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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

In the Matter of:)
)
)

HYDRO RESOURCES, INC.)
P.O. Box 15910)
Rio Rancho, New Mexico 87174)
_____)

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

REVIEW OF PARTIAL INITIAL
DECISION LBP-99-13 ON FINANCIAL ASSURANCE

RESPONSE BRIEF OF HYDRO RESOURCES, INC.

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GLOSSARY

“AEA” or “Act”	refers to the Atomic Energy Act, 42 U.S.C. §§ 2011, <u>et seq.</u>
“Appendix A”	refers to 10 C.F.R. Part 40, Appendix A
“COP”	refers to Consolidated Operations Plan, Revision 2.0, (Aug. 15, 1997)
“Criterion 9”	refers to 10 C.F.R. Part 40, Appendix A, Criterion 9
“CUP”	refers to the Crownpoint Uranium Project
“Draft SRP”	refers to NUREG-1569, the Draft Standard Review Plan for <u>In Situ</u> Leach Uranium Extraction License Applications (Sept. 1997)
“ENDAUM”	refers to Intervenor Eastern Navajo Dine Against Uranium Mining
“ERs”	refers to Environmental Reports
“FEIS”	refers to a Final Environmental Impact Statement
“GEIS”	refers to NUREG-0706, Final Generic Environmental Impact Statement on Uranium Milling (Sept. 1980)
“HRI”	refers to licensee, Hydro Resources, Inc.
“Intervenors”	refers to Intervenor Eastern Navajo Dine Against Uranium Mining and Southwest Research and Information Center
“ISL”	refers to <u>in situ</u> leach
“LC 9.5”	refers to SUA-1508 license condition 9.5
“NEPA”	refers to the National Environmental Policy Act, 42 U.S.C. § 4321, <u>et seq.</u>
“NMED”	refers to the New Mexico Environment Department
“NRC”	refers to the Nuclear Regulatory Commission
“PBL”	refers to performance-based licensing

“PBLCs”	refers to performance-based license conditions
“SRIC”	refers to Intervenor Southwest Research and Information Center
“UMTRCA”	refers to the Uranium Mill Tailings Radiation Control Act, 42 U.S.C. § 7901, <u>et seq.</u>

JURISDICTIONAL STATEMENT

The Commission has jurisdiction over this matter pursuant to 42 U.S.C. §§ 2011, et seq. and 10 C.F.R. § 2.786.

STATEMENT OF THE ISSUES

1. Is Hydro Resources, Inc. in compliance with the Nuclear Regulatory Commission's financial assurance requirements for the Church Rock Section 8 project?
2. Was financial assurance information submitted by Hydro Resources, Inc. adequate to meet the requirements for licensing Church Rock Section 8?
3. If Hydro Resources, Inc. is correct in its assertion that an approved financial assurance plan is not a prerequisite to the issuance of a license, what is the meaning of the staff's assertion in its response to Intervenor's Petition for Review that "the issue is thus not ripe for . . . [the Presiding Officer's] . . . review?"

STATEMENT OF THE CASE

Hydro Resources, Inc. ("HRI") was issued a Nuclear Regulatory Commission ("NRC") source materials license (SUA-1508) on January 5, 1998, authorizing it to conduct in situ leach uranium mining and milling for a five-year period in Church Rock and Crownpoint, New Mexico, pursuant to 10 C.F.R. Part 40. Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") (jointly, "Intervenor") petitioned the Commission for review of the Presiding Officer's Partial Initial Decision on Financial Assurance, LBP-99-13 (March 13, 1999). Following review of Intervenor's petition, the Commission issued a Memorandum and Order, CLI-99-22 (July 23, 1999), requesting that the parties submit briefs on LBP-99-13 addressing the arguments raised by Intervenor in their petition for review and questions posed by the Commission concerning the

financial assurance information submitted by HRI. Pursuant to the Memorandum and Order, Intervenor submitted a brief on August 13, 1999.

SUMMARY OF THE ARGUMENT

HRI is subject to, and in compliance with, the financial assurance requirements set forth at 10 C.F.R. Part 40, Appendix A, Criterion 9. HRI submitted plans for decommissioning, restoration, and reclamation and submitted cost estimates pertaining thereto. In addition, because the surety requirement set forth at 10 C.F.R. § 40.36 does not apply to HRI's license, and Criterion 9 does not require surety to be established until operations begin, HRI is in full compliance with NRC regulations governing surety. Finally, inasmuch as HRI's financial assurance information remains under NRC Staff review and no surety amount has yet been established, the adequacy of its submittals and/or of the surety amount are issues not ripe for review at this time. Accordingly, Intervenor's request for relief should be denied.

