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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
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

HYDRO RESOURCES, INC.'S ("HRI's") OPPOSITION TO INTERVENORS' PETITION FOR REVIEW OF PRESIDING OFFICER'S PARTIAL INITIAL DECISION LBP-99-13

On March 30, 1999, Eastern Navajo Dine Against Uranium Mining ("ENDAUM") and Southwest Resource and Information Center ("SRIC") (jointly, "Intervenors") petitioned the Commission (the "Intervenors' Petition") for review of the Presiding Officer's partial initial decision LBP-99-13 (financial assurance for decommissioning) (the "decision" or "LBP-99-13"). Intervenors' Petition alleges "prejudicial procedural error, . . . erroneous findings of fact and legal errors, and . . . new legal issues" (Intervenors' Petition at 1) as bases for Commission review. These allegations are without merit and Intervenors have not satisfied the standard for Commission review. Accordingly, Intervenors' Petition should be denied.

STANDARD OF REVIEW

In exercising its discretion to grant review of a partial initial decision of the Presiding Officer the Commission is to be guided by whether petitioners have raised a "substantial question with respect to the following considerations:"

- a finding of material fact that is clearly erroneous;

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- an erroneous or unsupported legal conclusion;
- a substantial and important law or policy issue;
- a prejudicial procedural error; or
- any issue the Commission deems to be in the public interest.

10 C.F.R. § 2.786(b)(4); Kenneth G. Pierce (Shorewood, Illinois), CLI-95-6, 41 NRC 381, 382 (1995). Intervenors are unable to raise a substantial question in connection with any of the foregoing considerations. Consequently, the Commission should deny Intervenors' Petition for Review.

ARGUMENT

Intervenors allege essentially three bases for review of the Presiding Officer's Partial Initial Decision LBP-99-13 relating to financial assurance for decommissioning: 1) that the decision fails to address the adequacy of HRI's financial assurance plan (Intervenors' Petition at 3-4); 2) that the decision was issued without an opportunity for a full hearing because NRC Staff failed to file some documents prior to filing its February 18, 1999 brief on financial assurance (Intervenors' Petition at 4-6); and 3) that the decision "contains legal errors and relies on material factual errors" in concluding that the requirements of 10 C.F.R. § 40.36 do not apply to HRI's license and in concluding that Intervenors had provided insufficient support for two factual claims made in their brief (Intervenors' Petition at 6-9). Intervenors' allegations are based on misapprehension of the law and distortion of the facts and are without merit.

Intervenors fail to raise any material legal or factual issues warranting review. Intervenors are not entitled to Commission review as their alleged bases for review fail to

demonstrate any material factual or legal errors or any significant public policy issue. The mere fact that Intervenors disagree with some or all of the Presiding Officer's decision does not entitle Intervenors to Commission review of those aspects of the decision with which they disagree. Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, & 2B), ALAB-467, 7 NRC 459, 461 n. 5 (1978)(no right to appeal every unfavorable finding).

1. The adequacy of HRI's financial assurance plan is not properly at issue.

It has not been disputed that the financial assurance criteria set forth at 10 C.F.R. Part 40 Appendix A, criterion 9 apply to HRI's Crownpoint Uranium Project ("CUP"). Intervenors note correctly that criterion 9 requires HRI to submit and the Staff to approve a financial assurance plan. Intervenors also note correctly that the decision does not analyze HRI's financial assurance plan. Intervenors' Petition at 4. Intervenors fail to acknowledge, however, that HRI's financial assurance plan is still under Staff review and has not yet been approved by NRC. NRC Staff is quite clear about this in their Response to Intervenors' Presentations on Technical Qualifications ("Staff Brief") (see, e.g., Staff Brief at 3, fn. 4). Thus, Intervenors' complaint that the Presiding Officer failed to determine the adequacy of HRI's financial assurance plan is premature; there is, as yet, no approved plan to determine the adequacy of.

Intervenors' complaints regarding compliance with the criterion 9 requirements is likewise misplaced. Intervenors persist in their misstatement of the regulatory requirements embodied in criterion 9: contrary to Intervenors' repeated claims (see, e.g., Intervenors' Petition at 4, 5, 7), criterion 9 requires that "[F]inancial surety arrangements must be established . . . 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." 10 C.F.R. Part 40, Appendix A, criterion 9. Though Intervenors may prefer that it were otherwise, criterion 9 does not impose pre-licensing requirements. Rather, criterion 9 and HRI's license (LC 9.5) require compliance with stated requirements prior to operation. As evidenced by the ongoing correspondence between HRI and NRC referenced below, HRI is in the process of complying with these requirements and Intervenors' allegations of non-compliance are not properly a basis for appeal of LBP-99-13, as the plain language of criterion 9 makes clear that an approved financial assurance plan is **not** a prerequisite to issuance of a source materials license.

2. Intervenors have been afforded a full hearing on all issues considered in issuing HRI's license.

Intervenors' complaint that they have not had an opportunity to review all documents submitted by HRI in support of the financial assurance plan also is out of synch with the actual timing of relevant events. Intervenors could not possibly have had an opportunity to review all documents submitted in support of the plan, as documents continue to be submitted and have been submitted as recently as March 19, 1999.[1] Intervenors, of course, cannot review documents submitted in support of HRI's financial assurance before those documents are submitted. Intervenors intervened in this proceeding to challenge the issuance of HRI's source materials license. Documents being submitted in support of the not yet approved financial assurance plan obviously had no bearing on the issuance of the license. Consequently, the fact that Intervenors have not had an opportunity to review and take issue with every document offered in connection with the financial assurance plan cannot form the basis for Commission review. In any event,

[1] On March 19, 1999, Mark Pelizza, Vice President of HRI forwarded proposed draft language for a trust agreement, performance bond, and performance guarantee bond to the NRC and the New Mexico Environment Department. It is anticipated that further correspondence between HRI and NRC and NMED will precede final NRC approval of a surety plan.

and as discussed above, 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.

