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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
OFFICE OF SECRETARY
OF REGULATORY AND
ADJUDICATIONS STAFF

BEFORE THE COMMISSION

In the Matter of)
)
HYDRO RESOURCES, INC.)
2929 Coors Road)
Suite 101)
Albuquerque, NM 87120)

Docket No. 40-8968-ML

ASLBP No. 95-706-01-ML

ENDAUM'S AND SRIC'S MOTION TO STRIKE NRC STAFF FILING, OR IN THE ALTERNATIVE, FOR LEAVE TO REPLY TO THE STAFF'S FILING AND RESPONSES FILED BY HRI AND THE STAFF TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF PBL-99-13 (FINANCIAL ASSURANCE FOR DECOMMISSIONING)

INTRODUCTION

Intervenors Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby move the Commission to strike the Staff's April 8, 1999, letter supplementing the hearing record with additional financial assurance for decommissioning information. This submission was made after the Presiding Officer had issued his Partial Initial decision on financial assurance and after the Intervenors had filed their Petition for Review of that Order. The Staff did not seek leave of the Commission to reopen the hearing record, in violation of 10 C.F.R. § 2.734. In the alternative, ENDAUM and SRIC seek leave to reply to this new information and to the Staff's Response and to HRI's Response to ENDAUM and SRIC's

U.S. NUCLEAR REGULATORY COMMISSION
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Petition for Review of LBP-99-13, which rely on it. This motion is made pursuant to 10 C.F.R. §§2.730 and 2.786(b)(3).

FACTUAL BACKGROUND

The Presiding Officer issued LBP-99-13, Partial Initial Decision (Financial Assurance for Decommissioning) on March 9, 1999. ENDAUM and SRIC appealed LBP-99-13 on March 30, 1999. ENDAUM's and SRIC's Petition for Review of Presiding Officer's Partial Initial Decision (Financial Assurance for Decommissioning) ("ENDAUM's and SRIC's Petition"). On April 8, 1999, counsel for the NRC Staff sent a letter to the Presiding Officer, which purportedly "updates the Hearing File" and attaches another draft of a performance bond and trust agreement between HRI and the State of New Mexico. Letter from John Hull, Staff counsel, to Judge Peter B. Bloch (April 8, 1999) ("April 8 Letter"). HRI's Response to ENDAUM's and SRIC's Petition for Review of LBP-99-13 ("HRI's Response") was filed on April 13, 1999. HRI asserts that the Petition should be denied and uses as the basis for one of its arguments the new information introduced by the Staff. *Id.* at 4, n.1. The NRC Staff's Response to Petition for Review of LBP-99-13 was filed on April 14, 1999. The Staff also cites the new information. Staff Response at 4-5.

ARGUMENT

I. **THE APRIL 8 LETTER SHOULD BE STRICKEN FROM THE HEARING RECORD BECAUSE THE STAFF DID NOT SEEK LEAVE FROM THE COMMISSION TO REOPEN THE RECORD IN THIS PROCEEDING.**

The Staff submitted the April 8 Letter after the hearing on financial assurance for decommissioning before the Presiding Officer was complete. The parties completed their written presentations in February, and LBP-99-13, the partial initial decision, was served March 10, 1999. The April 8 Letter therefore, fails to comport with 10 C.F.R. § 2.734, which sets forth the criteria required for a motion to reopen a closed record.¹

In addition, any motion by the Staff should have been directed to the Commission, which took jurisdiction over the financial assurance decision when LBP-99-13 was issued, and Intervenors filed their petition for review on March 30. See 10 C.F.R. § 2.1209(e) (granting the Presiding Officer the power to "Reopen a closed record for the reception of further information **at any time prior to initial decision in accordance with § 2.734.**" (emphasis added)). Even though some areas of concern raised by the Intervenors remain before the Presiding Officer, the Commission is the proper authority to consider reopening the record on financial assurance. See Philadelphia Electric Company (Limerick Generating Station, Units 1 and 2), ALAB-823, 22 NRC 773 (1985) (jurisdiction over a motion to reopen record after two of several partial initial decisions

¹ The motion must be timely, address a significant safety or environmental issue, demonstrate a materially different result would be or would have been likely had the newly proffered evidence been considered initially. 10 C.F.R. § 2.734(a).

have been issued is with the Commission). The April 8 1999 Letter is relevant only to financial assurance.²

II. IF THE COMMISSION ACCEPTS THE APRIL 8 LETTER INTO THE HEARING RECORD, ENDAUM AND SRIC SHOULD BE GRANTED LEAVE TO RESPOND.

