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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
BEFORE THE COMMISSION

OFFICE OF SECRETARY
RULEMAKING AND
ADJUDICATIONS STAFF

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
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**INTERVENORS' PETITION FOR REVIEW OF PRESIDING
OFFICER'S PARTIAL INITIAL DECISION ON LBP-99-13,
FINANCIAL ASSURANCE FOR DECOMMISSIONING**

Pursuant to 10 C.F.R. §§ 2.786, 2.1253, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM") and Southwest Research and Information Center ("SRIC") hereby petition for review of the Partial Initial Decision, LBP-99-13, served March 10, 1999.¹ The Commission should take review because LBP-99-13 fails to address material issues raised by the Intervenor, is based on a prejudicial procedural error, contains erroneous findings of fact and legal errors, and poses new legal issues. In addition, the Commission should take review because this adjudication is the first to review a materials license application for an ISL operation, and thus it raises substantial and important questions of law, policy and/or discretion, resolution of which is in the public interest.

¹ The standards for Commission review in 10 C.F.R. § 2.786(b)(4) have been incorporated into Subpart L proceedings in 10 C.F.R. § 2.1253. See *Babcock and Wilcox (Pennsylvania Nuclear Service Operations, Parks Township, Pa.)* CLI-95-4, 41 NRC 248, 249 (1995).

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U.S. NUCLEAR REGULATORY COMMISSION
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I. SUMMARY OF DECISION.

Hydro Resources Inc. ("HRI") has applied for a source and byproduct materials license to build and operate several in situ leach ("ISL") mines and a uranium mill in Church Rock and Crownpoint, New Mexico. *Hydro Resources Inc.*, LBP 98-9, 47 NRC 266 (1998). HRI received an operating license from the NRC Staff on January 5, 1998. License No. SUA-1508. The license allows mining and milling on all four sites for which HRI seeks permission (Church Rock Sections 8 and 17, Unit 1, and Crownpoint), conditioning operations on compliance with certain license conditions. HRI has not established a financial surety for any aspect of the proposed operations. License condition 9.5 requires HRI to submit an "NRC-approved surety arrangement" for decommissioning, reclamation, and groundwater restoration costs, before operating under the license. *Id.* at 2. The license condition also states that surety for groundwater restoration of the initial well fields shall be based on 9 pore-volumes. *Id.*

Intervenors raised several concerns about HRI's failure to comply with decommissioning funding requirements for the proposed *in situ* mining sites or for the proposed uranium processing sites. ENDAUM's and SRIC's Second Amended Request For Hearing, Petition to Intervene, and Statement of Concerns (August 15, 1997) at 96-101. These concerns were admitted as germane by the Presiding Officer. LBP-98-9, 47 NRC at 282. Intervenors filed a written presentation on these concerns

on January 11, 1999.² HRI filed its response on February 11, 1999.³ The NRC Staff responded on February 18, 1999.⁴

On March 9, 1999, the Presiding Officer issued LBP-99-13, denying Intervenors any relief "with respect to their area of concern related to financial assurance for decommissioning issues." *Id.* at 6.

II. LBP-99-13 FAILS TO CONSIDER MATERIAL ISSUES OF LAW AND FACT.

10 C.F.R. § 2.1251(c)(1) states that an initial decision must be based on information contained in the record and must include "findings, conclusions and rulings, with the reasons or basis for them, on all material issues of fact, law, or discretion presented on the record." LBP-99-13 violates this rule in two respects. First, it fails to even acknowledge the Intervenors' primary assertion that HRI has failed to submit a financial assurance plan to the NRC that complies with financial assurance for decommissioning requirements. Intervenors' Presentation at 11-13; 17-19. LBP-99-13 considers the applicable regulatory regime for financial assurance, and concludes that 10 C.F.R. § 40.36 does not apply. LBP-99-13 at 3. The Presiding

² See Eastern Navajo Diné Against Uranium Mining's and Southwest Research and Information Center's Brief in Opposition to Hydro Resources, Inc.'s Application for a Materials License with Respect to: Financial Assurance for Decommissioning ("Intervenors' Presentation").

³ Hydro Resources Inc.'s Response to Intervenors' Briefs with Respect to Hydro Resources, Inc.'s Technical and Financial Qualifications and Financial Assurance for Decommissioning ("Staff Response").

⁴ NRC Staff's Response to Intervenors' Presentations on Technical Qualification, Financial, and Decommissioning Issues ("HRI Response").

Officer, however, makes no reference to nor offers any analysis of HRI's alleged financial assurance plan with respect to the requirements of 10 C.F.R. Part 40, Appendix A, which he concludes does apply.⁵ *Id.* Appendix A does not require a surety to be paid prior to licensing, but it does require Commission approval of cost-estimates and a surety plan.

Second, the Presiding Officer, utterly fails to address Intervenors' argument that a surety for the entire licensed operation is required, not just for Section 8.