3. The decision does not contain legal errors and does not rely on material factual errors.

Intervenors' complaint that "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" (Intervenors' Petition at 8) also is without merit. As the Presiding Officer found, the plain language of § 40.36 makes clear that it does not apply to HRI's license: "[E]xcept for licenses authorizing the receipt, possession, and use of source material for uranium or thorium milling . . . for which financial assurance requirements are set forth in appendix A of this part. . . ." 10 C.F.R. § 40.36 (emphasis added). As discussed in LBP-99-13 (at 1-3), since pregnant lixiviant and the yellowcake extracted therefrom both come within the definition of "source material," and because the ISL operation, as well as the subsequent extraction of the yellowcake from the lixiviant produce "byproduct" and thus come within the regulatory definition of "milling," section 40.36 is inapplicable to HRI's license. Intervenors offer no support for their contention that the Presiding Officer committed legal error in determining that this provision does not apply. Intervenors' position is without merit and provides no basis for granting Intervenors' Petition.

Intervenors' alleged "material factual errors" regarding the timing and amount of the surety hardly warrant discussion. Regarding the timing for establishing surety, the citation Intervenors reference (their own presentation on Financial Assurance for Decommissioning (January 11, 1999) at 14), underscores the fallacy of their argument. The statement cited by Intervenors states unequivocally that HRI's surety calculation and funding will be consistent

with its license and the Consolidated Operations Plan ("COP"). The cited provision **is** consistent with HRI's license and with the applicable regulations. Read in conjunction with LC 9.5 of HRI's license, the statement cited by Intervenors says that HRI can only establish a cost estimate for restoration/decommissioning and obtain a bond in that amount upon completion of the Section 8 restoration demonstration project. See, LC 9.5, LC 10.28. LC 9.5 is clear: "Surety for groundwater restoration of the initial well fields shall be based on 9 pore-volumes. Surety shall be maintained at this level until the number of pore volumes required to restore the groundwater quality of a production-scale well field has been established by the restoration demonstration described in LC 10.28."

Intervenors' second allegation of "material factual error" (Intervenors' Petition at 9) goes to even greater lengths to create an issue where none exists. Intervenors assert that "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 . . . 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 ( )." Id.

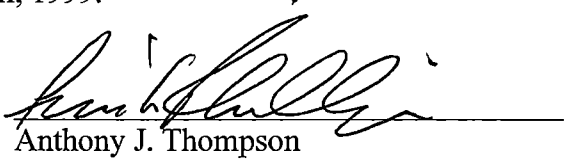
The Presiding Officer readily dismissed this nonsensical argument: "the requirement that restoration be estimated as being accomplished through flushing with 9 pore volumes, was reached through the professional judgment of the NRC and is contained in SUA-1508 LC 9.5. The number of pore volumes was estimated by the Staff to be greater than the 4 pore volumes proposed by HRI." LBP-99-13 at 4. Specifically referring to statements of Intervenors' expert set forth in Intervenors' Financial Assurance Brief, the Presiding Officer determined that Intervenors had "not provided any analysis or expert testimony that casts doubt on the Staff

estimate." Id. In essence, then, Intervenors complaint is that the Presiding Officer erred because he declined to be persuaded by one of Intervenors' experts. This is the province of the Presiding Officer and his determination is entitled to considerable deference. Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear-1), ALAB-303, 2 NRC 858, 867 (1975); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-680, 16 NRC 127, 133 (1982); Toledo Edison Co. (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-385, 5 NRC 621, 629 (1977). As with Intervenors' other complaints regarding financial assurance, these alleged "material factual errors" are not material, are not errors, and do not provide a basis for the review Intervenors request.

CONCLUSION

By their Petition for Review of LBP-99-13, Intervenors have raised no substantial question of fact, law, or policy warranting Commission review pursuant to 10 C.F.R. § 2.786(b)(4). Rather, as with so many of their pleadings, Intervenors' Petition reflects either a genuine misapprehension of the source materials licensing process or an aggressive effort to distort the relevant law and facts in order to prolong indefinitely this informal subpart L hearing, employing the process to wage a war of attrition. In either case, Intervenors are not entitled to review of LBP-99-13 and HRI respectfully requests that Intervenors' Petition for Review be DENIED.

Respectfully submitted this 13th day of April, 1999.



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document, HYDRO RESOURCES, INC.'S ("HRI's") OPPOSITION TO INTERVENORS' PETITION FOR REVIEW OF PRESIDING OFFICER'S PARTIAL INITIAL DECISION LBP-99-13, in the above-captioned proceeding has been served on the following by overnight mail on this 13th day of April, 1999.

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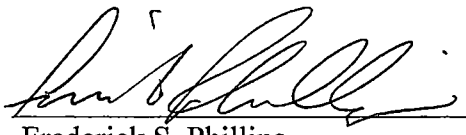

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