When a record is reopened, "intervenors are entitled to participate fully in any proceedings to resolve the issues involved." Florida Power & Light Co. (St. Lucie Nuclear Power Plant Unit 2) ALAB-335, 3 NRC 830, 1967 Lexis 67, at 26 (1976) (remanding to the Board for resolution an alternative siting issue on which the Staff presented post-review evidence). Accordingly, if for some reason, the Commission accepts the April 8 Letter and its attachments as part of the hearing file, this issue should be remanded to the Presiding Officer so that the Intervenors may have a meaningful opportunity to respond to the information contained in the April 8 Letter.³ Because both

² The Staff appears unlikely to prevail if a motion to reopen the record in this matter was submitted to the Commission. The Staff must meet the requirements of 10 C.F.R. § 2.734(a). And See Louisiana Power and Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 NRC 5, 43 n.47 (1985) (A draft document does not provide particularly useful support for a motion to reopen. A draft is a working document which may reasonably undergo several revisions before it is finalized.).

³ Intervenors have not had the opportunity to respond to any of the financial assurance documents introduced by the Staff. When Intervenors filed their written presentation with the Presiding Officer, the hearing file was devoid of any surety-related documents. ENDAUM's and SRIC's Petition at 4-6. Only in the Staff's response presentation, did the Staff include documents similar to those in the April 8 Letter. Id. at 4. Intervenors' motion to strike, or in the alternative to reply to the information, was denied. Id. at 4-5. If the opportunity is granted, Intervenors intend to present expert testimony on the inadequacy of these documents, which address only mining at Church Rock Section 8, rather than the requisite milling at the Crownpoint processing facility, the other mine

the Staff and HRI rely on the letter in their responses to ENDAUM's and SRIC's Petition, Intervenor should also have the opportunity to reply to those filings.

The opportunity to reply and to address the April 8 Letter is particularly essential in this instance. HRI relies on the information contained in the April 8 Letter and alleges review of HRI's financial plan is beyond the scope of the Commission's purview. HRI Response at 3-5. HRI's Response admits that the LBP-99-13 does not analyze HRI's financial assurance plan because there is no approved financial assurance plan in place, citing the information in the April 8 Letter.⁴ Id. at 3, 4, n.1. However, HRI argues that "approval of the financial assurance plan is not a prerequisite to issuance of the license here at issue and, thus, documents submitted in support of the financial assurance plan arguably are altogether irrelevant to this proceeding." Id. at 5. Likewise, the Staff argues it is in the process of evaluating the April 8 Letter and "until the Staff completes and documents its evaluation of HRI's surety arrangements, the record on which the Presiding Officer must base his decisions will be incomplete in this regard, and the issue is thus not yet ripe for his review." Staff Response at 5.

sites, and requires only half of the surety amount. Id. Moreover, these documents are being prepared with the New Mexico Environment Department whose regulatory authority has been rejected by the U.S. Environmental Protection Agency. See Intervenor's Amended Groundwater Presentation at 14-15 (January 18, 1999).

⁴ *See also* Financial assurance documents "mistakenly omitted from the hearing file" attached to the NRC Staff's Response to Intervenor's Presentations on Technical Qualification, Financial, and Decommissioning Issues (February 18, 1999) (includes "Draft" Performance Bond, Performance Guarantee Bond, and Trust Agreement).

HRI's and the Staff's arguments are based on the erroneous conclusion that the determination of the adequacy of HRI's financial assurance plan is premature. Id. In fact, HRI's lack of adequate financial surety arrangements under 10 C.F.R. Part 40 Appendix A, Criterion 9, is subject to review. While Criterion 9 of Appendix A does not require a surety to be in place until prior to commencement of operations, that surety must be based on "Commission-approved cost estimates in a Commission-approved plan." Criterion 9, Appendix A, 10 C.F.R. Part 40. The Introduction to Appendix A demonstrates that this plan must be included in the license application, "Every applicant for a license . . . is required by the provisions of § 40.31(h) to include in a license application proposed specifications relating to milling operations and the disposition of tailings or wastes resulting from such milling activities." Moreover,

All site specific licensing decisions based on the criteria in this Appendix. . . . will take into account the risk to the public health and safety and the environment with due consideration to the economic costs involved and any other factors the Commission determines to be appropriate.

