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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE  
GENERAL COUNSEL  
ADMINISTRATIVE

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 ) )
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**INTERVENORS' PETITION FOR REVIEW OF PRESIDING  
OFFICER'S PARTIAL INITIAL DECISION (WASTE DISPOSAL ISSUES)**

Pursuant to 10 C.F.R. §§ 2.786, 2.1253, Intervenor Eastern Navajo Diné Against Uranium Mining ("ENDAUM"), Southwest Research and Information Center ("SRIC"), Grace Sam and Marilyn Morris hereby petition for review of LBP 99-1, Partial Initial Decision (Waste Disposal Issues), served February 3, 1999.<sup>1</sup> The Commission should take review because LBP 99-1 is based on clearly erroneous finding of fact, legal error, 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.

**I. SUMMARY OF DECISION.**

Hydro Resources Inc. ("HRI") has applied for a source and byproduct materials

<sup>1</sup> 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).

SECY-EHD-004

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license to build and operate several in situ leach ("ISL") mines and a uranium mill in Church Rock and Crownpoint, New Mexico.<sup>2</sup> The NRC Staff issued a Final Environmental Impact Statement ("FEIS") for the Crownpoint Uranium Project in February of 1997, and a Safety Evaluation Report ("SER") in December of 1997. *Id.* 47 N.R.C. at 266. HRI received an operating license from the Staff on January 5, 1998. License No. SUA-1508. The license allows mining 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. Liquid waste is generated during wellfield production and aquifer restoration. LBP 99-1 at 3-4.

Intervenors raised several concerns about liquid waste disposal with respect to HRI's project, which were admitted as germane. LBP 98-9, 47 NRC at 281-283, n.s 51, 62-63, 67-69. Intervenors filed written presentations on these concerns on November 9, 1998.<sup>3</sup> HRI filed its response on December 9, 1998.<sup>4</sup> The NRC Staff responded on December 16, 1998.<sup>5</sup>

On February 3, 1999, the Presiding Officer issued LBP 99-1, Partial Initial

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<sup>2</sup> The project is known as the "Crownpoint Uranium Project," or "CUP". *Hydro Resources Inc.*, LBP 98-9, 47 NRC 261, 263-267 (1998).

<sup>3</sup> 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: Liquid Waste Disposal Issues; Initial Written Presentation of Grace Sam and Marilyn Morris.

<sup>4</sup> Hydro Resources Inc.'s Response to Intervenors' November 9, 1998 Briefs In Opposition to Application for a Materials License with Respect to Liquid Waste Disposal Issues.

<sup>5</sup> NRC Staff's Response to Intervenor Presentations on Liquid Waste Disposal Issues.

Decision (Waste Disposal), denying Intervenor's any relief "with respect to their area of concern related to waste disposal issues." *Id.* at 13.

**II. LBP 99-1 CONTAINS LEGAL ERRORS AND RELIES ON MATERIAL FACTUAL ERRORS.**

**A. The Presiding Officer Erred in Finding that the Appendix A Criteria in 10 C.F.R. Part 40 do not Apply to ISL Mining and in Failing to Properly Review Whether those Criteria have been Satisfied.**

LBP 99-1 holds that 10 C.F.R. § 40.31(h) and Part 40 Appendix A do not apply to ISL mining, with the exception of Criteria 2 and 5A. *Id.* at 6-9; *See* ENDAUM and SRIC presentation at 11-27; Morris and Sam presentation at 2-13. This decision is based on the Presiding Officer's conclusion that 10 C.F.R. § 40.31(h) only applies to sites "formerly associated with [uranium or thorium] milling." *Id.* at 6. This ruling is in error.

10 C.F.R. § 40.31(h) applies to "[a]n application for a license to receive, possess, and use source material for uranium, or thorium milling, or byproduct material, as defined in this part, at sites formerly associated with such milling. . . ." The phrase "at sites formerly associated with such milling" modifies only the term byproduct material.<sup>6</sup> The introduction to Appendix A clarifies that this is the correct interpretation:

Every applicant for a license to possess and use source material in conjunction with uranium or thorium milling, *or byproduct material at*

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<sup>6</sup> If Appendix A indeed only applies to sites formerly associated with milling, the hazards of milling at new sites escape regulation, which is inconsistent with the health and safety mandate of the Atomic Energy Act.

*sites formerly associated with such milling*, 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.

HRI's application is an application for a license to possess and use source material in conjunction with uranium milling, and Appendix A therefore applies.

The Presiding Officer's analysis regarding the applicability of Appendix A is also intellectually inconsistent. While the Presiding Officer claims that 10 C.F.R. § 40.31(h) and the legislative history behind Appendix A are primarily directed at mill tailings sites, he finds that pieces of Appendix A apply because they "explicitly apply to ISL mining." LBP 99-1 at 6. Criterion 5A does not explicitly mention ISL mining, but the Presiding Officer finds that it applies anyway because the provisions in Criterion 5A address issues that usually arise in ISL mining operations. *Id.* at 7. This approach is also a legal error, first because 10 C.F.R. § 40.31(h) applies the entirety of Appendix A to applicants and, second, because even applying the Presiding Officer's approach of picking the parts of Appendix A which address issues arising in ISL operations, the Criteria, including 7 and 7A, generally do regulate ISL issues.

