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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATION STAFF

Before Administrative Judges:
Peter B. Bloch, Presiding Officer
Thomas D. Murphy, Special Assistant

SERVED MAR 10 1999

In the matter of

HYDRO RESOURCES, INC.
(2929 Coors Road
Suite 101
Albuquerque, New Mexico 87120)

Docket No. 40-8968-ML

Re: Leach Mining
and Milling License

ASLBP No. 95-706-01-ML

PARTIAL INITIAL DECISION
(Financial Assurance for Decommissioning Issues)

This Partial Initial Decision is one of several decisions covering challenges to proposed in situ leach (ISL) uranium mining operations for which License SUA-1508 has been issued to Hydro Resources, Inc. (HRI). The HRI project is described in LBP 99-1, 49 NRC ____, February 3, 1999. This Decision addresses Eastern Navajo Diné Against Uranium Mining (ENDAUM) and Southwest Research and Information Center (SRIC) (collectively, "Intervenors") joint written presentation (10 C.F.R. § 2.1233), Financial Assurance for Decommissioning, dated January 11, 1999 (Intervenors' Assurance Brief).¹

¹HRI Response on Technical and Financial Qualifications and Financial Assurance for Decommissioning, February 11, 1998 (HRI Qualifications Brief); Staff's Response on Technical Qualification, Financial and Decommissioning Issues, February 18, 1999 (Staff Qualifications Brief).

The issues presented by Intervenors are primarily legal and can be addressed by considering applicable law. The HRI license is governed by 10 C.F.R. Part 40, which requires careful interpretation, beginning with the applicable definitions contained in 10 C.F.R. § 40.4. First, the definition of *Byproduct Material* defines the liquid wastes produced by *in situ* leach uranium mining (ISL) as byproduct material and it also specifies that underground ore bodies do *not* become byproduct material just because an ISL project has been undertaken:

Byproduct Material means 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.

[Emphasis added.]

Because ISL produces byproduct material, it also meets the definition of *uranium milling*:

Uranium Milling means any activity that results in the production of byproduct material as defined in this part.

Furthermore, both pregnant lixiviant² and the yellowcake extracted from it are *source material*, pursuant to the following definition:

Source Material means: (1) Uranium or thorium, or any combination thereof, in any physical or chemical form

The second clause of this definition, which is *not* quoted above, is separated by the disjunction "or", indicating that if material complies with *either* clause in the sentence it is

²See the description of the ISL process in LBP 99-1, 49 NRC ____, February 3, 1999.

considered source material. Hence, when uranium (or uranium oxide) is suspended in the pregnant lixiviant it is "uranium . . . in any physical or chemical form" and it is source material.

This brings us, now, to the threshold of 10 C.F.R. § 40.36, whose meaning is hotly contested by the parties. Since pregnant lixiviant is source material, as we have just discussed, HRI's project falls within the following exception from § 40.36:

Except for licenses authorizing receipt, possession, and use of source material for uranium . . . milling

Hence, this section does *not* apply to this license and it is not necessary to discuss further Intervenors' 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 Intervenors' 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.

On the other hand, varying somewhat from my determination in LBP-99-1, 49 NRC ____, February 3, 1999,³ I have determined that 10 C.F.R. Part 40, Appendix A *does* apply to ISL mining. First, the heading of the Appendix says that it covers "the disposition of

³LBP-99-1, I determined that Appendix A was "generally . . . not relevant" to ISL mining but that "Specific criteria within Appendix A are applicable . . ." *Slip op.* at 6-7. For reasons stated in this Partial Initial Decision, I now think that Appendix A does apply to ISL but that particular sections do not apply. In both approaches, it is necessary to consider the applicability of specific sections of Appendix A. Hence, this change in analysis does not affect the outcome.

tailings *or wastes*” [emphasis added]. Second, HRI is applying for a license to possess and use source material, as was just discussed. Accordingly, the first sentence of the Introduction to Appendix A does cover HRI’s project, even though ISL mining does *not* fall within the clause that is separated by commas: “byproduct material at sites formerly associated with such milling.”