ARGUMENT

I. STANDARD OF REVIEW

Commission review of Board decisions on legal and policy matters is de novo, although "[the Commission] of course give[s] respectful attention to the Board's views. In the Matter of Sequoyah Fuels Corporation and General Atomics (Gore, Oklahoma Site Decontamination and Decommissioning Funding), 46 N.R.C. 195, 197 (1997). In reviewing factual findings, the

Commission has the authority to reject or modify a licensing board's factual findings, see Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), 6 NRC 33, 42 (1976); Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), 4 NRC 397, 403-05 (1976), but will not do so lightly. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), 4 NRC at 404. The Commission does not generally sit to review factual determinations made by its subordinate panels. Public Service Company of New Hampshire (Seabrook, Units 1 and 2), 4 NRC 451, 467 (1976). "It is well settled that [the Commission] is 'not free to disregard the fact that the Licensing Boards are the Commission's primary fact finding tribunals.'" General Public Utilities Nuclear Corporation (Three Mile Island Nuclear Station, Unit 2), 31 NRC 1, 13 (1990), quoting Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), 2 NRC 858, 867 (1975). Thus, a hearing judge's "factual findings will not be overturned simply because the Commission might have reached a different result." Id., quoting General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1) 26 NRC 465, 473 (1987).

It should be borne in mind that it is the appellant that bears the responsibility of clearly identifying the errors in the decision below and ensuring that its brief contains sufficient information and cogent argument to alert the other parties and the Commission to the precise nature of and support for the appellant's claims. General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 2), 31 NRC 1, 9 (1990).

II. HRI IS IN COMPLIANCE WITH APPLICABLE FINANCIAL ASSURANCE REQUIREMENTS

HRI has submitted to the NRC and the New Mexico Environment Department ("NMED") detailed cost estimates for the decommissioning of Churchrock Section 8 and NRC Staff has incorporated these estimates in the record. These submittals currently are under review by NRC Staff. 10 C.F.R. Part 40, Appendix A, Criterion 9 ("Criterion 9") and HRI's license

condition 9.5 (“LC 9.5”) require that HRI must establish an NRC-approved surety prior to commencing operations. Contrary to Intervenor’s representations, the plain language of Criterion 9 requires precisely that surety be established by a mill operator “prior to the commencement of operations” and that the amount of the surety “be based on Commission-approved cost estimates in a Commission-approved plan” for decommissioning and decontamination of the mill and reclamation of tailings and/or waste areas. As detailed below, HRI has submitted to NRC a plan and cost estimates and is awaiting NRC approval of same. Following NRC approval, HRI will obtain the required surety prior to commencing operations.

A. HRI is in Compliance with the Requirements of 10 C.F.R. Part 40, Appendix A, Criterion 9.

1. The plain language of Criterion 9 requires the licensee to submit a decommissioning plan including cost estimates.

Ignoring its plain language, Intervenor’s re-write Criterion 9 in an attempt to find support for their specious argument. Intervenor’s state that “the applicant must submit ‘Commission-approved cost estimates in a Commission-approved plan.’” Intervenor’s Brief at 9 (citation omitted; emphasis added). Somewhat reluctant, perhaps to revise unilaterally Criterion 9, Intervenor’s acknowledge in a footnote (Intervenor’s Brief at 9, fn. 4) that Criterion 9 actually states that “[t]he licensee shall submit this plan” 10 C.F.R. Part 40, Appendix A, Criterion 9 (emphasis added). Intervenor’s attempt to dismiss this apparent difficulty with their argument by opining that “[t]he use of the term ‘licensee’ in this context is not significant as existing licensees at the time Appendix A was promulgated were also required to comply with its requirements. . . . It is clear that the requirement applies to applicants as well as licensees.” Intervenor’s Brief at 9, fn. 4 (emphasis added).