In addition, the Presiding Officer appears to have applied either the wrong legal standard or no legal standard at all in reviewing the sparse materials HRI has submitted on liquid waste disposal. LBP 99-1 at 9. The Presiding Officer rejects Intervenors' argument that the "license application is deficient because it does not specify in detail the arrangements for surface impoundments." He finds instead that HRI "complied

with these regulations" when it described retention pond liners. The Presiding Officer also cites with approval the Staff's inclusion of condition 10.26 in HRI's license, requiring HRI to meet the specifications of Criteria 5A prior to lixiviant injection. *Id.* Both grounds are in error.

The Presiding Officer ignores the fact that Appendix A and 10 C.F.R. § 40.31(h) require detailed design and specifications, such as the Criterion 5A pond design specifications, to be included *in the application*. HRI, however, has not submitted detailed designs or specifications in its application and its license simply requires compliance with Criterion 5A prior to injection of lixiviant (which could be after construction of the ponds). See License Condition SUA 10.26; SER at 30-31 (admitting Criterion 5A not met by HRI application).

The material submitted with respect to pond liners is insufficient. The Presiding Officer errs by attributing the pond liner description in the Consolidated Operations Plan Rev. 2.0 to apply to all ponds, when in fact the designs only apply to retention ponds, which store water until treatment, not evaporation ponds, which are much larger and designed to eliminate, not just retain waste water. See ENDAUM and SRIC Presentation at 14-17; Morris and Sam presentation at 5-7; FEIS at 2-12 , 2-18 The Waste Disposal Order quotes the COP 2.0 as stating "all CUP surface impoundments will be equipped with two impermeable synthetic membrane liners..." LBP 99-1 at 9. In fact, the COP 2.0 states, in Section 2.3, Retention Ponds, "Standard

provisions for the ponds will be two impermeable synthetic membrane liners. . .".

COP 2.0 at 29. This liner description does not include evaporation ponds, which are addressed elsewhere in HRI's COP. COP Rev. 2.0 at 59. Thus, the Presiding Officer has erred in applying his review of retention pond materials to evaporation ponds.

**B. The Presiding Officer Erred in finding that HRI does not need to Satisfy the Requirements of 10 C.F.R. § 20.2002 for Liquid Waste Disposal.**

LBP 99-1 finds that HRI does not need to satisfy the requirements of 10 C.F.R. § 20.2002 for liquid waste disposal by deep well injection, surface water discharge or land application, because HRI has not submitted an application to apply any of these methods. LBP 99-1 at 10. This decision is based on two mistaken assumptions. First, HRI has applied to use these methods in its license application.<sup>7</sup> Second, the Staff has already authorized HRI to conduct land application. License Condition 11.8 states "Prior to land application of waste water, the licensee shall submit and receive NRC acceptance of a plan outlining how the licensee will monitor constituent build-up in soils resulting from the land application." A monitoring plan is obviously not a license amendment application, thus the Staff has authorized HRI to conduct land application before submitting adequate information pursuant to 10 C.F.R. § 20.2002, and without a license amendment. See ENDAUM and SRIC presentation at 30-37. Therefore, the Presiding Officer's decision not to consider Intervenors' claims that HRI failed to meet

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<sup>7</sup> See Morris and Sam presentation at 7-11; ENDAUM and SRIC presentation at 4-5, citing HRI's COP Rev. 2.0 at 17, 57, 59; HRI Response to RAI No. 29 at 1-3.

the requirements of 10 C.F.R. § 20.2002 was in error.

**C. The Presiding Officer Erred in Finding the FEIS Adequate under NEPA, because the Decision was Based on Legal and Factual Errors.**

The Presiding Officer committed legal error in adopting the Staff's argument that even if Intervenors' claims that the FEIS fails to adequately evaluate the environmental effects of HRI's liquid waste disposal, the FEIS is adequate because it is 250 pages of text. LBP 99-1 at 10-11. The environmental impact statement must discuss any environmental effects. 42 U.S.C. § 4332(2)(C).

In addition, LBP 99-1 uncritically adopts the NRC Staff's response without addressing the issues raised by ENDAUM and SRIC, even though the Staff has the burden of proof with respect to NEPA issues.<sup>8</sup> The Staff represents that, and LBP 99-1 adopts, the FEIS' discussion of *retention ponds* for process water also provide a discussion of the impacts on *evaporation ponds* in terms of soil impact from ground disturbance and how groundwater will be protected from pond leakage. NRC Staff Response at 31-33, quoted at page 11-12, LBP 99-1. In fact, the pages cited by the Staff, and then the Presiding Officer, refer only to retention ponds, not evaporation ponds, with which the Intervenors are concerned, which are much larger ponds and intended to dispose of water water through evaporation, rather than simply retain the waste water prior to disposal. See FEIS at 2-18, 4-6, 4-10, 4-11, 4-13, and 4-14. LBP

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<sup>8</sup> The issues raised by Intervenors, which are completely omitted from LBP 99-1 are addressed in Section II.D. below.