Intervenors' Presentation at 16-17.

III. LBP-99-13 CONTAINS PREJUDICIAL PROCEDURAL ERROR.

LBP-99-13 was issued without a full opportunity for hearing of the financial assurance issue. The NRC Staff omitted material financial assurance materials from the hearing file. The NRC Staff attached these documents to its February 18, 1999 Response.⁶ Staff Response at n.4. Intervenors sought leave to file a response to the new information, or, if the request was not granted, to have that portion of the Staff's response stricken. *See* ENDAUM's and SRIC's Motion for Leave to File a Reply Brief and

⁵ The Staff submitted what is an inadequate financial assurance plan. Staff Response at n.4, Exhibits 1, 2. Intervenors sought to address the alleged financial assurance plan but were denied their right to review the plan by the Presiding Officer in a March 9, 1999 Memorandum and Order. *See* Section III *supra*.

⁶ The Staff was required to include this material in the hearing record. 10 C.F.R. § 2.1231(a), provides that the NRC Staff shall prepare a hearing file within 30 days of the presiding officer's order granting a request for a hearing, and that the hearing file be made available. 10 C.F.R. § 2.1231(b) states that the hearing file shall consist of the application, any environmental impact statement, and any NRC report and correspondence between the applicant and the NRC, relevant to the application.

Rebuttal Testimony on Issues of Financial Assurance for Decommissioning and Financial and Technical Qualifications or, In the Alternative, to Strike Documents Submitted on those Issues, at 3-6 (February 26, 1999).⁷ LBP-99-13 ruled on the Intervenors' claims, despite the fact they were not allowed an opportunity to reply.

Intervenors have been denied a meaningful opportunity for hearing under Section 189a of the Atomic Energy Act because they were denied the opportunity to reply to new information. 42 U.S.C. § 2239(a)(1)(A). The Intervenors' due process rights have also been severely prejudiced. *See, e.g., In The Matter of Hydro Resources, Inc.*, 47 N.R.C. 261, 284 (May 13, 1998) (ordering HRI and NRC Staff to inform the Presiding Officer and the parties as early as possible about "substantial new information that is developed by HRI or the Staff"); *In the Matter of Sequoyah Fuels Corporation*, 40 N.R.C. 314, 317 (November 22, 1994) (finding that it would not be fair for an Intervenor to file written presentations setting forth all of their concerns without access to the hearing file), *citing* NRC Rules and Regulations, 54 Fed. Reg. 8272 (February 28, 1989).

This error is serious and material. A financial assurance plan must be submitted and approved prior to licensing under both 10 C.F.R. § 40.36 and 10 C.F.R. Part 40 Appendix A, Criterion 9. Presentation at 11-13; 17-19. (Only 10 C.F.R. § 40.36, however, requires that surety funds be in place prior to licensing). Prior to the Staff's

⁷ The Presiding Officer denied the motion, stating he had "determined this issue without relying on the new information to which ENDAUM and SRIC sought to reply." Memorandum and Order (Denial of Motion to Reply on Financial Assurance for Decommissioning) at 1 (March 10, 1999).

response, there was no evidence of any surety-related plan in the record; Intervenors argued their position on an empty record. *Id.* The new information submitted by the Staff is the only information on which to evaluate compliance with 10 C.F.R. § 40.36 and 10 C.F.R. Part 40 Appendix A, Criterion 9. This information is lacking in specificity and does not meet the requirements of either regime because, for example, these document plan financial assurance only for Church Rock Section 8, not the mill at Crownpoint, which will process Section 8 production, nor other licensed activities, and HRI anticipates putting up just half the required surety. *See* Staff Response Exhibits 1 and 2. Intervenors have never had the opportunity to present these arguments.

IV. LBP 99-13 CONTAINS LEGAL ERRORS AND RELIES ON MATERIAL FACTUAL ERRORS.

A. The Presiding Officer Made Several Legal Errors in Finding that HRI Has Complied with Financial Assurance for Decommissioning Requirements.

The Presiding Officer errs in finding that since pregnant lixiviant is "source material," the entire Crownpoint Project is exempt from the requirements of § 40.36 which states, in part, "except for licenses authorizing receipt, possession, and use of source material for uranium . . . milling . . ." LBP-99-13 at 3. Both 10 C.F.R. § 40.36 and Criterion 9 of Appendix A apply to HRI's project because the project consists of uranium mining and milling operations. Because an *in situ* leach mine is a subsurface source materials facility that is not a milling operation, it is subject to 10 C.F.R. § 40.36. Intervenors' Presentation at 3. HRI's surface uranium milling

operations are subject to Criterion 9 of Appendix A to 10 C.F.R. Part 40 requirements. *Id.* at 17-19. The duality of ISL operations is represented in the caption for this proceeding, where the Presiding Officer refers to HRI's license as a "Leach *mining and milling* license." LBP-99-13 at 1 (emphasis added). Moreover, Criterion 9 of Appendix A to Part 40 does not include restoration of groundwater as a requirement for restoration and decommissioning but requires surety arrangements for the decontamination and decommissioning of uranium mill tailings, and waste disposal areas. By finding that only Criterion 9 requirements for financial assurance for decommissioning apply to HRI's project, LBP-99-13 creates a significant regulatory loophole.