Id. The risk to public health and safety of an inadequate financial assurance plan is properly before the Commission. Even in Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1) LBP-83-57, 18 NRC 445, 1983 Lexis 58, at 13-14 (1983), the Board found that there was not an unresolved health or safety issue that would preclude issuance of a license, but nevertheless kept the record open on a design issue the Staff lacked sufficient information to resolve.

Moreover, because an in situ leach mine is a subsurface source materials facility

in addition to a milling operation, 10 C.F.R. § 40.36 also applies to this project.

ENDAUM's and SRIC's Petition at 6-7. Under § 40.36, a decommissioning plan and surety funds are required to be in place prior to licensing. Thus, HRI's financial assurance documentation is relevant for the Commission to assess compliance with § 40.36, if review of ENDAUM's and SRIC's Petition is granted.

HRI and the Staff have adopted the position that the Intervenors are not entitled to a hearing on their concerns regarding the financial assurance plan. Such an approach is clearly inapposite to the Commission's purpose in establishing financial assurance requirements. Financial assurance raises serious environmental and safety concerns. When sureties are inadequate, the NRC is left to remediate sites.⁵ In promulgating the final rule for 10 C.F.R. Part 40 Appendix A, the Commission found "radioactive releases from existing mills constitute the largest potential routine releases from the nuclear fuel cycle. Therefore, it is absolutely essential that regulations, which assure that action is taken to protect the public health and safety are promulgated promptly." Uranium Mill Licensing Requirements, final rule, 45 Fed.Reg. 65521 (1980). In promulgating the final rule which created 10 C.F.R. § 40.36, the Commission noted, "Inadequate or untimely consideration of decommissioning, specifically in the areas of planning and financial

⁵ HRI's troubled financial condition renders the threat of inadequate surety for this project of particular concern. See Intervenors' Brief in Opposition to HRI's Application for a Materials License with Respect to HRI's Lack of Technical and Financial Qualifications (January 11, 1999); ENDAUM's and SRIC's Responses to the Presiding Officer's March 3, 1999 Questions (March 29, 1999).

assurance, could result in significant adverse health, safety and environmental impacts." General Requirements for Decommissioning Nuclear Facilities, final rule, 53 Fed.Reg. 24018 (1988).

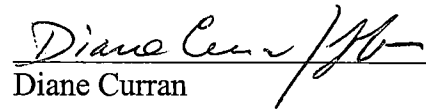
Public comment on the legality of surety arrangements is essential to maintain protective standards in licensing. Indeed, to interpret Criterion 9 otherwise would violate the public's right to a hearing on such issues, under Section 189(a) of the Atomic Energy Act, 42 U.S.C. § 2239(a). See Union of Concerned Scientists v. Nuclear Regulatory Commission, 735 F.2d 1437, 1438 (D.C. Cir. 1984), cert. den. 469 U.S. 1132 (1985) (holding that rule putting emergency preparedness exercises outside scope of licensing hearing violates Section 189(a) of Atomic Energy Act).

CONCLUSION

For the foregoing reasons, the Commission should strike the April 8 Letter submitted by the NRC Staff, purportedly to supplement the hearing file on a matter already before the Commission, and alternatively, to remand this issue to the Presiding Officer so that ENDAUM and SRIC have the opportunity to respond to the information contained in the April 8 Letter, and grant ENDAUM and SRIC leave to reply to the Responses of HRI and the Staff to the Petition for Review of LBP-99-13.

Respectfully submitted this 23rd Day of April, 1999.


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CERTIFICATE OF SERVICE

I hereby certify that:

On April 23, 1999, I caused to be served copies of the following:

ENDAUM'S AND SRIC'S MOTION TO STRIKE NRC STAFF FILING, OR IN THE ALTERNATIVE, FOR LEAVE TO REPLY TO THE STAFF'S FILING AND RESPONSES FILED BY HRI AND THE STAFF TO ENDAUM'S AND SRIC'S PETITION FOR REVIEW OF PBL-99-13 (FINANCIAL ASSURANCE FOR DECOMMISSIONING)

upon the following persons by U.S. mail, first class, and in accordance with the requirements of 10 C.F.R. § 2.712. Service was also made via e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

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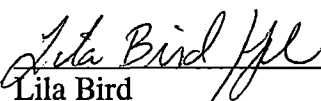
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April 23, 1999,


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