Intervenors' flagrant attempt to re-write Criterion 9 is completely at odds with long-standing principles of regulatory construction. The language of Criterion 9 is unambiguous and must be accorded its plain meaning:

Financial surety arrangements must be established by each mill operator prior to the commencement of operations . . . The amount of funds to be ensured by such surety arrangements must be based on Commission-approved cost estimates in a Commission-approved plan . . . The licensee shall submit this plan in conjunction with an environmental report

10 C.F.R. Part 40, Appendix A, Criterion 9 (emphasis added).

Intervenors argue that use of the word "licensee" in Criterion 9 really means "licensee or applicant" because existing licensees at the time Appendix A was promulgated had to comply with its requirements. Intervenors' Brief at 9, fn. 4. Intervenors' argument strains credulity. There is nothing in the language of Criterion 9 to suggest that it was intended to apply to anyone other than the "licensee(s)" to whom it is addressed. Appendix A is replete with instances in which NRC employed the phrase "applicant or licensee" where NRC intended a requirement to apply to license applicants as well as licensees. See, e.g., Criterion 5A(3) ("The applicant or licensee will be exempted"); Criterion 5E ("In developing and conducting groundwater protection programs, applicants and licensees shall"); but cf., Criterion 6 ("In disposing of waste byproduct material, licensees shall"); Criterion 7A ("The licensee shall establish a detection monitoring program"); Criterion 9 ("The licensee shall submit this plan").

10 C.F.R. Part 40, Appendix A.

Appendix A amply demonstrates that the NRC is fully capable of saying what it means. Criterion 9 states that surety is to be established prior to the commencement of operations and that the amount of the surety must be based on cost estimates in a decommissioning plan

submitted by the licensee and approved by the Commission. HRI, the licensee herein, has submitted a proposed plan, including cost estimates, to the NRC for approval. Following receipt of NRC approval, and prior to commencing operations, HRI will establish the required surety. Thus, HRI is in compliance with Criterion 9.

2. Discussion of the Appendix A criteria in the Generic Environmental Impact Statement does not alter those criteria.

Intervenors offer NUREG-0706, the Final Generic Environmental Impact Statement on Uranium Milling (Sept. 1980) (the "GEIS") as authority for interpreting Criterion 9 in a manner contrary to its plain meaning. Intervenors' Brief at 9-10. Intervenors' reliance on the GEIS is misplaced. The GEIS states that its "purpose would be to assess the potential environmental impacts of uranium milling operations, in a programmatic context, including the management of uranium mill tailings, and to provide an opportunity for public participation in decisions on any proposed changes in NRC regulations based on this assessment." GEIS at 2. The GEIS creates no enforceable requirements, and it imposes no binding obligations on NRC Staff or members of the regulated community.¹

¹ It is worth noting that the GEIS, and the Appendix A Criteria developed in conjunction therewith, are concerned primarily with the proper cleanup and disposal of mill tailings and the reclamation of the tailings disposal area. ISL operations, of course, do not result in the massive tailings piles associated with traditional uranium extraction. Indeed, neither the GEIS nor the Appendix A criteria specifically address in situ leach uranium extraction operations.

This focus on tailings is evident throughout the GEIS and Appendix A. "The limited consideration provided by this study to non-controversial uranium recovery processes (including ISL processes) is in accordance with the intended scope of work" GEIS at 1-2.

NRC guidance entitled "Environmental Report Content and Outline Position – Uranium Mill Decommissioning and Reclamation" developed to assist licensees in creating the Environmental Reports ("ERs"), makes clear that tailings are the primary concern. Discussing the section of the ER intended to address "Decommissioning and Reclamation Plan Design," the guidance recommends:

Footnote continued on next page

The GEIS was issued in September 1980. In October 1980, NRC promulgated final rules amending its regulations governing uranium and thorium milling activities, including the rules codified at 10 C.F.R. Part 40, Appendix A. See 45 Fed. Reg. 65,521 (Oct. 3, 1980). The preamble to those rules states that

[t]he amendments to Parts 40 and 150 take into account the conclusions reached in a final generic environmental impact statement on uranium milling . . . After careful consideration of all comments, the NRC staff has prepared a final generic environmental impact statement on uranium milling and the Commission has adopted the rules supported by this document.

Id., citing NUREG-0706.

Appendix A, including Criterion 9, was adopted by the NRC after issuance and upon "careful consideration" of the GEIS. It is thus reasonable to conclude that the NRC incorporated in Appendix A those portions of the GEIS that NRC wished to codify as enforceable regulations and, conversely, that NRC omitted from Appendix A discussion from the GEIS that NRC chose not to codify as regulatory requirements. As discussed above, Criterion 9 plainly states that, prior to operations, a licensee must submit a plan containing cost estimates and, upon NRC's

Footnote continued from previous page

A description of the mill site reclamation plan should be provided in sufficient detail to allow an independent assessment of the environmental impacts associated with its implementation. Compliance with Appendix A to 10 CFR Part 40 should be addressed with particular attention to Criteria 1 and 3.