Some of the provisions of Appendix A cover tailings and some cover wastes. By reading the criteria, it is not difficult to determine which apply to the HRI project. For example, Criterion 1 is addressed to permanent isolation of tailings and it does not apply to HRI, which does not plan to maintain any wastes on site permanently; it will transfer its wastes to an authorized disposal facility.⁴

This brings us to Criterion 10, which requires financial assurance for long-term surveillance of wastes. Despite the arguments of Intervenors (Intervenors Assurance Brief at 6), that criterion is not applicable to HRI, which will take its wastes off-site. It would make no sense to require them to fund long-term surveillance of a site from which all wastes have been removed.

Intervenors claim, without citation to the record or to any document, that HRI plans to establish surety only after completion of the Churchrock restoration demonstration project. Intervenors Assurance Brief at 11. However, SUA-1508 LC9.5 prohibits that action and the Staff asserts that HRI will establish financial surety based on 9 pore volumes, as required, before commencing operations. Staff Qualifications Brief at 19. I am

⁴See the description of the ISL process in LBP 99-1, 49 NRC ____, February 3, 1999.

persuaded, based on the evidence to which I have been directed, that there is no arrangement for HRI to depart from the condition contained in its license.

In this proceeding, it is not appropriate to challenge the validity of applicable regulations. 10 C.F.R. § 2.1239(a). Hence, the argument that a fair hearing has been denied by application of the regulations is beyond my jurisdiction. Intervenors Assurance Brief at 20.

Intervenors have argued that it is improper to base surety for groundwater restoration on a Staff determination that it will take 9 pore volumes for proper restoration of groundwater. Intervenors Assurance Brief at 16. However, the requirement that restoration be estimated as being accomplished through flushing with 9 pore volumes, was reached through the professional judgment of the NRC and is contained in SUA-1508 LC9.5. The number of pore volumes was estimated by the Staff to be greater than the 4 pore volumes proposed by HRI. Staff's conclusion, is that:

On the basis of the data submitted by HRI, the staff conclude that practical production-scale groundwater restoration activities would be at most require a 9 pore volume restoration effort.

FEIS, NUREG-1508 at 4-40 (1997). Intervenors attempt to impugn the motives of the Staff but have not provided any analysis or expert testimony that casts doubt on the Staff estimate. Intervenors Assurance Brief at 15-18. The Staff estimate, contained in LC9.5, establishes the amount of surety required before beginning the Churchrock Section 8 project. However, the surety amount may be increased if "at any time" it is determined that well field restoration requires greater pore volumes or a higher cost. SUA-1508 LC9.5. Hence, the surety may be adjusted *during* the Churchrock Section 8 ISL operations,

and the surety for the other portions of the project may be affected by the experience in Section 8. There is no merit to Intervenors' argument that the Staff improperly utilizes 9 pore volumes as a standard for calculating the amount of surety that is required before commencing operations.

ORDER

For all the foregoing reasons and upon consideration of the entire record in this matter, it is this 9th day of March, 1999, ORDERED, that:

1. Eastern Navajo Diné Against Uranium Mining and the Southwest Research and Information Center are denied relief with respect to their area of concern related to financial assurance for decommissioning issues..

2. This decision is reviewable under 10 C.F.R. § 2.1253, pursuant to the procedures set forth in 10 C.F.R. §§ 2.786 and 2.763. The petition for review must be filed within 15 days of the service of this decision..



Peter B. Bloch, Administrative Judge
Presiding Officer

Rockville, Maryland

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of
HYDRO RESOURCES, INC.

Docket No.(s) 40-8968-ML

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing LB PID - LBP-99-13 DTD 3/9/99 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
10 day of March 1999


Office of the Secretary of the Commission