99-1 adopts the Staff's statement that Figures 3.1-2 and 3.1-1 in the COP Rev.2.0 consistently show a 1% or 40 gallons per minute bleed rate, when ENDAUM and SRIC did not dispute that fact. LBP 99-1 at 11. The basis for their bleed rate claim is that those figures also show 39 gpm being reinjected into the aquifer, reducing the bleed rate to 1 gpm. ENDAUM and SRIC presentation at 45. LBP 99-1 also adopts without question the Staff explanation of the two restoration flow descriptions in the FEIS, which the decision admits can cause misunderstanding, again failing to address the concern raised by Intervenor that because there is confusion the FEIS is inadequate. ENDAUM and SRIC presentation at 46. LBP 99-1 adopts the Staff explanation for removing manganese, molybdenum and selenium from land application water quality data without addressing the underlying Intervenor argument that the water quality data is false. See LBP 99-1 at 12; Section II.D. below; ENDAUM and SRIC presentation at 52-53.

**D. The Presiding Officer Failed to Address All issues Raised by Intervenor.**

In the initial decision, the Presiding Officer must include "[f]indings, conclusions, and rulings, with the reasons or basis for them, *on all material issues of fact, law, or discretion presented on the record.*" 10 C.F.R. § 1.1251(c)(1) (emphasis added). LBP 99-1 fails to address the issue raised by ENDAUM and SRIC that HRI, in violation of 10 C.F.R. Part 40 Appendix A, Introduction, has failed demonstrate how it can accommodate foreseeable operations expansion. ENDAUM and SRIC

Presentation at 27-29.

Second, LBP 99-1 ignores the issue raised by ENDAUM and SRIC that the land application data submitted by HRI is unrepresentative of waste characterization data. It is, in fact, a meaningless collection of random data including water quality data from the Mobil pilot project, water in the Old Church Rock mine, monitor wells and crushed-core studies. ENDAUM and SRIC presentation at 52-53.

Third, the following NEPA issues raised by Intervenors are ignored: 1) the FEIS illegally segments the project by excluding detailed discussion of the liquid waste disposal system, such the impacts of deep-well disposal, surface discharge and land application (ENDAUM and SRIC presentation at 38, 42-43); 2) the FEIS and ERs do not adequately discuss the impacts of retention ponds (ENDAUM and SRIC presentation at 46-47); 3) The FEIS fails to address the adequacy of pond liners to prevent leakage, or prevent structural failures, or to address the impact on alluvial groundwater (ENDAUM and SRIC presentation at 47-48); 4) the FEIS omits discussion of evaporation ponds in ecology and land use sections (ENDAUM and SRIC presentation at 48-49); 5) the FEIS does not address the impacts of HRI's plan to use existing ponds (ENDAUM and SRIC presentation at 49-50); 6) the FEIS fails to address the impacts of land application because, as described above, the water quality data were meaningless, and the Staff did not perform an independent evaluation of whether treatments proposed by HRI can be successful in lowering constituent levels

(ENDAUM and SRIC presentation at 52-53).

### **III. THIS PETITION MEETS THE STANDARD FOR REVIEW.**

The Commission may exercise discretionary review, "giving due weight to the existence of a substantive question 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 99-1 contains significant errors of law and fact, 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, and it is among the first applications reviewed in an informal SubPart L proceeding. A ruling on the matters raised within this Petition will provide valuable guidance on the application of NRC laws and regulations to liquid waste disposal from ISL mines. Generally speaking, therefore, all of the issues raised herein raise important questions of law and policy and review by the Commission lies within the public interest.

### **V. CONCLUSION**

For the foregoing reasons, Intervenors respectfully request the Commission grant review of the Presiding Officer's partial initial decision on liquid waste disposal and reverse the decision.

Dated: February 23, 1999

  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

OFFICE OF SECRETARY  
RULEMAKING AND  
ADJUDICATIONS STAFF

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In the Matter of )	
HYDRO RESOURCES, INC. )	Docket No. 40-8968-ML
2929 Coors Road )	
Suite 101 )	ASLBP No. 95-706-01-ML
Albuquerque, NM 87120 )	
_____ )	

**CERTIFICATE OF SERVICE**

I hereby certify that:

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

**INTERVENORS' PETITION FOR REVIEW OF PRESIDING OFFICER'S  
PARTIAL INITIAL DECISION (WASTE DISPOSAL 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 facsimile and e-mail to the parties marked below by an asterisk. The envelopes were addressed as follows:

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Staff

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