Letter from Ramon E. Hall, Director, NRC to Bill Ferdinand, Rio Algam Mining Corp. (Oct. 30, 1992) (enclosure: "Environmental Report Content And Outline Position Uranium Mill Decommissioning And Reclamation"). Of course, Criteria 1 and 3 are concerned solely with mill tailings. That Appendix A and the GEIS are concerned primarily with mill tailings disposal is properly considered by NRC Staff in applying Appendix A and the GEIS to ISL activities.

approval of that plan, establish surety in the approved amount. HRI is in compliance with these requirements.

3. Draft NRC Staff guidance does not define compliance with Appendix A criteria.

Intervenors argue that by issuing HRI's license, "NRC Staff violated its own guidance and practice under Criterion 9." Intervenors' Brief at 10. Intervenors' argument mischaracterizes the facts and misapprehends the significance of the referenced guidance and "practice."

The NRC Staff guidance relied upon by Intervenors is NUREG-1569, the Draft Standard Review Plan for In Situ Leach Uranium Extraction License Applications (Sept. 1997) ("Draft SRP"). This document is still in draft and has not been adopted as Commission policy nor finalized as Staff guidance. Moreover, the Draft SRP does not purport to establish immutable requirements for regulatory compliance. Section 6.5 of the Draft SRP addresses financial responsibility for decommissioning and restoration. Subsection 6.5.3, entitled "Acceptance Criteria," states:

The financial assessment for groundwater restoration, decommissioning, reclamation, waste disposal, and monitoring is acceptable if it meets the following criteria:

- (1) The bases for establishing a financial surety are provided in accordance with those found in 10 CFR Part 40, appendix A, criterion 9. Surety for well fields is usually established as they go into production.

Draft SRP Section 6.5.3 at 6-17 (emphasis added). The language cited by Intervenors states that cost estimates "should be submitted to NRC with the initial license application or reclamation plan" Intervenors' Brief at 11 (citing Draft SRP, Appendix E, at E-1). This language does not purport to mandate a single means of compliance with Criterion 9.

4. Intervenor's argument regarding NRC Staff practice is misleading and should be stricken for improperly attempting to raise argument and introduce documents not previously placed in the hearing record.

Intervenors complain that in issuing HRI's license, NRC Staff ignored "its own established practice in approving ISL license applications." Intervenor's Brief at 1. Intervenor's argument mischaracterizes the facts and improperly attempts to place before the Commission matters outside the record.

- a. Intervenor's argument regarding NRC Staff practice should be stricken as the argument and the documents upon which the argument is based were not previously placed in the hearing record.

Intervenors' argument regarding NRC Staff's "established practice in approving ISL license applications" (Intervenors' Brief at 11-13) and the documents Intervenor's offer in support thereof (Addendum to Brief of Intervenor's, Table of Contents, items 4-10, pp. 16-48), should be stricken as they have not been previously raised by Intervenor's and are not a part of this hearing record. Intervenor's citations to ACN numbers for the afore-referenced documents all are part of other dockets and are not found in the hearing record for this proceeding. Moreover, the argument proffered by Intervenor's regarding supposed NRC Staff "practice" was not proffered below and should not now be raised for the first time.

Documents appended to an appellant's brief will be stricken where they constitute an unauthorized attempt to supplement the record. Toledo Edison Co. and Cleveland Electric Illuminating Co. (Davis-Besse Nuclear Power Station, Units 1, 2, & 3); (Perry Nuclear Power Plant, Units 1&2), 6 NRC 457 (1977); Philadelphia Electric Co. (Limerick Generating Station, Units 1&2), 22 NRC 680, 720, n. 51 (1985) (Commission holding that where one of the parties "refer[red] to and submit[ted] with its brief on appeal several articles and other references that

[were] not in the evidence of record before the Licensing Board,” that material should be stricken as “[i]t is well-settled that, as an appellate tribunal, [the Commission] must judge appeals on the basis of the record developed at the hearing below. Puerto Rico Electric Power Authority (North Coast Nuclear Plant, Unit 1), 14 NRC 34, 36 (1981). Consequently, the additional material supplied by [the party] is not properly before us and will not be considered”).

