See* SRIC's PBL Brief, at 30.

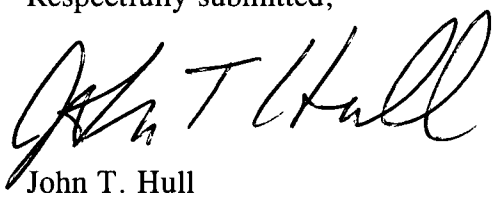
ENDAUM and SRIC assert that HRI submitted contradictory information regarding the size of ponds it intends to build, and that HRI did not identify whether it would build "retention ponds" or "evaporation ponds." *Id.*, at 29. As to the latter complaint, the Staff has already explained that there is no difference in meaning between these terms. *See* "NRC Staff's Response To Intervenor Presentations On Liquid Waste Disposal Issues," dated December 16, 1998, at 24. On the first point, if indeed there is a conflict and it later becomes an issue, HRI would be held to the more recent of the two commitments. *See* n. 18, *supra*.

As discussed above, ENDAUM and SRIC have failed to show that the Staff's action in issuing a license to HRI was an arbitrary and capricious act. To the extent that the Presiding Officer chooses to consider these arguments, the Staff requests the Presiding Officer to find that those arguments lack any merit, and to reject them.

CONCLUSION

The Staff has considered all of the arguments made by the Intervenors in their PBL briefs. As discussed above, the Intervenors have failed to identify any matters supporting the relief they request. Accordingly, the Staff requests the Presiding Officer to deny the relief sought by the Intervenors.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of January, 1999

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE PRESIDING OFFICER

In the Matter of	)	
	)	Docket No. 40-8968-ML
HYDRO RESOURCES, INC.	)	
2929 Coors Road, Suite 101	)	(Leach Mining and Milling License)
Albuquerque, New Mexico 87120	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO INTERVENORS' PRESENTATIONS ON PERFORMANCE-BASED LICENSING ISSUES" in the above-captioned proceeding have been served on the following by U.S. Mail, first class, or, as indicated by a single asterisk through deposit in the Nuclear Regulatory Commission's internal mail system, or, as indicated by double asterisks, via e-mail, this 19th day of January, 1999:

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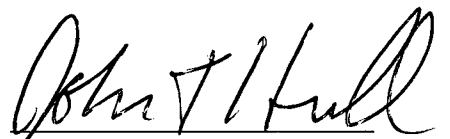

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