LBP-99-13 also errs in concluding that, "HRI will not be permitted to commence operations until it has complied with 10 C.F.R. Part 40, Appendix A, Criterion 9." LBP-99-13 at 3. First, Criterion 9 requires compliance with certain requirements prior to licensing, but LBP-99-13 does not address whether these have been met. Intervenors' Presentation at 17-19. Second, the decision appears to rely on HRI's license requirements to assure health and safety, but HRI's license does not mandate complete compliance with Criterion 9 for all licensed activities prior to operations. *Id.* at 16-19.

LBP-99-13 errs in denying Intervenors' claim that the Staff's deferral of an evaluation of HRI's financial surety until after licensing violates their right to a

hearing. LBP-99-13 at 5; Intervenors' Presentation at 20. LBP-99-13 claims Intervenors have mounted a facial attack on 10 C.F.R. Part 40, Appendix A, Criterion 9. However, Intervenors do not challenge the rule, rather they argue the Staff's approach violates the letter and intent of the rule and the Atomic Energy Act. Intervenors' Presentation at 17-20.

Finally, LBP-99-13 commits legal error in dismissing Intervenors' health and safety concerns by determining that 10 C.F.R. § 40.36 does not apply and that HRI will be required to comply with Criterion 9 prior to operations. LBP-99-13 at 3. 10 C.F.R. § 40.36 does apply, HRI has not satisfied Criterion 9, as explained above. HRI has failed to demonstrate that its project is not inimical to health and safety. Intervenors' Presentation at 12-15.

B. LBP-99-13 Contains Material Factual Errors.

The Presiding Officer makes two clear errors of fact in LBP-99-13. First, the Presiding Officer errs in stating that "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." LBP-99-13 at 8. In fact, Intervenors cite a February 19, 1998, HRI pleading before the Licensing Board where HRI states that they will establish a fund to cover restoration and decommissioning costs after completion of the Section 8 demonstration project. Intervenors' Presentation at 14. This error is material because Intervenors' citation is to a document that post-dates the

license and raises concerns about the Staff's willingness to enforce the license conditions.

Second, the Presiding Officer errs in stating that Intervenors did not provide any analysis or expert testimony that casts doubt on the NRC Staff's estimate that it will take 9 pore volumes for proper restoration of groundwater. LBP-99-13 at 5. Intervenors statements are, as indicated, based on an analysis conducted by their expert witness of the NRC Staff's estimated 9 pore volume figure. *Id.* at 17. Dr. Michael Sheehan, Intervenors' technical expert, states that HRI's estimate of financial assurance is inadequate because their projected cost of restoration/reclamation is based on 4 pore volumes (according to information contained in the hearing record), HRI's figures are not adequately adjusted for inflation, HRI underestimates the cost of production, and HRI's uncertain financial state merits an increase in surety value. Intervenors' Presentation, Exhibit 1 at 14-16. The amount of the surety is underestimated and inadequate to protect public health and safety. *Id.* at 15-16.

V. THIS PETITION MEETS THE STANDARD FOR REVIEW.

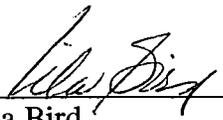
The Commission's discretionary decision on granting review should be guided by the existence of substantive questions with respect to: (i) an error or conflict of material fact, (ii) a necessary legal conclusion in error or without governing precedent, (iii) a substantial and important question of law, policy or discretion, (iv) prejudicial procedural error, or (v) any other consideration which the Commission may deem to be

in the public interest. 10 C.F.R. § 2.786(b)(4). As demonstrated above, LBP-99-13 fails to consider material issues of fact, contains significant errors of law and fact and prejudicial procedural error, thus warranting review. Review is also warranted because this is the first time that an application for an ISL mine materials license has been adjudicated in an informal Subpart L proceeding. Finally, financial assurance for decommissioning is an issue important to the public interest because it is the only means provided by the NRC to require clean up of contamination, thus protecting the public health and the environment.

VI. CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Commission grant review of the Presiding Officer's partial initial decision on financial assurance for decommissioning and reverse the decision.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that:

On March 30, 1999, I caused to be served copies of the following:

**INTERVENORS' PETITION FOR REVIEW OF PRESIDING OFFICER'S
PARTIAL INITIAL DECISION, LBP-99-13 (FINANCIAL ASSURANCE ISSUES)**

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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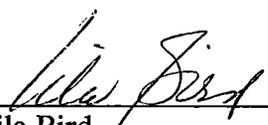
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