Similarly, Intervenor’s argument regarding NRC Staff’s alleged “practice” in issuing ISL licenses should be stricken, as it was not raised below. Arguments raised for the first time on appeal ordinarily are not entertained, absent a significant substantive issue just come to light. Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), 16 NRC 952, 955-56, n. 6 (1982), citing, Public Service Electric and Gas Co. (Salem Nuclear Generating Station, Unit 1), 14 NRC 43, 49 (1981); Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), 7 NRC 341, 348 (1978). Accordingly, Intervenor’s argument regarding the alleged “practice” of NRC Staff, and all documents proffered in support thereof, should be stricken.

- b. Intervenor fails to establish the existence of a NRC Staff practice for issuing ISL licenses and ignore changes in NRC policy bearing on the manner in which NRC Staff issues ISL licenses.

In the event that the Commission declines to strike the argument and associated documents proffered by Intervenor, Intervenor still fails to establish that NRC Staff adhered to a “practice” in issuing ISL licenses and fail to acknowledge changes in NRC policy that may impact the manner in which such licenses now are issued. Intervenor claims to demonstrate “the Staff’s complete departure from its well-established practice” (Intervenor’s Brief at 12; emphasis added) by reference to three licenses, issued, respectively, in 1989 (Crow Butte), 1987

(Highland), and 1990 (North Butte). Id. This meager showing not only fails to demonstrate “well-established practice,” but fails entirely to acknowledge the NRC’s adoption, in recent years, of a site-by-site, risk-informed and performance-based licensing (“PBL”) regime for ISL sites.

Intervenors’ failure to acknowledge this fact is all the more astonishing as they recognized in their performance-based licensing brief filed below that NRC developed its performance-based licensing policy for ISL sites during the summer of 1994.² See Letter from Joseph Holonich, Chief High-Level Waste and Uranium Recovery Branch, NRC, to Uranium Recovery Licensees and State Officials (Sept. 22, 1994); Memorandum from James M. Taylor, Executive Director for Operations, NRC, to Commissioners of the NRC, “Staff Efforts to Reduce Regulatory Impact on Uranium Recovery Licensees” (Aug. 26, 1994).

The PBL policy resulted from the NRC Chairman’s request that NRC “staff explore ways to reduce the regulatory burden of uranium recovery licensees without compromising protection of health and safety and the environment.” Id. Among other recommendations, NRC Staff proposed to incorporate performance-based license conditions in uranium recovery licenses that would allow licensees to make minor operational changes, under certain conditions, without NRC approval. Since implementing this policy, performance based license conditions (“PBLCs”) have been incorporated in several uranium recovery licenses, including at least three ISL licenses, not including HRI’s license.

NRC Staff’s more flexible regulatory approach in its issuance of recent ISL licenses is consistent with well-publicized Commission direction to the Staff to employ risk informed and

² See ENDAUM and SRIC’s Brief in Opposition to Hydro Resources, Inc.’s Application for a Material License With Respect to: Performance Based Licensing Issues at 2 (Dec. 7, 1998).

performance-based concepts in NRC regulatory activities. See, e.g. Staff Requirements – COMSECY-96-061 – Risk Informed, Performance-Based Regulation (DSI-12) (April 15, 1997), “Use of Probabilistic Risk Assessment Methods in Nuclear Regulatory Activities; Final Policy Statement,” 60 Fed. Reg. 42622 (Aug. 16, 1995). In light of the changes in NRC policy, Intervenor’s argument lacks merit.

B. The Surety Requirement Set Forth at 10 C.F.R. § 40.36 Does Not Apply to HRI’s License.

Intervenor’s reliance on 10 C.F.R. § 40.36 is misplaced. As the Commission noted in its July 23, 1999 Memorandum and Order, “the surety requirement in that regulation does not apply to HRI’s license.” Hydro Resources, Inc., CLI 99-22, slip op. at 22, 49 NRC ____ (July 23, 1999). The NRC Staff and HRI pointed out below that while the requirements of 10 C.F.R. § 40.36 may govern the timing and extent of the financial assurance generally, those requirements do not apply to ISL license applicants or ISL licensees. Instead, the governing regulatory requirement is 10 C.F.R. Part 40 Appendix A, Criterion 9. As stated above, with regard to the timing question, Criterion 9 states in pertinent part that surety arrangements need only be established “before beginning operations,” rather than prior to licensing.

10 C.F.R. § 40.4 defines “uranium milling” as “any activity that results in the production of byproduct material as defined in this Part.” The term “byproduct material” is defined in 10 C.F.R. § 40.4 as:

the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content, including discrete surface wastes resulting from uranium solution extraction processes. Underground ore bodies depleted by such solution extraction operations do not constitute “byproduct material” within this definition.

Id. (emphasis added). ISL mining activities clearly fall within the definition of “uranium milling” as that term is used in 10 C.F.R. Part 40. By its very terms, the exclusion (i.e. “except for”) clause in 10 C.F.R. § 40.36 takes licensed “uranium milling” activities outside the scope of its provisions, stating that for such activities the “financial assurance requirements” are set forth in 10 C.F.R. Part 40, Appendix A.

Finding the Staff’s and HRI’s arguments correct as a matter of law, the Presiding Officer held that 10 C.F.R. § 40.36 does not apply to HRI’s license:

... [T]his section [§ 40.36] does not apply to this license and it is not necessary to discuss further Intervenor’s arguments about failure to comply with the financial assurance provisions of this section. Since there is no violation of 10 C.F.R. § 40.36, it is also unnecessary to consider Intervenor’s argument that issuance of a license without a demonstration of financial assurance would be inimical to the public health and safety under 10 C.F.R. § 40.32(a). HRI will not be permitted to commence operations until it has complied with 10 C.F.R. Part 40, Appendix A, Criterion 9; consequently, there is no reason to believe that issuance of the license is inimical to public safety.

Hydro Resources, Inc., LBP 99-13, slip op. at 2-3, 49 NRC 233 (March 9, 1999).

In reviewing the Presiding Officer’s decision, the Commission stated in its July 23, 1999 Memorandum and Order that “[t]he Presiding Officer reasonably concluded that the surety requirement in 10 C.F.R. § 40.36 does not apply to this license.” Hydro Resources, Inc., CLI 99-22, slip op. at 22, 49 NRC ____ (July 23, 1999).

III. THE ADEQUACY OF THE FINANCIAL ASSURANCE INFORMATION SUBMITTED BY HRI IS UNDER REVIEW BY NRC STAFF

HRI has made multiple information submittals providing the information required by Criterion 9 and HRI’s license. In response to RAI Q1/92, HRI provided full cycle economics for each of the three New Mexico projects proposed by HRI. The economic evaluations are divided into five major cost categories: Plant Capital, Wellfield Replacement Capital, Plant Operating

Expense, Wellfield Operating Expense, and Restoration and Reclamation. These broad categories are further subdivided into approximately 150 classifications.

The Restoration and Reclamation schedule provides a restoration fluid balance based on circulating four pore volumes of processed water through the mine-out reservoir. In each of the scenarios evaluated in that schedule, a brine concentrator has been employed to treat brine generated from a reverse osmosis unit. The schedule recites that restoration waters are first introduced to ion exchange to remove any trace amounts of uranium, and solutions are then "ionically filtered" using reverse osmosis. The larger purified volume portion is returned to the wellfield area and reinjected. Brine generated from the reverse osmosis process is "distilled" inside a brine generator thereby producing additional quantities of pure water for wellfield injection. The resulting slurry rejected by the brine generator is very small in overall volume. It is directed to double-lined hypolan ponds for storage. The solids will later be transferred to an approved site.

Plugging of all production wells is scheduled to take place fifteen (15) months after restoration for selected areas has been achieved. Just prior to the last wellfield plugging, reclamation of the surface recovery structure commences. All costs associated with these activities are accounted for in this schedule.

HRI's Consolidated Operations Plan ("COP"), Revision 2.0, (Aug. 15, 1997), provides a more comprehensive decommissioning/restoration plan and commits to developing cost estimates based on a nine-pore volume groundwater restoration. During 1997, HRI provided to the NMED more detailed cost estimates for restoration of Churchrock Section 8. These estimates were also provided to NRC Staff.

On August 31, 1999, NRC Staff formally requested of HRI additional restoration cost and surety information. Thus, HRI's efforts to refine its restoration plan and associated cost estimates are ongoing. This effort is entirely consistent with applicable requirements since, as discussed above, Criterion 9 requires that the plan and cost estimates be approved, and surety corresponding thereto be obtained, prior to commencing operations.³

Applicable licensing requirements do not require HRI to have submitted financial assurance information prior to licensing. NRC Staff's recent request that HRI provide additional financial assurance information suggests that NRC Staff has not yet determined that financial assurance information submitted by HRI is adequate for plan/cost estimate approval.

IV. HRI'S FINANCIAL ASSURANCE IS NOT YET RIPE FOR REVIEW

HRI cannot, of course, state definitively what NRC Staff meant by its assertion that the issue of HRI's financial assurance is not yet ripe for review. However, inasmuch as HRI's financial assurance information remains under Staff review and no surety amount has yet been established, HRI submits that the adequacy of its submittals and/or of the surety amount are not issues ripe for review at this time.

³ Intervenor also take issue with the scope of the required surety. See Intervenor's Brief at 18 – 19. Intervenor fail again, however, to recognize that HRI is authorized to proceed only at Section 8 at this time. See License Conditions 10.28, 10.29. License Condition 9.5 provides, consistent with Criterion 9, that the surety must be updated annually and adjusted to account for, among other things, changes in operations/activities. This iterative approach to the project and project surety was recognized by the Presiding Officer as a reasonable approach and is consistent with the flexible, risk-informed approach to regulation of ISL operations that the Commission has championed. See, e.g., COMSECY-96-061 – Risk Informed, Performance-Based Regulation (DSI-12) (April 15, 1997); “Staff Efforts to Reduce Regulatory Impact on Uranium Recovery Licensee,” Memorandum from James M. Taylor, Executive Director of Operations, to the Commission (Aug. 16, 1994).

V. INTERVENORS' REQUEST FOR ORAL ARGUMENT SHOULD BE DENIED

Intervenors have requested oral argument. The Commission, in its discretion, may allow oral argument upon the request of a party made in a notice of appeal or brief, or upon its own initiative. 10 C.F.R. §§ 2.763, 2.786(d). The Commission will deny a request for oral argument where it determines that, based on the written record, it understands the positions of the participants and has sufficient information upon which to base its decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), 36 NRC 62, 68-69 (1992).

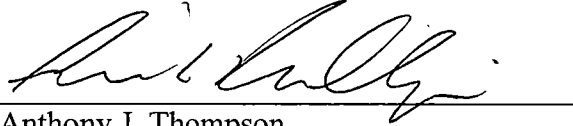
The Commission requires that a party seeking oral argument must explain how oral argument would assist it in reaching a decision. Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 2), 37 NRC 55, 59 n.4 (1993) (citing, In re Joseph J. Macktal, 30 NRC 19, 23 n. 1 (1989)). Here, Intervenors fail to explain why oral argument is necessary or how it would assist the Commission in reaching a decision regarding the matter at issue beyond stating that the procedural and factual history is complex. This bald assertion is simply not enough. The Commission has before it sufficient information to decide this matter. Accordingly, Intervenors' request for oral argument should be denied.

VI. CONCLUSION

Applicable regulatory requirements do not require HRI to establish surety or to submit, or obtain Commission approval of, its decommissioning/restoration plan or associated cost estimates prior to license issuance. Rather, these requirements are prerequisites to commencing operations, which HRI has not done. Accordingly, and for all of the reasons set forth above, HRI is in compliance with applicable financial assurance requirements and Intervenors have

established no grounds for invalidating HRI's license and Intervenor's claim for relief should therefore be denied.

Respectfully submitted this 3d day of September, 1999.



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ON BEHALF OF HYDRO RESOURCES, INC.

P.O. Box 15910
Rio Rancho, New Mexico 87174

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

99 SEP -3 P5:29

BEFORE THE COMMISSION

OFFICE OF THE SECRETARY
ADJUDICATION STAFF

In the Matter of:

HYDRO RESOURCES, INC.

P.O. Box 15910

Rio Rancho, New Mexico 87174

Docket No. 40-8968-ML

ASLBP No. 95-706-01-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, REVIEW OF PARTIAL INITIAL DECISION LBP-99-13 ON FINANCIAL ASSURANCE RESPONSE BRIEF OF HYDRO RESOURCES, INC., in the above-captioned proceeding has been served on the following by hand-delivery (as indicated), electronic mail (as indicated) and on all parties by first class mail, postage pre-paid, on this 3rd day of September, 1999.

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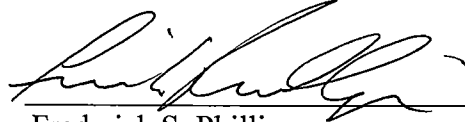
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A handwritten signature in dark ink, appearing to read 'F. Phillips', is written over a horizontal line.

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